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Opening Statement before the House of Commons Standing Committee on Access to Information, Privacy and Ethics

Mario Dion – Conflict of Interest and Ethics Commissioner
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Introduction

Mr. Chair and honourable members of the Committee, thank you for the invitation to appear before you today. I am accompanied by Martine Richard, Senior General Counsel and Lyne Robinson-Dalpé, Director of Advisory and Compliance Services.

I am pleased to have an opportunity to present some initial thoughts for changes to the *Conflict of Interest Act*. It is important to note that I make these observations after having been in office for just under one month, but also as a keen observer of ethics regimes for a few decades. It would be an obvious understatement to mention that since the House came back last week, a fair degree of interest has been expressed in issues involving my mandate.

Like my predecessor, I do not think that the Act is broken, but that there is clearly room for improvement.

We have just formally updated a mission statement for my Office which says that we exist to provide independent, rigourous and consistent direction and advice to Members of Parliament and federal public office holders, conduct investigations and, where necessary, make use of appropriate sanctions in order to ensure full compliance with the *Conflict of Interest Code for Members of the House of Commons* and the *Conflict of Interest Act*.

My goal as Commissioner is an ambitious one: to create the conditions under which all public office holders can be in full compliance with the Act at all times. The changes I speak of today are made with that objective in mind.

I have grouped the changes into two categories. The first are intended to clarify the obligations of ministers, parliamentary secretaries, ministerial staff and Governor in Council appointees and provide predictability in the administration of the Act. The second category of suggestions comprises those that are intended to strengthen the enforcement of the Act.

In terms of clarifying and providing more predictability, the committee should:

Consider harmonizing the Act and the Code.

Ministers and parliamentary secretaries are subject to both the Act and the Code but there is terminology and definitions in both regimes that should be harmonized to avoid confusion. To be clear, I am not speaking about harmonizing obligations, the Act is more stringent and this is important given the field of influence of ministers and parliamentary secretaries. For example, the Act has post-employment and divestment requirements, while the Code has none.

However, there are areas that should be harmonized. For example, the Code describes in some detail what amounts to furthering a private interest, while the Act does not. The Code also provides for a preliminary review to determine whether an inquiry is warranted, while the Act does not.

Section 17 of the Act should be clarified so that it explicitly includes controlled assets that are held indirectly, as well as those held directly.

There are two types of assets defined under the Act: controlled assets and exempt assets.

Exempt assets are items that are for private use and those of a non-commercial character, like a public office holder's residence, personal effects, cash or deposits. These do not normally trigger compliance measures because they do not present a possibility of conflict of interest.

Controlled assets, on the other hand, are assets that could directly or indirectly be affected by government decisions or policies. Except in limited circumstances, the Act requires that controlled assets be divested either by sale, in an arms-length transaction, or by placing them in a blind trust that meets the requirements of the Act.

I agree with the suggestions made by my predecessor that the Act should be amended to expressly indicate whether controlled assets can be held through a private company.

Consider removing the exception for gifts given by friends that is included in subsection 11(2) of the Act.

What people view as constituting a friend varies between cultures, ages and circumstances. It would be impossible to define "friend" for the purposes of the Act in a way that would take into consideration all of the possible circumstances and that would survive the test of time.

Moreover, the friend exception in subsection 11(2) is not necessary because of the acceptability test. If a gift cannot reasonably be seen to have been given to influence the public office holder, then it is acceptable, whether it is given by a friend of not. The converse is also true, if a gift given by a friend could be seen to have been given to influence, it should not be acceptable.

Removing the friend exception would have the added benefit of bringing the gift provisions of the *Conflict of Interest Act* in line with the comparable provision in the *Conflict of Interest Code for Members of the House of Commons,* which does not have an exception for gifts from friends and relatives.

The rules on fundraising for ministers and parliamentary secretaries could be strengthened.

The Act contains only one provision, section 16, that directly addresses participation in fundraising activities, and that provision does not distinguish between political and charitable fundraising.

The potential for conflicts of interest is higher for ministers and parliamentary secretaries in relation to fundraising activities because of the influence they have in departments, or, in the case of ministers, in cabinet. Stronger fundraising rules should be included in the Act.

I also have ideas on how the enforcement of the Act could be strengthened.

There should be sanctions for substantive breaches of the Act.

My emphasis in administering the Act is on providing accessible and clear advice as a means of prevention. Robert C. Clark, a former ethics commissioner from Alberta, described the role as “90% priest and 10% policeman.”

However, one should not ignore the dissuasive effect that sanctions can have. They help to focus the mind. They also provide Canadians with the assurance that there are consequences for breaching the Act that are more serious than what has been called “naming and shaming”. Sanctions could go some way in rebuilding the trust relationship with the Canadian public.

My Office had a look at the literature on the subject, and determined that there are no studies on the effectiveness of penalties in conflict of interest regimes. There are, however, several jurisdictions that provide for such penalties. A majority of provincial ethics commissioners are already empowered to recommend that the legislature impose a penalty.

The Commissioner should be given the power to issue confidentiality orders.

The *Conflict of Interest Act* is intended to help build public confidence in our system of government and parliamentary institutions. One could argue that the public airing of requests for examination before the Commissioner has had an opportunity to consider and report on them has the opposite effect. It can contribute to a loss of trust.

For many Canadians, an allegation that a public office holder has contravened the Act is tantamount to a finding of a contravention. For reasons of fundamental justice, and in order to protect the integrity of an examination, the Act imposes confidentiality obligations upon the Office. I suggest that the Commissioner be given the power to issue confidentiality orders to witnesses and that the Act be amended to require complainants to maintain confidentiality until the Commissioner has reported.

The Commissioner should be given the power to make recommendations.

The Commissioner could explicitly be empowered to make recommendations in his reports.

Examination reports invariably lead to a better understanding of circumstances that can lead to a failure to comply. They also serve as a reminder for public office holders of their obligations under the Act. When I served as Public Sector Integrity Commissioner, I was empowered to make recommendations. I believe that such authority would be useful in my current mandate, if and when appropriate, as it would allow me to recommend changes that would further strengthen the regime and to craft a just remedy to address the situation at hand.

Training sessions should be mandatory for public office holders.

I am convinced that contraventions to the Act often occur because of public office holders' lack of understanding of their obligations. Ignorance of the law, of course, is no excuse, but mandatory training sessions could go some way towards mitigating the risk of an inadvertent breach.

Technological advances allow us to offer such training online, by video, or in person so attending training need not represent a large time commitment or an inconvenience.

I look forward to having a dialogue with members of the Committee about these possibilities or any other matter they might wish to discuss with me this morning.