

**REPORT
OF
THE HONOURABLE ROBERT C. RUTHERFORD
INTEGRITY COMMISSIONER**

RE: THE HONOURABLE ELIZABETH WITMER, MINISTER OF HEALTH

BACKGROUND

On June 10, 1997, Professor Thomas Mulligan asked The Honourable Jim Wilson, M.P.P., then Minister of Health, to remedy what he characterized as:

“extensive noncompliance by the Niagara District Health Council and its Hospital Restructuring Steering Committee with respect to the provincial conflict of interest guidelines specified in the Management Board of Cabinet’s ‘Establishment and Administration of Agencies’. A Manager’s Guide.”

He added new information in a letter of July 26, 1997 to Mr. Wilson. Copies of Professor Mulligan’s letters of June 10 and July 26, 1997 to Mr. Wilson are found as Attachments C and E to Exhibit 1 to the affidavit of Ms. Sandra Papatello, M.P.P. for Windsor-Sandwich, sworn at Windsor on February 4, 1999; a copy of this affidavit is attached as Exhibit “A”.

On October 14, 1997, Professor Mulligan wrote to The Honourable Elizabeth Witmer, M.P.P., who had replaced The Honourable Jim Wilson as Minister of Health. He alleged again that various members of the Niagara Hospital Restructuring Steering Committee and the Niagara District Health Council had undeclared conflicts of interest. Exhorting Ms. Witmer to correct these conflicts of interest, he asserted that if she failed to take remedial action, she risked becoming a party to them. A copy of Professor Mulligan’s letter of October 14, 1997 to Ms. Witmer is found as Attachment G to Exhibit 1 to Exhibit “A”.

In a letter of November 27, 1997 to Professor Mulligan, Ms. Witmer explained the Ministry of Health's policies on appointing health care providers to district health councils. A copy of this letter is found as Attachment I to Exhibit 1 to Exhibit "A".

In letters of February 26 and March 19, 1998, to Ms. Witmer, Professor Mulligan affirmed anew that some appointees to the Niagara District Health Council were in conflict of interest. Copies of these letters are found as Attachments J and I to Exhibit 1 to Exhibit "A".

Professor Mulligan wrote to Ms. Pupatello on January 11, 1999, asking her to seek an opinion from me as to whether Ms. Witmer had contravened s.2 of the *Members' Integrity Act, 1994* ("*the Members' Integrity Act*") by failing to uphold the Management Board's conflict of interest rules. On February 4, 1999, Ms. Pupatello submitted a letter to me: she relayed for consideration four issues that Professor Mulligan had raised. She enclosed an affidavit date February 4, 1999, attesting that the copy of Professor Mulligan's letter of January 11, 1999 she attached and the copies of its attachments were authentic. Copies of Professor Mulligan's letter of January 11, 1999 to Ms. Pupatello and Ms. Pupatello's affidavit of February 4, 1999 are found as Attachment 1 to Exhibit 1 to Exhibit "A" and Exhibit "A". A copy of Ms. Pupatello's letter of February 4, 1999 to me is found as Exhibit "B".

On March 1, 1999, Ms. Witmer made submissions to me as to whether she had contravened s.2 of the *Members' Integrity Act*. A copy of her letter is found as Exhibit "C".

Ms. Pupatello replied to Ms. Witmer's submissions in a letter of March 12, 1999 to me; she attached a copy of a letter of March 11, 1999 from Professor Mulligan to her that contained his comments upon these submissions. Copies of Ms. Pupatello's letter of March 12, 1999 to me and Professor Mulligan's letter of March 11, 1999 to Ms. Pupatello are found as Exhibit "D" and Attachment 1 to Exhibit "D" respectively.

On the basis of the material filed and marked as Exhibits to my Report, I have concluded that the information submitted enables me to provide the requested opinion and that a more extensive enquiry is unnecessary.

Submission by the Complainant, Ms. Sandra Pupatello, M.P.P.

In her letter of February 4, 1999 to me, Ms. Pupatello advised that Professor Mulligan had identified four ways in which Ms. Witmer might have infringed s.2 of the *Members' Integrity Act* or parliamentary convention:

- (1) by deciding to override the conflict of interest rules applying to particular individuals about whom he had complained;
- (2) by making a policy decision to set aside the Management Board of Cabinet's conflict of interest rules;
- (3) by violating the jurisdiction of another member of the Executive Council by overriding these rules;
- (4) by failing to take remedial action after she was informed that the Niagara District Health Council had added a substantive interpolation to the rules that weakened them and exempted at least one council member from a previously identified conflict of interest.

