

**BILL C-4: AN ACT TO AMEND THE PARLIAMENT
OF CANADA ACT (ETHICS COMMISSIONER AND SENATE
ETHICS OFFICER) AND OTHER ACTS IN CONSEQUENCE**

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LEGISLATIVE HISTORY OF BILL C-4

HOUSE OF COMMONS

Bill Stage	Date
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Referred to Committee:	11 February 2004
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Report Stage and Second Reading:	11 February 2004
Third Reading:	11 February 2004

SENATE

Bill Stage	Date
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Royal Assent: 31 March 2004

Statutes of Canada 2004, c.7

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print**.

Legislative history by Peter Niemczak

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BILL C-4: AN ACT TO AMEND THE PARLIAMENT
OF CANADA ACT (ETHICS COMMISSIONER AND SENATE
ETHICS OFFICER) AND OTHER ACTS IN CONSEQUENCE*

BACKGROUND

On 11 February 2004, the Hon. Jacques Saada, P.C., M.P., Leader of the Government in the House of Commons and Minister responsible for Democratic Reform, tabled in the House of Commons Bill C-4, An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence. The Bill is the former Bill C-34, reinstated pursuant to the motion adopted by the House of Commons on 10 February 2004.⁽¹⁾ It was referred to the Senate the same day.

The former Bill C-34 had been debated at all three stages in the Senate, but the Senate had amended the Bill at third reading and sent it back to the House of Commons with a message to that effect.⁽²⁾

Bill C-34 was introduced in April 2003, and formed part of the parliamentary ethics initiative that was tabled in draft form in October 2002 in both chambers of Parliament. That initiative, in turn, fulfilled a commitment made by Prime Minister Chrétien in the House of Commons on 23 May 2002.⁽³⁾

* Notice: For clarity of exposition, the legislative proposals set out in the Bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

- (1) By a motion adopted on 10 February 2004, the House of Commons provided for the reintroduction in the 3rd session of government bills that had not received royal assent during the previous session and that died on the *Order Paper* when Parliament was prorogued on 12 November 2003. The bills could be reinstated at the same stage in the legislative process as they had reached when the 2nd session was prorogued.
- (2) The purpose of the amendment was to provide for the appointment of the Senate Ethics Officer by resolution of the Senate with the consent of the leaders of the recognized parties. The Bill had provided for appointment by the Governor in Council following consultation. The effect of the amendment would have been to remove the statutory base and, arguably, much of the independence of the Officer. Also deleted were all references to such matters as the term of office, security of tenure, expenses, staff and so on that were contained in Bill C-34. Presumably, those matters would have been included in the Senate's Rules, or else treated as internal staff matters, possibly to be dealt with by contract with the Officer when chosen.
- (3) In addition to the draft Bill, the initiative included a proposed Code of Conduct, based in many respects on the 1997 report of the Special Joint Committee on a Code of Conduct, commonly called the Oliver-Milliken report after its co-chairs. That report may be found on-line at:
http://www.parl.gc.ca/committees352/sjcc/reports/02_1997-03/sjcc-02-cov-e.html.

The draft Bill tabled in October 2002 was reviewed in that form by committees of both the Senate and the House of Commons.⁽⁴⁾ On 10 April 2003, each committee presented a report in its respective chamber with recommendations concerning the draft Bill. Almost all of their recommendations were reflected in Bill C-34. The House Committee on Procedure and House Affairs made one amendment; in the Senate, the Rules Committee reported the Bill back to the Chamber but, as noted, at third reading an amendment was adopted and the Bill died.

DESCRIPTION AND ANALYSIS

A. The Office of the Senate Ethics Officer (New Sections 20.1 to 20.7 to the *Parliament of Canada Act*)

Clause 2 of Bill C-4 provides for the appointment of a Senate Ethics Officer, establishes the mandate of the office, and specifies its nature.

