Office of the Conflict of Interest Commissioner
Province of Prince Edward Island

Report to the Speaker of the Legislative Assembly reviewing the findings and recommendation of the Auditor General arising from his audit of the Provincial Nominee Program and Members of the Legislative Assembly

November 6, 2009

On September 23, 2009 the Speaker of the Legislative Assembly of Prince Edward Island requested that the Conflict of Interest Commissioner review the findings and recommendations of the Auditor General arising from his audit of the Provincial Nominee Program and the involvement of Members of the Legislative Assembly.

The findings of the Auditor General are contained in the 2009 Report of the Auditor General at Section Three entitled "Provincial Nominee Program - Immigrant Partner Category." The relevant provisions relating to MLAs are Articles 3.117 - 3.122. At the conclusion of these six paragraphs, the Auditor General recommended as follows:

> "**3.123 The Legislative Assembly should review the Conflict of Interest Act to determine if revisions can be made to clarify conflict of interest situations for Members**."

The Commissioner is requested to provide an opinion on the findings of the Auditor General and to provide a Report which will assist the Legislative Assembly in determining whether revisions can or should be made to clarify conflict of interest situations for Members.

Review and Analysis

For ease of reference, the Auditor General's findings are set out in the numbered Articles as they appear in his Annual Report. The six Articles are emboldened and the Commissioner's review and analysis follow in ordinary type.

Auditor General's Findings

The Auditor General states:

> "**3.117 The Conflict of Interest Act applies to all elected Members of the Legislature. Subsection 14(2) of that Act states:**
>
> > **No member shall have an interest in a partnership or in a private company that is a party to a contract with the Government of Prince Edward Island under which the partnership or company receives a benefit.**
>
> **Subsection 14(4) of the Conflict of Interest Act provides as follows:**
>
> > **Subsection (2) does not apply if the Commissioner is of the opinion that the interest is unlikely to affect the member's performance of the member's duties."**

The Auditor General sets out the two provisions of the *Conflict of Interest Act* (hereinafter the "Act") that he believes are applicable to his audit. The Auditor General quotes ss. 14(2) of the Act but offers no analysis of the provision. Failing to provide such an analysis may inadvertently convey the impression that the provision is an explicit prohibition against Members having any interest in a partnership or private company that is party to any contract with the Government of P.E.I.. For the reasons that will appear below, such an inference is incorrect.

The Auditor General also quotes ss.14(4) but again simply quotes the subsection without reference to its application to the facts involving the MLAs and their companies which he found accessed the Provincial Nominee Program (hereinafter "PNP"). Quoting statutory provisions out of context may inadvertently convey impressions that fail to consider the intent, purpose and scope of the *Act*.

The proper application of ss. 14(2), the impact of ss. 14(4) and the nature of the contract involved will be discussed below.

The Auditor General states:

> "**3.118 As part of our audit we determined that from the inception of the PNP four corporations were approved to receive units while the related Member was a shareholder and was elected to the Legislature. This does not include instances where shares are held in a blind trust or a family trust. Section 14(2) of the Act does not apply to these situations. For three of these companies the related Member had requested and received a letter of clearance under the Conflict of Interest Act from the Conflict of Interest Commissioner.**"

Pursuant to section 7 of the Act an MLA may request that the Commissioner give an opinion respecting the Member's obligations under the Act. The three presently sitting Members to which the Auditor General refers requested such an opinion prior to their respective companies making application under the PNP. These opinions are what the Auditor General refers to as "letters of clearance".

Each of the three MLAs are owner/operators of small businesses in their respective communities. Each operated their respective business prior to entering the legislature and each continues to do so to the present day. The opinions provided by the Commissioner to each of the three sitting back bench MLAs were essentially the same, as the relevant circumstances were essentially the same.

Each of the three MLAs are Private Members, that is, they are not Ministers or part of Executive Council. They have no executive decision making authority and as a consequence do not have to relinquish their private business interests as do MLAs who become Ministers.

Pursuant to sections 17, 18 and 19 of the Act, MLAs who are Ministers are prohibited from operating a business either personally or through a corporation or partnership. MLAs who become Ministers are obliged to either dispose of their business interests or place those business interests in a "blind"trust as provided for in the Act.

