The Conflict of Interest and Ethics Commissioner: A Hybrid

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For
"Ombudsmen and Accountability Officers:
A Growing Class of Administrative Decision-Makers"

A session organized as part of
The 5th Annual National Forum on
Administrative Law & Practice
of Osgoode Hall Law School

October 14 & 15, 2009
Toronto, Ontario

INTRODUCTION

Canadians hope and expect that those in positions of public trust will make decisions in the public interest, and that they will act in an ethical manner. In keeping with these expectations, the ultimate objective of any conflict of interest and ethics regime is to sustain and, where possible, enhance public confidence in Canada's system of government and in its public institutions. The Office of the Conflict of Interest and Ethics Commissioner plays a key role in contributing to Canadians' confidence in government and its institutions, by helping to ensure that public officials, whether elected or appointed, do not use their public offices to improperly further private interests.

The conference session in which I am participating is called "Ombudsmen and Accountability Officers: A Growing Class of Administrative Decision-Makers." As the title suggests, my Office is part of a growing class of administrative decision-makers in Canada. Some, like the Office of the Auditor General of Canada, the Privacy Commissioner and the Information Commissioner, have been around for a long time. Others, which also have full-term mandates, like the Procurement Ombudsman, as well as a variety of bodies with short-term mandates, such as the Gomery and Oliphant commissions, have been created in recent years. Although my Office has only been in its current form since 2007, we are not a newcomer to these ranks, as a role similar to ours, if less formal, has been performed under various guises since 1974.

In this paper, I will briefly examine the mandate of the Conflict of Interest and Ethics Commissioner and the diverse administrative functions performed by my Office, and discuss some interesting investigations that we have undertaken, with a view to defining my Office and how it relates to the broader class of ombudsmen and accountability officers.

MANDATE OF THE COMMISSIONER

Canada's approach to regulating the ethical behaviour of public officials has developed along three interrelated tracks. An early emphasis on promoting integrity among public office holders through a values- or principles-based approach has gradually given way to an emphasis on ensuring compliance with ethical obligations through a more rules-based approach. Hence, there has been a movement away from guidelines and towards legislation.

This evolution is in no small part due to the concerns of the Canadian public in the face of a series of public controversies culminating in the so-called sponsorship scandal that contributed to an erosion of public confidence in the integrity of Canada's national government. It is also related to a desire to make the administration of Canada's conflict of interest regimes clearly independent of government.

The Office of the Conflict of Interest and Ethics Commissioner was created under the *Federal Accountability Act*, which was intended to restore Canadians' confidence in government. This omnibus legislation received Royal Assent on December 12, 2006. The part that relates to my Office, the *Conflict of Interest Act*, came into effect on July 9, 2007.

The Office, however, has several direct ancestors that predate this legislation, and its origins can be traced back to the 1970s. A brief history of the Office of the Conflict of Interest and Ethics Commissioner's development is set out in an annex to this paper.

The Conflict of Interest and Ethics Commissioner administers two separate conflict of interest regimes: the *Conflict of Interest Act* (Act) and the *Conflict of Interest Code for Members of the House of Commons* (Members' Code). The former is a statute, while the latter is a code of conduct appended to the standing orders of the House of Commons.

The Commissioner plays a similar role in administering these two regimes. Both prohibit various activities that involve conflicts between private and public interests, or have the potential to do so. The Commissioner's Office provides confidential advice to public office holders and Members of Parliament about how to comply with the Act and the Members' Code, reviews confidential reports of assets, liabilities and activities of reporting public office holders and Members, maintains public registries of publicly declarable information, and conducts inquiries and examinations. The Commissioner is also mandated under the *Parliament of Canada Act* to provide confidential advice to the Prime Minister about conflict of interest and ethics issues.

Thus, I wear three hats. They relate to my role under the Act, my role under the Members' Code, and my advisory role to the Prime Minister.

Conflict of Interest Act

The *Conflict of Interest Act* applies to about 2,700 full- and part-time appointees of the Government of Canada, called public office holders for the purposes of the Act. They are all subject to its general rules on avoiding conflict of interest. For example, there are a variety of conflict of interest rules that prohibit using their position to benefit private interests—their own or others—as well as rules relating to gifts, recusal requirements and post-employment rules that prohibit them from taking improper advantage of their former positions.

Part-time appointees, typically members of boards and tribunals, are subject only to the general conduct rules set out in the Act and have no reporting requirements.

Full-time appointees, who number about 1,100, are subject not only to the general rules, but also to a number of more specific requirements. These reporting public office holders include ministers, ministerial staff, parliamentary secretaries, deputy ministers, heads of agencies and Crown corporations and full-time members of federal boards and tribunals. The Act restricts their outside activities, requires them to

file detailed, confidential declarations of their assets and liabilities with my Office, and prohibits them from holding controlled assets consisting of publicly traded securities. In addition to the general post-employment rules, there is a “cooling-off” period during which they cannot work for or contract with an entity outside government with which they had direct and significant official dealings during their last year in office, nor can they make representations to any entity within government with which they had such dealings during their last year in office.

The main activities of my Office under the Act include the following: advising public office holders about their obligations; reviewing their confidential declarations and establishing individual compliance measures; maintaining a public registry of publicly declarable information; and investigating alleged contraventions.

