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Opening Statement to the Oliphant Commission on mandate of the Conflict of Interest and Ethics Commissioner and post-employment rules

Mary Dawson – Conflict of Interest and Ethics Commissioner
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Introduction

Thank you Mr. Commissioner, Commission counsel, commission experts, and members of the panel for this opportunity to present information to you today about my mandate and role as the federal Conflict of Interest and Ethics Commissioner.

I know you are mostly interested in the post-employment rules for current and past public office holders, but before I provide detailed information on those rules, I will first give you an overview of my mandate, as well as descriptions of the two conflict of interest regimes for which I am responsible.

History

The origins of the *Conflict of Interest Act* can be traced back to 1973, when Prime Minister Trudeau issued conflict of interest guidelines for cabinet ministers.

Later that same year, Trudeau announced guidelines for a variety of different groups of public servants and governor-in-council appointees. They were similar to those for ministers.

Many of the provisions in these guidelines we find today in the *Conflict of Interest Act*, such as the prohibition against using insider information for private gain, the restriction of outside activities, the requirement to divest certain assets and public declaration of certain assets.

Post-employment rules were developed a little later and on January 1, 1978, they officially came into force.

The guidelines were modified a number of times, most significantly in 1985, when Prime Minister Brian Mulroney issued the Conflict of Interest and Post-Employment Code for Public Office Holders. This code consolidated the rules for public office holders in one document.

Predecessors to my position include the Assistant Deputy Registrar General who was Canada's first conflict of interest administrator followed by the Ethics Counsellor who was part of the Department of Industry, Trade and Commerce.

In 2004, the Ethics Counsellor was replaced by an Ethics Commissioner whose office was no longer part of the public service, but a separate parliamentary entity. This reflects the fact that this position assumed responsibility for the new conflict of interest code for Members of the House of Commons while continuing to administer the Conflict of Interest and Post-Employment Code for Public Office Holders, which had been updated in 1994, 2003 and 2004.

Mandate

I became Canada's first Conflict of Interest and Ethics Commissioner on July 9, 2007, the date the *Conflict of Interest Act* came into effect.

As Commissioner, I am an Officer of Parliament and as such, I am independent from the government of the day. This is particularly important because I oversee the conduct of Ministers, including the Prime Minister, as well as Members of the House of Commons.

My Office is an independent parliamentary entity created by the *Parliament of Canada Act* and is part of Parliament along with the House of Commons, the Senate, and the Library of Parliament.

I administer two conflict of interest regimes:

- The first is the *Conflict of Interest Act*, which came into force in July 2007. It applies to over 2,700 public office holders. Most are appointed by the government through order in council, including ministers, parliamentary secretaries, deputy ministers, heads and members of various crown corporations and tribunals. It also includes ministerial staff, who are hired directly by ministers.

- The second is the *Conflict of Interest Code for Members of the House of Commons*, which has been in place since 2004. It applies to all 308 Members of the House of Commons and has the interesting attribute of having been developed by the Members themselves.

Generally, the Act and the Code set out prohibitions against activities that could or do involve conflicts between public and private interests.

My first two years as Commissioner have been focussed on ensuring that both the new Act and the Members Code are applied with clarity, consistency and common sense and with due consideration for the individuals affected. I have also emphasized prevention, providing information to Members of the House of Commons and to public office holders about their obligations and assisting them in becoming compliant with the Code and the Act respectively.

In a few minutes, I will be describing the approach we are currently taking to apply the provisions of the Act relating to post employment obligations. But I would like to say at the outset that, now that our transitional priorities have been addressed, we are in a better position to assess the effectiveness of compliance mechanisms to ensure that the post-employment provisions are being respected. This will continue to be challenging because there are virtually no reporting requirements. For the most part, we are reliant on either voluntary disclosures or information received from third parties. However, we will continue to address this in the coming year.

Other organizations

There has been some confusion about the scope of my mandate, so I would like to speak very briefly about what is outside my jurisdiction.

There is a separate Conflict of Interest Code for Senators administered by Jean T. Fournier, the current Senate Ethics Officer.

Except for the most senior leadership positions, employees of the Public Service of Canada are not covered by the Act. Public servants are subject to the *Values and Ethics Code for the Public Service*, developed and administered by Treasury Board.

There is a separate office – the Public Sector Integrity Office headed by the Public Sector Integrity Commissioner – that reviews allegations of wrongdoing by public service employees.

The Commissioner of Lobbying, who is here today, enforces the *Lobbying Act*, which came into force on July 2, 2008. That Act includes the five-year ban on lobbying, which had previously been part of the 2006 Conflict of Interest Code.

My Office still has some responsibility to administer and enforce the five-year ban for any public office holder who left office before July 9, 2007, the day the *Conflict of Interest Act* came into force. Any former public office holders who left office on or after that date fall under the jurisdiction of the Commissioner of Lobbying.

