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BACKGROUND PAPER



Conflict of Interest at the Federal Level: Legislative Framework

Publication No. 2010-92-E
19 August 2013
Revised 25 January 2018

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Legislative Framework*
(Background Paper)

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Ce document est également publié en français.

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CONFLICT OF INTEREST AT THE FEDERAL LEVEL: LEGISLATIVE FRAMEWORK

1 INTRODUCTION

Conflict of interest rules applicable to ministers, parliamentary secretaries, other public office holders and parliamentarians were once found in various federal statutes such as the *Criminal Code*¹ and the *Parliament of Canada Act*.² Over time, beginning in 1973 with then prime minister Pierre Trudeau's guidelines for Cabinet ministers, conflict of interest rules and guidelines have replaced or supplemented these statutory rules.

The federal conflict of interest regime is now governed mainly by the *Conflict of Interest Act*,³ which is applicable to public office holders such as ministers, and by the parliamentary conflict of interest codes that the Senate and the House of Commons have adopted to govern the conduct of their respective members. Integral to the regime are two independent conflict of interest watchdogs, namely the Conflict of Interest and Ethics Commissioner and the Senate Ethics Officer.

2 LEGISLATIVE FRAMEWORK

2.1 AMENDMENTS TO THE *PARLIAMENT OF CANADA ACT* (2004)

In 1985, the government introduced the first *Conflict of Interest and Post-Employment Code for Public Office Holders* (often referred to as the "Prime Minister's Code"), which replaced existing guidelines. This code applied to Cabinet ministers, parliamentary secretaries and other senior public office holders. In 1994, then prime minister Jean Chrétien issued a new Code and created the position of Ethics Counsellor with responsibility for its administration. Because that position was contained within the Department of Industry, it was often criticized for not being independent from the government.

In 2004, amendments to the *Parliament of Canada Act*⁴ provided a legal framework for the establishment of a conflict of interest regime for both houses of Parliament. Two independent conflict of interest watchdog positions were created: the Senate Ethics Officer and the Ethics Commissioner. These officers were responsible for the duties and functions assigned to them, respectively, by the Senate and the House of Commons with regard to governing the ethical conduct of members. The 2004 Act also contemplated the adoption by each house of a conflict of interest code pertaining to the conduct of its members.

The Ethics Commissioner, in addition to his or her duties and functions with respect to the members of the House of Commons, replaced the position of the Ethics Counsellor and assumed the functions of that office as it related to public office holders and the *Conflict of Interest and Post-Employment Code for Public Office Holders*.

2.2 THE *FEDERAL ACCOUNTABILITY ACT* (2006)

The *Federal Accountability Act*⁵ (FAA), which received Royal Assent on 12 December 2006, made two fundamental changes to the Canadian conflict of interest regime. First, it enacted the *Conflict of Interest Act*, which enshrined in legislation the *Conflict of Interest and Post-Employment Code for Public Office Holders*.⁶ The *Conflict of Interest Act* set out the rules and obligations that apply to Cabinet ministers, parliamentary secretaries and other senior public office holders such as political staff of ministers and most Governor in Council appointees. Second, the FAA amended the *Parliament of Canada Act* to replace the office of the Ethics Commissioner with that of the Conflict of Interest and Ethics Commissioner.

3 PUBLIC OFFICE HOLDERS AND MEMBERS OF THE HOUSE OF COMMONS

3.1 CONFLICT OF INTEREST AND ETHICS COMMISSIONER

The Conflict of Interest and Ethics Commissioner has a dual mandate: she or he is responsible both for public office holders under the *Conflict of Interest Act* and for members of the House of Commons under the *Conflict of Interest Code for Members of the House of Commons*.⁷

The Commissioner's mandate in respect of public office holders, as set out in the *Conflict of Interest Act*, includes the following:

- providing confidential advice to the prime minister, including at the request of the prime minister, with respect to the application of the Act to individual public office holders;
- providing confidential advice to individual public office holders with respect to their obligations under the Act;
- examining and reporting on possible contraventions of the Act by public office holders or former public office holders; and
- administering the disclosure regime whereby senior public office holders confidentially disclose their assets and liabilities and other information to the Commissioner and preparing a summary of that information for the public.

