



Office of the
Conflict of interest and
Ethics Commissioner

Commissariat aux
conflits d'intérêts et à
l'éthique

The 2007-2008 **ANNUAL REPORT**

in respect of the *CONFLICT OF INTEREST CODE
FOR MEMBERS OF THE HOUSE OF COMMONS*



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Conflict of Interest and
Ethics Commissioner

The 2007-2008 Annual Report

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PREFACE

This Annual Report is made in fulfillment of the requirements of paragraph 90(1)(a) of the *Parliament of Canada Act*. It reports on activities of the Conflict of Interest and Ethics Commissioner under the *Conflict of Interest Code for Members of the House of Commons* for the 2007-2008 fiscal year ending on March 31, 2008.

A separate annual report is made in fulfillment of the requirements of paragraph 90(1)(b) of the *Parliament of Canada Act*. It reports on the Commissioner's activities under the *Conflict of Interest Act* related to public office holders for the same fiscal year.

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INTRODUCTION

The Members' Code

The *Conflict of Interest Code for Members of the House of Commons* (Members' Code) was originally adopted by the House of Commons on April 29, 2004. Under Standing Order 108(3)(a)(viii), the Standing Committee on Procedure and House Affairs (Standing Committee) is given the mandate to review and report on all matters relating to the Members' Code. The Members' Code includes rules on conflict of interest for Members, processes for the confidential disclosure of personal information to the Commissioner, procedures for making Members' summary information public, an advisory role for the Commissioner and a process for the conduct of inquiries for alleged contraventions of the rules by Members.

On June 11, 2007 the House of Commons adopted the 54th Report of the Standing Committee (54th Report) which included recommended amendments to the Members' Code.

Role of the Commissioner

On May 17, 2004 an amendment to the *Parliament of Canada Act* came into force creating a new position of Ethics Commissioner reporting directly to Parliament and a new parliamentary entity, the Office of the Ethics Commissioner, to operate within the parliamentary framework. The Ethics Commissioner was responsible for administering the new Members' Code.

On December 12, 2006 the *Federal Accountability Act* was passed and, *inter alia*, replaced the previous amendments to the *Parliament of Canada Act* creating the position of Conflict of Interest and Ethics Commissioner (Commissioner) and continuing the Office of the former Ethics Commissioner under the new Commissioner. The Conflict of Interest and Ethics Commissioner is an Officer of Parliament and reports to the Speaker of the House of Commons with respect to the administration of her Office. The duties and functions of the Commissioner are carried out within the institution of the House of Commons.

The Commissioner was given responsibilities under both the Members' Code and the *Conflict of Interest Act*. The Act applies to public office holders. The Commissioner has the rank of a deputy head of a department and is responsible for the control and management of the Office of the Commissioner.

Role of the Office

The Office administers the Members' Code with a view to assisting Members to avoid conflicts of interest. Where necessary, the Office assists the Commissioner in the conduct of inquiries into alleged contraventions of the Members' Code. The Office

advises on Members' compliance obligations, maintains confidential files of required disclosures and maintains a registry, including an electronic registry, of required public disclosures.

FIRST YEAR AS COMMISSIONER

This Annual Report is the fourth report since the creation of the Members' Code and my first as Commissioner. I began my new position on July 9, 2007. This report covers the period up to March 31, 2008 and sets out the highlights of what has been nine months of transition and continuous learning. Although my time in office does not span the full year being reported upon, statistical information and budget numbers contained in this report are provided for the full 12 months of the fiscal year in order to facilitate comparisons with reports for previous years. I have also included significant developments in certain files that occurred after March 31, 2008 but for which substantial work of the Office occurred within the fiscal year being reported upon.

As Commissioner, I am guided by the fact that the Members' Code is a set of rules made by Members for Members. My role under the *Parliament of Canada Act* is to support the House of Commons in governing the conduct of its Members.

One of my first priorities has been to ensure a common understanding of the Members' Code and its recent amendments within my Office so that it is applied and interpreted fairly and consistently. The amendments resulting from the 54th Report have led to changes to our internal processes.

One of the amendments that has had a major impact is the requirement for any forms relating to Members' disclosures to remain confidential until they have been approved by the Standing Committee and reported to the House of Commons. Despite a number of attempts, we have not obtained the necessary approvals for the new forms. In order to ensure that new Members of the House of Commons are not in breach of the Members' Code, we have continued to make use of previous non-confidential, but also unapproved, forms. A fulsome description of our difficulties in this regard and the consequent steps we have taken is set out later in this report.