Another area of confusion is my relationship to the Standing Committee on Access to Information, Privacy and Ethics.

While that standing committee reviews my estimates, I do not report to it and it, of course, does not report to me. Nor do I take any regular part in its deliberations. This is sometimes a matter of confusion for the public.

Conflict of Interest Code for Members of Parliament

The Members' Code, as I have said, was prepared and approved by the Members themselves. My role is to support the House of Commons in governing the conduct of its members by interpreting and applying the Code.

The Members' Code is still relatively new- it was adopted in April 2004 and since then, it has been amended three times, most recently in June of this year.

It applies to all 308 Members of the House of Commons, including Ministers, Ministers of State and Parliamentary Secretaries who are subject to both the Act and the Code.

The Code only applies to Members in the conduct of their duties as Members of Parliament. Section 5 states that Members do not breach the Code if the activity is one in which they normally and properly engage on behalf of constituents.

The general rules of conduct outlined in the Code set out a number of prohibitions such as:

- using influence and insider information;
- furthering private interests;
- accepting gifts or other benefits (the Members or their families), that might reasonably be seen to have been given to influence the exercise of an official duty or function; and
- being a party to a contract with the Government of Canada or having an interest in a private corporation or partnership that contracts with the government

The Members' Code also establishes restrictions on debates and voting when a Member has a private interest that might be affected.

Within sixty days after their election becomes official, Members must file a disclosure statement with my Office.

A disclosure summary is prepared for each Member that covers the information that the Code requires be made public. Members must notify us of any material change throughout the year. In addition, a Member's information is reviewed on an annual basis and the disclosure summary updated accordingly.

Members are also required to publicly disclose gifts and benefits they receive worth more than $500.

My Office maintains a registry of the public disclosures of each Member and this is accessible on our web site.

Members, who are not ministers, ministers of state or parliamentary secretaries, are allowed to continue outside employment and businesses, and to practice a profession, as long as they are able to respect the other provisions in the Members' Code. Members are also not subject to specific post-employment restrictions.

I have the power to conduct inquiries, either at the request of a Member or Senator or on my own initiative where I have reasonable grounds to believe that a Member has contravened the Code.

The *Conflict of Interest Act*

I will now give you an overview of the *Conflict of Interest Act.*

As you will see, the rules for public office holders are more comprehensive than they are for Members of the House of Commons, although many of the general principles are similar. The Act replaces the 2006 Conflict of Interest and Post-Employment Code for Public Office Holders.

Under the Act, public office holders are prohibited from:

- making decisions on issues that put them in a conflict of interest;
- using insider information or influence to further private interests; and
- accepting gifts or other advantages that could reasonably be seen to influence them in performing their official duties.

Public Office Holders must comply with the Act as a condition of their employment.

The Act applies to about 2,700 full and part-time appointees of the Government of Canada:

- Approximately 1,100 are full-time appointees called “reporting public office holders.”
- Reporting Public Holders include a broad group of individuals. They include ministers, ministers of state and parliamentary secretaries who are also subject to the Conflict of Interest Code for Members of the House of Commons. Reporting public office holders also include full-time government appointees (e.g. deputy ministers, heads and many of the members of Crown corporations or federal tribunals). Finally, this group also includes ministerial staff who work 15 hours a week or more.
- The Act also covers Public Office Holders who are part-time appointees. This group includes those who are appointed to boards and commissions, as well as ministerial staff who work less than 15 hours a week. They are subject to general conflict of interest rules but do not have to file confidential disclosure forms.

My Office provides confidential advice to all current and former public office holders who want to understand how the Act applies in their particular situation.

As is the case for the Members’ Code, the Act uses disclosure and recusals to manage conflict of interest situations.

Also like the Members’ Code, reporting public office holders must file a detailed confidential declaration with my Office within 60 days after their appointment, and they must publicly disclose a summary of their assets, liabilities, and gifts.

Unlike the Members' Code, reporting public office holders are prohibited from holding controlled assets and must divest themselves of these within 120 days after their appointment. These include, for example and in particular, publicly traded securities. One of my Office's functions is to provide advice on divestiture of controlled assets through arm's-length sales or blind trust agreements.

Also unlike the Members' Code, the Act contains very broad restrictions on outside activities for reporting public office holders who cannot, for example, practice a profession, continue as or become a corporate director or officer, engage in outside employment, or serve as a paid consultant. Permitted outside activities are publicly reported.

All public office holders and their family members are prohibited from receiving a gift or other advantage if it might reasonably be seen as an attempt to influence their decision-making. They must disclose and publicly declare gifts with a value of $200 or more. Gifts with a value of $1,000 or more must be forfeited to the Crown, a requirement that does not apply under the Members' Code.

There are some exceptions under both the Act and the Code that permit gifts from family members and friends, or gifts that are a normal expression of courtesy or protocol.