Private Members such as the three MLAs are under no such obligation. They are free to continue to operate their private businesses as is confirmed by section 16 of the Act.

> "*Nothing in this Act prohibits a member who is not a Minister from,*
>
> *(a) engaging in employment or in the practice of a profession;*
>
> *(b) receiving fees for providing professional services under any legal aid, medical, dental, health, or social services program provided by the province;*
>
> *(c) engaging in the management of a business carried on by a corporation;*
>
> *(d) carrying on a business through a partnership or sole proprietorship;*
>
> *(e) holding or trading in securities, stocks, futures and commodities;*
>
> *(f) holding shares or an interest in any corporation, partnership, syndicate, cooperative or similar commercial enterprise;*
>
> *(g) being a director or partner or holding an office, other than an office that a member may not hold pursuant to another Act, where the member fulfils the obligations created pursuant to this Act."* (Emphasis added)

One of the reasons why Ministers and ordinary Members are treated differently is that being a Minister is a full time occupation with executive decision-making authority whereas being a private Member is a part time occupation with no executive decision-making authority.

The Auditor General states that his reference to corporations approved to receive PNP units does not include instances where shares are held in a blind trust or family trust as ss.14(2) does not apply to such situations. The Auditor General does not indicate why ss. 14(2) does not apply but the answer concerning blind trusts is found in ss. 14(5) which is in the following terms:

> *"14(5) Subsection (2) does not apply if the member has entrusted the interest to one or more trustees on the following terms:*
>
> *(a) the provisions of the trust shall be approved by the Commissioner;*
>
> *(b) the trustees shall be persons who are at arm's length with the member and approved by the Commissioner;*
>
> *(c) the trustees shall not consult with the member with respect to managing the trust property, but may consult with the Commissioner;*

(d) annually, the trustees shall give the Commissioner a written report stating the nature of the assets in the trust, the net income of the trust for the preceding year and the trustees' fees, if any;

(e) the trustees shall give the member sufficient information to permit the member to submit returns as required by the Income Tax Act (Canada) and shall give the same information to Revenue Canada."

The central feature of a "blind trust" is that the person who places his interest into such a trust relinquishes all control to a trustee who is at arm's length and who will manage the trust without any involvement by the person. The trustee neither consults nor advises the person as to how the trust is being managed. If the blind trust is operating as required by the Act, the person is unaware of what is being done in the name of the business and is therefore not responsible for the business' actions.

Typically, it is Ministers who have "blind trusts" because the Act expressly prohibits them from carrying on any business activity while they are in Cabinet. Ministers are allowed to place their business interests in a blind trust pursuant to subsections 18(3) and 19(2) of the Act. If Ministers were not allowed to place their business interests in trust, they would have no choice but to dispose of those interests to comply with the Act. Without that option, many business owners would be reluctant to become Ministers if they had no choice but to dispose of their business interests.

Subsection 14(5) specifically allows companies, in which a Member's interest is held in a blind trust, to enter into contracts with the Provincial Government provided that the Member is not involved in any government decision involving the contract that might further the Member's "private interest". This very specific statutory provision provides the authority allowing a company, in which a Member's interest is held in a blind trust, to contract with the Provincial Government.

What would be inconsistent with the Act, would be an MLA or a Minister influencing or being involved in any decision of government that furthered their individual "private interests". The Auditor General did not express any finding that any such involvement occurred.

Family Trusts:

The Auditor General also makes reference to "family trusts" and states that ss. 14(2) does not apply to them. That statement is incorrect. The exemption found in ss. 14(5) applies only to "blind trusts" not to "family trusts". Family trusts do not meet the necessary conditions to qualify for the exemption found in ss. 14(5) which require that: (a) the terms of the trust must be

approved by the Commissioner; (b) the Trustee must be a person other than a close relative approved by the Commissioner; and (c) the Trustee must not consult with the Member about the trust property.

