Understanding the Unwritten Rules: Examining the use of Ontario Parliamentary Convention to Guide the Conduct of Elected Officials in Ontario

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws

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Abstract
Government ethics legislation in Canada guides and restricts the conduct of parliamentarians.

Ontario established an independent officer of the legislature in 1988 who is responsible for administering its government ethics legislation. In 1994, an undefined behaviour-guiding standard called “Ontario parliamentary convention” was added to the legislation.

This paper explores the history of Ontario’s government ethics regime and examines its response to specific scandals, in order to describe the emergence of Ontario parliamentary convention as a
standard of conduct. It then provides a full discussion and complementary summary of the specific parliamentary conventions that Ontario’s legislative ethics officers have determined must guide the conduct of Ontario’s parliamentarians. This discussion and summary illuminate the problematic and inconsistent use of this standard by Ontario’s legislative ethics officers. Two sets of recommendations are then offered to help modernize and strengthen the legislation for the benefit of Ontario’s parliamentarians.
Acknowledgments

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1 Introduction

Questions about the ethical conduct of government officials throughout Canada have taken up residence on the front pages of our local and national newspapers. As the public scrutiny of elected officials grows and becomes more accessible, it is important that citizens engage in critical and meaningful discussions about the rules that we have put in place to promote ethical conduct and accountability from those individuals. Members of the media and members of the public should be aware of the rules and should be able to challenge those rules when they are deficient.

The rules currently in place in Ontario are designed to prevent elected officials from using their public office for their own personal gain. The rules also seek to ensure that officials do not use their public office to improperly further the private interests of others. Behaviours such as these are considered to be conflicts-of-interest and may amount to corrupt practices. In order to prevent such practices, the rules require that parliamentarians disclose their assets, liabilities and other interests to a non-partisan officer of the legislature and that a portion of the information disclosed then be made available to the public. Parliamentarians are also permitted to seek advice from that officer of the legislature in order to help them make ethically sound decisions.

The Ontario government’s long history with ethics rules can be traced back to the mid-1950s when Premier Leslie Frost directed his cabinet to refrain from holding particular investments. This restriction was placed on his cabinet in an effort to avoid replicating scandals that municipal politicians had become mired in. The Ontario legislature then

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1 For example, the scrutiny no longer finds its voice only in newspapers or on the nightly news. Thanks to modern technology, information is shared and opinions are expressed using both print and electronic mediums.


3 Ibid.
passed legislation to prohibit conflicts of interest at the municipal level,\textsuperscript{4} but it did not also codify conflict of interest rules for provincial politicians.

There continued to be no rules in place for provincial politicians until two members of Premier Bill Davis’ cabinet became embroiled in scandals in 1970.\textsuperscript{5} Sustained public pressure then compelled the Premier to announce in 1972 that he was putting conflict of interest guidelines in place for members of his cabinet.\textsuperscript{6} Premier Peterson succeeded Davis in 1985 and maintained nearly identical guidelines for his cabinet.\textsuperscript{7} Much like Davis had done in 1973, Peterson also expanded his guidelines to include his parliamentary assistants. Scandals eventually befell the Peterson government as well\textsuperscript{8} and Ontario then became the first jurisdiction in Canada to pass conflict of interest legislation that included the appointment of an independent officer of the legislature who was responsible for its administration.\textsuperscript{9} The first conflict of interest commissioner in Canada was appointed in 1988 after the passing of the \textit{Members’ Conflict of Interest Act}.\textsuperscript{10} The addition of this legislative officer has been heralded as a remarkable success.\textsuperscript{11} It has been such a success in fact, that every other provincial and territorial jurisdiction in

\begin{itemize}
\item \textsuperscript{4} See \textit{Municipal Act}, RSO 1960, c 249.
\item \textsuperscript{5} Further discussion of these scandals can be found in chapter 2, below.
\item \textsuperscript{6} See Ontario, \textit{Statement by the Hon. William Davis, Premier of Ontario, on Guidelines with Respect to Conflict of Interest} (Toronto: Government of Ontario, 1972) [Davis statement].
\item \textsuperscript{7} See Ontario, \textit{Statement by the Hon. David Peterson, Premier of Ontario, on Guidelines with Respect to Conflict of Interest} (Toronto: Government of Ontario, 1985) [1985 guidelines].
\item \textsuperscript{8} Further discussion of these scandals can be found in chapter 2, below.
\item \textsuperscript{9} Ian Greene & David P Shugarman, \textit{Honest Politics: Seeking Integrity in Canadian Public Life} (Toronto: James Lorimer & Company Ltd., 1997) at 130 [Greene].
\item \textsuperscript{10} SO 1988, c 17 [MCIA].
\item \textsuperscript{11} Greene, supra note 9 at 158.
\end{itemize}
Canada now has an officer of the Legislature who is responsible for administering its government ethics legislation.12

In its effort to address evolving ethical expectations, Ontario’s legislature passed the Members’ Integrity Act13 in 1994. The Members’ Integrity Act widened the scope of Ontario’s government ethics regime so that the legislation dealt with broader ethical considerations as well as conflicts of interest. This expansion of jurisdiction was intended to capture instances of impropriety by members that affected public trust and confidence, but that did not “involve issues in which there is a conflict between personal and public interests.”14 This expanded jurisdiction came from the addition to the legislation of Ontario parliamentary as a standard against which members’ conduct could be judged.15 The addition of Ontario parliamentary convention sent a message that Ontario’s parliament was attempting to advance the standards in Canadian government ethics law.

It has been more than 20 years since Ontario passed the Members’ Integrity Act and Ontario’s legislation now lags behind that of other Canadian jurisdictions. One example of this lag is that Ontario’s Integrity Commissioner can receive complaints about members or provincial parliament from other members, but not from the public.16 Another example is that Ontario has never included a clause requiring the legislature to periodically review this legislation even though the Integrity Commissioner very clearly

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13 SO 1994, c 38 [MIA].
15 See MIA, *supra* note 13 at ss 5, 28(1) & 30(1).
16 See e.g. *Code of Ethics and Conduct of the Members of the National Assembly*, CQLR c C-23.1, s 92; *Members’ Conflict of Interest Act*, RSBC 1996, c 287, s 18; *Conflicts of Interest Act*, RSA 2000, c C-23, s 24 (for examples of jurisdictions whose legislation permits members of the public to file complaints about the conduct of their elected officials).
called for such a clause in his 1995-1996 annual report. These legislative shortcomings exist despite increased public pressure for transparency in government.

This paper will take an in-depth look at the codification of the concept of “Ontario parliamentary convention”. Ontario parliamentary convention was added in 1994 without a definition. It is a rule or standard against which the behaviour of members can be judged. The addition of this standard was uneventful, but has since emerged as an extremely important component of Ontario’s government ethics regime. It is important because most of the complaints that have been made to the Integrity Commissioner since 1994 have included an allegation that a member has breached Ontario parliamentary convention. As such, a significant portion of the Integrity Commissioner’s work has involved the consideration of this standard. Whereas the Commissioner has also historically required complainants to specify the parliamentary convention that they were alleging had been breached, that level of specificity is no longer required. Complaints must now only include details of the allegedly improper behavior and the integrity commissioner accepts the onus of determining what parliamentary convention, if any, has been violated. This shift of responsibility has made it difficult for members who are being complained about to know what standards they are being held to and what the case is that they must meet in order to defend their own conduct.

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17 Ontario, Office of the Integrity Commissioner, *Annual Report, 1995-96* (Toronto: Publications Ontario, 1996) at 4 [1995-1996 Annual Report] (Commissioner Evans commented that “Legislation of this nature is relatively recent and in the day to day implementation of the Act deficiencies will surface which will require remedial action. In order that the Act remain relevant and consistent with present day conditions and public attitudes it should be reviewed every five years. While such a proposal for a statutory provision would make certain that a mandatory review is provided, it does not prevent revisions and amendments whenever deemed necessary.”)

18 This public pressure has been reflected, for example, in Premier Wynne’s open government initiative that formed part of her 2014 election campaign platform and resulted in the passing of Bill 8, *Public Sector and MPP Accountability and Transparency Act, 2014*, 1st Sess, 41st Leg, Ontario, 2014 (assented to 11 December 2014), SO 2014, c 13 [Bill 8].

19 Evidence of this assertion can be found in chapter 5, below.

20 Further discussion of this change in approach can be found in chapter 4, below.
Chapter 2 of this paper will explore the history of Ontario’s government ethics regime. Since Premier Frost made his decree to his cabinet in 1956, Ontario’s government ethics regime has responded to the evolving ethical expectations of its citizens. It was in response to two scandals in 1986\(^\text{21}\) for example, that Premier Peterson commissioned Former-Lieutenant John Aird to determine whether his cabinet had complied with his 1985 guidelines.\(^\text{22}\) Aird’s recommendations\(^\text{23}\) then led to the passing of Ontario’s first provincial government conflict of interest legislation in 1988. Another scandal then arose in Premier Rae’s cabinet in 1990. Rae had put his own conflict of interest guidelines in place when he took office\(^\text{24}\) because he did not feel that the 1988 legislation was strong enough. In fact, it was a rule in the guidelines and not in the 1988 legislation that was a parliamentary committee considered when a scandal arose involving one of his ministers improperly attempted to mediate a dispute between board members at a non-profit housing centre in her riding.\(^\text{25}\) All three of Ontario’s political parties responded to this gap in the legislation by working together to draft and pass the *Members’ Integrity Act* in 1994. The *Members’ Integrity Act* expanded the scope of Ontario’s legislation beyond mere conflicts of interest to include an undefined standard of conduct called Ontario parliamentary convention. This chapter will demonstrate that Ontario parliamentary convention was used to add Rae’s guidelines into the legislation in order to strengthen the rules that were in place.

\(^{21}\) Further discussion of the Caplan and Fontaine scandals can be found in chapter 2, below.


\(^{23}\) *Ibid* at 5-7.

\(^{24}\) See Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, 35th Parl, 1st Sess, No 69 (12 December 1990) at 2613 (Rt Hon Bob Rae) [Rae Guideline Introduction].

The legislature did not debate the undefined concept of Ontario parliamentary convention prior to passing the *Members’ Integrity Act*. It is accordingly not clear in the legislation or apparent in the legislative debates what exactly the concept was intended to address. The history of government ethics rules in the province demonstrates that the 1994 legislation was passed in response to a scandal in Premier Rae’s cabinet, but no specific discussions took place that would clarify the legislature’s intent when adding Ontario parliamentary convention. In order to determine what meaning had been ascribed to the concept in Ontario’s parliament prior to 1994, chapter 3 of this paper explores the historical use of the language of parliamentary convention by Ontario’s legislature. That historic meaning will then be contrasted in chapter 4 with the Ontario Integrity Commissioners’ use of the concept since the passing of the *Members’ Integrity Act*.

Chapter 4 will build on chapter 3 to demonstrate that Ontario parliamentary convention has been applied inconsistently by Ontario’s Integrity Commissioners. Chapter 3 will have demonstrated that the language of parliamentary convention was used in legislative debates extending back to 1985. Ontario’s first integrity commissioner even used the expression in annual reports that he released in advance of the passing of the *Members’ Integrity Act* in 1994. The first commissioner explained parliamentary convention by reference to a book on constitutional conventions and drew parallels between the two.26 The first two commissioners continued to employ this explanation and it will be shown that this explanation was consistent with the legislative debates dating back to 1985.27 It was the two most recent Commissioners who expanded the use of parliamentary convention. The expression has come to be used more loosely in order to capture a more general class of rules or practices that have been accepted by parliamentarians through usage or custom. These rules need not be based on constitutional conventions, but can

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27 Further discussion of the uses of the expression “parliamentary convention” in legislative debates will be found in chapter 3, below.
instead be supported by the four principles that form the preamble to the *Members’ Integrity Act*.28

Chapter 5 will then summarize the rules of ethical conduct that have emerged from Ontario parliamentary convention. These rules of conduct fall into two major categories. The first category is parliamentary conventions that are grounded in constitutional conventions. The second category is parliamentary conventions that are based on the improper use of government or legislative resources, including benefits afforded to members by virtue of their status as members. This chapter will also summarize comments that Commissioners have made about the types of conduct that fall clearly outside of the realm of Ontario parliamentary convention, including the conduct of the Speaker acting in his or her official capacity as Speaker. This information is presented in a succinct and easy to reference format.

With a better sense of the legislative history and of Ontario’s use of parliamentary convention both before and after 1994, chapter 6 then offers two sets of recommendations. The first set of recommendations is for the current Integrity Commissioner and assumes that amendments to the legislation are not immediately forthcoming. Briefly, I recommend that the Integrity Commissioner narrow the use of Ontario parliamentary convention and expand the use of section 2 of the legislation. This expanded use of section 2 would allow the second category of Ontario parliamentary convention to instead fall under a provision that impugns improper decision-making. This would be consistent with the first Integrity Commissioner’s work and would bring more clarity and less ambiguity to the legislation. The second set of recommendations is directed to parliamentarians who may be considering ways to improve Ontario’s government ethics regime. I suggest that a specific definition for Ontario parliamentary convention be added to the legislation and that section 2 be amended. Again, the new wording that I propose for section 2 is intended to capture those rules that have heretofore

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fallen under the second category of Ontario parliamentary convention that I have outlined above.

Strong ethics legislation can have a real impact on the trust that the public places in government. As such, Ontario’s legislation ought to be written and applied in a manner that is clear and compelling to its citizens and to its parliamentarians. Determining whether a member has violated Ontario parliamentary convention has been a needlessly subjective exercise undertaken by the Integrity Commissioner for over 20 years. Ontario ought to amend the Members’ Integrity Act so that it is not vague and so that it can be more easily understood. Legislation of this nature is enacted to encourage ethical behaviour by government officials and to promote the public’s trust in government actors.29 Keeping Ontario parliamentary convention in the Act without a definition allows the concept to continue to be inconsistently applied. This inconsistency leads to confusion that weakens the public dialogue concerning government ethics in Ontario and may even weaken members’ compliance with the legislation.

29 Ibid at Preamble.
2 The History of Government Conflict of Interest Rules in Ontario

The rules that governed the ethical conduct of members of provincial parliament in Ontario were not codified prior to 1972. It was each party leader’s responsibility to hold their members accountable for any poor ethical conduct.\(^{30}\) If, for example, a minister had behaved poorly, the public and/or the opposition might react and the Premier would need to decide whether to remove that individual from Cabinet or to risk criticism for not doing so.\(^ {31}\) If a backbencher had exercised poor ethical judgment, his or her party leader would have to decide whether that poor judgment warranted sanction. Sanction for a backbencher, or even a minister, could include removal from the party, removal from a critic or parliamentary assistant portfolio, as applicable, loss of stature within the party or even being asked to resign his or her seat in the legislature.\(^ {32}\) Again, if the party leader did not take action and if the member him or herself did not resign, both the member and the leader could be subject to heavy criticism and political fallout for their inaction.

In this chapter I will set out the historical background of conflict of interest policies and legislation in Ontario, within the larger context of action at the federal and municipal levels. I will identify various crises that have occurred and explore how those crises gave rise to incremental responses that have cumulatively led to the current legislation. This history will begin in the mid-1950s with the Northern Ontario Natural Gas scandal. This early scandal involved municipal politicians and motivated legislators to add conflict of interest rules to municipal legislation. Two provincial politicians also found themselves


\(^{32}\) Ibid at 391.
embroiled in scandals at the time, which led to Premier Bill Davis announcing the province’s first government ethics guidelines for members of cabinet in 1972. Premier David Peterson kept similar guidelines in place when he took office in 1985. Peterson’s guidelines were tested when allegations were made against two of his cabinet members. Those allegations led to legislative committees conducting investigations and to the Premier retaining former Lieutenant-Governor John Black Aird to prepare a report regarding cabinet’s compliance with the guidelines. Ontario’s first provincial government conflict of interest legislation was passed in 1988 in response to this report. Premier Rae took office in 1990 and supplemented the legislation with further guidelines. These supplementary guidelines were stricter than the legislation and proved to be difficult for Rae’s cabinet to comply with. A scandal quickly surfaced and a legislative committee determined that a cabinet minister had violated the guidelines. Given this finding of a violation, a new legislative committee was assembled to consider whether the guidelines ought to be incorporated into the legislation. The committee ultimately recommended that the guidelines should be incorporated and the legislature responded by passing new provincial government ethics legislation in 1994. Debate in the legislature did not focus on Premier Rae’s guidelines when the Members’ Integrity Act was passed in 1994, but the legislation did include a new concept called Ontario parliamentary convention that appears to have been intended to capture several of the rules found in Rae’s guidelines. The integrity commissioner at the time had worked with all three parties to draft the legislation and would in fact later clarify that Ontario parliamentary convention was added to satisfy the legislative committee’s recommendation that parts of Rae’s guidelines be incorporated into the legislation. No recorded history of Ontario’s government ethics rules has ever been comprehensive enough to explain the context surrounding the addition of Ontario parliamentary convention to the legislation. Chapter 2 will therefore undertake this important task by providing a more detailed description of the crises and responses that I have outlined above.
2.1 The Northern Ontario Natural Gas Company

The series of events that led to Ontario’s current government ethics regime began in the mid 1950s. Ontario Premier Leslie Frost responded to a scandal that involved municipal and provincial politicians by passing legislation that prohibited conflicts of interest in municipal government.

In 1956 Premier Frost determined that the Northern Ontario Natural Gas Company (NONG) had been receiving favourable treatment from several municipal governments in its efforts to build pipelines across northern Ontario.\(^{33}\) NONG was seeking contracts to transport natural gas from the Trans-Canada pipeline to northern Ontario municipalities. Unbeknownst to Premier Frost, NONG had offered stock options to a number of municipal officials and these stock offerings had enabled the company to secure contracts with several municipalities.\(^{34}\) NONG’s stock was then split in 1955 and in 1956, the first split being 100:1 and the second being 5:1.\(^{35}\) Individuals who held NONG stock became very rich as more contracts with municipalities were being secured and as the stock was being split. Premier Frost became aware of the profits when NONG sought approval from the provincial secretary’s department for its stock splits. Frost then began to question why none of the northern municipalities involved had incorporated their own gas distribution companies instead of contracting with NONG.\(^{36}\) The provincial government had also committed to assisting with financing the construction of the northern Ontario main line, which would benefit Trans-Canada as well as ancillary distribution companies such as NONG.\(^{37}\) The Premier’s suspicions about NONG’s success and the provincial government’s heavy involvement in the pipeline project allowed him to recognize the potential for a conflict of interest in his cabinet and he “instructed his ministers in writing not to invest in any natural gas company and to divest

\(^{33}\) Graham, supra note 2 at 341.

\(^{34}\) Ibid at 340.

\(^{35}\) Ibid.

\(^{36}\) Ibid at 341.

\(^{37}\) Ibid at 340.
themselves of all such holdings.”38 It was not until the opposition began to demand answers regarding the Minister of Mines’ sudden resignation in 1957 that it was revealed that three members of Premier Frost’s cabinet had improperly profited from investments in NONG, including that same Minister of Mines.39 Those three ministers would either resign voluntarily or be forced to resign after their improper stock purchases came to light.40

2.2 Municipal Conflicts of Interest

Following the NONG scandal the Ontario government noticed a lack of flexibility in the rules applicable to public officials. Premier Frost’s majority government passed the Municipal Act41 in 1960 in an attempt to resolve this inflexibility. The Municipal Act did not prove sufficient however, and new legislation was passed that was dedicated exclusively to municipal conflicts of interest.

The Municipal Act42 that was passed in 1960 prohibited councilors from having an interest in a contract with a municipal corporation or local board.43 The courts had occasion to consider this restriction and decided to apply a broad interpretation to the term “interest” so that it would include more than mere pecuniary interests.44 Municipal lawyer and author Ian MacF. Rogers has noted that “[m]any an aspiring candidate and sitting member has run afoul of this provision.”45 An exception to the provision existed

38 Ibid. See also Stanley Westall, Morality in Government (Toronto: The Ontario Woodsworth Memorial Foundation, 1965) at 12.
40 Ibid at 79.
41 RSO 1960, c 249.
42 RSO 1960, c 249.
43 Ian MacF Rogers, "Conflict of Interest a Trap for Unwary Politicians" (1973) 11:3 Osgoode Hall LJ 537 at 541 [Rogers].
44 Ibid.
45 Ibid.
for individuals who were merely shareholders of a company that had an interest in a contract with a municipal corporation or local board.\textsuperscript{46} The exception allowed an individual who would otherwise be caught by this provision to gain immunity simply by incorporating a company to hold their interest in the contract and positioning themselves as a shareholder who refrained from voting.\textsuperscript{47} The legislature of Ontario amended the \textit{Municipal Act} in 1961 to remove this exception for any councilor or their spouse who held a controlling interest in a company that received some benefit from a contract with a municipal corporation or local board.\textsuperscript{48} The legislature also changed the \textit{Act} in 1962 so that a councilor would be obligated to disclose any pecuniary interest in a matter before council and then refrain from voting on that matter.\textsuperscript{49} These amendments prohibited sitting councilors from entering into a contract with the government even if they had disclosed their pecuniary interest and not participated in any related discussion, debate or voting.\textsuperscript{50}

According to Ian MacF Rogers, the 1960 legislation continued to lack flexibility in spite of the amendments.\textsuperscript{51} This inadequacy was demonstrated when a City of London alderman was forced under the legislation to vacate his seat because he signed a contract with the City on behalf of his union while he was also employed as a union secretary for the London Transportation Commission.\textsuperscript{52} The legislation was drafted in a manner that assumed that every case of a council member dealing contractually with a council was a case where that individual was acting for his or her own selfish ends.\textsuperscript{53} Because the alderman in London also stood to gain from that contract as a member of the union

\begin{footnotesize}
\begin{enumerate}
\item[Ibid.]
\item[Ibid.]
\item Rogers, \textit{supra} note 43 at 542. See also Westall, \textit{supra} note 38 at 9.
\item Rogers, \textit{supra} note 43 at 542.
\item Unless the councilor was also a teacher and their teaching contract was the interest at issue. See Rogers, \textit{supra} note 43 at 541.
\item Rogers, \textit{supra} note 43 at 542.
\item This arguably placed him in an immediate conflict of interest as a result of his eventual pecuniary gain. See \textit{Re Election of Collins}, [1967] 2 OR 41.
\item Rogers, \textit{supra} note 43 at 543.
\end{enumerate}
\end{footnotesize}
himself, the court had no choice but to remove him from office. This rule seemed to be too strict given that the alderman was transparent about his involvement in the union. The government of Ontario established a special committee to look into the flexibility of the remedies and other problems that it perceived to exist within the legislation. The committee’s report was released in 1968 and its main proposal “called for adoption of the principle of disclosure, rather than specification of detailed disqualifying clauses.” The report noted that the “principle of disclosure is subject to certain weakness” but the “ultimate result must place some faith in the integrity of persons who seek public office and place the onus of final disqualification on the citizens of the community, who can disqualify a person through the ballot box.” Furthermore, “[p]enalties were to be applicable only where a person having a conflict failed to disclose.” This recommendation would clearly address the conflict of interest that arose for the London alderman who had two jobs. The alderman’s disclosure of his conflict should have been adequate to allow the judge to avoid removing him from office. The onus should then be on the voting public to call for the alderman’s resignation or to choose not to re-elect him.

These recommendations had already been made public when North York councilor Irving Paisley was forced to resign following a conflict that resulted from an interest he had acquired in a development company before he had become a member of council. He then signed subdivision agreement documents in 1970 as a director of the company, after

54 Ibid at 542.
55 Ontario, Ministry of Municipal Affairs, Report of the Committee on Conflicts of Interest, (Toronto: Queen's Printer, 1968) [Committee on Conflicts of Interest].
56 Rogers, supra note 43 at 543.
57 Committee on Conflicts of Interest, supra note 55 at 12.
58 See Committee on Conflicts of Interest, supra note 55. See also Dick Illingworth, “Province’s policy is too loose on conflict of interest”, The Toronto Star (2 September 1986) E4 [Illingworth].
59 Rogers, supra note 43 at 543.
60 Committee on Conflicts of Interest, supra note 55 at 13.
61 Illingworth, supra note 58.
local council gave the go-ahead for that particular subdivision. The judge who heard the case against Mr. Paisley was forced to vacate his seat.

Around that same time, four aldermen from Thunder Bay who had connections to a company that had purchasing contracts with the city declared their interests and refrained from voting on any matters related to that company or those contracts. The rest of council voted in a manner that provided a direct financial benefit to those aldermen. A judge was then asked to consider whether, despite their declaration and their restraint from voting, they had violated the Municipal Act and ought to be forced to resign their seats due simply to the fact that they had each gained financially. The judge determined that he had no choice but to unseat all four due to their clear conflicts of interest.

The legislature of Ontario responded to these five high profile cases by passing the first Municipal Conflict of Interest Act in 1972. This legislation changed the rules for municipal councilors and allowed them to disclose their pecuniary interests in any contract with the municipality or any other contract that may be affected by a council decision, without fear of losing their seat. If the councilor failed to disclose his or her interest however, he or she could still be unseated and barred from holding office for up to seven years.

62 Ibid.
63 Rogers, supra note 43 at 542.
64 Municipal Act, RSO 1970, c 284.
65 Illingworth, supra note 58.
66 Ibid.
67 Ibid.
68 Municipal Conflict of Interest Act, 1972, SO 1972, c 142 (Royal Assent was given to Bill 214 on December 15, 1972).
69 Ibid, s 2.
70 Supra note 68, s 5(1).
With the public’s attention focused on municipal conflicts of interest and the government’s new legislation, a new scandal emerged in 1972 at the provincial level. The Attorney-General of Ontario had purchased land on speculation around a location in Pickering, Ontario that he would have known as a member of cabinet had been proposed as a site for a future airport.\(^\text{71}\) To make matters even worse for Premier Davis, Ontario’s Minister of Municipal Affairs also made the mistake of intentionally approving the development of a subdivision in Chatham in which he also held an ownership interest.\(^\text{72}\)

### 2.3 Premier Bill Davis’ 1972 Guidelines

Premier Davis was quickly criticized for not having also taken legislative action at the provincial level\(^\text{73}\) when the *Municipal Conflict of Interest Act* was passed.\(^\text{74}\) Davis responded to the mounting criticism and pressure by making a statement in the legislature on September 14, 1972 that established conflict of interest guidelines for members of his cabinet.\(^\text{75}\) These guidelines were attentive to the recent scandals and also marked the beginning of the codification of provincial government conflict of interest rules in Ontario. Successive premiers would base their guidelines on Davis’ guidelines, which included the following rules:\(^\text{76}\)

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\(^\text{71}\) Illingworth, *supra* note 58. See also Sylvia Stead, “Stricter guideline on conflicts is urged for Cabinet ministers”, *The Globe and Mail (Canada)* (12 January 1981).

\(^\text{72}\) Illingworth, *supra* note 58.

\(^\text{73}\) See e.g. Illingworth, *supra* note 58; Robert Sheppard, “Conflict of interest Ontario proposal is ethical buck-passing, critics claim”, *The Globe and Mail (Canada)* (18 July 1987) [Buck-Passing].

\(^\text{74}\) See Illingworth, *supra* note 58.

\(^\text{75}\) Ontario, *Statement by the Hon. William Davis, Premier of Ontario, on Guidelines with Respect to Conflict of Interest* (Toronto: Government of Ontario, 1972) [Davis statement].

\(^\text{76}\) The list below is paraphrased and not taken directly from the guidelines.
1) Members of Cabinet must make disclosures to the Clerk of the Assembly. The Clerk will then publicly disclose all land owned by each member or by his or her spouse or dependents that is not for primarily residential or recreational use;

2) Likewise, members of Cabinet and their spouse or dependents are prohibited from acquiring any interests in land that is not for either recreational or residential use;

3) Each Minister is responsible for ensuring that they recuse themselves from matters in which they may have a personal beneficial interest;

4) No private company in which a Minister or his or her family has an interest may become contractually involved with the Government of Ontario;

5) Any pre-existing interests in public corporations must be divested or put into a trust over which the Minister is to exercise no control or influence;

6) Ministers shall refrain from day to day participation in outside business or professional activities.

Davis’ guidelines firmly established that his own ministers’ speculative land purchases would be considered inappropriate, but they also established some new innovative standards. Ministers were required to file a report disclosing their assets and liabilities with the Clerk of the Assembly and the Clerk would then be responsible for making the disclosed information available for public examination. Premier Davis also noted in the statement he made in the legislature that situations of conflict of interest may arise that are not covered by his guidelines. This remark was presumably made to serve as a notice to his Ministers that compliance with the guidelines is necessary, but not

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77 Ibid at 2.
78 Ibid.
79 Ibid at 3.
80 Ibid.
81 Ibid.
82 Ibid at 4.
83 Ibid at 5
84 Ibid at 6.
sufficient, to meet the high ethical standards that necessary to earn and maintain the public’s trust.

