

CONFLICTS OF INTEREST AND ETHICS IN GOVERNMENT

BRIEFING NOTE: CANADA

I. Jurisdiction Overview:

Canada is a federal country with a central government and ten provincial and three territorial governments. In the federal Parliament, there is an elected lower house (the House of Commons) and an appointed upper house (the Senate). All provincial and territorial legislatures consist of unicameral elected chambers. Under Canada's parliamentary system of government, Cabinet members are appointed from amongst the members of the Legislature. Each level of government has its own legislation or conflict of interest code to deal with office holders at that level. Also, municipal governments have separate regulations. This note will focus on the applicable provisions at the federal level with reference as well to British Columbia and Ontario, Canada's most populous province.

II. Scope of Coverage of Conflict of Interest Provisions:

At the federal level, there is a general conflict of interest code for all members of Parliament (MPs). There is a new *Conflict of Interest Act* which went into effect in July 2007 which applies to the activities of cabinet ministers, their staff and other government appointees (referred to as "public office holders"). There is a separate Conflict of Interest Code for members of the Senate, the unelected Upper House in Canada's bicameral Parliament. Both British Columbia and Ontario have legislative conflict of interest codes that apply to members of the legislature as well as separate provisions for the public service. This note will focus only on the provisions for elected members of the federal and provincial legislatures, known as "members" of Parliament (MPs), of the Legislative Assembly (MLAs) or of the Provincial Parliament (MPPs). Each act places additional requirements on Cabinet ministers ("Ministers") because of the additional responsibilities, power and opportunities for conflicts of interest that accompany them. Under each regime, the Act is supervised by an independent parliamentary officer known as the "Commissioner". The powers and the independence of each Commissioner is an essential element of the efficacy of each regime.

The federal Act generally applies to actions of public officials which can benefit themselves or family members whereas the provincial Acts are less explicit in acknowledging benefits that can accrue to members' relatives as a result of the actions of members.

III. Prohibited Activities:

A. General Prohibition on Conflicts of Interest

The federal *Conflict of Interest Act* (herein after referred to as the "the federal Act") defines a conflict of interest as a situation where a public office holder "exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another

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person's private interests." Similar provisions exist in both the British Columbia and Ontario legislation as the definition and understanding of conflict of interest is generally shared across Canada. The British Columbia Act distinguishes between an actual conflict of interest and "an apparent conflict of interest" which exists where there is "a reasonable perception, which a reasonably well informed person could properly have, that the member's ability to exercise an official power or perform an official duty or function must have been affected by his or her private interest."

The federal Act establishes a general duty on every public office holder to arrange his or her private affairs in a manner that will prevent the public office holder from being in a conflict of interest. It bars a public office holder from making a decision or participating in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest. It specifically bars Ministers, junior ministers and parliamentary secretaries from debating or voting on questions in Parliament that would place him or her in a conflict of interest. The federal Act contains a general anti-avoidance provision which prohibits public office holders from taking any action that has as its purpose the circumvention of the public office holder's obligations under this Act. There are no like provisions in the British Columbia or Ontario legislation.

The federal Act prohibits public office holders from giving preferential treatment to any person or organization based on the identity of the person or organization that represents that person or organization.

The federal and the provincial Acts prohibit public office holders from using "inside information" obtained by virtue of his or her position as a public office holder and that is not available to the public to further or seek to further the public office holder's private interests or those of the public office holder's relatives or friends or to improperly further or to seek to improperly further another person's private interests.

The federal Act prohibits public office holders from using their positions to seek to influence a decision of another person so as to further their own private interests or those of their relatives or friends or to improperly further another person's private interests. There are similar provisions under the British Columbia and Ontario Acts.

Under the federal Act, public office holders may not allow themselves to be influenced by plans for, or offers of, outside employment.