The appointment of the Senate Ethics Officer will be by the Governor in Council, after consultation with the leaders of the recognized parties in the Senate and a confirming vote in the chamber. The Officer will hold the position for a term of seven years and may be removed only by the Governor in Council following an address of the Senate, and only for cause. He or she may be reappointed for subsequent terms of up to seven years. If the incumbent is incapable of acting, or if the office is vacant, the Governor in Council may appoint another person to serve for an interim period of up to six months.

Other provisions provide for the Senate Ethics Officer's remuneration and expenses, and require the Officer not to hold any other government office or paid employment if the appointment is full-time. If the appointment is part-time, the Officer may not engage in any activity, including employment or office, inconsistent with his or her duties. The Officer has the rank of a deputy head of a department, with the necessary powers to sign contracts and other obligations, and to hire staff. These powers may be delegated. An estimates process is specified with regard to the budget of the office.

(4) In the Senate, the Bill was reviewed by the Standing Senate Committee on Rules, Procedures and the Rights of Parliament; in the House of Commons, by the Standing Committee on Procedure and House Affairs.

Section 20.5 is short and general in its description of the functions of the Senate Ethics Officer. He or she is to perform whatever duties and functions are assigned by the Senate relating to the conduct of Senators in their official capacities, under the general direction of a committee. Thus, the precise mandate of the Officer remains to be fleshed out by whatever code of conduct the Senate ultimately adopts.

Two aspects of the section emphasize that the activities of the Senate Ethics Officer in carrying out his or her duties are covered by parliamentary privilege and that the Senate retains full control over the discipline of its members. Subsection (2) states:

The duties and functions of the Senate Ethics Officer are carried out within the institution of the Senate. The Senate Ethics Officer enjoys the privileges and immunities of the Senate and its members when carrying out those duties and functions.

Further, subsection (5) states:

For greater certainty, this section shall not be interpreted as limiting in any way the powers, privileges, rights and immunities of the Senate or its members.

The purpose of the foregoing provisions would seem to be to preclude judicial intervention in any of the official duties of the Officer, or actions of the Senate in relation to the Officer. Clause 7, mentioned below, is also relevant to this end because it specifies that the Senate Ethics Officer is not subject to judicial review by the Federal Court.

The Senate Ethics Officer and his or her staff are protected from being summoned as a witness in a criminal or civil proceeding in relation to any information they receive in the course of their duties, or as a result of performing any of their duties or functions. Similarly, they may not be the subject of civil or criminal proceedings for anything done in good faith in the course of their work.

Before the end of June of each year, the Officer must table an annual report on the activities of the office with the Speaker of the Senate, who then tables it in the chamber. No information required to be kept confidential can be included.

B. The Office of the Ethics Commissioner
(New Sections 72.01 to 72.04 to the *Parliament of Canada Act*)

Clause 4 of Bill C-4 provides for the appointment of an Ethics Commissioner and provides some of the powers and immunities necessary to carry out his or her duties.

The Bill provides that the Governor in Council shall appoint an Ethics Commissioner for a term of five years, which may be renewed. The appointment must be preceded by consultation with the recognized parties in the House, and by a confirming vote. The Commissioner may be removed only by the Governor in Council following an address of the House, and only for cause. If the incumbent is incapable of acting, or if the office is vacant, the Governor in Council may appoint another person to serve for an interim period of up to six months.

Other provisions provide for the Ethics Commissioner's remuneration and expenses. Whereas it is contemplated that the Senate Ethics Officer may be a part-time appointment, the Bill requires the Ethics Commissioner not to hold any other government office or paid employment. The Commissioner has the rank of a deputy head of a department, with the necessary powers to sign contracts and other obligations, and to hire staff. These powers may be delegated. An estimates process is specified with regard to the budget of the office.