Premier Davis also gave “consideration to the matter of conflict of interest as it pertains to the private members of the Legislature.” Accordingly, in January of 1973 the guidelines were made applicable to parliamentary assistants. These guidelines remained in force until June 26, 1985, when the Progressive Conservative party of Ontario ceased to form government.

2.4 Premier David Peterson’s 1985 Guidelines

The government of Canada appointed a Task Force on Conflict of Interest in 1983 to undertake a major review of how conflicts of interest were being handled at the federal level, including what policies and procedures ought to be in place. The task force released its report in May of 1984 and the federal government established the Conflict of Interest and Post-Employment Code of Public Office Holders on September 9, 1985.

It was with this development in the background that David Peterson took office as Ontario’s Premier on June 26, 1985 and issued his conflict of interest guidelines in September of that same year. Premier Peterson followed former Premier Davis’ lead

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88 Ibid.

89 Ibid

and adopted conflict of interest guidelines that applied to both ministers and parliamentary assistants. Except for three changes relating to the right to contract with the government, Premier Peterson’s guidelines were very nearly identical to Premier Davis’ 1972 guidelines. The fact that the new Liberal government adopted the former Conservative government’s guidelines with only minor changes was not insignificant. This transition between government seemed to signal an understanding that the rules in place were universally agreeable and that there was a benefit to be gained from maintaining consistency and clarity in those rules for successive governments. Peterson also signaled through his adoption of the guidelines and the small changes that he made that it was important to strive to improve the conflict of interest rules so that they do not act as a disincentive for individuals considering public service in the Ontario. The three changes Peterson made can be described as follows:

1) MPPs and/or their family members were now permitted to own an interest in a private company that could become contractually involved with the Government of Ontario as long as the interest in that company had been previously placed in a blind trust that was established in accordance with the guidelines;

2) An explanation of how a blind trust must be established and how it must operate, including the degree of control that the member can continue to exert, if any, over the trust property; and,

3) A rule permitting ministers to enter into contracts with the government that by the terms of the applicable legislation or regulation are available even-handedly to all members of the public or to a special class of members of the public.

Premier Peterson was criticized for permitting ministers and their families to benefit from contracts with the government through privately owned companies. It was widely noted that Peterson’s guidelines were technically weaker than Premier Davis’ guidelines.  

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91 Legislative Assembly of Ontario, Standing Committee on Public Accounts, Report on the Allegation of Conflict of Interest Concerning Elinor Caplan, MPP (September 1986) at 47 [Caplan Report].

92 Linda McQuaig, “Peterson bill weakens rules on conflict of interest, critics say. Forced to resign under old rules, two have posts in new Cabinet”, The Globe and Mail (8 October 1987).
According to opposition leader Bob Rae, “[i]t will now be possible for companies in which Cabinet ministers have a substantial private interest to carry on doing extensive work for the Government. That’s just appalling.” 93 Despite this criticism however, the first scandal to emerge under Peterson’s guidelines was not due to the rules being too weak, but due to a minister’s spouse’s non-compliance with those rules.

2.5 Minister Elinor Caplan’s Scandal

In 1986 Minister Elinor Caplan’s husband was alleged to have benefited from his association with a company that had received funding from the government of Ontario. Mr. Caplan’s beneficial interest in the company was not held in a blind trust, as per the guidelines. 94 On a motion made by Robert Nixon on June 16, 1986, 95 the Legislative Assembly ordered that the Standing Committee on Public Accounts meet to consider whether there had been an actual or apparent breach of the Premier’s conflict of interest guidelines by Mr. Wilfred Caplan. Mr. Caplan was subject to the guidelines because his spouse Eleanor Caplan was the Minister of Government Services, Chair of the Management Board and Chair of Cabinet from June 26, 1985 until June 16, 1986. 96

The facts of the alleged conflict of interest are rather involved, but can be summarized as follows: Mr. Caplan was an “officer of a company that had negotiated $3 million in provincial financing, contrary to the Premier’s guidelines that prohibited spouses of cabinet ministers from having an interest in companies contracting with the government.” 97 The Standing Committee’s report concluded that Mr. Wilfred Caplan was clearly in breach of the conflict of interest guidelines. 98 The Committee also offered a

93 Ibid.
94 Caplan Report, supra note 91 at 1.
95 Minister of Economics, Minister of Revenue and Government House Leader.
96 Caplan Report, supra note 91 at 3.
97 Greene, supra note 9 at 130-131.
98 Caplan Report, supra note 91 at 62.
few recommendations with respect to the Premier’s Guidelines, including the following:\textsuperscript{99}

1) The guidelines must be replaced by legislation or regulations under appropriate existing legislation;

2) Appropriate and effective mechanisms for interpretation, enforcement and monitoring of provisions should be developed. With respect to interpretation, responsibility for providing advice to ministers should be vested in a non-partisan and independent advisor;

3) Provision should be made for a non-partisan and independent arbiter for conflict of interest compliance;

4) The imposition of an arbiter should not remove responsibility for compliance from a minister nor relieve the Premier of his obligation to monitor compliance. The necessity for responsible government with regard to compliance should not in any way be diminished;

5) Post-employment restrictions for ministers that have been contemplated need not be imposed as they are not warranted at present; and,

6) Disclosure statements in Ontario should include full disclosure of all beneficial interests and ongoing disclosure requirements should be monitored so that failure to report changes in circumstances can be detected and penalized;

7) An arbiter for compliance with conflict of interest provisions be an officer of the Legislative Assembly, appointed in the same manner as the Ombudsman or the provincial Auditor. Similarly, advice on interpretation and compliance should be provided by a non-partisan appointee operating under the jurisdiction of the Assembly rather than as a government official; and,

8) Apparent conflicts of interest should be avoided as conscientiously as actual conflicts of interest and that this principle, to the extent possible, be included and emphasized in new laws or regulations.\textsuperscript{100}

\textsuperscript{99} The list below is paraphrased and not taken directly from the guidelines.

\textsuperscript{100} Caplan Report, \textit{supra} note 91 at 87-88; see also Ontario, Commission on Conflicts of Interest, \textit{Annual Report, 1988-89} (Toronto: Publications Ontario, 1989) at 4 [IC Annual Report 88/89].
The proposal to enact legislation to address conflicts of interest in government was very likely inspired by what had been happening throughout the country at that time. Not only had the federal government been considering how to handle conflicts of interest, but every other province and territory in Canada had also already enacted its own conflict of interest legislation. What was new and very noteworthy about the recommendations made by the committee was the proposal that a non-partisan and independent arbiter be responsible for administering this legislation in Ontario.

2.6 Minister René Fontaine’s Scandal

The Committee’s recommendation might have gone unheeded had another conflict of interest not surfaced in Premier Peterson’s cabinet while the Caplan allegations were being investigated. René Fontaine, the Minister of Forestry and Mines, was accused of violating Premier Peterson’s guidelines by failing to publicly disclose all of his investment holdings, including those in mining and forestry companies.

On July 2, 1986, the House made an Order of Reference that the matter of René Fontaine’s compliance with the conflict of interest guidelines be referred to the Standing Committee on the Legislative Assembly for review and report to the Assembly. On that same day, and in response to the growing political pressures arising from the conflict of interest allegations, Premier Peterson commissioned former Lieutenant-Governor John Black Aird to “review the compliance of all cabinet members with the guidelines and to recommend improvements to the rules.” The retention of Mr. Aird signaled that the

101 See supra, note 87.
102 See Caplan Report, supra note 91.
103 Green, supra note 9 at 131.
104 Caplan Report, supra note 91 at 3.
105 Legislative Assembly of Ontario, Standing Committee on the Legislative Assembly, Report on Allegation of Conflict of Interest Concerning René Fontaine, MPP (September 1986) at Appendix A [Fontaine Report].
106 Greene, supra note 9 at 132.
Premier was open to improving the conflict of interest rules in place. The Committee looking into the allegations against Minister Fontaine would do so at the same time as Mr. Aird conducted his review of the Premier’s guidelines.\(^ {107}\)

The Standing Committee on the Legislative Assembly considered the application of the 1972 and 1985 guidelines, in addition to several applicable sections of the *Legislative Assembly Act*.\(^ {108}\) The 1972 and 1985 guidelines both required that:

All members of Cabinet will make public disclosure of the following categories of properties owned by them, in whole or in part, or by their spouses, or their minor children, whether directly held by them, or indirectly through companies or nominees.

First, all land owned in Ontario except property occupied for their own private residential or recreational use, or for the use of their dependents; second, all share or debt interests in private companies and land; third, all partnerships or proprietorships in which they are principals.\(^ {109}\)

The hearings into the allegations against Minister Fontaine were conducted between July 21, 1986 and September 19, 1986.\(^ {110}\) The Committee deliberated from September 22 to September 24\(^ {111}\) and their report was tabled later that same month.\(^ {112}\)

The report explained that Minister Fontaine had a robust portfolio of investments and business interests.\(^ {113}\) It became apparent very early in the hearings that Minister Fontaine had violated the Guidelines in several major respects.\(^ {114}\)


\(^{108}\) *Legislative Assembly Act*, RSO 1980, c 235.

\(^{109}\) Davis Guidelines, *supra* note 75 at I; Peterson Guidelines, *supra* note 90 at 1.

\(^{110}\) Fontaine Report, *supra* note 105 at 1.

\(^{111}\) *Ibid*.

\(^{112}\) *Ibid* at Letter to the Speaker.

\(^{113}\) *Ibid* at 3-7.

\(^{114}\) The list below is paraphrased and not taken directly from the report.
1) although he did disclose eight parcels of land that he owned, he did not declare one additional parcel that he should have declared;
2) he did not disclose two debts that were owed to him by two different private corporations;
3) he failed to disclose part of his holdings in a mining company; and,
4) he failed to comply with the Guidelines in regards to his interests in a sawmill company.\textsuperscript{115}

The Committee’s report was scathing in its criticism of Minister Fontaine and of the Premier for not actually enforcing his guidelines. The committee wrote that “[m]ore than a year after becoming a Minister, despite explicit instructions from at least two senior officials, Mr. Fontaine still failed to comply with the Guidelines”\textsuperscript{116} and “Mr. Fontaine, as a Cabinet Minister had the responsibility of conforming to the Premier’s Conflict of Interest Guidelines. He must accept responsibility for his incompetence in failing to comply with the Guidelines.”\textsuperscript{117} The committee noted that “[n]otwithstanding the Premier’s repeated assurances that he had enforced the Guidelines, it is evident that there was little, or no, effort to monitor compliance.”\textsuperscript{118}

The committee’s report concluded by referring to the Aird Report, which had not yet been made public. The report noted that “[i]t will be a priority of the Legislative Assembly Committee to review the Aird Report on Conflict of Interest Guidelines” and “[a]ny new rules should reflect a sensitivity to the public trust which each of us holds. There can be neither the possibility of personal gain nor the appearance of personal gain for any member of the Legislature while attempting to discharge his or her duties. We will proceed with this work as soon as the Aird Report is tabled.”\textsuperscript{119} Despite this

\begin{footnotesize}
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\item[\textsuperscript{115}] Fontaine Report, \textit{supra} note 105 at 28-30.
\item[\textsuperscript{116}] \textit{Ibid} at 30.
\item[\textsuperscript{117}] \textit{Ibid} at 29.
\item[\textsuperscript{118}] \textit{Ibid}.
\item[\textsuperscript{119}] \textit{Ibid} at 30.
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heightened anticipation, the Aird Report was reluctantly\textsuperscript{120} released on September 24, 1986\textsuperscript{121} - a day that notably coincided with the last deliberation day for the Standing Committee on the Legislative Assembly in its consideration of the allegations against Minister René Fontaine.\textsuperscript{122} The Standing Committee on Public Accounts also tabled a second report on October 3, 1986, with respect to the allegations concerning MPP and former minister Elinor Caplan.\textsuperscript{123}

### 2.7 The Aird Report

There was much anticipation for the release of the report from former Lieutenant-Governor John Black Aird in the midst of the heightened public attention to government conflicts of interest in Ontario at the time.\textsuperscript{124} Aird was held in high regard in Ontario political circles and his report, at least theoretically, promised answers to some very

\textsuperscript{120} The Aird Report was released after the Standing Committee on Public Accounts, subsequent to the release of its second “Report with Respect to the Alleged Conflict of Interest Concerning Elinor Caplan, MPP”, requested a speaker's warrant to compel Premier David Peterson to release the report commissioned by him from the law firm of Blake, Cassels with respect to holdings of ministers of the Crown. The speaker issued his warrant and the premier subsequently produced the document to the Committee. This is the first time that a Speaker's Warrant has been issued to a Premier. See “Reports on Legislative Activities” (1986) 9:4 Can Parl Rev. 38 at 40 [Legislative Reports].

\textsuperscript{121} Supra note 86 at 2.

\textsuperscript{122} It is not clear whether this was also the same day that the report was released by the Standing Committee on the Legislative Assembly in its consideration of the allegations against Hon. René Fontaine.

\textsuperscript{123} The second report was “an attempt to provide an explicit statement of findings and conclusions based on the evidence received and summarized” in the first report. In other words, it was a report that was filed in likely response to criticism that the first report was not definitive or clear enough with respect to its conclusions. See Ontario, Legislative Assembly, \textit{Official Report of Debates (Hansard)}, 33rd Parl, 2nd Sess, No 48 (15 October 1986) at 2471 (Robert W Runciman).

\textsuperscript{124} See generally “Premier can’t hide behind Aird probe”, Editorial, \textit{The Toronto Star} (3 July 1986) A20; Sandro Contenta “Aird to review conflict rules as probe ordered into Fontaine affair”, \textit{The Toronto Star} (3 July 1986); Rosemary Speirs “Politicians need an ethics watchdog Peterson must take action if he wants to keep his vow of clean, open government”, \textit{The Toronto Star} (27 June 1986) A24; Sandro Contenta “Conflict of interest: A troublesome topic Ontario: A review is ordered”, \textit{The Toronto Star} (14 June 14 1986) B4.
timely questions. The heightened public interest also motivated Premier Peterson to move quickly to try to pass conflict of interest legislation that reflected Aird’s report. Peterson failed twice to pass such legislation. The report included an assessment of whether all the current Ministers had complied with the Guidelines and also included advice with respect to how the government conflict of interest regime in Ontario could be improved.  

A large portion of the Report was also dedicated to an analysis of what the government could do to restore public trust in the Ontario government.

Aird reviewed the disclosure statements that had been filed by the current members of the executive council and noted that quite a few had not complied with Premier Peterson’s 1985 conflict of interest guidelines. He observed that “many of these examples of non-compliance are technical in nature in that the letter rather than the spirit of the Guidelines has been breached.”

Aird also stated in his report that “in some matters the Guidelines are vague, imprecise and even self-contradictory. As a result, compliance with the Guidelines is in many instances a question of interpretation. That situation is unfair to everyone and particularly to the Ministers who are, in my view, entitled to know precisely what they must do to comply.” Aird stated that the Guidelines were inadequate to achieve what he believed to be the principal goal of any government conflict of interest regime, being “public confidence that government office is not used for private gain.” In order to achieve this goal of public confidence, Aird’s report contained the following key recommendations:

1) the present Guidelines should be replaced by the enactment of ministerial conflict of interest legislation;

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125 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 33rd Parl, 2nd Sess, No 41 (2 July 1986) at 2045 (Hon David Peterson).
126 Supra note 15 at 2.
127 Ibid.
128 Ibid at 5.
129 For the complete list of recommendations, see Aird Report, supra note 107 at 5-7.
2) the new legislation should have the following principal features:
   a) broadened requirements for full and complete disclosure;
   b) the establishment of the office of the Commissioner of Compliance, charged with the responsibility of supervising and monitoring disclosure under the legislation, advising those covered by the legislation and investigating allegations of non-compliance;
   c) the elimination of the requirement for mandatory divestment in particular circumstances and its replacement by a choice between full and continuing public disclosure or the placing of assets in a more stringent form of blind trust;
   d) the strengthening of the blind trust by the imposition of a requirement that the Commissioner of Compliance, or his or her nominee, be appointed the trustee of any blind trust; and,
   e) the introduction of an alternative to the requirement that a private corporation in which a Minister has an interest can only contract with the Government if the interest is held in a blind trust. Private corporations ought to be permitted to contract with the Government if there is complete disclosure by the Minister of his interest and a withdrawal by the Minister from any deliberations in respect of the contract.

Aird also concluded that there was no need for built in sanctions or enforcement mechanisms for non-compliance with the rules and that there should be post-employment restrictions for when a member leaves cabinet. The legacy of the Aird report lies however in the recommendation that there should be an independent commissioner of compliance. Even though the Standing Committee on Public Accounts put forth nearly the same recommendation for an independent commissioner in their report regarding the allegations against Minister Elinor Caplan, the Aird Report had

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130 *Ibid* at 57.

131 *Ibid* at 58.
considerably greater clout as a result of Aird’s strong reputation as the former Lieutenant-Governor of Ontario and as a well-respected lawyer.

It is not clear when exactly Premier Peterson received the full Aird Report. Premier Peterson learned of Aird’s findings by letter dated July 23, 1986, but he did not release the report publicly until after the Standing Committee on Public Accounts requested a Speaker’s warrant on September 17, 1986 to compel its release. The House then ordered the Standing Committee on the Legislative Assembly to review Aird’s findings and to report back. The Committee’s report was tabled in the Legislature on December 10, 1986.

2.8 Bill 160

The government did not wait for the Committee’s report and quickly tabled Bill 160 on November 27, 1986, entitled “An Act to provide for greater Certainty in the Reconciliation of the Personal Interests of Members of the Assembly and Executive Council with their Duties of Office.” This bill was the Ontario government’s first attempt at designing comprehensive government ethics legislation that would address the many deficiencies in the current guidelines that had been brought to light in the Aird, Caplan and Fontaine reports. The bill notably included:

1) a definition of “conflict of interest”;

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132 Ibid at Appendix III.

133 Robert Sheppard, “Report urges law to replace conflict code”, The Globe and Mail (Canada) (18 September 1986) A11. See also Legislative Reports, supra note 120. (the report was released on September 24, 1986)


135 Madisso, supra note 86 at 3.


137 The following list is not comprehensive and for the sake of brevity consists simply of those items I have deemed to be of most significance. The listed items have been paraphrased from Madisso, supra note 86 at 4.
2) stipulations that a member cannot:
   a) use insider information,
   b) use his or her office to influence someone to further that member’s own private interest(s), or
   c) receive extra benefits;
3) a rule that members must make a disclosure if and when a conflict of interest arises in a meeting and immediately withdraw therefrom;
4) the stipulation that a commissioner shall be appointed, who may:
   a) provide members with opinions about other members; and,
   b) recommend that certain penalties be imposed against another member (with the Assembly having to accept the commissioner’s recommendations in this regard);
5) a rule requiring all members to file disclosure statements with the newly-appointed commissioner and a corresponding requirement that the commissioner must prepare a public disclosure statement; and,
6) a rule prohibiting members of the Executive Council from granting benefits to former members of the Executive Council during the first year after that former member leaves their position. This includes a prohibition against granting a benefit to a person or party on whose behalf the former member has made representations within that same year.\textsuperscript{138}

The opposition parties were not included in the drafting of the bill and it was subject to some derision in the legislature.\textsuperscript{139} The bill did not progress past first reading before Parliament was prorogued on February 12, 1987.\textsuperscript{140} The Standing Committee on the

\textsuperscript{138} \textit{Ibid.}

\textsuperscript{139} See Ontario, Legislative Assembly, \textit{Official Report of Debates (Hansard)}, 33rd Parl, 2nd Sess, No 78 (10 December 1986) at 4104 (Michael J Breaugh) [Breaugh]. See generally Buck-Passing, \textit{supra} note 73; Linda McQuaig, “Peterson bill weakens rules on conflict of interest, critics say Forced to resign under old rules, two have posts in new Cabinet”, \textit{The Globe and Mail (Canada)} (8 October 1987); Alan Christie, “Tories, NDP Unite to delay conflict-of-interest bill”, \textit{The Toronto Star} (30 June 1987) A8.

\textsuperscript{140} Madisso, \textit{supra} note 86 at 4.
Legislative Assembly had reviewed the Aird Report in the meantime and reported back to the House on December 10, 1986. The Committee was extremely supportive of the Report but also made a few additional recommendations such as “the inclusion of senior civil servants, reference to standing committee of unresolved allegations of conflict of interest, a provision for penalties, and the need to consider the regulation of lobbying.”

2.9 Bill 23

Peterson introduced new conflict of interest legislation as Bill 23 during the next session of parliament. The bill was substantially the same as Bill 160 and first reading took place on May 5, 1987. Bill 23 differed from Bill 160 only in a few respects:

1) a section was not included in Bill 23 that allowed for an individual to be disqualified from future membership in the Assembly under certain circumstances;
2) the definition of “spouse” was broadened;
3) there was an amendment to the section that prohibited granting benefits to former members of the Executive Council; and,
4) there was minor rewording of various other sections.

Premier David Peterson called an election in the summer of 1987 and Bill 23 did not make it to third reading. After his re-election and upon re-taking office as Premier on September 10, 1987, Peterson chose not to wait and push for a legislation-based conflict

141 Breaugh, supra note 139.
143 Bill 23, An Act to provide for Greater Certainty in the Reconciliation of the Personal Interests of Members of the Assembly and the Executive Council with their Duties of Office, 3rd Sess, 33rd Parl, Ontario, 1987 (as passed by Legislative Assembly of Ontario (referred for third reading 05 May 1987) [Bill 23]
144 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 33rd Parl, 3rd Sess, No 5 (5 May 1987) at 177 (Hon Ian G Scott) [Ian Scott].
of interest regime. Instead, Peterson introduced new guidelines that were modeled after Bill 23.\textsuperscript{146} Rather than limiting the guidelines’ application to ministers, he stipulated that they would apply to all members of the government caucus.\textsuperscript{147} John Black Aird was also then appointed\textsuperscript{148} in September 1987 to administer the guidelines as the Interim Commissioner of Compliance.\textsuperscript{149} This action was met with some criticism, as it seemed to other members of provincial parliament that the Premier had appointed an interim commissioner and implemented a bill before it had even been introduced in the legislature.\textsuperscript{150} A commissioner who was unilaterally appointed by one party to watch over its own compliance with its own conflict of interest rules could also not be seen to be independent.

2.10 Members’ Conflict of Interest Act, 1988

Able to learn from having its own commissioner of compliance already in place, the government continued to work on draft conflict of interest legislation. Bill 1 was only a very slightly modified version of Bill 23 and was tabled amid criticism\textsuperscript{151} when the legislature returned on November 3, 1987.\textsuperscript{152} This new bill received royal assent on February 11, 1988, and was proclaimed into force on September 1, 1988, with former Chief Justice Gregory Evans being appointed as Conflict of Interest Commissioner

\begin{footnotes}
\item[146] Denise Harrington “Liberal attitude makes opposition twitchy ‘Arrogance’ seen in way government acts as if conflict rules already law”, \textit{The Toronto Star} (7 November 1987) D5 [Harrington].
\item[147] Greene, \textit{supra} note 9 at 132.
\item[148] Madisso, \textit{supra} note 86 at 4-5. See also Harrington, \textit{supra} note 146.
\item[149] Greene, \textit{supra} note 9 at 133.
\item[151] See Denise Harrington “Peterson tells cabinet to comply or be fired as conflict law passes”, \textit{The Toronto Star} (10 February 1988) A11.
\item[152] Bill 1, \textit{An Act respecting Conflicts of Interest of Members of the Assembly and the Executive Council (Members’ Conflict of Interest Act)}, 1st Sess, 34th Parl, Ontario, 1987 (assented to 11 February 1988), SO 1988, c 17.
\end{footnotes}
on June 29, 1988.\textsuperscript{153} Despite the oppositions’ criticism of the legislation itself,\textsuperscript{154} all parties unanimously voted to appoint former Justice Evans as the conflict of interest commissioner for a five-year renewable term.\textsuperscript{155} The unanimous all-party agreement strengthened the perceived independence of the Commissioner’s role and was the first step towards an all-party discourse emerging with respect to government conflict of interest rules.

The \textit{Members’ Conflict of Interest Act, 1988}\textsuperscript{156} was the first government conflict of interest legislation in Canada to create an independent officer of the legislature who would be responsible for its administration.\textsuperscript{157} The new legislation continued to apply to all members of provincial parliament, including their spouses and minor children.\textsuperscript{158} The key components of this important legislation can be described as follows:

1) a definition of “conflict of interest”;
2) a rule against members using insider information in order to further their private interest(s);
3) a rule against members using their office in order to influence or seek to influence another person in a manner that could further the member’s private interest;
4) rules regarding the appropriateness of accepting of gifts and when the need to be reported and disclosed publicly;
5) rules detailing the procedure members must follow if they have reasonable grounds to believe that they may have a conflict of interest in the performance of an official duty;

\begin{footnotes}
\item[153] IC Annual Report 88/89, \textit{supra} note 100.
\item[154] Some criticism arose from the fact that the Liberal party won a majority of the seats in the 1987 general election and proceeded to pass Bill 1 without the support of the opposition parties.
\item[155] \textit{Supra}, note 12.
\item[156] MCIA, \textit{supra} note 10.
\item[157] Greene, \textit{supra} note 9 at 130.
\item[158] MCIA, \textit{supra} note 10 at 13 (This list is simply my summary of what I believe be the most significant components of the legislation and is not a comprehensive summary).
\end{footnotes}
6) rules outlining what private interests must be disclosed by members (and their spouses and children) to the Commissioner and when that disclosure must take place;
7) rules outlining what information disclosed by members and their families is to be made public by the commissioner;
8) a requirement that every member must meet with the commissioner after filing a disclosure statement;
9) rules allowing the Commissioner to provide an opinion to members about whether their conduct conforms with their obligations under the Act;
10) rules allowing a member to refer a question to the Commissioner with respect to another member’s compliance with the Act;
11) the right of the Commissioner to conduct a public inquiry under the Public Inquiries Act;
12) rules regarding the rights to Ministers to hold particular investments and to participate in particular business activities;
13) rules outlining what assets must be placed in trust by Ministers and when this must be done;
14) the requirement that an annual report be filed by the Commissioner with the Speaker of the Assembly and include an anonymous summary of advice given throughout the past year;
15) rules regarding how current members of the Executive Council can treat former members of the Executive Council with respect to the awarding or approval of contracts, benefits or grants; and,
16) the inclusion of a mechanism whereby the Commissioner can be removed from his or her office.

This legislation was responsive to the reports that had expressed a need for a truly independent arbiter of government conflicts of interest in Ontario. This was accomplished was by the inclusion of a provision requiring that the Commissioner of Compliance be appointed by the Lieutenant Governor in Council only “on the address of the
The appointment of a Commissioner could not simply be the result of a majority government’s will. This would in theory assist in ensuring that the legislation was administered in a non-partisan manner.

2.11 Premier Bob Rae’s 1990 Guidelines

The Members’ Conflict of Interest Act replaced Premier Peterson’s guidelines and remained the sole source of government conflict of interest rules in the province until Bob Rae became Premier on October 1, 1990. Rae supplemented the Act with his own guidelines in December of that year. Those supplementary guidelines included several new rules that would later be added to the legislation. As will be discussed below, a scandal in Rae’s cabinet served as the motivation for making changes to the legislation. Rae’s guidelines continue to play an important role in today’s Members’ Integrity Act.