Ms. Pupatello requested my opinion as to whether Ms. Witmer violated s.2 of the *Members' Integrity Act* in the ways alleged by Professor Mulligan.

Submission by Ms. Elizabeth Witmer, M.P.P. and Minister of Health

In her submissions of March 1, 1999 to me, Ms. Witmer denied that she had violated s.2 of the *Members' Integrity Act* or parliamentary convention in any of the ways alleged by Professor Mulligan.

Reply by the Complainant, Ms. Sandra Pupatello, M.P.P., to the Submission by Ms. Elizabeth Witmer, M.P.P. and Minister of Health

Ms. Pupatello took issue with Ms. Witmer's submissions of March 1, 1999 on various points. Ms. Pupatello was especially alarmed by Ms. Witmer's supposed failure to alleviate conflicts of interest, writing:

"[O]ne must question the outcome of all works of all agencies, boards and commissions of Ontario when any Minister at his or her choosing may deem conflict of interest rules to simply not apply."

ISSUE

The issue for my consideration is whether Ms. Witmer infringed s.2 of the *Members' Integrity Act* in any of the four ways proposed by Professor Mulligan.

SECTION 2 OF THE MEMBERS' INTEGRITY ACT

Section 2 of the *Members' Integrity Act* stipulates:

"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 have known 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."

The intent underlying s.2 is to forbid an Assembly member from taking any action that gives the member or another person an advantage inconsistent with the public interest and incompatible with the member's oath of office.

FINDINGS OF FACT

Issue 1: Did Ms. Witmer decide to override the conflict of interest rules in regard to various individuals about whom Professor Mulligan had complained?

Professor Mulligan had indeed complained that various members of the Niagara Hospital Restructuring Steering Committee (*"the Steering Committee"*) and the Niagara District Health Council (*"the District Health Council"*) stood in conflict of interest at the time when they held office:

- (1) in a letter of June 9, 1997 to Barbara Robinson, Chair of *the District Health Council*, he affirmed that seven of *the Steering Committee's* twelve members had a "direct pecuniary interest" in the outcome of Niagara hospital restructuring. He alleged conflict of interest by three further members: the largest hospital in the Niagara district retained the law firm of which *the Steering Committee's* Chair was a partner; the Vice-Chair was chairman of the board of a Niagara district hospital; and a third member belonged to the board of Niagara Rehabilitation. In addition, he claimed

that six of *the District Health Council's* seventeen members had "direct pecuniary interests" "in the fates of specific health care institutions" and that two other members had "non-pecuniary personal interests."

- (2) Professor Mulligan attached a copy of his letter of June 9, 1997 to Ms. Robinson to his above-mentioned letter of June 10, 1997 to The Honourable Jim Wilson.
- (3) when Professor Mulligan wrote to Mr. Wilson again on July 26, 1997, he pointed out that an eleventh member of *the Steering Committee* had joined the board of a Niagara Falls hospital approximately two months after *the Steering Committee* disbanded.
- (4) in writing to Ms. Witmer, Professor Mulligan voiced anew concerns that particular members of *the District Health Council* were in conflict of interest, witness his aforementioned letters of February 26 and March 19, 1998 to her.

Professor Mulligan and Ms. Pupatello, on the one hand, and Ms. Witmer, on the other hand, agree that the Management Board of Cabinet's conflict of interest rules apply to district health councils. See Professor Mulligan's letter of June 9, 1997 to Ms. Robinson, Ms. Witmer's submission to me of March 1, 1999 and Ms. Pupatello's comments of March 12, 1999 upon this submission. The particular issues I must consider are therefore threefold:

- (1) what the conflict of interest rules require concretely;
- (2) whether the conflicts of interest Professor Mulligan has sought to document were grievous enough to require Ms. Witmer's intervention;
- (3) whether she "overrode" the conflict of interest rules in respect of the individuals about whom he complained.

A district health council, as defined in s.8(1) of the *Ministry of Health Act* is a Schedule III agency. It therefore falls beneath Directive 6 of Management Board of Cabinet, which deals with appointees, agencies and royal commissions. I am persuaded that the intent of Directive 6 was that the Ontario government's general management principles should be applied flexibly. Directive 6 states that Schedule III agencies "*adhere to the general management principles of the government but can demonstrate reasons whereby full compliance with all administrative directives established by the Management Board is not appropriate*".