Another priority has been to provide clear information about the Members' Code. The 54th Report underlined the importance of educating both Members and the general public about the Members' Code and my role. The recent amendments to the Members' Code made educational activities mandatory. In response to this, we have updated our website to reflect changes to the Members' Code. I have made a number of presentations over the year on the Members' Code.

One of my first public speaking engagements was a presentation on ethics in Parliament, delivered on September 28, 2007 as part of the Library of Parliament Seminar Series. This presentation, which provides an overview of the Members' Code, is available on our website. As well, in partnership with the Office of the Senate Ethics Officer and the Canada Public Service Agency, my Office hosted the annual meeting of the Canadian Conflict of Interest Network in September 2007 and welcomed conflict of interest commissioners from 10 provincial and territorial jurisdictions. I would like to express my appreciation for the collegiality and support shown to me by my federal, provincial and territorial colleagues.

The Office has undergone some organizational changes over the year to respond to its new mandate, particularly in relation to applying the new *Conflict of Interest Act*. The most notable change was the creation of a legal services unit which I expect to rely upon for legal support related to my mandate under the Members' Code.

APPLICATION OF THE CODE

The following describes some of the main activities of my Office and includes a number of observations that I wish to make about the Members' Code at the end of this transition period. The Members' Code has been referred to by the Standing Committee as a "work in progress" with adjustments and modifications to be considered as and when required. I make some general observations on certain situations where I find that the application of the Code raises problematic issues. My intent is to be transparent about the approaches I am taking in administering the Code.

Disclosures

General

The Members' Code deals with Members' potential conflicts of interest by establishing a disclosure regime that is to be supported by advice from the Commissioner.

An initial disclosure of confidential information to my Office must be made after election to the House of Commons. The 2007 amendments to the Members' Code modified disclosure requirements, particularly with respect to trusts. In addition to assets, liabilities, sources of income, benefits related to government contracts and positions in outside corporations, Members are now required to disclose every known trust from which they could derive a benefit or income and to disclose any material changes to their initial disclosures.

After the initial disclosure, a disclosure summary of a Member's private interests is made available in a public registry. This registry also includes disclosures of certain gifts valued over \$500 that a Member or a member of a Member's family accepts, of sponsored travel, of trusts, of any positions held in corporations, trade or professional associations or trade unions, and of material changes to the disclosure summary. On an annual basis, a Member's information is reviewed and the disclosure summary updated.

During the fiscal year, three new Members were elected in the September 2007 by-elections and disclosures were required. Of the three new Members, one submitted disclosure statements within the required 60 days of becoming a Member. A second submitted within a few days after the deadline and the third was five months late. There were no disclosures regarding trusts as a result of the new amendments.

There was a delay in the annual review exercise primarily due to the difficulties in getting forms approved, as discussed below. Letters were mailed in April and early May, 2008 requesting an update from all Members of the House of Commons with past due annual reviews.

In order to facilitate the disclosure of confidential information, the Office has created five draft forms, including forms for initial disclosures, disclosure summaries, statements of material change, gifts and statements of sponsored travel.

Seeking Approval of Forms

The Members' Code requires that forms be approved by the Standing Committee, and reported to the House of Commons for concurrence. The 2007 amendments also added the requirement that the proposed forms be kept confidential until reported to the House.

Since the adoption of the Members' Code in 2004, no forms or guidelines have been approved for use. This has not been for lack of attempts to do so.

Following the June 2004 general election, new Members were provided with unapproved forms for disclosures as part of the initial implementation of the new Members' Code. In November of the following year, draft forms were sent to the Standing Committee for approval. Shortly after that, however, the general election of January 2006 was called. Unapproved forms were again used for initial disclosures.

It was not until December 2006 that the Subcommittee on Disclosure Forms for the Conflict of Interest Code began to deal with the issue. Forms were submitted to the Subcommittee in January 2007 but no conclusions had been reached by the time I became Commissioner in July of that year. A letter sent by the Chair of the Standing Committee in June 2007 was waiting for me when I took up my position, indicating that the Standing Committee wanted further revisions to the draft forms previously submitted, as well as to have an additional draft form for material changes in light of the new requirements of the Code.

In November, 2007, immediately following the commencement of the current Session of Parliament, I submitted proposed new forms reflecting all of the new requirements of the Members' Code to the Standing Committee. A new Subcommittee on Disclosure Forms for the Conflict of Interest Code was formed and I met with the Subcommittee in December 2007 along with two of my staff.

