



Office of the Conflict  
of Interest and Ethics  
Commissioner

Commissariat aux  
conflits d'intérêts et à  
l'éthique

**Discontinuance Report relating to an  
examination of allegations of partisan  
advertising of government initiatives by the  
Prime Minister, certain ministers and their  
respective parliamentary secretaries**

made under the  
*CONFLICT OF INTEREST ACT*



**January 13, 2010**

**Mary Dawson**  
Conflict of Interest and  
Ethics Commissioner

Discontinuance Report  
relating to an examination of allegations of partisan advertising  
of government initiatives by the Prime Minister,  
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## **PREFACE**

The *Conflict of Interest Act*, S.C. 2006, c.9, s.2 (Act) came into force on July 9, 2007.

An examination under the Act may be initiated at the request of a member of the Senate or House of Commons pursuant to section 44 or on the initiative of the Conflict of Interest and Ethics Commissioner pursuant to section 45.

The Commissioner is required under subsection 44(3) of the Act to examine the matter described in the request unless she determines that the request is frivolous or vexatious or is made in bad faith. The Commissioner may, having regard to all the circumstances of the case, discontinue the examination.

Pursuant to subsection 44(7) the Commissioner must provide the Prime Minister with a report setting out the facts in question as well as the Commissioner's analysis and conclusions in relation to the request even where an examination is discontinued. Pursuant to subsection 44(8) the Commissioner must, at the same time, provide a copy of the report to the member who made the request and to the current or former public office holder who is the subject of the request, and must also make the report available to the public.



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## THE REQUEST

On October 27, 2009, my Office received a letter from Ms. Martha Hall Findlay, Member of Parliament for Willowdale, requesting that I conduct an investigation into alleged contraventions of both the *Conflict of Interest Act* (Act) and the *Conflict of Interest Code for Members of the House of Commons* (Code) by the Prime Minister, various ministers and all of their respective parliamentary secretaries and ministerial staff in relation to the advertising and communications strategy established to promote the Government of Canada's Economic Action Plan.

Ms. Hall Findlay alleged that the Prime Minister, the President of the Treasury Board, the Minister of Finance, the Minister of Public Works and Government Services, the Minister of Transport, Infrastructure and Communities, the Minister of Human Resources and Skills Development, the Minister of Industry, the Minister of Natural Resources, the Minister of National Revenue and their respective parliamentary secretaries adopted a strategy that, in her view, equated the Conservative Party of Canada with the Government of Canada. In her opinion, this improperly furthered the Party's private interests and, therefore, placed the public office holders in a conflict of interest. More particularly, Ms. Hall Findlay alleged that the public office holders had contravened section 5, subsection 6(1) and sections 7 and 9 of the Act.

Specifically, Ms. Hall Findlay alleged that these public office holders used their positions to develop an advertising and communications strategy to promote the Economic Action Plan that adopted the colours, images, slogans and "look and feel" aspects of the Conservative Party of Canada in order to benefit the Party's electoral prospects. She supported this allegation by claiming that this strategy included references to the "Harper Government" and other elements of partisan branding in television and radio advertisements, in print and online communications, in websites and weblinks, in official letters and in funding announcements using novelty cheques.

As Ms. Hall Findlay's request identified individuals by position only, my Office requested that she forward the names of the individuals she believed had breached the Act. Through an email sent by a member of her staff, she identified the names of the public office holders holding the positions she had identified in her letter of request. This email also erroneously included the name of one minister of state whose position was not identified in Ms. Hall Findlay's original examination request. An examination was not pursued in relation to that particular minister of state.

On November 3, 2009, I advised Ms. Hall Findlay that her request under the Code did not satisfy the requirements set out in subsection 27(2) of the Code. In that same letter, I also advised her that I would not initiate an examination under the Act with respect to unnamed ministerial staff. Ms. Hall Findlay did not pursue her request under the Code, or her request against ministerial staff under the Act.



## THE PROCESS

Section 44 of the Act governs examinations initiated at the request of a member of the Senate or House of Commons. The relevant portions of section 44 read as follows:

*44. (1) A member of the Senate or House of Commons who has reasonable grounds to believe that a public office holder or former public office holder has contravened this Act may, in writing, request that the Commissioner examine the matter.*

*(2) The request shall identify the provisions of this Act alleged to have been contravened and set out the reasonable grounds for the belief that the contravention has occurred.*

*(3) If the Commissioner determines that the request is frivolous or vexatious or is made in bad faith, he or she may decline to examine the matter. Otherwise, he or she shall examine the matter described in the request and, having regard to all the circumstances of the case, may discontinue the examination.*

[...]