The *Conflict of Interest Act* permits any parliamentarian to request, in writing, that the Commissioner investigate the conduct of a present or former office holder if the parliamentarian has a reasonable belief that the person in question has contravened the Act. The Commissioner may also conduct such an examination on her or his own initiative. He or she reports on such investigations to the prime minister, and his or her reports are made public, although particular types of information obtained from the investigations must be kept confidential.

Consistent with the dual mandate, the Conflict of Interest and Ethics Commissioner reports to two House of Commons committees, as follows:

- the Standing Committee on Procedure and House Affairs with respect to duties and functions governed by the *Conflict of Interest Code for Members of the House of Commons*; and
- the Standing Committee on Access to Information, Privacy and Ethics with respect to responsibilities prescribed by the *Conflict of Interest Act*, as well as with respect to the general administration of the Office of the Conflict of Interest and Ethics Commissioner.

As provided in the *Parliament of Canada Act*, the Conflict of Interest and Ethics Commissioner also provides confidential policy advice and support to the prime minister in respect of conflict of interest and ethical issues in general.

3.2 THE CONFLICT OF INTEREST CODE FOR MEMBERS OF THE HOUSE OF COMMONS

Members of the House of Commons are bound by the *Conflict of Interest Code for Members of the House of Commons*, which is Appendix 1 to the *Standing Orders of the House of Commons*. The Code articulates several purposes, including that of maintaining and enhancing public confidence and trust in the integrity of members, along with a number of principles intended to guide members in reconciling their private interests and public duties.

This Code came into force upon the first sitting of the 38th Parliament on 4 October 2004. It addresses the maintenance of the public registry of all members' public disclosure summaries; the provision of written confidential opinions to members; and the conduct of inquiries into any member's alleged non-compliance with the Code's obligations. The Commissioner reports on her or his inquiries to the House and also reports annually on her or his activities respecting members.

The Code prohibits members from voting or acting in a way that would further their own or others' private interests, and requires that their private interests be disclosed whenever a decision that would affect those interests is under consideration. Members and their families must report to the Commissioner any travel or gifts valued in excess of specified limits. Members, and any corporations owned by them, are prohibited from entering into federal government contracts.⁸

All members are required to file statements with the Commissioner disclosing the assets and liabilities belonging to them and their families. The Office of the Conflict of Interest and Ethics Commissioner then prepares a disclosure summary based on each member's statement and makes these summaries available for public review on the Commissioner's website.

Members of the House of Commons may, at any time, ask the Commissioner to offer a confidential opinion about their obligations under the Code. Also, any member who is of the opinion that another member has not fulfilled her or his obligations under the Code may request that the Commissioner conduct an inquiry into the matter. The Commissioner may also conduct an inquiry on her or his own initiative. In conducting such inquiries, the Commissioner must operate in private and with due dispatch, and at all appropriate stages throughout the inquiry the Commissioner must give the

member reasonable opportunity to be present and to make representations. In a report on an inquiry, the Commissioner may recommend sanctions and must offer reasons for the conclusions and recommendations. The Code also requires the Standing Committee on Procedure and House Affairs to undertake a comprehensive review of its provisions and operation every five years.⁹

3.3 THE *CONFLICT OF INTEREST ACT*

The *Conflict of Interest Act* requires that, once they are appointed, public office holders must arrange their private affairs so as to prevent conflicts of interest from arising. With limited exceptions, they must not solicit or accept money or gifts; assist individuals in their dealings with government in such a way as to compromise their own professional status; take advantage of information obtained because of their positions as insiders; or, after they leave public office, act so as to take improper advantage of having held that office. Since 1994, information relating to the spouses and dependent children of ministers, secretaries of state and parliamentary secretaries has also been considered relevant.