"Family trusts"are trusts primarily designed to reduce income tax liabilities within a family group. Family trusts must be approved by the Canada Revenue Agency. Typically, they are created by a business owner who has a family and wishes to allow other family members to share in the growth and value of the business without that individual losing control of the business. In the typical situation, the trustee of the family trust will hold shares of the business in trust for the benefit of family members who are beneficiaries of the trust. The ownership of the business remains in the business owner/trustee's name and the business is still under the control of the business owner/trustee. Pursuant to the terms of the family trust any current income and capital growth of the business is attributable to the beneficiaries who then pay the tax applicable at a lower rate than would be paid by the business owner/trustee.

If the business owner/trustee is an MLA, ss. 14(2) of the Act would apply, if the business owner/trustee is a spouse of an MLA, then ss. 14(2) of the Act would not apply. Subsection 14(2) of the Act applies only to MLAs not to family members of MLAs; nothing in the Act precludes spouses of members from arranging their business and financial affairs as they deem appropriate.

<u>Ministers and "blind trusts":</u>

Recently at the Public Accounts Committee, the Auditor General disclosed that there were two instances where companies, in which Ministers placed their interests in a blind trust, received PNP investment. As indicated earlier, when the business interest of a Minister is placed in a blind trust as provided for in sections 18 and 19, the Minister has no further involvement with the business. After a Minister has placed his business interest in a blind trust, any subsequent business decision including whether to apply for PNP investment is a decision made by the trustee and/or remaining shareholders and not the Minister. Under a blind trust, the Minister is neither aware of nor involved in any decision made by the business subsequent to the creation of the trust.

In respect of the two companies that received a PNP investment in which Ministers had placed their interests in a blind trust, the Auditor General's Report does not indicate any evidence or draw any conclusion that either Minister was personally involved in either company's application for the PNP investment. Similarly, the Auditor General reports no evidence that either Minister was involved in any government decision concerning either company's application for a PNP investment.

The Auditor General's silence on whether there has been any personal involvement by Ministers clearly indicates that he found no evidence that Ministers were in any way improperly involved. If there had been evidence of any involvement whatsoever, the Auditor General would have reported that involvement in his audit report.

In the absence of any evidence that Ministers breached the terms of their blind trusts or that they made or participated in any government decision that advanced their private interests, it must be presumed that they have fully complied with the Act.

The Auditor General states:

> "**3.119 The Conflict of Interest Commissioner provided a letter of clearance to those MLAs who requested a ruling. In his ruling he stated that if the Members made an application under the Program he would not be in breach of the Conflict of Interest Act. His rulings were based on the following premises:**
>
> - **Once the business is deemed eligible IIDI's involvement ends;**
> - **The intermediary and the immigrant select the business and ensure investment is made;**
> - **There is no contract with government nor any involvement other than through IIDI;**
> - **IIDI assesses business eligibility based on guidelines applicable to all businesses; and**
> - **The intermediary is independent of government**."

The Commissioner's opinion was that the three back bench MLAs would not be in breach of the Act by reason of making an application for PNP benefits if the application was submitted in the same manner as any other eligible business owner and provided that the MLAs were assessed in the same way as any other applicant.

<u>MLAs Not in a Conflict of Interest:</u>

The Commissioner's opinion was essentially the same for each of the three MLAs that requested an opinion under sec. 7 of the Act. The opinion to Mr. Dumville is illustrative of the opinion given to the other two MLAs and is in the following terms:

"October 22, 2007

Bush Dumville, MLA

Dear Mr. Dumville:

This is in response to your letter of October 19, 2007, wherein you requested an opinion pursuant to section 7 of the Conflict of Interest Act R.S.P.E.I. 1988, Chap. C-17.1. You requested an opinion as to whether you would be in compliance with the Act if Dumville Restaurants Ltd., a company in which you have a majority interest, were to seek funding under the Federal Immigrant Investor Program.

To respond to your request I have had the opportunity to speak with Mr. Brooke MacMillan, Deputy Minister, Department of Development and Technology and Mr. Neil Stewart, Director of Corporate Services of the PEI Business Development Inc. In addition, I have examined various documentation concerning this program (much of it available on the Internet).

Most of the provinces in Canada have an agreement with the Federal government that allows the province to nominate immigrants who wish to settle in that province. Prince Edward Island has such an agreement and for that purpose has established the PEI Provincial Nominee Program (PNP). The Program's purpose is to nominate immigrants for expedited entry into Canada provided that the immigrant meets the Program's minimum education, work experience, personal net worth requirements and invests $200,000 in an "eligible Island business".

