PRESENTATIONS & SPEECHES
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Presentation at the 30th Annual Canadian Administrative Law Seminar

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Introduction

I am very pleased to have been asked to participate in the 30th Annual Canadian Administrative Law Seminar, and I thank the organizers for inviting me.

I spent part of my Justice career as a legislative drafter and the rest as a public law lawyer, with particular emphasis on constitutional law. I look back with fondness on my many years at Justice. Seeing the faces of so many former colleagues here makes this feel like a homecoming of sorts.

En tant que commissaire aux conflits d'intérêts et à l'éthique, je travaille toujours dans le domaine du droit, mais sous un angle différent : je suis maintenant responsable de l'application de la *Loi sur les conflits d'intérêts* pour les titulaires de charge publique. J'applique également le *Code régissant les conflits d'intérêts des députés*.

Je commencerai mon exposé avec un survol de l'historique des régimes fédéraux canadiens en matière de conflits d'intérêts, puis du développement du Commissariat. J'examinerai ensuite les rôle et mandat actuels du commissaire aux conflits d'intérêts et à l'éthique. J'aborderai ensuite certaines questions d'actualité, tout en faisant référence à quelques conclusions de mes enquêtes.

History of Federal Conflict of Interest Regimes

My Office has been in its current form since 2007. As detailed in my paper, however, the development of Canada's federal conflict of interest regimes and a framework for administering them began 40 years ago.

That history included the successive appointments of an Assistant Deputy Registrar General and an Ethics Counsellor, both within government departments. In 2004 the appointment of an Ethics Commissioner brought with it a very significant change in the evolution of the office, in that the position became, for the first time, independent of the government.

The Ethics Commissioner administered the *Conflict of Interest and Post-Employment Code for Public Office Holders*. It had been established in 1985, and consolidated in one document the rules for ministers, parliamentary secretaries, ministerial staff, all public servants and Governor-in-Council appointees. The Ethics Commissioner also administered the *Conflict of Interest Code for Members of the House of Commons*, which came into effect in October 2004.

In 2007, the *Conflict of Interest Act* replaced the *Code for Public Office Holders* and the Ethics Commissioner was replaced by a Conflict of Interest and Ethics Commissioner, an independent Officer of Parliament who is accountable to and reports directly to Parliament. Independence is critical to the Commissioner's ability to administer the Act and the Members' Code. This is because the Commissioner oversees the conduct of government ministers, including the Prime Minister, as well as other public office holders and Members of the House of Commons.

The Office has evolved, but some of the issues remain the same. I recently came across a copy of the speech that the former Ethics Counsellor, the late Howard Wilson, gave at the CALS conference in 1998. He spoke about the inappropriateness of ministers making representations on behalf of constituents to quasi-judicial tribunals. One of the examples he cited was the granting of broadcasting licences by the Canadian Radio-Television and Telecommunications Commission.

Fifteen years later, this issue is still current. In January, I issued compliance orders under section 30 of the *Conflict of Interest Act* to a minister and two parliamentary secretaries. They had written to the CTRC on behalf of constituents who were seeking broadcasting licences, and I ordered them to refrain from writing similar letters in the future without seeking approval from my Office.

In the compliance orders, I referenced section 9 of the Act, which prohibits public office holders from using their positions to seek to influence decision-making where to do so would improperly further the private interests of another person. I also noted that the CRTC is a quasi-judicial tribunal that is meant to operate at arm's length from the government with respect to its decision-making.

Mandate

I have a mandate to administer the *Conflict of Interest Act* and the *Conflict of Interest Code for Members of the House of Commons*, the Members' Code. I am also mandated under the Act to provide confidential advice on conflict of interest and ethics issues to the Prime Minister.
The Act applies to some 3100 public office holders, people appointed to their positions by the federal government. All of them are subject to the Act's core set of conflict of interest and post-employment rules.

About 1100 public office holders—including ministers, parliamentary secretaries, ministerial staff, deputy ministers, heads of Crown corporations and full-time members of tribunals—are considered reporting public office holders. They are subject not only to the Act's general rules, but also to its reporting and public disclosure provisions, as well as some additional rules of conduct.

The Members' Code applies to all 308 elected Members of Parliament. It includes rules on conflict of interest for Members similar to those in the Act for public office holders. However it is a code of conduct rather than an Act. It does not include a number of the more onerous rules that apply to reporting public office holders, such as restrictions on outside activities and a prohibition against holding controlled assets. Ministers and parliamentary secretaries are subject to both the Act and the Code.

The two regimes prohibit public office holders and Members from using their offices to further their own private interests or those of their relatives or friends, or to improperly further someone else's private interests.

They set out a number of other rules. For example, public office holders and Members cannot accept gifts that could reasonably be seen to have been given to influence them.

Although both regimes include some language that sets out purposes and principles, at their core both the Act and the Members' Code reflect a rules-based rather than a values-based approach. I feel, therefore, that I must keep myself within the four corners of each, although there have been situations where I have resorted to common sense to avoid an obviously unintended result or to interpret a provision that is unclear.

Some provisions of the Act go further than what I think is strictly necessary to achieve the purposes for which they were developed and this has, in some cases, created an unnecessary burden on public office holders. I have commented publicly on these situations in my reports and before Parliament. I have also chosen to comment publicly, often in my investigation reports, where I think matters that are not covered should be regulated.

The debate continues about which approach—values- or rules-based—is preferable. A values-based regime is open to a greater degree of interpretation and discretion, both on the part of those subject to it and the person who administers it. Under a rules-based regime, everyone is constrained by specific do's and don'ts. There is more certainty, but sometimes there are unforeseen loopholes and sometimes the rules may be overly broad.

