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# Keynote Presentation for Luncheon Seminar Organized by the Public Sector Lawyers Section of the Ontario Bar Association

**Mary Dawson – Conflict of Interest and Ethics Commissioner**
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## Introduction

I am pleased to be part of today's luncheon seminar, and thank the program co-chairs for inviting me to speak to you.

I am here to tell you about my mandate and role. I will do that with reference to various aspects of the two regimes that I administer: the *Conflict of Interest Act* for public office holders and the *Conflict of Interest Code for Members of the House of Commons*.

I will take some time towards the end of my presentation to focus on investigations and some of the issues that we have had to deal with, such as our confidentiality obligations.

## Federal Landscape

It is useful first to situate my mandate within Canada's ethical landscape. This will help you understand what areas of governance are covered under the regimes that I administer, and what areas are not.

- There is a separate *Conflict of Interest Code for Senators* administered by the Senate Ethics Officer.
- The *Lobbying Act* is enforced by the Commissioner of Lobbying. It includes a five-year ban on lobbying for certain former public office holders.
- The *Values and Ethics Code for the Public Service*, developed and administered by the Treasury Board, applies to most employees of the Public Service of Canada, other than the most senior leadership positions.
- There is a Public Sector Integrity Commissioner who reviews allegations of wrongdoing by public service employees.
- And, Canada's provinces and territories have their own conflict of interest and ethics commissioners.

**Mandate**

As Conflict of Interest and Ethics Commissioner of Canada, I am an Officer of Parliament who is non-partisan and independent from the government of the day. For example, I report directly to Parliament through the Speaker of the House of Commons, and not through a minister. This independence is important because I oversee the conduct of ministers, including the Prime Minister, and Members of the House of Commons.

I administer the *Conflict of Interest Act* for public office holders and the *Conflict of Interest Code for Members of the House of Commons*. I am also mandated to provide confidential advice on conflict of interest and ethics issues to the Prime Minister.

These two regimes seek to enhance public confidence and trust in government by holding public officials to standards that place the public interest above private interests.

Briefly, my mandate is to help ensure that public officials, whether elected or appointed, do not use their offices to further private interests—their own or those of others.

The concept of “private interest” is at the heart of Canada’s conflict of interest regimes. Public office holders and Members are prohibited from using their office to further their own private interests or those of their relatives or friends, or to improperly further another person’s private interests—or, in the case of the Code, another person or entity’s private interests. However, neither the Act nor the Code contains a positive definition of “private interest”.

Both the Act and the Code set out circumstances where a private interest is not considered to be furthered, for example when the matter in question is of general application or affects the Member or public office holder as one of a broad class of the public.

The Code sets out circumstances where a private interest is considered to be furthered. These would include cases where a Member’s actions result, directly or indirectly, in outcomes such as an increase in a person’s assets or obtaining a business position.

Despite the guidance provided in the Act and the Code, it is not always easy to determine if a private interest is at play in a given case.

Take, for example, the situation that arose last fall when a bill to reorganize the Canadian Wheat Board came before the House of Commons. My Office was asked whether Members who are grain farmers, or who have relatives or friends who are grain farmers, would be required to withdraw from debates or votes on the bill, because they had an interest in the subject-matter of the legislation.

Under the Code, Members may not participate in debate or vote on a question in which they have a private interest. I determined, however, that one of the exclusions I just mentioned would apply, as the Members were part of a broad segment of the public—there are some 70,000 grain farmers in Western Canada. After making this determination, I issued an advisory opinion to Members.

The Act and the Code set out a number of rules to deal with situations that involve conflicts between private and public interests, or have the potential to do so.

For example, individuals subject to the regimes are not allowed to accept gifts or benefits that could reasonably be seen to have been given to influence them in exercising their official duties. They cannot participate in discussions, decisions, debates or votes on any matter in respect of which they would be in a conflict of interest. And they must not take improper advantage of their former position after leaving office.

