Office of the
Conflict of Interest and
Ethics Commissioner

Commissariat aux
conflits d'intérêts et à
l'éthique

The Thibault Inquiry

**made under the authority of the
CONFLICT OF INTEREST CODE
FOR MEMBERS OF THE HOUSE
OF COMMONS**

May 7, 2008

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

THE THIBAULT INQUIRY

pursuant to the
CONFLICT OF INTEREST CODE FOR
MEMBERS OF THE HOUSE OF COMMONS

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052008-01E

PREFACE

Under section 27 of the *Conflict of Interest Code for Members of the House of Commons*, which constitutes Appendix 1 of the *Standing Orders of the House of Commons*, a request for an inquiry may be made by a Member of the House of Commons who has reasonable grounds to believe that another Member has not complied with his or her obligations under the *Code*.

The Conflict of Interest and Ethics Commissioner is required to forward the request to the Member who is the subject of the request and to afford the Member 30 days to respond. Once the Member has completed his or her response, the Commissioner has 10 working days to conduct a preliminary review of the request and the response and to notify both Members in writing of the Commissioner's decision as to whether an inquiry is warranted. Inquiries must be conducted in private.

Following the completion of an inquiry, a report is to be provided to the Speaker of the House of Commons who tables it in the House of Commons when it next sits. The report is made available to the public once it is tabled or, if the House is not then sitting, upon its receipt by the Speaker.

Within 10 sitting days after the tabling of the report, the Member who is the subject of the report has the right to make a statement in the House of Commons. The report may be subject to either a motion to concur or a motion to be considered by the House.

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THE REQUEST FOR AN INQUIRY

By letter dated and received on November 27, 2007, David Tilson, Conservative Member for the riding of Dufferin-Caledon, requested that I determine whether Robert Thibault, Liberal Member for the riding of West Nova, had breached any of his obligations under the *Conflict of Interest Code for Members of the House of Commons* (the Code) in connection with his participation in the review conducted by the Standing Committee on Access to Information, Privacy and Ethics (Standing Committee) into the Mulroney Airbus Settlement.

In his request, Mr. Tilson referred to widespread media coverage of legal proceedings instituted against Mr. Thibault by the Right Honourable Brian Mulroney seeking $2 million in damages. Mr. Tilson requested that I determine whether Mr. Thibault had contravened paragraph 3(2)(a), section 8, subsections 12(1) and (4) and section 13 of the Code when he participated in debates and voted on motions related to Mr. Mulroney and the Mulroney Airbus Settlement at meetings of the Standing Committee on November 22 and 27, 2007.

THE PROCESS

I wrote to Mr. Thibault on December 3, 2007 to provide him with a copy of Mr. Tilson's letter of November 27, 2007 and notified him that he had 30 days to respond to these allegations in accordance with subsection 27(3.1) of the Code. By letter dated December 19, 2007 and received by my Office on December 28, 2007, Mr. Thibault provided a response to Mr. Tilson's allegations.

I conducted a preliminary review of the request and the response. By letter of January 10, 2008, I notified both Mr. Thibault and Mr. Tilson of my decision to proceed with an inquiry, advising them that I required more time and additional information in order to properly assess the situation, and more time to consider the breadth of the expression "private interest" in the context of the relevant provisions of the Code.

Both Mr. Thibault and Mr. Tilson were given an opportunity to provide my Office with any information that they believed to be relevant to this inquiry. In addition, Mr. Thibault was given an opportunity to present his views in person at a meeting with me on February 25, 2008 and on several occasions by telephone and e-mail. I also communicated with Mr. Thibault's lawyer by telephone. Mr. Thibault was given an opportunity to comment on a draft of this report up to and including the preliminary observations.

THE FACTS

General Background

The events that are the subject of this inquiry took place in the fall of 2007, during a period of minority government, in a charged and partisan political climate. There were many media reports concerning the alleged relationship and business dealings between Mr. Mulroney and Mr. Karlheinz Schreiber. These reports concerned litigation between them relating to consulting fees allegedly paid by Mr. Schreiber to Mr. Mulroney, and the impact, if any, of those allegations on the 1997 settlement of libel litigation between Mr. Mulroney and the federal government.

On November 14, 2007 Prime Minister Stephen Harper announced the appointment of Mr. David Johnston to recommend terms of reference for a public inquiry into the nature of financial dealings between Mr. Schreiber and Mr. Mulroney. On November 22, the Standing Committee adopted a motion to begin its own review of the Mulroney Airbus Settlement.

The Legal Proceedings Against Mr. Thibault

Media reports in early November stated that Mr. Thibault, who was described as the Liberal Party's lead critic on the Mulroney-Schreiber affair, spoke about this matter in the House of Commons on October 31, 2007. He was also interviewed by Mike Duffy of CTV on the same day. Mr. Thibault was reported to have called for the government to conduct a public inquiry into the "Airbus affair", and to have said that the out-of-court settlement with Mr. Mulroney should be re-examined in light of recent information about cash payments that Mr. Mulroney had received from Mr. Schreiber in 1993 and 1994.

A letter dated November 1, 2007 was sent from Mr. Mulroney's lawyer to Mr. Thibault concerning the following statements allegedly made by Mr. Thibault during the CTV interview:

> 1. *"… (Mr. Mulroney) said that he didn't know Mr. Schreiber."*
>
> 2. *"According to Schreiber the first funds were delivered while Mr. Mulroney was still a member of Parliament in May of 1993."*
>
> 3. *"… (Mr. Mulroney) indicated that he had no business relationship with Mr. Schreiber, that he didn't even know him personally."*

Reference was also made to the following statement allegedly made by Mr. Thibault in the House of Commons: "under oath, [Mr. Mulroney] testified that he never had any dealings with Schreiber". Mr. Mulroney's lawyer contended that these statements were false and were intended to injure Mr. Mulroney's reputation, and requested that Mr. Thibault "set the record straight."