The immigrant makes an application to the PNP office to establish eligibility and Island businesses make application to determine whether the business is eligible to be considered for investment. It is the latter process that you wish to begin on behalf of Dumville Restaurants Ltd.

As you are aware the PNP office for PEI is Island Investment Development, which is a subsidiary of PEI Business Development Inc., which in turn is an agency of the provincial government.

Island Investment Development has established guidelines regarding which businesses are eligible and those guidelines are publicly available to all businesses on the government website. Restaurants are eligible under the"Retail investment" category. All restaurants meeting the guidelines will be deemed eligible.

Once a business is deemed eligible under the Program, that is, has met the guidelines, the business then approaches an intermediary who matches that business to an immigrant. If the immigrant is interested in the business, the immigrant makes the investment directly to the business.

Once the business has been deemed eligible, Island Investment Development's involvement ends. It is then up to the intermediary to match the immigrant to the business and to ensure that the investment is made via preferred shares in the eligible company and that the immigrant takes an active role in the business as a director or as a senior management employee.

In these circumstances, there is no contract with the Government of PEI nor is government money involved. There is no involvement by government other than through its agency, Island Investment Development, which assesses a business' eligibility based on guidelines applicable to all businesses. That assessment is not discretionary in nature but rather is made based on guidelines that are applicable to all businesses. Being deemed eligible under the Provincial Nominee program does not guarantee that an immigrant will invest in that business.

The decision to invest in a particular company is made solely by the immigrant on the advice of the intermediary, who is also independent of government.

In my view, should you make an application under the Provincial Nominee Program in the name of Dumville Restaurants Limited, you would not be in breach of the Conflict of Interest Act.

Sincerely, etc..."

The principal theme of the Commissioner's opinion is that the decision to invest in a particular company is solely that of the immigrant investor who makes that central decision with the assistance of an independent intermediary. Neither Government nor IIDI make that fundamental decision.

The definition of what constitutes a conflict of interest is set out in section 9 of the Act as follows:

"9. No member shall make a decision or participate in making a decision in the execution of the member's office if the member knows or reasonably should know that in the making of the decision there is an opportunity (a) to further the member's private interest; or (b) improperly to further another person's private interest."

In the circumstances outlined by the PNP officials to the Commissioner, the central decisions of whether to invest and in which company to invest, were made not by government, but rather by the immigrant investor with the assistance of an independent intermediary. The Commissioner ruled that because the MLAs made no decision nor participated in any decision that furthered their private interests in the manner contemplated by section 9 of the Act, the MLAs could not be in a conflict of interest.

The Commissioner's opinion indicates that the Program is of general application to all businesses. All applicant businesses were subject to the same rules and assessment guidelines administered by IIDI. The assessments were not discretionary in nature but rather were based on clear guidelines equally applicable to all business applicants.

Additionally, the Program affected the MLA as one of a broad class of persons, in this case, business people.

As indicated in section 9 of the Act, not only must there be a decision, there must be a decision that furthers the Member's 'private interest'.

"Private interest" is defined under the Act as follows:

"Private interest" does <u>not</u> include an interest in a decision,

(i) that is of general application,

(ii) that affects a member or a person belonging to a member's family as one of a broad class of persons..." (emphasis added)

Based on the foregoing, it can readily be seen that the three MLAs would not make or participate in <u>any</u> decision let alone a decision that advanced their "private interests" within the meaning contained in the definition of conflict of interest set out in section 9 of the Act. In accord with that analysis, the Commissioner ruled that the MLAs would not be in breach of the Act by reason of making an application under the program

It should be clearly understood that nothing in the Act precludes Members from accessing government programs or benefits on the same terms and conditions as are generally available to the general public or to a broad class of similarly qualified individuals provided that Members receive no unfair advantage or benefit by reason of holding public office.

