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The Federal Approach to Ethics from an Evolutive Perspective: Key Milestones, Past and Future

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I am very honoured to participate in the prestigious Annual Public Policy Lecture organized by York University's McLaughlin College. Thank you to my friend Dr. James Simeon, head of the College, for inviting me to discuss issues related to my new role.

I am pleased to share my perspective on the development of ethics regimes that govern the conduct of federal officials. Given my current role as Conflict of Interest and Ethics Commissioner, I will pay special attention to those that seek to prevent and address conflicts between public and private interests. In doing so, I will draw on the experience I have gained in over 35 years of public service.

To help you understand that perspective, I will begin by talking about my philosophical approach, which is informed by my education and experience.

I will then situate conflict of interest in the broader field of ethics and look at how ethics are relevant to politics and democracy. To provide historical context, I will discuss milestones in the development of the regimes that I now administer—the *Conflict of Interest Act* and the *Conflict of Interest Code for Members of the House of Commons*—as well as some for regimes that I do not administer.

I will discuss the instruments, institutions, processes and structures that, in my opinion, need to be in place to ensure effective ethics regimes. I will also speak about what I see as the pillars of conflict of interest regimes in particular, and identify some of the features of the regimes in relation to which I currently play a role.

I will end with a look at what I believe the future could hold with respect to identifying and addressing conflicts of interest in Canada.

Philosophical Approach to Ethics, Politics and Democracy

Achieving a culture of ethics and integrity is a keystone of good governance. It is also necessary for the effective functioning of democracies.

My title, Conflict of Interest and Ethics Commissioner, is very on point. My mandate as set out in the *Parliament of Canada Act* requires that I administer the *Conflict of Interest Act* and the *Conflict of Interest Code for Members of the House of Commons*. These regimes deal exclusively with conflicts of interest, ensuring private interests are not put before the public interest when decisions are made by public officials. The latter part of my title, "ethics", also forms part of my mandate, in that I may provide confidential policy advice and support to the Prime Minister in respect of conflict of interest and ethics issues in general. While the term does not otherwise appear in the regimes I administer, ethics largely determine how an individual will approach a conflict of interest situation.

The term "ethics" is derived from the Greek word "ethos," which means "way of living." According to textbook definitions, it is a branch of philosophy that is concerned with human conduct, specifically the behaviour of individuals in society. Ethics examine the rational justification for our moral judgements. It is the study of what is morally right or wrong, just or unjust.

Individuals who hold public office, whether elected or appointed, are expected to always act in the public interest. Their decisions must be guided by the public interest and never by their private interests or those of their friends, families or relatives.

The decision-making process can be negatively impacted by a lack or lapse of ethical judgement. A legal framework setting out rules governing conduct helps to ensure the decisions of those who hold public office are made in the public interest.

Consequently, I view my role as dealing largely with ethical issues.

Throughout my career in public service, I have played a role in shaping and implementing instruments related to rules governing the conduct of public sector workers in the areas of conflict of interest and ethics.

I find it is easier to apply a rule when I actually understand its theoretical foundation, its intent and its purpose. In this regard, I consider myself a practitioner, rather than a theorist, and this informs the way I approach ethical problems.

My viewpoint is likely the result of my legal education. I am what in French is called a "civiliste." I was trained in the law of Québec, which follows the civil-law tradition and is the only province with a civil code, a comprehensive embodiment of rules. I therefore tend to focus much more on the literal text of the written rules before I consider past decisions in which the rules were interpreted.

The common law, on the other hand, is derived from judicial precedents rather than statute. An established common law rule guides a decision-maker, such as a judge, in making a decision when faced with similar facts to earlier decisions.

Parliament, or the legislature, has the power to make or amend laws. These laws take the place of the common law or precedents dealing with the same subject. The courts must then interpret the laws.

My viewpoint as a *civiliste* guides me in my role as Conflict of Interest and Ethics Commissioner. What this means in practical terms is that while I always want to know the decisions made by my predecessor, I make my own interpretations in applying the *Conflict of Interest Act* and the *Conflict of Interest Code for Members of the House of Commons*, while, to the extent possible, striving to achieve consistency.

My role is to administer the Act and the Code. I do not have the authority to change them in any way. I make a conscious effort not to rewrite indirectly a rule with which I might find myself in disagreement.

The Act is a statute, so it can only be amended by Parliament through a bill voted on in both the Senate and the House of Commons before receiving Royal Assent, or final approval, from the Governor General. The Code is not a statute, but a code of conduct that is part of the Standing Orders of the House of Commons, the permanent written rules under which the House regulates its proceedings. Therefore, it can only be amended by the House itself.