By letter of November 2, 2007, Mr. Thibault's lawyer acknowledged receipt of the letter from Mr. Mulroney's lawyer, requested some information and advised that a more fulsome response would be forwarded the following week. A more detailed response was sent on November 12, 2007 in which Mr. Thibault's lawyer advised that the statement made by Mr. Thibault in the House of Commons was absolutely privileged, and that statements 1 and 3 had been quoted out of context. He provided the full context from the transcript of the CTV broadcast, which he said indicated that Mr. Thibault had said that Mr. Mulroney and Mr. Schreiber "were acquaintances who might meet for a cup of coffee from time to time and had no business contact." He advised that there was a small inaccuracy with respect to statement 2 which in his view was immaterial, but that Mr. Thibault might consider revising it as follows:

> *That Brian Mulroney was in fact Prime Minister in June of 1993, when he contracted for these cash payments from Mr. Schreiber, and remained a Member of the Parliament of Canada at the time that he received the first instalment of $100,000.00.*

There was widespread media coverage, starting with reports on November 15, 2007, of a Statement of Claim filed in the Ontario Superior Court by Mr. Mulroney against Mr. Thibault, seeking $2 million in damages for allegedly libellous comments that Mr. Thibault made about Mr. Mulroney on the October 31, 2007 edition of *Mike Duffy Live*. A Statement of Claim was filed in the Ontario Superior Court on behalf of Mr. Mulroney on November 8, 2007, a copy of which was provided to my Office in January 2008.

The documents received by my Office from Mr. Thibault during this inquiry show that on November 15, 2007 Mr. Mulroney's lawyer asked Mr. Thibault's lawyer whether he had instructions to accept service of the Statement of Claim. Mr. Thibault learned of this letter sometime between November 15 and 21, 2007. The response that was given on November 21, and copied to Mr. Thibault, who had reviewed a draft of the response on that same day, indicated that Mr. Thibault's lawyer would not seek instructions to accept service on behalf of Mr. Thibault because the lawyer felt that he had not been treated in accordance with ordinary standards of professional courtesy in that he had first learned of the litigation through media reports. Also on November 21, Mr. Thibault received a copy of the Statement of Claim from his lawyer, who had obtained it from the Court.

Mr. Thibault's lawyer indicated that he received a response from Mr. Mulroney's lawyer on November 26 stating that he had no connection with any disclosure to the press relating to the Statement of Claim. This was followed by voice-mail messages between the lawyers on November 27 and December 7, 2007 on this issue. In this regard, Mr. Thibault's lawyer advised Mr. Thibault in a timely manner that there had been some conciliatory communications between the lawyers and that he expected that at some point, once the lawyers had spoken directly, he would recommend that service be accepted.

There is no indication of any further activity on the file until January 24, 2008 when Mr. Thibault's lawyer received a letter from Mr. Mulroney's lawyer stating that, if he didn't hear from Mr. Thibault's lawyer by noon the next day, he would serve Mr. Thibault personally. Mr. Thibault's lawyer indicated in an e-mail to Mr. Thibault on that day that the matter had resurfaced, as had been expected. The e-mail indicated that, as Mr. Mulroney's lawyer was determined to serve Mr. Thibault personally and, as the relationship between the lawyers had improved sufficiently, Mr. Thibault's lawyer recommended that service be accepted.

On January 25, 2008, the Statement of Claim was served on Mr. Thibault's lawyer and service was acknowledged on January 31. Mr. Thibault was informed of the service on February 4, in response to a request on that day by Mr. Thibault to his lawyer for a status report. A Notice of Intent to Defend was served on Mr. Mulroney's lawyer on January 31, 2008 and filed on behalf of Mr. Thibault on February 4, 2008.

Mr. Thibault's lawyer told me that he kept Mr. Thibault apprised of exchanges between the two lawyers, including those by letter, e-mail and telephone. He further confirmed that, at no time, did Mr. Thibault provide instructions to avoid or delay accepting service of the Statement of Claim.

The Standing Committee on Access to Information, Privacy and Ethics

On November 15, 2007, Mr. Thibault attended a meeting of the Standing Committee as an acting member. The Standing Orders provide for the replacement of permanent members, when they are unable to attend, by designated substitutes who enjoy the same rights and privileges as the regular member being replaced.[1] The Chair and Vice-Chairs were elected and various administrative matters were dealt with. Unanimous consent was sought to waive the required notice period in order to move a motion to the effect that the Standing Committee undertake a review of matters related to the Mulroney Airbus Settlement. This was a settlement of a libel suit instituted by Mr. Mulroney against the federal government in 1995.

As unanimous consent was not given to waive the notice requirements, this motion and another related motion were deferred to the following meeting. The next meeting was held on November 22, 2007, and Mr. Thibault again attended as an acting member. At this meeting, the Committee Chair ruled that the subject-matter of these motions was within the Committee's mandate. Mr. Tilson then raised the following point of order:

> *The issue I wish to speak on involves Mr. Thibault. Mr. Martin is going to make a motion and you have now ruled it is in order to make that motion. Ultimately, we're going to vote and debate that matter. Mr. Thibault can*

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[1] Robert Marleau & Camille Montpetit, eds., *House of Commons Procedure and Practice* (Ottawa: House of Commons, 2000) at 824.

