



THE ETHICS COMMISSIONER

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
<i>CONFLICT OF INTEREST CODE FOR MEMBERS OF THE HOUSE OF COMMONS</i>	2
<i>CONFLICT OF INTEREST AND POST-EMPLOYMENT CODE FOR PUBLIC OFFICE HOLDERS</i>	3
THE ETHICS COMMISSIONER AND THE 38 th PARLIAMENT	5
2006 ELECTION CAMPAIGN PROPOSALS	6
EXPECTATIONS FOR THE 39 th PARLIAMENT	7



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THE ETHICS COMMISSIONER

INTRODUCTION

The Office of the Ethics Commissioner was created in 2004 as a result of amendments to the *Parliament of Canada Act*.⁽¹⁾ The objective of the legislation was to provide for an Ethics Commissioner to perform the duties and functions assigned by the House of Commons regarding the conduct of its members and to administer any ethical principles, rules or obligations established by the Prime Minister for public office holders.

The Ethics Commissioner is an Officer of Parliament appointed under section 72.01 of the *Parliament of Canada Act*. His Office does not deal with issues related to public service ethics, and does not take complaints from members of the public.

Since the Office began operations in May 2004, Dr. Bernard Shapiro has been the Ethics Commissioner. During the 38th Parliament, the Commissioner reported to two parliamentary committees. Under the *Standing Orders* of the House of Commons,⁽²⁾ his duties with respect to the *Conflict of Interest Code for Members of the House of Commons* (“the Members’ Code”) fall within the mandate of the House of Commons Standing Committee on Procedure and House Affairs. His duties with respect to the *Conflict of Interest and Post-Employment Code for Public Office Holders*, referred to as the Prime Minister’s Code, which applies to Cabinet ministers, parliamentary secretaries and other senior public office holders, including political staff of ministers and most Governor-in-Council appointees, fall within the mandate of the House of Commons Standing Committee on Access to Information, Privacy and Ethics.

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- (1) Bill C-4, An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence; received Royal Assent on 31 March 2004. Previously, the Ethics Counsellor, whose office was within Industry Canada, had been responsible for the administration of the *Conflict of Interest and Post-Employment Code for Public Office Holders*.
 - (2) See House of Commons, *Standing Orders*, section 108(3)(h), <http://www.parl.gc.ca/information/about/process/house/standingorders/toc-e.htm>.

The Ethics Commissioner's mandate under the Members' Code, which came into effect with the first sitting of the 38th Parliament on 4 October 2004, includes: the maintenance of the public registry of all Members' public disclosure summaries; the provision of written confidential opinions to Members; and the conduct of inquiries into any Member's alleged non-compliance with the Code's obligations. The Commissioner reports on the inquiries he conducts pursuant to the Members' Code, and makes annual reports to the House of Commons on his activities in relation to its Members.

The Ethics Commissioner's role in respect of public office holders, as set out in section 72.07 of the *Parliament of Canada Act*, includes the following:

- (a) to administer any ethical principles, rules or obligations established by the Prime Minister for public office holders;
- (b) to provide confidential advice to the Prime Minister with respect to those ethical principles, rules or obligations and ethical issues in general; and
- (c) to provide confidential advice to a public office holder with respect to the application to him or her of those ethical principles, rules or obligations.

The Act permits any parliamentarian to request, in writing, that the Ethics Commissioner investigate if the parliamentarian reasonably believes that a minister of the Crown, a minister of state or a parliamentary secretary has not observed the ethical principles, rules or obligations established by the Prime Minister for public office holders. Reports on such investigations must be made public, although some of the information obtained from the investigations must be kept confidential. The Act also requires the Ethics Commissioner to report annually on his or her activities to the Speaker of the House of Commons, who then tables the report in that House.

***CONFLICT OF INTEREST CODE FOR
MEMBERS OF THE HOUSE OF COMMONS***⁽³⁾

Members of Parliament are bound by the Members' Code, which is Appendix 1 to the *Standing Orders* of the House of Commons. The Code articulates several purposes, including that of maintaining and enhancing public confidence and trust in the integrity of

(3) House of Commons, *Conflict of Interest Code for Members of the House of Commons* (Appendix 1 to the *Standing Orders* of the House of Commons), <http://www.parl.gc.ca/information/about/process/house/standingorders/appa1-e.htm>.

Members, and a number of principles that are intended to guide Members in reconciling their private interests and public duties.

The Members' Code prohibits Members from voting or acting in a way that would further their own or others' private interests, and requires that their private interests be disclosed whenever a decision that would affect those interests is under consideration. They and their families must report to the Commissioner any travel or gifts valued in excess of specified limits. Members, and any corporations owned by them, are prohibited from entering into federal government contracts.⁽⁴⁾

All Members are required to file statements with the Commissioner disclosing the assets and liabilities belonging to themselves and their families. The Office of the Ethics Commissioner then prepares a disclosure summary based on each Member's statement, and the summaries are available for public review on the Commissioner's Web site.