On balance I have come to think that the rules-based approach is probably preferable, but along with some general values-based principles. The Members' Code does this to some extent. I believe that the Act should, as well, set out some underlying principles in order to help its purposes to be understood and its rules to be interpreted.

In applying the Act and the Members' Code, I view my role as being primarily to advise, inform, and try to prevent contraventions. Where contraventions occur, though, I also have a mandate to enforce compliance.

My powers to carry out investigations are limited to matters covered specifically by the Act and the Members' Code and do not extend to ethical issues in general.

Under the Act, I can impose administrative monetary penalties of up to $500, issue compliance orders and conduct examinations. Under the Members' Code, I can conduct inquiries, but I have no power to levy penalties or issue orders. In my investigation reports, I can make recommendations as well as findings. As well I have often added a section with general observations that go beyond the margins of the Act or Members' Code. All of these reports are made public without any approvals by the government or Parliament. While I think the enforcement tools in the Act and the Members' Code could be strengthened, public disclosure following an investigation is, in my view, the most potent sanction for a failure to comply.

The two regimes are currently undergoing five-year reviews conducted by two different committees of the House of Commons.

In my submissions to Parliament for these reviews, I have made a number of recommendations designed to clarify and strengthen the regimes.

Les propos suivants porteront principalement sur le régime législatif de la *Loi sur les conflits d'intérêts* et mes recommandations présentées dans le cadre de l'examen quinquennal.

Current Issues

Increasing transparency around gifts and other advantages through increased disclosure and public declaration has been a priority area for me.

The rule in the Act is that gifts cannot be accepted if they may reasonably be seen to have been given to influence a public office holder. The Act also requires reporting public office holders to disclose and report publicly any gifts with a value of $200 or more.

There is a commonly held misconception that gifts worth less than $200 are automatically acceptable. Because of the continued confusion between the acceptability of gifts and the requirement to report them, I have recommended lowering the $200 reporting threshold to a minimal amount, such as $30. The $30 recommendation, if a little dramatic, served the purpose at least of drawing attention to the problem. I will be interested to see what, if anything, the committee will recommend in response.

This lower reporting threshold would allow my Office to find out about these gifts and advise on whether a gift is acceptable. At the same time the public reporting would enhance transparency.

It is interesting that since my appearance, the City of Ottawa is now looking at a similar rule and that same threshold for its officials.

A second priority area involves strengthening the Act's post-employment provisions by introducing reporting obligations for public office holders during their one-year or two-year cooling-off period after they leave public office.

An investigation that I reported on last fall illustrated the need for stronger post-employment provisions in the Act. In *The Sullivan Report*, I found that former Canadian Ambassador for Fisheries Conservation, Loyola Sullivan, contravened the post-employment provisions of the Act by making representations on behalf of a seafood company to a department with which he had direct and significant official dealings during his last year in office. As ambassador, Mr. Sullivan reported to both the Minister of Fisheries and Oceans and the Minister of Foreign Affairs.

Some question has been raised about whether a post-employment reporting requirement would violate individual rights under the *Canadian Charter of Rights and Freedoms*. No legal opinion has been sought on this matter, but I suspect it would be alright if it isn't too onerous. Some of the constitutional lawyers in this room might have thoughts on this.

A third area I have raised involves establishing some disclosure and public reporting requirements for non-reporting public office holders, particularly in relation to outside activities, recusals, and gifts. None exist now for them.

I have also made a few recommendations that would actually lighten the restrictions on public office holders. For example, I would reduce the number of those who must automatically divest themselves of their controlled assets—things like shares—and require divestment for those who are excluded only where there is a real conflict of interest in holding them. I would also allow more outside activities in certain cases where they don't interfere with public duties or create a conflict of interest situation.

I have also recommended that the Act and the Members' Code be harmonized where possible, to ensure consistency of language and processes.

During committee hearings on the five-year review, it was also suggested that the Act and the lobbying regimes should be harmonized to some extent. This is because some believe that the Lobbying Commissioner and I have made contradictory findings in related investigations.

Our respective investigations of one particular case, the involvement of lobbyists in a political fundraising event, looked at the same set of facts but from different perspectives. My decision related to whether a gift had been given to a minister. The Lobbying Commissioner was considering whether the fundraising activities of lobbyists had created an apparent conflict of interest for the minister. Even if we had both been determining the same issue, there is no logical inconsistency in having a different standard for the two groups—public office holders and lobbyists.

One area where the Lobbying Commissioner and I do have a substantive difference of view is in the area of political activities or interests.

I have found that, given the wording of the *Conflict of Interest Act*, political interests are not captured by the Act's definition of private interest, and have said that if Parliament intends that they be covered they should so provide.

In April 2010, I reported on my investigation under the Act and the Members' Code of the use of partisan or personal identifiers on ceremonial cheques and other props used by government Members in making Government of Canada funding announcements. I found that the Act and the Code were not breached because political interests are not covered by them. Despite this, I went on to make general observations about the ethical problem of using political identifiers on government cheques and, even though I found no contravention of the Act or the Code, this practice was quickly stopped by the government.

Looking Ahead

I have now been in this office for nearly six years. In that time, I have had the opportunity to observe how well the Act and the Code are working. Despite the fact that some areas of both could be improved, I believe that the regimes, at their core, are functioning relatively well.

J'attends avec intérêt les résultats des examens quinquennaux du Parlement relativement aux régimes de conflits d'intérêts fédéraux du Canada. J'ai hâte de voir quelles modifications y seront apportées, le cas échéant.

Cette pensée marque la fin de mes commentaires aujourd'hui. Je vous remercie encore de m'avoir invitée à présenter et c'est avec grand plaisir que je participerai aux discussions.