Bob Rae had focused during his election campaign on convincing voters that Premier Peterson lacked the integrity to continue to be Premier of the province. He followed through with his campaign criticism by putting in place what journalist Thomas Walkom would later refer to as “the toughest conflict-of-interest guidelines in the province’s history”. These guidelines were tabled with the Legislature on December 12, 1990 and included the following additional standards:

159 MCIA, supra note 10 at 10(2).
160 Ibid.
161 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 1st Sess, No 69 (12 December 1990) at 2613 (Rt Hon Bob Rae) [Rae Guideline Introduction].
162 Thomas Walkom, Rae Days (Toronto: Key Porter Books Limited, 1994) at 233.
163 Ibid at 238.
164 Legislative Assembly of Ontario, Standing Committee on Administration of Justice, Report on Conflict of Interest Guidelines (September 1991) at i (Preface) [Report on Guidelines].
1) a list of 4 fundamental principles that would set the stage for the rules that followed in the guidelines;\footnote{These principles would later be included as the “Preamble” in the updated 1994 legislation. See MIA, supra note 13 at Preamble.}

2) very strict rules against contracting with the government;

3) rules requiring Ministers and Parliamentary Assistants to disclose any material changes in their assets, liabilities and financial interests to the Conflicts Commissioner and to make the fact of their material change public;

4) a rule requiring any declaration of conflict that arises during a cabinet meeting to be made public by the Secretary of Cabinet after the decision in question has been made and implemented;

5) strict and clear divestment rules regarding assets, liabilities, financial interests and/or business interests;

6) a lower threshold for gift disclosure;\footnote{See MCIA, supra note 10 at 6(3). Section 6(3) of the MCIA stated that “Where a gift or personal benefit referred to in subsection (2) exceeds $200 in value, or where the total value received directly or indirectly from one source in any twelve-month period exceeds $200, the member shall immediately file with the Commissioner a disclosure statement, in the form prescribed by the regulations, indicating the nature of the gift or benefit, its source and the circumstances under which it was given and accepted” and Rae’s guidelines simply lowered that number to $100.}

7) rules against communicating with the judiciary concerning matters pending before the court;

8) rules against ministers and/or parliamentary assistants communicating with on behalf of a private party in any adjudicative or investigative process before a provincially appointed body or ministry, if it could reasonably be perceived that the minister or parliamentary assistant was seeking to or was actually influencing a decision;

9) a rule requiring ministers and parliamentary assistants to advise the Premier of any advice they receive from the Conflicts Commissioner regarding a recommended course of action in relation to an actual or potential conflict of interest; and,

10) a stipulation that Parliamentary Assistants are also subject to the rules in the Members’ Conflict of Interest Act that were intended only for Ministers.\footnote{Report on Guidelines, supra note 164 at Appendix B.}
Premier Rae noted when introducing his guidelines in the Legislature that “[f]ew principles are more fundamental to our democratic system than the independence of our justice system. Accordingly, we set out in some detail guidelines regarding communication with judges, tribunals, prosecutors and the police, mindful that these guidelines are part of and subject to the fundamental duty to maintain public confidence and trust.”\footnote{Rae Guideline Introduction, \textit{supra} note 161.} This statement was likely made by Rae in order to address a controversy that took place in May 1989 when Solicitor General Joan Smith contacted the police regarding a possible prosecution that she had taken an interest in.\footnote{See e.g. Ontario, Legislative Assembly, \textit{Official Report of Debates (Hansard)}, 34th Parl, 2nd Sess, No 17 (24 May 1989) at 796 (debate in the Legislature on this topic took place over a number of days)} The Solicitor General resigned in the face of considerable legislative debate insisting that it was inappropriate for her to contact the Police about a case or potential case.\footnote{See Ontario, Office of the Integrity Commissioner, \textit{Report of the Honourable Gregory T. Evans, Commissioner Re: Ms Dianne Cunningham, MPP, London North} (Toronto: Office of the Integrity Commissioner, 1995) [Cunningham Report].} This statement by Premier Rae would set the stage for much of the debate that would follow concerning the application of his guidelines.

### 2.12 Standing Committee Report on Premier Rae’s Conflict of Interest Guidelines

The Premier’s guidelines were heavily criticized in the legislature on December 19, 1990 for being overly harsh.\footnote{Ontario, Legislative Assembly, \textit{Official Report of Debates (Hansard)}, 35th Parl, 1st Sess, No 73 (19 December 1990) at 2945 (Steven W Mahoney).} It was perhaps in response to this criticism that a member of Rae’s cabinet moved the next day to have the Standing Committee on Administration of Justice “review and make recommendations with respect to the guidelines governing
conflict of interest.” The standing committee’s hearings lasted until May 1991 and its report was tabled in the Legislature in September of 1991.

The Committee called thirteen witnesses throughout the course of its hearings. The Conflict of Interest Commissioner, Hon. Greg Evans, would even appear before the committee twice. Commissioner Evans also followed up his attendances by “submitting additional written comments and recommendations, including a summary of those Guidelines that, in his view, ought to be incorporated into the existing Act.”

The Committee’s eventual report recommended that the guidelines be adopted and added to the legislation in place. This recommendation was made despite some very clear objections from the opposition parties. The report also contained some supplementary recommendations, such as:

1) the divestment section remain an integral part of the Premier’s Guidelines and that divestment applies to Parliamentary Assistants as well as Ministers;  
2) the proposed guidelines be incorporated into the Members’ Conflict of Interest Act and that the administration be through investigation and report to the Legislature by the Conflict of Interest Commissioner;

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172 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 1st Sess, No 74 (20 December 1990) at 3010 (Hon Shelley Martel); See also Report on Guidelines, supra note 164 at i (Preface)

173 Report on Guidelines, supra note 164 at Letter to the Speaker.

174 Ibid at i (Preface).

175 Ibid at 3 (The two dates of his attendance were February 18 and April 30, 1991).


177 Ibid.

178 Report on Guidelines, supra note 164 at 21 (see dissenting opinions).

179 The following list is not comprehensive and for the sake of brevity consists simply of those items I have deemed to be of most significance. The listed items have been paraphrased from Report on Guidelines, supra note 164 at 21.
3) all members should be required to provide the Commissioner with detailed statements of their assets, liabilities and interests and information from those statements should be publicly disclosed;

4) spouses and minor children of all members should be required to file similar detailed statements with the Commissioner and information from those statements should also be publicly disclosed; and,

5) conflict of interest rules should be put in place for senior public servants and government appointees and those rules should be incorporated into the Public Service Act.\(^{180}\)

The Committee also considered the Conflict of Interest Commissioner’s paper entitled “Suggested Amendments to the Members’ Conflict of Interest Act” that was submitted to the Attorney General in 1988.\(^{181}\) This paper contained recommendations about what were then sections 12 and 13 of the Act, dealing with the filing of disclosure statements, meetings with the Commissioner and the rules about what information must be made public. The Committee recommended the adoption of Commissioner Evans’ suggestions and signaled that it was time to again consider how the overall legislation can be improved. The committee’s report noted that the legislation would have to be amended because it was not enough to simply ask the Commissioner to take on this added responsibility.\(^{182}\)

The Liberals and the Progressive Conservatives both submitted strong dissenting opinions with the report that was drafted by the Standing Committee on the Administration of Justice. The members from the Liberal party who were involved in the Committee filed a 12-page dissent in which they clearly stated their belief that the NDP members who formed the majority on the committee chose to “disregard any recommendations which did not coincide with the Premier’s previously stated policy position and issued a report which effectively rubber-stamps the Guidelines as currently

\(^{180}\) RSO 1990, c P.47.
\(^{181}\) Report on Guidelines, supra note 164 at 20.
\(^{182}\) Ibid at 8.
constituted.” The Liberals’ dissent also stated that they “cannot, in good conscience, endorse the report of the Committee.” The Progressive Conservative members of the Committee similarly noted in their dissent that they “repeatedly expressed concerns about the process by which the committee conducted its deliberations. The government majority on the committee ignored our concerns” and that in their opinion “the majority report and recommendations neither adequately address the problems surrounding the provincial conflict of interest guidelines, nor provide remedial measures sufficient to deal with the inadequacies of the guidelines.” It is with this clear divide amongst the parties that the debate in the legislature continued after the report was tabled.

The Premier’s guidelines were not added to the Members’ Conflict of Interest Act due to the highly divided report. The government also notably did not push to pass amendments without the support of the other two parties. The government’s reluctance to pass amendments opposed by the other parties was arguably reflective of the opposition parties’ poor opinion of the Peterson government’s earlier attempts to push through Bill 160 and Bill 23 without the consensus of all the parties. Rae’s patience also set the stage for a tradition that continues to exist in Ontario today whereby amendments have not been made to government conflict-of-interest legislation without the consensus of all parties. This new approach did lead to some apparent confusion among the members of the legislature about who was responsible for administering the Premier’s Guidelines. The Conflict of Interest Commissioner wrote in his 1992-1993 annual report that he received an inquiry about whether the Premier’s Guidelines had been violated. In

184 Ibid.
186 Ibid.
187 MCIA, supra note 10.
response to this inquiry, the Commissioner made it clear that the Premier’s Guidelines did not form part of the Act and that the Commissioner therefore had no authority to express an opinion with respect to the question referred to him.189 In the absence of any sort of amendments, the guidelines remained in force under the Premier’s control.

2.13 Minister Evelyn Gigantes’ Scandal

Premier Rae’s resolve to enforce his guidelines was subsequently tested when the Minister of Housing, Hon. Evelyn Gigantes, allegedly violated them in June of 1994. The Conflict of Interest Commissioner cited his lack of jurisdiction and declined to investigate.190 The matter was therefore referred to the Standing Committee on the Legislative Assembly.191 The Standing Committee held public hearings in August 1994192 and filed their report with the Speaker later that same month.193

Minister Gigantes had allegedly violated the Premier’s guidelines by attempting to mediate a dispute between board members at a non-profit housing centre in her riding. One of the board members had commenced proceedings against another under the Provincial Offences Act,194 and the allegation was that Minister Gigantes had encouraged the latter board member to urge the prosecutor to withdraw the charges.195 Minister Gigantes’ actions would potentially violate provisions 4 and 5 in the Premier’s Guidelines if proven. Provisions 4 and 5 stated that “[m]inisters shall at all times act in a manner that will bear the closest public scrutiny”196 and “[m]inisters shall perform the duties of office and arrange their affairs in such a manner as to maintain public

189 Ibid. See also Greene, supra note 9 at 140.
190 Greene, supra note 9 at 140.
191 Gigantes Report, supra note 25.
192 Ibid at 3.
193 Ibid at Letter to the Speaker.
194 RSO 1990, c P.33.
195 Gigantes Report, supra note 25 at 1.
196 Ibid at 109.
confidence and trust in the integrity of the government.” Further to the above, the Committee also considered two provisions that prohibited ministers from communicating with the judiciary and another provision that prohibited ministers from communicating with tribunals or other ministries concerning ongoing matters.

The Committee concluded that Minister Gigantes had not violated the Guidelines by attempting to interfere with the judicial process, but that she had violated sections 4 and 5. Sections 4 and 5 are very much flexible provisions that are open to interpretation. Minister Gigantes resigned her position, but she continued to assert that she had done nothing wrong. A general election was called soon thereafter.

The writs for the 1995 general election were dropped on April 28, 1995 and the election took place on June 8, 1995. The parties worked together before parliament was dissolved to achieve consensus on amendments to the Members’ Conflict of Interest Act, including changing its name to the Members’ Integrity Act, 1994. Bill 209 passed first, second, and third readings on December 8, 1994 and received royal assent the very next day. The quick passing of the bill meant that there was no public debate and no opportunity for non-members to read the proposed legislation in advance of its

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197 Ibid at 110 (See sections 19, 20 and 22).
198 Ibid at 110-111 (See sections 19, 20 and 22 of Premier Rae’s guidelines).
199 Ibid at 136-139.
200 Greene, supra note 9 at 140.
201 Elections Report 09/10, supra note 145.
202 MCIA, supra note 10.
203 Bill 209, An Act to revise the Members’ Conflict of Interest Act and to make related amendments to the Legislative Assembly Act, 3rd Sess, 35th Leg, 1994 (as passed by the Legislative Assembly of Ontario 8 December 1994) [Bill 209].
passing. This all gave rise to some fairly pointed criticism by the media.\(^{206}\) Liberal MPP Sean Conway was asked about this unorthodox approach to passing the bill and agreed that “the 11\(^{\text{th}}\)-hour handling of legislation is not particularly good procedure.”\(^{207}\) Conway also noted that passage of the bill was very important “because of the imminent election. It gives candidates now being recruited a clear idea of the rules under which they, if elected, will have to live. And it gives them time, if need be, to begin making appropriate arrangements.”\(^{208}\) A new government was subsequently elected on June 6, 1995 and it was not until October 6, 1995 that the new Act was proclaimed\(^{209}\) and the old legislation was replaced.

### 2.14 Members’ Integrity Act, 1994

The new Members’ Integrity Act\(^{210}\) differed in several ways from the old Members’ Conflict of Interest Act.\(^{211}\) One obvious difference was the change of name. As Commissioner Evans noted in his 1995-1996 annual report, the change of name “was motivated by a desire to accentuate the positive and replace “conflict of interest”, which had acquired a negative connotation.”\(^{212}\)

The new legislation adopted a few provisions from Premier Rae’s Guidelines and notably refused to adopt others. This was perhaps not surprising given that Commissioner Evans

\(^{206}\) Jim Coyle, “Members’ Integrity Act passed with usual lack of respect for the public”, *The Ottawa Citizen* (8 December 1994) A11 [Coyle].


\(^{208}\) Coyle, *supra* note 206.


\(^{210}\) MIA, *supra* note 13.

\(^{211}\) MCIA, *supra* note 10.

described Premier Rae’s Guidelines as being “pretty draconian.”213 In fact, former
Premier Rae has even noted that his own guidelines “established a standard that Mother
Teresa would have found difficulty living up to all the time.”214 Brian Charlton, the Chair
of Management Board and the Government House Leader, explained when introducing
the bill215 that it would replace the Premier’s guidelines and include several elements that
had been absent from the previous legislation, including “parliamentary tradition.”216

This bill includes ministerial conflict-of-interest obligations previously
contained in the Premier’s guidelines on conflict of interest. For this reason,
separate guidelines will no longer be required.

The highlights of the amendments include broadening the scope of the act to
deal with parliamentary tradition as well as issues of conflict on interest in
the economic sense; amendments to the Legislative Assembly Act
restricting contracts between members and the government; cabinet
members will not be allowed to acquire land; the scope of members’ private
disclosure statements will be expanded as will the scope of the
commissioner’s statements based on information provided by members.217

The new Act included a preamble that outlined the values upon which the legislation was
based218 and expanded the commissioner’s jurisdiction to include the undefined concept
of Ontario parliamentary convention.219 It did not extend the rules applicable to ministers
to parliamentary assistants.

213 Kenneth Kernaghan, “Rules are not enough: Ethics, politics, and public service in
178.
214 Bob Rae, From Protest to Power: Personal Reflections on a Life in Politics (Toronto:
Penguin Group, 1996) at 243-244.
215 Bill 209, supra note 203.
216 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 3rd
Sess, No 169B (8 December 1994) at 8453 (Hon Brian A Charlton).
217 Ibid.
218 This preamble was based on the 4 guiding principles set out by Premier Rae in his
guidelines. See Report on Guidelines, supra note 164 at Appendix B.
219 See MIA, supra note 13; See generally IC Annual Report 94-95, supra note 205 at 6;
Ian Urquhart, “Al Leach ran afoot of rules that just aren’t realistic”, The Toronto Star (26
June 1997) A27.; Daniel Girard, “Rules too strict, Leach says Ministers should be able to
The undefined concept of Ontario parliamentary convention has arguably been the most controversial component of the Members’ Integrity Act. With the quick passage of the Act through 1st, 2nd and 3rd readings in one day, there was no debate about why Ontario parliamentary convention was added to the bill or what types of situations this phrase was intended to address. There has also continued to be relatively little analysis of this concept in the legislature since the legislation’s passing.

This chapter has provided a detailed historical background of government conflict of interest policies and legislation in Ontario. The Members’ Integrity Act and its predecessor legislation and guidelines emerged in response to a very specific series of controversies. Ontario parliamentary convention, for example, was clearly added to the Act in response to the Evelyn Gigantes scandal and to the Standing Committee on Administration of Justice’s report on Premier Rae’s conflict of interest guidelines.

Ontario’s history also demonstrates the relative infancy of this model of parliamentary ethics. The Members’ Conflict of Interest Act brought the promise of clarity and continuity of administration with it. The passing of the Members’ Integrity Act was then a significant moment in Canada’s parliamentary ethics history because Ontario took a turn away from merely regulating conflicts of interest and focused more broadly on ethics and parliamentary tradition. Most other jurisdictions in Canada did not follow Ontario’s lead by broadening their Commissioners’ mandates to include parliamentary convention. As will be discussed below, Commissioners and members from other Canadian jurisdiction have even expressed concern about Ontario’s inclusion of parliamentary convention in its legislation. Ontario parliamentary convention remains a very poorly understood concept despite the fact that every integrity commissioner in Ontario’s history has written about it. It is with this lack of clarity in mind that I will now turn to understanding how “parliamentary convention” was used prior to its inclusion in the Members’ Integrity Act.

3 Parliamentary Convention

Ontario parliamentary convention was not a new concept, despite having been included without a definition in the *Members’ Integrity Act*. Conventions of parliament had been discussed at great length in Andrew Heard’s 1991 book that Lorne Sossin and Adam Dodek described as the “landmark book on Canadian constitutional conventions.”\(^{220}\) Heard adopts a definition of conventions as being “rules of constitutional behavior which are considered to be binding by and upon those who operate the Constitution, but which are not enforced by the law courts (although courts may recognize their existence), nor by the presiding officers of the Houses of Parliament.”\(^{221}\) If they are not binding in the traditional legal sense, they must be considered to be binding in a political sense. As A.V. Dicey noted, the subject of conventions “is not one of law, but of politics.”\(^{222}\) Heard’s book explores the unwritten conventions that impact the organization and operation of the federal and provincial legislatures. As Heard explains, “[t]he actual operation of the legislative branch of government is determined by an amalgam of a few provisions of positive law fleshed out by usage, binding convention, and what has come to be called ‘law and custom of Parliament’.”\(^{223}\) The Honourable Greg Evans was Ontario’s Conflict of Interest Commissioner at the time Heard’s book was released, and he referenced the book in his 1992-1993 annual report. He noted in his report that there are unwritten


\(^{223}\) Heard, *supra* note 221 at 76.
conventions or rules of conduct that bind parliamentarians\textsuperscript{224} and that they must be supported by some constitutional reason. Specifically, he wrote that:

Laws which govern the conduct of a legislature or parliament have had grafted on them over the years informal rules arising out of tradition and political practice. These rules are frequently referred to as “conventions”. Conventions which are binding are supported by some constitutional reason or principle and differ from non-obligatory practices or procedures which are not based on reason or principle, but rather on habit or convenience.\textsuperscript{225}

Following the conflict of interest commissioner’s\textsuperscript{226} comments in his annual report, the stage was set for the formal recognition of parliamentary convention in Ontario’s government ethics regime well in advance of the passing of the \textit{Members’ Integrity Act} in 1994. The idea of Ontario parliamentary convention appeared to have been informed by the concept of a constitutional convention, as was explored in Heard’s book. This chapter will demonstrate that meaning had already been ascribed to the expression “Ontario parliamentary convention” well in advance of the \textit{Members’ Integrity Act} being passed. I will begin by providing a detailed overview of the concept of a constitutional convention in order to better analyze the Commissioner’s remarks in his 1992-1993 annual report. I will then list references to “parliamentary convention” that had been made in legislative debates prior to 1994 in order to demonstrate that the concept had been the subject of debate in the past. The use of the concept in those past debates was remarkably consistent with the Conflict of Interest Commissioner’s use in his annual reports that pre-dated the 1994 legislation. The Conflict of Interest Commissioner also appeared before a legislative committee considering conflict of interest allegations against a member and I will draw attention to some remarks that the Commissioner made to that committee. This chapter will provide a complete picture of the use of the expression “parliamentary convention” in Ontario’s legislature in order to argue that these words had clear meaning to Ontario parliamentarians prior to their inclusion in the \textit{Members’ Integrity Act}.

\textsuperscript{224} 1992-1993 Annual Report, \textit{supra} note 188 at 3.

\textsuperscript{225} \textit{Ibid}.

\textsuperscript{226} The Commissioner would not be renamed the “Integrity Commissioner” until after the passing of the \textit{Members’ Integrity Act}, 1994, S.O. 1994, c. 38.
3.1 Constitutional Conventions

Constitutional conventions have long been the subject of academic literature\textsuperscript{227} and have also been addressed by the Canadian courts. Peter Hogg explains that conventions are born out of the preamble to the \textit{British North America Act}:\textsuperscript{228}

In Canada (as in the United Kingdom), there is no single document comparable to the Constitution of the United States, and the word “Constitution” accordingly lacks a definite meaning. The closest approximation to such a document is the British North American Act, 1867…

The B.N.A. Act did not follow the model of the Constitution of the United States in codifying all of the new nation’s constitutional rules. On the contrary, the B.N.A. Act did no more that was necessary to accomplish confederation. The reason was stated in the Preamble to the Act: the new nation was to have “a Constitution similar in principle to that of the United Kingdom.” Apart from the changes needed to establish the new federation, the British North Americans wanted the old rules to continue in both form and substance exactly as before. After 1867, therefore, much of Canada’s constitutional law continued to be found in a variety of sources outside the B.N.A. Act. Indeed, some of the most important rules were not matters of law at all, but were simply “conventions” which were unenforceable in the courts.\textsuperscript{229}

The courts have determined that they are unable to enforce constitutional conventions, but have on many occasions recognized that these conventions do exist. Hogg noted that


\textsuperscript{228} \textit{Constitution Act}, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

\textsuperscript{229} Peter W, \textit{Constitutional Law of Canada}, 5th ed (Toronto: Carswell, 1997) (looseleaf 2013 supplemented 5:1) at 1-3 -1-4 [Hogg].
as early as 1942 the House of Lords\textsuperscript{230} took “notice of the conventions of responsible government, which make a Minister accountable to Parliament, as a consideration in deciding to give a broad rather than a narrow interpretation to a statute conferring power on a Minister.”\textsuperscript{231}

The major recognition of constitutional conventions in Canada came in 1981 when the Supreme Court was asked to consider whether a convention existed that would require the federal government to obtain the consent of the provinces before it could request the United Kingdom Parliament to enact an amendment to the Constitution of Canada that would have an effect on provincial powers.\textsuperscript{232} Prime Minister Trudeau had announced his intention to request that the United Kingdom Parliament amend the Constitution of Canada by adding a mechanism to Canada to make amendments to its own Constitution going forward. Prime Minister Trudeau also intended to ask the United Kingdom Parliament for the entrenchment of the \textit{Canadian Charter of Rights and Freedoms} at the same time.\textsuperscript{233} The governments of three Canadian provinces took interest in Trudeau’s request and chose to refer the issue to their individual courts of appeal.\textsuperscript{234} The \textit{Patriation Reference (1981)}\textsuperscript{235} was heard by the Supreme Court of Canada and was an appeal of the rulings of all three of those provincial courts of appeal.

\section*{3.2 The Patriation Reference (1981)}


\textsuperscript{231} Hogg, \textit{supra} note 229 at 1-22.2 – I-23.


\textsuperscript{234} See \textit{Reference Re Amendment of the Constitution of Canada} (1981), 117 DLR (3d) 1 (Man CA); \textit{Reference Re Amendment of the Constitution of Canada} (1981), 118 DLR (3d) 1 (Nfld CA); \textit{Reference Re Amendment of the Constitution of Canada} (1981), 120 DLR (3d) 385 (Qué CA).

\textsuperscript{235} Patriation Reference 1981, \textit{supra} note 232.
One of the reference questions that was considered by the Supreme Court of Canada was whether a constitutional convention existed that would prohibit the Federal government from requesting that the United Kingdom Parliament make amendments to the Constitution of Canada that would affect provincial power without first obtaining the consent of the Canadian provinces to make such a request. The Supreme Court concluded that a convention existed that required the Federal government to obtain “a substantial degree” or “substantial measure” of provincial consent on any such proposed amendments to the Constitution of Canada before seeking action from the United Kingdom Parliament. The Supreme Court also determined that constitutional conventions were not matters of law that could be enforced by the court. As such, the Court could neither enforce this convention nor remedy its violation. Practically speaking, this meant that the Court could not restrict the Federal government from making its proposed request for amendments if it decided to proceed.

The Supreme Court of Canada recognized the limitations of its own jurisdiction over conventions and then set out a test that could be used to determine whether and when a constitutional convention existed. This test was important because the Federal government had previously established a practice of obtaining provincial consent before seeking amendments to the Constitution and was now arguing that their established practice was a mere usage and did not amount to a convention. Hogg explains the significance of this distinction being that “a convention is a rule which is regarded as obligatory by the officials to whom it applies; a usage is not a rule, but merely a governmental practice which is ordinarily followed, although is not regarded as obligatory.” If the Court had agreed that the practice was a usage, then it could not hold that the Federal government’s proposed actions violated any obligatory rule. Even

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236 *Ibid* at 756 (for brevity, I am paraphrasing the question that was asked).


239 *Ibid* at 898

240 Hogg, *supra* note 229 at 1-25.
though the court cannot enforce constitutional conventions, giving an opinion that one exists is significant because it places tremendous pressure on the government to treat the court’s opinion as if it were in fact binding. Furthermore, the Court was certainly aware that its opinion would be considered by the United Kingdom Parliament and taken into account when considering the Canadian government’s request.

To determine whether a practice qualified as a convention, the Supreme Court of Canada adopted the following test from Sir W. Ivor Jennings’ 1959 text, *The Law and the Constitution*:

> We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.

The adoption of this test is extremely important because, as Hogg noted, “[b]efore the Patriation Reference (1981), it was generally assumed that there was no judicial procedure for adjudicating a dispute about whether a particular practice was a convention or a usage. Since no legal consequence could flow from questions that the court could not answer, the issue appeared to be non-justiciable.” After the Patriation Reference, the Supreme Court of Canada had confirmed that courts ought not to shy away from recognizing constitutional conventions and it adopted a test that could be used to determine whether a convention existed. In fact, since the Patriation Reference, the Supreme Court has continued to emphasize that Canada’s Constitution is not a single

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243 Hogg, *supra* note 229 at 1-26.leva

document and that it consists of a number of written texts and unwritten principles that assist with explaining and filling out those texts.\footnote{245}{See especially: \textit{Ontario (Attorney General) v OPSEU}, [1987] 2 SCR 1; Osborne v Canada (Treasury Board), [1991] 2 SCR 69; New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly), [1993] 1 SCR 854.}

### 3.3 Canadian Constitutional Conventions

Many of the conventions that have been recognized by the courts are so fundamental to the operation of Canada’s democratic institutions that it can be difficult to believe that the courts have no related enforcement powers. Hogg has explained that “[i]f a convention is disobeyed by an official, then it is common, especially in the United Kingdom, to describe the official’s act or omission as “unconstitutional” …[b]ut where ‘unconstitutionality’ springs merely from a breach of convention, no breach of the law has occurred and no legal remedy will be available.”\footnote{246}{Hogg, supra note 229 at 1-22.1 - 1-22.2.} In his 1991 book on Canadian constitutional conventions,\footnote{247}{Heard, supra note 221.} Heard explored a long list of well-known practices that have been recognized as constitutional conventions in Canada. The list of conventions was divided into five categories representing “each of the major areas of the constitution: the prerogative powers of the Governor general and Lieutenant-Governors; the operation of responsible cabinet government; the workings of the legislature; federalism; and judicial independence.”\footnote{248}{\textit{Ibid} at 15.} It is important to have a good sense of the types of rules and practices that are considered to be conventions in Canada and I will now explore Heard’s book in greater detail to provide a few examples of recognized constitutional conventions.\footnote{249}{This list is not a comprehensive list of all conventions covered in Heard’s book, but is simply a representative list of the conventions that I have chosen to include in this paper in order to provide a brief overview of the types of conventions covered by Heard.}
3.3.1 Powers of the Governor General and Lieutenant Governor

The Governor General is mentioned many times in the Constitution Act, 1867, yet there is no provision for his or her appointment. Heard notes that, “[a]s the appointment of a Governor General is made through a commission granted under the Great Seal of Canada, it must involve the federal Cabinet. A firmly established convention dictates that the initiative for selecting a new Governor General lies with the Canadian Prime Minister personally.”

Once the Prime Minister has selected a Governor General, that Governor-General is then charged with the task of appointing subsequent Prime Ministers.

Although the Governor General has complete freedom at law to make such appointments, he or she is “bound by convention to appoint as first minister a person who is likely to command a majority in the legislature.” Similarly, the Governor General has the express power to refuse to give royal assent to any bill passed by Parliament, but convention binds the Governor General to “abide by all advice that is constitutionally correct, regardless of their personal view of the wisdom or merits of the advice. Indeed, most observers would also add that governors should give their assent even to advice that is unconstitutional, provided there is some effective remedy for the consequences of that advice.”