The Auditor General states:

"**3.120 As a result of our audit we had some concerns about these premises. For example, the Use of Proceeds Agreement implemented in October 2007 is a contract that confers a benefit to the business involved. Under this Agreement the eligible business commits to IIDI to use the proceeds within two years in accordance with the approved business plan or could pay a penalty to IIDI of $55,000 per unit. Of the four corporations noted above, three entered into a contract with Government through the Use of Proceeds Agreement. The other corporation was approved prior to October 2007 did not sign a Use of Proceeds Agreement and did not request a letter of clearance from the Commissioner.**"

The Auditor General does not question the Commissioner's ruling that the MLAs would not be in a conflict of interest by reason of making application under the Program. He does, however, express a concern that the Act may have been violated by reason of the MLAs' businesses entering into the "Use of Proceeds Agreement".

The Auditor General's concern may have arisen from the reference contained in the Commissioner's opinion letters to the MLAs that:

> "...In these circumstances there is no contract with the government of PEI nor is government money involved..."

What the Commissioner meant to express was:

> "In these circumstances there is no contract with the government of PEI under which PNP money is paid nor is government money involved."

The imprecision of the Commissioner's language may have misled the Auditor General.

Whatever the reason, during the course of his investigation the Auditor General identified a document entitled the "Use of Proceeds Agreement". The Auditor General correctly

concluded that the document constituted a contract between an applicant and IIDI. The Auditor General infers that the MLAs ought not to have signed the Use of Proceeds Agreements given the language of ss.14(2) which provides as follows:

> *"No Members shall have an interest in a partnership or private company that is party to a contract with the government of Prince Edward Island under which the partnership or company receives a benefit."*

Simply stated, the Auditor General found that a contract with Government had been signed by businesses owned by MLAs and he concludes that to do so was apparently contrary to ss.14(2) of the Act. Some discussion of the contract involved is necessary to understand why section 14(2) has no application to the facts and therefore, why the Auditor General is incorrect in his conclusion.

Use of Proceeds Agreement:

The central transaction in the PNP is the decision of the immigrant investor to invest in a particular business. The Use of Proceeds Agreement is peripheral to that central transaction. The Agreement is between IIDI and the business applicant. The immigrant investor is not one of the contracting parties.

The Use of Proceeds Agreement is an enforcement document in which the applicant agrees to be liable to pay IIDI a penalty in the amount of $55,000.00 per unit if any funds received are not used within two years in the manner set out in the application. The Agreement is identical for all applicants. All applicants must sign the same document before IIDI accepts them as an eligible applicant. Acceptance by IIDI as an eligible applicant alone is no guarantee of receiving any PNP investment. The decision to invest remains the sole and final decision of the immigrant investor.

Simply stated, the Use of Proceeds Agreement gives IIDI the ability to sue applicants if they fail to do what they said they would do in their business plan. The applicant receives no material benefit from signing the Agreement. Whatever benefit the applicant receives, it is the same for all applicants as members of the same broad class of individuals. All members of the group benefit equally and the MLA's interest is no more or less than that of any one else. This is the contract that the Auditor General infers violates ss. 14(2) of the Act.

The Auditor General also quotes ss. 14(4) of the Act which is in the following terms:

> *"(4) Subsection (2) does not apply if the Commissioner is of the opinion that the interest is unlikely to affect the member's performance of the member's duties."*

The Auditor General does not state how signing the Use of Proceeds Agreement could *"...affect the member's performance of the member's duties"*nor is the Auditor General charged with the statutory responsibility for making such determinations.

In fact, it is difficult to imagine a circumstance where entering into a contract which has the same terms and conditions as are equally applicable to all others in the same broad class, would ever interfere with the Member's performance of the Member's public duties.

As Commissioner, I am of the view that the execution of the Use of Proceeds Agreement by an MLA would not *"...affect the member's performance of the member's duties..."* and in so finding, the Members are not in breach of ss. 14(2) of the Act.

There is however, a much more fundamental reason why signing the Use of Proceeds Agreement does not violate ss. 14(2) of the Act and that is that section 14 does not apply to contracts of general application or contracts applicable to a broad class of similarly eligible individuals.