The Act draws on many of the provisions of the former *Conflict of Interest and Post-Employment Code for Public Office Holders, 2006*, which it replaced in 2007 (see annex), but includes additional rules and grants the Conflict of Interest and Ethics Commissioner additional powers. For example, the Commissioner’s power to conduct examinations was expanded to cover alleged contraventions by all current or former public office holders. Previously, only ministers and parliamentary secretaries were covered. Administrative monetary penalties for a failure to meet deadlines for disclosures, divestments and public declarations were also added, as well as some new post-employment rules.

Conflict of Interest Code for Members of the House of Commons

The *Conflict of Interest Code for Members of the House of Commons* applies to all 308 elected Members of Parliament[i]. Cabinet ministers and parliamentary secretaries are subject to both the Members’ Code and the *Conflict of Interest Act*.

The Code includes rules on conflict of interest for Members that are similar to those found in the Act. While Members are not subject to some of the more stringent requirements that reporting public office holders are subject to, such as those in the areas of divestment of assets and restrictions on outside activities, the Members’ Code does include processes for the confidential disclosure of private interests to the Commissioner, procedures for making Members’ summary information public, an advisory role for the Commissioner and a process for the conduct of inquiries into alleged contraventions of rules by Members.

Because it is a code of conduct rather than a legislative instrument, the Members’ Code can be changed more easily than the *Conflict of Interest Act*. The Standing Committee on Procedure and House Affairs has oversight responsibility for the Code, dealing with any clarifications, changes or amendments; it has no mandate with respect to the Act. I provide input and suggestions to the Committee on aspects of the Members’ Code that I believe should be clarified or amended. On the Committee’s recommendation, the House of Commons has amended the Code in each of the past three years. The most recent amendments, concerning the rules on gifts, came into effect in June 2009.

Enforcement Powers

The enforcement provisions of the *Conflict of Interest Act* and the Members' Code and the powers they give the Commissioner to encourage or enforce compliance or to deal with breaches are limited. This reflects the fact that the Commissioner's role is primarily to advise, inform and try to prevent contraventions. Public disclosure following an investigation is the most potent sanction for a failure to comply.

There are three types of action available to assist the Commissioner in enforcing the Act: imposing administrative monetary penalties; issuing compliance orders; and conducting examinations with consequential recommendations. These sanctions are not options under the Members' Code, but I am empowered to conduct inquiries under it, which are similar to examinations under the Act. Under both the Act and the Code, I can investigate contraventions, make my investigation reports public and recommend sanctions.

Administrative Monetary Penalties

The Act allows the Commissioner to impose administrative monetary penalties of up to $500 for reporting public office holders' failures to meet a number of reporting requirements. These include submitting a confidential report within 60 days after taking office, and completing a public declaration relating to their confidential report within 120 days after taking office. There are other cases in which a penalty may be imposed if a declaration is not made within specified deadlines, but these are more difficult to monitor. They include declarations of material changes to the contents of their confidential report, receipt of gifts or other benefits, offers or acceptance of outside employment and recusals.

The Office is able to ensure compliance with the initial reporting requirements because we are generally informed of new appointments in a timely manner. We have implemented a system of reminder notices to ensure that reporting public office holders are kept aware of deadlines as they approach. In most instances where reporting public office holders miss the 60-day deadline, it is because we were not informed of their appointment in a timely manner and therefore could not send them the usual reminders. Reporting public office holders may not be able to meet the 120-day deadline for a variety of reasons beyond their control. In cases where a reporting public office holder does not have a good reason for missing the deadline and we consider imposing a penalty, I have found that notice of an imminent penalty is sufficient to achieve compliance very quickly.

It is noteworthy that administrative monetary penalties cannot be imposed for contraventions of the Act other than those involving a failure to report. This means my Office cannot impose a penalty for a more substantial contravention of the Act.

Compliance Orders

The Act empowers the Commissioner to issue compliance orders, which are made public. To date, I have not had to issue such an order, although I have come close on several occasions. Generally, people do not require an order to comply with

their obligations once they understand what is required and, to date, the mere suggestion of a compliance order has elicited compliance in the rare cases where they are considered.

In effect, a compliance order is a public statement that I believe a reporting public office holder is not in compliance with the Act. Public disclosure is the only sanction.

Examinations and Inquiries

I may investigate whether a present or former public office holder is in contravention of the Act, on the request of a Senator or a Member of the House of Commons when that person has reasonable grounds to believe that a contravention has occurred. I can also conduct an inquiry under the Code at the request of a Member of the House of Commons when there is reason to believe that a breach has occurred.

I can also conduct investigations on my own initiative. I have independent authority to conduct examinations under the Act where there are reasonable grounds to believe that a breach has occurred. I can self-initiate inquiries under the Members' Code when there is reason to believe that a Member has contravened it.

When my Office is dealing with an allegation of non-compliance, we are very thorough in our investigation. And when writing my reports, I put a great deal of effort into documenting the reasons for my conclusions, as this is my chief means of communicating with the public.

My reports on examinations under the Act, which are made public, can include recommended sanctions. However, it is ultimately up to the Prime Minister to decide what action to take.