3.3.2 Responsible Cabinet Government

A Cabinet government is a creature of convention, appointed by the Governor General at the direction of the prime minister. Once a Cabinet government is in place, each

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250 See e.g. Supra, note 228 at 10-14.
251 Heard, supra note 221 at 16.
252 Ibid at 20.
253 Ibid at 18.
254 Ibid at 34.
255 Ibid at 48.
minister is guided by the conventional principles of individual responsibility. This
convention holds that a minister is responsible for answering questions in the legislature
regarding his or her portfolio and must also hold him or herself politically culpable and
legally liable for actions taken within that portfolio.\textsuperscript{256}

A further convention known as cabinet solidarity dictates that cabinet ministers have a
two-pronged responsibility to one another. These responsibilities are that “they must
maintain a public posture of unanimity in support of the policies decided upon by cabinet,
and they must respect the confidentiality of the materials reviewed and of discussions
held in reaching those decisions.”\textsuperscript{257}

Another facet of responsible government is that it is important to ensure that civil
servants can remain anonymous and that the civil service on the whole is politically
neutral or non-partisan.\textsuperscript{258} The conventional doctrine of individual ministerial
responsibility, as was briefly discussed above, ensures that “a government department is
accountable to the legislature only through its minister”\textsuperscript{259} because it is important that
civil servants be permitted to freely offer their advice to ministers without the risk of
having to account in the legislature for the advice that they have given.\textsuperscript{260} The convention
that public servants when working within the public service must remaining politically
neutral or non-partisan is to ensure that they are loyal to their employer, the government
of Canada and not to the political party that governs them.\textsuperscript{261}

3.3.3 Workings of the Legislature

\textsuperscript{256} Ibid at 52-54.
\textsuperscript{257} Ibid at 62.
\textsuperscript{258} Ibid at 59.
\textsuperscript{259} Heard, \textit{supra} note 221.
\textsuperscript{260} Ibid.
\textsuperscript{261} Ibid.
The majority of the rules that govern the operation of the provincial and federal legislatures cannot be found in legislation or in common law. The operation of the legislatures is derived mostly from “a few provisions of the positive law fleshed out by usage, binding convention, and what has come to be called the ‘law and custom of Parliament’.”\textsuperscript{262} A fundamental principle that underlies how legislatures function is that parliamentary democracy operates through a party system and an important convention that has developed out of the party system is that of party discipline. Party discipline is the “general requirement for elected members to vote according to the policies of their parties.”\textsuperscript{263} Exceptions to party discipline may exist when there is an extremely compelling reason to vote against the party; for example, “if the decision of the caucus conflicts with a members’ moral or religious beliefs or if the party position places a member in direct conflict with the interest of his constituents.”\textsuperscript{264} This convention is important because without it “the government of the day would be left bargaining with free-forming coalitions of MPs for each bill is wished to enact.”\textsuperscript{265}

The first minister will generally appoint a party whip and/or house leader whose job is to enforce the convention of party discipline. The functions and powers of these individuals come entirely from unwritten rules. The house leader “is responsible for organizing the strategy of a party’s participation in the daily work of the legislature, and along with the whip can schedule which members will appear on the party’s list of speakers.”\textsuperscript{266} Party discipline is a well-recognized convention that forms an integral part of the operation of the legislature. The specific rules respecting how the individual parties carry out party discipline are simply rules that inform that convention.

### 3.3.4 Federalism

\textsuperscript{262} Ibid at 76.
\textsuperscript{263} Ibid at 79.
\textsuperscript{264} Ibid at 80.
\textsuperscript{265} Ibid at 79.
\textsuperscript{266} Ibid at 81.
While the division of powers is clearly a fundamental principle of the Canadian Constitution, the provinces’ jurisdiction to create their own laws on certain subjects is restrained by a control over the provincial legislative process that was given to the Governor General.267 Specifically, the Governor General can choose to provide royal assent to a provincial bill or he or she can withhold consent or even “reserve the bill ‘for the signification of the Governor General’s Pleasure’ – in which case the federal Cabinet then decides whether or not to grant assent to the reserved bill.”268 In actual fact, 182 provincial bills have been reserved or have had assent withheld since 1867.269 A convention has emerged since the last world war however, that Heard reasons has “fully nullified both of these powers, and one can conclude that the provinces are protected from any further interference in their jurisdictions.”270

### 3.3.5 Judicial Independence

The independence of the judiciary is fundamental to a healthy liberal democracy. Judicial independence is achieved in Canada through a combination of positive law271 and

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267 See Supra, note 228 at 90 (which reads: “The following Provisions of this Act respecting the Parliament of Canada, namely, — the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, — shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada). See also Heard, supra note 221 at 102.

268 Heard, supra note 221 at 102-103.

269 Ibid at 103.

270 Heard, supra note 221.

271 See e.g. Supra note 228 at 99 (section 99 states that “the judges of the superior courts shall hold office during good behavior…” )
constitutional conventions. The convention restricting third-party interference in adjudication is worth explaining for the purposes of this paper. This convention is in place to ensure that judges are protected from outside pressures “to resolve a particular case in a certain way.” This convention is upheld partially through criminal laws prohibiting bribery of judges and other dishonest attempts to obstruct justice, but is also upheld by purely conventional rules. For example, there is a convention that “prohibits cabinet ministers from trying to interfere in a dispute and cajoling a judge to decide in the interest of the government or its supporters.” Likewise, “[m]inisters should neither criticize a judge publicly nor make private representations to judges.” Heard also drew attention to the sub judice convention that supports judicial independence. He explains the sub judice convention as follows:

Members are expected to refrain from discussing matters that are before the courts or tribunals which are courts of records. The purpose of this sub-judice convention is to protect the parties in a case awaiting or undergoing trial and persons who stand to be affected by the outcome of a judicial inquiry. It is a voluntary restraint imposed by the House upon itself in the interest of justice and fair play.

The above conventions are extremely important because they allow aspects of the Canadian constitution to come to life without the need for positive laws. Many constitutional conventions will effectively take on the force of law due to their persuasiveness, however they will never be enforceable through the courts as laws are. In spite of the court’s lack of enforcement jurisdiction, the belief that conventional rules can bind parliamentarians seems to have worked its way into Ontario’s political discourse.

3.4 Conflict of Interest Commissioner

272 Heard, supra note 221 at 127.
273 Ibid.
274 Ibid.
275 Ibid.
Ontario’s conflict of interest commissioner, Hon. Greg Evans, appeared before the Standing Committee on Administration of Justice on February 18, 1991, as it reviewed and made recommendations with respect to Premier Bob Rae’s conflict of interest guidelines. Rae’s guidelines included several provisions that echoed the constitutional convention of judicial independence and restricted a minister’s ability to advocate on behalf of his or her constituents in certain circumstances. These restrictive provisions were not included in the Members’ Conflict of Interest Act that was in place at the time and the committee was tasked with considering whether they ought to be added thereto. Commissioner Evans was asked by committee members for his thoughts on some scenarios that could give rise to situations that would trigger the application of those restrictive provisions in Premier Rae’s guidelines. For example, Gary Carr, the member for Oakville South, asked:

…section 24 deals with another cabinet minister in a constituency office. I was wondering how you would handle a problem like this: If I am the Solicitor General and I have written the Minister of Community and Social Services about a particular problem on behalf of my constituent, as we all do, it would be inappropriate for me at the next cabinet meeting to say: "Charles" -- when he is Minister of Community and Social Services -- "what about that? What is your answer on that?"

In response, Commissioner Evans stated:

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277 See Chapter 2, above, for a discussion of the Standing Committee on Administration of Justice’s review of Premier Rae’s Guidelines.

278 See Chapter 2, above, for a discussion of the Evelyn Gigantes Scandal that includes a description of some of the restrictions placed on ministers under Premier Rae’s Guidelines. Other restrictions can be found under sections 19, 20, 21, 22, 23 and 24 of the Members’ Integrity Act (see MIA, supra note 13).

279 MCIA, supra note 10.

280 Report on Guidelines, supra note 164 at 1.

I think ministers should not be interfering with any agency of the government, and I think now that parliamentary assistants might well be in that same category. But that does not stop your constituency office from representing the constituents, and I think once you become a minister you have to have a level in there of non-intervention.

... I do not think it is right for a parliamentary assistant to come before the Liquor Control Board of Ontario because invariably he is going to say, "I am the parliamentary assistant to the minister." To say that the minister has a right to appear, I think he is restricted and, I think, properly. I do not think that if his constituency office goes in there they should start waving a flag that they are from the ministry of certain health and welfare. 282

The Commissioner appeared before the committee again on April 30, 1991. The province’s Solicitor General, Mike Farnan, had stood before the legislature one week earlier and admitted he had learned that two of his constituency assistants sent letters to separate justices of the peace on behalf of constituents. The Solicitor General’s name appeared on both letters, but the constituency assistants signed them. The Solicitor General recognized the “serious inappropriateness of the actions taken” 283 and admitted that “the Solicitor General must be at arm’s length from the judiciary.” 284 The opposition immediately called for the Solicitor General’s resignation due to his violation of the fundamental constitutional convention of judicial independence. The Mike Farnan controversy took place in the wake of Solicitor General Joan Smith’s earlier resignation in 1989 after she admitted to having contacted the Police about a potential case that she was interested in. 285

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285 See Chapter 2, above, for a discussion of Solicitor General Joan Smith’s ethical transgression. See also Cunningham Report, *supra* note 170.
Commissioner Evans spent his second appearance before the committee answering questions that were very similar to the ones he had answered in his first appearance.\textsuperscript{286} The Commissioner’s comments about the inappropriateness of ministers interfering in government agencies seemed to clearly align with the committee’s own analysis of the Solicitor-General’s transgressions.

The RCMP investigated Solicitor-General Mike Farnan’s two staffers and cleared them of any wrongdoing.\textsuperscript{287} This led to Premier Rae categorically rejecting the idea that the Solicitor General ought to resign or be removed from his position.\textsuperscript{288} The Standing Committee on Administration of Justice then filed its Report on Conflict of Interest Guidelines\textsuperscript{289} with the Speaker in September 1991. The committee had clearly not been satisfied that the Premier’s guidelines were being properly enforced by him, and it recommended the incorporation of those guidelines into the Members’ Conflict of Interest Act.\textsuperscript{290} This recommendation, if instituted, would mean that the Conflict of Interest Commissioner, whose views expressed in committee seemed to align with the opposition’s views, would be responsible for administering the rules contained in the Premier’s Guidelines - guidelines that, it was believed, the Premier himself had recently failed to enforce on his own. Commissioner Evans prepared and released his annual report that year with the committee hearings and the Solicitor General’s ethical transgression in the background.

3.5 1991-1992 Annual Report

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\textsuperscript{287} See e.g. Gene Allen, “Farnan, workers cleared by police. Cover-up alleged on letters to JPs”, The Globe and Mail (Canada) (29 May 1991) GAM.

\textsuperscript{288} Ontario, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 1st Sess, No 21 (23 April 1991) at 899 (Rt Hon Bob Rae).

\textsuperscript{289} Report on Guidelines, supra note 164.

\textsuperscript{290} Ibid at 21.
Commissioner Evans first used the expression “parliamentary convention” in his 1991-1992 annual report. This was only the second annual report filed by the Commissioner that included a summary of selected inquiries and referred questions in order to assist members with understanding their obligations under the Act. Commissioner Evans would later explain that his discussion of parliamentary convention in the 1991-1992 report was inspired by the legislative debate in May of 1989 with respect to former Solicitor General Joan Smith’s contact with police that led to her resignation. Inquiry number 6 in the annual report read as follows:

Inquiry #6:
A constituent was seeking the assistance of her member with an agency which fell under the Ministry of which the member was the Parliamentary Assistant.

Decision:
Constituency Assistants to Ministers and Parliamentary Assistants should not appear or have communication with any agency, board or commission which falls under the jurisdiction of the Minister or Parliamentary Assistant.

Parliamentary convention prohibits Ministers from appearing on behalf of a private party, or having communication with any agency, board or commission which falls under the jurisdiction of the Ministers’ particular portfolio. Ministers always wear the cloak of ministerial responsibility. There is no way that their actions, whether verbal or written, and whether in the member’s position as an elected member of the Legislature or as a Minister, can be considered by the recipient as other than actions by a Minister, and thus could reasonably be considered as attempting to influence a decision.

It is likely not coincidental that section 22 of Premier Rae’s guidelines, about which the Commissioner had very recently testified before the Standing Committee on Administration of Justice, read as follows:

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291 The report was filed with the Speaker on June 23, 1992.
292 MCIA, supra note 10.
294 See Cunningham Report, supra note 170.
22. In any adjudicative or investigative process by, or application for a benefit from, a provincially appointed tribunal or ministry, ministers shall not communicate on behalf of a private party in any manner in which his or her position as minister could reasonably be perceived as influencing a decision.  

Commissioner Evans’ response to Inquiry #6 in his annual report can reasonably be seen to be a restatement of section 22 of Premier Rae’s guidelines, coupled with language about the “parliamentary convention” of ministerial responsibility. It is also notable, and perhaps not coincidental, that the language of ministerial responsibility was used in the legislature during Solicitor General Mike Farnan’s admission of his assistants’ mistakes. The debate on this topic also appeared in Hansard under the heading “Ministerial Responsibility.” Furthermore, while there is no suggestion in the 1991-1992 annual report that Heard’s book played a role in the Commissioner’s use of this language in his work, Heard does explain in his book that the principle of responsible government “has taken shape through conventions” and “involves two general aspects: the responsibility of individual ministers for their departments and their own personal activities, and the collective responsibility of Cabinet as a whole.”

The Commissioner made it clear that he drew inspiration from Solicitor General Joan Smith’s 1989 troubles, but he never discussed whether that was his only inspiration for including parliamentary convention in his 1991-1992 annual report. Searching Ontario’s Hansard sheds light on whether the language of parliamentary convention had a well-cultivated history in Ontario prior to 1989. If so, then it is important to ask whether that history might reasonably have informed the Commissioner’s use of the expression in a meaningful way.

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296 Report on Guidelines, supra note 164 at Appendix B.
298 Heard, supra note 221 at 51.
299 Ibid at 50-51.
3.6 References to Parliamentary Convention in Legislative Debates prior to 1991-1992

Ontario’s Hansard included only four prior references in legislative debates to parliamentary convention. Looking at these four prior references may assist in uncovering whether the expression “parliamentary convention” was known or knowable to Commissioner Evans prior to his use of the expression in his 1991-1992 annual report:

1. On December 2, 1985: Elinor Caplan, then Chair of Management Board of Cabinet, referred to parliamentary convention when answering a question in the Legislature about a decision made by the Minister of Government Services who had served in the previous government. Minister Caplan quoted an unidentified paper that she had before her in the Legislature, which referenced the convention of cabinet confidentiality\(^{300}\) and stated that:

   “It is a convention followed both in Canada and the United Kingdom that a new minister may not have access to cabinet papers of the preceding government where there has been a change in government party. These records are usually left in the custody of the secretary of the cabinet and clerk of the executive council on the condition that they are to be seen only by persons who were ministers at the time to which the records relate, and in fact, when the decisions were made. As well, the secretary of cabinet or his designate may refer to these documents only to ensure continuity.”\(^{301}\)

Minister Caplan then noted that she did “not think it would be productive for us to spend the next hour discussing something about which I cannot give him the answers because of parliamentary convention.”\(^{302}\)

2. Monte Kwinter, Minister of Consumer and Commercial Relations, alluded to the convention of cabinet confidentiality as it applied to transition between governments. In

\(^{300}\) See *Ibid* at 65 (for a discussion of this convention)


\(^{302}\) *Ibid*. 
his response to a question asked of him in the legislature on January 10, 1986, Minister Kwinter explained the issue and answered the question as follows:

Yesterday the Leader of the Opposition (Mr. Grossman) and the member for Leeds (Mr. Runciman) both alluded to a commission set up by the previous government to look into various problems in the insurance industry. I replied that I had no knowledge of it, and the member for Leeds issued a press release which stated this was "inexcusable, claiming that Kwinter's ignorance of the insurance area of his ministry has contributed to the present crisis."

I now find, after investigation, that a commission was never established by the previous government. A previous minister did establish a committee to pursue that minister's policy initiative. The matter was not brought forward to me because of the parliamentary convention governing the change of government. For that reason, this matter was never brought forward to me by my officials.303

3. Opposition MPP John Gillies, a member of the Liberal party, cited parliamentary convention on June 16, 1986, as a reason for Minister Elinor Caplan to resign her post in the midst of allegations of conflict of interest.304 Mr. Gillies referenced the convention of individual ministerial responsibility305 when stating that:

The parliamentary convention, of which I have 30 precedents here from across Canada, is that when there is a serious appearance of conflict of this nature, the minister must resign. This is not to say that if the matter is cleared up before the public accounts committee, a judicial inquiry or any other body, the Premier could not retain, as his option, the right to reinstate her as a minister. However, I say again, the honourable course of action is that the minister must resign; she must resign today.306

304 See Chapter 2, above, for a discussion of the allegations.
305 See Heard, *supra* note 221 at 52 (for a discussion of the Individual Responsibility of Ministers and their obligation to resign their ministerial position in the face of allegations of personal impropriety).
4. On June 1, 1987, MPP John Gillies again cited parliamentary convention while debating the second reading of Bill 23. Mr. Gillies commented that he was concerned the bill, if passed, might give rise to a situation where the presence of a new conflict of interest commissioner might minimize the convention of ministerial responsibility:

My concern with regard to this legislation is simply this: I would hope it would not be the interpretation of any of us that the commissioner takes full responsibility for members of cabinet and the House with regard to conflict of interest and that this in fact then removes the ministerial responsibility of the chief minister, the Premier, for the conduct of his ministers…[T]he parliamentary convention is that we question ministers about their ministerial administrative responsibilities, and that is a clearly established principle.

Each of the above prior uses of parliamentary convention referred to very specific conventions that have been recognized in the academic literature on constitutional conventions. The use of the expression in prior debates is certainly not definitive, but it suggests that the language of parliamentary convention had some prior context that parliamentarians might have been aware of. The above four passages, coupled with the debate about the allegations of impropriety faced by Solicitor General Mike Farnan, comprise the totality of uses of the expression “parliamentary convention” in Ontario legislative debates from 1978 until the expression was used by Commissioner Evans in his 1991-1992 annual report. As the above demonstrates, the expression had only been used to describe the two widely accepted conventions of cabinet confidentiality and ministerial responsibility.


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307 Bill 23, supra note 143.
308 See Heard, supra note 221 at ch 3 (for a discussion of the constitutional convention of Ministerial Responsibility)
310 Heard, supra note 221 at 48.
311 Ontario’s online Hansard in Ontario was only searched to February 21, 1978. I believe that this is back far enough to be able to demonstrate the recent use of the expression.
It was not until his next annual report that Commissioner Evans would attempt to clarify the concept of a parliamentary convention. On page 3 of his introductory remarks to his 1992-1993 report, Commissioner Evans explained conventions as follows:

Laws which govern the conduct of a legislature or parliament have had grafted on them over the years informal rules arising out of tradition and political practice. These rules are frequently referred to as “conventions”. Conventions which are binding are supported by some constitutional reason or principle and differ from non-obligatory practices or procedures which are not based on reason or principle, but rather on habit or convenience. Professor Andrew Heard, in his recent book “Canadian Constitutional Conventions” states at page 144:

“One should bear in mind that a convention does not have to be supported unanimously in order to be binding. A strong consensus, where the preponderance of opinion would favour the rule or principle, is sufficient for political actors to face an obligation to observe the convention” 312

The appeal to Heard’s book provided context for the Commissioner’s inclusion of parliamentary convention in his previous annual report. This passage in the Commissioner’s report made it clear that the Commissioner believed that the parliamentary convention he had previously written about prohibiting “ministers from appearing on behalf of a private party, or having communication with any agency, board or commission which falls under the jurisdiction of the Ministers’ particular portfolio,” 313 was “supported by some constitutional reason or principle.” 314 Commissioner Evans did not go on to explain which constitutional reasons or principles gave rise to the parliamentary convention, but with a close reading of Heard’s book and of the Commissioner’s 1991-1992 annual report, it is clear that he was relying upon the principle of “ministerial responsibility.” 315 As we have seen in the legislative debates that took place prior to 1991, the convention of ministerial responsibility had previously

313 Ibid at 3.
314 Ibid.
been appealed to on three occasions: twice in the context of matters relating to alleged conflicts of interest and the other in relation to the second reading of a bill proposing conflict of interest legislation.

3.8 1993-1994 Annual Report

Commissioner Evans dedicated a full page of his 1993-1994 annual report to further explaining parliamentary convention. This section of his annual report was entitled “Take Time to Reflect” and was included because there remained “considerable misunderstandings still remain with respect to activities which may be carried on by ministers, parliamentary assistants and their staff with regard to courts quasi-judicial bodies, agencies, boards and commissions.”316 The Commissioner arguably appealed to Heard317 when he wrote in his report that:

The Ontario political system is based on the Westminster model of parliament—a cabinet government with its accompanying constitutional conventions of,

(1) ministerial responsibility;
(2) political neutrality; and
(3) public service anonymity.

These conventions provide the framework for relations between politicians and public servants, and between government officials and the public.318

The Commissioner also interestingly repeats part of his 1991-1992 annual report,319 but adds clarification at the end to make clear that he has jurisdiction over questions of ministerial responsibility and the ministers attempting to influence decisions:

317 See Heard, supra note 221 at ch 3 (these same three items are included in Heard’s chapter entitled “Cabinet, Ministers and the Civil Service” and are outlined as being conventions that inform the operation of responsible Cabinet government).
319 1991-1992 Annual Report, supra note 176 at 7 (see Inquiry No 6)
Ministers always wear the cloak of ministerial responsibility. There is no way that their actions, whether verbal or written, and whether in the member’s position as an elected member of the Legislature or as a minister, can be considered by the recipient as other than actions by a minister, and thus could reasonably be considered as attempting to influence a decision contrary to s.4 of the Act.

The addition of the words “contrary to s.4 of the Act” suggests that the Commissioner recognized that rules about parliamentary convention must be derived from the legislation. It also suggests that the Commissioner would like to assume such jurisdiction, presumably because he believes the concept could be useful to him in his work. Without clear jurisdiction, the Commissioner’s assertions of parliamentary convention are merely suggestive however, and it would be for the Legislature or the public to determine whether a breach of convention had occurred and what the repercussions of that breach might be. As Heard noted in his book, conventions are not law, but can instead be thought of as that which puts “the flesh on the dry bones of the law.”

3.9 Standing Committee on the Legislative Assembly

On June 17, 1994, the day after Commissioner Evans filed his 1993-1994 annual report with the Speaker, the member for Ottawa Centre and the Minister of Housing, Evelyn Gigantes, attended a meeting in her riding and acted in a manner that would later be questioned by other members. MPP Brian Charlton would move on June 23, 1994, that the Standing Committee on the Legislative Assembly be authorized to conduct an investigation into allegations of conflict of interest against Minister Gigantes with respect to her attendance at that meeting on June 17. The Committee asked Minister Gigantes for her thoughts on Commissioner Evans’ comments in his 1993-1994 annual report:

Ms Cronk: Thank you. Ms Gigantes, could I ask you to look with me first, if you would, please, at the second-to-last page of this extract, which is in a

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321 Ibid.
322 Supra, note 220 at 92.
323 See Gigantes Report, supra note 25.
section entitled by the commissioner "Take Time to Reflect." Have you got that?

Hon Ms Gigantes: Yes.

Ms Cronk: All right. I'm going to direct your attention to the comments contained in the column on the right-hand side, which appear to concern the Premier's guidelines that we just spoke about. Do you see that?

Hon Ms Gigantes: Yes.

Ms Cronk: Specifically, in that column of this part of the report reference is made to sections 21 to 24 of the guidelines.

Hon Ms Gigantes: Yes.

Ms Cronk: We just looked at those.

Hon Ms Gigantes: Yes.

Ms Cronk: Then in the concluding paragraph to the report and to this column of discussion about the guidelines it is suggested as follows: "Ministers always wear the cloak of ministerial responsibility. There is no way that their actions, whether verbal or written, and whether in the member's position as an elected member of the Legislature or as a minister, can be considered by the recipient as other than actions by a minister, and thus could reasonably be considered as attempting to influence a decision contrary to s.4 of the Act."

Stopping there for a moment, that's clearly a reference to section 4 of the conflict-of-interest legislation, which we're not concerned with here today.

Hon Ms Gigantes: Yes.

Ms Cronk: But do you agree with the principle that "Ministers always wear the cloak of ministerial responsibility"?

Hon Ms Gigantes: I do.324

This passage from the transcript is the only Hansard reference by any MPP to Commissioner Evans' writings on parliamentary convention prior to the adoption of the Members' Integrity Act in 1994. The investigation into Minister Gigantes received lots of attention in the media325 and took place at a time when the Conflict of Interest Commissioner was working on draft amendments to the Members' Conflict of Interest Act326 with representatives from all three parties.327 It is clear from the above line of


326 MCIA, supra note 10.
questioning that MPP Eleanore Cronk believed that sections 21 to 24 of Premier Rae’s guidelines were examples of what Commissioner Evans had described in his 1993-1994 annual report to be constitutional conventions\(^\text{328}\) and that she was aware of the Commissioner’s assertion that those constitutional conventions might conceivably fall under s.4 of the Members’ Conflict of Interest Act.\(^\text{329}\)

### 3.10 Legislative Debate Regarding the Passing of the Members’ Integrity Act, 1994

Commissioner Evans noted in his 1993-1994 annual report that his “goal to submit proposed amendments to the Ontario legislation to the Legislature by the fall of 1993 was not realized” and he also noted that he was continuing his indepth review of the legislation.\(^\text{330}\) It was not long after his report was tabled that a new bill was put forth. Bill 209, entitled “An Act to revise the Members’ Conflict of Interest Act and to make related amendments to the Legislative Assembly Act,”\(^\text{331}\) passed first, second and third reading on the last day that the legislature sat before the general election on June 8, 1995. The Ottawa Citizen reported on a discussion with Sean Conway, the member for Renfrew

\(^{327}\) See Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 35th Parl, 3rd Sess, No 169B (8 December 1994) at 8467 (Charles Harnick) (The group of individuals working on the legislation were: Mr. Steven W. Mahoney (LIB MPP), Mr. Sean G. Conway (LIB MPP), Rick Weiler (LIB legal representative), Mr. Eldon Bennett (NDP legal representative), Charles Harnick (PC MPP), Integrity Commissioner Gregory T. Evans and his executive assistant, Lynn Harris).

\(^{328}\) Although the 1991-1992 annual report was not referenced by Ms. Cronk, the Commissioner’s annual report that year referred to ministerial responsibility as a parliamentary convention, not a constitutional convention. It was the 1993-1994 annual report that Ms. Cronk was citing that referred to ministerial responsibility as a constitutional convention. See 1993-1994 Annual Report, *supra* note 316.

\(^{329}\) MPP Cronk is reading from an annual report in which Commissioner Evans quoted section 21-24 of Premier Rae’s guidelines, all of which relate to restrictions on the activities of Ministers, and immediately followed those provisions with the passage read by Ms. Cronk.


\(^{331}\) Bill 209, *supra* note 203.
North, as he explained that “passage of the bill was of immense important, Conway said, because of the imminent election. It gives candidates now being recruited a clear idea of the rules under which they, if elected, will have to live. And it gives them time, if need be, to begin making appropriate arrangements.”

The members debated the bill by sharing kind words for those who worked on it and by sharing stories of the ethical transgressions of past members. As Jim Coyle wrote for the Ottawa Citizen, the debate was “positively oozing tri-partisan self-congratulation” and “Hansard shows that much of what passed for debate that night was clubby anecdotal recollections of former colleagues ensnared in previous conduct regimes. Or mutual congratulation for what had been drawn up as the new rules.” There was also discussion of the fact that the new legislation would include a preamble and effectively eliminate the need for Premier Rae’s guidelines, as some of the members had previously recommended during their work for the Standing Committee on Administration of Justice. The fact that there was relatively little critical analysis of the bill is perhaps not surprising given the quick passage through all three readings. As Norm Sterling, the member for Carleton, noted, “we are agreeing to have first, second and third reading all in one day – the bill has not been widely spread among members in this Legislature, so many of the members who will be voting on the bill today will not in fact have read it.” Given that this bill was prepared by an informal tri-partisan group of members and party delegates with the approval of the party leaders, it is perhaps not surprising that there was minimal substantial debate and absolutely no debate about the concept of Ontario parliamentary convention. The bill was also not referred to committee.

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332 Coyle, supra note 206.
333 See e.g. Ontario, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 3rd Sess, No 169B (8 December 1994) at 8466 (Charles Harnick).
334 Coyle, supra note 206.
335 Ibid.
336 Report on Guidelines, supra note 164.
337 See supra, note 327.
3.11 Do the Words “Parliamentary Convention” Have Prior Meaning?