> *correct me if I'm wrong. I believe he's an honourable fellow. I've sat with him on committees and observed him. But it's my understanding that this topic, this whole issue, involves Mr. Schreiber and Mr. Mulroney, and as I understand it, Mr. Mulroney has a lawsuit against Mr. Thibault.*
>
> *The point of order, Mr. Chairman, is that I believe Mr. Thibault should recuse himself from this committee. He cannot use this committee as an examination for discovery – or a question, as it is now known in the legal field – to further his personal action. Justice must appear to be done, whether it's in the courts or in this committee.*

Mr. Thibault responded as follows:

> *What's being suggested – and I know it's common practice and it's well accepted – is that if a member of any committee has a pecuniary interest in a matter that is being debated at the committee, they recuse themselves…if they have a family business interest in that thing.*
>
> *As to alleged, supposed, proposed, maybe, might be legal action, personal legal action, against a member of the committee, I don't know that that would meet that test. I think if we did succumb to that, it wouldn't be long before we would have 308 lawsuits in this House of Commons against everybody for minor matters, dilatory matters, to try to remove members of Parliament from being able to debate questions of interest where it would serve somebody out in society better to have them not participate.*
>
> *So in the interest of democracy, Mr. Chairman, and of parliamentary tradition, I hope you have a serious look at this preposterous suggestion by Mr. Tilson.*
>
> *The second question I ask is, how could Mr. Tilson possibly be aware of a legal action that I'm not aware of?*

Mr. Tilson replied:

> *However, he does, with due respect to Mr. Thibault, have a pecuniary interest. He is being sued for a lot of money. That's called pecuniary interest. And it is in his personal interest that the plaintiff in that particular action look badly. I don't think he should have the right to vote in this committee, nor should he have the right to vote in Parliament.*

Before debating the motion relating to the Mulroney Airbus Settlement, the Chair of the Standing Committee ruled on Mr. Tilson's point of order as follows:

> *It was the opinion of legal counsel, and I concur, that the member has rights as a full member of this committee, he is assigned to this committee at this*

time, and there is no requirement, obligation or reason for him to recuse himself, this is his decision, should he become aware of a reason that would require him to recuse himself. The committee cannot force a member to recuse himself.

Mr. Thibault continued to participate in this meeting. The Standing Committee subsequently adopted the following motion:

That in order to examine whether there were violations of ethical or code of conduct standards by any office holder, the Standing Committee on Access to Information, Privacy and Ethics review matters relating to the Mulroney Airbus settlement, including any and all new evidence, testimony and information not available at the time of settlement, and including allegations relating to the Right Hon. Brian Mulroney made by Karlheinz Schreiber, and in particular, the handling of allegations by the present and past government including the circulation of relevant correspondence in the Privy Council Office and Prime Minister's office; that Karlheinz Schreiber be called to be a witness before the committee without delay; and that the committee report to the House its findings, conclusions, and recommendations.

Other motions were adopted to determine the dates upon which Mr. Schreiber and Mr. Mulroney would be interviewed.

Mr. Thibault participated in the next Standing Committee meeting on November 27, 2007, when motions were debated and adopted to compel Mr. Schreiber's attendance before the Committee. At that meeting, Mr. Thibault proposed an amendment to a motion to include a plan for extended hours and sittings so that the Committee's review could be concluded in a timely manner. Mr. Thibault also moved that warrants be issued as necessary by the Speaker of the House of Commons to ensure not only that Mr. Schreiber appear before the Committee, but also that he remain available until formally discharged by the Committee. Both of Mr. Thibault's motions were adopted.

Mr. Thibault also participated in the subsequent meetings of the Standing Committee study of the Mulroney Airbus Settlement which were held on November 29, 2007 and December 4, 6, 11, 12 and 13, 2007. At these meetings, Mr. Thibault questioned various witnesses, including Mr. Mulroney and Mr. Schreiber.

The House of Commons adjourned for the Christmas break on December 14, 2007 and resumed on January 28, 2008. On January 11, 2008, Prime Minister Harper announced that the Government had decided to convene a public inquiry once the Standing Committee had completed its review.

The Standing Committee meetings resumed, with Mr. Thibault's participation, on February 5, 2008 and continued on February 7, 12, 14 and 25. The Committee completed its examination of witnesses and issued its preliminary report on February 29, 2008, at

which time it recommended that the Government proceed to a full public inquiry. On April 2, 2008, the Committee issued its final report and that report was tabled in the House of Commons on the same day.

MR. THIBAULT'S POSITION

Mr. Thibault claims that he did not contravene any of the provisions of the Code because the lawsuit against him does not constitute a "private interest" within the meaning of the Code. He has consistently held this position as is evidenced by his remarks at the Standing Committee meeting of November 22, 2007, by his response to Mr. Tilson's request for inquiry and during his discussions with me and my Office.

When Mr. Tilson asked Mr. Thibault to recuse himself at the Standing Committee meeting on November 22, 2007, Mr. Thibault responded as quoted earlier in this Report. He acknowledged that "If a member of any committee has a pecuniary interest in a matter that is being debated at the committee, they recuse themselves…". He argued however, that this would not apply in the case of an "alleged, supposed, proposed, maybe, might be legal action, personal legal action, against a member of the committee." He went on to suggest:

> *If we did succumb to that, it wouldn't be long before we would have 308 lawsuits in this House of Commons against everybody for minor matters, dilatory matters, to try to remove members of Parliament from being able to debate questions of interest where it would serve somebody out in society better to have them not participate.*

Mr. Thibault also said at that meeting of November 22, 2007 that he was not aware of the lawsuit against him. He further indicated in his letter to me dated December 19, 2007, responding to Mr. Tilson's request for an inquiry, that he had not been served with the Statement of Claim nor, to the best of his knowledge, had any attempt at service been made. Mr. Thibault reiterated in that letter:

> *It is, indeed, preposterous to suggest that a legal action – whether real or merely threatened – against a Member about a very public issue automatically makes that issue one of potential private loss or gain under the Code, thereby silencing the Member with regard to that public issue. This would mean that any citizen wishing to silence any Member of Parliament need only engage a publicity agent to announce that he is commencing legal action against the Member.*
>
> *In conclusion, I believe Mr. Tilson's position to be a perversion of the Code, which is not and was never intended to be a vehicle for attempted gagging or intimidation of Members of Parliament.*

Mr. Thibault suggested, further, during his meeting with me that, in his view, the role of the Standing Committee is not to decide on regulations, it is not a trial, it is not prejudiced against Mr. Mulroney; the only objective is to get to the truth. He also stated that he did not see a problem with his participation in the Committee since parliamentary

privilege prevents one from using testimony before a parliamentary committee in a lawsuit.