The *Conflict of Interest 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, mostly full-time, 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 prohibitions against outside activities and holding controlled assets. Reporting public office holders include ministers, parliamentary secretaries, ministerial staff, deputy ministers, heads of Crown corporations and full-time members of tribunals.

The Code applies to Canada's 308 elected Members of Parliament. It includes rules on conflict of interest similar to those in the Act. However, it does not require Members to divest controlled assets, and does not restrict their outside activities.

Ministers and parliamentary secretaries are subject to both the Act and the Code. While the two regimes are based on many of the same underlying principles, there are some differences.

**Administration of Act and Code**

Assisted by my Office, I fulfill several important roles.

My primary role is to advise and inform those subject to the *Conflict of Interest Act* and the *Conflict of Interest Code for Members of the House of Commons*, in order to help Members and public office holders meet their obligations and to prevent contraventions. My staff and I work to raise awareness of the obligations of the two regimes, so that Members and public office holders have the information they need to comply with them.

Confidential disclosure and public declaration are cornerstones of compliance with the Act and the Code.

After they are appointed or elected, reporting public office holders and Members of the House of Commons are required to disclose to my Office in confidence their private interests, and those of their family members. These confidential disclosures must describe their assets, liabilities, income and activities.

My Office reviews the disclosures to determine if we need to establish any compliance measures, and to target the advice and guidance we provide to an individual's particular situation.

I also have a role in making information publicly available, in support of transparency and accountability. My Office keeps the disclosures themselves confidential, but we make a brief summary public in our public registries in accordance with the rules in the Act and the Code.

Those registries also include disclosures made to my Office from time to time of gifts, recusals from votes and debates and, in the case of Members, sponsored travel.

Gifts can be a challenging area.

The Act gives the term "gift" a broad definition, including money, property or services. Event tickets and invitations are also covered. If a gift might reasonably be seen to have been given to influence a public office holder or Member in exercising his or her duties, it must be refused. There are exceptions for courtesy and protocol gifts.

Public office holders must publicly disclose any acceptable gift, other than one from a family member or friend, that has a value of $200 or more. Gifts worth more than $1,000 that are received as matter of courtesy or protocol must be forfeited to the Crown. Members of the House of Commons must publicly disclose gifts worth $500 or more, but there is no limit on the value of gifts that they may accept.

Another role is enforcement. In enforcing the Act, I can impose administrative monetary penalties of up to $500 for failures to report within prescribed deadlines, and I can issue compliance orders. I can also investigate cases of alleged non-compliance and issue public reports of my findings. In my view, public reporting is a powerful tool in ensuring transparency and accountability.

In enforcing the Code, I cannot impose monetary penalties for contraventions, but I am empowered to conduct investigations and report publicly on them.

I also have a reporting role. I am required to submit two annual reports to Parliament by June 30 of each year. One is on my administration of the Act and the other on my administration of the Code.

Under the Code, I must also prepare a list of sponsored travel by Members of the House of Commons, to be tabled by March 31 of each year.

I also testify before parliamentary committees about my Office and its work. I appear most frequently before two committees of the House of Commons:

- The first is the Standing Committee on Access to Information, Privacy and Ethics. It has oversight responsibility for my Office and reviews its annual spending estimates, as well as matters related to my reports under the *Conflict of Interest Act*.
- The other is the Standing Committee on Procedure and House Affairs. It has responsibility for the *Conflict of Interest Code for Members of the House of Commons* and, with my input, may recommend changes to the Code to the House of Commons.

Both the Act and the Code are subject to review, the Act within five years after coming into force, and the Code generally on a five-year cycle.

In fact, reviews of both regimes are due this year. I have already given the Procedure and House Affairs Committee my recommendations for improvements to the Code, and their study is continuing. I am preparing recommendations on the Act for consideration when the study of the Act is launched. That study will likely, but not necessarily, be carried out by the Access to Information, Privacy and Ethics Committee.