The purpose of this chapter has been to explore how the concept of parliamentary convention had been used in Ontario prior to the quick passing of Bill 209. It is clear from annual reports that the Conflict of Interest Commissioner assumed jurisdiction over what he had called parliamentary convention well before the legislation was amended to include Ontario parliamentary convention. In his attempts to explain parliamentary convention, Commissioner Evans drew inspiration from Premier Rae’s conflict of interest guidelines and from Heard’s 1991 book, *Canadian Constitutional Conventions: The Marriage of Law and Politics.*

It is also clear that inspiration was drawn from previous debates in the legislature, including those concerning transgressions by former and current Solicitors General. Commissioner Evans had only published one example of what he believed to be an actual parliamentary convention by the time that the 1994 legislation had been debated in the legislature. He did, however, make several very important comments in his 1991-1992 annual report, including that he believed parliamentary conventions to be “supported by some constitutional reason or principle.”

Given the Commissioner’s comments, coupled with the lack of debate in the legislature and the fact that the bill was not referred to committee before passing third reading, perhaps the only things that a member of provincial parliament could have known about parliamentary conventions, or could have been presumed to know, at the time the bill was passed were that:

1) Conventions are informal rules arising out of tradition and political practice that legislatures or parliaments have had grafted on them over the years;

2) These “conventions” are binding and supported by some constitutional reason or principle;

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338 Heard, *supra* note 221.


3) These “conventions” differ from non-obligatory practices or procedures which are not based on reason or principle, but rather on habit or convenience; \(^{342}\)

4) In his 1991-1992 annual report, the conflict of interest commissioner effectively declared one rule in Premier Rae’s guidelines to be a parliamentary convention. \(^{343}\) He noted that “Ministers always wear the cloak of Ministerial responsibility” \(^{344}\) and later pointed out in his 1993-1994 annual report that “ministerial responsibility” is a constitutional convention; \(^{345}\)

5) The Conflict of Interest Commissioner believes that Heard’s book \(^{346}\) explains “conventions”; and,

6) The Canadian courts have acknowledged many constitutional conventions. In fact, the Supreme Court of Canada has even put forth a test to determine when a constitutional convention exists. \(^{347}\) Regardless, conventions are not justiciable. \(^{348}\)

It is with this background in mind that I will now look at the ways in which Ontario parliamentary convention has actually been applied by Ontario’s Integrity Commissioners since the coming into force of the Members’ Integrity Act.

\(^{342}\) Ibid.


\(^{344}\) Ibid.


\(^{346}\) Heard, supra note 221.

\(^{347}\) Patriation Reference 1981, supra note 232 at 888.

\(^{348}\) Hogg, supra note 229 at 1-26.
4 The Evolution of “Ontario Parliamentary Convention”

Ontario became the first jurisdiction in Canada to include parliamentary convention in its government conflict of interest legislation after it passed the Members’ Integrity Act in 1994. The following three provisions from the Act provide an excellent summary of how the concept was included:

5: This Act does not prohibit the activities in which members of the Assembly normally engage on behalf of constituents in accordance with Ontario parliamentary convention.\(^{349}\)

…28(1): A member of the Assembly may request that the Commissioner give an opinion and recommendations on any matter respecting the member’s obligations under this Act and under Ontario parliamentary convention.\(^{350}\)

…30(1): A member of the Assembly who has reasonable and probable grounds to believe that another member has contravened this Act or Ontario parliamentary convention may request that the Commissioner give an opinion as to the matter.\(^{351}\)

The absence of a definition in the bill for this concept was not mentioned in debate when it passed through first, second and third readings in one sitting. As discussed in chapter 3 above, the expression “parliamentary convention” had only rarely been used in Ontario’s legislature and very little explanation of the concept had been offered by the Conflict of Interest Commissioner prior to the passing of the 1994 legislation. This chapter will focus on what has been said about parliamentary convention by Ontario’s Integrity Commissioners since the passing of the Members’ Integrity Act and how the concept has been used in practice. This chapter will clearly demonstrate that the work of Ontario’s

\(^{349}\) MIA, supra note 13 at 5.
\(^{350}\) Ibid at 28(1).
\(^{351}\) Ibid at 30(1).
first Integrity Commissioner, Gregory Evans, remained true to the traditional concept of a parliamentary convention that was modeled after constitutional conventions, as the Commissioner had described in his annual reports prior to the new legislation coming into force. Ontario’s second Commissioner, Robert Rutherford, also employed the traditional concept in his work. Subsequent Commissioners have strayed from Commissioner Evans’ and Rutherford’s interpretation of Ontario parliamentary convention and have broadened the scope of its application. Commissioners Osborne and Morrison have not attempted to justify their use of parliamentary convention by appeal to constitutional scholarship. Instead, the most recent two Commissioners have relied on the Black’s Law Dictionary’s definition of “convention” coupled with the exercise of their own discretion in order to determine that parliamentary conventions are practices that are “generally accepted as a rule or practice in the context of norms accepted by parliamentarians.”\(^{352}\) Furthermore, they have concluded that the “elements of parliamentary convention are framed by the core principles which provide the general foundation for the Act as set out in the Act’s preamble.”\(^{353}\) This broadening of the use of Ontario parliamentary convention is likely due to the Commissioners’ desire to exercise jurisdiction over unethical behaviours they would not have otherwise have had jurisdiction over. A clear divide therefore exists between the work of Ontario’s first two Integrity Commissioners and its more recent two. The work of the more recent two relies heavily on the exercise of discretion. In this chapter, I will also briefly explore the Speaker’s jurisdiction over the ethical conduct of parliamentarians, insofar as understanding the Speaker’s role is helpful to understanding the scope and application of Ontario parliamentary convention under the Members’ Integrity Act.


4.1 Commissioner Evans

The Honourable Gregory T. Evans was first appointed to serve as Ontario’s Conflict of Interest Commissioner by Order-in-Council dated June 29, 1988. Commissioner Evans began pushing for improvements to the legislation shortly after his appointment. His efforts to pressure the legislature to reform the legislation lasted approximately two years and involved working with delegates from all three caucuses. Commissioner Evans was lauded in the legislature for his tenacity and commitment to the project. The government member who worked on the amendments, MPP Charles Harnick, described the process as follows:

I can tell you that we used to start these meetings generally at 5 or 6 in the evening and at 11 o'clock we would finally have to ask Justice Evans if we could be excused because we were too tired to carry on. He would look at his watch and say, "It's only 11 o'clock," and there was more work to do. We would have to beg him to let us go because we couldn't think straight, and he was just getting warmed up.

The Commissioner’s first annual report after the Members’ Integrity Act received royal assent discussed some of the changes to the legislation that members should be aware of, including the preamble and the inclusion of Ontario parliamentary convention. That report also included the Commissioner’s first comments on Ontario parliamentary convention since he had led the all-party group that drafted the legislation. Commissioner Evans explained parliamentary convention as follows:

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356 See supra, note 337.
358 Supra, note 355 at 8466 (Charles Harnick).
There are instances of impropriety by members that do not involve issues in which there is a conflict between personal and public interests, however they do affect public trust and confidence. Some of these situations we have characterized as Ontario parliamentary conventions, because they recognize and support those accepted democratic principles of fairness, impartiality, justice and due process, of which the Legislature has signified its approval.360

He further explained that the new legislation served to codify one particular convention that had long been recognized:

The words “Ontario parliamentary convention” are new in legislation of this nature. They apply to certain activities previously carried out by Ontario Parliamentarians which are now accepted by them as being inimical to the proper administration of government in our democratic society. Parliamentary conventions result from practices and customs and may not be the same in every jurisdiction. Section 6(5) of the Members’ Integrity Act, 1994 dealing with the use of promotional awards is one example of such a convention.361

Section 6(5) of the Act read as follows:

A member who receives promotional awards or points from airlines, hotels and other commercial enterprises as the result of travel for which he or she is reimbursed by the Government of Ontario shall not use them for personal purposes.362

It is not clear how not having a policy related to the use travel points is something that had been accepted as “inimical to the proper administration of government in our democratic society,”363 but the topic had certainly been previously addressed in the legislature. On October 17, 1991, for example, Mr. Gilles Bisson, the member for Cochrane South, asked the Chairman of Management Board to consider instituting a policy to allow travel points to be accumulated but only used on government business.

360 Ibid.
362 MIA, supra note 13 at 6(5) (the topic of travel points had previously been the subject of a provision of the legislation that was repealed in 2010)
According to Mr. Bisson, this suggestion would help save the government money.\textsuperscript{364} The topic of travel points was again addressed when Bill 50, the “Members’ Integrity Amendment Act, 2010”\textsuperscript{365} was debated in the legislature on May 5, 2010. During third reading of the bill, Peter Kormos, the member for Welland, commented that section 6(5) had been of little impact:

The travel points section: Of course, before this amendment travel points couldn’t be used for personal use. Well, please. I mean, when the kids were here on the weekend smoking marijuana, that’s their argument for the legalization of marijuana: You can’t enforce the law anyway, so why don’t you just legalize it? What in fact this amendment does is it eliminates the prohibition against using travel points for personal use.\textsuperscript{366}

Section 6(5) was repealed from the \textit{Members’ Integrity Act} on May 18, 2010.

Commissioner Evans had his first opportunity to consider whether Ontario parliamentary convention had been violated by a member when he received a complaint from Marilyn Churley, the member for Riverdale, on November 21, 1995, about Dianne Cunningham, the member for London North and Minister Responsible for Women’s Issues. The allegation was that Minister Cunningham had violated Ontario parliamentary convention when she spoke to three agencies working with battered women about the impact of “provincial funding cuts to violence against women services.”\textsuperscript{367} Specifically, Minister Cunningham threatened to audit and withdraw funding from groups or agencies that were “not seen to be working with this government”\textsuperscript{368} or “providing an oppositional voice.”\textsuperscript{369}

In his report that was filed with the Speaker on December 13, 1995, Commissioner Evans followed up on the comments in his previous annual reports by again stressing that

\begin{itemize}
  \item \textsuperscript{364} Ontario, Legislative Assembly, \textit{Official Report of Debates (Hansard)}, 35th Parl, 1st Sess, No 70 (17 October 1991) at 2994 (Gilles Bisson).
  \item \textsuperscript{365} \textit{Members’ Integrity Amendment Act}, 2010, SO 2010, c 5.
  \item \textsuperscript{366} Ontario, Legislative Assembly, \textit{Official Report of Debates (Hansard)}, 39th Parl, 2nd Sess, No 27 (5 May 2010) at 2994 (Peter Kormos).
  \item \textsuperscript{367} Cunningham Report, \textit{supra} note 170 at 1.
  \item \textsuperscript{368} \textit{Ibid} at Appendix A: Affidavit of Julie Lee at 2.
  \item \textsuperscript{369} \textit{Ibid}.
\end{itemize}
parliamentary conventions are informal rules that have been accepted and approved by the Legislature.

The concept of a parliamentary convention is not new although it has now received statutory recognition by being included among the provisions of the *Members’ Integrity Act, 1994*. Parliamentary conventions are, in general, practical guidelines or directives concerned with the manner in which members discharge their legislative functions and have been accepted and approved by the Legislature as being procedures which maintain public trust and confidence in the institution of Parliament.  

He then outlines the two well-recognized constitutional conventions of parliamentary immunity and judicial independence as examples:

Probably the most fundamental convention arises when an accusation of impropriety is made by a member against another member in the Legislature and the member against whom the accusation is levied categorically denies the accusation. In such an event, the word of the member must be accepted and the accusation rejected. The issue is dead unless some parliamentary process is invoked to revive it.

If the accusation is raised in a forum outside the Assembly, where the question of parliamentary immunity is not involved, the matter is subject to the provisions of civil law.

It is stated by many political scientists that the Judiciary along with the Executive and the Administration are separate branches of government…by long recognized convention, members do not contact the Judiciary to influence the manner in which they should discharge their official duties. The independence of the Judiciary has always been respected

These two examples are consistent with comments made by the Commissioner in his earlier annual reports, where he had referenced what I will refer to as traditional constitutional conventions, such as ministerial responsibility and the independence of the judiciary. He explained in his report that the convention of judicial independence had

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370 *Ibid* at 1.
371 See Heard, *supra* note 221 at ch 6 (for a discussion of judicial independence).
372 Cunningham Report, *supra* note 170 at 1.
373 The comments he previously made about travel points being an example of a convention did not seem to fit in and are difficult to reconcile with the rest of his analysis of Ontario parliamentary convention.
been extended in Ontario when the previous administration’s Solicitor-General resigned her ministerial office after accusations that she consulted with the police about a constituent’s possible criminal prosecution. The Legislature’s acceptance of the Solicitor-General’s resignation “extended the concept of the judicial convention to include police investigations” and “[i]t also gave support to the heretofore rather unevenly recognized convention that certain restrictions applied to members of the Executive in becoming involved with agencies, boards and commission under their particular jurisdiction on behalf of constituents.” He also noted that an earlier parliament had recognized both conventions, namely that it is improper to attempt to influence the police about possible prosecutions and that ministers should not advocate on behalf of constituents before agencies, board or commissions under their jurisdiction.

The Cunningham report is most significant however, because of how Commissioner Evans explains parliamentary convention and the fact that his precedent-dependent approach to the application of Ontario parliamentary convention led him to dismiss the complaint without commencing an inquiry. As he explained:

> Parliamentary conventions usually evolve over a period of time. When certain situations continue to arise and the legislators reach a consensus as to their disposition, they are then classified as conventions and serve as precedents which may be adopted to determine future cases of a similar nature.

**FINDING OF FACT**

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375 *Ibid* at 2 (see also *supra*, note 170 for a detailed discussion of Solicitor General Joan Smith’s ethical transgression).


377 *Ibid*.

378 *Ibid*. 
I am not aware of any precedent approved by the Legislature which is applicable to the circumstances related in the material provided by the Member from Riverdale.379

Commissioner Evans added to his comments from the Cunningham report in his 1995-1996 annual report. Noting first that Ontario parliamentary conventions are “recognized customs and procedures which have developed over the years in the Ontario Legislature and have been adopted by it as precedents,”380 he further explained the rationale underlying the convention prohibiting ministers from advocating before agencies, boards and commissions under their jurisdiction:

The purpose of the restriction was to permit the members of the agencies, boards and commissions to carry out their responsibilities without influence by members of the Executive Council upon their decisions.381 However, the members of the Executive Council are not excluded from inquiring whether a particular agency, board or commission has followed established policies and procedures or ascertaining the present status of a matter before that tribunal.382

Commissioner Evans would only have two more opportunities to explain the concept of Ontario parliamentary convention before he retired as Integrity Commissioner. The first opportunity was in his 1996-1997 annual report where he simply quoted his explanations of parliamentary convention from his earlier annual reports. The second opportunity was in his report regarding Minister Allan Leach’s communication with the Health Services Restructuring Commission.383 The allegation made against Minister Leach was that he

379 Ibid (the approach taken in this report also serves to further confuse the Commissioner’s comments concerning travel points in his 1993-1994 annual report. I am unable to find any precedent that might have been established during legislative debates that might justify considering the codification of s.6(5) of the MIA to be akin to the codification of a parliamentary convention, as Commissioner Evans has otherwise explained them).


381 Ibid (Commissioner Evans discusses the convention prohibiting ministers from advocating before agencies, boards or commissions under their jurisdiction).

382 Ibid.

383 Ontario, Office of the Integrity Commissioner, Report of the Honourable Gregory T. Evans, Commissioner Re: The Honourable Allan Leach, Minister of Municipal Affairs
improperly wrote to the Health Services Restructuring Commission ("H.S.R.C.") on behalf of two hospitals and requested that those hospitals be provided with an extension of the deadline by which their submissions had to be made to the Commission with respect to whether those hospitals should be closed.\textsuperscript{384} Having already announced his retirement,\textsuperscript{385} Commissioner Evans took the opportunity, in what he likely expected to be his last report, to explain parliamentary convention in great detail. After considering the parties’ submissions with respect to whether Minister Leach had violated Ontario parliamentary convention, the Commissioner made two key determinations.

The first determination was that although it was not a judicial body, the H.S.R.C. had been set up and “granted wide powers by the government.”\textsuperscript{386} The Commissioner determined that Minister’ Leach’s letter to the H.S.R.C. went beyond simply asking for information and instead requested reconsideration of the H.S.R.C.’s decision to close a particular hospital. The Commissioner explained that the convention of Cabinet solidarity establishes, a) that a “Minister must not speak about or otherwise become involved in a colleague’s portfolio without first consulting him and gaining his approval”\textsuperscript{387} and b) that “the Executive Council is by convention supposed to speak with one voice, since it is collectively responsible for initiating and implementing policies.”\textsuperscript{388} The H.S.R.C. was a creation of cabinet and “Cabinet solidarity requires that all Ministers must accept collective responsibility for the policies and actions of the government.”\textsuperscript{389}

The Commissioner’s second determination was that it was inappropriate for Minister Leach not to consult first with the Minister of Health and it was also a violation of

\underline{\textit{and Housing with Respect to the Health Services Restructuring Commission (25 June 1997) [Leach HSRC Report]}}

\textsuperscript{384} \textit{Ibid} at 3-4.


\textsuperscript{386} Leach HSRC Report, \textit{supra} note 383 at 5.

\textsuperscript{387} \textit{Ibid} at 6.

\textsuperscript{388} \textit{Ibid} at 8.

\textsuperscript{389} \textit{Ibid}. 
Ontario parliamentary convention for him “to act on behalf of constituents as far as quasi-judicial tribunals are concerned.”

Commissioner Evans cited the work of Eugene A. Forsey, a retired Senator he described as “a distinguished teacher and writer on constitutional matters.” Having only previously cited Heard’s book in his work, it was notable that Forsey’s work on conventions now appeared to have some influence on the Commissioner’s understanding of the concept of a parliamentary convention. The Commissioner quoted the following passage in his report regarding Minister Leach:

Conventional principles are generalizations from a mass of usages flowing down from incident to incident. These incidents in light of common sense are usually termed precedents which over a period reflect common usage and are consolidated ultimately into conventions.

A precedent may be followed on another occasion because the actions composing the precedent are seen with hindsight to be correct, that it, to have constituted a common sense solution to a particular problem in conformity with the best general constitutional principles.

If the reasons for regarding those actions as correct are still applicable in like political situations, they are likely to be followed. Once a new practice is followed, a precedent is established which will constitute a usage and in due time a convention. Conventions and usages are not cast in stone; they may be modified or even abandoned, if they are no longer germane to current conditions or to the underlying principles of the current political system. Some conventions are easily identified as cut and dried principles but most exist in variable states of elasticity.

Conventions have been defined as extra-legal rules of structure or procedure or principle established by precedent, consolidated by usage and generally observed by all concerned.

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This final report by Commissioner Evans again cited a constitutional scholar in order to support his finding that parliamentary convention applied to the case at hand. This report was also the first report to recognize cabinet solidarity\(^393\) and to bring attention to the rule that a minister must not interfere in another minister’s portfolio without first consulting with that minister. Commissioner Evans made it clear with each convention he recognized that they were not new and that they had been well documented by renowned scholars prior to being employed by him in his work as Commissioner. He also made it clear that these conventions had been recognized by the Ontario legislature on some earlier occasion.

4.2 Commissioner Rutherford

The Honourable Robert Rutherford held the position of Integrity Commissioner from December 1, 1997 until March 4, 2001. Commissioner Rutherford’s tenure began mid-year and his first annual report covered the first four months of his term in office as well as the last eight months of Commissioner Evans’ term.\(^394\) Although he would file three annual reports and four investigation reports\(^395\) during his term, Commissioner

\(^{393}\) Recall that cabinet solidarity was covered in detail in Heard’s book. See Heard, *supra* note 221 at 62.


Rutherford’s final investigation report was the only one in which he said something new about Ontario parliamentary convention.

A request for investigation was made to the Integrity Commissioner on September 11, 2000, with respect to the actions of Ontario’s Premier, Mike Harris. David Ramsay, the member for Timiskaming-Cochrane, alleged that Premier Harris had contravened several provisions of the *Members’ Integrity Act* as well as Ontario parliamentary convention by attempting to use his office to ensure that a specific private sector contractor was granted the contract to dispose of the city of Toronto’s garbage at the Adams Mine site in Kirkland Lake, Ontario.\(^{396}\) It is not necessary to go through the facts of this complaint in great detail because Commissioner Rutherford very succinctly refused to consider whether Ontario parliamentary convention had been breached:

> As a preliminary, I observe that Mr. Ramsay has not specified the way in which he alleges that Mr. Harris infringed parliamentary convention by supporting the plan. Without clarification as to precisely what parliamentary convention Mr. Harris allegedly infringed, I cannot conclude that he violated any parliamentary convention.\(^{397}\)

It is unclear whether the Commissioner sought clarification from Mr. Ramsay on the question of what convention he was alleging had been breached before publishing his report. Regardless, it was clear from his refusal to consider Ontario parliamentary convention in the abstract that he did not believe it to be his job to build the complaint against the member(s) complained of. It is arguably also the case that Commissioner Rutherford thought that any convention that was alleged to have been breached necessarily had to also be a convention that was previously recognized in Ontario.

Commissioner Evans did not have occasion to consider a complaint that lacked specificity with respect to an alleged breach of Ontario parliamentary convention. In the two reports where Commissioner Evans considered Ontario parliamentary convention,

\(^{396}\) Harris Report, *supra* note 395 at 1.

\(^{397}\) *Ibid* at 6.
the requests from the members referred to examples in previous annual reports\textsuperscript{398} to justify their allegations. As will be discussed below, the position that Commissioner Rutherford took with respect to the complainants’ burden to be specific would later be relaxed by his successors.

### 4.3 (Interim) Commissioner Evans

The Honourable Greg Evans returned as interim Integrity Commissioner when Commissioner Rutherford resigned suddenly on March 5, 2001.\textsuperscript{399} The Toronto Star reported in late February of 2001 that Commissioner Rutherford had admitted to a reporter that a friend had assisted him with writing his report exonerating Premier Harris from allegations that he attempted to influence the awarding of the city of Toronto waste disposal contract.\textsuperscript{400} Commissioner Rutherford also refused to disclose the name of this friend.\textsuperscript{401} Those comments to the Toronto Star, coupled with the conclusions he came to in his December 27, 2000 report, left Commissioner Rutherford open to a great deal of public criticism.\textsuperscript{402} As Speaker Gary Carr later explained to the media after receiving Commissioner Rutherford’s resignation, “[h]e was obviously aware of some of the controversy…and he said that he thought that it would be in the best interest of the office if he stepped aside.”\textsuperscript{403}

\textsuperscript{398} See Cunningham Report, \textit{supra} note 170 and Leach HSRC Report, \textit{supra} note 383.


\textsuperscript{400} See e.g. Bill Schiller, “Leaders will decide Rutherford’s future”, \textit{The Toronto Star} (24 February 2001) NEWS; Bill Schiller, “Who helped write report on Harris?”, \textit{The Toronto Star} (23 February 2001) NEWS.

\textsuperscript{401} Theresa Boyle, “Integrity Commissioner resigns over report”, \textit{The Toronto Star} (2 March 2001) NEWS.

\textsuperscript{402} See e.g. \textit{Ibid}; Bill Schiller, “Who helped write report on Harris?”, \textit{The Toronto Star} (23 February 2001) NEWS.

\textsuperscript{403} \textit{Supra}, note 401.
Commissioner Evans’ first task upon returning to the role of Integrity Commissioner was to issue a new report concerning the allegations against Premier Harris.\textsuperscript{404} This re-consideration was necessary “[i]n mid-February because the Office of the Integrity Commissioner was deluged with a flood of approximately 1,500 letters, faxes and emails in support of such a review.”\textsuperscript{405} The Commissioner concluded that the actions taken by the Premier that Mr. Ramsay had alleged to be improper were in fact the actions of the government and not actions that Premier Harris had taken on his own behalf:

A government positions itself for re-election by enacting legislation and establishing policies which it hopes will appeal to the electorate. Harris, as leader of the government, is legitimately entitled to seek public support for his policies and for the activities which he believes will foster their implementation in any manner that is not prohibited by the \textit{Criminal Code of Canada}, the \textit{Legislative Assembly Act} or is not a violation of the Members’ \textit{Integrity Act}.\textsuperscript{406}

... A government cannot be in violation of the Members’ \textit{Integrity Act}. If it should exceed its legislative powers, it is a constitutional issue for judicial consideration. Otherwise, its actions are to be assessed by public opinion through our election process.\textsuperscript{407}

The Commissioner also concluded that there was no evidence to suggest Premier Harris had improperly benefitted from the government’s actions.\textsuperscript{408} Commissioner Evans determined that further inquiry would not be justified.\textsuperscript{409} The report did not specifically address the allegation that Premier Harris had breached Ontario parliamentary convention. Nor did the report address Commissioner Rutherford’s comments that the member seeking the investigation must specify the specific parliamentary convention that they were alleging had been violated. Despite the fact that parliamentary convention was not addressed, Commissioner Evans’ comment that “[a] government cannot be in

\textsuperscript{404} Evans’ Harris Report, \textit{supra} note 399.
\textsuperscript{405} \textit{Ibid} at 1.
\textsuperscript{406} Evans’ Harris Report, \textit{supra} note 399 at 7-8.
\textsuperscript{407} \textit{Ibid} at 16.
\textsuperscript{408} \textit{Ibid} at 10.
\textsuperscript{409} \textit{Ibid} at 17.
violation of the *Members’ Integrity Act*\(^\text{410}\) was significant. This point had not been addressed by any previous report with respect to the need to determine whether a member’s actions are his or her own or whether they are taken on behalf of the government. This could be especially important when considering allegations against Premiers, but it could also apply with respect to allegations against ministers or parliamentary assistants. This report suggests that it is important in the future for the Commissioner to ask whether allegedly improper actions are taken for personal reasons or out of a sense of public authority.

Commissioner Evans’ tenure as interim Integrity Commissioner ended on September 17, 2001, when the Honourable Coulter Osborne, former Associate Chief Justice of Ontario, was appointed as the new Integrity Commissioner.

### 4.4 Commissioner Osborne

Commissioner Osborne first addresses Ontario parliamentary convention in his 2001-2002 annual report.\(^\text{411}\) The report included a number of anonymous inquiries that had been received by the office from members and their staff. Ontario parliamentary convention was addressed in three separate inquiries and in all three inquiries a convention was cited that could be easily traced back to Commissioner Evans’ work.\(^\text{412}\) It was not until 2002 that Commissioner Osborne first made a substantive addition to Ontario parliamentary convention.

\(^{410}\) *Ibid* at 16.


\(^{412}\) *Ibid* (see Inquiry No. 6 at 9 for a discussion of judicial independence, Inquiry No. 8 at 9-10 for a discussion of ministerial responsibility and Inquiry No. 19 at 14 for a further discussion of ministerial responsibility).
In early 2001, Sandra Pupatello, the member for Windsor West, offered to assist a friend by allowing her to ship personal belongings to England using the preferred rate provided to the government of Ontario by Purolator Courier. The friend did not immediately take advantage of this offer, but had her sister contact Ms. Pupatello after she herself had moved overseas. At that time, the friend’s sister made arrangements to drop off the parcels of belongings at Ms. Pupatello’s home in Windsor so that Ms. Pupatello could take everything with her to the Purolator depot at Queen’s Park. Ms. Pupatello had certainly agreed to transport the boxes from her home in Windsor, Ontario, but was surprised when eight large boxes were left on her doorstep. The member’s Queen’s Park office called Purolator and was informed that the items would have to be weighed before a quote could be provided. Purolator also noted that as long as the parcels were marked “personal” an invoice would be sent to Ms. Pupatello so that she could pay the cost out of her own pocket.

Without first confirming the price with her friend, Ms. Pupatello took the boxes to Purolator and shipped them to England. She forwarded the invoice for $3,176.99 to her friend who would not pay because she was under the impression that the cost would be no more than $500. Ms. Pupatello contacted the friend’s father for payment and he immediately wrote a cheque payable to the Legislative Assembly for the full amount. Ms. Pupatello’s friend then started a small claims court action seeking damages of $2,676.99, which represented the difference between the $500 she had originally expected to pay and the $3,176.99 that her father had paid.

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414 Ibid at 3.

415 Ibid at 4.

416 Ibid at 3.

417 Ibid at 5.

418 Ibid at 3.

419 Ibid.
picked up on the small claims action and ran an article on the matter.\textsuperscript{420} The member for Simcoe North, Mr. Garfield Dunlop, filed a complaint alleging the breach of certain provisions of the \textit{Members’ Integrity Act} and of Ontario parliamentary convention.