On February 7, 2008, after a few minor revisions, five disclosure forms were approved by the Subcommittee. The Subcommittee moved to authorize the Chair to review the final edited forms and report the forms to the Standing Committee for approval.

There has been no review of the forms to date by the Standing Committee and, due to ongoing procedural issues within the Standing Committee, the Standing Committee has been unable to conduct normal business.

Because it has been impossible to obtain approval of forms by the Standing Committee since the Members' Code was created, one is left to wonder whether this requirement for approval is desirable. Consultation with the Standing Committee or a subcommittee on proposed forms might be sufficient.

As a practical matter, it was necessary to proceed with some forms in order to carry out the requirements of the Members' Code relating to disclosures. As a consequence, I decided to use the same draft forms that had been used prior to the amendments to the Members' Code for purposes of the initial disclosures by new Members. While those forms had never been approved by the House of Commons, they were not confidential. Although the annual review was delayed this year due to the lack of approved forms, I finally proceeded by way of letters requesting new information, thereby avoiding the use of forms altogether.

With a view to meeting the new requirement for an electronic registry and while awaiting approval of forms for summaries, I have decided to post a summary of information on the Office website, after it has been reviewed by Members, without using forms. This project is expected to be completed in the summer of 2008.

Sponsored Travel List

The 2007 amendments to the Members' Code extended the time allowed for reporting on sponsored travel to 60 days after the end of the trip. Members are required to report on the nature of the benefits received and the values of transportation and accommodation. No separate reporting of these benefits as gifts is required.

Because I am required to submit a list of sponsored travel to the Speaker of the House by January 31 of each year in respect of the previous year, not all sponsored travel in December will appear on the sponsored travel list of the relevant year. Travel often takes place during December. Disclosures that are missed will be added to the sponsored travel list for the following year.

A sponsored travel list for 2007 was tabled by the Speaker in the House of Commons on January 31, 2008.

Advisory Role

The main areas in relation to which Members seek advice have been gifts, invitations and outside activities.

Gifts and Invitations

The prohibition on gifts or other benefits presents an interpretive challenge. The language of the prohibition precludes accepting any gift or other benefit "that is related to the Member's position" without reference to whether there is a conflict of interest. On its face the prohibition appears to cover all gifts given to a Member because of his or her position. This would amount to a prohibition against virtually all gifts except for those from family or friends or those under the following exception.

Some gifts or other benefits are allowed if they are "received as a normal expression of courtesy or protocol, or within the customary standards of hospitality that normally accompany the Member's position". The scope of this exception, in particular

the reference to “the customary standards of hospitality that normally accompany the Member’s position”, is unclear. For instance, while golf memberships have been received by Members in the past, it would appear to me that they would not fall within the exception to the general prohibition.

My Office was asked to provide advice related to whether a Member could accept an item of value arising out of a caucus activity. There are a number of caucus groups that are formed around a particular interest in relation to which there is often a private sector interest group or association. A prize (considered to be a gift or other benefit) donated from the related interest group to the caucus ultimately went to a Member. In that instance, there was some evidence that the practice met the customary standard of hospitality test and, for this reason but with some hesitation, I concluded that it was an exception to the prohibition. In my view, this area of activity should be treated with caution to ensure compliance with the Members’ Code.

The 54th Report requested that a guideline on the receipt of gifts and other benefits be developed with an emphasis on the general prohibition. My Office is working on such a guideline but, given the challenges in interpreting the general prohibition and exceptions, I will be seeking to have a preliminary discussion with the Standing Committee before forwarding a draft guideline. All drafts will, as required, be kept confidential until approved by the Standing Committee and reported to the House of Commons.

Outside Activities

The experience to date has been that Members will seek advice on the permissibility of outside activities expecting that there is a prohibition in that regard. Although certain outside activities related to holding positions in corporations, associations and trade unions must be publicly disclosed, there are no prohibitions against holding the positions or, indeed, against participating in other outside activities so long as Members are able to fulfill their obligations under the Members’ Code.

Government Contracts

In the 2007 amendments to the Members’ Code, the provisions relating to government contracts were amended. With some exceptions, Members are prohibited from knowingly being a party, directly or through a subcontract, to a contract with the Government of Canada under which the Member receives a benefit, unless the Commissioner is of the opinion that the contract is unlikely to affect the Member’s obligations under the Members’ Code. Members are also prohibited from having an interest in a partnership or in a private corporation that is a party, directly or through a subcontract, to a contract with the Government of Canada under which the partnership or corporation receives a benefit, unless the Commissioner is of the opinion that the interest is unlikely to affect a Member’s obligations.