B. Gifts

Under the federal and provincial Acts, public office holders or members of their families are not permitted to accept any gift or other advantage that might reasonably be seen to have been given to influence the public office holder in the exercise of an official power, duty or function. The federal Act exempts gifts received from relatives or friends and it is unlikely that the provincial regimes would be particularly concerned about this issue unless a particular conflict of interest arose because such gifts would not be considered

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connected directly or indirectly to the performance of public duties (e.g. anniversary gift from a spouse or birthday gift from a friend). All of the acts exempt gifts that are received as normal expressions of courtesy or protocol, or that are within the customary standards that normally accompany the public office holder's position. On this last point, however, under the federal Act, if the gift has a value of \$1,000 or more, it must be forfeited to the state. Under the British Columbia Act, if the gift exceeds \$250, it must be disclosed; in Ontario the threshold is \$200 (see further below on disclosure of gifts).

C. Travel

The federal Act prohibits most public office holders from accepting travel on non-commercial chartered or private aircraft for any purpose unless required in his or her capacity as a public office holder or in exceptional circumstances or with the prior approval of the Commissioner. The Ontario Act prohibits members from accumulating frequent flyer miles on government travel.

D. Contracts with Government

The federal Act prohibits Cabinet Ministers, junior ministers and parliamentary secretaries from knowingly being a party to a contract with a public sector entity under which he or she receives a benefit, other than a contract under which he or she is entitled to pension benefits. The Ontario Act has a similar provision for members. While the British Columbia Act does not have an explicit prohibition, it would be caught by the general prohibition on conflict of interest. The federal Act further prohibits these officials from having an interest in a partnership or private corporation that is a party to a contract with a public sector entity under which the partnership or corporation receives a benefit. An exception to these provisions can be granted if the Commissioner concludes that the contract or interest is unlikely to affect the exercise of the official powers, duties and functions of the public official.

The provincial Acts each contain prohibitions and restrictions on contracting with former Ministers. There is a general "cooling off period" during which they are generally prohibited from contracting with government (12 months in the case of Ontario; 24 months in the case of British Columbia). Former Ministers may never contract with the government or make representations to government respecting any matter that they were involved with during their government service.

E. Anti-Nepotism Provisions

The federal Act prohibits public officials from entering into a contract or employment relationship with his or her spouse, common-law partner, child, sibling or parent. It also prohibits ministers from allowing a public sector entity for which they are responsible from entering into a contract or employment relationship with these relatives. It prohibits all other public office holders from doing the same unless the contract or hiring takes place through the ordinary impartial administrative process in which the public office holder plays no part. Ministers are also prohibited from hiring the relatives of other

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Ministers or party colleagues (except for their own staff), except in accordance with an impartial administrative process in which the Minister themselves plays no part. Contracts for goods and services can be public sector entities to relatives on the same terms and conditions as to the general public.

F. Outside Interests

Under the federal Act, most public office holders are prohibited from engaging in other employment or the practice of a profession; managing or operating a business or commercial activity; continuing as, or becoming, a director or officer in a corporation or an organization; holding office in a union or professional association; serving as a paid consultant; or being an active partner in a partnership. It is permissible, however, for a public office holder to continue or to become a director or officer in an organization of a philanthropic, charitable or non-commercial character but special permission from the Commissioner is required - only if the Commissioner is of the opinion that it is not incompatible with his or her public duties as a public office holder. While public office holders may continue political activity, they are not permitted to personally solicit funds from any person or organization if it would place the public office holder in a conflict of interest.

Under the provincial Acts, only Ministers are prohibited from engaging in outside employment, the practice of a profession, managing a business or holding an office or directorship (unless it is in a social club, religious organization or political party).

G. Holding of Certain Assets

Under the federal Act, certain public office holders are prohibited from holding “controlled assets” which are assets whose value could be directly or indirectly affected by government decisions or policy. These include such assets as publicly traded securities of corporations and foreign governments, whether held individually or in an investment portfolio account such as, but not limited to, stocks, bonds, stock market indices, trust units, closed-end mutual funds, commercial papers and medium-term notes; self-administered registered retirement savings plans, self-administered registered education savings plans and registered retirement income funds composed of at least one asset that would be considered controlled if held outside the plan or fund; commodities, futures and foreign currencies held or traded for speculative purposes; and stock options, warrants, rights and similar instruments. These public office holders must divest themselves of such controlled assets unless they take steps as outlined in Part IV below.