The Establishment and Administration of Agencies. A Manager's Guide ("the Guide"), to which Professor Mulligan alluded in his letter of June 10, 1997 to The Honourable Jim Wilson, contains provisions on conflict of interest for boards, agencies and commissions. Principle 2 affirms: "*A conflict of interest shall be declared at the earliest opportunity.*" A Suggested Practice stipulates that "*any member of an agency who has a conflict of interest in a matter under consideration by the agency should disclose the nature of that conflict to the head or chairperson at the first opportunity and refrain from any further participation in the discussion.*" Most importantly, the *Guide*, too, adopts a contextual approach to determining which practices are appropriate to a particular agency. It affirms: "*[T]he reader should keep in mind the actual or proposed size and scope of the agency in order to gauge which of these mechanisms are of particular importance to it.*" This passage lends support to the commonsensical view that no one set of conflict of interest rules can fit every circumstance.

I wish to add one crucial qualification: by recognizing that the precise requirements of the conflict of interest rules need to be tailored to specific circumstances, the Government of Ontario is not watering down the conflict of interest rules.

From another perspective, the requirements of the conflict of interest rules must interact with the Ministry of Health's policy on the composition of district health councils. Section 8(1)(4) of the *Ministry of Health Act* defines the functions of district health councils as follows:

- (a) to advise the Minister on health needs and other health matters in the council's geographic area;
- (b) to make recommendations on the allocation of resources to meet health needs in the council's geographic area;
- (c) to make plans for the development and implementation of a balanced and integrated health care system in the council's geographic area; and
- (d) to perform any other duties assigned to it under this or any other Act by the Minister.

To help the district health councils fulfil their statutory purposes, since the 1970s the Ministry of Health has espoused the following policy concerning their members:

- (1) forty per cent should be health care providers;
- (2) forty per cent should be consumers; and
- (3) twenty per cent of the members should stem from local and/or regional government.

In his letter of March 11, 1999 to Ms. Pupatello, Professor Mulligan acknowledged that he does not challenge the Ministry's authority to enact such a policy; moreover, he was willing to concede that the policy is "*in the community and broader public interest.*"

Any attempt to appraise the implications of the conflict of interest rules for district health councils must take into account one reality: a member is not in conflict of interest solely because he or she is a health care provider. Further evidence is necessary to show that a member was in actual or potential conflict of interest. I must also look at the extent to which the causes promoted by members allegedly in conflict of interest were objectively justifiable: the purpose of this enquiry is to assess whether the alleged conflicts of interest led to demonstrable prejudice to the public interest.

In applying the foregoing remarks to Issue 1, I refrain from commenting at length upon conflicts of interest specifically within the Niagara Hospital Restructuring Steering Committee.

When Professor Mulligan wrote to Mr. Wilson on July 26, 1997, the Steering Committee had been disbanded. Chronology shows that conflicts of interest on the part of Steering Committee members lay outside Ms. Witmer's responsibilities: she was sworn in as Minister of Health on October 10, 1997.

In his letter of June 9, 1997 to Ms. Robinson, Professor Mulligan commented that the Steering Committee recommended "*that five Niagara hospitals be downgraded or closed and that four hospitals be retained or upgraded.*" He went on to say that the five "*losing*" hospitals had ties to two Steering Committee members while the four "*winners*" had links to eight members. Furthermore, he remarked that the two hospitals

with ties to the Steering Committee's Chair and Vice-Chair fell strongly within the "winning" group: these two hospitals were earmarked to receive 56% of the funds marked for capital improvements.

The correlations Professor Mulligan has made may be accurate. However, the evidence does not enable me to deduce that the Steering Committee's recommendations were patently unreasonable enough to provide circumstantial evidence of partiality on the part of some members. If Ms. Witmer has accepted these recommendations during her tenure as Minister of Health, she has not implicitly set aside the conflict of interest rules.

The alleged conflicts of interest within the *Niagara District Health Council* require further examination. When Professor Mulligan wrote to Ms. Witmer on February 26, 1998, he remarked that three members of *the District Health Council* had declared conflicts of interest and withdrawn; a fourth member had withdrawn for other reasons. He had complained about all four members in his letter of June 10, 1998 to Mr. Wilson.

If these members were in conflict of interest when Professor Mulligan complained and failed to declare their conflict, then they arguably infringed the *Guide's* Principle 2 and Suggested Practice referred to above. On present evidence, it is uncertain whether they remained members of *the District Health Council* after Ms. Witmer became Minister of Health; if so, the existing evidence does not mark them as clearly in conflict of interest at that time. As for the remaining members of *the District Health Council* about whom Professor Mulligan has complained, further information about them would be necessary for me to draw any of the following three conclusions:

- (1) their interests fell outside even a flexible interpretation of what the conflict of interest rules permit;
- (2) their advice should be discarded as tainted in its origins and unjustifiable under any objective standard; and
- (3) Ms. Witmer failed to uphold the conflict of interest rules by allowing them to continue as members.