Finally, Mr. Thibault suggested that perhaps the Code should be revised if the meaning of “private interest” is unclear but that, in any event, the lawsuit against him is too remote to be considered to involve a private interest.

PRELIMINARY OBSERVATIONS

The central question that had to be addressed in this inquiry is whether Mr. Thibault had a "private interest" that was engaged by the prohibitions or requirements of section 8, 12 or 13 of the Code. All three of these provisions are built around the expression "private interest".

Before embarking on this analysis, I note that the discussions in the Standing Committee around Mr. Thibault's obligations focused on whether Mr. Thibault was required to recuse himself in light of the potential lawsuit against him by Mr. Mulroney. There was no consideration of any requirement of disclosure on the part of Mr. Thibault.

While the existence of a private interest is central to a Member's obligations under sections 8, 12 and 13, it is possible that a private interest may trigger an obligation under only one section. Once a private interest is found to exist, the sections require the Member to do or refrain from doing quite different things. Section 8 establishes a general prohibition against acting in a way to further private interests when a Member performs his or her parliamentary duties or functions; section 12 establishes an obligation to disclose the general nature of a private interest that might be affected by a matter before the House of Commons or committee; and section 13 imposes an obligation on a Member to remove himself or herself from debates and votes that relate to his or her private interest.

This is not to say that the three sections are unrelated. While disclosure and recusal obligations do not necessarily arise together, very often a private interest that requires disclosure under section 12 will also require recusal under section 13. It is my view, however, that the threshold for disclosure under section 12 is different from and arguably lower than, the threshold for recusal under section 13.

In almost all situations, disclosure will logically precede recusal, so I propose to begin my analysis with section 12 of the Code. I will then address section 13, which deals with a Member's obligation to recuse himself or herself from participating in a debate or voting on a question. Finally, I will consider the more general prohibition contained in section 8.

Subsection 3(2), the remaining provision raised by Mr. Tilson, is an interpretive provision, and will be considered, as necessary, in the discussions that follow.

FINDINGS

Section 12

Section 12 provides as follows:

> *Disclosure of a private interest: House and committee*
>
> *12.(1) A Member who has a private interest that might be affected by a matter that is before the House of Commons or a committee of which the Member is a member shall, if present during consideration of the matter, disclose orally or in writing the general nature of the private interest at the first opportunity. The general nature of the private interest shall be disclosed forthwith in writing to the Clerk of the House.*
>
> *Subsequent disclosure*
>
> *12.(2) If a Member becomes aware at a later date of a private interest that should have been disclosed in the circumstances of subsection (1), the Member shall make the required disclosure forthwith.*
>
> *Disclosure recorded*
>
> *12.(3) The Clerk of the House shall cause the disclosure to be recorded in the Journals and shall send the disclosure to the Commissioner, who shall file it with the Member's public disclosure documents.*
>
> *Disclosure of a private interest: other circumstances*
>
> *12.(4) in any circumstances other than those in subsection (1) that involve the Member's parliamentary duties and functions, a Member who has a private interest that might be affected shall disclose orally or in writing the general nature of the private interest at the first opportunity to the party concerned. The Member shall also file a notice in writing concerning the private interest with the Commissioner, who shall file it with the Member's public disclosure documents.*

Mr. Tilson requested that I consider whether Mr. Thibault has breached both subsections 12(1) and (4). Based on the introductory words of subsection 12(4), it is my view that this subsection is intended as an alternative to subsection 12(1). I will therefore focus only on subsection 12(1).

Subsection 12(1) is framed in broad terms. Its objective is to ensure that Members perform their parliamentary duties in full transparency. It requires Members to disclose any private interest that <u>might</u> be affected by a matter that is before the House of

Commons or a committee of which the Member is a member. In other words, this disclosure obligation is triggered by the mere possibility that a matter before the House of Commons or a committee could affect a Member's private interest.

Private Interest

The first issue to determine is whether Mr. Thibault's interest in the outcome of the libel suit against him constitutes a "private interest" within the meaning of the Code.

Section 13.1 defines "private interest" for the purposes of sections 12 and 13:

> *Private Interest*
>
> *13.1 For the purpose of sections 12 and 13, "private interest" means those interests that can be furthered in subsection 3(2), but does not include the matters listed in subsection 3(3).*

Subsections 3(2) and (3) read as follows:

> *Furthering private interests*
>
> *3.(2) Subject to subsection (3), a Member is considered to further a person's private interests, including his or her own private interests, when the Member's actions result, directly or indirectly, in any of the following*
>
> *(a) an increase in, or the preservation of, the value of the person's assets;*
> *(b) the extinguishment, or reduction in the amount, of the person's liabilities;*
> *(c) the acquisition of a financial interest by the person;*
> *(d) an increase in the person's income from a source referred to in subsection 21(2);*
> *(e) the person becoming a director or officer in a corporation, association or trade union; and*
> *(f) the person becoming a partner in a partnership.*
>
> *Not furthering private interests*
>
> *3.(3) For the purpose of this Code, a Member is not considered to further his or her own private interests or the interests of another person if the matter in question*
>
> *(a) is of general application;*
> *(b) affects the Member or the other person as one of a broad class of public; or*

(c) concerns the remuneration or benefits of the Member as provided under an Act of Parliament.

By specifying "those interests that can be furthered in subsection 3(2)", section 13.1 refers specifically to paragraphs 3(2)(a) to (f). Mr. Tilson has suggested that paragraph 3(2)(a) is the relevant paragraph in this case. Although an adverse judicial decision could ultimately affect the value of a Member's assets under paragraph 3(2)(a), it seems to me that paragraph 3(2)(b) is more directly applicable in the circumstances of this case. Of the private interests listed in paragraphs 3(2)(a) to (f), lawsuits claiming damages against a Member would fall within the normal understanding of "the person's liabilities" (paragraph 3(2)(b)) as opposed to their assets (paragraph 3(2)(a)).