The Ontario Act prohibits Ministers from carrying on a business through a partnership or sole proprietorship and from holding or trading in securities, stocks, futures or commodities. The British Columbia Act only restricts Ministers from carrying on a business. A Minister can comply with these restrictions by putting their assets into a blind trust, as is described at length in Part IV below.

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IV. Affirmative Requirements:

A. Duty of Disclosure and Recusal

Under the Federal and provincial Acts, the relevant public officials have a general duty to recuse themselves from any discussion, decision, debate or vote on any matter in respect of which he or she would be in a conflict of interest and to declare the general nature of the conflict.

B. Duty of Disclosure

1. Confidential Disclosure Report

Under the federal Act, certain public office holders are required to file a confidential report to the Commissioner when they assume office that contains a description of the following:

- all of their assets and liabilities and their values; a description of all income received during the previous 12 months and all income expected to be received in the forthcoming 12 months;
- all employment, business or commercial activity; service as a director or officer in a corporation or an organization; offices held in a union or professional association; work as a paid consultant; or active partner in a partnership, engaged in the two-year period before the day of appointment;
- all involvement in philanthropic, charitable or non-commercial activities in the two-year period before the day of appointment;
- all activities as trustee, executor or liquidator of a succession or holder of a power of attorney in the two-year period before the day of appointment; and
- any other information that the Commissioner considers necessary to ensure that the public official is in compliance with this Act.

For each of the above items, Ministers must also include in the report information for each member of his or her family. All public office holders subject to this reporting requirement also have to report any benefits that they or any members of their family are entitled to receive in the next 12 months as a result from contracts with government. Public office holders subject to this reporting requirement have to file a supplementary report within 30 days of a material change to any matter.

Similar provisions apply to all members of the relevant legislature under the British Columbia and Ontario Acts for both initial and annual disclosure reports.

Under the federal and the provincial Acts, the members must meet with the Commissioner to review their disclosure report after the initial filing and annually. The purpose of the meeting is to review any deficiencies and recommend any steps to ensure avoidance of conflicts of interest and compliance with the act. It is a prelude to the public disclosure of part of the report.

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2. Disclosure of Gifts

Under the Federal Act, certain public office holders must disclose gifts that they or their family members receive if the gifts exceed \$200 from any one source other than relatives and friends in a 12-month period. Similar provisions exist for members under the British Columbia Act (for gifts of \$250 or more) and under the Ontario Act (for gifts of \$200 or more).

3. Disclosure of Offers of Employment

The Federal Act requires certain public office holders to disclose in writing to the Commissioner within seven days all firm offers of outside employment. They must also disclose their acceptance of the offer in writing to various persons.

4. Disclosure and Public Declaration of Recusal

The federal Act requires public officers to make a public declaration within 60 days after having recused themselves to avoid a conflict of interest. The declaration must provide sufficient detail to identify the conflict of interest that was avoided. Under the British Columbia legislation, such information is filed with the Clerk of the Legislative Assembly and available for public review.

5. Disclosure and Public Declaration re Financial Matters

Under the federal Act, certain public office holders must make a public declaration of their assets that are not controlled (i.e. restricted) or exempt (personal property etc.). Similarly, certain public officials must make a public declaration regarding their liabilities of \$10,000 or more that provides sufficient detail to identify the source and nature of the liability, but not the amount. In both cases, they must do so within 120 days of their appointment. Under the provincial Acts, limited financial information from members' confidential disclosure statements is then publicly disclosed.

6. Other Public Declarations

Under the federal Act, certain public office holders must make similar public declarations regarding outside activities, gifts, and travel that parallel the disclosure (to the Commissioner) requirements set out in Part III above. Similarly, public disclosure statements under the provincial Acts include gifts.

C. Duty to File a Summary Statement

Under the federal Act, each reporting public office is required to file a Summary Statement with the Commissioner containing a description of each controlled asset and how they have divested it; the steps taken to recuse oneself from particular matters; and the steps taken to comply with any other order of the Commissioner.

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D. Divestment and Blind Trusts

Under the Federal Act, when a reporting public office holder takes office, they have 120 days to divest all controlled assets either by selling them at an arm's length transaction or by placing them in a blind trust.