*(7) The Commissioner shall provide the Prime Minister with a report setting out the facts in question as well as the Commissioner's analysis and conclusions in relation to the request. The report shall be provided even if the Commissioner determines that the request was frivolous or vexatious or was made in bad faith or the examination of the matter was discontinued under subsection (3).*

[...]

Under subsection 44(1), where a member of the Senate or the House of Commons has reasonable grounds to believe that a current or former public office holder has contravened the Act, the member may request, in writing, that my Office conduct an examination into the alleged contravention. As provided in subsection 44(2), the request must not only identify the provisions alleged to have been contravened, but also set out the reasonable grounds for the member's belief that a contravention has occurred.

Under subsection 44(3), the Commissioner must undertake an examination of any appropriately constituted request made by a member of the Senate or the House of Commons. The Commissioner may only decline to initiate an examination of a request if she determines that the request is frivolous, vexatious or made in bad faith. The Commissioner may, however, discontinue an examination where, having regard to all of the circumstances of the case, she considers this to be appropriate.





The Commissioner is required, under subsection 44(7), to provide a report to the Prime Minister setting out the facts in question as well as the Commissioner's analysis and conclusions in relation to the request for an examination, and must do so even where the Commissioner determines that the request was frivolous, vexatious or made in bad faith or where the examination was discontinued.

By letters sent on October 30, 2009, I provided a copy of Ms. Hall Findlay's request to the Prime Minister, the identified ministers and their respective parliamentary secretaries. In those letters, I asked them to provide me, within 30 days, with their views relating to the alleged contraventions of the Act and a description of their involvement in developing the advertising and communications strategy to promote the Government of Canada's Economic Action Plan.

On November 30, 2009, I received a response letter from Mr. Arthur Hamilton, counsel for the Conservative Party of Canada. He provided me with a joint response on behalf of the Prime Minister, the ministers and the parliamentary secretaries identified in Ms. Hall Findlay's request. I also received supplemental letters directly from two of the public office holders who were subjects of the request.

Because of my decision to discontinue this examination, no further information was sought from the individuals involved in this matter and no interviews were held.



## ANALYSIS

I have been asked to determine whether the public office holders identified by Ms. Hall Findlay used their positions to develop a partisan advertising and communications strategy to promote the Economic Action Plan, in order to improve the electoral prospects of the Conservative Party of Canada, and were thereby in a conflict of interest. In particular, I have been asked to determine whether those public office holders contravened section 5, subsection 6(1), section 7 or section 9 of the Act. Those provisions read as follows:

5. *Every public office holder shall arrange his or her private affairs in a manner that will prevent the public officer holder from being in a conflict of interest.*
- 6.(1) *No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest.*

[...]

7. *No public office holder shall, in the exercise of an official power, duty or function, give preferential treatment to any person or organization based on the identity of the person or organization that represents the first-mentioned person or organization.*
9. *No public office holder shall use his or her position as a public office holder to seek to influence a decision of another person so as to further the public office holder's private interests or those of the public officer holder's relatives or friends or to improperly further another person's private interests.*

[emphasis added]

The existence of a conflict of interest or the potential for one is a core element of the rules of conduct set out in section 5 and subsection 6(1). The definition of “conflict of interest” is set out in section 4 of the Act and reads as follows:

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

[emphasis added]



Section 9 does not refer to the term “conflict of interest” directly. However, it draws upon the same language used in section 4 to define “conflict of interest” in prohibiting public office holders from using their positions to influence decision-making.

### ***Section 5, subsection 6(1) and section 9***

In the context of Ms. Hall Findlay’s request, the relevant question in relation to section 5, subsection 6(1) and section 9 is whether the identified public office holders acted in a way that provided an opportunity to “improperly further another person’s private interests”, in this case alleged to be the private interests of the Conservative Party of Canada.

#### *The meaning of “person”*

A threshold issue is whether the Conservative Party of Canada is a “person” for the purposes of these provisions.