I provide my reports on inquiries under the Members' Code first to the Speaker of the House of Commons and to the Member who is the subject the inquiry; they become public when they are tabled by the Speaker. The House of Commons has thirty days to concur in a report, and it is up to the House to determine what further action, if any, to take.

It is important to note that my powers to carry out investigations are limited to conflict of interest matters covered specifically under the Act or the Members' Code. Furthermore, I do not have a mandate to carry out general audits or to investigate other ethical issues.

INVESTIGATIONS

This section of the paper summarizes several investigations that I have conducted and that are interesting from a legal perspective. The first two involve interpreting the expression "private interest" in the Members' Code and the Act. The third relates to the standing of a member of the public in relation to the Act and the courts and the standards of judicial review.

Private Interests

To date, all of my investigations have revolved around the expression “private interest”. This is understandable, since the concept of conflict of interest is built on that concept.

Subsection 2(1) of the Conflict of Interest Act sets out what is not covered by the expression “private interest”:

> “private interest” does not include an interest in a decision or matter
> (a) that is of general application;
> (b) that affects a public office holder as one of a broad class of persons;
> (c) that concerns the remuneration or benefits received by virtue of being a public office holder.

Section 3 of the Members’ Code sets out the circumstances where a private interest is considered to be furthered:

> 3(2) Subject to subsection 3, a Member is considered to further a person’s private interests, including his or her own private interests, when the Member’s actions result, directly or indirectly, in any of the following:
> (a) an increase in, or the preservation of, the value of the person’s assets;
> (b) the extinguishment, or reduction in the amount, of the person’s liabilities;
> (c) the acquisition of a financial interest by the person;
> (d) an increase in the person’s income from a source referred to in subsection 21(2);
> (e) the person becoming a director or officer in a corporation, association or trade union; and
> (f) the person becoming a partner in a partnership.
>
> 3(3) For the purpose of the Code, a Member is not considered to further his or her own private interests or the interests of another person if the matter in question
> (a) is of general application;
> (b) affects the Member or the other person as one of a broad class of the public;
> (b.1) consists of being a party to a legal action relating to actions of the Member of Parliament; or
> (c) concerns the remuneration or benefits of the Member as provided under an Act of Parliament.

Section 4 of the *Conflict of Interest Act* reads as follows:

> 4. For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person’s private interests.

Section 8 of the *Conflict of Interest Code for Members of the House of Commons* reads as follows:

> 8. When performing parliamentary duties and functions, a Member shall not act in any way to further his or her private interests or those of a member of the Member’s family, or to improperly further another person’s or entity’s private interests.

These two sections establish the general rules that underpin both the Act and the Members’ Code.

Subsection 6(1) and section 21 of the Act, which are general recusal requirements, combined with the description of conflict of interest in section 4, quoted above, prohibit a public office holder from performing his or her role as a public office holder in any situation that would provide an opportunity to further the private interests of the public office holder himself or herself, or those of his or her relatives or friends. These cases—oneself, one's relatives and one's friends—are treated in an absolute way. The prohibition extends not only to furthering private interests, but also to having an opportunity to further private interests. When someone other than oneself, one's relatives or one's friends is involved, the furthering of the private interest must be "improper" for the prohibition to be engaged.

Thibault Inquiry

The first case is an inquiry under the *Conflict of Interest Code for Members of the House of Commons* that related to the rules governing recusal and disclosure obligations. It examined whether a lawsuit was considered a private interest.

In late November 2007, a Member of Parliament requested that I initiate an inquiry into the conduct of Mr. Robert Thibault, then Liberal Member of Parliament for West Nova, in connection with his participation as an acting member of the Standing Committee on Access to Information, Privacy and Ethics (the Standing Committee), which was at that time examining the alleged business relationship between the Right Honourable Brian Mulroney and Mr. Karlheinz Schreiber as part of its review of the Mulroney Airbus Settlement.

It was alleged that Mr. Thibault had breached several sections of the Members' Code by continuing to participate in the work of the Standing Committee after Mr. Mulroney had instituted a lawsuit against him. The lawsuit sought $2 million in damages for allegedly libellous statements made by Mr. Thibault outside of the House of Commons. More particularly, it was alleged that, by continuing to sit on the Standing Committee, Mr. Thibault, the Liberal Party's lead critic on Mulroney-Schreiber, had acted to further his own private interests contrary to section 8 of the Code, that he breached section 12 by failing to disclose this private interest, and that he ought to have recused himself from participating in the work, including the debates and votes, of the Committee as required by section 13. On the basis of these allegations, I initiated an inquiry as required by section 27 of the Members' Code.

At its core, the inquiry turned on the threshold question of whether a lawsuit constitutes a "liability" and, consequently, a "private interest" within the meaning of the Members' Code. In answering this question, I determined that a lawsuit instituting a damages claim against a Member of Parliament is a contingent liability, and therefore constitutes a "liability" within the meaning of the Code and, consequently, a "private interest" for the purposes of applying sections 8, 12, and 13.

The most important consideration in this inquiry was that the subject matter of the Standing Committee's review and the subject matter of the lawsuit instituted against Mr. Thibault overlapped to a considerable degree in that they each related to many of the

same underlying facts. Much of the information sought by the Standing Committee would also be necessary to determine the outcome of the libel suit.