I will now say a little more about my role in investigating possible contraventions of the conflict of interest regimes that I administer. This investigation role has given rise to perhaps the most interesting issues of my mandate from a legal perspective. I will look, in particular, at how my Office deals with confidentiality obligations during investigations.

**Examinations and Inquiries**

My Office spends a significant amount of time investigating cases of alleged non-compliance with the Act or the Members' Code. Investigations are called examinations under the Act and inquiries under the Code.

Under the Act, I can investigate any present or former public office holder—on the request of a Member of the Senate or House of Commons, or on my own initiative, where there are reasonable grounds to believe that the person has contravened a specific section of the Act.

Under the Code, I can conduct an inquiry into a possible breach on the request of a Member or on my own initiative when there are reasonable grounds to believe that a contravention has occurred. A resolution of the House of Commons can also lead to an inquiry.

In conducting examinations, I have the same powers to compel witnesses and records under the *Conflict of Interest Act* as a court of record.

In conducting investigations under both the Act and the Code, I am responsible for making findings of fact, along with an analysis and conclusions.

Where I have concluded that the Code has not been complied with, I may make any recommendations I believe are appropriate. This may include recommendations to the House of Commons regarding the Code's general interpretation and possible revisions to it.

While I usually simply report my findings without making recommendations, I often add some general observations about the situation I have investigated, whether or not I find a specific contravention.

The investigations conducted by my Office involve determining the facts of a case and, in most cases, a careful interpretation of the provisions of the Act or the Code, often creating new precedents. My decisions arising from my investigations have served to clarify some of the provisions of the Act and Code.

As I previously noted, in my investigation reports, which are all made public, I can make recommendations. It is up to the Prime Minister, in the case of the Act, and to Parliament, in the case of the Code, to decide if any measures should be taken for failure to comply. Ultimately, for Members of Parliament, voters will have their say at election time.

**Interesting Investigations**

I will now highlight for you several investigations that are interesting for different reasons.

Raitt

One, conducted under both the Act and the Code, focussed on issues related to political fundraising.

It concerned the activities of the Honourable Lisa Raitt, a Member of Parliament and minister, in connection with a political fundraising event organized by her riding association, the Halton Conservative Association.

The investigation was requested by two Members of Parliament because of the involvement in the event's organization of several lobbyists, as well as Ms. Raitt's former executive assistant at the Toronto Port Authority, which she headed before running for election.

Section 11 of the Act and section 14 of the Code prohibit accepting "gifts or other advantages" or "gifts or other benefits", respectively, that might reasonably be seen to have been given to influence a public office holder or Member in the exercise of his or her official duties and functions.

It was alleged that Ms. Raitt had breached the gift rules under both the Act and the Code by accepting the assistance provided by a lobbyist in connection with the political fundraising event organized by the Halton Conservative Association.

Under the Act, it was alleged that she had contravened section 16, which prohibits public office holders from personally soliciting funds from any person or organization if doing so would place them in a conflict of interest.

I determined that Ms. Raitt was not involved in organizing the fundraiser or recruiting volunteers.

In fact, she was not aware of the lobbyists' involvement. Nor did she personally solicit funds or ask anyone to sell tickets. It is up to the Halton Conservative Association to organize fundraising events and to decide how the funds raised are to be used. Contributions or services provided by lobbyists were given to the Association, and not to Ms. Raitt.

I concluded, therefore, that Ms. Raitt did not contravene the *Conflict of Interest Act* or the *Conflict of Interest Code for Members of the House of Commons*. Notwithstanding this, a conflict of interest screen was set up to avoid future involvement with lobbyists.

I noted in my reports on the investigation, however, that this matter raised important issues about the relationship between Members of the House of Commons, particularly those who are ministers or parliamentary secretaries, and lobbyists or other stakeholders who become involved in political fundraising activities organized by their riding associations.

