**PRESENTATIONS & SPEECHES**
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**Presentation to "Ombudsmen and Accountability Officers: A Growing Class of Administrative Decision-Makers" A session organized as part of the 5th Annual National Forum on Administrative Law and Practice Osgoode Hall Law School**

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**Introduction**

Good morning. I'm pleased to be part of the 5th Annual National Forum on Administrative Law and Practice. Thank you to the organizers for inviting me to address this session.

I'm not going to talk about the finer points of administrative law, or the ins and outs of its practice in Canada. But the admin law enthusiasts among us can take heart—the paper I submitted discusses some relevant cases.

Instead, I want to share with you the perspective of an entity that does not fit neatly into a particular class of administrative decision-makers, given the unique characteristics of my mandate and role, the two distinct instruments my staff and I administer, and the way my Office is constituted.

**Mandate**

The devil, of course, is in the details, but the mandate of the Office of the Conflict of Interest and Ethics Commissioner can be summed up quite simply. We help ensure that public officials, whether elected or appointed, do not use their offices to improperly further private interests, whether their own or those of others.

We do that by administering two separate conflict of interest regimes: the *Conflict of Interest Act*, and the *Conflict of Interest Code for Members of the House of Commons*. Both prohibit various activities that involve conflicts between private and public interests, or have the potential to do so.

Details of these two regimes and how my Office administers them are discussed in my paper. One important difference between them is their legal status. The Act is a legislative instrument, while the Members' Code is a code of conduct established under the standing orders of the House of Commons. I operate as part of the parliamentary family, and my Office is actually afforded the protection of parliamentary privilege by the *Parliament of Canada Act*. My decisions under the Code are not subject to judicial review, but with respect to the *Conflict of Interest Act*, the Federal Court of Appeal does have jurisdiction to review my decisions.

The Democracy Watch case described in my paper relates to who has standing to request examinations, and what is reviewable by the Federal Court of Appeal. The advocacy group's coordinator, Mr. Duff Conacher, had asked me to investigate alleged contraventions of the *Conflict of Interest Act* by various Cabinet ministers in relation to the Mulroney-Schreiber matter. I declined to do so, and Democracy Watch filed an application for judicial review of my refusal with the Federal Court of Appeal. In finding that it was not judicially reviewable, the Court accepted my position that a member of the public did not have standing to require that an examination be conducted. The ruling confirmed that no one other than MPs or Senators can request that I undertake an investigation.

My Office is concerned primarily with possible conflicts between the public duties and private interests of public officials, and not with all types of ethical concerns. Although "ethics" is part of my title, there is no mention of ethics in the *Conflict of Interest Act*—or in the Members' Code for that matter. In the *Parliament of Canada Act*, there is a provision for me to provide confidential policy advice and support to the Prime Minister regarding conflict of interest and ethical issues in general. Frankly, I am still grappling with what role, if any, I should play in the general ethics field. But I am very cognizant of the fact that the *Conflict of Interest Act* and the Code both establish a precise mandate that may only incidentally touch upon broader ethical issues.

I note that the things that tend to worry Canadians the most when it comes to the conduct of public office holders occur in the political sphere and are beyond the scope of my mandate. For example, a lack of civility in the House of Commons, instances of politicians stretching the truth, and issues like MPs using their mailing privileges to send partisan materials to constituents in other ridings all diminish the confidence that Canadians have in public institutions, but all are outside my mandate. Some of these activities are monitored by other bodies and some are not monitored by anybody.

My Office is completely non-partisan in its treatment of Members, and we take care to have processes in place that are demonstrably fair and transparent. I have always been vigilant about resisting attempts to draw my Office into political issues, and will remain so in the future.

**Status**

Some of the broader issues related to my role and mandate can best be identified by addressing the question of what, exactly, is the Office of the Conflict of Interest and Ethics Commissioner?

First, we are completely independent from government. The Commissioner is an Officer of Parliament. My Office is not an institution of the Government of Canada, but part of the parliamentary infrastructure. My employees are not public servants. I report directly to Parliament, through the Speaker of the House of Commons, and not through a Minister. Similarly, I submit the annual spending estimates of the Office directly to the Speaker, for review by the Standing Committee on Access to Information, Privacy and Ethics. My independence is also ensured in other ways, such as the appointment and removal processes. My Office is immune from criminal or civil proceedings in relation to its activities.

At the same time, for purposes of financial accountability, my Office is a Department under the *Financial Administration Act*.

It is not subject to the *Access to Information Act* or to the *Privacy Act*.

**Roles**

Because of its unique and varied characteristics, my Office does not fit one of the standard moulds of ombudsman, administrative tribunal or the like. Rather, it is a unique, hybrid form of organization that I believe can only be described by the more general term “accountability officer”.

I have a very unusual mix of roles, from advising and educating people, to investigating possible contraventions, to administrative decision-making, to imposing penalties.

The bulk of our day-to-day work consists of giving advice and keeping people out of trouble. When promoting awareness about the *Conflict of Interest Act* in presentations such as this one, I always stress the fact that my Office has, above all, a preventive role. Its strength lies not in penalizing or even exposing cases of non- compliance, but in encouraging widespread adherence. Our advisory role is somewhat unique in that my Office provides advice on compliance issues to the same people we could end up investigating.

I have an investigative role, with the same powers under the Act to compel witnesses and records as a court of record. My Office spends a significant amount of time investigating cases of alleged non-compliance with the Act or with the Members' Code. This involves determining the facts of a case and also involves, in most cases, a careful interpretation of the provisions of the Act or the Code, often creating new precedents.