In conducting this inquiry, therefore, it was exceedingly difficult to disentangle the extent to which Mr. Thibault's participation in the work of the Standing Committee may have been motivated, or at least influenced by, his private interest in defending the lawsuit from the more impartial and duty-bound pursuit of the public interest. The evidence gathered by the Standing Committee, shaped in part by Mr. Thibault's interventions in questioning witnesses, could have affected his private interests in the outcome of the libel suit. As a consequence, Mr. Thibault's participation in the work of the Committee could be reasonably seen to have been influenced by his private interests, potentially interfering with the execution of his public duties and functions.

I found that Mr. Thibault ought to have not only declared his private interest as required by section 12 of the Members' Code, but also recused himself from participating in the work of the Standing Committee, including its debates and votes, pursuant to section 13. I also concluded that he had breached the broad prohibition set out in section 8 insofar as his participation in the Committee's work could result in furthering his private interests. However, because my findings depended on a new interpretation of the term "liability", I recommended that no sanction be imposed on Mr. Thibault, though I also recommended that he disclose the existence of his private interest to the Speaker of the House in fulfillment of his formal disclosure obligations. Mr. Thibault complied with this recommendation.

My Report on the Thibault Inquiry, submitted to the Speaker of the House on May 7, 2008, provoked a strong reaction from certain Members of Parliament who were not only surprised that the term "liabilities" in the Members' Code encompassed contingent liabilities such as pending (undecided) lawsuits, but, more important, were also concerned that my ruling created incentives for third parties to institute unmeritorious libel suits as a means of preventing MPs from pursuing legitimate initiatives in the public interest. MPs felt that this broad interpretation of "liabilities" would trench on their parliamentary privileges and immunities and, in particular, their untrammelled right to free speech. They believed that such "libel chill" unjustifiably interfered with their ability to execute their public duties and, therefore, fundamentally undermined their important role in assuring the appropriate functioning of Canada's system of representative democracy.

In response to these concerns, the House of Commons adopted a motion on June 5, 2008, amending the Members' Code to exclude from the concept of a private interest "matters that consist of being a party to a legal action relating to actions of the Member as a Member of Parliament" and requiring me to reconsider the conclusions I had reached in my Report in light of this amendment.

In responding to the motion, I found, as a preliminary matter, that the amendment did not affect the broad interpretation of the term "liabilities" as used in the Members' Code, which continues to encompasses both actual and contingent liabilities except to the extent that legal actions are, by the effect of the amendment, considered beyond the scope of private interests. Starting from the premise that the amendment to the Code

had been made before I began my inquiry into Mr. Thibault's alleged misconduct and assuming the same underlying facts as set out in my original Report, I concluded that if the amendment had been in effect when I conducted my inquiry, Mr. Thibault would not have breached the Members' Code. In other words, the amendment to the definition of private interests, which clarified that this concept did not include legal actions against Members of Parliament, would have fundamentally changed both my analysis and the conclusions I reached in conducting this inquiry.

Watson Examination

The second case is a self-initiated examination involving an individual's recusal obligations under the *Conflict of Interest Act* when there is an opportunity to further the private interests of a friend. This required legal analysis of what is considered a friend in the context of a conflict of interest regime, and what is meant by "improperly" furthering the private interests of someone other than a friend or relative.

In the spring of 2009, my Office received information alleging that Mr. Colin Watson, a Member of the Board of Directors of the Toronto Port Authority (TPA), was in a conflict of interest with respect to his participation in votes by the TPA Board regarding a proposal to acquire a new ferry to service the Toronto City Centre Airport. It was alleged, more particularly, that Mr. Watson ought to have recused himself from these votes on the grounds that they provided him with an opportunity to further the private interests of his alleged "friend" Robert Deluce, President and CEO of Porter Airlines, whose business interests would benefit from the acquisition of a new ferry.

On the basis of the information that I received, I initiated an examination under subsection 45(1) of the *Conflict of Interest Act* to determine whether Mr. Watson ought to have recused himself from making any decisions with respect to the new ferry proposal on the basis of the rules of conduct set out in sections 6 and 21, which require public office holders to avoid conflicts of interest and to recuse themselves from participating in decisions and votes that place them in conflicts of interest, respectively. In conducting this examination, I was called upon to determine whether Mr. Watson and Mr. Deluce were "friends" within the meaning of the Act, whether Mr. Watson's participation in the TPA's decision to acquire a new ferry either impacted on his own or Mr. Deluce's private interests or amounted to improperly furthering another person's private interests under the definition of conflict of interest set out in section 4, and whether Mr. Watson had, in the circumstances, contravened the Act.

This inquiry turned largely on two questions of interpretation, both of which involved key terms in the definition of "conflict of interest" set out in section 4 of the Act, namely "friends" and "improperly". Neither is defined in the Act. In conducting this examination, therefore, I was called upon to consider both the meaning and scope of these terms in light of the objectives of the Act and then to apply these definitions to the facts at issue in this particular inquiry.