I also pointed to the need for effective fundraising guidelines.

At the time of the fundraising event, there were no rules or guidelines that applied generally to Members or in particular to ministers or parliamentary secretaries in relation to political fundraising events that could help them ensure that they are not placed or seen to be placed in situations of actual or potential conflicts of interest.

While we were considering the Raitt case, the Prime Minister established a guidance document for ministers called "Fundraising and Dealing with Lobbyists: Best Practices for Ministers, Ministers of State and Parliamentary Secretaries." It was appended to the document *Accountable Government: A Guide for Ministers and Ministers of State*, which is administered by the Privy Council Office, in November 2010.

The Raitt investigation is, I believe, interesting for a couple of reasons.

Not only did it help define the parameters of political fundraising within the meaning of both the Act and the Code, it appears to have prompted the federal government to better regulate political fundraising by ministers and parliamentary secretaries.

Guergis

My inquiry under the Code into the conduct of the Honourable Helena Guergis, when she was the Member of Parliament for Simcoe–Grey, is also noteworthy. She wrote a letter to municipal officials encouraging them to consider a request by a constituent to make a public presentation on his company's technology to Simcoe Council. It was alleged that, by sending the letter, Ms. Guergis promoted a firm that was linked to her husband, and thereby contravened specific provisions of the Code.

I focussed on whether Ms. Guergis contravened two specific provisions of the Code.

One was section 8, which prohibits Members from acting in any way to further their private interests or those of a member of their family, when acting in an official capacity.

The other was section 9, which prohibits Members of the House of Commons from using their position to influence the decision of another person so as to further their private interests or those of a member of their family.

I concluded that Ms. Guergis contravened section 8 by sending the letter because she was acting in a way to further her husband's private interests. I also concluded that she contravened section 9 because the letter was directed at influencing the decision of Simcoe County officials in a way that could further her husband's private interests.

This investigation was interesting because, although Ms. Guergis was at the time a member of Cabinet and subject to the Act, she was acting in her capacity as a Member of Parliament. I therefore determined that an inquiry under the Code was necessary. The Act was not engaged.

While Members who are also ministers are subject to both regimes concurrently, both instruments are not always engaged. Sometimes, however, it is difficult to determine in what capacity a minister or parliamentary secretary may be acting.

Sullivan

The last investigation I will mention is my examination under the *Conflict of Interest Act* of the conduct of Mr. Loyola Sullivan, former Canadian Ambassador for Fisheries Conservation.

This was the first time I had occasion to examine a matter under the post-employment provisions of the Act. Mr. Sullivan, as a former reporting public office holder, was subject to certain rules during a cooling-off period of one year. Subsection 35(2) prohibits former reporting public office holders, during their cooling-off period, from making representations for or on behalf of another entity to any department, organization, board, commission or tribunal with which they had direct and significant official dealings during their last year in office.

As Ambassador, Mr. Sullivan reported to both the Minister of Fisheries and Oceans and the Minister of Foreign Affairs, and worked with officials in their two departments. After leaving office, he became vice president of a private-sector seafood company. I found that Mr. Sullivan contravened subsection 35(2) by making representations on behalf of his company to the departments of Fisheries and Oceans and Foreign Affairs.

The Act does not require former reporting public office holders to report their post-employment activities to my Office or to seek advice. The only exception is when they are engaged in certain activities referred to in specific sections of the *Lobbying Act*.

I noted in the Sullivan Report that more comprehensive reporting obligations—such as a requirement that former reporting public office holders inform my Office of any interactions with the federal government during their cooling-off period—may help them comply with the Act.

Such reporting obligations could also help my Office obtain timely and accurate details of their post-employment activities in order to ensure that they are meeting their obligations under the Act.

**Confidentiality Obligations**

Several obligations relating to confidentiality come into play when my Office conducts an investigation. This is an area where some interesting legal issues have arisen.