The terms of a blind trust must provide that:

- the assets to be placed in trust shall be registered to the trustee unless they are in a registered retirement savings plan account;
- the reporting public office holder shall not have any power of management or control over the trust assets;
- the trustee shall not seek or accept any instruction or advice from the reporting public office holder concerning the management or the administration of the assets;
- the assets placed in the trust shall be listed on a schedule attached to the instrument or contract establishing the trust;
- the term of any trust shall be for as long as the reporting public office holder who establishes the trust continues to hold his or her office, or until the trust assets have been depleted;
- the trustee shall deliver the trust assets to the reporting public office holder when the trust is terminated;
- the trustee shall not provide information about the trust, including its composition, to the reporting public office holder, except for information that is required by law to be filed by the reporting public office holder and periodic reports on the overall value of the trust;
- the reporting public office holder may receive any income earned by the trust, and add to or withdraw from the capital funds in the trust;
- the trustee shall be at arm's length from the reporting public office holder and the Commissioner is to be satisfied that an arm's length relationship exists;
- the trustee must be (a) a public trustee; (b) a public company, including a trust company or investment company, that is known to be qualified to perform the duties of a trustee, or (c) an individual who may perform trustee duties in the normal course of his or her work; and
- the trustee shall provide the Commissioner, on every anniversary of the trust, a written annual report verifying as to accuracy the nature and market value of the trust, a reconciliation of the trust property, the net income of the trust for the preceding year and the fees of the trustee, if any.

Similar but less elaborate provisions exist under both the British Columbia and Ontario Acts. Under the British Columbia Act, the Commissioner must approve the provisions of the trust, the trustees must be persons who are at arm's length with the member and approved by the Commissioner, the trustees are prohibited from consulting with the member regarding the management of the trust property and the trustees must provide the Commissioner with a confidential report within 60 days of establishing the trust and annually thereafter. The Ontario Act contains separate trust provisions for passive

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investments (stocks, securities, commodities, etc.) and for active businesses such as partnerships or sole proprietorships. The Ontario Act contains the same requirements as the British Columbia Act with the addition of mandating that the trustees provide the member with sufficient information to enable the member to complete necessary tax returns and in the case of a passive investment trust, the member may direct the trustees to liquidate all or part of the trust and pay over the proceeds to the member at any time. In the case of a trust set up to manage an active business, the member is entitled to be reimbursed for all the costs associated with this trust, but not for those in connection with a passive investment trust.

Under the federal Act, general investment instructions may be included in a blind trust instrument or contract, but only with the prior approval of the Commissioner. The instructions may provide for proportions to be invested in various categories of risk, but may not be industry-specific, except if there are legislative restrictions on the type of assets that a public office holder may own. However, the federal Act explicitly prohibits the giving of any oral investment instructions regarding a blind trust.

The federal Act requires the public office holder to provide the Commissioner with a confirmation of sale or a copy of a contract or instrument establishing the blind trust. The Commissioner is required to keep confidential all information provided by a reporting public office holder relating to a divestment, except the fact that a sale has taken place or that a trust exists.

E. Disclosure of Spending / Expenses

Separate legislation exists under both the federal and provincial regimes mandating disclosure of the spending on expenses by public officials in the executive branch of government. The trend across Canada is towards greater regulation and public disclosure in this area.

F. Disclosure of Private Sector Contacts / Lobbying

Additional requirements exist under both the federal and provincial regimes mandating the registration of lobbyists including the declaration of on whose behalf they are lobbying and what government entities they are lobbying. The trend in Canada is towards greater regulation and public disclosure in this area.

V. Post-Employment Prohibitions

The federal Act contains extensive post-employment restrictions. No former reporting public officer holder can contract with a government entity that they had direct and significant official dealings with for a period of one year from leaving office. Neither can they make representations to any such government entity for one year. Former ministers are prohibited from making representations to any current Minister who was a cabinet colleague while they were in office. For former Ministers, all of the above restrictions are in place for two years.

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As set out above, the provincial Acts each contain prohibitions and restrictions on contracting with former Ministers. There is a general “cooling off period” during which they are generally prohibited from contracting with government (12 months in the case of Ontario; 24 months in the case of British Columbia). Former Ministers may never contract with the government or make representations to government respecting any matter that they were involved with during their government service.