Historical Development of Ethics Regimes

Different countries have adopted various approaches to the development of public sector ethics frameworks.

Unfortunately, it would appear that, scandal often precedes progress in public sector ethics, just as accidents often precede new safety rules.

For example, in the United States, the Office of Government Ethics was established under the *Ethics in Government Act* of 1978, when Congress enacted sweeping post-Watergate reforms.

The British House of Commons set up the Office of the Parliamentary Commissioner for Standards in 1995, following the “cash for questions affair” in which two MPs accepted money from a lobbyist in exchange for asking parliamentary questions.

In Canada, various rules, some more elaborate than others, have been adopted at the federal level since 1867 to deal with ethics issues. Their focus has evolved over the years in response to the challenges our parliamentary democracy has faced as a consequence of various scandals.

Public trust in the integrity in Canada’s federal government and its institutions have been shaken by a series of controversies, which often prompted positive action. Successive prime ministers have also made efforts to provide clear written guidelines, usually shortly after an election.

In 1867, soon after it was formed, the House of Commons prohibited Members from voting on any questions in which they had a direct pecuniary interest. The practice, however, was based on an honour system: a Member’s word was simply accepted.

In 1964, there were allegations of bribery and corruption in the House of Commons in relation to a Montreal extradition case. Lucien Rivard, in a Canadian jail on U.S. drug charges, had contacted officials in the governing party to secure bail. A Royal Commission was appointed and several Canadian officials, including the Justice Minister, Guy Favreau, resigned. The Rivard Affair, as it was called, prompted Prime Minister Lester Pearson to write a letter to his ministers and colleagues. In it, he set out a code of ethics and morality for them and their staff to follow in performing public responsibilities. He forbade bribery and conflicts of interest.

In 1973, then Privy Council President Allan MacEachen tabled a green paper that recommended adopting legislation to prevent conflict of interests by Members and Senators. It divided conflict of interest into four areas. One, corrupt practices and prohibited fees. Two, incompatible offices. Three, government contracts. And, four, financial interests.

That same year, Prime Minister Pierre Elliott Trudeau introduced conflict of interest guidelines for cabinet ministers. Guidelines for various groups of public servants and Governor-in-Council appointees were also announced.

In his speech to Parliament on July 18, 1973, Mr. Trudeau explained why the government adopted guidelines in lieu of legislation. He said, and I quote:

> The government believes that no higher standards should be demanded of anyone than of ministers themselves. They would, of course, as Members of Parliament or Senators, be subject to all the provisions that would apply to members of those bodies, whether by law, by resolution or by custom. Because of their unique duties and responsibilities, ministers should, however, be required to conform to a series of guidelines which impose added restraints, particularly in relation to pecuniary interests. The government has concluded that guidelines are preferable to additional legislation specifically relating to ministers since certain aspects of conduct cannot readily be defined except in relation to particular circumstances. An element of discretion, to be exercised by a minister on the basis of discussion with the prime minister of the day, seems the best solution.

End quote.

In 1974, Mr. Trudeau appointed Canada's first federal conflict of interest administrator, an Assistant Deputy Registrar General with an office in the former Department of Consumer and Corporate Affairs.

In 1979, Prime Minister Joe Clark issued new conflict of interest guidelines for cabinet ministers, including their spouses and dependent children. The guidelines created categories of assets, specified which ones required public disclosure or divestment, and prohibited certain professional, corporate and commercial activities.

In 1980, Mr. Trudeau issued a revised set of guidelines similar to those issued by Mr. Clark, but the provisions dealing with spouses and dependent children were removed.

In the so-called Gillespie Affair, a former minister in Mr. Trudeau's government allegedly lobbied his former deputy minister. In response, a Task Force on Conflict of Interest was appointed in 1983 and reported the following year. Its report, known as the *Starr-Sharp Report*, recommended creating a code of conduct and establishing an independent Office of Public Sector Ethics, with an Ethics Counsellor.

In 1985, Prime Minister Brian Mulroney issued the first *Conflict of Interest and Post Employment Code for Public Office Holders*, which was based on a number of the Starr-Sharp recommendations. While non-statutory, it consolidated in one document the rules for ministers, parliamentary secretaries, ministerial staff and Governor in Council appointees, and covered matters such as gifts, outside activities, confidential disclosures, recusals, divestment and blind trusts.

In 1986, a commission of inquiry, known as the Parker Commission, was appointed to examine and report on allegations of conflict of interest relating to former cabinet minister Sinclair Stevens. It recommended redesigning the Assistant Deputy Registrar General and giving the position a separate and more visible status.