The Commissioner considered Mr. Dunlop’s allegations and concluded “…there was no “decision” as contemplated by either section 2 or section 4.”\textsuperscript{421} Section 2 and section 4 read as follows:

2. Conflict of Interest
A member of the Assembly shall not make a decision or participate in making a decision in the execution of his or her office if the member knows or reasonably should know that in the making of the decision there is an opportunity to further the member’s private interest or improperly to further another person’s private interest.\textsuperscript{422}

4. A member of the Assembly shall not use his or her office to seek to influence a decision made or to be made by another person so as to further the member’s private interest or improperly to further another person’s private interest.\textsuperscript{423}

Without including any supporting analysis for this conclusion, the Commissioner accepted Ms. Pupatello’s argument that she did not make a “decision” or participate in the making of a decision, and as such there could have been no violation of that provision.

Commissioner Osborne quickly dismissed the allegation that other sections of the \textit{Act} had been violated, and then considered whether there had been a breach of Ontario parliamentary convention. The Commissioner focused on section 5. He noted

\textsuperscript{420} See e.g. Theresa Boyle, “Critic of Tory expenses used government courier for friend”, \textit{The Toronto Star} (10 October 2002) A27.

\textsuperscript{421} Pupatello Report, \textit{supra} note 413 at 8.

\textsuperscript{422} MIA, \textit{supra} note 13 at 2.

\textsuperscript{423} \textit{Ibid} at 4.
“parliamentary convention is also used in the Act to justify some actions by members on behalf of constituents. See section 5 of the Act.”  

Section 5 read as follows:

5. Activities on behalf of constituents

This Act does not prohibit the activities in which members of the Assembly normally engage on behalf of constituents in accordance with Ontario parliamentary convention.

Commissioner Osborne explained that parliamentary convention was undefined, but that the Act’s preamble could assist him in determining what qualified as a parliamentary convention. A new approach to the use of Ontario parliamentary convention then emerged.

Parliamentary convention is not defined in the Act. A convention is a generally accepted rule or practice – established by usage or custom (see Blacks Law Dictionary). Parliamentary convention refers that [sic] which is generally accepted as a rule or practice in the context of norms accepted by parliamentarians. The elements of parliamentary convention are framed by the core principles which provide the general foundation for the Act as set out in the Act’s preamble (the reconciliation of private interests and public duties).

I think it is accepted that there are limits on what members can do in their personal affairs and what they can do for friends, relatives, constituents etc. Some of those limits are established by parliamentary convention. For example, it is generally accepted that members’ personal business should be kept separate from business undertaken by the member in connection with the members’ duties and responsibilities as a member of the Provincial legislature. This is reflected in the Act’s preamble’s reference to the reconciliation of private interests and public duties.

Commissioner Osborne recognizes that that Ontario parliamentary convention is undefined in the legislation. In order to determine what constitutes a parliamentary convention, the Commissioner then turned to Black’s Law dictionary and to the Act’s preamble. This is a curious approach given that the previous Commissioners had already

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424 Pupatello Report, supra note 421 at 8.

425 MIA, supra note 13 at 5.

426 Pupatello Report, supra note 421 at 9.
done a great deal of work to define Ontario parliamentary convention. As we have seen above, Commissioner Evans assisted in the drafting of the legislation and cited constitutional scholars in his work to clarify the concept of Ontario parliamentary convention. Perhaps Commissioner Osborne did not have access to the previous Commissioners’ reports or alternatively, he either chose to ignore them or did not believe himself to be bound by them. Each of these possibilities is rather curious given that the Members’ Integrity Act places a burden on members to follow rules that promote transparency and accountability. Ontario parliamentary convention was perhaps the most provocative of these rules that were designed to promote accountability. Given the role that Commissioner Evans played in the drafting of the 1994 legislation, it is curious that Commissioner Osborne’s report did not acknowledge Evans’ body of work in this area.

What is also interesting about those comments made by Commissioner Osborne quoted above is that he seems to be saying that the rule requiring a member’s personal business to be kept separate from his or her duties as a public office holder is an example of a parliamentary convention. Perhaps this was the case before conflict of interest guidelines and legislation came into existence, but now this principle is well recognized in law and there is no reason why it would ever need to be thought of as a conventional rule in the context of Ontario’s government ethics regime. The Commissioner continues to confuse matters when he relies on section 5 of the Act and explains that:

> In my opinion although parliamentary convention permits a member to assist a constituent in certain circumstances, it does not extend to legitimize a member assisting a friend or a constituent in piggy backing on a government contract, manifestly intended to provide for Government of Ontario courier needs even where the friend or constituent receives no financial gain in the transaction.

> I therefore conclude that in participating as she did as Ms. McCulloch’s agent in couriering Ms. McCullogh’s eight boxes to England, Ms. Pupatello acted contrary to parliamentary convention.

With the above statements, the Commissioner is arguably saying that:

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427 See e.g. supra, note 306.

428 Pupatello Report, supra note 421 at 10.
1) Section 5 of the Act means that there are parliamentary conventions that apply to the work members engage in on behalf of their constituents;

2) Whatever those convention are, none of them permit Ms. Pupatello’s actions of using the Purolator preferred rate for a friend;

3) Therefore, Ms. Pupatello’s actions are a violation of Ontario parliamentary convention.

It seems that the Commissioner is declaring a violation simply by reason of non-conformity. It is not clear what the parliamentary convention is that the Commissioner believes has been violated until later in his report when he states that:

…in my view, the core issue is not how much was gained or lost but rather whether this kind of third party participation in a Government of Ontario contract, facilitated in the circumstances by Ms. Pupatello, was appropriate. It is my view the clear answer to that question is that Ms. Pupatello’s participation in the Purolator – Government of Ontario contract solely for the benefit of a friend and constituent was inappropriate. It constitutes a breach of parliamentary convention.\textsuperscript{429}

Commissioner Osborne determined that there was a parliamentary convention in Ontario that members should not use government contracts to benefit their friends and constituents. This does not appear to be in line with the reasoning historically put forth by Commissioners Evans and Rutherford to justify their declarations of parliamentary convention. Commissioner Osborne’s analysis also made it clear that the member filing the request for an investigation no longer needed to be specific about what parliamentary convention had been violated, as had been explicitly required by Commissioner Rutherford.

Commissioner Osborne appeared before the Canadian Senate’s Standing Committee on Rules, Procedures and the Rights of Parliament approximately six months after the Pupatello report was released. The Standing Committee was considering proposals to amend the Federal ethics legislation. Several members of the Standing Committee

\textsuperscript{429} Ibid at 11.
focused their questions to Commissioner Osborne on the concept of Ontario parliamentary convention. In his responses, the Commissioner relayed his explanation of the concept from his Pupatello report.\textsuperscript{430} He noted that he based his definition of the concept on the Black’s Law Dictionary definition and the Act’s preamble. After listening to the Commissioner’s explanation, the chairman of the standing committee, Senator Lorne Milne, commented that “[p]erhaps it is a good thing that the proposed code that we are studying does not use that phraseology.”\textsuperscript{431} Senator Serge Joyal added that he “would have second thoughts about putting this in a code because of the difficulty of adjudicating on it.”\textsuperscript{432}

After hearing that others found Ontario parliamentary convention to be confusing and undesirable, Commissioner Osborne used his 2002-2003 annual report to reiterate his explanation of the concept of an Ontario parliamentary convention.\textsuperscript{433} He then had occasion to consider its application when he received a request in 2003 to investigate the actions of Dave Levac, the member from Brant.

Marilyn Mushinski, the member for Scarborough Centre, filed a complaint alleging simply that Mr. Levac had “breached the provisions of the Members’ Integrity Act, 1994.”\textsuperscript{434} Mr. Levac had visited the Don Jail in Toronto accompanied by two people whom he allegedly passed off as his staff. Only one of the individuals accompanying him was in fact a member of Mr. Levac’s staff and the other was a reporter from the Toronto Star. Due to Mr. Levac’s status as the opposition critic for the Ministry of Public Safety and Security, he occasionally inspected custodial institutions throughout the

\textsuperscript{430} Pupatello Report, \textit{supra} note 421.
\textsuperscript{432} \textit{Ibid} at 15:27 (Serge Joyal).
\textsuperscript{434} Ontario, Office of the Integrity Commissioner, \textit{Report of The Honourable Coulter A. Osborne, Integrity Commissioner Re: Mr. Dave Levac, Member for Brant} (Toronto: Office of the Integrity Commissioner, 2003) at 1 [Levac Report].
province. In May 2002, the Toronto Star was denied access to the Don Jail because public visitation to the facility was temporarily suspended due to the SARS crisis.\footnote{Ibid at 4} Knowing that “Mr. Levac had a statutory right under section 59 of the Ministry of Correctional Services Act to enter and inspect any correctional institution in Ontario,”\footnote{Ibid at 3} the Star contacted Mr. Levac’s office and arranged to have their reporter gain access to the jail. Mr. Levac’s assistants promptly phoned the Don Jail and advised that he “would be arriving at 4:00pm that afternoon, to enter and inspect the facility, accompanied by two assistants.”\footnote{Ibid.} Ms. Mushinski’s allegation was that the visit violated the Act because it was improper for Mr. Levac to pass the reporter off as a member of his staff.\footnote{Ibid at 1.}

Commissioner Osborne concluded in his report that Mr. Levac’s actions were indeed improper, but that they did not violate any specific provision of the Members’ Integrity Act. In considering the three general provisions in the Act that provided for restrictions on the conduct of members,\footnote{See Ibid at 2-4.} the Commissioner concluded that:

I do not think that any of sections 2, 3 and 4 apply. Sections 2 and 4 focus on making (section 2) or influencing (section 4) a decision. Although “decision” is not defined in the Act it seems to me that it must relate to a decision that is made in the Legislative Assembly, in Cabinet or perhaps at a Committee level. Thus, although the Toronto Star’s private interests may have been preferred to the interests of its competition, in my view, s.2 is not engaged because the preference in question did not arise out of a “decision” as referred to in sections 2 and 4. Section 3 is different in that it involves the improper use of information not available to the general public. The facts here do not trigger the application of section 3, in my opinion.\footnote{Levac Report, supra note 434 at 8.}

He then analyzed section 5 before moving on and concluding that Mr. Levac had violated Ontario parliamentary convention:
…section 5 legitimizes members’ activities if those activities are normally done on behalf of constituents in accordance with Ontario parliamentary convention. The events surrounding the Toronto Jail visit did not concern Mr. Levac’s constituents directly. Thus, section 5 has no direct application. It does, however, highlight the significance of conduct in which members typically, or as section 5 puts it, “normally engage”. This broad range of acceptable (or unacceptable) conduct is what parliamentary convention is all about….In participating in this venture as he did, in my opinion, Mr. Levac did not meet the standards imposed by parliamentary convention. The ends, - exposing the conditions at the Toronto Jail to the public through the media did not justify the means – participating in a plan designed to assist in providing a member of the media access to a correctional facility.\(^{441}\)

Commissioner Osborne’s second investigation report clarified that parliamentary convention now had a general meaning that encompassed all rules, practices or norms that the Commissioner believed to be generally accepted by parliamentarians in Ontario and that could be explained or justified by appeal to the Act’s preamble. Neither the Pupatello report nor the Levac report contained analysis to demonstrate how the Commissioner determined what Ontario’s parliamentarians had generally accepted. The conclusions that these two members violated Ontario parliamentary convention appeared to rest wholly on the Commissioner’s exercise of his own discretion as to what parliamentarians had accepted. This was the case despite the fact that Commissioner Evans had concluded in the Cunningham report\(^{442}\) that a precedent needed to be established in order to find that a parliamentary convention had been violated. The Cunningham report was Commissioner Evans’ first report dealing with Ontario parliamentary convention after the passing of the 1994 legislation and is arguably the single most compelling indicator of legislative intent that is available with respect to this concept.

Commissioner Osborne would have one further opportunity in 2003 to consider whether a member’s actions amounted to a breach of parliamentary convention when Ms. Caroline Di Cocco, the member for Sarnia-Lambton, filed a complaint against Premier

\(^{441}\) Ibid at 10.

\(^{442}\) Cunningham Report, supra note 170 at 2.
Ernie Eves, the Honourable Tony Clement, the Honourable James Flaherty, and the Honourable Brian Coburn for allegedly engaging in partisan political conduct while they were engaged in Ministry business. Ms. Di Cocco later withdrew her complaint against Premier Eves and Minister Clement when it came to her attention that they were not in fact on government business when they engaged in the activities about which she was complaining. As a result of an election being called and Mr. Coburn not re-gaining his seat, the complainant withdrew her complaint against him and the only complaint that proceeded was the one against Minister Flaherty.

The facts of this complaint did not lead Commissioner Osborne to conclude that Minister Flaherty had violated the Members’ Integrity Act. The Commissioner did draw attention in his report to what in his opinion was a further principle that had become “part of parliamentary convention:”

…since tax payers pay the expenses incurred by Ministers engaged in Ministry business, Ministers should discharge their duties and responsibilities as Ministers in a non-partisan manner. I would add that quite apart from the expense rationale, parliamentary convention has long recognized that while engaged in Ministry business, Ministers should not mix that business with partisan political activity.

There was again no indication in his report that Commissioner Osborne had searched for precedent in the literature or in the legislature to support his finding that this principle is

443 The Minister of Health and Long-Term Care
444 The Minister of Enterprise, Opportunity and Innovation
445 The Minister of Tourism and Recreation
446 Ontario, Office of the Integrity Commissioner, Report of The Honourable Coulter A. Osborne, Integrity Commissioner Re: Mr. Ernie Eves, Mr. Tony Clement, Mr. James Flaherty and Mr. Brian Coburn (Toronto: Office of the Integrity Commissioner, 2003) at 2 [ECF&C Report].
447 Ibid.
448 Ibid.
449 MIA, supra note 13.
450 ECF&C Report, supra note 446 at 5.
451 Ibid at 4.
considered to be “part of parliamentary convention”\textsuperscript{452} under the \textit{Act}. This approach can be contrasted with Commissioner Evans’ comments in his 1995-1996 annual report, wherein he remarked that Ontario parliamentary conventions are “recognized customs and procedures which have developed over the years in the Ontario Legislature and have been adopted by it as precedents.”\textsuperscript{453} Having not provided any such support for this newly recognized convention, Commissioner Osborne then released his annual report in which he seemed almost apologetic that Ontario parliamentary convention might be a difficult concept for members to understand:

The Act also incorporates Parliamentary Convention as a standard against which Members’ conduct is to be measured. The inclusion of Parliamentary Convention in the Act is important. It enables conduct to be regulated in areas that do not come within the specific rule based conduct controls set out in the Act. Although I acknowledge that including a concept like Parliamentary Convention in a regulatory legislation introduces elements of uncertainty, I think Members generally accept the principle that acting in a way that breaches Parliamentary Convention ought to be prohibited by the Act.\textsuperscript{454}

In the wake of this acknowledgment, Commissioner Osborne’s next two reports dealing with parliamentary convention returned to a detailed analysis of the concept that more closely resembled Commissioner Evans’ approach. These two reports were prepared in response to related complaints that were filed by two different members about the same general issue. Mr. James Flaherty, the member for Whitby-Ajax, filed one complaint against the Honourable Greg Sorbara, Minister of Finance. Bob Runciman, the member for Leeds-Grenville, filed the other complaint against Premier Dalton McGuinty. Both complaints concerned alleged leaks of Ontario’s May 2004 budget in advance of it having been tabled with the Legislature. One complaint alleged that Premier McGuinty leaked portions of Ontario’s budget to the Prime Minister of Canada. The complaint against Minister Sorbara alleged that he had leaked portions of the budget to the media.

\textsuperscript{452} \textit{Ibid} at 5.


The specific allegation was that the Premier and Minister of Finance had breached the parliamentary convention of budget secrecy. Commissioner Osborne recognized in his reports that both complaints required “consideration of the practice of budget secrecy, the principles that underlie it and its scope,” but he did not accept that a violation of the budget secrecy convention was necessarily a violation of Ontario parliamentary convention. The Commissioner noted in his analysis that the Speaker of the Ontario Legislature had previously addressed the topic of budget secrecy in May 9, 1983, when he referred to it as a “political convention” that had “nothing to do with parliamentary privilege.” The Speaker further noted at that time that:

The disclosure of information relating to the budget has to do with the conduct of a minister of the crown in the performance of his ministerial duties. Allegations that the Treasurer failed to ensure the secrecy of the budget and thereby permitted a budget leak may only be raised by a substantive motion of confidence in, or censure of, the minister.

Commissioner Osborne followed this analysis and determined that there was no breach of parliamentary convention by either the Premier or the Minister of Finance. He determined that not all political conventions should properly be considered parliamentary conventions, and concluded that the actions in question did not offend the principle of budget secrecy even if that principle was in fact a parliamentary convention:

In the circumstances of this complaint, I do not think that it matters whether budget secrecy, however its scope is defined, is viewed as a political practice (or convention), or as a parliamentary convention. I say that because I do not think that the breaches of budget secrecy alleged are sufficiently egregious or


457 Ibid.

far from the mainstream that they are capable of giving rise to a finding of a breach of parliamentary convention as referred to in the *Members’ Integrity Act*.\(^{459}\)

Perhaps the most interesting aspect of the McGuinty and Sorbara reports however, was that the Commissioner also recognized that the Supreme Court of Canada’s 1981 decision in the *Patriation Reference*\(^{460}\) was relevant to the concept of a parliamentary convention:

> Conventions are consistently followed rules that are not enforced in law, that is by the courts. They prescribe ways in which legal powers are exercised, and in some limited circumstances not exercised at all. In a constitutional context, conventions embrace rules which are observed in practice and, although they do not have the force of law, they may have legal effect. The Supreme Court of Canada made this clear in the well known Constitutional Reference Case. Although not directly enforceable in law, conventions may be transformed into law by being included in a statute. This will create a legal obligation where none existed before. The *Members’ Integrity Act* provides a useful example of that occurrence. In the *Members’ Integrity Act* parliamentary convention is given legal effect through several provisions of the *Members’ Integrity Act*.\(^{461}\)

Commissioner Osborne drew support for his work regarding parliamentary convention from the Supreme Court of Canada’s comment that specific conventions can become law by being explicitly included in legislation. Despite the Commissioner’s attempt to draw a parallel between constitutional and parliamentary convention however, the *Members’ Integrity Act* is not an example of legislation that gives legal effect to specific conventions. The *Members’ Integrity Act* merely recognizes conventions in a general sense and only allows the Integrity Commissioner to recognize specific conventions in the context of whether one has been violated. The *Act* itself does not recognize any specific conventions. Furthermore, Commissioner Osborne expanded the scope of parliamentary convention well beyond rules that one might reasonably understand to be influenced by the Supreme Court’s comments on constitutional conventions. In the


Pupatello\textsuperscript{462} and Levac reports\textsuperscript{463} for instance, the Commissioner broadened the definition of Ontario parliamentary convention to encompass all rules, practices or norms that he believed to be generally accepted by parliamentarians in Ontario and that could be explained or justified by appeal to the Act’s preamble.

The Commissioner also drew attention in the Sorbara report\textsuperscript{464} to a few important distinctions. First, there was a distinction between constitutional conventions and parliamentary conventions. Second, there was a distinction between parliamentary conventions and political conventions. Finally, the Commissioner held that there was a distinction between parliamentary conventions that impacted on members’ conduct within the legislature and those that impact on members’ conduct outside of the legislature:

Parliamentary convention as referred to in the Members’ Integrity Act is used as a conduct related device to control, and in some cases sanction, Members’ conduct. In my view, the adjective “parliamentary” limits the scope of the convention to matters having to do with the Members as parliamentarians. Thus, not all political conventions would properly be considered to be parliamentary conventions for Members’ Integrity Act purposes. Moreover, to the extent that parliamentary convention may impact on members’ conduct in the Legislature, such parliamentary conventions are for the Speaker to consider. They do not engage the Members’ Integrity Act.\textsuperscript{465}

It is unclear what exactly was meant by the Commissioner’s comment that the parliamentary convention in the Act only applied to “members as parliamentarians,”\textsuperscript{466} because he did not provide examples. This is perhaps a reference to the distinction made in Commissioner Evans’ Harris report\textsuperscript{467} wherein he noted that the Premier’s actions were taken in his official capacity as Premier and that they accordingly fell outside of the

\textsuperscript{462} Pupatello Report, \textit{supra} note 421.
\textsuperscript{463} Levac Report, \textit{supra} note 434.
\textsuperscript{464} Sorbara Report 2004, \textit{supra} note 455.
\textsuperscript{465} \textit{Ibid} at 3.
\textsuperscript{466} \textit{Ibid}.
\textsuperscript{467} Evans’ Harris Report, \textit{supra} note 399.
jurisdiction of the *Members’ Integrity Act*. Commissioner Osborne clearly asserted in this report however that members’ conduct within the Legislature is the jurisdiction of the Speaker. No Integrity Commissioner in Ontario had ever previously commented on the Speaker’s jurisdiction over the conduct of members when discussing parliamentary convention. Commissioner Osborne’s comment suggests that the Speaker has some jurisdiction over members’ conduct within the legislature that might otherwise be subject to the rules of parliamentary convention were that conduct to take place outside of the Legislature. The next complaint received by the Commissioner would allow him to elaborate on this point.

A complaint was submitted in April of 2006 by Mario Sergio, the member for York-West, about the conduct of Robert Runciman, the member for Leeds-Grenville. Mr. Runciman had made comments inside and outside of the legislature with respect to a matter that was before the Superior Court of Justice. Plea negotiations were ongoing between a woman who was the innocent victim of a drive-by shooting and the four men who were charged in that shooting. The joint submission on sentencing entered by the parties included a term requiring that the victim be paid $2,000,000.00. This payment was referred to as a “restitution order.” Mr. Runciman was the opposition critic for the Ministry of the Attorney General and a former Solicitor General. He was not happy with the idea that the victim might be compensated with what he thought to be “dirty money.” He voiced his displeasure both during proceedings within the Legislature and to a reporter outside of the Legislature. Mr. Sergio’s complaint to the Integrity Commissioner alleged that Mr. Runciman breached the parliamentary convention known as the “*sub judice rule*” by making the comments that he made. The Integrity Commissioner determined that Mr. Runciman’s comments made outside of the Legislature were in fact “intended to influence the disposition of the criminal

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469 Ibid at 6.

470 Ibid at 5.

471 Ibid at 2.
prosecution”\textsuperscript{472} and were “a clear violation of the \textit{sub judice} rule, which is part of parliamentary convention as that term is referred to in the \textit{Members' Integrity Act.”}\textsuperscript{473}

The commissioner also concluded that he did not have jurisdiction over the member’s comments made inside the Legislature because it was the Speaker’s responsibility to determine the appropriateness of those comments:

The Speaker’s jurisdiction, at least in part, comes from Standing Order 23(g) to which I have made reference earlier. It provides:

In a debate, a Member shall be called to order by the Speaker if he or she:

(g) refers to any matter that is the subject matter of a proceeding

(i) that is pending in a court or before a judge or judicial determination, or
(ii) that is before any quasi-judicial body constituted by the House or under the authority of an Act of the Legislature where it is shown to the satisfaction of the Speaker that further reference would create a real and substantial danger of prejudice to the proceeding.\textsuperscript{474}

This conclusion was not surprising given the Commissioner’s comments in his previous report regarding the allegations against the Premier and Minister of Finance with respect to budget secrecy. It is prudent in light of this report to seek to understand the breadth of the Speaker’s jurisdiction over the conduct of members and how it relates to the Integrity Commissioner’s jurisdiction.

\section*{4.5 The Speaker’s Jurisdiction over Members’ Conduct}

As Commissioner Osborne pointed out in the Levac report,\textsuperscript{475} the Speaker derives his or her jurisdiction over the conduct of members within the legislature from the Standing

\textsuperscript{472} \textit{Ibid} at 8.
\textsuperscript{473} \textit{Ibid}.
\textsuperscript{474} \textit{Ibid} at 3.
\textsuperscript{475} Levac Report, \textit{supra} note 434.
Orders of the Legislative Assembly of Ontario. Among the current standing orders that have been in place in Ontario since January 2009 there are arguably six main orders that are of important for the purposes of this paper.

The first is found at section 1, which sets up the overall purpose of the Standing Orders and addresses what happens if and when the Standing Orders cannot cover all possible contingencies. Section 1 provides that the Speaker is responsible for making a ruling based on the democratic rights of members and any applicable usages and precedents of the Legislature and Parliamentary tradition when faced with those situations that were not contemplated by the Standing Orders.

Business of House conducted according to Standing Orders

1. (a) The proceedings in the Legislative Assembly of Ontario and in all Committees of the Assembly shall be conducted according to the following Standing Orders.

Purpose

(b) The purpose of these Standing Orders is to ensure that proceedings are conducted in a manner that respects the democratic rights of members, (i) to submit motions, resolutions and bills for the consideration of the Assembly and its Committees, and to have them determined by democratic vote; (ii) to debate, speak to, and vote on motions, resolutions and bills; (iii) to hold the government accountable for its policies; and (iv) collectively, to decide matters submitted to the Assembly or a Committee.

Contingencies unprovided for

(c) In all contingencies not provided for in the Standing Orders the question shall be decided by the Speaker or Chair and, in making the ruling, the Speaker or Chair shall base the decision on the democratic rights of members referred to in clause (b). In doing so the Speaker shall have regard to any

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477 Ibid, s 1(c).
applicable usages and precedents of the Legislature and Parliamentary tradition.\textsuperscript{478}

Section 13 sets out the Speaker’s obligation to preserve order and decorum in the legislature by deciding on questions of privilege and/or points of order:

Speaker to preserve order

13. (a) The Speaker shall preserve order and decorum, and shall decide questions of privilege and points of order. In making a decision on a question of privilege or point of order or explaining a practice, the Speaker may state the applicable Standing Order or authority.\textsuperscript{479}

A point of order is when a member draws the attention of the Speaker to an alleged breach of the parliamentary rules, as found in the standing orders.\textsuperscript{480} The standing orders also define privileges at section 21(a):

Privileges

21. (a) Privileges are the rights enjoyed by the House collectively and by the members of the House individually conferred by the Legislative Assembly Act and other statutes, or by practice, precedent, usage and custom.

Privileges are rights and immunities that belong to the assembly and its members and are essential to the operation of the assembly. Privileges and immunities allow individuals involved in the parliamentary process to fulfill their duties without obstruction or fear or prosecution.\textsuperscript{481} Two examples of individual privileges are the right to freedom of speech in debate and the freedom of members from arrest. Some of the collective privileges are access to the Crown; detention or molestation for civil causes during defined periods; immunity of members from the obligation to serve on juries; the power to regulate its own proceedings by establishing its own rules or standing orders; the power to order the

\textsuperscript{478} Ibid, s 1.

\textsuperscript{479} Ibid, s 13.


\textsuperscript{481} Ibid at Parliamentary Privilege.
attendance at the Bar of the House of persons whose conduct has been brought before the House on a matter of privilege; and, the power to order the arrest and imprisonment of persons guilty of contempt or breach of privilege.\textsuperscript{482}

As was noted by Commissioner Osborne in the Runciman report,\textsuperscript{483} section 23(g) of the Standing Orders codifies the \emph{sub judice} convention. This provision requires that the Speaker call a member to order if he or she refers to a matter that is pending in a court of before a judge for judicial determination, and if the Speaker is satisfied that further reference to the matter has the real potential to prejudice the proceedings in question. This rule also applies to quasi-judicial bodies that are created under an Act or the authority of the Legislature.\textsuperscript{484}

While each of these provisions in the Standing Orders bestows some authority or obligation on the Speaker to deal with members’ conduct, it is arguably only section 1(c) that would operate to allow the Speaker to rule on matters that are similar in kind to that which may be contemplated by Ontario parliamentary convention. Rules that are already written down in the Standing Orders, like the \emph{sub judice} convention, are no longer conventions in the traditional sense, even though they may have originated as such. Commissioner Osborne noted in the Sorbara report, “conventions may be transformed into law by being included in a statute.”\textsuperscript{485} The Standing Orders operate in much the same manner as a statute within the context of the rules that govern members’ conduct when in parliament.\textsuperscript{486} It is therefore not immediately clear what Commissioner Osborne meant when he wrote that “to the extent that parliamentary convention may impact on members’


\textsuperscript{483} Runciman Report, \textit{supra} note 468.

\textsuperscript{484} Standing Orders, \textit{supra} note 476, s 23(g).

\textsuperscript{485} Sorbara Report 2004, \textit{supra} note 455 at 3.

\textsuperscript{486} If the \emph{sub judice} convention exists outside of parliament, it would arguably fall under the Integrity Commissioner’s jurisdiction and Ontario parliamentary convention.
conduct in the Legislature, such parliamentary conventions are for the Speaker to consider. One can only assume that he was allowing for those contingencies contemplated by section 1(c) of the Standing Orders, but no clear example of such a convention was offered.