The outcome of a lawsuit is far from certain. Consequently, I must determine whether the term "liabilities", referred to in paragraph 3(2)(b), includes both actual and contingent liabilities. I am of the opinion that it does. Nothing in the Code suggests a limited interpretation of the term "liabilities" and the standard legal definition of the term "liability" supports the conclusion that both actual and contingent liabilities are included.[2]

Recognizing that the House of Commons shares its traditions and its privileges with other legislative bodies in Canada, and that the language used in many of the ethical codes and statutes established by those bodies is similar to that used in the Code, I consulted my counterparts at the Senate and in the provinces and territories to determine how they interpret the term "liabilities". Most have responded and have confirmed that they interpret "liabilities" to include contingent liabilities. Many added that they interpret pending lawsuits as falling within the ambit of the term "liabilities".

I am of the view that lawsuits claiming damages that have been instituted against an individual constitute a liability. That liability will be contingent until judgment awarding damages against that individual is rendered. Should a court render judgment against the individual, the liability would become an actual liability. Both are liabilities for the purposes of the Code.

I conclude, therefore, that the potential damages award in the libel action instituted by Mr. Mulroney against Mr. Thibault is a liability within the meaning of paragraph 3(2)(b) and hence falls within the definition of "private interest" in section 13.1 for the purposes of sections 12 and 13.

When the Private Interest Arose

A difficult question underlying this inquiry is when the lawsuit instituted by Mr. Mulroney against Mr. Thibault became real – that is, when the potential damages award could be considered to have become a contingent liability for Mr. Thibault, and

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[2] *Black's Law Dictionary*, 8th ed. (St. Paul, MN: West Group, 2004) defines "liability" as "a financial or pecuniary obligation", and lists different types of liabilities, including a "contingent liability" which is in turn defined as "a liability that will occur only if a specific event happens; a liability that depends on the occurrence of a future and uncertain event" (at 932-933).

accordingly become a private interest under the Code. It is difficult, and perhaps somewhat arbitrary, to identify a precise moment when a contingent liability is created.

In some circumstances, a lawyer's demand letter or threatened lawsuit is never followed up and remains a mere threat. In such a case, as the lawsuit is only a possibility, a contingent liability is probably not yet established.

In the context of a lawsuit, one could argue that service is a necessary element before a contingent liability, and consequently a private interest, could be considered to exist. I would agree that once service is completed, the contingent liability becomes real.

I am also of the view, however, that the fact that a lawsuit is being pursued can be sufficient in certain circumstances to trigger a private interest. Normally, filing and service of the lawsuit will occur almost simultaneously. However, where there is a delay between the time of filing and service, a contingent liability in a lawsuit can be understood to exist where service is being actively pursued and the defendant in the lawsuit knows that this is the case. The precise time when a contingent liability becomes real has to be determined on the facts of each case.

Mr. Thibault emphasized the fact that he had not been served with the Statement of Claim when Mr. Tilson suggested that Mr. Thibault should recuse himself. At the Committee meeting of November 22, Mr. Thibault said that he was not aware of the lawsuit. The Statement of Claim, we now know, was filed in the Ontario Superior Court on November 8, 2007, but service was not complete until January 31, 2008.

While he had, indeed, not been served, Mr. Thibault confirmed with my Office on April 1, 2008, that he had been aware for some time that service had been attempted by Mr. Mulroney's lawyer. This is contrary to what he wrote to my Office in December, 2007 in his response to the request for the inquiry. By November 21, 2007, Mr. Thibault had been made aware of correspondence between the two lawyers with respect to service. More particularly, on that date, in response to a request to serve on November 15, 2007, Mr. Thibault's lawyer sent a letter to Mr. Mulroney's lawyer advising that he had no intention of obtaining instructions to accept service on behalf of Mr. Thibault. Mr. Thibault reviewed a draft of that letter on the same day. The issue of Mr. Thibault's recusal came up the very next day, on November 22, before the Standing Committee.

In summary, Mr. Thibault confirmed that, as early as November 21, 2007, the day before the matter arose in the Committee, he knew of the media reports, he had seen a copy of the Statement of Claim that his lawyer had obtained directly from the Court and he also knew that service was being actively pursued by Mr. Mulroney's lawyer. I conclude that this was sufficient in this case for Mr. Thibault's contingent liability, and consequently his private interest, to be engaged as of November 21, 2007.

Private Interest "Might Be" Affected

That takes us to the second element that must be met in order to engage section 12, namely whether Mr. Thibault's private interest might be affected by a matter before the Standing Committee.

In my view, Mr. Thibault's private interest, namely his contingent liability for damages in the lawsuit, could potentially be affected by the Committee's review of the circumstances surrounding the Mulroney Airbus Settlement. The subject matter of the Committee's review and the subject matter of the lawsuit instituted against Mr. Thibault overlap to a considerable degree because they relate to many of the same underlying facts. The information sought by the Committee would reasonably be expected to involve much of the same information necessary to determine the truth or falsity of Mr. Thibault's allegedly libellous statements.

More specifically, in conducting its review, the Committee could obtain information relating to the following questions: whether Mr. Mulroney knew Mr. Schreiber; whether Mr. Schreiber made payments to Mr. Mulroney while he was still a Member of Parliament in May of 1993; and whether Mr. Mulroney had a business relationship with Mr. Schreiber. Each of these questions parallels closely the statements being challenged in the lawsuit. Consequently, the Committee's review of these matters and, in particular, the information that it gathered in respect of each question could well be relevant to Mr. Thibault's private interest in the lawsuit.