VI. Enforcement

Each Act is overseen by an independent official. Under the federal Act, this is the Conflicts of Interest and Ethics Commissioner. Under the Ontario Act, it is the Integrity Commissioner and under the British Columbia Act the person is simply known as “the Commissioner”. Under each Act, the Commissioner has significant powers.

Under both provincial Acts, any member can request that the commissioner give an opinion to them regarding their obligations under the Act. Such advice is confidential. Under the federal Act, the Commissioner can provide confidential advice to the Prime Minister respecting the application of the Act to any individual office holders. The Commissioner can also provide confidential advice to individual public officer holders respecting their obligations under the Act.

Under both provincial Acts and the federal Act, any member who has reasonable and probable grounds to believe that a provision of the Act has been contravened can request that the Commissioner inquire into the matter. Under the British Columbia Act, any member of the public who has reasonable and probable grounds to believe that a provision of the Act has been contravened. Under both provincial Acts, the Legislative Assembly itself can request that the Commissioner provide an opinion on the compliance of a member with any provision of the Act. Under the British Columbia Act, the Executive Council (the Cabinet) may make a referral regarding a Minister.

Under both provincial Acts and the federal Act, the Commissioner may conduct an inquiry and has the power to summon witnesses and produce documents. The Commissioner also has the power to punish for contempt.

Under both provincial Acts the Commissioner makes an annual report which must be tabled in the Legislative Assembly. In practice, all Commissioners produce annual reports which are publicly available on their websites.

Under the Ontario Act, if the Commissioner determines that there are reasonable and probable grounds to believe that there has been a contravention of another Act or of the Criminal Code, the Commissioner “shall immediately refer the matter to the appropriate authorities and suspend the inquiry until any resulting police investigation and charge have been finally disposed of, and shall report the suspension to the Speaker [of the Legislature].” A similar provision exists under the federal Act.

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VII. Sanctions

Under the provincial Acts, the Commissioner does not impose penalties but makes recommendations regarding sanctions to the Legislative Assembly. The Commissioner can recommend to the Legislative Assembly that the member be reprimanded, be suspended for a period, or that the member's seat be declared vacant (i.e. that the member be immediately removed from office). Under the British Columbia Act, the Commissioner can also recommend that a fine not exceeding \$5,000 be imposed.

Under the federal Act, the Commissioner may impose "Administrative Monetary Penalties" not exceeding \$500 for violations of certain provisions of the Act.

In effect, the greatest sanction that the Commissioners have at their disposal is political condemnation. If the Commissioner finds that a member has violated the Act, this may result in a political price on the affected member.

VIII. References:

Federal:

Conflict of Interest Act, S.C. 2006, c.9, s. 2, online: <http://laws.justice.gc.ca/en/showtdm/cs/C-36.65>

Conflict of Interest Code for Senators, online: <http://sen.parl.gc.ca/se0-cse/PDF/Code-e.pdf>

Office of the Conflict of Interest and Ethics Commissioner, online: <http://ciec-ccie.gc.ca/>

British Columbia:

Members' Conflicts of Interest Act, R.S.B.C. 1996, c. 287, online: http://www.bclaws.ca/Recon/document/freeside/--%20M%20--/Members%27%20Conflict%20of%20Interest%20Act%20%20RSBC%201996%20%20c.%20287/00_96287_01.xml

Office of the Conflicts of Interest Commissioner, online: <http://www.gov.bc.ca/oci/>

Ontario:

Cabinet Ministers' and Opposition Leaders' Expenses Review and Accountability Act, 2002, S.O. 2002, c. 34, sched. A, online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_02c34_e.htm

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Lobbyists Registration Act, 1998, S.O. 1998, c. 27, Sched., online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_98l27_e.htm

Members' Integrity Act, 1994, S.O. 1994, c. 38, online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_94m38_e.htm

Public Service of Ontario Act, 2006, S.O. 2006, c. 35, Schedule A, online: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_06p35_e.htm

Conflict of Interest Rules for Public Servants (Ministers' Offices) and Former Public Servants (Ministers' Offices), O. Reg. 382/07, online: http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_070382_e.htm

Office of the Integrity Commissioner, online: <http://www.oico.on.ca>