In interpreting the term "friend", I determined that the definition of "conflict of interest" was not intended to encompass situations involving individuals with whom a

public office holder was merely acquainted either as part of a broad social network or through a business association. As used in the Act, the term “friend” is meant to capture those individuals who share a close bond of friendship, a feeling of affection or special kinship with the concerned public office holder. On the basis of this interpretation, I concluded that the professional acquaintance between Mr. Watson and Mr. Deluce did not amount to the close personal bond required in order to conclude that the two men were “friends” within the meaning of section 4. Therefore, Mr. Watson could not, on the sole basis of his alleged friendship with Mr. Deluce, be understood to be in a conflict of interest as defined in the Act or as required in order for me to conclude that he ought to have recused himself from participating in the votes of the TPA Board of Directors pursuant to either sections 6 or 21.

Moving on from the question of whether Mr. Deluce was a friend, it was necessary then to consider the broader question of whether Mr. Watson “improperly” furthered Mr. Deluce's private interests in supporting the proposal for a new ferry. I determined that all relevant procedures for making the decision were approved by the TPA Board, such that any alleged improprieties in this regard would go to the conduct of the Board as a whole and not only to Mr. Watson. There was no evidence either that Mr. Watson played a particularly influential role in moving the TPA’s decision-making process along or that any other Board Members were in a conflict of interest. In fact, I had no doubt, based on the interviews I conducted, that all of the Board Members, including Mr. Watson, believed that they were acting in the best interests of the TPA, notwithstanding significant differences in opinion regarding the appropriate course of action for it to take. On this basis, I concluded that Mr. Watson did not improperly further Mr. Deluce’s private interests in voting on the proposal and that he was thus not in a conflict of interest and therefore had not breached sections 6 or 21.

For these reasons, I concluded that Mr. Watson had not contravened the Act and, therefore, did not impose any sanctions upon him.

Democracy Watch

The third and final case does not involve an actual investigation, but rather a request for an investigation that I chose not to pursue, and the subsequent court challenge of the manner in which I exercised my statutory discretion under the Conflict of Interest Act not to self-initiate an examination.

The case had its origins in a letter sent to me in late fall 2007 by Mr. Duff Conacher, Coordinator for Democracy Watch, an advocacy organization focussed on democratic change. In it, he asked me to conduct an investigation of alleged violations of the *Conflict of Interest Act* by the Prime Minister, the Attorney General of Canada and various other Cabinet ministers. In particular, Mr. Conacher alleged that those public office holders had contravened the Act by furthering their private interests or those of former Prime Minister Brian Mulroney in making decisions with respect to the Mulroney-Schreiber matter. He also requested that I issue compliance orders requiring that they recuse themselves from any future decision-making in respect of it.

In a letter of reply dated January 7, 2008, I indicated that I would not undertake an examination on my own initiative on the grounds that I did not have sufficient credible evidence to believe that any of those public office holders used their office or position to further their private interests or those of Mr. Mulroney in making decisions related to the Mulroney-Schreiber matter. There was no reason to believe, therefore, that any of them had contravened the Act. In light of this determination, I did not consider it necessary to issue any compliance orders requiring recusals.

Democracy Watch initiated an application for judicial review of my letter by the Federal Court of Appeal[ii], alleging that I had made a reviewable error in refusing to undertake an examination on my own initiative.

The application for judicial review was heard by the Federal Court of Appeal on January 21, 2009 and dismissed from the Bench. In its Reasons for Judgment, the Court unanimously dismissed Democracy Watch's application for lack of jurisdiction on the basis that I did not owe Mr. Conacher a legal duty to act upon his request for an examination, and that my letter of response did not constitute a decision reviewable by the Court.

Main Argument

We argued that where administrative action does not affect an applicant's rights or carry legal consequences, it is not amenable to judicial review. The applicant has no statutory right to have its complaint investigated by the Commissioner, and the Commissioner has no statutory duty to act on it. There is no provision in the Act that allows a member of the public to require the Commissioner to initiate an examination. Furthermore, any statement made by the Commissioner in the original letter of refusal does not have any binding legal effect, as she retains the discretion to commence an investigation into the complaint if in the future the Commissioner has reason to believe that there has been a contravention of the Act.

This argument rested on the scheme of the *Conflict of Interest Act*, which contemplates two mechanisms by which an examination may be commenced by the Commissioner: 1) upon the request of a Senator or Member of Parliament the Commissioner must investigate as long as the Commissioner does not determine that the request is frivolous, vexatious or made in bad faith; and 2) on the Commissioner's own initiative if the Commissioner has reasonable grounds to believe that the Act has been contravened.

Section 66 of the Act states that all decisions and orders of the Commissioner are final, and are not reviewable in any court except in accordance with the *Federal Courts Act* on the limited grounds that the Commissioner acted without or beyond her jurisdiction or refused jurisdiction, failed to observe principles of natural justice or procedural fairness, or acted by reason of fraud or perjured evidence.

In recognition of the scheme of the Act, the Court made the important finding that my letter was not judicially reviewable since I did not issue "a decision or order" within

the meaning of section 66 of the *Conflict of Interest Act* or subsection 18.1(3) of the *Federal Courts Act*.

Thus, the Court accepted our position that a member of the public did not have standing to require that an examination be conducted on the basis that a broad discretion had been conferred upon the Commissioner, and that the Commissioner's refusal to initiate an examination was not a decision reviewable by the Court.

Democracy Watch subsequently filed an application for leave to the Supreme Court of Canada, which was dismissed with costs on June 11, 2009.