The 54th Report requested that a guideline be developed to assist Members by clarifying these prohibitions.

Office records for the period proceeding the date on which I became Commissioner indicate little activity in this regard whether for advice or for actual disclosures. Since July, 2007 only three requests for advice relating to particular fact situations were received. In order to develop a guideline that responds to the concerns of Members, I will be seeking advice from the Standing Committee as to the basis for the concerns that led to the recommendation for a guideline in the 54th Report.

INQUIRIES

The 2007 amendments established a new formal procedure to be used when a request for an inquiry is received from a Member. The Member who is the subject of the request must be afforded 30 days to respond to the allegations and then the Commissioner has 10 working days to conduct a preliminary review and to decide whether an inquiry is warranted. Other amendments constrain what can be said about a preliminary review or inquiry. The requirement that the inquiry process be conducted in private is maintained.

The 54th Report requested that more information on inquiries and their associated costs be provided. Information on the number of requests and inquiries made during the reporting year is set out below.

All requests were handled from within the Office during the year. I decided early in my mandate to establish a small legal services group within the Office to assist with advisory and inquiry work relating not only to the Members' Code but also to the new *Conflict of Interest Act* for public office holders. As a result, there were no contracts for outside legal services associated with inquiry related work during the year.

Requests from Members

During the last fiscal year, there were two requests from Members for inquiries relating to other Members. A preliminary review was undertaken for both and, for one, it was determined that the facts did not warrant an inquiry.

For the other, a full inquiry was undertaken into an allegation that the Honourable Robert Thibault, Member for West Nova, had breached the Members' Code in participating in the work of the Standing Committee on Access to Information, Privacy and Ethics with respect to the Mulroney Airbus Settlement. My report on this inquiry was tabled on May 7, 2008.

This inquiry raised the question of whether a lawsuit constitutes a "liability" and, consequently, a "private interest" within the meaning of the Members' Code and, if so, whether Mr. Thibault had a private interest that was engaged by the prohibitions or requirements of sections 8, 12 or 13 as a result of the lawsuit instituted against him by Mr. Mulroney. The Members' Code requires that a Member with a private interest must avoid furthering that interest (section 8), must formally disclose the interest (section 12) and must recuse him or herself from related votes and debates (section 13).

I found that a lawsuit instituting a damages claim against a Member, being a contingent liability, constitutes a liability within the meaning of the Members' Code and, therefore, a private interest for the purposes of sections 8, 12, and 13.

While finding that Mr. Thibault had contravened sections 8, 12 and 13 of the Members' Code, I also recommended that no sanction be imposed because there had been no similar questions addressed in the past and the obligations under the Members' Code

might be unclear to Members. I nonetheless recommended that Mr. Thibault disclose the existence of his private interest to the Speaker of the House of Commons in fulfillment of his formal obligations under the Members' Code, and he did this shortly after the report was tabled.

On June 5, 2008 the House of Commons adopted a motion that amends the Members' Code to exclude a matter that "consists of being a party to a legal action relating to actions of the Member as a Member of Parliament" from the concept of a private interest. In addition, the House of Commons referred the Thibault Inquiry Report back to me for further consideration of my conclusions in light of the amendment. I have considered the matter in light of the amendment and the resulting response was submitted to the Speaker of the House of Commons on June 17, 2008. Applying sections 8, 12 and 13 to the facts underlying the Report as if the amendment to subsection 3(3) of the Code had been made at the relevant times, I concluded that Mr. Thibault would not have failed to comply with the Code had that amendment then been part of the Code and as well that, as of June 5, 2008, Mr. Thibault no longer had any obligations under those sections in relation to his previous private interest resulting from the lawsuit.

Requests from Non-Members

Members of the public sometimes ask that I undertake an inquiry on the basis of their own belief that there has been a contravention of the Members' Code or, alternatively, to undertake an investigation where there is rumour or innuendo in the press giving rise to suspicions that there has been a contravention of the Members' Code. Neither of these alternatives meets the threshold test set out in the Members' Code.