C. General Role of the Ethics Commissioner

The Ethics Commissioner will administer two sets of ethical régimes, for at least two different groups of people. The first group consists of all Members of the House of Commons, including ministers of the Crown, ministers of state and parliamentary secretaries *when they are acting as members of the House*. The second group is composed of "public office holders," which also includes ministers of the Crown, ministers of state, and parliamentary secretaries, as well as a large group of other individuals.⁽⁵⁾ The *Conflict of Interest and Post-Employment Code for Public Office Holders* (hereafter referred to as the Prime Minister's Code)⁽⁶⁾ will thus relate to ministers and parliamentary secretaries *when they are acting in their ministerial (or parliamentary secretary) capacity*. The rules of each régime are currently different in a number of respects.

(5) These other individuals include political staff of ministers and most Governor in Council appointees.

(6) The Prime Minister's Code may be found on-line at the Web site of the Ethics Counsellor: <http://strategis.ic.gc.ca/SSG/oe00001e.html>. There are also additional rules and obligations established for public office holders by the Prime Minister.

Currently, the rules relating to public office holders are administered by the Ethics Counsellor, who is a public servant. The Bill will strengthen the independence and transparency of the process with regard to the executive.

D. Functions of the Ethics Commissioner Relating to Members of the House of Commons (Proposed Section 72.05)

As with the comparable provision relating to the Senate Ethics Officer, section 72.05 is short and general in its description of the functions of the Ethics Commissioner in relation to members of the House of Commons. The Commissioner is to perform whatever duties and functions are assigned by the House of Commons relating to the conduct of MPs *as members of the House*, under the general direction of a committee of the House.⁽⁷⁾ Thus, the Ethics Commissioner in this capacity takes his or her direction and powers solely from the House of Commons. As is the case with the Senate Ethics Officer, the precise mandate of the Ethics Commissioner remains to be fleshed out by whatever code of conduct the House of Commons adopts.⁽⁸⁾

A provision in Bill C-4 that was not in the draft Bill is intended to clarify the exact relationship between the two sets of rules discussed above and their application to parliamentary public office holders, i.e., ministers and parliamentary secretaries. Section 72.05 (1) states:

The Ethics Commissioner shall perform the duties and functions assigned by the House of Commons for governing the conduct of its members *when carrying out the duties and functions of their office as members of that House*. (emphasis added)

Thus, should a complaint be made to the Ethics Commissioner that a minister has breached his or her obligations under the House of Commons code, it would appear that the Ethics Commissioner will have to make a threshold determination of whether the individual was acting in a ministerial capacity. If the answer is yes, only the Prime Minister's Code will apply. It should be noted that provincial conflict of interest commissioners have, over the years, frequently made statements to the effect that ministers always wear the cloak of ministerial responsibility. While there are some actions that are clearly related solely to a minister's

(7) In the House, this committee is expected to be the Standing Committee on Procedure and House Affairs.

(8) On 30 October 2003, the House Committee on Procedure and House Affairs presented a report containing its recommended Conflict of Interest Code. The House had not concurred in the report by the time Parliament was prorogued on 12 November 2003.

position as a member of the House (e.g., voting, constituency work), it may be predicted that most of their actions will be found to be ministerial, and thus the Prime Minister's rules will apply. The exception may be the disclosure provisions of the House of Commons code; it is possible that they will apply to all members of the House, including public office holders.

Subsection 4 of section 72.05 introduces a provision that was not in the draft Bill and that reinforces the concept that the role of the Ethics Commissioner is to administer one code or the other, but not both at the same time:

For greater certainty, the administration of any ethical principles, rules or obligations established by the Prime Minister for public office holders, and applicable to ministers of the Crown, ministers of state or parliamentary secretaries, is not within the jurisdiction of the Ethics Commissioner under subsection (1) or the committee.

As in the case of the provisions regarding the position of the Senate Ethics Officer, two aspects of the section emphasize that the Ethics Commissioner, in relation to members of the House of Commons,⁽⁹⁾ is covered by parliamentary privilege and that the House retains full control over the discipline of its members. Subsection 72.05(2) states:

The duties and functions of the Ethics Commissioner are carried out within the institution of the House of Commons. The Ethics Commissioner enjoys the privileges and immunities of the House of Commons and its members when carrying out those duties and functions.