Alternative Argument

As an alternative argument that was not dealt with by the court, we argued that in light of the Supreme Court of Canada decision in *Dunsmuir*[iii], the standard of review ought to be one of reasonableness. In determining which of the two standards, correctness or reasonableness, ought to apply, a number of relevant factors need to be considered, such as: the presence or absence of a privative clause; the purpose of the tribunal; the nature of the question at issue; and the expertise of the tribunal.

In *Dunsmuir*, the Court identified the existence of a privative clause as a strong indication of legislative intent for reviewing courts to extend greater levels of deference to administrative decision-makers. We maintained that section 66 of the *Conflict of Interest Act* constitutes a full, broad and strong privative clause.

The question at issue was one of discretion, pertaining to the manner in which I exercised my discretion not to initiate an examination. In *Dunsmuir,* questions of discretion were characterized as a deferential factor in conducting a standard of review analysis.

In *Dunsmuir*, the Court also determined that courts should show deference when administrative decision-makers interpret their home statutes and where such decision-makers have developed particular expertise in a specific statutory context.

In the face of a strong privative clause, a question involving the exercise of a statutory discretion as well as the interpretation of the Commissioner's home statute, and given that establishing the existence of conflict of interest breaches is patently within the Commissioner's expertise, we argued that the exercise of my discretion would be reviewable on a reasonableness standard. In light of the unsubstantiated allegations, the position of the Office was that it was reasonable for the Commissioner not to pursue an examination. The Federal Court of Appeal did not make a determination on which standard of review would be applicable.

Improperly Furthering a Private Interest

We have had several cases focussing on the general prohibition, found in both the Act and the Members' Code, against improperly furthering the private interests of someone who may not be a friend or relative. The qualifier "improperly" reflects that fact

that Members and public office holders routinely and legitimately further the private interests of particular groups or individuals through the formulation and implementation of public policy. Politicians, in particular, should be able to voice their support for fellow politicians and particular political agendas, and should not be restricted from doing so on the grounds that it may incidentally result in furthering particular private interests.

Accordingly, in deciding whether an interest has been improperly furthered, it is often necessary to determine whether the focus of the action in question was really on the private interest at issue or whether that private interest was incidental to some broader policy-making or political activity falling outside the scope of the Act and the Members' Code. It is important for my Office to avoid getting embroiled in political controversies unless there is a clear intention to further a private interest.

The ruling in the criminal trial of Ottawa Mayor Larry O'Brien on charges of influence-peddling[iv] is interesting in this regard. The judge found that political objectives are generally acceptable and would not place a public office holder in a conflict of interest, but that where such political objectives also provide an opportunity to further a public office holder's private interest to the detriment of the public interest, a conflict of interest arises.

During the trial, in which the judge ultimately found Mr. O'Brien not guilty of the charges, the defence filed a motion for a directed verdict on the grounds that Mr. O'Brien's alleged political activities, such as negotiations and acceptance of a resignation from a mayoral race, in exchange for his cooperation in securing an appointment did not fall within the scope of the particular sections of the *Criminal Code*. The judge dismissed the motion because some evidence existed upon which a trier of fact might reasonably convict Mr. O'Brien of the offences.

In coming to his conclusion, the judge considered both the ordinary and grammatical meaning of the provisions' language, and the underlying legislative intent. The judge found that those sections of the *Criminal Code* encompass diverse forms of advantages or benefits, including those of a purely political nature, and found further that those sections were clearly aimed at preventing influence-peddling in order to protect the public's confidence in the integrity and appearance of integrity of the government:

> While certain commonplace patronage-based arrangements or appointments may be perceived as not properly the subject of criminalization under s.121(1), this may not be true of other such arrangements and appointments, which despite being part of the ordinary course of government business, may nonetheless be viewed by a reasonable member of the public as inappropriate, and a negative reflection on the integrity of government officials. Although the court may, as counsel for Mr. O'Brien argues, take judicial notice that such political maneuverings are "not uncommon features of Canadian political life," if we are to adhere to the Supreme Court's pronouncement on the matter in *Hinchey*, it is not necessarily the case that maneuverings are not, and will not be perceived by the Canadian public as bringing the integrity of government into disrepute. The Crown submits that just because this activity is one of politics' dirty realities does not make it any less odious, indeed criminal. I agree with this submission. In short, just because it happens, doesn't necessarily make it acceptable and therefore excluded from the scope of s.121(1)(d). This section must be interpreted in accordance with its legislative purpose of safeguarding integrity, both actual and apparent.

> I am certainly mindful of the necessity in interpreting statutory provisions of avoiding absurd or negative outcomes; the defence contends that an inclusive interpretation of s.121(1)(d) produces such outcomes. I agree that it was likely never the intention of Parliament to make it a crime for a politician to offer a Senate appointment or a ministerial position as part of the cost of inducing another politician to agree to cross the floor or vacate a seat or nomination. Such dealings are unlikely to impugn the integrity of government. Ultimately such matters will be decided with the ballot box. However, to categorically exclude the conferring of all kinds of political advantage in exchange for cooperation, assistance or influence, from the scope of s.121(1)(d) is to exclude activity that may seriously compromise public perception of the honesty and integrity of public officials—a result which is itself absurd. Accordingly, I find that s.121(1)(d) captures political advantage, and that Mr. O'Brien's alleged conduct in this case is properly within the scope of the subsection.