In his final report, Commissioner Osborne considered whether the Honourable Harinder Takhar, Minister of Transportation and member for Mississauga Centre, violated the Members’ Integrity Act with respect to the establishment and management of his blind trust. John Tory, the Leader of the Official Opposition and the member for Dufferin-Peel-Wellington-Grey, filed a complaint alleging that Minister Takhar did not comply with the provisions of the Act related to the requirement that a Minister place his or her businesses interest(s) in a blind trust that is to be managed by an trustee who is at arm’s length to the minister. Specifically, sections 12(1) and 12(2), para 2 of the Act, required that:

12. (1) A member of the Executive Council shall not carry on business through a partnership or sole proprietorship.

(2) A member may comply with the requirements of subsection (1) by entrusting the business or his or her interest in the business to one or more trustees on the following terms:

2. The trustees shall be persons who are at arm’s length with the member and approved by the Commissioner.

Minister Takhar owned a controlling interest in the Chalmers Group of Companies when he was appointed to the executive council. He was required to place that controlling interest in a management trust with a trustee who was at arm’s length to him. The definition of arm’s length was not in the Act, but the Commissioner accepted Mr. Tory’s submission that the appropriate definition of arm’s length is that there are “no bonds of dependence, control or influence, in the sense that there is no moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the

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487 Ibid.
488 MIA, supra note 13 at 12(1) and 12(2).
Mr. Tory’s complaint specified that Minister Takhar had visited the head office of the Chalmers Group of Companies in order to engage in the management of a business held by the corporation and that his trustee was not in fact at arm’s length.

Minister Takhar admitted in his response that he had attended at the company’s offices to visit his wife and trustee, but he denied that the visit was for any purpose other than to discuss his daughter’s desire to attend school overseas. The Minister also noted that Commissioner Osborne had approved his trustee and that section 30(7) of the Act stated that the Commissioner cannot recommend a penalty for a breach of the Act if the member in question sought and followed the Commissioner’s recommendation and had, “before receiving those recommendations, disclosed to the Commissioner all the relevant facts that were known to the member.” The Commissioner took the position that although Minister Takhar did advise that his trustee had no previous or present relationship to the Chalmers Group of Companies, it ought to have been disclosed that he was appointed as the CFO of the Minister’s riding association under the Elections Finances Act shortly before the Commissioner approved his appointment. The trustee would not have been considered to be at arm’s length under the definition of arm’s length that was accepted by the Commissioner if this information had been disclosed.

Upon reviewing Minister Takhar’s response to Mr. Tory’s allegations, Commissioner Osborne concluded that he had no reason to believe that the minister’s attendance at the Chalmers Group of Companies’ building was for any reason other than to consult with his spouse and trustee about his daughter’s academic pursuits. There was no evidence to suggest that the minister was contributing to the management of any of the Chalmers

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489 Ontario, Office of the Integrity Commissioner, Report of The Honourable Coulter A. Osborne, Integrity Commissioner Re: The Honourable Harinder Takhar, Minister of Transportation & Member for Mississauga Centre (Toronto: Office of the Integrity Commissioner, 2006) at 28 [Takhar Report].

490 MIA, supra note 13, s 30(7).

491 RSO 1990, c E.7.

492 Takhar Report, supra note 489.
Group companies. With respect to the minister’s trustee, the Commissioner concluded that “the Minister has breached s.11 of the Act and parliamentary convention associated with the establishment of management trusts by allowing Mr. Jeyanayangam to continue as his trustee after he became treasurer of his Riding Association and by failing to disclose that Mr. Jeyanayangam was his CFO under the Election Finances Act.” It is not clear what the parliamentary conventions were that the Commissioner believed to be “associated with the establishment of management trusts,” but it is clear that Commissioner Osborne concluded that there was a violation of parliamentary convention.

Commissioner Osborne brought about a significant change to the convention-based standards applicable to members of provincial parliament during his tenure as Ontario’s Integrity Commissioner. The complaint against Sandra Pupatello clearly presented a challenge for the legislation at the time and also for Commissioner Osborne. The creative expansion of the concept of Ontario parliamentary convention allowed the Commissioner to declare Ms. Pupatello’s actions to be improper, despite their having been no precedent to support this expansion of the concept. This expansion also continued to permit Commissioner Osborne to use Commissioner Evans and Commissioner Rutherford’s interpretations of Ontario parliamentary convention. As a result of Commissioner Osborne’s new approach to Ontario parliamentary convention however, members could now also be held accountable for violating rules for which no clear precedent had been established within the legislature or legislative proceedings. This expanded jurisdiction has adopted by Commissioner Osborne’s successor and has been used in much the same manner.

4.6 Commissioner Morrison

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493 Ibid.
494 Takhar Report, supra note 489 at 29-30.
495 Ibid.
Ms. Lynn Harris\textsuperscript{496} started working at the Office in 1988 under Commissioner Evans. She continued to take on progressively more senior roles alongside each subsequent Integrity Commissioner until she was appointed Acting Integrity Commissioner on July 31, 2007.\textsuperscript{497} Given that Ontario’s legislation was the first of its kind in Canada, Commissioner Morrison’s experience administering government conflict of interest legislation and working alongside other Integrity Commissioners far exceeds that of any other official in Canada. The members of the Legislative Assembly of Ontario unanimously placed their confidence in Ms. Morrison by removing her “acting” title on April 13, 2010 and appointing her as the province’s fourth Integrity Commissioner.

The first complaint received by Commissioner Morrison concerned the actions of the Speaker of the Legislative Assembly and was submitted by Peter Kormos, the member for Welland. Mr. Kormos complained that the Speaker, Michael Brown, had attended a post-election celebratory dinner for members of the Liberal caucus and their families and that his attendance was a violation of parliamentary convention under the Act.\textsuperscript{498} Mr. Kormos took the position “that it is a clear and long-established Parliamentary Convention contemplated by the Members’ Integrity Act, 1994 that the Speaker abstain from partisan political activity to protect the impartiality of the Office of Speaker…”\textsuperscript{499}

Commissioner Morrison first considered whether she had jurisdiction to receive the complaint before she would consider whether such a convention existed. As she stated:

\begin{quote}
I agree with the view of the former Integrity Commissioner The Honourable Coulter A. Osborne, that not all conventions were intended to be captured by the Members’ Integrity Act, 1994. Accordingly, if I determine that I do not
\end{quote}

\textsuperscript{496} She would later change her last name to Morrison.


\textsuperscript{499} \textit{Ibid} at 4.
have jurisdiction, I will not decide whether Mr. Brown’s conduct was a violation of Parliamentary Convention. 500

Mr. Kormos argued that the Speaker is not expressly excluded from the Act and therefore must be subject to it. The Commissioner considered this argument and determined that the contrary was true and that the legislature would have explicitly included the Speaker in the legislation had it intended for the Speaker to be subject to the Act in his or her capacity as Speaker. 501 The Commissioner’s opinion was that the Speaker was only subject to the Act in his role as a member and not in his official role as the Speaker of the Legislative Assembly.

Commissioner Morrison did not address whether a convention existed that prohibited the Speaker from engaging in partisan activities while holding the office of Speaker. She did not address this question due to what she determined to be a limitation in her jurisdiction. Former Commissioner Osborne had taken the position that there was a distinction between parliamentary conventions that the Commissioner had jurisdiction over and parliamentary conventions that the Speaker must consider. 502 Commissioner Morrison’s report outlined a further category of parliamentary convention that exists due to the House’s jurisdiction to decide on questions of misconduct by the Speaker. 503 Because the Speaker holds office on the confidence of the members, it is the members who have jurisdiction to consider whether his or her attendance at a partisan fundraiser is a violation of parliamentary convention.

The Commissioner also received a complaint later that same year from Liz Sandals, the member for Guelph. Ms. Sandals alleged that Ted Chudleigh, the member for Halton, had breached parliamentary convention and thus violated the Members’ Integrity Act by

500 Ibid at 6-7.
501 Ibid at 8.
502 Runciman Report, supra note 468 at 3.
503 Brown Report, supra note 498 at 5.
using constituency office resources for partisan purposes.\textsuperscript{504} Specifically, Mr. Chudleigh was using the same website address for both his constituency office and his riding association.\textsuperscript{505} Mr. Chudleigh took the position that managing one website was more efficient than managing two and that he was not using legislative or government funds improperly because his riding association was paying for and managing that website.

Commissioner Morrison’s analysis referenced rules explained in annual reports from 1998-1999,\textsuperscript{506} 2002-2003\textsuperscript{507} and 2004-2005\textsuperscript{508} requiring constituency offices to remain non-partisan at all times. None of those opinions referenced a section of the Members’ Integrity Act as justification. Although it was not included in the Commissioner’s report, the 1998-1999 annual report also included an anonymous question about whether it was appropriate to use a constituency office’s email address to communicate with colleagues about a members’ intention to run for the nomination in a new riding. Commissioner Rutherford’s opinion was as follows:

It is inappropriate to use the Queen’s Park or constituency office, including the e-mail system, for any activities related to the member’s nomination or re-election.

The member was referred to the Member’s Guide with respect to Political Activity Regulations in which it states that these “offices can never be used to further activities such as Riding Association activities, political meetings or to display partisan politically-oriented signs.” Although the Commissioner does not have jurisdiction to interpret the Regulation, the member should keep political activities separate from the duties of a Member of Provincial Parliament.\textsuperscript{509}

\textsuperscript{504} Ontario, Office of the Integrity Commissioner, \textit{Report of Lynn Morrison, Acting Integrity Commissioner Re: Ted Chudleigh, Member for Halton} (Toronto: Office of the Integrity Commissioner, 2008) at 1 [Chudleigh Report].

\textsuperscript{505} \textit{Ibid}.

\textsuperscript{506} Chudleigh Report, \textit{supra} note 504 at 5.

\textsuperscript{507} \textit{Ibid} at 6.

\textsuperscript{508} \textit{Ibid} at 5.

\textsuperscript{509} 1998-1999 Annual Report, \textit{supra} note 395 at 14 (see “Inquiry No. 18”).
Commissioner Rutherford did not refer to the rule that constituency offices remain non-partisan as a parliamentary convention in 1998-1999, but rather referenced the Members’ Guide and noted his lack of authority over such concerns. Commissioner Morrison noted in her report regarding Ted Chudleigh that page 15 of the Members Handbook\(^{510}\) stated: “[p]lease note that Global Budget funding support is limited to websites that have non-partisan and non-political content only;\(^{511}\) but then determined that she had jurisdiction nonetheless:

[T]here is a practice in Ontario that members who offer constituency services on the internet – a virtual constituency office – have followed the same rules that are applicable to traditional constituency offices. Whether or not this practice is a function of the funding rules is irrelevant. The practice has created an expectation on the part of constituents in Ontario that constituency services they access will be non-partisan. This practice is consistent with the objectives of the Members’ Integrity Act and, I find, is a parliamentary convention. Consequently, any conduct that is not permitted within the four walls of a constituency office is not permitted within a virtual constituency office.\(^{512}\)

It is not clear whether it was the members’ acceptance of the rules regarding websites being non-partisan or the public’s expectation that websites would be non-partisan that led the Commissioner to conclude that a rule in the Handbook should now be recognized as a parliamentary convention. Regardless, the Integrity Commissioner’s jurisdiction had been expanded to include members’ websites. Commissioner Morrison then offered the following advice for members so that they would not violate parliamentary convention when managing their virtual constituency office(s):

1. If a member decides to offer constituency information on the Internet, it must be available in a non-partisan format. Specifically, the website must not display a party logo, any reference to a riding association including a link to a riding association website, information about riding association activities or an invitation to make political donations.

\(^{510}\) The Members’ Handbook was previously referred to as the Members’ Guide. Copies of the Handbook/Guide are available to members from the Financial Services branch at the Legislative Assembly of Ontario and are not made available to the public.

\(^{511}\) Chudleigh Report, \textit{supra} note 504 at 6.

\(^{512}\) \textit{Ibid} at 8.
2. Members can have both a constituency and a riding association website. If they choose to do so, the URLs must be distinct from each other.\textsuperscript{513}

The Chudleigh report was reaffirmed in 2011 when Rick Johnson, the member for Haliburton-Kawartha Lakes-Brock, alleged that Randy Hillier, the member for Lanark-Frontenac-Lennox and Addington, breached Ontario parliamentary convention. Mr. Johnson complained that an e-mail had been sent out to campaign supporters from a PC candidate’s email address and that when recipients “moused-over” a link in the e-mail Mr. Hillier’s constituency office’s website address would appear in a pop-up box.\textsuperscript{514} Commissioner Morrison’s report repeated that:

\[\text{…using constituency office resources (i.e. phone, fax lines, websites) for partisan purposes is not appropriate, is contrary to Ontario parliamentary convention and accordingly is a contravention of the Members’ Integrity Act}\textsuperscript{515}\]

The Commissioner then concluded that the pop-up with Mr. Hillier’s constituency office website address was a mistake made by an information technology contractor who had worked for both Mr. Hillier and for the PC candidate. As such, Mr. Hillier did not violate Ontario parliamentary convention.\textsuperscript{516}

Monte McNaughton, the member for Lambton-Kent-Middlesex, was the next member to file a complaint with the Integrity Commissioner. Mr. McNaughton alleged that the Honourable Brad Duguid, Minister of Economic Development and Innovation and the member for Scarborough Centre, contravened the Members’ Integrity Act\textsuperscript{517} because of the way his 2012 holiday cards were mailed. Specifically, Mr. Duguid’s holiday cards

\textsuperscript{513} \textit{Ibid} at 10.


\textsuperscript{515} Chudleigh Report, \textit{supra} note 504 at 6 cited in Hillier Report, \textit{supra} note 514 at 6-7.

\textsuperscript{516} Hillier Report, \textit{supra} note 514 at 7.

\textsuperscript{517} Ontario, Office of the Integrity Commissioner, \textit{Report of Lynn Morrison, Integrity Commissioner Re: The Honourable Brad Duguid, Member for Scarborough Centre} (Toronto: Office of the Integrity Commissioner, 2013) at 1 [Duguid Report].
were mailed without postage affixed and with a label that said “Her Majesty’s Service” (“the label”). Mr. McNaughton took the position that the label must have been used in an attempt to benefit from the Canada Post Government mail Free of Postage program even though it was not available to Members of Provincial Parliament.

The Commissioner’s investigation also revealed that Minister Duguid had been using a staff member who was paid through his Ministry to oversee his constituency office while one of his regular constituency staff was on leave. The Commissioner’s report would address these two issues:

1. Did Mr. Duguid act contrary to Ontario parliamentary convention due to the fact that holiday cards were mailed without postage and with the label?
2. Did Mr. Duguid act contrary to Ontario parliamentary convention because of the role a member of Mr. Duguid’s ministers’ staff played in the constituency office?

The Commissioner included a list in her report of previous types of conduct that were found to be in violation of Ontario parliamentary convention:

…a minister advocating before an agency, board or commission on behalf of a constituent, a minister advocating to the judiciary regarding a matter, a member using constituency resources for partisan purposes, a member using the benefit of a contract between the government and a courier firm to mail goods on behalf of a friend and constituent, and a member using his inspection privileges to allow access to a provincial facility by a member of the press under false pretenses.

This list did not include any conventions that would be applicable to issue #1, but it clarified that no member had ever violated Ontario parliamentary convention as a result of the actions of his or her staff member(s). The Commissioner concluded that Minister Duguid was not aware that the cards had been sent out with the improper label and that

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518 Ibid.
519 Ibid.
520 Duguid Report, supra note 517 at 4.
521 Ibid.
the Minister had moved quickly to rectify the situation when he did become aware of the problem. Although he is ultimately responsible for his staff’s actions, Minister Duguid was held not to have violated Ontario parliamentary convention because his staff was acting without his knowledge.

In response to issue #2, the Commissioner determined that Minister Duguid had violated Ontario parliamentary convention by assigning his special assistant from his ministerial office to oversee his constituency office.\(^{522}\) Commissioner Morrison relied on Commissioner Osborne’s commentary that “[t]he elements of parliamentary convention are framed by the core principles which provide the general foundation for the Act as set out in the Act’s preamble” and focused her analysis on paragraph 4 of the preamble, which stated that “[m]embers are expected to act with integrity and impartiality that will bear the closest scrutiny.”\(^{523}\) In Commissioner Morrison’s opinion, “acting in a manner that bears the closest scrutiny means respecting the boundary between constituency staff and ministers’ staff and ensuring that resources allocated for ministers’ work are not inappropriately allocated to the constituency office.”\(^{524}\) The Commissioner would later summarize this rule by saying that it is contrary to Ontario parliamentary convention for a minister to assign a minister’s staff to oversee and supervise a constituency office.\(^{525}\)

Commissioner Morrison has continued to recognize the work of the Office’s first two Commissioners on Ontario parliamentary convention, but has also adopted Commissioner Osborne’s broadened approach in her work. Her adoption of this broadened approach has given rise to a question about what is contained in the Members’ Handbook/Guide and how those rules would otherwise be enforced without the Integrity Commissioner’s involvement.

\(^{522}\) Duguid Report, supra note 517 at 19-20.

\(^{523}\) MIA, supra note 13 at Preamble 4.

\(^{524}\) Duguid Report, supra note 517 at 19-20.

\(^{525}\) Ontario, Office of the Integrity Commissioner, Report of Lynn Morrison, Integrity Commissioner Re: Laurie Scott, Member for Haliburton-Kawartha Lakes-Brock (Toronto: Office of the Integrity Commissioner, 2013) at 2-3 [Scott Report].
What perhaps distinguishes Commissioner Morrison’s work from Commissioner Evans’ work is that the Members’ Handbook/Guide can be pointed to as a document that has been accepted by parliamentarians in their work as parliamentarians and could thus qualify as an example of an accepted convention, i.e. that members of the legislature accept the Members’ Handbook/Guide as a set of rules to which they are bound. There is however no reference in Commissioner Morrison’s reports to any legislative proceedings wherein the Members’ Handbook/Guide has effectively been adopted. It is simply taken for granted that the Handbook is agreeable to the members. Likewise, Commissioner Morrison stated in her report regarding Minister Duguid that it was her “opinion that acting in a manner that bears the closest scrutiny means respecting the boundary between constituency staff and ministers’ staff and ensuring that resources allocated for ministers’ work are not inappropriately allocated to the constituency office.”526 It is conceivable that such a rule is contained in the Members’ Handbook/Guide, but there is no reference in the report to confirm this. It is more likely the case however that the Commissioner determined that Minister Duguid had violated Ontario parliamentary convention simply by applying Commissioner Evans’ approach to Ontario parliamentary convention.

4.7 Summary

An analysis of the work of Ontario’s Integrity Commissioners makes it clear that there is a striking difference between the approach to parliamentary convention taken by Commissioners Evans and Rutherford and the approach later taken by Commissioners Osborne and Morrison. Commissioners Evans and Rutherford relied on precedent established within the legislature and further justified their analysis using clear references to academic texts about constitutional conventions. Commissioners Osborne and Morrison continued to apply the parliamentary conventions previously recognized by Commissioners Evans and Rutherford, but also carved out a new analytic path. The new path relies on the Black’s Law Dictionary definition of “convention” and the exercise of the Commissioners’ own discretion in determining what rules and principles might be

526 Duguid Report, supra note 517 at 20.
justified by the Act’s preamble. Canadian constitutional scholars have long held that constitutional conventions emerge from the preamble to the British North America Act, and the approach taken by Commissioners Osborne and Morrison is perhaps loosely based on this understanding. Commissioners Osborne and Morrison also notably concluded that there were different categories of parliamentary conventions and that the legislation did not give the Commissioner jurisdiction over every category. The parliamentary conventions recognized by the Office’s four Commissioners have been given further context through analysis of what does not and cannot qualify as an Ontario parliamentary convention. I will now provide a summary of the recognized conventions and the categories into which they fall.

527 See e.g. Hogg, supra note 229 at p 1-3 -1-4.
5 Understanding the Categories of Ontario Parliamentary Convention

The history of government conflict of interest rules in Ontario clearly demonstrates a willingness by Ontario’s Premiers to improve their guidelines by addressing the changing ethical needs and challenges faced by members of the legislature. This drive for improved rules continued even after conflict of interest legislation was introduced. The preamble to the *Members’ Integrity Act*\(^{528}\) was also added alongside Ontario parliamentary convention in an effort to move the rules forward by including Premier Rae’s guidelines in Ontario’s government ethics legislation.\(^{529}\) There is however no clear indication as to what the legislators intended to specifically address with the addition of Ontario parliamentary convention. Chapter 3, above, demonstrated that Commissioner Evans referred to the concept in his reports prior to 1994 and continued to write about the subject after the *Members’ Integrity Act* was passed. This chapter will provide a summary of those rules that have emerged from the use of Ontario parliamentary convention and will condense those rules into convenient charts. The charts will allow the reader to understand the different categories of Ontario parliamentary convention that have been accepted, as well as the categories of conventional rules that have been recognized as falling outside of the Integrity Commissioner’s jurisdiction. This categorization is important because it clarifies what exactly the words “Ontario parliamentary convention” mean to Ontario’s Integrity Commissioner. Once the meaning of the words has been clarified, it is easier to assess their usefulness in legislation of this nature.

Two principle categories of parliamentary conventions have emerged since the passing of the *Members’ Integrity Act*.\(^{530}\) There has also been one finding of

\(^{528}\) MIA, *supra* note 13.

\(^{529}\) See Chapter 2 - *Members’ Integrity Act, 1994*, above, for a discussion on this topic.

\(^{530}\) *Ibid.*
parliamentary convention that I will argue was unnecessary and merely serves to confuse rather than to clarify the concept.

The categories of Ontario parliamentary convention that have emerged since 1994 are:
1. Parliamentary conventions grounded in Constitutional conventions; and,
2. Conventions based on the improper use of government or legislative resources, including benefits afforded to members by virtue of their status as members.

The outlier is the statement of parliamentary convention that Commissioner Osborne made in his report regarding Minister Harinder Takhar. Commissioner Osborne concluded “that the Minister has breached s.11 of the Act and parliamentary convention associated with the establishment of management trusts by allowing Mr. Jeyanayangam to continue as his trustee after he became treasurer of his Riding Association and by failing to disclose that Mr. Jeyanayangam was his CFO under the Election Finances Act.” This statement of Ontario parliamentary convention ought to be dismissed as a misstatement that was unnecessary and served only to confuse the concept.

5.1 Parliamentary Conventions Grounded in Constitutional Conventions

Constitutional Conventions have a long history. Ontario parliamentary conventions grounded in constitutional conventions have been supported in Ontario by reference to legislative proceedings and to constitutional scholarship that details their long history. Commissioner Evans was very clear prior to the passing of the Members’ Integrity Act about the important role that constitutional conventions played in his conception of a parliamentary convention. He also continued to hold a consistent position in this regard

531 Takhar Report, supra note 489.
532 Ibid at 29-30.
533 See Chapter 3, above, for a detailed discussion of this topic.
after the legislation was passed. Commissioner Evans even regularly cited specific rules from Premier Rae’s guidelines as examples of Ontario parliamentary convention. The following chart provides a list of the rules that developed out of constitutional conventions that have consistently been accepted as parliamentary conventions by Ontario’s Integrity Commissioners:

<table>
<thead>
<tr>
<th>Convention:</th>
<th>Commissioner:</th>
<th>Report:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial independence (i.e. it is improper for a member to contact the judiciary in an attempt to influence the manner in which they discharge their official duties.)</td>
<td>Evans</td>
<td>Re: Cunningham (1995)</td>
</tr>
<tr>
<td>Parliamentary immunity (i.e. when an accusation of impropriety is made by a member against another member in the Legislature and the member against whom the accusation is levied categorically denies the accusation, the word of the member must be accepted and the accusation rejected).</td>
<td>Evans</td>
<td></td>
</tr>
<tr>
<td>Ministerial Responsibility (i.e. a Minister must not advocate before agencies, boards or commissions under his or her ministerial portfolio).</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judicial Independence (i.e. ministers are prohibited from advocating before agencies, boards and commissions under their jurisdiction)</td>
<td>Evans</td>
<td>1995-1996 Annual report</td>
</tr>
<tr>
<td>Cabinet Solidarity (i.e. a Minister must not speak about or otherwise become involved in a colleague’s portfolio without first consulting him</td>
<td>Evans</td>
<td>Re: Leach (1997)</td>
</tr>
</tbody>
</table>

534 See for example, 1995-1996 Annual Report, supra note 209 at 2; Canada, House of Commons, Special Joint Committee on A Code of Conduct, 35th Parl, 1st Sess, Meeting No 7 (18 October 1995) at 1640 (Hon. Greg Evans); Gregory T. Evans, Bar to Bar to Bench: a Memoir (Markham: Stewart Publishing & Printing, 2007).

535 For the sake of brevity I have only referenced one source in the chart even if that particular rule has been recognized in multiple sources.
and gaining his approval. Cabinet solidarity also requires that all Ministers must accept collective responsibility for the policies and actions of the government.

**Judicial Independence** (i.e. it is also a violation of parliamentary convention for a minister to act on behalf of constituents as far as quasi-judicial tribunals are concerned). Judicial Independence (i.e. ministers are prohibited from advocating before agencies, boards and commissions under their jurisdiction).

**Sub judice convention** (i.e. members should not make comments outside of the Legislature that are intended to influence the disposition of an ongoing judicial proceeding).

<table>
<thead>
<tr>
<th>Osborne</th>
<th>Re: Runciman (2006)</th>
</tr>
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</table>

### 5.2 Conventions Based on the Improper Use of Government or Legislative Resources, including Contractual Benefits and Statutory Rights Afforded to Members

This second type of convention began to emerge after Commissioner Osborne took office. Commissioner Osborne recognized the first such convention in his report regarding Minister Pupatello’s improper use of the government’s preferred rate Purolator contract.  

536 This type of convention has most recently been recognized in 2015.  

The following chart provides a list of the rules in this category that have been accepted as parliamentary conventions by Ontario’s Integrity Commissioners.\(^{538}\)

<table>
<thead>
<tr>
<th>Convention</th>
<th>Sub-category</th>
<th>Commissioner and Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>It is a breach of parliamentary convention in Ontario for a members to use government contracts to benefit their friends and constituents.</td>
<td>Improper use of a contractual benefit provided to members.</td>
<td>Osborne (Re: Pupatello, 2002)</td>
</tr>
<tr>
<td>Mr. Levac did not meet the standards imposed by parliamentary convention when he brought a member of the press into the jail using his statutory right of access as a member.</td>
<td>Improper use of a statutory right afforded only to members.</td>
<td>Osborne (Re: Levac, 2003)</td>
</tr>
<tr>
<td>Parliamentary convention has long recognized that while engaged in Ministry business, Ministers should not mix that business with partisan political activity.</td>
<td>Improper use of ministerial resources (i.e. time and travel expenses)</td>
<td>Osborne (Re: Eves, Clement, Flaherty &amp; Coburn, 2003)</td>
</tr>
<tr>
<td>Ontario parliamentary convention prohibits using constituency office resources (i.e. phone, fax lines, websites) for partisan purposes.</td>
<td>Improper use of constituency office resources.</td>
<td>Morrison (Re: Chudleigh, 2008)</td>
</tr>
<tr>
<td>There is an Ontario parliamentary convention that constituency resources should not be used for partisan purposes.(^{539})</td>
<td>Improper use of constituency office resources.</td>
<td>Morrison (Re: Hillier, 2011)</td>
</tr>
<tr>
<td>Ontario parliamentary convention prohibits</td>
<td>Improper use of</td>
<td>Morrison (Re:</td>
</tr>
</tbody>
</table>

\(^{538}\) For the sake of brevity I have only referenced one source in the chart even if that particular rule has been recognized in multiple sources.

\(^{539}\) Hillier Report, *supra* note 514 at 7.
This overall category of parliamentary convention is rather broad and can be further broken down into four sub-categories:

1. Improper use of constituency office resources;
2. Improper use of ministerial resources;
3. Improper use of a statutory right afforded only to members; and,
4. Improper use of a contractual benefit provided to members.

What unites these four categories of parliamentary conventions is that each is considered to be an improper use of something (i.e. a resource, benefit or right afforded to a member by virtue of his or her status as a member or minister). It appears to be the case that the Integrity Commissioner has assumed jurisdiction in sub-category one over certain rules

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\(^{540}\) Scott Report, supra note 525 at 4.