Further, subsection (5) states:

For greater certainty, this section shall not be interpreted as limiting in any way the powers, privileges, rights and immunities of the House of Commons or its members.

As was noted earlier with regard to the comparable provisions relating to the Senate Ethics Officer, the purpose of the foregoing provisions would seem to be to preclude judicial intervention in any of the official duties of the Ethics Commissioner, or actions of the House in relation to the Officer. Clause 7, mentioned below, is also relevant to this end because it specifies that the Ethics Commissioner is not subject to judicial review by the Federal Court.

(9) As opposed to his or her jurisdiction over public office holders.

E. Functions of the Ethics Commissioner Relating to Public Office Holders (Proposed Sections 72.06 to 72.11)

As noted above, the Ethics Commissioner will be responsible for a number of different groups of public office holders:

- Ministers of the Crown, ministers of state and parliamentary secretaries;
- Political staff of ministers of the Crown or ministers of state;
- Governor in Council appointees (with specified exceptions); and
- Full-time ministerial appointees designated by a minister of the Crown as public office holders.

All of the above are members of the executive and are currently covered under the Prime Minister's Code, which is administered by the current Ethics Counsellor, Mr. Howard Wilson. The new Ethics Commissioner will take over that role.

The mandate of the Ethics Commissioner in relation to public office holders is threefold:

- to administer ethical principles, rules or obligations established by the Prime Minister;
- to provide confidential advice to the Prime Minister regarding the foregoing, and about ethical issues in general; and
- to provide confidential advice to public office holders with regard to their duties under the Prime Minister's ethical principles, rules or obligations.

The Ethics Commissioner is to administer rules, ethical principles and obligations for public office holders that the Prime Minister has a duty to make and to lay before Parliament within 30 sitting days of assuming office. Any subsequent changes must be laid before Parliament within 15 sitting days after they are made.

Any parliamentarian may request the Ethics Commissioner to inquire into whether a minister of the Crown, a minister of state or a parliamentary secretary has observed the rules established by the Prime Minister for them.⁽¹⁰⁾ The request must be in writing, and must set out the obligation believed not to have been observed, and the grounds for this belief. The Ethics Commissioner does not have the power to initiate an investigation on his or own initiative.

(10) Note that requests may not be made in relation to the broader group of public office holders.

In inquiring into a complaint, the Ethics Commissioner has the power to summon witnesses to give evidence and to produce any documents and things considered necessary. The Commissioner has the same power to compel compliance as a court of record in civil cases. All evidence must be taken in private.

Any person who provides information in such an inquiry is protected from having it used against him or her in a court or in any proceeding, except for perjury in connection with a statement made to the Ethics Commissioner. This provision is similar in principle to the protection afforded by the *Canada Evidence Act* to witnesses who are compelled to testify.

The Ethics Commissioner must consider each request for an examination, although he or she may decide to discontinue the examination “having regard to all the circumstances of the case.” Section 72.11 provides that investigations must be suspended immediately if facts emerge indicating that an offence has been committed under an Act of Parliament, that an investigation is under way or that a charge has been laid.

After inquiring into the request, or when a decision has been made to discontinue the examination, and after providing the person concerned with a reasonable opportunity to respond, the Ethics Commissioner must provide the Prime Minister with a report that sets out the facts and contains his or her analysis and conclusions on the matter, although it should be noted that it is not part of the Ethics Commissioner’s mandate to recommend sanctions. Nothing required to be kept confidential may be revealed in the report.

At the same time as the Ethics Commissioner provides the report to the Prime Minister, a copy must be given to the parliamentarian who made the request, and to the person who is the subject of the complaint. It must also be made available to the public.

Confidential advice provided to the Prime Minister in relation to ethical issues in general and the ethical principles, rules or obligations that the Prime Minister has established, and confidential advice to public office holders with regard to their duties under the ethical régime applicable to them, remain confidential.

The Ethics Commissioner and staff are required to keep confidential all information that comes to them in the course of their work with public office holders, with two exceptions. The first is if disclosure is essential in the course of business – for example, in order to conduct an examination or write a report. Second, information may be revealed in a prosecution for perjury arising from a statement made to the Ethics Commissioner.