In 1994, Prime Minister Jean Chrétien appointed the first Ethics Counsellor, a position that replaced the Assistant Deputy Registrar General. Reporting to the prime minister, the Ethics Counsellor had jurisdiction over two of the most important integrity instruments of the time: the *Lobbying Registration Act* and the *Conflict of Interest and Post-Employment Code for Public Office Holders*.

In 2004, the federal sponsorship scandal was uncovered.

Also in 2004, under Prime Minister Paul Martin, the positions of Senate Ethics Officer and Ethics Commissioner, the first independent office to administer conflict of interest rules for Members and public office holders, were created. The *Conflict of Interest Code for Members of the House of Commons* was adopted.

In 2006, under Prime Minister Stephen Harper, Parliament passed the *Federal Accountability Act*, which replaced several earlier instruments that were part of the federal ethics framework. It included the *Conflict of Interest Act* and the new position of Conflict of Interest and Ethics Commissioner.

Conflict of interest rules for public office holders are complemented and reinforced by the prime minister's own guidelines governing the conduct of the executive. First issued in 2002, by Prime Minister Chrétien, as a *Guide for Ministers and Secretaries of State*, the guidelines require ministers to uphold the highest standards of ethical conduct in both their public and private lives. The current version, called *Open and Accountable Government*, was issued by Prime Minister Justin Trudeau in 2015.

The integrity of the government's decision-making process is further assured by rules governing the behaviour of all 260,000 public servants, from the Clerk of the Privy Council to front-line employees.

The 1997 report of the Task Force on Public Service Values and Ethics, known as the *Tait Report*, was key in strengthening the conflict of interest regime for public servants. It was led by the late John Tait, a former Deputy Minister of Justice and at the time a Senior Fellow of the Canadian Centre for Management Development. I had the privilege and pleasure of working with John Tait in the early 1990s at the Department of Justice, where I was an assistant deputy minister. In fact, he had tasked me with deciding all conflict of interest issues within the department. The structures surrounding conflict of interests were still quite new, and there was a need to change internal practices to ensure that conflict of interest situations did not arise.

The task force examined public service issues and the principles and practices of our parliamentary democracy, and stressed the importance of values that could help provide a foundation for the behaviour of public servants. It struck a balance between values and rules, and was instrumental in the shift from an excessive focus on rules to a more values-based approach, while recognizing the importance of having some rules. Also significantly, it promoted the concept of public interest as central to a professional public service. This was a major revolution within the federal public service. I remember it as being a very important change.

The current public service integrity regime is the result of a positive and enthusiastic response to the *Tait Report*, which also led to the creation of the Office of the Public Services Values and Ethics in the Treasury Board of Canada and the adoption of an organizational code of conduct for each department. The V*alues and Ethics Code for the Public Sector* was adopted in 2012 pursuant to a requirement of the *Accountability Act*. Finally, my predecessor adopted a similar *Code of Values and Standards of Conduct* that is in place in my office.

Evolution of Canada's Federal Conflict of Interest Regimes

I wish to emphasize the evolutive nature of Canada's federal conflict of interest regimes. One is the *Conflict of Interest Act*, which applies to some 2200 public office holders, including ministers, their staff, parliamentary secretaries, and Governor in Council appointees. The other is the *Conflict of Interest Code for Members of the House of Commons*, which applies to all 338 elected Members of Parliament.

Throughout their development, the aim has been to support and enhance public confidence and trust in the integrity of those holding public office in Canada.

They evolved from a values-based to a rules-based approach. The Act and the Code help provide a foundation for the desired behaviours of elected and appointed officials, who are expected to act in the public interest and place the public interest ahead of other interests.

Both regimes deal specifically with conflicts of interest. Their focus is largely on ensuring that Members and public office holders do not use their positions to further their private, largely pecuniary, interests or the private interests of their relatives (and friends, in the case of the Act) or to improperly further the private interests of anyone else.

They set out various rules of conduct and ensure transparency through disclosure and public declaration requirements.

They also contain enforcement provisions. In the Act, these include administrative monetary penalties of up to $500 for failures to meet certain reporting requirements and the issuance of compliance orders to ensure public office holders meet their obligations in the future. In addition, formal investigations of possible contraventions may be conducted under both regimes and my reports on those investigations are made public the minute they are sent to the Speaker of the House of Commons and the prime minister.

In administering the regimes, my Office provides public office holders and Members with confidential advice and guidance on specific matters. We also seek opportunities to educate them, individually and collectively, about the rules, how those rules apply to them and any broader considerations.

Importance of Instruments, Institutions, Processes and Structures

An effective ethics regime, in my view, must be supported by effective instruments, institutions, processes and structures if is to enhance the public's confidence in those who hold public office.