The term “person” is not defined in the Act. In law, a “person” is conventionally understood to include both an individual and a corporation (legal person). The *Interpretation Act*, R.S.C. 1985, c. I-21 provides that, in every enactment, a “ ‘person’ or any word or expression descriptive of a person includes a corporation” unless a contrary intention appears (subsections 35(1) and 3(1)). I find no contrary intention in relation to the provisions under consideration. In the absence of any other definition in the *Conflict of Interest Act*, the definition in the *Interpretation Act* applies.

Our research has found that the Conservative Party of Canada is not a corporation but rather an unincorporated association.

I note that registered political parties, including the Conservative Party of Canada, are deemed to be “persons” for the purposes of judicial proceedings and compliance agreements under the *Canada Elections Act*, S.C. 2000, c.9, s.504. There is, however, no similar deeming provision in the *Conflict of Interest Act*. I note as well that there are provisions of the *Conflict of Interest Act*, itself, that apply to a broader range of entities. They refer expressly to “any person or organization” or “any person or entity” (for example, sections 7 and 16 and subsection 35(2)). Similarly, the conflict of interest rule found in section 8 of the *Conflict of Interest Code for Members of the House of Commons*, which is analogous to section 4 of the *Conflict of Interest Act*, is cast more broadly than the Act to cover “persons” or “entities”.

While the reasons for the differences in scope of the various provisions may not always be apparent, the fact remains that organizations or entities that are not corporations are not covered by section 5, subsection 6(1) or section 9 of the Act.

Because the Conservative Party of Canada is not a corporation, I conclude that the Conservative Party of Canada is not a “person” within the meaning of section 4 and is therefore outside the scope of section 5 and subsection 6(1). It is similarly outside the scope of section 9.



## *“Private interest”*

In light of my conclusion above, it is not necessary for me to consider the question of whether the Conservative Party of Canada had a “private interest” within the meaning of the Act in relation to this request. The alleged interests at issue here are the improved electoral prospects of the Conservative Party of Canada. In my view it is questionable whether those political interests are included within the meaning of “private interest” under the Act, but it is not necessary to decide that issue at this time. It is, however, an important question, and I expect to have occasion to comment further on the scope of the expression “private interest” in the near future.

## **Section 7**

Ms. Hall Findlay’s request also alleged that the identified public office holders contravened section 7 of the Act. For ease of reference, I have set that section out again below:

7. *No public office holder shall, in the exercise of an official power, duty or function, give preferential treatment to any person or organization based on the identity of the person or organization that represents the first-mentioned person or organization.*

[emphasis added]

Section 7 is confusing both in its presentation and its intent. Although section 7 is the only provision in the Act that refers to “preferential treatment”, its scope appears to be very narrow. It prohibits preferential treatment to a person or organization based on the identity of a representative, most likely a lobbyist or counsel. This interpretation is reinforced by the text of the French version in that it uses the words “retenu pour représenter”, which are not entirely reflected in the English version. The French version reads as follows:

7. *Il est interdit à tout titulaire de charge publique d’accorder, dans l’exercice de ses fonctions officielles, un traitement de faveur à une personne ou un organisme en fonction d’une autre personne ou d’un autre organisme retenu pour représenter l’un ou l’autre.*

[emphasis added]

The French version suggests that the representative would be a third party hired or retained by a person or an organization specifically to represent it. The English version does not include the term “hired”. The French version, which is consistent with the predecessor provision of the 2006 *Conflict of Interest and Post Employment Code for Public Office Holders* (subsection 22(2)), would appear to be the appropriate interpretation to be given to this provision.

Unlike the provisions of the Act considered earlier, section 7 covers “organizations” as well as “persons”. While the Conservative Party of Canada would appear to fall within the general meaning of an organization, there has been no suggestion that a representative was hired or retained to represent it. In my opinion, section 7 has no application in relation to this request.



## CONCLUSIONS

In light of the foregoing analysis, I am discontinuing this examination on the basis that the Conservative Party of Canada is not a “person” within the meaning of section 4 and, consequently, the identified public office holders could not have contravened the substantive rules of conduct set out in section 5 or subsection 6(1). For similar reasons, they could not have contravened section 9. In addition, I find that section 7 has no application in the context of this request.

For these reasons, this examination under the *Conflict of Interest Act* is discontinued.