<u>Interpretation of Section 14:</u>

The Auditor General quotes ss. 14(2) of the Act in a manner that suggests he believes the subsection should be interpreted literally. The Auditor General appears to have come to that interpretative conclusion without considering the consequences that such an interpretation would have on ss. 14(1). Both ss. 14 (1) and (2) refer to contracts with the Government and must be interpreted consistently with one another. They are in the following terms:

> *"14. (1) No member shall knowingly be a party to a contract with the Government of Prince Edward Island under which the member receives a benefit.*
>
> *(2) No member shall have an interest in a partnership or in a private company that is a party to a contract with the Government of Prince Edward Island under which the partnership or company receives a benefit."*

If the Auditor General were correct in his literal interpretation of section 14, it would mean that MLAs would be unable to enter into <u>any</u> contracts with the Government of Prince Edward Island or its agencies. As contracts can be express or implied including both written

and oral, the implications of such an interpretation would be far reaching. The consequences of adopting such an interpretation would lead to absurd results.

For example, if ss. 14(1) were interpreted and enforced literally, MLAs would not be able to enter into the following contracts:

- MLAs would not be able to purchase green fees to play golf on a provincially owned course;
- MLAs would not be able to purchase camping permits at provincially owned camping grounds;
- MLAs would not be able to purchase licenses to fish or hunt.;
- MLAs would not be able to purchase wines, beer or spirits at a provincially owned Liquor Control outlets;
- MLAs would not be able to obtain a driver's licence; or the registration for a motor vehicle, boat, etc..

Each of the foregoing transactions are implied contracts of purchase and sale and if ss. 14(1) were interpreted literally, MLAs would be prohibited from being party to such contracts with government.

If ss. 14(1) were interpreted literally, MLAs who are not Ministers, would be prohibited from entering into the following express contracts with government:

- MLAs who are fishers would not be able to participate in financial assistance programs such as the Fishers Low Interest Loan Program;
- MLAs who are farmers would not be able to participate in the various farm income stabilization programs or the crop insurance programs;
- MLAs who are teachers would not be able to work in the public school system;
- MLAs who are health care professionals including nurses and physicians would not be able to work within the health care system.

Even programs of general application such as the Home Energy Audit Program would be unavailable to MLAs because the program requires a contract with government.

If MLAs were prohibited from participating in activities that are generally open to other citizens or to others of the same broad class of which they are a member, it would have a serious adverse impact on whether people would be prepared to run for public office.

Such results are clearly absurd and were not intended by the Legislature when it passed the Act in 1999.

The Proper Statutory Interpretation:

The Supreme Court of Canada has determined that the proper approach to statutory interpretation is that the words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute, and the intention of the legislature.[1]

The Supreme Court of Canada has also determined that it is a well established principle of statutory interpretation that parliaments and legislatures do not intend to produce absurd consequences. An interpretation can be considered absurd if it leads to ridiculous or frivolous consequences which are incompatible with the object of the legislation.[2]

This approach recognizes that statutory interpretation cannot be determined on the wording of the legislation alone. Moreover, where it appears that the consequences of adopting an interpretation would be absurd, the Courts are entitled to reject it in favour of a plausible alternative that avoids the absurdity. [3]

The modern rule for the interpretation of legislation was further refined by Ruth Sullivan in the third edition of Driedger on the Construction of Statutes.

> "*There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in*

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[1] *Rizzo & Rizzo Shoes Ltd.* (Re) [1998] 1 S.C.R. 27 at para.21.

[2] *Supra*. At para. 27; see also Waugh v. Waugh v. Pednault (Nos.2 and 3), [1949] 1 W.W.R. 14(B.C.C.A.)

[3] *Ruth Sullivan, Driedger on the Construction of Statutes*, 3rd ed. (Toronto, Butterworths, 1994), Chapter 3 "Avoiding Absurd Consequences" pp. 79-99.

terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just." [4]

Section 14 must be interpreted with the purpose of the Act in mind which is to prevent conflicts of interest and reconcile the private interests of MLAs with their public duties. One of the aspects is to insure that MLAs do not obtain an unfair advantage by reason of being an MLA. Contracts which are either of general application or are applicable to a broad class of individuals on the same terms and conditions do not give MLAs an unfair advantage as the benefit is the same for all. Consequently, such contracts are not contemplated by section 14.