Members of Parliament may request the Commissioner to offer a confidential opinion in respect of their obligations under the Code at any time. Also, any Member who is of the opinion that another Member has not fulfilled his or her obligations under the Code may request that the Ethics Commissioner conduct an inquiry into the matter. In conducting such inquiries, the Ethics Commissioner must operate in private and with due dispatch, and at all appropriate stages throughout the inquiry, the Ethics Commissioner must give the Member reasonable opportunity to be present and to make representations. In a report on an inquiry, the Commissioner may recommend sanctions, and must offer reasons for his conclusions and recommendations.

CONFLICT OF INTEREST AND POST-EMPLOYMENT CODE FOR PUBLIC OFFICE HOLDERS⁽⁵⁾

The Prime Minister's Code requires that, once they are appointed, public office holders must arrange their private affairs so as to prevent real, potential or apparent conflicts from arising. With limited exceptions, they must not: solicit or accept money or gifts; assist

(4) Section 18 of the Code provides that a Member may not have an interest in a partnership or in a private corporation that is a party to a contract with the Government of Canada "unless the Ethics Commissioner is of the opinion that the interest is unlikely to affect the Member's obligations under this Code."

(5) *Conflict of Interest and Post-Employment Code for Public Office Holders* ("the Prime Minister's Code"), http://www.parl.gc.ca/oec/en/public_office_holders/conflict_of_interest/docs/code_e.pdf.

individuals in their dealings with government in such a way as to compromise their own professional status; take advantage of information obtained because of their positions as insiders; and, after they leave public office, they must not act so as to take improper advantage of having held that office. Since 1994, information relating to the spouses and dependent children of ministers, secretaries of state and parliamentary secretaries has also been considered relevant.

Public office holders are bound by their obligations under the Code, although it does not have the force of law, because they are obliged to sign a document certifying that they will observe its provisions as a condition of holding office. Approximately 1,250 full-time public office holders, including not only the Prime Minister, ministers, ministers of state, parliamentary secretaries and ministers' exempt staff, but also full-time Governor-in-Council appointees including deputy and associate deputy ministers and heads of agencies, Crown corporations, boards, commissions and tribunals, and 2,200 part-time public office holders are bound by the Code.

The Code requires that public office holders, in order to reduce the risk of conflict of interest, should, depending on the asset or interest in question, use avoidance, a confidential report, a public declaration, divestment, or recusal. Divestment can include making an asset subject to a trust or management agreement. In relation to outside activities, a public office holder is not to engage in the practice of a profession, actively manage or operate a business or commercial venture, retain or accept directorships or offices in a financial or commercial corporation, hold office in a union or professional association, or serve as a paid consultant. The Code also deals with public office holders after they leave office, proscribing ministers for two years and others for one year from certain activities in order to ensure impartiality while in office and to avoid preferential treatment upon leaving office. Former ministers, senior public servants and designated ministerial staff may not act as consultant lobbyists, or accept employment as in-house lobbyists, for a period of five years after leaving public office.⁽⁶⁾

The Ethics Commissioner's duties are spelled out in section 5 of the Prime Minister's Code. He or she is to administer the Code and apply its conflict of interest compliance provisions to public office holders. Any information he or she receives is to be kept confidential until and unless a public declaration is made. Arrangements made by public office holders to reduce the risk of a conflict of interest must be approved, in the case of ministers of

(6) *Ibid.*, section 29(1).

the Crown, ministers of state and parliamentary secretaries, by the Prime Minister, in consultation with the Ethics Commissioner. In the case of all other public office holders, including the Prime Minister, approval must be obtained from the Ethics Commissioner. Once arrangements are completed, summaries and public declarations are posted in the public registry.

THE ETHICS COMMISSIONER AND THE 38th PARLIAMENT

During the 38th Parliament, Dr. Shapiro met many times with both the Standing Committee on Procedure and House Affairs and the Standing Committee on Access to Information, Privacy and Ethics. He completed and reported on three inquiries related to Members of the House of Commons, and one in relation to a public office holder,⁽⁷⁾ finding wrongdoing or inappropriate behaviour in three out of the four cases. In no case did the Commissioner recommend any particular sanction against the investigated individual, although in one case he noted that the public office holder in question had already resigned as minister.

In June 2005, the Commissioner issued annual reports with respect to both Codes for the fiscal year ending 31 March 2005. In October 2005, he presented another report entitled *Issues and Challenges 2005*, which, as its title indicates, addressed the issues and challenges faced by the Office in its first year of operation.⁽⁸⁾ In these reports, Dr. Shapiro identified some organizational challenges that had made his first year in office difficult. The creation of a new parliamentary office, although it inherited some expertise and resources from the former Ethics Counsellor's office in Industry Canada, posed significant organizational challenges. Very few of the public servants who had initially been seconded to the Ethics Commissioner's office accepted permanent employment there, which led to a loss of expertise and production for several months. However, the report concluded that the Office was fully operational.