Under s.8(1)(4) of the *Ministry of Health Act*, district health councils are primarily advisory bodies; those to whom they offer advice are not obliged to accept it. I have yet to receive evidence showing that the Niagara District Health Council's advice was skewed enough to portray its members as partial. Nor, more broadly, has evidence reached me suggesting that the District Health Council's advice has reduced public confidence in Ontario's agencies, boards and commissions.

Issue 2: Did Ms. Witmer make a policy decision to set aside the Management Board of Cabinet's conflict of interest rules?

In examining Issue 1, I found that the currently known evidence does not suffice to show that Ms. Witmer set aside the Management Board of Cabinet's conflict of interest rules. Any claim not only that she did so but also that she made a policy decision to that effect is therefore bound to become speculative.

Issue 3: Did Ms. Witmer violate the jurisdiction of another member of the Executive Council by overriding these rules?

Once more, in examining Issue 1, I found that the currently known evidence does not suffice to show that Ms. Witmer set aside the Management Board of Cabinet's conflict of interest rules. Any attempt to assert not only that she did so but furthermore that she violated the jurisdiction of another member of the Executive Council in the process is thus bound to be tenuous.

Issue 4: Did Ms. Witmer fail to take remedial action after she was informed that the Niagara District Health Council had added a substantive interpolation to the rules that weakened them and exempted at least one council member from a previously identified conflict of interest?

Undoubtedly Professor Mulligan advised Ms. Witmer in his letter to her of March 19, 1998 that the *Niagara District Health Council* added a substantive interpolation in the conflict of interest rules that exempted at least one council member from a previously identified conflict of interest; in this sense, the interpolation appeared to weaken the conflict of interest rules. See Attachment K to Exhibit 1 to Exhibit "A". At the same time I am satisfied that Ms. Witmer did cause remedial action to be taken after Professor

Mulligan forwarded his letter to her. On July 7, 1998, Mr. Ronald Sapsford, the Assistant Deputy Minister of Health, wrote to the Acting Chair of *the District Health Council*, asserting that its interpretation of the guidelines issued by the Management Board of Cabinet on conflicts of interest was "*inappropriate and beyond the purview of the Council.*" Mr. Sapsford went on to say: "[T]his interpretation cannot, and will not, be supported by the Ministry of Health." Attachment O-1 to Exhibit 1 to Exhibit "A". He forwarded a copy of this letter to Professor Mulligan.

On April 1, 1999, I wrote to Ms. Witmer inquiring as to what steps were taken by her, to ensure conflict of interest issues, as set out in the Manager's Guide, were addressed by the members of *the District Health Council*. This letter is filed as Exhibit "E".

In response to Exhibit "E", an undated letter was received by our office on April 14, 1999, from Ms. Witmer, filed as Exhibit "F". Ms. Witmer outlined in great detail the steps taken by the Ministry to ensure agencies for which she was responsible received the Management Board of Cabinet conflict of interest Directives and Guidelines and that such rules were adhered to.

Ms. Witmer advised that although an arms length relationship existed between her Ministry and *the District Health Council*, her Ministry staff have always impressed upon *the District Health Council* the critical importance of following all relevant Management Board rules. She advised that the Ministry staff has explained in detail the duties and obligations of agency members with regard to the conflict of interest issues that exist in the various agencies.

OPINION

It has been pointed out by Ms. Witmer in Exhibit "F" the steps that have been taken by the Ministry to ensure that Ministry staff is fully informed with regard to their obligations under the conflict of interest issues.

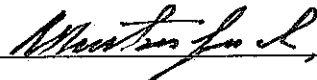
Despite this arm's length relationship between Ministry and *the District Health Council*, the Ministry staff has always made it a point to stress to *the District Health Council* the importance of following the Management Board rules, including the conflict of interest issues.

In Ms. Witmer's letter to me, Exhibit "F", she points out that the Ministry staff attend virtually every meeting of *the District Health Council* and are to report back on any problems which require Ministry action. At these meetings the Ministry representatives offer advice on various conflicts of interest issues affecting *the District Health Council*.

In addition there has been correspondence from senior Ministry staff to *the District Health Council* on a number of occasions. On many occasions legal counsel was present to assist in explaining to these agencies their obligations under the conflict of interest legislation.

I am satisfied for the reasons stated above and from the explanation given in Exhibit "F" into the matters referred to me by Ms. Pupatello with respect to alleged conflicts of interest on the *Niagara District Health Council*. I find no contravention of the *Members' Integrity Act, 1994* by Ms. Witmer.

DATED at Toronto this 7th day of May 1999.



The Honourable Robert C. Rutherford
Integrity Commissioner