While the O'Brien case did not involve my Office—and indeed was initiated in the sphere of criminal, not administrative law—it could, I believe, have interesting implications in the context of the *Conflict of Interest Act*, given the parallel interpretation that could be made in relation to the confluence of political and private interests.

STATUS OF THE COMMISSIONER

The preceding discussion of my mandate and of some of the investigations with which my Office has been involved provides a background against which to suggest how the Conflict of Interest and Ethics Commissioner fits into the "growing class of administrative decision-makers."

First, perhaps we could establish what the Commissioner is *not*.

I am clearly not an "ombudsman", overseeing the investigation of citizens' complaints about improper government activity. I am not required to follow up on complaints from the general public, although I often respond to inquiries from members of the public. Certain other Officers of Parliament were constituted as ombudsmen, in particular the Information Commissioner of Canada, who investigates complaints from Canadian citizens that the federal government has denied citizen rights under the *Access to Information Act*, and the Privacy Commissioner of Canada, who investigates complaints about the use of personal information held by the Government of Canada, under the *Privacy Act*. Our focus is on the behaviour of individual public office holders and not that of the government as such. At the same time, I do have investigative powers.

Neither does my Office fit the definition of "administrative tribunal," since it does not have quasi-judicial authority to adjudicate disputes between two adversarial parties.

Nor is my Office a "government agency" responsible for the provision of specific services to Canadians.

What, then, is it?

There is no short answer to this question. As can be seen from the following discussion, many factors must be taken into consideration.

In the first instance, the Commissioner is an Officer of Parliament. My Office is not an institution of the Government of Canada, but belongs to Parliament itself. Along with the Senate, the House of Commons and the Library of Parliament, it is part of the parliamentary infrastructure. My employees are not public servants, but are employed under the *Parliamentary Employment and Staff Relations Act*. While the agents of Parliament I have referred to above are independent to a significant degree, my Office is unique in an important regard. I report directly to Parliament, through the Speaker of the House of Commons, and not through a Minister. Similarly, I submit the Office's annual spending estimates to the Speaker, who submits them to the Standing Committee on Access to Information, Privacy and Ethics for review.

At the same time, for purposes of financial accountability, my Office is a Department under the *Financial Administration Act* and I have the rank of a deputy head of a department.

Another interesting attribute of my Office is that my decisions under the *Conflict of Interest Code for Members of the House of Commons* are not subject to judicial review. I operate within the institution of the House of Commons, and the protection of parliamentary privilege is extended to my Office under the *Parliament of Canada Act*. At the same time, with respect to the *Conflict of Interest Act*, I am a "commissioner" under the *Federal Court Act*. The Federal Court of Appeal has jurisdiction to review my decisions under the Act.

My Office is not subject to the *Access to Information Act* or to the *Privacy Act*.

This independence from government, which is also ensured in other ways, such as the appointment and removal processes and immunity from criminal or civil proceedings in relation to the Commissioner's activities, is critical to the Commissioner's ability to administer the federal conflict of interest regime for several reasons. The Commissioner oversees the conduct of government ministers, including the Prime Minister, in addition to other public office holders and Members of the House of Commons. More generally, it is essential that those subject to the Act and the Code be assured that they will receive fair and equal treatment regardless of their political affiliation. The public will trust the legitimacy of the Commissioner's conclusions only if the Commissioner is truly independent of the government of the day and is perceived to be so.

I have an advisory role, which is somewhat unique in that my Office provides advice on compliance issues to the same people we could at some point end up investigating. I am also mandated to provide the Prime Minister with confidential advice regarding conflict of interest and ethics issues.

I have an educational role. Educating people about conflict of interest issues is an important part of my mandate. In particular, I am mandated under the *Conflict of Interest Act* to promote public awareness and education about this conflict of interest regime, a task that includes ensuring that the public understands the preventive role of my Office, and that its strength lies not in penalizing or even exposing cases of non-compliance, but in encouraging widespread adherence.

I have an investigatory role, with the same powers under the Act to compel witnesses and records as a court of record. My Office investigates cases of alleged non-compliance with the Act and the Members' Code. In addition to being interested in the facts of a case, I am almost invariably equally concerned with interpreting the provisions of the Act or the Code in situations that are often without precedent.

And, lastly, I have an administrative decision-making role. My Office renders administrative decisions following investigations of matters raised in individual cases.

These unique and varied characteristics related to form, structure, role and powers mean that my Office does not fit one of the standard moulds, but is rather a unique, hybrid form of organization. Therefore, perhaps the best description would be the more general "accountability officer," which appears in the title of this session.

CONCLUDING COMMENTS

While my staff and I will monitor with interest and participate, as necessary, in any further legal cases that could potentially clarify or broaden the responsibility that Parliament has entrusted to me, I do not see my Office being significantly affected by the growing trend for recourse to the courts regarding government decisions.

We have yet to be taken to court by someone covered by the *Conflict of Interest Act*, and have no reason to believe this would happen. The only action against us, referred to earlier, was taken by a group that, it was ruled, had no standing to do so in the matter raised. It is important to understand that our practice is primarily collaborative, not adversarial. My staff and I work with individuals to avoid conflicts of interest from arising. Our aim is prevention, not punishment.