F. General Provisions Relating to the Ethics Commissioner
(Proposed Sections 72.12 and 72.13)

The Ethics Commissioner and staff are protected from being summoned as a witness in a criminal or civil proceeding in relation to any information they receive in the course of their duties, or as a result of performing any of their duties or functions. Similarly, they may not be the subject of civil or criminal proceedings for anything done in good faith in the course of their work.

Before the end of June of each year, the Ethics Commissioner must table two annual reports on his or her activities with the Speaker of the House of Commons, who then tables them in the House. One report is to relate to his or her activities as Ethics Commissioner for the members of the House; the other is to relate to public office holders.⁽¹¹⁾ No information expressly required to be kept confidential can be included.

G. Other Provisions and Consequential and Coordinating Amendments
(Clauses 1 and 3, and 5-41)

Clauses 1 and 3 repeal those sections of the *Parliament of Canada Act* that relate to contracting with the government by Senators and members of the House of Commons. It is widely acknowledged that these provisions are antiquated, and it is anticipated that the codes of conduct adopted by the House of Commons and the Senate will contain updated contracting provisions.

As noted above, the role of the current Ethics Counsellor is being subsumed into that of the Ethics Commissioner. That new role does not, however, include those functions of the Ethics Counsellor that relate to lobbying. A number of amendments to the *Lobbyists Registration Act*, therefore, are necessary to remove all references to the Ethics Counsellor. These are made in clauses 19 to 24. The person responsible for the Lobbyists' Code of Conduct and all of the functions relating to it, including investigations, will now be the registrar.

(11) In the draft Bill of October 2002, only one report was required. This provision appears to be another indication that the different roles of the Ethics Commissioner are to be as compartmentalized as possible.

Clauses 5 and 35 remove the Ethics Counsellor from the schedules to the *Access to Information Act* and the *Privacy Act* because the position will no longer exist. Note that since the Senate Ethics Officer and the Ethics Commissioner are *not* included on those schedules, these Acts will not apply to those officers.

The amendment made by clause 6 to the *Canada Post Corporation Act* adds the Senate Ethics Officer and the Ethics Commissioner to the list of Parliament-related offices for which mail does not require postage.

Clause 7 amends the *Federal Courts Act* to specify that the term “federal board, commission, or other tribunal” does not include the Senate Ethics Officer or the Ethics Commissioner. The Senate, the House of Commons and any committee or member of either House are already excluded. The effect is to remove the named bodies from the judicial review jurisdiction of the Federal Court.

The remaining consequential amendments all add references to the Senate Ethics Officer and the Ethics Commissioner to statutes in which parliamentary institutions are treated together. To illustrate, under the *Garnishment, Attachment and Pension Diversion Act*, there is a separate division covering the “Senate, House of Commons and Library of Parliament.” Clauses 9 to 17 thus add the office of the Senate Ethics Officer and the office of the Ethics Commissioner to every section of that division where the other three are mentioned.

There are a number of coordinating amendments in the Bill, which reflects the fact that some of the consequential amendments relate to Acts that are being amended in bills currently before Parliament or bills that have been passed by Parliament and are not yet in force.⁽¹²⁾

H. Coming Into Force (Clause 42)

With the exception of the coordinating amendments, the provisions of the Act come into force on a day or days fixed by the Governor in Council. This is a standard clause allowing for provisions to be brought into force at different times, if necessary.

(12) One coordinating amendment did not relate to a consequential amendment, but rather to the fact that if the proposed Public Service Modernization Act (Bill C-25) became law, the definition of “public service” would need to change to reflect the staff of the offices of the Senate Ethics Officer and the Ethics Commissioner. (Bill C-25 received royal assent on 7 November 2003, and some sections have been proclaimed in force.)