Effective instruments are written rules that clearly set out the conduct expected of those who hold public office. For example, conflict of interest guidelines, codes or statutes have been adopted by all levels of government in Canada.

Effective institutions are independent, impartial oversight bodies that administer the rules. For example, my status as an Officer of the House of Commons means I am solely responsible to Parliament and not to the federal government or an individual minister.

These written rules are given weight and meaning through the structures and processes put in place to enforce them. For example, my Office maintains a public registry of publicly declarable information under the *Conflict of Interest Act* and the *Conflict of Interest Code for Members of the House of Commons*.

Pillars of Conflict of Interest Regimes

There are, in my view, four pillars common to all effective conflict of interest regimes. They are: accountability, transparency, fairness and consistency.

Accountability means being responsible and answerable for one's actions and subject to consequence. This is how I see the regime: Members of the House of Commons and public office holders are the epicentre where conflicts of interest arise. They are responsible for their own actions.

Transparency means openness, clarity, unobstructed access and disclosures, when interacting with, or acting on behalf of, the public.

Fairness is the quality of treating people equally or in a reasonable way—impartially and honestly. It requires impartial procedures and a lack of bias on the part of decision-makers.

Consistency means always acting in the same coherent and logical way.

These pillars support the foundation of my Office's mission statement, which I introduced as a priority upon my appointment. It reads, and I quote:

> *The Office of the Conflict of Interest and Ethics Commissioner provides independent, rigorous and consistent direction and advice to Members of Parliament and federal public office holders, conducts investigations and, where necessary, makes use of appropriate sanctions in order to ensure full compliance with the* Conflict of Interest Code for Members of the House of Commons *and the* Conflict of Interest Act*.*

End quote.

Accountability, fairness, transparency and consistency are also reflected in the Act and the Code themselves.

Public office holders and Members of the House of Commons are accountable under both regimes. For example, the Act contains a provision that makes compliance with it a condition of a person's appointment or employment as a public office holder. The Act also has an administrative monetary penalty scheme, which holds public office holders accountable for the completeness and timeliness of the information they are required to file with my Office.

The regimes are transparent. For example, both the Act and Code require those holding public office to make public declarations of some of their interests. These declarations are accessible to the public through a searchable public registry maintained by the Commissioner. The Act also gives me the discretion to make public any document I deem appropriate. As well, my reports on investigations of possible contraventions of the Act and the Code are made public.

Fairness is reflected throughout both regimes and in the impartial way my Office administers them. For example, when a public office holder or Member of the House of Commons cannot be seen to be acting fairly, because of a private interest, whether their own or that of someone close to them, both the Act and Code provide for recusals. The Act also reflects the duty to act fairly in its prohibition against giving preferential treatment when exercising an official power, duty or function.

Both the Code and the Act provide the subject of an investigation a reasonable opportunity to make representations. My Office also ensures procedural fairness when conducting investigations by, for example, giving the subject an opportunity to review their transcript, as well as excerpts of transcripts from witnesses and other relevant documents, and an opportunity to comment on the factual portions of the draft report before it is finalized.

My Office ensures consistency and coherence in the interpretation and application of the Act and the Code. Although I am not bound by my previous decisions and all determinations must take into account the particular facts of a situation, consistency and coherence are necessary to eliminate confusion and uncertainty. There are also some indicia in the Act underlying the importance of consistency in the Commissioner's decisions. For example, when the Commissioner grants a waiver or reduction of the post-employment obligations of a former reporting public office holder, the Commissioner must consider the disposition of other cases. Consistency also means different individuals in the same situation must receive the same advice over time.

Future Possibilities

Canadian society and government have changed a great deal since the early days of public ethics regimes. And they continue to evolve, at a faster and faster pace.

Since the Act came into force in 2007, technology has become increasingly more sophisticated and economic exchanges more complex. For example, people can now use their private assets for commercial activities such as Uber and Airbnb. The concept of who may be considered a friend has become more complex in the wake of interactions and connectivity via social media platforms.

Diversity, writ large, continues to grow. New generations of Canadians, and from many cultural backgrounds, have entered public life, bringing with them diverse values, experiences, and ways of looking at things. There is more interaction between the public and private sectors.

The rules governing the conduct of Canada's elected and appointed public officials should be adapted to acknowledge and reflect these and other changes.

It is up to Parliament alone to decide if, when and how to change the rules set out in the *Conflict of Interest Act* and the *Conflict of Interest Code for Members of the House of Commons*. Looking ahead to the next fifty years, there are several interesting possibilities that it might have occasion to consider.