Bound by the Act are approximately 2, 250 current and former public office holders, including not only the prime minister, ministers, ministers of state, parliamentary secretaries and ministers' exempt staff, but also most full- and part-time Governor in Council appointees, including deputy and associate deputy ministers and heads of agencies, Crown corporations, boards, commissions and tribunals.¹⁰

The *Conflict of Interest Act* makes a distinction between reporting and non-reporting public office holders. Reporting office holders include ministers, parliamentary secretaries, ministerial staff who work on average 15 hours or more a week, part-time Governor in Council appointees who receive an annual salary and benefits, and full-time Governor in Council appointees. The obligations imposed on reporting public office holders are, by and large, more stringent than those imposed on non-reporting public office holders.

The *Conflict of Interest Act* provides that, in order to reduce the risk of conflict of interest, public office holders should use such means as avoidance, a confidential report, a public declaration, divestment, or recusal, depending on the asset or interest in question. Divestment can include making an asset subject to a trust or management agreement. In relation to outside activities, a public office holder must not engage in the practice of a profession; actively manage or operate a business or commercial venture; retain or accept directorships or offices in a financial or commercial corporation; hold office in a union or professional association; or serve as a paid consultant.

The *Conflict of Interest Act* also deals with the conduct of public office holders after they leave office. The rules for post-employment are laid out in Part 3 of the Act (sections 33 to 42). These rules establish the general principle that former public office holders cannot act in such a manner as to take improper advantage of their previous public office. They provide that former reporting public office holders cannot:

- enter into a contract of service with, or accept an appointment to a board of directors of, an entity with which they had direct and significant official dealings during the one-year period of immediately before their last day in office;
- accept an offer of employment with one of these entities; or
- make representations, whether for remuneration or not, for or on behalf of any other person or entity, to any department, organization, board, commission or tribunal with which they had direct and significant official dealings during the one-year period immediately before their last day in office.

In addition, former public office holders who were ministers of the Crown or ministers of state cannot make representations to former colleagues who are still in Cabinet.

The prohibitions for former reporting public office holders who were not ministers of the Crown or ministers of state apply for a period of one year following their last day in office. For former ministers of the Crown or ministers of state, the prohibitions apply for a period of two years following their last day in office.

The Act gives the Conflict of Interest and Ethics Commissioner the power to reduce or waive these limitations, on application by a reporting public office holder or a former reporting public office holder. When making a decision on the application, the Commissioner must consider whether the public interest in granting the waiver or reduction outweighs the public interest in maintaining the prohibition and must also consider the factors set out in the Act.

Under the *Conflict of Interest Act*, the Conflict of Interest and Ethics Commissioner is required to administer the Act and apply its conflict of interest compliance provisions to public office holders. The Commissioner has the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of the Act occurred. Section 29 of the Act provides that in the determination of the appropriate measures, the Commissioner shall try to achieve agreement with public office holders. Once compliance measures have been taken, reporting public office holders' summary statements and public declarations are posted in the public registry. Section 43 of the Act sets out the requirement, previously found in section 72.07 of the *Parliament of Canada Act*, that the Commissioner provide confidential advice to the prime minister, as well as to individual public office holders, on the application of the Act.

In a significant change from the previous regime, section 44 of the *Conflict of Interest Act* permits parliamentarians to request, based on a belief on reasonable grounds, that the Commissioner examine a possible contravention of the Act by any current or former public office holder. The Commissioner may consider information from the public or brought to her or his attention by a member of the Senate or the House of Commons that suggests a public office holder has not complied with the Act.

Section 45 of the *Conflict of Interest Act* permits the Commissioner to examine a matter on her or his own initiative when he or she has reason to believe that a current or former public office holder has contravened the Act. The Commissioner must provide the affected public office holder with a reasonable opportunity to present his or her views before reporting on an examination.