COMMENTARY

The method of appointment of the Ethics Commissioner, and the term of office, that were first proposed in the original draft Bill were strongly criticized by both the Senate and the House of Commons committees. Both recommended that the appointment be made only after consultation with the leaders of the recognized parties and a vote in the chamber, although the Senate Committee recommended that the *approval* of the parties also be required. They also recommended that the term of office be renewable. In addition, the Senate committee recommended that there be a separate official for that chamber. All of those recommendations were accepted for Bill C-34, and for its successor, Bill C-4 (with the exception of *approval* by the parties), as were the recommendations regarding the length of the appointment recommended by each committee for its chamber.

It is noteworthy that the Senate committee report of April 2003 on the original draft Bill did not reflect consensus as to whether the office of the Senate Ethics Officer should rest on a statutory base, or should be non-statutory and completely internal to the Senate. In brief, those favouring the non-statutory approach maintained that using a statute would create a significant risk of judicial intervention into the activities of the Officer. Those favouring a statutory Officer wished to emphasize the independence of the office and noted that most Canadian provinces had proceeded by way of legislation in this area and had not run into difficulty. Bill C-4 bases the office of the Senate Ethics Officer in a statute, although the amendment to the former Bill C-34 made by the Chamber at third reading would have made the Officer's appointment, term and tenure entirely internal matters.

The Ethics Commissioner will occupy a new and unique position in Canadian law. The Bill contains a number of provisions intended to clarify that when the Ethics Commissioner is acting in relation to members of the House of Commons and applying the House code of conduct, the privileges of the House apply and no activities of the Ethics Commissioner will be subject to judicial review. Since all of the powers will come from the House, there are no procedural matters specified in the Bill in this context.

In contrast, when he or she is acting in relation to the public office holders (in the parliamentary context, ministers and parliamentary secretaries), the powers of the Ethics Commissioner are spelled out, including the same power to enforce the attendance of witnesses and compel evidence as is possessed by a court of record in civil cases. Although the actions of

the Ethics Commissioner in this context are unlikely to be protected by parliamentary privilege, judicial review by the Federal Court will be precluded by the amendment to the *Federal Courts Act* noted above.

In the provinces, most of which have a comparable commissioner, all legislators are subject to the same code of conduct, with additional requirements for ministers included in it. As noted, the Ethics Commissioner will administer two codes. All private members of the House of Commons will be subject to the House code, as will ministers when acting as members of the House. When acting as ministers, which it may be predicted will be found to be most of the time, the Prime Minister's Code will apply. As noted above, one aspect of the House of Commons code that may apply to ministers and parliamentary secretaries is the disclosure régime. However, if the rules on the disclosure of private interests in the House code as reported to the House on 30 October 2003⁽¹³⁾ are held *not* to apply, the anomalous situation will result wherein a summary of the private interests of the spouses and dependent children of private members will be publicly available, but not for those of ministers and parliamentary secretaries.

It is unclear what the situation will be with regard to the treatment of contracts with the Government of Canada. Bill C-4 removes the existing contracting provisions from the *Parliament of Canada Act*. The rules intended to replace those provisions are well developed in the proposed House of Commons code, and oblique in the Prime Minister's Code.⁽¹⁴⁾ This area may require clarification.

Another area of potential overlap relates to gifts. Under the Prime Minister's Code, acceptance of a permissible gift must be publicly declared if its value exceeds \$200. In the proposed House code, the threshold is \$500. If a minister accepts a gift worth \$300 from a constituent, does he or she publicly declare it? Will all constituency work by ministers be considered work as a member of the House, notwithstanding that there are some special rules governing proper actions that the Prime Minister has established for ministers in this regard?

It thus remains to be seen exactly how the proposed approach to ministers and parliamentary secretaries will work in practice.

(13) It provides for confidential disclosure and public summary of the private interests of spouses and dependants on the same basis as for MPs.

(14) Under the Prime Minister's Code, an interest in a corporation that contracted with the government would appear to be a controlled asset, and it would be necessary to divest it by sale or trust. There is no direct prohibition against personally contracting with the government, as there is in the draft House code.