\(^{541}\) Commissioner Rutherford determined in his 1998-1999 annual report that the Members’ Guide contained rules prohibiting members from using their office resources...
that are found within the Guide to Members’ Allowances and Services and Members’ Support and Caucus Staff.\textsuperscript{542} It is not clear whether sub-category two finds support in the Members’ Guide, but it is clear that five of the six most recent complaints received by the Integrity Commissioner\textsuperscript{543} relate to allegations that a member has used his or her legislative or ministerial resources improperly. The next chapter of this paper will argue that the Commissioners could have arrived at the same conclusions by making use of a more traditional provision in the \textit{Members’ Integrity Act}.\textsuperscript{544}

5.3 An Ontario Parliamentary Convention that Ought to be Dismissed Outright

Commissioner Osborne’s report regarding Minister Harinder Takhar\textsuperscript{545} gave rise to a parliamentary convention based on a member’s failure to ensure ongoing compliance with a provision of the \textit{Members’ Integrity Act}.\textsuperscript{546} Minister Takhar had an obligation under section 11(3)(2) of the Act to ensure that the trustee of a blind trust he was required to establish under the legislation was someone who was at arm’s length to him and that the Integrity Commissioner also approved that person.\textsuperscript{547} The Commissioner noted in his

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\textsuperscript{542} See e.g. Duguid Report, \textit{supra} note 517.

\textsuperscript{543} See \textit{Chudleigh Report}, \textit{supra} note 504; Hillier Report, \textit{supra} note 514; Scott Report, \textit{supra} note 525; Duguid Report, \textit{supra} note 517; Singh Report, \textit{supra} note 537 (for examples of complaints related to the improper use of government or legislative resources); See also Brown Report, \textit{supra} note 498 (a complaint that did not relate to the improper use of government or legislative resources).

\textsuperscript{544} MIA, \textit{supra} note 13.

\textsuperscript{545} Takhar Report, \textit{supra} note 489.

\textsuperscript{546} MIA, \textit{supra} note 13.

\textsuperscript{547} \textit{Ibid}, s 11(3)(2).
report that the *Act* did not specifically impose an obligation on the Minister to disclose a change in his trustee’s circumstances after the initial approval of the trust. The Commissioner also noted however, that “[i]f that were not the case, the provisions of s.11 of the Act as related to management trusts, would make little sense.”

The Commissioner confusingly stated that there was no rule requiring the Minister to report the change in circumstances, but then proceeded to rely on the legislation’s preamble in order to explain why the Minister nonetheless was required to report the change in his trustee’s circumstances. The Commissioner drew attention to section 8 of the *Interpretation Act* and noted that it allowed a piece of legislation’s Preamble to be used to “…assist in explaining the purpose and object of the Act.” He then clearly imposed an obligation on Minister Takhar to have reported the change in his trustee’s circumstances:

> Consistent with Preamble (3), members are expected to arrange their private affairs in a manner that promotes public confidence. I accept that an Act’s Preamble does not impose substantive obligations. The Preamble does, however, inform the interpretation to be given to the approval of trustees as referred to in s.11 and 12 of the Act. The trustee must be a person who is at arm’s length with the Minister, on an on-going basis.

Commissioner Osborne concluded that Minister Takhar “breached s.11 of the Act and parliamentary convention associated with the establishment of management trusts by allowing Mr. Jeyanayangam to continue as his trustee after he became treasurer of his Riding Association and by failing to disclose that Mr. Jeyanayangam was his CFO under the Election Finances Act.” It is not clear why parliamentary convention needed to be referenced if a violation of section 11 had already been found. Once the *Interpretation Act* had been relied upon and the preamble had been used to inform the content of

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549 RSO 1990, c I.11.
551 *Ibid* at 29.
sections 11 and 12 of the *Act*, the finding of a violation of a parliamentary convention was unnecessary and added nothing to the Commissioner’s conclusion. This finding of parliamentary convention should therefore be disregarded.

5.4 What is not an Ontario Parliamentary convention?

In order to have a full and complete understanding of Ontario parliamentary convention, it is important to summarize the commissioners’ comments about what does not qualify as a parliamentary convention. In the interest of brevity, the list below does not account for the rules that are no longer relevant. For example, it is no longer the case that a member must refer to an established convention when requesting that the Commissioner investigate the actions of another member. The following list merely seeks to provides an up-to-date explanation of the un-contradicted rules that have emerged from comments made about what does not qualify under the *Members’ Integrity Act* as an Ontario parliamentary convention:

<table>
<thead>
<tr>
<th>Comments:</th>
<th>Commissioner:</th>
<th>Report:</th>
</tr>
</thead>
<tbody>
<tr>
<td>There is a distinction between parliamentary conventions and political conventions (i.e. the adjective “parliamentary” limits the scope of the convention to matters having to do with the members as parliamentarians). Although he did not rule out assuming jurisdiction over issues related to budget secrecy in the future, the Commissioner noted that he was not prepared to conclude that budget secrecy was anything more than a political practice in the absence of some inappropriate use of information contained within the budget. The Commissioner found that the purpose of budget secrecy was simply to “prevent financial</td>
<td>Osborne</td>
<td>Re: McGuinty, 2004</td>
</tr>
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<td></td>
<td></td>
<td>&amp; Re: Sorbara, 2004</td>
</tr>
</tbody>
</table>
speculation resulting from the disclosure of insider budget information and to avoid loss of revenue from the government’s standpoint.”

Parliamentary conventions that relate to a member’s conduct within the legislature are for the Speaker to consider and are not under the jurisdiction of the Integrity Commissioner.

| The Integrity Commissioner does not have jurisdiction over parliamentary conventions that relate to the Speaker’s conduct as Speaker and not as member. | Morrison | Re: Brown, 2008 |

These summaries provide a succinct overview of Ontario parliamentary convention. It is my hope that the above will be useful to parliamentarians and to the Integrity Commissioner. I also believe that summarizing Ontario parliamentary convention as I have above will make is easier to offer clear recommendations to the Integrity Commissioner and to parliamentarians. It is to these recommendations that I will now turn.

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6 Recommendations

Ontario parliamentary convention has given rise to principles that are relatively uncontroversial in their general application. Few people would disagree, for example, with a rule prohibiting a member from using his or her legislative or ministerial resources to solicit donations to his or her next election campaign. Few people would understand however, that a rule prohibiting this type of behavior is called an “Ontario parliamentary convention” in the legislation. This chapter will make recommendations that seek to advance the values espoused in the legislation’s preamble. Legislation intended to promote transparency and public confidence in parliamentarians ought to be transparent and clear itself so as to encourage compliance. Clarity is also important in legislation of this nature in order to encourage public dialogue. I will make recommendations for the current Integrity Commissioner that are not contingent on legislative reform, and I will also recommend amendments to the legislation that can be made by parliamentarians. In both cases it is important to narrow the use of Ontario parliamentary convention and to expand the use of section 2 of the Members’ Integrity Act.

The passing of the Members’ Conflict of Interest Act in 1988 established Ontario as a leader in Canada with respect to the creation of strong government ethics legislation. As outlined above in chapter 4, Ontario’s parliamentarians moved quickly to improve the legislation by passing the Members’ Integrity Act in 1994. The 1994 legislation was designed to enable the Integrity Commissioner to exercise jurisdiction over questions of ethical conduct that extended beyond mere conflicts of interest.\textsuperscript{554} More than 20 years have passed since the addition of Ontario parliamentary convention and it is clear that other jurisdictions are not following suit. In fact, Prince Edward Island and Nunavut are the only other jurisdictions in Canada to have added parliamentary convention to their government ethics legislation and no Commissioners from either jurisdiction have ever

used the concept in their work. Commissioners and law reform commissions in other jurisdictions have also spoken out against the inclusion of parliamentary convention in their regimes. British Columbia’s Conflict of Interest Commissioner at the time, the Honourable Ted Hughes, appeared before the Federal government’s Special Joint Committee on a Code of Conduct for members of Parliament and Senators in 1995 and told the Committee that he felt parliamentary convention imposed an unclear standard:

I commend my colleague from Ontario for the leadership he has shown in bringing about these changes with their new statute. I appreciate that they have moved to include, as you were told last week, Ontario parliamentary convention into their statute. I personally favour the inclusion of a more definitive statement, like those I’ve just mentioned to you that exist in the Northwest Territories and in the code here. Nonetheless, they all moved in the same direction.

The Manitoba Law Reform Commission’s December 2000 report entitled “The Legislative Assembly and Conflict of Interest” argued that parliamentary convention was too subjective of a standard to warrant its inclusion in Manitoba’s Legislative Assembly and Executive Council Conflict of Interest Act. The Commission made the following comments about parliamentary convention:

Incorporating such provisions in the Act would substantially expand the scope of the Commissioner’s responsibilities, and authority. Neither Ontario nor Prince Edward Island define what is meant by “parliamentary convention,” leaving it entirely to the Commissioner’s good sense and discretion – limited, presumably, by existing common law and other non-statutory definitions.

555 See Conflict of Interest Act, RSPEI 1988, c C-17.1, ss 12, 28(1)(b), 28(4), 7(1)(c); Conflict of Interest Act, RSNWT (Nu) 1988, c C-16, s 12.
556 Canada, House of Commons, Special Joint Committee on A Code of Conduct, 35th Parl, 1st Sess, Meeting No 8 (23 October 1995).
557 Ibid at 1610 (Hon. Ted Hughes)
559 Ibid.
While there may be sound reasons for giving the Commissioner the authority to enforce Parliamentary convention in this manner, the Commission is not persuaded that such a step is either necessary or desirable at this time. Before such a step is undertaken, the Commission would recommend a review and delineation of the precise scope of the parliamentary convention that the Commissioner would be expected to enforce.\(^{560}\)

In light of some of the very public skepticism that has been expressed regarding Ontario’s use of parliamentary convention, it is important to make changes so that Ontario can move forward as a leader in this area. Ontario must strengthen its regime and not continue to rely on a standard of conduct within its legislation that is not transparent and that is difficult for members of parliament and members of the public to understand.

### 6.1 Recommendations for the Integrity Commissioner

A close look at Commissioner Evans’ work as Integrity Commissioner supports the suggestion that Ontario parliamentary convention was intended to address traditional conventional rules that were supported by the academic literature on constitutional conventions. Chapter 3 of this paper has demonstrated that Ontario parliamentary convention was applied very consistently until Commissioner Osborne’s report regarding Sandra Pupatello.\(^{561}\) My recommendation is that the concept of Ontario parliamentary convention only be used in instances and in a manner that is consistent with Commissioner Evans’s probable intent. More specifically, that the concept only be used to allow the Commissioner to exercise jurisdiction over members’ conduct that is related in some demonstrable way to rules of conduct that have been derived from constitutional conventions and that can be supported by the legislature’s clear prior acceptance or approval of that standard of conduct. The Integrity Commissioner should also rely on the

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\(^{560}\) *Ibid* at 88.

\(^{561}\) Pupatello Report, *supra* note 421.
comments made by Commissioners Osborne and Morrison with respect to conventions that do not fall under the Integrity Commissioner’s jurisdiction.\textsuperscript{562}

In the absence of legislative reform, the conventions that have been identified that are based on the improper use of government or legislative resources, including benefits afforded to members by virtue of their status as members, ought to be re-characterized as matters that fall under section 2 of the \textit{Members’ Integrity Act}.\textsuperscript{563} Section 2 of the \textit{Act} is a slightly amended derivative of section 2 of the old \textit{Members’ Conflict of Interest Act}.\textsuperscript{564} Section 2 of the \textit{Members’ Conflict of Interest Act}\textsuperscript{565} read as follows:

\begin{quote}
For the purposes of this Act, a member has a conflict of interest when the member makes a decision or participates in making a decision in the execution of his or her office and at the same time knows that in the making of the decision there is the opportunity to further his or her private interest.
\end{quote}

This section was amended in 1994 in order to make it prescriptive. This section has not been amended since the passing of the 1994 legislation and reads as follows:

\begin{quote}
A member of the Assembly shall not make a decision or participate in making a decision in the execution of his or her office if the member knows or reasonably should know that in the making of the decision there is an opportunity to further the member's private interest or improperly to further another person's private interest.\textsuperscript{566}
\end{quote}

Commissioner Evans considered the old section 2 in his report regarding Will Ferguson.\textsuperscript{567} Mr. Ferguson was alleged to have used his position as a parliamentary assistant to the Minister of Transportation to gain access to and publish the criminal

\textsuperscript{562} See Chapter 5, above, for a discussion of what types of conduct fall outside of the Integrity Commissioner’s jurisdiction.

\textsuperscript{563} MIA, \textit{supra} note 13.

\textsuperscript{564} MCIA, \textit{supra} note 10, s 2.

\textsuperscript{565} \textit{Ibid.}

\textsuperscript{566} MIA, \textit{supra} note 13 at 2

record of a citizen against whom he had launched a civil suit for reasons not specified in the Commissioner’s report. Commissioner Evans determined that there were five sets of words in section 2 that he must consider in order to determine whether a conflict of interest had arisen. Those sets of words were “a decision”, “participates in making”, “in the execution of his office”, “member’s private interest” and “the opportunity to further.” Mr. Ferguson admitted that he provided the records to a senior staff member who later released them, but he also contended that he did not participate in the actual release of those criminal records. Commissioner Evans found that the decision to release the records was another individual’s decision, but that Mr. Ferguson had participated in that decision and that he had done so “in the execution of his office.” But for the office that Mr. Ferguson held as parliamentary assistant, he would not have had access to the records or to the individual who released them. It was not necessary that the decisions in question have any relationship to Mr. Ferguson’s execution of his official duties of office. It was sufficient to find a conflict of interest that Mr. Ferguson’s status as a member was what allowed him to participate in a decision that was made by another individual.

Ontario’s integrity commissioners have rarely applied section 2. Commissioner Evans’ interpretation of section 2 can therefore really only be contrasted with Commissioner Osborne’s interpretation in his 2003 report regarding Dave Levac. Commissioner Osborne dismissed the complainant’s contention that Mr. Levac’s actions violated section 2 based on what seems to be the Commissioner’s unsupported belief about the legislature’s intent:

Sections 2 and 4 focus on making (section 2) or influencing (section 4) a decision. Although “decision” is not defined in the Act it seems to me that it must relate to a decision that is made in the Legislative Assembly, in Cabinet or perhaps at a Committee level. Thus, although the Toronto Star’s private interests may have been preferred to the interests of its competition, in my view, s.2 is not engaged because the preference in question did not arise out of a “decision” as referred to in sections 2 and 4.

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568 Ibid at 5.a
569 Levac Report, supra note 434.
570 Ibid at 8.
This approach is clearly inconsistent with Commissioner Evans’ earlier approach. Mr. Ferguson was held to account for his involvement in a decision that did not take place in the legislative assembly, at cabinet or at committee. The legislature clearly broadened section 2 with the passing of the *Members’ Integrity Act* in 1994. The Commissioner’s report regarding Will Ferguson was one of only three investigation reports that had been tabled by the Commissioner before the new legislation was passed. It is difficult to imagine that the committee working on the 1994 legislation would not have considered those three investigation reports and the implications of broadening the wording of section 2 in light of comments that Commissioner Evans had made in his Ferguson report.

The current Integrity Commissioner ought to consider re-characterizing conventions that have been based on the improper use of government or legislative resources, including benefits afforded to members by virtue of their status as members, as violations of section 2 of the *Members’ Integrity Act* rather than violations of Ontario parliamentary convention. This re-characterization would be consistent with Commissioner Evans’ approach in his report regarding Wil Ferguson. A member or minister made every decision in question in each of the reports listed in the chart found in chapter 5 of this paper. The decisions made also had some material impact on whether that member benefitted or whether another person’s private interests were improperly furthered. The wording of section 2 was clearly broadened in 1994 and there is no clear or compelling reason that the decision referred to in the provision must be made “in the Legislative Assembly, in Cabinet or perhaps at a Committee level”571 in order to give rise to a conflict of interest.

Section 2 has been used very infrequently by Ontario’s Integrity Commissioners. By re-characterizing the section, Commissioners and/or legislators can give new and clearer meaning to the provision. A clearly worded rule about what qualifies as improper decision-making in the execution of one’s public office can be a valuable tool for legislators. Such a rule could also provide guidance to members of the public seeking to

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understand the actions of their elected officials. It could also allow a healthy public
debate to flourish around the meaning of “improper”.

6.2 Recommendations for Legislators

I do not recommend that Ontario parliamentary convention be removed from the
Members’ Integrity Act. I believe that Ontario parliamentary convention allows the
Integrity Commissioner a measure of flexibility to address true conventional practices
that can emerge over time. I recommend instead that a definition be added to the Act that
reflects the recommendations I have made above to the Integrity Commissioner. An
Ontario parliamentary convention should be defined as:

“An informal rule governing the conduct of members of the Ontario
legislature that has been grafted on members over time and that has arisen
out of political tradition and practice. Ontario parliamentary conventions
generally reflect a desire to promote the public’s trust in government. These
conventions can be identifiable by reference to clear precedent established
within the legislature or legislative proceedings and occasionally by
reference to established scholarship pertaining to Constitutional
conventions. Ontario parliamentary convention does not include:

a) informal rules governing conduct that are purely political practice
   and are not grounded in moral or value-driven reasoning;
b) the conduct of the Speaker in his or her official capacity as
   Speaker; or,
c) parliamentary conventions that relate to a member’s conduct
   within the legislature.”

I also recommend that section 2 of the Members’ Integrity Act be amended to clarify that
it applies to situations where it can be demonstrated that a member knowingly makes a
decision or participates in the making of a decision, whether by action or intentional
omission, and that decision materially contributes to the improper use of government or
legislative resources, including benefits afforded to members and their staff. It is
important to ensure that members are not held culpable for conflicts of interest that others
bring about without the member’s knowledge or contribution. Commissioner Morrison
made it clear in her report regarding Minister Brad Duguid\footnote{Duguid Report, supra note 517.} that certain tasks fall

\footnote{Duguid Report, supra note 517.}
outside the realm of what a reasonable person might expect a member to exercise supervisory responsibility over. A member is certainly responsible in a general sense for ensuring that his or her staff is properly trained, but we must be reasonable about whether we expect that member to supervise particular administrative tasks performed by others.\(^{573}\) I agree with Commissioner Morrison on this point. Therefore, if section 2 is expanded as I have recommended, it might read as follows:

“A member of the Assembly acting in the execution of his or her office shall not knowingly make a decision or contribute in some way to the making of a decision, whether by the member’s action or intentional inaction, if the member knows or reasonably should know that his or her action or intentional inaction can potentially materially contribute to the improper use of government or legislative resources, including the improper use of benefits afforded to members, or can potentially further the member’s private interest or improperly further another person’s private interest.”

This revised section 2 would be broad enough to allow the Integrity Commissioner a continued discretion over the interpretation of the word “improper”, but would signal to members that there is a difference between legislative and government resources and that there are rules respecting a member’s use of those resources.

### 6.3 Clarity and Legitimacy

Ontario parliamentary convention has overall been a positive addition to Ontario’s legislation. Many of the rules that have emerged since its addition have been well received and have arguably advanced government ethics in Ontario. The recommendations I have made in this chapter seek to address a challenge that has emerged since the passing of the 1994 legislation. The challenge for Ontario’s integrity commissioners has been in applying Ontario parliamentary convention consistently. It is important that legislation of this nature maintain its legitimacy by eliminating its ambiguity and arbitrariness. There is an old maxim that ignorance of the law is no excuse. Despite this maxim, it is certainly more reasonable to expect people to comply with laws that are clear and specific. It is also important that successive integrity

\(^{573}\) Ibid at 17-18.
commissioners apply and enforce the legislation in a consistent manner in order to ensure better compliance from members. Clarity and consistency would also add a certain legitimacy to Ontario parliamentary convention and provide better notice of the rules to those who are subject to the legislation.

Defining Ontario parliamentary convention as I have recommended would also narrow its use so that Ontario’s legislation more closely resembles that of other jurisdictions across Canada. Ontario ought to strive to minimize its use of Ontario parliamentary convention in favour of more clear, transparent and universally agreeable standards of conduct. Adopting the recommendations I have outlined should not have a negative impact on Ontario’s Integrity Commissioner’s ability to consider matters that reach beyond mere conflicts of interest. These recommendations should assist Ontario with strengthening its government ethics legislation and moving back towards being a government ethics leader in Canada.
There is no social science evidence to demonstrate that the public expects something different from government ethics legislation today than it did in 1994.\textsuperscript{574} I would argue that it is fair to assert however, that the public interacts differently with news about the conduct of government officials now than it did 20+ years ago. Newspapers and news broadcasts were the main source of information about government ethics when the \textit{Members’ Integrity Act} was passed,\textsuperscript{575} but the world of information dissemination has changed drastically since then. With blogging, alternative news sources, social media and instant messaging, information travels quickly and reaches the consumer with much less filter. For example, if an individual questions a member’s actions on a very discrete matter in their riding, they can immediately publish their thoughts on social media for others to consider. That post can go ‘viral’ and be picked up by media outlets very quickly. The news might effectively originate from social media and not from traditional media. The speed at which information is shared and the mediums through which information is shared are changing the landscape for politicians.

Ontario’s Integrity Commissioner mentioned social media for the first time in her 2011-2012 annual report that was released in June of 2012. The Commissioner commented in that report that she had discussed the topic with MPPs at her annual in-person meetings. Social media then became such a significant concern in the next year that the June 2013 annual report covered the topic in much greater detail. The Commissioner specifically noted in the 2013 report that “[s]ocial media, the accelerated pace of change and the facts of life of a minority government resulted in many challenging questions for me and my

\textsuperscript{574} See generally Maureen Mancuso et al, \textit{A question of ethics: Canadians speak out}, 2nd ed (Toronto: Oxford University Press, 2006) (although a revised edition of this text was published in 2006, the survey data was not updated from the 1st edition that was published in 1998).

\textsuperscript{575} See e.g. Greene, \textit{supra} note 9 at 16.
staff”. In fact, social media was given its own heading in the section of the report that listed anonymized opinions that were provided to MPPs in the past year. As such, it is clear that social media, and all that it entails, has begun to have an impact on the work of the Commissioner and of MPPs. This change in public engagement and in the public’s appetite for immediate information has given rise to new opportunities for government ethics legislation in Ontario.

Premier Kathleen Wynne’s majority government quickly seized the opportunity to advance government ethics legislation upon taking office in 2014. One of the first items on the new government’s agenda was Bill 8, entitled “An Act to promote public sector and MPP accountability and transparency by enacting the Broader Public Sector Executive Compensation Act, 2014 and amending various Acts.” Bill 8 was broadly focused on government accountability and passed quickly. Even though the bill did not make changes to the Members’ Integrity Act, it did send a clear signal that the public’s demand for greater transparency and accountability from its government had been heard. The Members’ Integrity Act may not have been amended by Bill 8 because is unlike any other government accountability legislation. Specifically, the legislation has historically only been amended by an all-party consensus prior to any legislative debates taking place. Premier Wynne’s government moved quickly to pass Bill 8 and likely did not wish to take the time to engage in protracted political discussions about the Members’ Integrity Act with the other two political parties. It is also unique legislation because the individuals who would be best situated to understand its strengths and weaknesses

577 Also known as s.28 opinions in Ontario, which are the fundamental advisory component of the legislation.
578 Bill 8, supra note 18.
579 It is also notable that the outgoing government had suffered through a not insignificant number of scandals in the previous few years, including e-Health, Ornge and the power plant closures.
in order to consider possible amendments are the MPPs and party leaders who are themselves the only people subject to the Act. In the absence of greater public awareness about the workings of the legislation, it is therefore either the Integrity Commissioner or the MPPs who must push for amendments to the legislation. MPPs may be reluctant to strengthen the rules that limit their own freedoms however, especially if they are not also faced with significant public pressure to make those changes.

A similar tension exists that limits the Integrity Commissioner’s ability to seek strengthening amendments to the legislation. In order for the Integrity Commissioner to be able to do his or her job most effectively, it is imperative that he or she seek to earn and maintain the trust of the members. As Commissioner Evans noted in his 1990-1991 annual report,

> [t]he disclosure process is an invasion of the right to privacy of the member and the member’s immediate family. That important right and the competing consideration of public accountability and the public’s interest in those who represent them in public office must be kept in proper balance and perspective. In order for the process to function properly, there must be mutual respect and confidence between the members and the office of the Commissioner.  

The legislation provides the Commissioner with an opportunity to earn the confidence of members by requiring that he or she meet with each member after yearly disclosure statements have been submitted. The Integrity Commissioner might leave these meetings with the belief that the legislation ought to be strengthened. It might then be difficult for him or her to call for these strengthening amendments. This difficulty could arise because the Commissioner might be hesitant to effectively ask members to trust him or her in one breath and then in the next breath call for amendments to the legislation so that

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580 MIA, supra note 13 at 36(2) (this section states that the Act “applies with necessary modifications to every leader of a recognized party, as defined in subsection 62 (5) of the Legislative Assembly Act, who is not a member of the Assembly as if he or she were a member of the Assembly”, subject to a few exceptions).

the public can be better protected against the possibility that those same members will behave poorly in the execution of their duties of office. This would not be a good way for the Commissioner to encourage the members’ openness and trust. This tension may not arise with respect to every possible amendment the Commissioner considers, but it could be uncomfortable to suggest an amendment if it might be clear to a particular members why that suggestion is being made.

Certain implications can be drawn from the above. In the absence of a significant scandal that exposes a need to improve the legislation, it seems unlikely that members will feel compelled to strengthen the legislation of their own accord. It is therefore very important to encourage public dialogue about government ethics. To combat the tensions that exist by virtue of the Integrity Commissioner’s stakeholders being the legislators responsible for advancing the legislation, it is important that government ethics legislation be clearly and accessibly written. Accessibility of language is especially important in this era of intense cynicism about politics and politicians. This type of legislation arguably serves as one of relatively few obvious tools that the government has at its disposal to use to seek to earn back some public trust.\textsuperscript{582}

This paper has traced through Ontario’s history in order to demonstrate that the province has been a leader in government ethics. The addition of Ontario parliamentary convention in 1994 served to further advance Ontario’s status as a leader in this regard. The legislative debates prior to 1994 and the creation of Premier Rae’s conflict of interest guidelines clearly led to the inclusion of Ontario parliamentary convention in the 1994 legislation. The landscape of public engagement has transformed drastically since 1994 however, and it is now time for legislators to consider how Ontario can become a leader again by reflecting this transforming landscape in its legislation. It is no longer

\textsuperscript{582} In other Canadian jurisdictions citizens are more directly engaged by being permitted to file complaints with their provincial Ethics Commissioner. (See e.g. Code of Ethics and Conduct of the Members of the National Assembly, CQLR c C-23.1, s 92; Members’ Conflict of Interest Act, RSBC 1996, c 287, s 18; Conflicts of Interest Act, RSA 2000, c C-23, s 24).
satisfactory that the law governing the ethical conduct of parliamentarians is written so that only experts can understand it.

Ontario parliamentary convention is a great example of a standard that the general public cannot understand without having to rely on an expert’s interpretation. No other jurisdiction in Canada has applied parliamentary convention in their government ethics regime and this suggests that it is simply not necessary to have this standard in order to have effective government ethics legislation. This is an era of increasingly more open government and it is no longer appropriate to maintain inconsistent standards that are difficult to understand. It may have been acceptable to avoid defining Ontario parliamentary convention in 1994 because information did not travel as fast to an engaged public. There may also have been greater deference to expert opinion in 1994 because micro-blogging\textsuperscript{583} was not then part of the culture. Governments must now be cognizant of this shift and make ongoing efforts to share information and to encourage public discourse.

This paper has demonstrated that the rules that have emerged from the Integrity Commissioners’ consideration of Ontario parliamentary convention can be preserved while also improving the legislation. I have recommended specific amendments that legislators can make to the *Members’ Integrity Act* in order to accomplish this task. In the interim however, it is also important to recognize the role that the Integrity Commissioner plays in engaging the public in discourse about government ethics. The current legislation limits this discourse between the Commissioner and the public by not allowing the public to file complaints about members. Regardless, I have recommended that the Commissioner send a signal to parliamentarians that the legislation needs to be improved by performing his or her duties under the legislation in a manner that seeks to maximize accessibility, transparency and public engagement. For these reasons, it is

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\textsuperscript{583} Due to the ubiquity of websites that allow users to make short and frequent posts, it is no longer difficult for the average citizen to express his or her opinions on a media platform that allows them to communicate instantaneously and without geographic limitations. Because of this ubiquity, citizens may not feel the need to wait for one expert’s opinion when they can read the opinion of many others who may also be well-informed on the matter.
important to minimize the use of an unclear standard of ethical conduct in Ontario’s government ethics legislation.