For example, the Standing Committee study might result in certain matters being made public much earlier than in the course of the lawsuit. If these matters were unfavourable to Mr. Mulroney, he might decide to withdraw his lawsuit. Alternatively, even though the proceedings before the Committee are subject to parliamentary privilege, sources of information might be revealed that could be of use to Mr. Thibault in the lawsuit. Therefore, Mr. Thibault's private interest in the lawsuit might be affected by the matter before the Committee, thereby triggering his disclosure obligations under subsection 12(1) of the Code.

As noted above, Mr. Thibault was aware of the lawsuit and that service was being actively pursued at the time the Standing Committee met on November 22, 2007. I have concluded that he had a contingent liability at that time and hence a private interest that might be affected by the work of the Committee.

I conclude further, therefore, that subsection 12(1) of the Code obliged Mr. Thibault to disclose his private interest in the libel suit on November 22, 2007. This is not an onerous obligation. Section 12 is simply a mechanism to advance transparency. It does not interfere with a Member's capacity to fulfill his or her duties as a Member of the House of Commons or of a committee.

In Mr. Thibault's case, it is understandable why he may not have focused on his obligations under section 12 when Mr. Tilson requested on November 22, 2007 that Mr. Thibault recuse himself. First, Mr. Tilson raised the issue of recusal, not disclosure, and so disclosure was not the focus of discussion. Second, Mr. Tilson's request brought the matter to the attention of the Committee, the House of Commons and the general public, making a disclosure by Mr. Thibault appear to be somewhat redundant. Finally, the Chair of the Standing Committee ruled that the Committee cannot force members to recuse themselves. This alone may well have reinforced a belief on the part of Mr. Thibault that he had no outstanding obligations in this matter and that the issue of disclosure was effectively put to one side. Notwithstanding these circumstances, the obligations of the Code remain.

While these circumstances may explain Mr. Thibault's failure to disclose his private interest, in the final analysis they do not remove Mr. Thibault's obligation to make the disclosure in the manner required by the Code at the appropriate time. This obligation, as I have noted above, is not an onerous one. However, it does involve a more formal process than merely mentioning the private interest in a committee or the House of Commons and this process must be followed.

In the context of the discussions of recusal obligations, Mr. Thibault expressed a concern that imposing obligations on a Member whenever someone institutes a lawsuit against the Member would have an adverse effect on the ability of Members to fulfill their duties in Parliament. This concern has little application in the context of disclosure obligations. A potential negative effect might be the possibility that there could be circumstances where an unfounded lawsuit is instituted against a Member and a disclosure could unjustly create unfavourable effects on the Member's reputation.

I conclude that Mr. Thibault was obliged to disclose his private interest pursuant to subsection 12(1). Despite the fact that the Standing Committee has completed its review of this matter, Mr. Thibault remains obliged to disclose the general nature of his private interest in writing to the Clerk of the House as required under subsection 12(2). This disclosure would then be recorded and made public in accordance with subsection 12(3) of the Code.

Section 13

Section 13 provides as follows:

Debate and voting

13. A Member shall not participate in debate on or vote on a question in which he or she has a private interest.

Section 13 requires that Members not participate in debate on or vote on a question before the House of Commons or a committee in which they have a private interest. Said another way, they are required to recuse themselves in those circumstances.

In the discussion relating to section 12, I found that the potential damages award in the libel action instituted by Mr. Mulroney against Mr. Thibault falls within the definition of "private interest" in section 13.1 for the purposes of section 12 and 13. I also found that the relevant date when his private interest would be engaged was November 21, 2007 for the purposes of section 12. This date applies as well for the purposes of section 13.

The remaining issue to be addressed in order to engage section 13 is different from the one addressed in relation to section 12. Under section 12, disclosure is required if the private interest "<u>might be affected by a matter</u> that is before the House of Commons or a committee...". Section 12 applies automatically if the Member concerned is present during the consideration of a matter that might affect his or her private interest. It requires disclosure whenever it is merely possible that a matter before the House of Commons or a committee would affect a private interest. Section 13 is engaged if the Member has a private interest <u>in a question</u> before the House of Commons or a committee. I understand this to mean that the question must relate to the private interest.

Between November 22, 2007 and February 29, 2008, the Standing Committee debated and voted on a number of motions, including whether to inquire into the Mulroney Airbus Settlement, how to proceed and who should be questioned. The Committee's inquiry was to review the circumstances and events that led the government to settle the libel suit with Mr. Mulroney. The Committee sought to determine the facts and events relating to the Mulroney Airbus Settlement.

Mr. Thibault's statements to the media that led to the lawsuit against him by Mr. Mulroney also related to facts and events, whether true or not, that led to the Mulroney Airbus Settlement. The facts underpinning both the Committee's activities and the lawsuit are essentially the same. They relate to what was known by whom and when in relation to the Mulroney Airbus Settlement.

The high degree of overlap in the questions at issue in the Standing Committee's inquiry and the lawsuit instituted against Mr. Thibault are evident from the time of the

debate and vote on the motion to study the Mulroney Airbus Settlement on November 22, 2007 and throughout the process of the Committee's inquiry.

Mr. Thibault participated in the debate and vote on the motion to study the Mulroney Airbus Settlement on November 22, 2007. As noted in the discussion relating to section 12, the Chair of the Standing Committee ruled that the Committee cannot force members to recuse themselves. The Chair left it to Mr. Thibault to decide whether he should recuse himself. Mr. Thibault should then have considered his obligations under the Code. The ruling of the Chair and my ruling under the Code are the result of separate processes, and one does not bear on or affect the other.

In subsequent meetings of the Committee, Mr. Thibault participated in questioning a number of witnesses, including both Mr. Schreiber and Mr. Mulroney. In asking his questions, Mr. Thibault probed the truth of the very statements that he made about Mr. Mulroney and Mr. Mulroney's relationship with Mr. Schreiber for which Mr. Thibault is being sued and the facts underlying them. These statements are listed earlier in this Report and, in summary, address whether Mr. Mulroney knew Mr. Schreiber and whether payments were made while Mr. Mulroney was a Member of Parliament.