The power to summon witnesses and require them to give evidence and produce documents must be exercised in private according to the Act. Other Officers or Agents of Parliament also have this provision. I have had to grapple with just what this means. For example, is this obligation restricted to not disclosing the fact that a summons has been issued? Or does it extend to the entire process by which my Office obtains evidence? In other words, to what extent can I disclose information received from witnesses?

My investigation reports may not include any information that I am required by law to keep confidential.

This includes information that is subject to Cabinet confidence, and personal information that was obtained for purposes other than the investigation. There are, of course, other types of privilege, such as solicitor-client privilege, that could arise.
Unless required by law, and with limited exceptions, my staff and I may not disclose any information that comes to our knowledge in carrying out investigations. Exceptions include:

- First, the disclosure of information that is <u>essential</u> for the purposes of carrying out my power to summon or take evidence;
- Second, information required to establish the conclusions contained in a report;
- And, third, information used in perjury proceedings in respect of a statement made to me or my Office.

These exceptions are very narrow. I have interpreted the first two exceptions to allow my Office to disclose relevant information gathered from some witnesses, either documentary or testimonial, to other witnesses, in order to obtain the information that we need to establish the conclusions that will eventually be included in a report.

We try to balance the following objectives: to safeguard the integrity of the investigation; to respect confidentiality; and to ensure procedural fairness for all participants in the process. Striking the right balance is not always easy.

**Practical Issues**

The need to respect confidentiality has given rise to several practical issues.

In order to preserve the confidentiality of witness testimony, my Office asks witnesses to keep their interview confidential and not discuss it with anyone, until my investigation report is made public. The only exceptions are to enable the witnesses to gather documents within their organizations and to consult with their legal counsel.

However, in one instance, legal counsel raised an objection, arguing that the confidentiality provisions of the *Conflict of Interest Act* only extend to the Office and not to witnesses. I am not aware of any problems in this area to date, but we are left with questions of how to enforce confidentiality from witnesses should the need arise.

**Representation by Legal Counsel**

Another issue I have dealt with relates to representation by legal counsel.

Many of the public officials subject to examinations under the Act and inquiries under the Code, and often the witnesses we call, are represented by legal counsel.

The right to legal representation is a fundamental right and the reflex to retain legal counsel is both understandable and legitimate. However, representation by legal counsel may pose some practical challenges.

We have, for example, encountered situations where legal counsel wanted to represent both the subject of the investigation and other witnesses. I have not permitted this. However, we have allowed one lawyer to represent more than one witness, when we felt that a conflict in the testimony of those witnesses was unlikely.

The style of advocacy that is both expected and effective in the context of civil litigation before the courts can be counter-productive in the context of investigations conducted by my Office.

For example, legal counsel representing the person who is the subject of an investigation may want to be present for witness interviews, and even cross-examine witnesses.

Other regimes specifically provide that there is no right for counsel to be present while representations are made by witnesses. The Act simply provides that a public office holder be given a reasonable opportunity to present his or her views. We have therefore adopted several practices to ensure procedural fairness:

- We provide the subject of the investigation, and his or her legal counsel, with an opportunity to review excerpts of transcripts and provide copies of relevant documents before a follow-up interview. We disclose what is necessary to satisfy procedural fairness for the person to know the case to be met.
- As well, my Office provides the subject with an opportunity to review most of the draft investigation report, omitting only the Analysis, Conclusions and Observations, and to provide submissions before the report is released.

**Conclusion**

I hope you have found my remarks helpful in understanding my mandate and role and the work of my Office, and gained some insight into some of the legal issues we faced in conducting investigations.

Even though I have spent a lot of time talking about matters related to investigations, because these are likely of most interest to this audience, I want to conclude by pointing out that the primary focus of my Office is on prevention, not investigation. Its strength, I believe, lies not in exposing cases of non-compliance, but in encouraging widespread adherence to conflict of interest rules and principles.

I will now be happy to answer any questions you may have.