More specifically, by definition "private interests" under the Act do not include interests that are of general application or that affect a Member as part of a broad class of persons. If the contract does not further a "private interest" as defined in the Act, it cannot be prohibited under section 14. Therefore, contracts that are of general application or contracts that are applicable to a broad class of individuals are not contemplated under section 14. [5]

As the foregoing clearly demonstrates, section 14 is not intended to prohibit members from being a party to all contracts with the Government, rather the section only applies to those government contracts that are not available on the same terms and conditions to the general public or to a broad class of similarly eligible persons.

The Use of Proceeds Agreement is a contract that is equally available on the same terms and conditions to a broad class of individuals of which the MLAs are members, and as a consequence, ss. 14(2) does not apply. The three MLAs that signed the agreement are not in violation of the Act. The Use of Proceeds Agreement is irrelevant to the Act.

The Auditor General states:

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[4] *Ibid* at p.130

[5] See also s.9 of the *Interpretation Act* R.S.P.E.I. Cap I-8
"Every enactment shall be construed as being remedial and shall be given such fair, large and liberal construction and interpretations as best insures the attainment of its objects."

"3.121 As an elected representative, each Member of the Legislature holds a public office. It is appropriate that each Member be held to a high standard in the conduct of his or her business affairs. The Conflict of Interest Act is important in protecting the integrity of the public office held by each Member."

The *Conflict of Interest Act* presently holds Members of the Legislature to a high standard in reconciling their private business interests and their public duty. Each MLA knows that where their private interests and public duty conflict, it is the public duty that must prevail.

Each MLA is acutely aware that their actions are closely scrutinized and that they must govern their actions accordingly. Each MLA fully expects criticism if they fail to comply with the high standard that the Legislature has imposed on them by virtue of the Act.

The findings of the Auditor General cannot form the basis for any inference that Members have not met the high standard imposed by the Act. The Auditor General bases his finding on two facts. First, that three MLAs whose businesses received PNP signed the same enforcement contract that every other applicant signed when making application. For the reasons given earlier, the MLAs fully complied with their obligations under the Act including ss. 14(2). Any unintended inference to the contrary is incorrect. Second, that two companies, in which a Minister has an interest which is in a blind trust, received PNP investment. The Auditor General found no evidence that either Minister was in any way involved in the decision of the company to make the PNP application or that either Minister made or participated in any decision of government that furthered that Minister's "private interest". In the absence of any such evidence, any unintended inference of wrongdoing is baseless.

The Auditor General's Report is significant not only for what is stated but also for what is not stated but which may reasonably be inferred, such as:

- The Auditor General did not make any finding or inference of fraud or corruption involving any MLA.

- The Auditor General did not make any finding or inference that any MLA whose business received PNP investment either influenced or interfered in any way with the processing of that application.

- The Auditor General did not make any finding or inference that any Minister influenced any government decision involving the company in which he had an interest that had been placed in a blind trust.

- The Auditor General did not make any finding or inference that any Minister personally applied for PNP investment on behalf of a company in which he had an interest that had been placed in a blind trust.

- The Auditor General made no finding that would indicate that any Member contravened the Conflict of Interest Act other than to infer that signing the Use of Proceeds Agreement was contrary ss. 14(2) of the Act which it manifestly is not.

It is also noteworthy that no MLA has laid any complaint under the Act arising from the findings of the Auditor General. Further it should be noted that no Member has characterized the conduct of any other Member as being either a conflict of interest or a violation of the Act. This demonstrates that all Members have a clear understanding of the Act and its application to the findings of the Auditor General.

The Auditor General states:

"3.122 Each Member who applied to the Conflict of Interest Commissioner clearly intended to avoid a conflict situation. The Provincial Nominee Program was complex and evolved throughout the period of review. For example, the introduction of specific required documents had an impact on how involvement in the Program was interpreted under the Conflict of Interest Act. In addition, certain sections of the Act are broad and open to interpretation. For example, the section on contracts with government does not address the application of this section to family members or family trust arrangements."

The Auditor General acknowledges that the three Members who requested an opinion from the Commissioner intended to avoid a conflict of interest situation. For the reasons given and in the absence of any evidence to the contrary, each of the three Members did in fact avoid a conflict of interest situation. Nothing that the Auditor General has inferred, changes the Commissioner's ruling that the three MLAs are not in breach of the Act by reason of making an application on behalf of their respective businesses for immigrant investment under the PNP.