Developments in other areas could, however, affect the ongoing evolution of my Office. For example, the Oliphant Commission[v] might make some policy recommendations with respect to post-employment and possibly other aspects of the conflict of interest regime when it submits its report at the end of this year.

My Office is primarily concerned with possible conflicts between the public duties and private interests of public office holders and not with all types of ethical concerns, although there is a tendency for some to think of the Office as a single window into all ethics issues. Interestingly, despite my title, there is no mention of "ethics" in the *Conflict of Interest Act*. In the *Parliament of Canada Act*, which sets out my mandate, there is a provision for me to provide confidential policy advice and support to the Prime Minister in respect of conflict of interest and ethical issues in general. Frankly, I am still grappling with what role, if any, I should be playing in the general ethics field, but I am very cognizant of the fact that the *Conflict of Interest Act* and the Members' Code both establish a precise mandate that may only incidentally touch upon broader ethical issues.

A number of other countries have established their own conflict of interest and ethics regimes, some with a legislative basis, others founded on codes of conduct or

policy directives, and others consisting of a combination of these two types of instruments. I believe that Canada can learn from and teach other jurisdictions.

I hope that this paper has succeeded in providing conference participants with a better understanding of how the Office of the Conflict of Interest and Ethics Commissioner fits into the class of administrative decision-makers as we all seek to sustain and enhance public confidence in Canada's system of government and in its public institutions.

ANNEX

History of the Office of the Conflict of Interest and Ethics Commissioner

1973
Conflict of interest guidelines for Cabinet ministers were introduced by Prime Minister Pierre Elliott Trudeau. They included prohibitions on the use of insider information for private gain, restrictions on outside activities and a requirement that ministers either divest or publicly declare certain assets. Some of the guidelines, such as a prohibition on corporate directorships, reflected informal policies that had been in place for a number of years. Others, such as the requirement to divest or publicly declare certain assets, were borrowed from other jurisdictions.

Guidelines for various groups of public servants and Governor-in-Council appointees were announced. They were similar to those for ministers; more specific requirements for senior Crown corporation and agency officials were set by the minister responsible.

Plans to appoint Canada's first federal conflict of interest administrator were announced.

1974
An Assistant Deputy Registrar General was named and an office was established within the former Department of Consumer and Corporate Affairs. In addition to maintaining a registry of public declarations, the office provided conflict of interest advice to ministers and other public officials.

1970s and 1980s
The conflict of interest guidelines administered by the Office of the Assistant Deputy Registrar General were modified several times. Most significantly, in 1985, Prime Minister Brian Mulroney issued the *Conflict of Interest and Post-Employment Code for Public Office Holders*, which consolidated in one document the rules for ministers, parliamentary secretaries, ministerial staff, all public servants and Governor-in-Council appointees.

1994
The Assistant Deputy Registrar General was replaced by an Ethics Counsellor, who served under the general direction of the Clerk of the Privy Council; administrative support was provided by Industry Canada. A revised *Conflict of Interest and Post-Employment Code for Public Office Holders* (Public Office Holders' Code) was issued; it was amended in 2003 and again in 2004.

2004
An amendment to the *Parliament of Canada Act* came into force, creating the new position of Ethics Commissioner, which was no longer part of the public service but a separate parliamentary entity. A new Commissioner was appointed.

The Ethics Commissioner administered the Public Office Holders' Code, and also assumed responsibility for a new *Conflict of Interest Code for Members of the House of Commons*, which came into effect in October 2004. The Members' Code built on various conflict of interest rules that were included in the *Parliament of Canada Act* and the former *Senate and House of Commons Act*.

2006
The *Federal Accountability Act* established the *Conflict of Interest Act*, which replaced the *Conflict of Interest and Post-Employment Code for Public Office Holders*.

It also created the new position of Conflict of Interest and Ethics Commissioner, replacing the previous position of Ethics Commissioner. Mary Dawson assumed the post in July 2007.

Endnotes

[i] There is a separate *Conflict of Interest Code for Senators* administered by the Senate Ethics Officer. In May 2009, the government introduced legislation, Bill C-30, to eliminate the position of Senate Ethics Officer and to transfer the duties and functions of that Officer to the Conflict of Interest and Ethics Commissioner.

[ii] Pursuant to section 28 of the *Federal Courts Act*, the Federal Court of Appeal has jurisdiction to hear judicial review applications made in respect of the Office of the Conflict of Interest and Ethics Commissioner.

[iii] *Dunsmuir v. New Brunswick*, 2008 SCC 9

[iv] Mr. O'Brien was accused of having or pretending to have influence with the Government of Canada or with a Minister of the Government and accepting a benefit or advantage (the withdrawal of a candidate from the 2006 mayoral election) as consideration for exercise of influence in connection with the appointment of the candidate to an office of the National Parole Board, contrary to section 121(1)(d) of the *Criminal Code of Canada*. Mr. O'Brien was also accused of negotiating with respect to an appointment to an office in expectation of an advantage or benefit, namely the candidate's withdrawal from the mayoral election, contrary to section125(b) of the *Criminal Code*.

[v] Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney