Office of the Ethics Commissioner
Bureau du commissaire à l'éthique

ISSUES AND CHALLENGES

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FOREWORD

Issues and Challenges 2005 is intended as a supplement to the two Annual Reports of the Ethics Commissioner issued on June 30, 2005. This paper addresses a number of conceptual and procedural challenges that have arisen during the first year of operations of the Office of the Ethics Commissioner. I plan to issue such papers on an annual basis, in order to foster and sustain a dialogue on ways to improve the federal ethics regime in Canada.

This paper assumes that the basic premises of the current federal ethics regime are appropriate. In subsequent years, however, I hope to consider the viability of a variety of fundamentally different approaches to addressing the underlying goal of enhancing public confidence in our federal democratic institutions.

Bernard J. Shapiro

INTRODUCTION

Ethics in government is a constantly evolving, multi-dimensional area of public policy, of which conflict of interest policy is but one aspect. The ultimate objective of the Office of the Ethics Commissioner is to sustain and, where possible, enhance public confidence in our system of government at the federal level and in our parliamentary institutions. Canadians expect that our elected representatives and public office holders will make decisions in the public interest, without any consideration of personal gain.

After more than three decades of initiatives aimed at developing and implementing an effective conflict of interest regime at the federal level in Canada, Bill C-4, *An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer)* received Royal Assent on March 31, 2004. The legislation created a new conflict of interest regime for parliamentarians and a new context for the administration of the established regime for public office holders. A key feature of these two regimes was the creation of the Office of the Ethics Commissioner, a new entity reporting directly to Parliament. The first Ethics Commissioner of Canada assumed his duties on May 17, 2004.

The Commissioner administers the *Conflict of Interest Code for Members of the House of Commons* (the Members' Code) and the Prime Minister's *Conflict of Interest and Post-employment Code for Public Office Holders* (the Code for Public Office Holders). In addition to having a role in providing confidential advice under both codes, the Commissioner conducts examinations of ministers, ministers of state and parliamentary secretaries under the Code for Public Office Holders, and inquiries of members of the House of Commons under the Members' Code.

The experience gained during the first year of operations of the new Office of the Ethics Commissioner has given rise to a number of conceptual and procedural challenges - challenges that must be addressed in order to enhance the effectiveness of the current ethics regime. Accordingly, the purpose of this paper is to:

- address the issues that have arisen and the lessons learned in the first year of the Office;
- continue the public dialogue on ethics (including conflict of interest) in both the legislative and executive branches of government;
- canvass various ways of improving the effectiveness and efficiency of the ethics regime, particularly in relation to conflict of interest;
- review the current system of recusal; and
- outline areas for potential change to
    - i. the existing policies of the Office of the Ethics Commissioner,
    - ii. the *Parliament of Canada Act*; and
    - iii. the relevant conflict of interest codes.

THE ETHICS COMMISSIONER AND THE PUBLIC

Ethics in government and in Parliament concerns not only public office holders and parliamentarians, but also the Canadian public at large. Indeed, both the current and former ethics regimes have been criticized for the lack of public input, other than through elected representatives, on ethics policy in general and how to deal with ethical breaches in particular.

The Ethics Commissioner is an independent Officer of Parliament. Under the *Parliament of Canada Act*, only members of the Senate or the House of Commons may request the Commissioner to examine the compliance of ministers, ministers of state and parliamentary secretaries to the Code for Public Office Holders. The public at large has no right to do so. Furthermore, the title "Ethics Commissioner" contributes to the high expectation of the public that the incumbent of the position address a wide variety of issues related to ethics in government, whereas in fact the mandate of the Commissioner primarily involves issues related to conflict of interest.

With regard to the ethical conduct of members of the House of Commons, one way to address the concerns of individual citizens, albeit indirectly, lies in the Commissioner's authority under the Members' Code to conduct an inquiry on his own initiative. It is conceivable that the Commissioner may decide, after receiving and reviewing a complaint from a member of the public, that there are reasonable grounds to believe it would be appropriate to initiate an inquiry into the ethical conduct of a member of the House of Commons.

An alternative, of course, would be to amend the Act to allow any eligible voter to request that the Ethics Commissioner conduct an examination into the ethical conduct of a minister, minister of state or parliamentary secretary, outlining the reasons and any relevant information for the request. Although we recognize the frustration expressed by members of the public regarding their inability to submit such requests directly to the Ethics Commissioner, we believe there are several important issues that must be thoroughly explored and addressed before we can consider making any legislative or policy recommendation in this area. For example:

- Would the Commissioner have the discretion to act or not act on such a request by a member of the public?
- With respect to public office holders, what effect would public access to the Ethics Commissioner have on the role of various ombudspersons in the federal government? How would potential problems arising from any overlap of mandate be addressed?
- Would these additional responsibilities, analogous to those of an ombudsperson, defeat the original purpose of creating the Office of the Ethics Commissioner as an independent Officer of Parliament?
- Would enabling any member of the public to request an examination by the Ethics Commissioner result in an unmanageable volume of requests, and would taxpayers tolerate the increased financial resources necessary to discharge an expanded mandate for the Ethics Commissioner?

Given the problems raised by this alternative, it would be preferable, at least in the short term, to simply encourage citizens who wish that the Ethics Commissioner examine a minister, minister of state or parliamentary secretary to present such requests through a member of the House of Commons or a senator.

POLICY APPROACH 1

Through its recently relaunched website and other means, the Office of the Ethics Commissioner will inform Canadians that any requests to examine the ethical conduct of a minister, minister of state or parliamentary secretary should be made through a member of the House of Commons or a senator, as envisaged by subsection 72.08 (1) of the Parliament of Canada Act*.*

COMMUNICATION AND EDUCATIONAL CHALLENGES

Regardless of whether the public should have the same right as parliamentarians to request an examination under subsection 72.08 (1) of the Act, the Office of the Ethics Commissioner has an obligation to educate Canadians on both the role of the Office and the limits of its mandate. It is hoped that an increased emphasis on communication, including the launch of our new website in September 2005, will foster greater public awareness and understanding of the mandate and functions of the Commissioner.

SOME LESSONS LEARNED

In our first year of operations, the Office of the Ethics Commissioner gained valuable experience in interpreting the new legislation and the Codes. In the process, a number of precedents have been set. These include the determination by the Ethics Commissioner that the following activities are not permitted under the ethics regime:

- the use of volunteers during an election campaign of a member of the House of Commons who is also a public office holder, where the volunteer is seeking the intervention of the candidate in his or her capacity as a public office holder;

- attempts by a member of the House of Commons, when assisting constituents, to require certain acts or commitments from a federal department or agency that are not envisaged, authorized or permitted under the legislation applicable to that department or agency; and

- the avoidance of ministerial responsibility in relation to the conduct of all officials under the direction of a minister, regardless of whether or not the minister had prior knowledge of the conduct in question.

Furthermore, it was observed by the Office that matters involving immigration are among the most difficult and sensitive constituent files for members of the House of Commons and public office holders, and are therefore more susceptible to create a real or apparent conflict of interest.

It is therefore essential that ministers, ministers of state and parliamentary secretaries draw a clear distinction between their campaign activities and their responsibilities as public office holders. In other words, we believe that no minister, minister of state or parliamentary secretary should exercise decision-making in a matter concerning any volunteer or campaign worker on their constituency or leadership campaign.

Another lesson learned during the first year of operations of the Office concerns the political environment in which the Commissioner must operate. The House of Commons is not only a forum for national policy debate, it is also the nation's primary public arena for the cut and thrust of partisan politics. Given this context, it is almost inconceivable that the Office of the Ethics Commissioner would be able to operate unaffected by the political fray. For example, the Office has become increasingly sensitized to the fact that while requests for examinations and inquiries invariably relate to a genuine and substantive ethical concern, the timing and manner of raising such concerns may lead one to question whether partisan political purposes are the main consideration. The Office will, however, continue to work at remaining not so much above the political fray as aside from it.

Members of the House of Commons and public office holders are obligated under their respective codes not only to avoid real conflicts of interest, but also apparent conflicts. Defining what constitutes an apparent conflict of interest involves, by nature, a subjective analysis. In a recent commentary on the definition of conflict of interest, the Organisation for Economic Co-operation and Development observed:

> The fundamental idea is that where there is, in fact, an unacceptable possibility of conflict between a public official's interests as a private citizen (*private-capacity interests*) and their duty as a public or civil servant (*official duty*), a "*conflict of interest*" can be said to exist.
>
> The basic definition can also be applied in order to test situations in which there appears to be a conflict of interest, but this is not in fact the case, or may not be the case. It is crucial to distinguish such a situation as an "*apparent* conflict of interest". Having an "apparent conflict of interest" as a public official can be as serious as having an actual conflict, because of the potential for doubt about the official's integrity, and that of his/her organisation.[1]

The subjective nature of determining what constitutes an apparent or potential conflict of interest begs the question as to whether the determination of apparent conflicts should not be left to the Ethics Commissioner but to the political process, which ultimately determines the composition of both the legislative and executive branches of government. In any event, it is clear that both substantive and apparent conflicts carry the risk of serious political consequences.

[1] Organisation for Economic Co-operation and Development, *Forum on Implementing Conflict of Interest Policies* (Rio de Janiero, May 2004), at p. 6.

Given that this is one of the Ethics Commissioner's major areas of work, we will discuss this issue further and consider appropriate criteria and procedures for determining:

- what constitutes an apparent or potential conflict of interest; and
- the extent to which apparent conflicts should be dealt with by the Ethics Commissioner or by the political process.

A related but more specific area of concern is the high degree of partisanship that occurs on a given issue while it is under examination by the Commissioner. A provision exists in the Members' Code whereby members are required to refrain from public comment on an issue once a request for an inquiry on a matter has been made to the Commissioner.[2] This provision allows the Commissioner to conduct the inquiry effectively and efficiently, and to avoid the spectre of an inquiry that is little more than political theatre. However, a similar provision is not included in the Code for Public Office Holders.

RECOMMENDATION 1

A) *It is recommended to the Prime Minister that the Code for Public Office Holders be amended to include a provision requiring all public office holders to refrain from public comment on an examination or inquiry under either the Code for Public Office Holders or the Members' Code while that examination or inquiry is in progress.*

B) *It is also recommended to the Commons Standing Committee on Procedure and House Affairs that the Members' Code be amended to include a provision requiring all Members to refrain from public comment on an examination under the Code for Public Office Holders while that examination is in progress.*

Another area of concern that has emerged in the past year is the recusal process under the Code for Public Office Holders, and, in particular, its application to the Prime Minister. Earlier this year, the Ethics Commissioner undertook to review the present recusal arrangements. At the outset of this review, it was the Commissioner's view that although the present arrangements were imperfect, cumbersome and time-consuming, they had worked reasonably well. Nevertheless, it seemed wise to consider the various alternatives to the current arrangements in order to improve the recusal process. This entire matter is, therefore, discussed in the next part.

RECUSAL

A. Definition

Although the term "recusal" is not defined in the Code for Public Office Holders, it can be broadly interpreted to mean "the process by which a person is disqualified, or disqualifies himself or herself, from a matter because of a

[2] *Conflict of Interest Code for Members of the House of Commons*, ss. 27 (5).

conflict of interest."[3] In the context of the Code for Public Office Holders, recusal is the step taken by a public office holder to refrain from exercising any official power or performing any official duty or function so as to prevent the official from exerting influence over any matter where his or her participation could be perceived as a conflict of interest. When the usual strategies of divestment and/or the establishment of blind trusts and management agreements are deemed either inappropriate or inadequate, the Ethics Commissioner establishes recusal processes in order to bring particular individuals into compliance with the provisions of the Code.

Under the Code for Public Office Holders, recusal may include situations where a public office holder must refrain from exercising any official power or performing any official duty or function with respect to matters that have a specific and direct link to his or her personal or family holdings. In such cases, the Office of the Ethics Commissioner administers the recusal process tailored to the specific circumstances of the public office holder. The details of these processes and the instances of recusal are described in the Commissioner's *Annual Report on Activities in Relation to Public Office Holders*, which is available on the Office's website.

B. Recusal Process in the Canadian Federal Government

In the practice adopted by the Canadian federal ethics regime, recusal (as mentioned above) is used only when the other more standard measures (e.g. divestment, blind trust) are not fully adequate under the special circumstances of a public office holder. It often involves a significant business entity owned or controlled by the family of a public office holder, a business that is either difficult to dismantle and/or where it would seem unreasonable to ask the public office holder to do so in order for him or her to serve in public office. Recusal is generally straight forward, but there can be difficulties when great wealth and high public office come together in the same individual.

It is recognized that recusal is a helpful but not a perfect process. Among its imperfections are:

- expressed dissatisfaction among political opponents and others, who view recusal as an insufficient measure for preventing conflicts of interest on the part of public office holders;

- the cumbersome administration of the current process, involving many ministerial staff members and public servants, compounded by the often brief interval between the arrival of Cabinet and Cabinet Committee meeting agendas in the Office of the Commissioner and the meetings themselves, thus restricting the Office's ability to advise on the need for recusal; and

- the fact that, even when a public office holder recuses himself or herself on an issue, those who remain in the discussion and decision-making process often are aware of the interests of the person recusing himself or herself. This does not mean that those making the decision would be partial – or that the public office holder with a conflict of interest would, without recusal, act corruptly – but the opportunity to do so is, of course, present.

[3] This is the definition codified by New Jersey's Executive Commission on Ethical Standards, at subchapter 7 of the Commission Rules.

[4] Government of Canada, *Conflict of Interest and Post-employment Code for Public Office Holders*, 2004, ss. 3 (1-3, 5, 7).

B.i) Public Office Holders

The Code for Public Office Holders establishes the principles that apply specifically to recusal.[4] It is clear that a public office holder must take care to avoid being placed or the appearance of being placed under an obligation to any person or organization, or the representative of a person or organization that might profit from special consideration by the public office holder. In addition, a public office holder must not give preferential treatment in any official matter to family members or friends or to organizations in which they, family members or friends, have an interest.

Fifteen public office holders, including the Prime Minister, are currently subject to a recusal process as a compliance arrangement under the Code for Public Office Holders. The specific measures undertaken by these individuals to refrain from exercising any official authority or performing official duty on matters that could put them in a conflict of interest are outlined in their Summary Statements and Public Declarations, both of which are placed in the Public Registry.

B.ii) New Recusal Requirements for the Prime Minister

Because of the continued ownership by Prime Minister Martin's family of Canada Steamship Lines (CSL), the recusal process that was put in place for the Prime Minister in December 2003 and remains in place today centres on a range of issues that could be directly beneficial to CSL. These are: marine transportation policy, shipbuilding and the fee structure for the St. Lawrence Seaway.

In addition to these recusal requirements, the Prime Minister's role in the Governor-in-Council (GIC) appointment process for agencies, boards and commissions involved in these three areas has also been included in the requirement for recusal to avoid potential conflicts of interest. In December 2004, the Ethics Commissioner determined that the Prime Minister should be recused from the process of making any GIC appointment to the following organizations in the Transport portfolio:

- Pilotage Authorities
- Port Authorities
- Harbour Commissions (including Harbour Quebec)
- Canadian Transportation Agency (which has significant marine mandate)
- Marine Atlantic Inc.
- Ridley Terminals Inc.
- Ship-source Oil Pollution Fund.

At the same time, the Ethics Commissioner determined that the Prime Minister should also recuse himself from any GIC appointment to the Canadian Transportation Accident Investigations and Safety Board which reports to the President of the Queen's Privy Council for Canada.

[4] Government of Canada, *Conflict of Interest and Post-employment Code for Public Office Holders*, 2004, ss. 3 (1-3, 5, 7).

A related issue is the participation of staff from Prime Minister's Office in Cabinet or Cabinet Committee meetings. Although we do not have any concern regarding the participation of his staff in the more general Cabinet planning sessions, we do believe that their attendance at Cabinet or Cabinet Committee meetings during which a specific recusal item is discussed could create the impression among the public that the Prime Minister is participating by proxy in a Cabinet decision regarding an item covered by his recusal policy. After all, staff of the Prime Minister are understood to act in his best interests. In our view, if the Prime Minister cannot be involved in a Cabinet discussion on an issue where he has recused himself, neither should his staff be allowed to remain in the room. We recognized that this change in policy may pose certain inconveniences to the Prime Minister's Office. Nevertheless, the Ethics Commissioner advised the Prime Minister that such a policy change would further limit the likelihood of an apparent conflict of interest in Cabinet decisions. This advice was accepted by the Prime Minister and has been incorporated into his recusal policy.

C. Comments and Options

An overview of the practices in certain foreign jurisdictions similar to our system of government is attached in Appendix B of this paper. The results of the overview indicate that, in general, the approaches to recusal adopted in these jurisdictions parallel those in use at the federal level in Canada. While some jurisdictions have opted to emphasize some aspects of recusal more than others, the underlying foundations remain the same.

At the federal level, the formal recusal process only applies to public office holders. Members of the House of Commons are governed by its Standing Orders in this area. This seems entirely appropriate given that additional and higher standards for ministers and other public office holders reflect the greater likelihood of conflicts of interest arising in the course of their respective ministerial and administrative responsibilities.

There are, however, alternatives to the recusal process. Two of these - compulsory divestment and a more detailed disclosure of assets and corporate holdings - are discussed below. Also addressed below are possible improvements to the current system, which includes implementing a more transparent recusal reporting mechanism for the Prime Minister and all public office holders.

C.i) Divestment

One approach to avoiding conflicts between financial interests and ministerial or official responsibilities of public officials is to require all public office holders to sell their assets in an arm's length transaction before taking office. This approach is one of the options currently available to public office holders to handle their controlled assets. However, as Gerard Carney of Australia's Bond University notes in his 1998 Working Paper, *Conflict of Interest: Legislators, Ministers and Public Officials* for Transparency International:

> Requir[ing] the disposition of all businesses upon accepting public office would probably deter capable people from accepting public office and thereby deny the government service of their business talent and experience.[5]

[5] Gerard Carney, *Working Paper - Conflict of Interest: Legislators, Ministers and Public Officials*, Transparency International, 1998.

When Mr. Martin transferred his interest in CSL to his sons prior to becoming Prime Minister in 2003, some commentators expressed concern that he had set the dangerous precedent of requiring public office holders to permanently sell their assets as a condition of holding public office. It was argued at the time that a proper conflict of interest regime (including disclosure requirements, and blind trusts and management agreements), administered by an independent Ethics Commissioner, would make divestment unnecessary. Concern was also expressed that the continued ownership of CSL by members of the Martin family left the Prime Minister with an indirect interest in the company and was therefore not a "real" divestment.

The risk of a conflict of interest arises with most shareholdings. Obviously, the size of the shareholding will affect the likelihood of a conflict of interest occurring , as well as a particular holding's worth relative to other parts of the portfolio. As Professor Carney observed:

> Usually the most effective approach for avoiding a conflict of interest is to require the disposition of the shares. The harshness of this requirement can be alleviated by confining the disposition to only those shares in excess of a prescribed threshold in companies which may be involved in the official's area of responsibility.[6]

Clearly, if at all possible, divestment of assets is generally the most appropriate approach to avoid any potential conflict of interest. Where total divestment is not possible or appears unreasonable, a combination of divestment of certain assets or placing them in a blind trust, along with a carefully designed system of recusal, should achieve the same objective.

C.ii) A More Detailed Disclosure of Assets and Corporate Interests

Another approach that has been suggested is the notion that recusal would not be necessary if public office holders were to provide a more detailed public disclosure of their assets, holdings and interests in any corporate entities. At present, only Public Declarations, which provide a general summary of the assets of public office holders, are placed in the Public Registry. Federal public office holders are ultimately accountable to Parliament and the Canadian public. It is argued that the disclosure of more detailed information on the holdings of public office holders in the Public Registry would allow parliamentarians and the public to judge whether the officials, in fulfilling their responsibilities and in making decisions, have upheld the principles outlined in the Code for Public Office Holders.

It is interesting, however, to note that the 1998 Transparency International Working Paper appeared to be less concerned with the recusal of ministers and other officials from the public decision-making process, and more pre-occupied with their withdrawal from any decision-making capacity in the operations of their family holdings:

> Requir[ing] the minister or public official to withdraw from the daily operations of the business appears to be the most appropriate option, although it depends on the goodwill of the minister or official. Effective monitoring is therefore essential together with other mechanisms of *ad hoc* disclosure, register of interests and disqualification of government contractors which may alleviate the risk of conflict of interest.[7]

[6] *Ibid.*

[7] *Ibid.*

A pitfall of this approach is that a requirement to provide a more detailed public disclosure of assets, holdings and corporate interests may deter well-qualified and experienced persons from seeking or accepting public office because of legitimate privacy concerns. Another drawback is the likelihood that many citizens will think of it as a retrograde step in that they might well expect that the Office of the Ethics Commissioner should assist the public by being more active in this arena.

One option would be to require the more detailed disclosure of assets in addition to the existing recusal policy. This would go some way to enhance transparency and, possibly, reduce public scepticism with respect to conflicts of interest. On the other hand, our sense is that the benefits gained under such a regime would be outweighed by the substantial burden it would place on any prospective candidate for public office.

C.iii) Expanding the Areas of Recusal for the Prime Minister

In our parliamentary system, the Prime Minister is responsible for the effective operation of the entire government. Indeed, the Prime Minister is often questioned in the House of Commons on the operation of any given federal department or agency. Moreover, at the executive level, it is the prerogative of the Prime Minister to give direction on any matter falling within the responsibility of individual ministers. Establishing a recusal process under which a Prime Minister would have to recuse himself or herself on a wide-ranging set of public policy issues would undermine the role of the Prime Minister. Obviously, it would not be appropriate for the Prime Minister to refrain from participating in the entire decision-making process.

What may be essential is to have a balanced approach. The recusal process for the Prime Minister should be sufficiently focussed to avoid any real or potential conflict of interest, while at the same time, it should not impede his ability to effectively discharge his responsibilities as head of government. As noted earlier, a special recusal process, including specific areas where recusal is required, has been developed for Prime Minister Martin, given the substantial holdings of the Martin family. However, we do not view the current areas for recusal as exhaustive or static. We believe that, in order to maintain the credibility of the conflict of interest regime, it is essential to continually monitor the range of issues on which the Prime Minister should recuse himself. We have reviewed the areas of recusal for the Prime Minister throughout the past year, and for the time being, we are satisfied with the existing recusal process. Nevertheless, our Office will continue to review the recusal process on an ongoing basis in light of the most recent and relevant information on the Martin family holdings, and to advise the Prime Minister accordingly on the necessity for recusal. For example, we have advised the Prime Minister that he should recuse himself on any issues discussed and decided in Cabinet or Cabinet Committees that would likely have a significant and direct impact on Canada Steamship Lines' major clients, and would therefore be perceived as a conflict of interest.

C.iv) Implementing a More Transparent Recusal Process

Given the difficulties presented by the alternatives considered above (divestment and more detailed disclosure of assets), we believe that, rather than adopting a new model for recusal, the current recusal process can be improved by enhancing its transparency. Recent experience in Canada and similar countries points to the need for greater transparency as the cornerstone of any recusal process for public office holders. In the *Annual Report on Activities in*

Relation to the Public Office Holders, the Ethics Commissioner recommended that the details of ministerial recusal from Cabinet or Cabinet Committee meetings be recorded and subsequently reported to the Ethics Commissioner by the Clerk of the Privy Council. The Commissioner also recommended that all instances of ministerial recusal from Cabinet or Cabinet Committee meetings, including details of the reasons for each recusal, be recorded in a public registry as soon as possible.

The transparency of the process is perhaps more important than withdrawal from public decision-making itself. As the Organisation for Security and Co-operation in Europe noted in its multi-jurisdictional study:

> Clearly, some real or perceived conflicts will be minor and not warrant any action beyond recording the situation and disclosing it to others who are participating in the decision-making process. For example, an official might hold such a small number of shares in a company that their value could not possibly be affected significantly by the outcome of the particular matter under review. In such a case, the others involved may feel comfortable with the official's continued participation in the decision-making process. When they do not, however, the person should excuse himself or herself from further involvement. The assumption here, of course, is that there are no pre-existing arrangements for such a recusal.[8]

As mentioned previously, with respect to the Prime Minister's requirement to recuse himself from Cabinet decision-making on certain issues, the current system of coordination and reporting, although time-consuming and awkward, does work reasonably well. Full disclosure of the details of instances of recusal involving all public office holders would further enhance the public's confidence in this regard. For such a recusal disclosure process to be effective, these details would have to be made public at the earliest opportunity, recognizing the constraints of the requirement to respect Cabinet confidence.

RECOMMENDATION 2

It is recommended to the Prime Minister that all instances of ministerial recusal from Cabinet or Cabinet Committee meetings be recorded in a public registry as soon as possible, including details of the reasons for each recusal. The same disclosure requirement would also apply to other public office holders on any instance of recusal.

OTHER ISSUES TO BE REVIEWED

Based on the experience of the first year of operations, it is clear that some of the policy and administrative challenges encountered under the new ethics regime may not have been anticipated when the legislation and the Codes were first drafted. The experience gained by the Commissioner and by members of the House of Commons and public office holders in the first year of the new system should prove to be invaluable in the review of the existing legislation and the Codes. A review of the current ethics legislation was suggested by the Standing Committee on Access to Information, Privacy and Ethics, and has been launched jointly by the Office of the Ethics Commissioner and the

[8] Organisation for Security and Co-operation in Europe, "Best Practices in Combating Corruption", Chapter 3: Conflict of Interest and Monitoring Financial Assets, Vienna, May 2004.

Office of the Law Clerk and Parliamentary Counsel to the House of Commons. The results and recommendations of the review will be reported back to the Standing Committee for its consideration.

The scope of the review includes a number of policy and procedural issues that have arisen in the past year in relation to examinations and inquiries by the Ethics Commissioner under the Codes. These issues, which are addressed below, are being considered in order to improve the effectiveness and efficiency of the current system. In some cases, we suggest recommendations for action.

A. Subjects of Examination

It is not entirely clear the extent to which public office holders other than ministers, ministers of state and parliamentary secretaries (as specifically listed in subsection 72.08 (1) of the *Parliament of Canada Act*) can be the subject of an examination by the Ethics Commissioner. The Members' Code, for example, expressly states that the Ethics Commissioner may initiate inquiries on a Member's compliance to the Code.[9] The Commissioner's authority to initiate inquiries is also one remedy to the perceived public concern over the lack of outside scrutiny over the compliance process. Moreover, for reasons of accountability and transparency, we believe the Code for Public Office Holders should stipulate that all public office holders may be the subject of examinations.

Subsection 72.07(b) of the *Parliament of Canada Act* stipulates that part of the Ethics Commissioner's mandate is to provide confidential advice to the Prime Minister on ethical principles, rules and obligations established for public office holders. One interpretation of this aspect of the Ethics Commissioner's mandate is that subsection 72.07(b) authorizes the Commissioner to initiate examinations of any public office holder. However, since the advice provided is confidential in nature, it follows that any examination preceding that advice, including any final report, must also be kept confidential. Such an approach would not be consistent with the principle of transparency that we are trying to uphold. Another way to ensure that all public office holders are subject to examinations by the Commissioner would be to amend the *Parliament of Canada Act* in order to clarify this point.

In our view, it is desirable that the *Parliament of Canada Act* be amended to include a provision clarifying the mandate of the Ethics Commissioner to examine all public office holders, either at the request of a parliamentarian or of his own initiative. Having said that, we also believe that it will be necessary for all concerned to examine the possible implications and potential consequences such an amendment could have on the ability of our Office to fulfil its mandate. Therefore, we are of the view that this issue requires further study before making any recommendation.

B. Frequency of Filing Disclosure Statements under the Members' Code

Members of the House of Commons are required to file a Disclosure Statement with the Ethics Commissioner on an annual basis. They are also required to report any material changes in their assets, liabilities and outside activities to the Ethics Commissioner within thirty days.

[9] *Conflict of Interest Code for Members of the House of Commons*, ss. 27 (4).

RECOMMENDATION 3

In order to reduce the unnecessary administrative burden on members of the House of Commons and the Office of the Commissioner, and given that Members must file an annual Disclosure Statement with the Ethics Commissioner, it is recommended to the Commons Standing Committee on Procedure and House Affairs that the requirement to report material changes within thirty days be removed from the Members' Code.

C. Gifts from Political Parties

The provisions of the Members' Code regarding gifts and other benefits specify the nature of the acceptable gifts, but do not make any distinction between the sources of these gifts. For example, no contrast is made between gifts in general and gifts from political parties.

Previous disclosures indicate that members of the House of Commons have occasionally received non-monetary gifts from riding associations and their political parties in the course of their political activities. These gifts include, for example, clothing, the use of automobiles and accommodations.

The Office of the Ethics Commissioner continues to work on a draft policy on the appropriateness of such gifts, as well as their disclosure to the public, and will seek the views of members of the House of Commons on the subject. Their input will be important for the formation of the Commissioner's recommendations on this issue to the Standing Committee on Procedure and House Affairs.

D. Political Activities of Governor-in-Council Appointees

The participation of Governor-in-Council (GIC) appointees in partisan political activities at the federal, provincial and municipal levels is one of the criteria often used by the public to determine an appointee's ability to discharge their official responsibilities with integrity, impartiality and objectivity.

While it is essential to recognize that GIC appointees are required to curtail their involvement in political activities by virtue of the office they hold, it is important to respect their democratic rights to participate in our political system. The challenge is to strike the appropriate balance between the public interest in ensuring the real and perceived non-partisanship of the *office held* with the democratic rights of the *office holder*.

The current Code for Public Office Holders neither defines nor addresses political activities in relation to GIC appointees. In concert with the Privy Council Office, the Office of the Ethics Commissioner continues to work on the development of a policy on political activities by GIC appointees, which will be submitted to the Prime Minister for his consideration.

E. Post-Employment Compliance of Public Office Holders

In order to prevent public office holders from taking advantage of their previous position after leaving public office, the current *Conflict of Interest and Post-employment Code for Public Office Holders* prohibits former public office holders from accepting service contracts or employment from entities with which they had direct and significant official dealings for one year, except for ministers and ministers of state for whom the prescribed period is two years. However, the Code does not provide any sanctions in the event that a former public office holder is in breach of its post-employment provisions. Given that the post-employment individual is no longer a public office holder, the potential sanctions that apply to any breach of the Code (*e.g.* termination, demotion, reprimand) are not available to the Prime Minister.

RECOMMENDATION 4

Recognizing the inherent difficulty in creating new offences and penalties in federal legislation, we nevertheless recommend that at the appropriate time the Government introduce legislation providing the appropriate legal sanctions for breaches of the post-employment provisions of the Code for Public Office Holders. In our opinion, the sanction of a specified maximum fine applicable to former members of the provincial legislature and Cabinet who contravene the ethics legislation of Ontario, serves as an appropriate model, which could be applied to all public office holders at the federal level.

PROCEDURAL ISSUES

This part of the discussion paper addresses procedural challenges encountered by the Office of the Ethics Commissioner in its first year while conducting examinations of public office holders and inquiries of members of the House of Commons under the new federal conflict of interest regime.

A. Examinations of Public Office Holders

A.i) Procedural Fairness

The *Parliament of Canada Act* affords a minister, minister of state or parliamentary secretary under examination "a reasonable opportunity to present his or her views" before the Ethics Commissioner provides advice or issues a report on the matter.[10] This provision raises a question of procedural fairness; namely, does the Act go far enough in ensuring that the rights of those under examination are respected?

[10] *Parliament of Canada Act*, R.S.C., 1985, c. P-1, s. 72.09.

The Members' Code is more expansive on this point:

> At all appropriate stages throughout the inquiry the Ethics Commissioner shall give the member reasonable opportunity to be present and make representations to the Ethics Commissioner in writing or in person by counsel or any other representative.[11]

POLICY APPROACH 2

The Ethics Commissioner will interpret the words "reasonable opportunity to present his or her views" in section 72.09 of the Parliament of Canada Act *as having the same meaning as the procedural guarantees afforded to members of the House of Commons at subsection 27 (7) of the Members' Code.*

A.ii) Suspending an Examination

The Ethics Commissioner is required to immediately suspend an examination and notify the relevant authorities if there are reasonable grounds to believe that the subject of the examination has committed an offence under an Act of Parliament.[12] An examination may, however, involve several issues, only one or some of which may be related to the possible offence. If the reasonable grounds to believe an offence has been committed are related to only part of the conduct under examination, it would appear to be in the public interest to continue to examine the remaining issues under investigation.

POLICY APPROACH 3

Where the information disclosed to the relevant authorities concerns only one or some of the aspects of the conduct under examination, the Ethics Commissioner will proceed with the remaining, unrelated, aspects of the examination already underway.

A.iii) Confidential Advice Given during the Course of an Examination

Paragraph 72.07 (c) of the *Parliament of Canada Act* stipulates that a public office holder may seek confidential advice from the Ethics Commissioner. Responding to such requests, however, becomes problematic when a public office holder seeks the Commissioner's input on an issue that is the focus of an ongoing investigation. This scenario begs the question as to whether it would be appropriate for the Commissioner to respond to such a request. In our opinion, to do so would not only be inappropriate, it would also be inconsistent with the intention of Parliament in adopting paragraph 72.07 (c) of the Act. Parliament could not have intended for the Ethics Commissioner to counsel a public office holder on his or her conduct at the very same time that conduct is under investigation by the same Commissioner.

[11] *Conflict of Interest Code for Members of the House of Commons*, ss. 27 (7).

[12] *Parliament of Canada Act*, R.S.C., 1985, c. P-1, para. 72.11 (a).

POLICY APPROACH 4

The Ethics Commissioner will refrain from providing confidential advice to any public office holder in respect of any matter that the subject of an ongoing examination.

A.iv) Disclosure of Information Gathered during an Examination

The question of whether the Ethics Commissioner may disclose the information gathered during an investigation under section 72.1 of the *Parliament of Canada Act* was discussed before the Standing Commons Committee on Access to Information, Privacy and Ethics on June 2, 2005. It was noted during the discussion that subsection 10.4 (6) of the *Lobbyist Registration Act* expressly states that the information gathered during an investigation may be disclosed in order to establish conclusions of any report under that Act.

POLICY APPROACH 5

The Ethics Commissioner will adopt an approach on the disclosure of information gathered during an investigation in the same manner as stipulated in the Lobbyist Registration Act.

B. Inquiries of Members of the House of Commons

B.i) Administration of Oaths during Inquiries

Oaths are an essential component of any legitimate inquiry. They impose a legal obligation to tell the truth. Moreover, the public at large understands that there are serious consequences attached to giving false testimony under oath. Section 72.1 of the *Parliament of Canada Act* grants the Ethics Commissioner the power to compel witnesses to give evidence during an examination of the ethical conduct of a minister, minister of state or parliamentary secretary. Section 10 of *Parliament of Canada Act* authorizes the Senate, House of Commons and any of their respective committees to administer an oath to any witness under examination.

The Ethics Commissioner, in conducting an inquiry under the Members' Code, is considered a one-person Committee of the House of Commons. Subsection 72.05 (2) of the *Parliament of Canada Act* provides that the Ethics Commissioner enjoys the privileges and immunities of the House of Commons and its members when carrying out his duties and functions. However, the Commissioner himself must be present at all times when witnesses provide testimony in order for the process to enjoy parliamentary privilege. Given that the privileges and immunities of the Commissioner cannot be delegated to investigators, this significantly reduces the ability of the Office to conduct investigations expeditiously. The authority to designate persons to administer oaths would greatly assist the Ethics Commissioner in carrying out the investigation process efficiently.

RECOMMENDATION 5

It is recommended that at the appropriate time the Government introduce legislation to amend the Parliament of Canada Act *to grant the Ethics Commissioner, and persons designated by the Ethics Commissioner, the authority to administer oaths for the purposes of an inquiry on the ethical conduct of a member of the House of Commons.*

B.ii) Compelling Persons of Interest to Cooperate

The Members' Code requires members of the House of Commons to "cooperate with the Ethics Commissioner with respect to an inquiry".[13] However, non-members are under no obligation to cooperate with the Commissioner, even though they may have information, or have made allegations, central to the inquiry. The inability to compel the cooperation of non-Members hampers the ability of the Commissioner to conduct an effective inquiry.

RECOMMENDATION 6

It is recommended that at the appropriate time the Government introduce legislation to amend the Parliament of Canada Act *to give the Ethics Commissioner the power to compel persons of interest other than members of the House of Commons to cooperate with the Commissioner during an inquiry.*

CONCLUSION

Elected officials are continually challenged to improve the safeguards against conflicts of interest, in order to meet the ever increasing expectations of the public they serve. We hope that this paper will facilitate an ongoing public dialogue on ways to improve the existing federal conflict of interest regime, with the ultimate objective of bolstering the confidence of Canadians in their public institutions.

[13] *Conflict of Interest Code for Members of the House of Commons*, ss. 27 (8).

APPENDIX A

RECOMMENDATIONS AND POLICY APPROACHES

RECOMMENDATION 1

A) It is recommended to the Prime Minister that the Code for Public Office Holders be amended to include a provision requiring all public office holders to refrain from public comment on an examination or inquiry under either the Code for Public Office Holders or the Members' Code while that examination or inquiry is in progress.

B) It is also recommended to the Commons Standing Committee on Procedure and House Affairs that the Members' Code be amended to include a provision requiring all Members to refrain from public comment on an examination under the Code for Public Office Holders while that examination is in progress.

RECOMMENDATION 2

It is recommended to the Prime Minister that all instances of ministerial recusal from Cabinet or Cabinet Committee meetings be recorded in a public registry as soon as possible, including details of the reasons for each recusal. The same disclosure requirement would also apply to other public office holders on any instance of recusal.

RECOMMENDATION 3

In order to reduce the unnecessary administrative burden on members of the House of Commons and the Office of the Commissioner, and given that Members must file an annual Disclosure Statement with the Ethics Commissioner, it is recommended to the Commons Standing Committee on Procedure and House Affairs that the requirement to report material changes within thirty days be removed from the Members' Code.

RECOMMENDATION 4

Recognizing the inherent difficulty in creating new offences and penalties in federal legislation, we nevertheless recommend that at the appropriate time the Government introduce legislation providing the appropriate legal sanctions for breaches of the post-employment provisions of the Code for Public Office Holders. In our opinion, the sanction of a specified maximum fine applicable to former members of the provincial legislature and Cabinet who contravene the ethics legislation of Ontario, serves as an appropriate model, which could be applied to all public office holders at the federal level.

RECOMMENDATION 5

It is recommended that at the appropriate time the Government introduce legislation to amend the *Parliament of Canada Act* to grant the Ethics Commissioner, and persons designated by the Ethics Commissioner, the authority to administer oaths for the purposes of an inquiry on the ethical conduct of a member of the House of Commons.

RECOMMENDATION 6

It is recommended that at the appropriate time the Government introduce legislation to amend the *Parliament of Canada Act* to give the Ethics Commissioner the power to compel persons of interest other than members of the House of Commons to cooperate with the Commissioner during an inquiry.

POLICY APPROACH 1

Through its recently relaunched website and other means, the Office of the Ethics Commissioner will inform Canadians that any requests to examine the ethical conduct of a minister, minister of state or parliamentary secretary should be made through a member of the House of Commons or a senator, as envisaged by subsection 72.08 (1) of the *Parliament of Canada Act*.

POLICY APPROACH 2

The Ethics Commissioner will interpret the words "reasonable opportunity to present his or her views" in section 72.09 of the *Parliament of Canada Act* as having the same meaning as the procedural guarantees afforded to members of the House of Commons at subsection 27 (7) of the Members' Code.

POLICY APPROACH 3

Where the information disclosed to the relevant authorities concerns only one or more aspects of an examination, the Ethics Commissioner will proceed with the remaining, unrelated, aspects of the examination already underway.

POLICY APPROACH 4

The Ethics Commissioner will refrain from providing confidential advice to any public office holder in respect of any matter that is currently the subject of an examination.

POLICY APPROACH 5

The Ethics Commissioner will adopt an approach on the disclosure of information gathered during an investigation in the same manner as stipulated in the *Lobbyist Registration Act*.

APPENDIX B

RECUSAL IN OTHER COUNTRIES

In reviewing our system of recusal, we felt it would be useful to survey the systems used in other countries. In foreign jurisdictions analogous to our own system of representative government, codes of conduct applying to all categories of public office holders, where they exist, are statute-based, while rule-based codes are usually restricted to officials under the responsibility of the issuing authority. For this reason, legislators are covered by rules promulgated by the houses of the legislature and ministers are regulated by the rules issued by the Prime Minister or President.[1]

i) United Kingdom

Under the Prime Minister's *Ministerial Code*, upon appointment to each new office, ministers provide their Permanent Secretary with a full list in writing of all interests which may give rise to a conflict. Ministers are required to disclose not only their personal interests, but also those of their spouse or partner, of minor children, of trusts of which the minister or their spouse or partner is a trustee or beneficiary, or of closely associated persons. Financial interests subject to disclosure include financial instruments and partnerships, unincorporated businesses and real estate, as well as relevant non-financial private interests such as links with outside organizations, and previous relevant employment.[2]

The *Ministerial Code* requires that ministers avoid any an actual or apparent conflict of interest between their ministerial responsibilities and their private financial interests. In order to prevent this prospect, the Code sets out the general principle that ministers should either dispose of any financial interest giving rise to the actual or apparent conflict, or take alternative steps to prevent it.[3]

Where a minister has a previous or existing financial or other interest giving rise to a real or perceived conflict, he or she must declare that interest to Cabinet colleagues and remain "entirely detached from the discussion of any public business which may affect that interest".[4] Aside from the obvious risk to the minister's reputation, two legal obligations must be considered by the minister:

> A) any exercise or non-exercise by a Minister (including a Law Officer) of a legal power or discretion or other influence on a matter in which the Minister has a pecuniary interest could be challenged in the courts and, if the challenge is upheld, could be declared invalid. The courts interpret conflict of interest increasingly tightly;
>
> B) Ministers are bound by the provisions of Part V of the Criminal Justice Act 1993 in relation to the use or transmission of unpublished price-sensitive information obtained by virtue of their Ministerial office.[5]

Unless adequate steps can be taken in relation to the financial interests themselves, the minister and the department are required to establish a process to prohibit his or her access to certain papers and ensure that the minister is not

[1] Gerard Carney, *Working Paper - Conflict of Interest: Legislators*, Ministers and Public Officials, Transparency International, 1998.
[2] Cabinet Office (United Kingdom), *Ministerial Code: A Code of Ethics and Procedural Guidance for Ministers*, July 2005, para. 5.2.
[3] *Ibid.*, para. 5.11
[4] *Ibid.*, para. 5.5
[5] *Ibid.*, para. 5.13

involved in certain decisions and discussions. The extent to which this is possible depends on the specific powers requiring the minister to make decisions.[6]

ii) Australia

Ministers are required by the *Guide on Key Elements of Ministerial Responsibility* to divest themselves, or relinquish control, of all shares and similar interests in any company or business involved in the area of their portfolio responsibilities. The transfer of interests to a spouse or dependent family member, or to a nominee or trust, is not an acceptable form of Divestment under the Guide. Ministers may transfer control to an outside professional nominee or trust providing the minister or immediate family exercises no control on the operation of the nominee or trust.[7]

While ministers are not prohibited from making investments on the stock market, they are prohibited from operating as traders and are implored by the Guide to "exercise careful personal judgment in respect of transactions."[8]

Ministers attending Cabinet or Cabinet Committee meetings must, in relation to the matters under discussion, declare any private interests held by them, or members of their immediate family of which they are aware, which give rise to, or are likely to give rise to, a conflict with their public duties. Generally, declarations should be made in all cases where an interest exists which could not be said to be shared with the rest of the community. Any such declarations will be recorded by Cabinet officers. It is then open to the meeting to excuse a minister from the discussion or to agree explicitly to his or her taking part.

Once a minister has made Cabinet aware of a particular private interest, it will not normally be necessary to declare that interest in subsequent Cabinet discussions. If a significant time has elapsed since a declaration and the interest is one that might not be well known to colleagues, the minister might declare the interest again when the relevant matter is under discussion.[9]

iii) New Zealand

The Cabinet Manual provides seven steps that ministers may take in order to "ensure that no conflict exists or appears to exist between their public duty and their private interests"[10]:

1. *Declaration of interest*: Where a Minister has a conflict of interest that arises in the deliberations of Cabinet, he or she must declare the interest and then either withdraw from the discussion or seek the agreement of his or her colleagues to remain in the meeting. The declaration of interest will be recorded.

2. *Restricted access to information*: A Minister's personal interest in an issue may require that the Minister instruct the Cabinet Office to ensure that the he or she does not receive official papers or reports about the issue.

3. *Transfer of responsibility to another Minister*: A Minister with a conflict of interest concerning a particular issue within his or her portfolio may, with the agreement of the Prime Minister, transfer responsibility for that issue to another Minister. In this case, the Minister with the conflict of interest should instruct his or her officials to ensure

[6] *Ibid.*, para. 5.17
[7] Department of the Prime Minister and Cabinet (Australia), *A Guide on Key Elements of Ministerial Responsibility*, Canberra, December 1998, page 10.
[8] *Ibid.*, page 11.
[9] *Ibid.*, page 4.
[10] Cabinet Office (New Zealand), *Cabinet Manual*, Wellington, 2001, para. 2.49.

that departmental briefings and papers on the issue are directed to the other Minister. The Minister with the conflict will also need to declare his or her interest if the matter is discussed at Cabinet, and should consider whether it is appropriate to receive Cabinet papers on the issue, or to remain at the meeting.

4. *Transfer of responsibility to the department*: If a conflict arises in the Minister's portfolio concerning a minor issue, the Minister may be able to handle the matter without further difficulty by passing on the issue to the department. The Minister should take care to ensure, however, that it is clear that there is no attempt to influence the department inappropriately. The Minister should also declare his or her interest if the matter is discussed at Cabinet, and should consider whether it is appropriate to receive Cabinet papers on the issue, or to remain at the meeting.

5. *Divestment*: Where a conflict of interest is significant and pervasive, the Minister may need to divest himself or herself of the interest.

6. *Blind trusts*: Ministers with complicated or extensive shareholdings may wish to consider placing their investments into a blind trust, as a precaution against unintended conflicts of interest.

7. *Resignation from an organization*: Where a conflict of interest arises from association with a non-governmental organization, the Minister may be required to resign from that organization.[11]

iv) United States

Recusals are generally required when an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States is prohibited by statute[12] from participating personally and substantially in a particular matter, chooses or is directed not to participate in a particular matter involving specific parties[13], or receives an extraordinary payment from a former employer.[14]

Ethics officials play a critical role in advising an employee of the significance of screening arrangements and recusal obligations. Ethics officials also counsel employees regarding the scope of their recusals. Effective screening arrangements identify a gatekeeper, who will screen incoming phone calls, correspondence and other communications to determine if they are a covered matter from which the employee recuses himself or herself. This gatekeeper can be identified by name, by position, or even by office, provided that it is absolutely clear who will be screening matters for the recused official.[15]

Screening arrangements identify an agency official who will handle matters covered by the employee's recusal obligations. The person acting in lieu of the official must be, and be perceived as, able to exercise independent judgment on the covered matter. For this reason, the screening arrangement must require that matters affected by the official's recusal are referred to someone who has actual and apparent authority to act on the matter.

As part of its oversight responsibilities, the Office of Government Ethics (OGE) requires agencies to provide "evidence of compliance" for certain recusals made by persons nominated to, or occupying, positions that require Senate confirmation (appointees). By providing documents to the OGE on appointees' recusals and their screening arrangements, agencies enable the OGE to track the recusal commitments.[16]

[11] *Ibid*., para. 2.56.
[12] 18 *United States Code* § 208.
[13] 5 *Code of Federal Regulations* § 2635.502.
[14] *Ibid*., § 2635.503.
[15] United States Office of Government Ethics, Memorandum DO-04-012 (June 1, 2004).
[16] *Ibid*.