More particularly, Mr. Thibault directed his questioning of these witnesses to facts surrounding each of the allegedly libellous statements he made on *Mike Duffy Live*. For example, in questioning Mr. Schreiber on November 29, 2007, Mr. Thibault asked the following questions:

> **Hon. Robert Thibault:** Mr. Schreiber, did you reach an agreement with Mr. Mulroney in June 1993, when he was still Prime Minister, enjoining you to procure money for him, either directly or through a third party?
>
> …
>
> **Hon. Robert Thibault:** Did you, Mr. Schreiber, or anyone in association with you, give to Brian Mulroney a cash payment of $100,000 in August of 1993 while he was still a member of Parliament?

On December 11, 2007 Mr. Thibault asked the following question:

> **Hon. Robert Thibault:** I look at the testimony Mr. Mulroney gave during the preliminary hearing on this lawsuit with the federal government, wherein he says — and I paraphrase, but it's from a longer context — that he "had had no dealings with Schreiber", and now there is a suggestion that this means prior to his testimony of that date. Others would suggest, when they read it, that it meant in general, that he had had no dealings.
>
> These were dealings. You were dealing with Mulroney and with his government on the question of Thyssen, right?
>
> …

Moreover, in questioning Mr. Mulroney on December 13, 2007, Mr. Thibault asked the following:

> **Hon. Robert Thibault:** The first payment you received while still a Member of Parliament. The two subsequent payments of $100,000 each you received at the time you were employed with a law firm. Is that correct?
>
> …
>
> **Hon. Robert Thibault:** … You chose at Harrington Lake—from your testimony—to suggest to Mr. Schreiber that he could go back to you with his dealings.
>
> Then you exercised the option to accept money, in cash, in a hotel room in Montreal.
>
> In a deposition, you said that you were having coffee every now and then.
>
> …
>
> **Hon. Robert Thibault:** Then you again accepted the option of accepting money at the Queen Elizabeth Hotel, and again accepting money, in cash, at Hotel Pierre in New York.

This line of questioning by Mr. Thibault goes to the core of the objectives of the Committee study. The questions aim at determining the facts underlying the Mulroney Airbus Settlement and the relationship between Mr. Mulroney and Mr. Schreiber. Had Mr. Thibault not asked these questions, another Member would almost certainly have done so. These questions also go to the core of what he will wish to see established in the defence of the lawsuit.

I gave some thought to whether section 13 could be read to require recusal only if the private interest itself, the potential damages that might arise from the contingent liability in the lawsuit, were the very question before the Standing Committee. I have concluded that this interpretation could not have been what was intended by section 13. The intent of section 13 must have been to catch a broader set of circumstances. The House of Commons or a committee would be very unlikely to be examining directly the private interest of an individual as such. Instead, in the normal course, the House or a committee would be focusing on a question of public interest with any private interests relating to the discussion being only incidentally involved. This was the case for Mr. Thibault's private interest.

It is perhaps useful in understanding my reasoning to consider the more usual situations when section 13 would be engaged. The type of situation that would more likely come to mind as triggering the requirements of section 13 would be, for example, a situation where a Member had a significant ownership interest in a business and there was a question before the House of Commons or a committee that clearly related to the private interest of the Member in that business. This would typically happen during the consideration of a bill that contains provisions relating to that business while not directly addressing the Member's private interest. It would be obvious in such a case that the Member should not participate in debate on or vote on any question that would relate to that private interest.

I apply the same reasoning to Mr. Thibault's situation. The proceedings before the Standing Committee clearly related to Mr. Thibault's private interest. From the moment the motion to inquire into the Mulroney Airbus Settlement was proposed on November 22, 2007, Mr. Thibault should not have participated in any debates or votes of the Committee related to that study. I do not think it is useful to make technical distinctions between debating and voting on the one hand and participating generally in the activities of the committee on the other hand. These form a continuum. Consequently I conclude that Mr. Thibault should not have participated in the activities of the Committee in relation to the Mulroney Airbus Settlement on or after November 22, 2007.

Mr. Thibault contended that, even assuming he could obtain information that would be useful to his lawsuit, that information could not be used in the litigation because it would be subject to parliamentary privilege. This is true, but, as discussed in relation to section 12, information revealed during the committee discussions could lead to avenues whereby the same information could be obtained independently of the committee proceedings.

Mr. Thibault also submitted that the Committee's debates and votes on the various questions would not determine the outcome of his private interest, namely his contingent liability in the lawsuit. In his view, the lawsuit would be determined by an independent court of law because both processes are entirely independent. This is true.

Although these contentions may help to explain Mr. Thibault's determination and his reasoning as to why he should not recuse himself, the fact remains that his private interest was very closely related to the Committee inquiry. His participation in the work of the Committee could reasonably be seen to be potentially influenced by his private interest, thus interfering with his public duties and functions and clearly creating a situation of real or apparent conflict of interest. His private interest in the lawsuit could have motivated his conduct before the Committee regardless of whether his private interest would, in fact, be affected by the information obtained and irrespective of the fact that an independent court would determine the outcome of the lawsuit.

As I noted earlier, Mr. Thibault expressed a concern that a Member's role not be lightly set aside and that recusals based on lawsuits against Members could create a chilling effect upon Members' ability to fulfil their public duties and functions. I agree that Members should not be precluded from participating in parliamentary votes and debates unless there is a serious justification for doing so. I note as well that, unlike the requirement for disclosure under section 12, the requirement to recuse oneself under section 13 does amount to a serious interference with the exercise of a Member's public duties.