The requirement that I have reasonable grounds to believe that there has been a contravention is a significant test that creates its own difficulties but cannot be taken lightly. It raises issues for me about how much tracking of events and on-going informal inquiry can or should be undertaken when the press reports a scandal with unverified information. Sufficient credible evidence would have to be available to give me reasonable grounds to believe that the Members' Code had been contravened.

Three requests were received from private individuals seeking inquiries into Members' activities. They were not proceeded with, because of insufficient evidence or lack of jurisdiction.

Parallel Studies by House Committees

House of Commons committees from time to time conduct their own public studies into a matter for which I may also receive a request to conduct an inquiry under the Code. This has led to some general confusion about the different processes and the possibility of different outcomes. This confusion may arise in part from the fact that the Members' Code requires that inquiries be conducted, in private, with a report that is made public at the end of the process while House of Commons committee proceedings are usually conducted in public. The existence of a public study by a House of Commons committee,

whether commenced before or after the receipt of a request for an inquiry, does not affect my obligation to conduct an inquiry under the Members' Code.

Timeframes for Inquiries

As indicated above, the Members' Code sets out two mandatory delay periods related to inquiries: a maximum of 30 days for a response from a Member to a request that alleges a contravention on his or her part; and then ten working days for consideration of the request and response and the making of a determination by the Commissioner whether an inquiry is warranted. Only after these two delay periods have passed does the actual inquiry commence. The amount of time then required to complete the inquiry depends on the substantive and procedural complexity of the particular inquiry. Once the inquiry is completed and the report prepared, additional time is needed for translation and for printing. Thus the minimum time required generally approaches three months from the time of the complaint.

ADMINISTRATION

Human Resources

The Office is a parliamentary entity with the authority to hire its own employees and to establish its own classification structure and terms and conditions of employment. It is subject to the *Parliamentary Employment and Staff Relations Act*. The *Public Service Employment Act* does not apply. As of March 31, 2008, 45 employees worked at the Office.

Having the status of a separate employer brings certain flexibilities to the management of human resources. For example, with the guidance of the Hay Group, I have implemented a compensation package (salary, benefits, etc.) that is intended to allow the Office to be competitive with other comparable employers. As a result of the *Federal Accountability Act*, our staff can now compete for positions in the core public service.

The Office also maintains its own Terms and Conditions of Employment. We have an employer-employee committee that works on the joint development of internal policies and procedures in human resources management. This year members of this committee developed a draft policy on the prevention and resolution of harassment issues.

Finance

Prior to my becoming Commissioner in July 2007, the Office was allocated an initial budget of \$5,140,000 in 2007-08. An additional \$672,000 that was primarily intended to cover the forecasted cost of the new internal legal unit and other new positions was processed through the Supplementary Estimates A. Most of the funding received through the Supplementary Estimates A was not spent at year-end because staffing of the new positions did not occur until late in the fiscal year.

Seventy-two percent of the expenditures for 2007-08 related to salaries and the remaining 28 percent related to standard operating costs. Given its size, the Office has arrangements with the House of Commons, the Library of Parliament and Public Works and Government Services Canada for the provision of internal services. Memoranda of Understanding have been negotiated with each of these organizations for the provision of support in information technology, finance and compensation services, respectively.

The Office continues the practice of its predecessor of disclosing on its website travel and hospitality expenditures for the Commissioner and the Deputy Commissioner. Contract information will be disclosed in the new fiscal year.

LOOKING AHEAD

As I prepare to enter my second year as Conflict of Interest and Ethics Commissioner, I am pleased with progress made to date in building the capacity of my Office to deal with the two conflict of interest regimes, the Members' Code and the *Conflict of Interest Act* for public office holders.

I am also mindful that the Members' Code, although in existence longer than the Act, is still relatively new and that important work remains to be accomplished for it to fulfill its important objective. I look forward to working with the Standing Committee and making progress on a number of matters identified in this report, including obtaining approvals for certain forms necessary for Members to fulfill their disclosure obligations under the Members' Code.

I intend to continue to focus on prevention through education. The Office will continue to improve its website so that it can be a useful reference tool for those covered by the Members' Code and the Act, as well as being a source of information for the general public. We will also continue with the public outreach activities begun this year to inform the general public about both the Members' Code and the Act.

This has been a year of learning for me and for all staff. I am indebted to the staff who have stayed with the Office after the transition, and I appreciate the continuing support I have received. In the coming year, I want to continue the work begun this year to foster a positive and supportive workplace that will allow the Office's workforce to grow professionally.

APPENDIX: FINANCIAL STATEMENTS