I am going to share with you a few possible scenarios. I am not advocating for or against any particular course of action, but will simply describe what I envision in the future.

We must keep in mind how the Act and the Code currently work. Both of these regimes define inappropriate behaviour. However, when it comes to finding out whether public office holders and Members have behaved inappropriately, they are both largely complaint-driven. I think the day will come when Parliament will realize that in order to achieve a greater degree of compliance, proactive monitoring and assessment mechanisms should be prescribed.

Communication, education and outreach can also help prevent conflicts of interest from arising. In fact, section 32 of the Code requires the Commissioner to undertake educational activities for Members and the general public regarding the Code and the role of the Commissioner. There is no similar requirement in the Act, but my Office conducts education and outreach on both regimes.

For example, my staff and I give presentations to groups of Members and public office holders and communicate collectively with them on a regular basis, we produce YouTube videos on applying the rules, we are revising all of our written educational materials, we have started conducting webinars, and we post regularly on Twitter.

I expect that in the future, we will be able to make use of new technologies that will give us accessible and resource-efficient communications options.

The importance of education and outreach in minimizing conflicts of interest is illustrated by a matter that was recently brought to my attention. For years, third-party organizations have been providing Members of the House of Commons with interns to work in their offices, at no cost to the Members. Such arrangements benefit the Members by providing free labour, they benefit the interns by giving them parliamentary experience, and they could also benefit the sponsoring organizations, some of which are registered to lobby the House of Commons.

It likely never occurred to Members that accepting free intern services could pose a conflict of interest vis à vis the sponsoring organization. At that point, any conflict of interest might be latent or potential, but, unchecked, it could become a manifest or arising conflict of interest. Later, if the sponsoring organization wanted something from a Member to whom it had given free intern services, such as the Member's support in a debate or vote, the conflict of interest would develop fully. In short, it would be known and noticed.

To prevent any conflicts of interest from reaching that stage, earlier this fall I issued an advisory opinion under the *Conflict of Interest Code for Members of the House of Commons*. I made it clear that any intern services provided to Members free of charge by a third party are benefits as defined in the Code. They are therefore subject to the Code's acceptability test for gifts and other benefits. The Code prohibits Members and their family members from accepting, directly or indirectly, any gift or other benefit that might reasonably be seen to have been given to influence the Members in the exercise of a duty or function of their office.

The ability to proactively monitor and address the compliance of Members and public office holders could also help identify and assess latent conflicts of interest before they are allowed to develop further.

I believe artificial intelligence could have great potential in the development of an electronic oversight tool. For example, one day a system could be developed that contains data not only on public office holders and Members, such as their assets and liabilities, but also on the official decisions they are making or have made. The system would be able to automatically generate red flags that would alert the public office holder or Member as well as the Commissioner. Then, conflicts of interest could be avoided or addressed right away. Of course, the tricky part would be how to obtain and input data on decisions. Privacy could be an issue but, given that election or appointment to public office is a choice, public office holders and Members could contractually agree to become subject to such a system.

Citizen oversight is another area where we might see some major changes in the next 50 years. I envision much better and easier access for the public at large to share information and concerns about possible conflicts of interest. Currently, anyone who has a concern can contact my Office by email, telephone or post, but perhaps one day there will be an app that would make such disclosures easier and more accessible. That could lead to more investigations. More investigations could lead, in turn, to greater vigilance by public office holders and Members in meeting their obligations under the Act and the Code.

At present, we have a searchable public registry, but it is not an intelligent one and it is difficult to identify any patterns in the data it contains. Plus, my Office is required to remove the data once a Member of the House of Commons is no longer a Member and after a former public office holder's one- or two-year cooling-off period has ended. The registry's utility for conducting studies and comparisons and its accessibility might one day be increased significantly.

The *Conflict of Interest Code for Senators* is much broader in its application than the *Conflict of Interest Code for Members of the House of Commons*. The Senate code covers "conduct expected of the Office" but the House of Commons Code does not. Parliament might one day consider expanding its scope.

Conclusion

Even if no important changes are made to the conflict of interest regimes and their administration in the future, I believe they are already effective components of Canada's ethics framework. In fact, Canada is looked to as an international leader in the field of conflict of interest. My Office regularly hosts delegations from the governments and ethics authorities of countries around the world that seek to learn from us.

The regimes' effectiveness also relies on how they are administered and how seriously they are viewed by those subject to them. I believe that rigour on the part of my Office is very important. We expect rigour from public office holders and Members in meeting their obligations, and we exercise rigour in reviewing how they are meeting their obligations.

Public officials and ethics commissioners are not adversaries. They must work together to uphold the highest standards of integrity in support of the effective functioning of democracy in Canada.