I must balance this consideration, however, against the recognition that it is one of the main objectives of the Code to ensure that Members perform their public duties in a way that fosters the confidence of the public in the way these duties are performed. The purposes and principles of the Code are set out in sections 2 and 3 of the Code. I quote,

for example, the introductory words of subsection 2 (1) and paragraph (b) of that subsection:

> *2.(1) Given that service in Parliament is a public trust, the House of Commons recognizes and declares that Members are expected*
> *...*
> *(b) to fulfil their public duties with honesty and uphold the highest standards so as to avoid real or apparent conflicts of interests, and maintain and enhance public confidence and trust in the integrity of each Member and in the House of Commons;*

The fact that Mr. Thibault should not have participated in the proceedings before the Standing Committee does not mean that any Member can be prevented from taking part in proceedings before the House of Commons or a committee by the institution of a lawsuit against that Member. To trigger that result there would have to be some connection between the lawsuit and the question before the House of Commons or committee such that the private interest of the Member was engaged.

The lawsuit instituted against Mr. Thibault resulted from his statements to the media outside Parliament. Furthermore, the questions before the Standing Committee were substantially overlapping with the very statements that were the essence of the lawsuit. A similar conjunction of circumstances is unlikely to occur frequently. Only where questions debated and voted on by the House or a committee relate to the private interest of a Member is he or she not permitted to participate.

I conclude that section 13 requires that Mr. Thibault not participate in the debates or votes on the Mulroney Airbus Settlement, and that consequently he has contravened section 13.

Section 8

Section 8 reads as follows:

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

Section 8 of the Code establishes a broad general prohibition against a Member acting in such a way as to further his or her own private interests, or those of any other person, when performing parliamentary duties and functions. In other words, a Member cannot act in a way that <u>could result</u> in the furthering of his private interest.

My conclusion in relation to section 8 flows from the observations already made in relation to sections 12 and 13 of the Code. Mr. Thibault participated in the debate on whether to pursue the Mulroney Airbus Settlement inquiry and asked questions that went directly to the issues raised in the lawsuit against him. In asking the questions that he did, Mr. Thibault was "act[ing] in [a] way" to further his private interest regardless of his motivation for doing so. I recognize that those questions also go to the core of the study of the Committee and that, in performing his public duty, Mr. Thibault may not have intended to further his private interest. However, given the considerable degree of overlap between the subject matter of the Committee study and the lawsuit, Mr. Thibault's participation in the Committee proceedings involved acting "in [a] way to further" his private interest in the lawsuit.

I conclude, therefore, that Mr. Thibault has contravened section 8 of the Code.

CONCLUSIONS AND RECOMMENDATIONS

This case raises the important question of whether and when a lawsuit constitutes a liability, and consequently a "private interest" for the purpose of the Code. These concepts are essential to a consideration of all three sections that have been at issue, sections 8, 12 and 13. I have found that a lawsuit does constitute a liability, and for this reason that the obligations under these sections were engaged and that Mr. Thibault failed to comply with them.

The Code requires that a Member with a private interest must not act in a way to further that interest (section 8), and sets out the circumstances in which a Member must formally disclose that interest (section 12) and must recuse himself or herself from related votes and debates (section 13).

Because this case involves questions that have not been addressed before under the Code and because it is reasonable to expect that the meaning of central concepts such as "private interest" and "liability" may, in these circumstances, be unclear to Members, I have concluded that Mr. Thibault's failure to comply with his obligations under sections 8, 12 and 13 of the Code resulted from "an error of judgment made in good faith" and that, for that reason, subsection 28(5) of the Code applies.

Subsection 28(5) provides as follows:

> *Mitigated contravention*
>
> *28.(5) If the Commissioner concludes that a Member has not complied with an obligation under this Code but the Member took all reasonable measures to prevent the non-compliance, or that the non-compliance was trivial or occurred through inadvertence or <u>an error of judgment made in good faith</u>, the Commissioner shall so state in the report and may recommend that no sanction be imposed. [Emphasis added]*

Accordingly, I recommend that no sanction be imposed as a result of Mr. Thibault's failure to comply with his obligations under the Code.

Mr. Thibault's obligations under section 12, however, are not extinguished simply because the Standing Committee has completed its work with regard to the Mulroney Airbus Settlement. As discussed earlier, Mr. Thibault was obliged on November 22, 2007 to disclose his private interest in the outcome of the lawsuit against him in accordance with subsection 12(1) of the Code. If Mr. Thibault has not yet discharged this obligation, he should do so forthwith on receiving this Report in accordance with subsection 12(2).

FINAL OBSERVATIONS

Concerns have been raised about the use of lawsuits, more particularly libel suits, to prevent a Member from performing his or her duties in the House of Commons. I cannot predict whether this may indeed become a problem and I hope it does not. Should this become a serious concern for Members, however, the Code could be adjusted to except libel suits from the ambit of “private interest” for the purposes of sections 8 and 13. Such a step would not appear to be necessary, in any event, in relation to disclosures under section 12.

As a final comment I would note that there is a fundamental difficulty in dealing with a request for an inquiry relating to section 12 or 13 of the Code. When a potential disclosure or recusal is under consideration it calls for a very quick decision in order for the resolution of the matter to be effective. At the same time, the Code does not allow for quick resolution of inquiries. Fairness requires that the Member who is the subject of the request be given sufficient time to respond and that the matter be carefully considered.

The Code sets out two mandatory delay periods. Under subsection 27(3.1) the Member against whom a complaint is made must be provided with a copy of the request for an inquiry and afforded 30 days to respond. Once the response is completed, the Commissioner is required under subsection 27(3.2) to conduct a preliminary review of the matter within 10 working days to determine whether an inquiry is warranted. Only after these two delay periods have passed does the actual inquiry commence. The amount of time required to complete the inquiry then 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 into one or other of the official languages and for printing. Thus the minimum time required generally approaches three months from the time of the complaint.

I recognize that this decision comes well after the fact. For the reasons set out above, this could not be avoided. In addition to the inherent delays, this particular inquiry required careful consideration of questions of interpretation that effectively broke new ground in applying the Code. I hope that this Report will serve to assist in an understanding of the Code.