Under the Act, I can conduct examinations of any present or former public office holder – on the request of a Member of the Senate or House of Commons, or on my own initiative – where there is reason to believe that the person has contravened a specific section of the Act or the previous Codes. However, I can only investigate for a period going back 10 years.

I can impose administrative monetary penalties on those who do not meet various deadlines set out in the Act.

Interestingly, despite my title, there is no mention of ethics in the *Conflict of Interest Act*. In the *Parliament of Canada Act* which sets out my mandate, there is a provision for me to provide confidential policy advice and support to the Prime Minister in respect of conflict of interest and ethical issues in general.

Post-Employment Rules

Now moving onto the post-employment rules, which I know you are most interested in. There are no post-employment rules in the Members' Code.

As for the Act, reporting public office holders are required to disclose in writing to me all firm offers of outside employment within seven days of the offer and acceptance of an offer of outside employment within seven days.

The post-employment rules in Sections 33 and 34 of the Act apply to all former public office holders, while sections 35 to 42 apply only to former reporting public office holders.

All former public office holders are expressly prohibited from taking improper advantage of their previous public office (section 33). They may not “switch sides” by acting for or on behalf of any person or organization in matters relating to a specific procedure, transaction, negotiation or case in which they previously acted for or provided advice to the government (subsection 34(1)).

They are also prohibited from providing advice to any person or organization using information obtained while in public office that is not available to the public (subsection 34(2)). There is no time limit on these prohibitions.

Sections 35 and 36 of the Act require that former reporting public office holders observe what is commonly known as a “cooling-off period” following their departure from public office. The cooling-off period is two years for former ministers of the Crown and ministers of state and one year for all other former reporting public office holders (section 36).

During this period a former reporting public office holder may not contract with, sit on the board of directors of, or accept employment with any entity outside the federal government with which he or she had direct and significant official dealings during the one year immediately prior to leaving public office (subsection 35(1)).

In addition, he or she may not make representations for or on behalf of another person to any department, organization, board, commission or tribunal with which he or she had direct and significant official dealings during that past year (subsection 35(2)). For ministers, this prohibition extends to former cabinet colleagues (subsection 35(3)).

The Act does not provide guidance on how to interpret “direct and significant official dealings,” but this has not given me or my Office a lot of difficulty. It is a question of fact based on the circumstances of each case. I will address this in more detail during the round of questions.

I have discretion to waive or shorten the cooling-off period under certain conditions set out in the Act and have done so on rare occasions.

There is only one reporting requirement during the one or two year cooling-off period. A former reporting public office holder must let me know if he or she conducts any activities referred to in paragraphs 5(1)(a) or (b) of the *Lobbying Act* (section 37). These paragraphs involve:

- communicating with a public office holder regarding:
    - legislation, regulation or policy and program development;
    - the introduction, amendment, passage or defeat of a Bill or resolution in Parliament; and
    - the awarding of contracts, grants, contributions or other financial benefits; and
- arranging meetings between a public office holder and any other person.

This is not a well-known requirement and, interestingly, we have received no such reports. It is confusing because the individuals covered by the *Conflict of Interest Act* are not necessarily the same as those covered by the *Lobbying Act*.

If I have reason to believe that a former public office holder has not complied with his or her post-employment obligations, I can use my power to conduct an examination. If I determine that the former reporting public office holder has failed to comply, I can order current public office holders not to have official dealings with that person.

My Office has attempted to apply the post-employment provisions with consistency and common sense, but there are some challenges.

Few maintain any contact with my Office because there is no general reporting requirement during the post-employment period. It is therefore difficult to assess whether they are meeting their post-employment obligations and, more generally, how effective those provisions are.

My Office provides public office holders with detailed information on their post-employment obligations, both at the time they assume public office and as soon as we are informed of their departures.

In the past year, a number of reporting public office holders have approached my office prior to leaving office to seek advice on how the “cooling-off” period might restrict their post-employment activities.

Such discussions have proven to be very useful in preventing contraventions of the Act and I am now actively encouraging Ministers and senior ministerial staff to stay in touch with my Office regarding any positions they might take during their cooling off period.

I have also followed up on media reports and information received from third-parties regarding post-employment activities of former reporting public office holders, particularly during their cooling off period. In those cases, so far as I could tell, the post-employment rules were not being contravened.

Conclusion

I hope that my remarks have provided you with the context you need for your deliberations.

I would like to leave you with a final thought. I believe that a fine balance must be found in a conflict of interest regime that succeeds in preventing public office holders from using their public offices to further their private interests but at the same time does not deter qualified and competent persons from accepting appointments as public office holders. Indeed, the objectives of the Conflict of Interest Act state just that.

The *Conflict of Interest Act,* in its current form, is quite onerous for reporting public office holders. While there are areas like post-employment that may need strengthening, I believe there are other areas that could be less restrictive. Thank you.