So my final role is one of administrative decision-making. I render administrative decisions following investigations of matters raised in individual cases, with powers of recommendation with respect to sanctions

**Investigations**

A good way to understand the sort of issues I deal with is to look at some of the investigations my Office has conducted. I mention the Thibault inquiry, which examined whether a lawsuit was considered a private interest under the Members' Code, and the Watson examination, which looked at the concept of "friend" under the *Conflict of Interest Act*. Details of both are included in my paper, so I will limit myself now to some general comments.

The Thibault inquiry was conducted in connection with the participation of Member of Parliament Robert Thibault as an acting member of the Standing Committee on Access to Information, Privacy and Ethics, and incidentally the spokesperson for the Liberal Party in the Mulroney-Schreiber matter. The Committee was examining the alleged business relationship between the Right Honourable Brian Mulroney and Mr. Karlheinz Schreiber as part of its review of the Mulroney Airbus Settlement. Mr. Mulroney had launched a lawsuit for libel against Mr. Thibault for remarks made outside the House of Commons.

I found Mr. Thibault in breach of the Members' Code, but in doing so I was aware of a general concern about "libel chill" and its effect on MPs' freedom of speech. Realizing that Members would be surprised by my findings, I made a point of mentioning in my report that they might wish to amend the Code to except libel suits from the ambit of "private interest" and—lo and behold!—they did.

The Watson examination was my first self-initiated case, and the matter was brought to my attention by someone from outside the House of Commons and Senate, who therefore could not request an investigation. It was alleged that Mr. Colin Watson, a member of the board of directors of the Toronto Port Authority, was in conflict of interest when he voted on a proposal to acquire a new ferry to service the Toronto City Centre Airport, as the acquisition would benefit the business interests of his alleged "friend", Robert Deluce, President and CEO of Porter Airlines.

My investigation involved a very careful assessment of what was included in the concept of "friend" within the meaning of the Act. Even though Mr. Watson had frequently referred to Mr. Deluce as his "friend", I found their relationship was not one that was meant to be captured by the term "friend" as it is used in the Act. Since the investigation was self-initiated, and because of how the definition of conflict of interest is structured, I felt it necessary to go a step further and examine whether Mr. Watson had improperly furthered Mr. Deluce's private interests, even where friendship was not a factor. I determined that he had not. Mr. Watson's vote in favour of the new ferry appeared to have been based on a genuine conviction that it would be a good thing to do and was not intended to favour the airport's main user, Porter Airlines. The primary motivation was not to further the private interests of Mr. Deluce, a significant shareholder of Porter Airlines.

I look forward to hearing Michael Morris's comments on a case in which a breach of Rule 8 of the *Lobbyists' Code of Conduct* was alleged. My Office is able to rely on a definition of "conflict of interest", so we will not face the same issues that were raised in the Campbell case. However, I am mindful that there may be situations where my Office and the Office of the Commissioner of Lobbying could reach different conclusions on the same case.

**Conclusion**

My Office has been in its current form for just over two years, and the *Conflict of Interest Act* is young, too, so it is still early days for us.

Looking ahead, I do not see my Office being significantly affected by the growing trend for recourse to the courts. We have yet to be taken to court by someone covered by the Act, and have no reason to believe this would happen.

I fully expect, however, to encounter any number of interesting challenges as we continue to fulfill our various roles in interpreting and applying Canada's federal conflict of interest regimes.

For example, there are no rules in the Act or the Code to deal with politicians exaggerating or misrepresenting issues in debate. Thus, I would not intervene in policy disputes or other political matters unless they also involve a deliberate and focussed attempt by a Member of the House of Commons to further a private interest. It is sometimes difficult to determine exactly where to draw the line between a private interest and a “political” or “partisan” interest, and it will always depend on the circumstances of the case.

**Conclusion**

As you can see, Canada has been in the business of preventing conflicts of interest for a long time. Many newer democracies, including those in Central America that have faced civil wars and economic crises, are only just starting to build ethical frameworks to address the possibility of corruption that arises when public offices can be used to further private interests.

No one can implement a comprehensive regime overnight—effective systems develop and evolve over time, in keeping with the needs and desires of the population. Citizens’ negative perceptions of corruption in politics and in government institutions can be corrected only if all stakeholders work together to put in place effective mechanisms that ensure transparency and promote respect for the rule of law.

Corruption among public officials and institutions not only erodes public trust, but leads to contempt for the rule of law, undermines competition in the marketplace, and has a devastating effect on investment, growth and development.

Canada’s federal conflict of interest regimes are important dimensions of democratic governance and the democratic process in terms of accountability, transparency and ethics.

And I believe the Office of the Conflict of Interest and Ethics Commissioner is an important part of Canada’s ethical framework. However, as I have noted, there is no single window into the regulation of ethical behaviour.

Indeed, I believe it is impossible to regulate all behaviour of public officials through explicit rules or codes.

In a democracy, where governments are accountable to the people for their very futures, transparency through public access to information is perhaps the most powerful inducement to ethical behaviour. Public opinion, influenced by effective, responsible opposition, can elect or unseat individual political representatives and whole governments. The ultimate judge of those in positions of power is the general population—the people.

We all deserve the highest standards from our elected and non-elected government officials. Canada has demonstrated that it is committed to meeting those expectations, by putting in place over the years a number of initiatives and structures, like the Office of the Conflict of Interest and Ethics Commissioner, that are designed to build and maintain Canadians’ trust in government.

I look forward to our upcoming discussion.