The Commissioner may summon witnesses and compel them to give evidence or to produce documents.

4 SENATORS

4.1 SENATE ETHICS OFFICER

The Senate has, in the Senate Ethics Officer, its own conflict of interest watchdog. This office has been the subject of some debate over the years.

When the establishment of a parliamentary conflict of interest regime was initially considered in the 1990s, thought was given to having a single ethics officer for both houses of Parliament. In 1997, a committee of both houses of Parliament, the Special Joint Committee on a Code of Conduct, recommended the establishment of a single commissioner to administer one code of conduct and conflict of interest regime for members of both the Senate and the House of Commons.¹¹ Although these recommendations were not implemented at the time, they were tabled by the government in 2002 for reconsideration by both chambers.

The Standing Senate Committee on Rules, Procedures and the Rights of Parliament, which was called upon to look into the matter, objected to the creation of a single commissioner. Asserting the Senate's independence from the House of Commons and the government, as well as its separate constitutional role and function, the Committee requested that the Senate have its own ethics officer.¹²

Echoing these demands, a legislative proposal introduced in 2003 contemplated the establishment of two positions: a Senate Ethics Officer, who would be responsible for the administration of the conflict of interest regime for Senators, and an Ethics Commissioner, who would be responsible for the conflict of interest regimes of members of the House of Commons and public office holders.¹³ This legislative proposal, as discussed above, was enacted in 2004.¹⁴

Despite the creation of a separate ethics officer for each house of Parliament in 2004, the government introduced, in 2006 and 2009, further bills aimed at abolishing the position of the Senate Ethics Officer and implementing a single conflict of interest regime for members of both houses of Parliament. In 2006, the FAA as originally introduced would have abolished the position of Senate Ethics Officer and transferred his or her duties to the yet-to-be-created position of Conflict of Interest and Ethics Commissioner. This portion of the bill was, however, amended by the Senate, and the FAA, as enacted, made no change to the office of the Senate Ethics Officer. In 2009, the government introduced Bill C-30, the Senate Ethics Act,¹⁵ with the same purpose. That bill died on the *Order Paper* with the 30 December 2009 prorogation.

The Senate Ethics Officer performs the duties and functions assigned by the *Conflict of Interest Code for Senators*. In short, he or she administers the confidential disclosure regime and the public registry of senators' public disclosure summaries,

provides senators with opinions and advice with respect to their obligations under the Code, and may be called upon to inquire into possible breaches of the Code.

4.2 CONFLICT OF INTEREST CODE FOR SENATORS

Under the 2004 amendments to the *Parliament of Canada Act*, the Senate was called upon to establish a conflict of interest code for senators, and the report of the Standing Committee on Rules, Procedures and the Rights of Parliament recommending such a code was adopted by the Senate on 18 May 2005.¹⁶

The *Conflict of Interest Code for Senators* and the *Conflict of Interest Code for Members of the House of Commons* are identical in some regards and similar in many others. One distinctive feature of the *Conflict of Interest Code for Senators* is the role played by the Standing Committee on Conflict of Interest for senators, to which the Senate Ethics Officer confidentially reports after an inquiry and which may be called upon to conduct its own investigation on a matter. Since its adoption, the *Code for Senators* has been amended three times: twice when the Standing Committee on Conflict of Interest for Senators completed the mandated periodic comprehensive review of its provisions in 2008 and 2012, and once in 2014.¹⁷

5 CONCLUSION

The Canadian conflict of interest regime has evolved considerably since the promulgation of the first prime ministerial guidelines on conflict of interest in 1973. Conflict of interest rules are now embodied in such legislation as the *Conflict of Interest Act* and in formal orders of both houses of Parliament, namely the *Conflict of Interest Code for Senators* and the *Conflict of Interest Code for Members of the House of Commons*. Moreover, whereas rules were once interpreted and administered by the Ethics Counsellor, who had no independent status and reported directly to the prime minister, two independent officers, the Conflict of Interest and Ethics Commissioner and the Senate Ethics Officer, are now entrusted with the administration of conflict of interest rules and are required to report to Parliament.