In its first year in operation, the Office had discovered practical problems in the administration of the Codes, and the Commissioner proposed new policy approaches designed to improve its effectiveness. In other areas, he indicated that gaps or conflicts would need to be corrected by amendment of the *Parliament of Canada Act* or one of the Codes.

(7) The Grewal-Dosanjh, Smith, Grewal and Sgro Inquiries. All inquiry reports are available on the Commissioner's Web site: www.parl.gc.ca/oec.

(8) Office of the Ethics Commissioner, *Issues and Challenges 2005*, October 2005, http://www.parl.gc.ca/oec/en/media/annual_reports/reports/2005/Challenges2005web_EN.pdf.

Concerns were raised about the mechanisms under the Prime Minister's Code by which public office holders prevent real or perceived conflicts of interest, including the recusal process, compulsory divestment or more detailed disclosure. The Commissioner recommended that all instances of ministerial recusal should be made public. Also, he sought clarification that, under that Code, all public office holders could be examined by the Commissioner, as Members can be under the Members' Code.

The *Issues and Challenges* report suggested that the *Parliament of Canada Act* should be amended to include a provision clarifying the power of the Ethics Commissioner to examine all public office holders, either at the request of a parliamentarian or on the Commissioner's own initiative. The Commissioner also recommended that the government introduce legislation providing for appropriate legal sanctions for breaches of the post-employment provisions of the Prime Minister's Code.

In the areas governed by the Members' Code, the Commissioner made a number of procedural recommendations, and proposed that the requirement to report material changes in Members' assets, liabilities or outside activities within 30 days be removed from the Members' Code.

2006 ELECTION CAMPAIGN PROPOSALS

All five major political parties addressed ethics-related issues in the 2006 election campaign. The Conservative Party of Canada made a series of recommendations in its proposed "Federal Accountability Act" to increase the powers and broaden the role of the Ethics Commissioner, including empowering the Commissioner to impose fines for violations.⁽⁹⁾

The Liberal Party of Canada, in its election platform,⁽¹⁰⁾ referred to the creation in 2004 of the Office of the Ethics Commissioner, but offered no plans to alter its role.

Arguing that a lack of resources had prevented the Ethics Commissioner from imposing real controls on ministers during the 38th Parliament, the Bloc Québécois proposed in its 2006 platform that the budgets of Officers of Parliament and the Ethics Commissioner should

(9) Conservative Party of Canada, *The Federal Accountability Act: Stephen Harper's Commitment to Canadians to Clean up Government*, p. 11, <http://www.conservative.ca/media/20051104-Policy-Accountability3.pdf>.

(10) Liberal Party of Canada, *Securing Canada's Success*, pp. 75-76, http://www.liberal.ca/images/dir/PDFs/platform_e.pdf.

be determined by a parliamentary committee composed of one representative from each party represented in the House of Commons, supported by an expert panel and representation from the offices concerned.⁽¹¹⁾

The New Democratic Party, although it made a number of proposals relating to ethics and accountability in its 2006 platform, made no specific plans to change the role or the office of the Ethics Commissioner.⁽¹²⁾

The Green Party of Canada recommended replacing the current Ethics Commissioner with an independent Ethics Commission, which would report to Parliament, be appointed through a merit-based process and have strong powers to investigate government officials and lobbyists. It also recommended mandatory ethics training for all MPs and their staff.⁽¹³⁾

EXPECTATIONS FOR THE 39th PARLIAMENT

Given the consistent interest of parliamentarians and parliamentary committees, as well as the public at large, it can be anticipated that the role of the Ethics Commissioner will generate considerable attention during the coming Parliament. There may be proposals to amend the conflict of interest codes administered by the Commissioner, as well as amendments to the *Parliament of Canada Act*. The Commissioner himself raised a number of concerns in his *Issues and Challenges* report that will likely be considered in the coming months. Certainly, his reports on inquiries into the ethical conduct of Members and public office holders, as they appear, will continue to be closely monitored in Parliament and in the press.

(11) Bloc Québécois, *Heureusement, ici c'est le Bloc: Plateforme électorale, Campagne 2005-2006*, p. 26, http://www.bloc.org/archivage/plateforme_2005-2006.pdf.

(12) New Democratic Party of Canada, *Jack Layton: Getting Results for People*, <http://www.ndp.ca/ndp-drupal/files/platform-en-final-web.pdf>.

(13) Green Party of Canada, *Green Party of Canada: 2006 Election Platform*, p. 29, http://web.greenparty.ca/download/GPC_Platform_2006.pdf.