The Auditor General indicates that in his opinion, certain provisions of the Act are *"broad and open to interpretation"*. As an example he cites *"the section on contracts with government"* because it does not *"address the application of this section to family members*

or family trust arrangements". The reason for that is simple, section 14 does not apply to family members or family trusts where a family member other than the MLA, is a Trustee.

Section 14 does apply to MLAs but not to their family members. An MLA's family member is free to contract with the Provincial Government, nothing in the Act prohibits such a contract. What is prohibited is the MLA making a decision or participating in a decision that would indirectly further the private interest of the MLA or the family member directly contrary to either section 9 or 11 of the Act which provide as follows:

> "9. *No member shall make a decision or participate in making a decision in the execution of the member's office if the member knows or reasonably should know that in the making of the decision there is an opportunity*
>
> *(a) to further the member's private interest; or*
>
> *(b) improperly to further another person's private interest.*"

> "*11. No member shall use the member's 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.*"

As can readily be seen, insofar as an MLA's private interest may be indirectly furthered by an immediate family member entering into a contract with the government, the MLA should have no involvement whatsoever in any government decision to enter into such a contract with the close family member. Having said that, it should be clearly understood that nothing in the Act prevents a member of an MLA's family from entering into contracts with the government.

It is manifestly obvious that any contract with government that is entered into with a family member of an MLA will attract the closest of public scrutiny. For that reason, MLAs in the past have been counselled that family members should not enter into contracts with government where the awarding of the contract is discretionary. For the reasons given earlier, contracts with government that are of general application and applicable on the same terms and conditions to a broad class of individuals are not prohibited either to MLAs or to family members of MLAs.

The Auditor General recommends:

"Recommendation 3.123 The Legislative Assembly should review the Conflict of Interest Act to determine if revisions can be made to clarify conflict of interest situations for Members."

The *Conflict of Interest Act* for this Province is modeled after the *Members' Integrity Act*[6] for the Province of Ontario as is most similar legislation in other jurisdictions in Canada. All of the provisions of our legislation that have been cited by the Auditor General are identical to the wording found in the applicable provisions of the Ontario statute[7]. The Ontario legislation was enacted in 1988 and the applicable provisions have remained unchanged since then.

The Auditor General's recommendation is based on the premise that Members require clarification of conflict of interest situations. The existing Act recognizes that interpretation of the Act is required depending on the particular fact situation confronting a Member. The Act provides that all MLAs must meet with the Commissioner no less than once annually to review the Member's obligations under the Act and such other times as may be required by the Member to receive advice as to how to deal with specific circumstances and be in compliance with the Act.

Experience shows that Members are aware that the existing Act is a principles-based statute that sets out the general principles that should guide the behavior of Members in reconciling their private interests with their public duties. Members know that the principles must be applied to the myriad of fact situations that confront them as politicians on a regular basis. Members know that the existing Act is not a codification of all the particular circumstances where a conflict of interest might arise. Members know that such a codification is impossible.

The overarching principle contained in the Act is the definition of what constitutes a conflict of interest found in section 9. Other principles governed by the Act include the prohibition against the misuse of insider information found in section 10; the prohibition against influencing government decisions for an improper purpose found in section 11; the prohibition against accepting improper fees, gifts or personal benefits found in section 13; and the prohibition against improper contracts with government found in section 14. All of the general principles require interpretation based on the specific facts that might arise. It is impossible for the Act to specifically anticipate all the circumstances that might confront an MLA.

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[6] *Members' Integrity Act, 1994*, S.O., 1994, Chap. 38

[7] *Ibid.* see section 7 and the definition of "private interest"

The Auditor General's recommendation arises from his literal interpretation that ss. 14 prohibits MLAs from being involved in any contract with government either personally or through a company. To make it abundantly clear that section 14 does not apply to contracts that are of general application or contracts which are applicable to a broad class of individuals, the Legislative Assembly may wish to consider amending the Act by adding a subsection to section 14 which might read as follows:

"14(8) Subsections (1) and (2) do not apply to contracts that are of general application or that apply to a broad class of individuals similarly qualified."

Respectfully submitted

November 6, 2009

A. Neil Robinson

Commissioner