The *Conflict of Interest Act* provides for one review five years after the coming into force of its section 67, and the House of Commons Standing Committee on Access to Information, Privacy and Ethics conducted this review in 2013.¹⁸ Through committees, the House of Commons in 2007 and 2015 and the Senate in 2008, 2012 and 2014 conducted comprehensive reviews of their respective conflict of interest codes; these reviews have led to numerous amendments to both codes. Both parliamentary codes provide for periodic reviews of their provisions. Consequently, the federal conflict of interest regime has the capacity to be adjusted and improved with time.

NOTES

1. [Criminal Code](#), R.S.C., 1985, c. C-46.
2. [Parliament of Canada Act](#), R.S.C., 1985, c. P-1.

3. [Conflict of Interest Act](#), S.C. 2006, c. 9, s. 2.
4. [An Act to amend the Parliament of Canada Act \(Ethics Commissioner and Senate Ethics Officer\) and other Acts in consequence](#) [*An Act to amend the Parliament of Canada Act*], S.C. 2004, c. 7.
5. [Federal Accountability Act](#), S.C. 2006, c. 9.
6. Government of Canada, [Conflict of Interest and Post-Employment Code for Public Office Holders](#), 2006.
7. House of Commons, [Conflict of Interest Code for Members of the House of Commons](#), Appendix I in *Standing Orders of the House of Commons*, 2017.
8. Section 16 prevents members from receiving benefits under contracts with the federal government, and section 18 of the Code provides that a member may not have an interest in a partnership or in a private corporation that is a party to a contract with the Government of Canada, “unless the Ethics Commissioner is of the opinion that the interest is unlikely to affect the Member’s obligations under this Code.”
9. The first review was completed in 2007: House of Commons, Standing Committee on Procedure and House Affairs, [Fifty-fourth Report](#), 1st Session, 39th Parliament, 11 June 2007. The second comprehensive review was completed in 2015: House of Commons, Standing Committee on Procedure and House Affairs, [Thirty-ninth Report](#), 2nd Session, 41st Parliament, 18 June 2015.
10. Office of the Conflict of Interest and Ethics Commissioner, [The 2016–2017 Annual Report in respect of the Conflict of Interest Act](#), 8 June 2017, p. 1.
11. Parliament of Canada, Special Joint Committee on a Code of Conduct, *Second Report – Code of Conduct*, 2nd Session, 35th Parliament, March 1997.
12. Senate, Standing Committee on Rules, Procedures and the Rights of Parliament, [Eighth Report](#), 2nd Session, 37th Parliament, April 2003.
13. This proposal was initially introduced in the 2nd Session of the 37th Parliament as [Bill C-34, An Act to amend the Parliament of Canada Act \(Ethics Commissioner and Senate Ethics Officer\) and other Acts in consequence](#), but it died on the *Order Paper* with prorogation. It was reintroduced as Bill C-4 in the subsequent session.
14. *An Act to amend the Parliament of Canada Act*.
15. [Bill C-30, An Act to amend the Parliament of Canada Act and to make consequential amendments to other Acts](#), 2nd Session, 40th Parliament, May 2009.
16. Senate, Standing Committee on Rules, Procedures and the Rights of Parliament, [Third Report](#), 1st Session, 38th Parliament, May 2005.
17. Senate, Standing Committee on Conflict of Interest for Senators, [Fourth Report](#), 2nd Session, 39th Parliament, May 2008; [Third Report](#), 1st Session, 41st Parliament, March 2012; [Fourth Report](#), 1st Session, 41st Parliament, October 2012; and [Fifth Report](#), 2nd Session, 41st Parliament, June 2014.
18. House of Commons, Standing Committee on Access to Information, Privacy and Ethics, [Statutory Review of the Conflict of Interest Act](#), 2nd Session, 41st Parliament, February 2014.