Public Duties and Private Interests: The Special Joint Committee on Conflict of Interest

by Barbara Laine Kagedan

Reconciling the public duties and private interests of Members of Parliament is a task which has proven in the past to be as difficult as it is important. A Special Joint Committee of the House of Commons and the Senate recently studied the issue and recommended that a completely new system be instituted to address conflicts of interest. The Committee's recommendations are the subject of this article.

Recent years have seen an exponential rise in the number of incidents in which a Member of Parliament, usually a Cabinet Minister, has abused his or her position of public trust for personal ends. These incidents cast a pall of suspicion on all who enter public life and contribute to the emerging crisis of confidence in our government institutions.

Despite its signal importance, the problem has defied solution. The question how to regulate conflicts of interest among elected representatives has perplexed governments at all levels, in diverse countries, for several decades. A myriad of solutions have been proposed and tried in different jurisdictions, with varying levels of success. In Canada, several studies were conducted over the last three decades, and at least two different rounds of legislation prepared and sent to the House of Commons. To date, no legislation has been passed. In late 1991, a Special Joint Committee of the House of Commons and Senate was established to study the issue and recommend a solution to apply to all Members of both Houses of Parliament, including Cabinet Ministers and Parliamentary Secretaries. The Committee's report was tabled in June, 1992. Its recommendations are the subject of this article.

In order best to understand the recommendations of the Special Joint Committee on Conflict of Interests, an overview of the current state of conflict of interest regulation at the federal level in Canada may be useful.[1]

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To date, the only rules governing the conduct of all Members of Parliament in matters of conflict of interest have existed in the *Criminal Code*, the *Parliament of Canada Act*, and the standing rules of each House of Parliament. All of these provisions have existed in substantially their current form for over seventy-five years; the provisions of the Standing Rules are based on a British House of Commons rule that has existed since at least the 17th century.

The *Criminal Code* addresses conduct that is criminal, that is where a Member knowingly and intentionally abuses his or her position, for example, accepting a bribe, influence-peddling or committing breach of trust. In its report, the Special Joint Committee noted certain gaps and inconsistencies in the *Criminal Code* provisions relating to Members of Parliament, and recommended amendments to remedy those defects.

The *Parliament of Canada Act* is primarily focused on regulating Members' ability to hold government contracts, and especially contracts to build a public work. At the time this legislation was drafted these contracts were the major avenue of potential abuse and personal profit by Members of Parliament. The role of government and Parliament in individuals' daily lives has of course greatly expanded over the years, and with it the potential for Members to personally benefit from their public position. At present, there is nothing in the *Parliament of Canada Act* to prohibit or in any way regulate a Member who seeks to contract with the government for anything other than the building of a public work. The Member must use a corporate veil, and not seek to contract in his or her individual capacity, but these days that is merely a technical barrier, easily overcome.

The standing rules of each House prohibit Members from voting on any question in which they have a pecuniary interest not available to the general public. While broadly phrased, and potentially a useful tool to resolve a conflict of interest that has arisen, these standing rules have been interpreted in such a way as to reduce their import virtually to insignificance.

Even this sketchy review of existing provisions demonstrates that the current regime does not provide any assistance to Members in determining what they can and cannot do when a conflict arises between their private interests and public duties. Against this background, several studies were commissioned over the years to recommend appropriate changes to the system.

In July 1973, Allan MacEachen, then-President of the Privy Council, tabled a Green Paper entitled *Members of Parliament and Conflict of Interest*. That Green Paper was the first — and until recently, the only — attempt to formulate rules to govern all Members of Parliament, not only Cabinet Ministers. Its primary focus still was on government contracts as the major avenue by which Members could seek to benefit themselves financially. Among other things, the Green Paper recommended requiring periodic disclosure by Members of certain interests, primarily related to government contracts.

The Green Paper was studied by committees of the House of Commons and Senate, but neither committee report was ever debated in Parliament. In 1978, bills to implement a number of the Green Paper recommendations were tabled in two successive sessions of Parliament.[2] Both died on the Order Paper.

Not surprisingly, significantly greater attention was devoted to conflict of interest rules for Cabinet Ministers. Several sets of guidelines were put in place by different governments over the years, beginning with Prime Minister Pearson's "Code of Ethics" put forward on November 30, 1964. This was succeeded by guidelines issued on December 28, 1973 by Prime Minister Trudeau, which in turn were replaced by Prime Minister Clark with a new set on August 1, 1979. These guidelines were again altered when Trudeau returned to power and issued a set dated April 28, 1980.

In 1983, Prime Minister Trudeau established a Task Force under the joint chairmanship of Michael Starr and Mitchell Sharp to examine the policies and practices that should govern the conduct of Ministers, Parliamentary Secretaries, exempt staff, Governor-in-Council appointees and public servants. The Report of the Task Force, entitled *Ethical Conduct in the Public Sector*, was presented in 1984 and quickly became a leading study of the issue. It provided an in-depth analysis of the principles underlying ethical conduct regulation for the public sector, and derived a series of basic rules for the levels of office holders within its mandate. (Private Members of Parliament were not part of the mandate of the Task Force.) The Task Force stated three "touchstones" to evaluate a conflict of interest system: the rules must be simple, fair and reasonable.

The Task Force drafted an *Ethics in Government Act*, which it appended to its report. It contained a Code of Ethical Conduct, and would have established an independent Office of Public Sector Ethics, with an Ethics Counsellor who would advise on the interpretation and application of the Code, and where necessary investigate alleged breaches.

In September 1985, Prime Minister Mulroney issued a *Conflict of Interest and Post-Employment Code for Public Office Holders* (the "Conflict of Interest Code"), which incorporated a number of the Task Force's recommendations. It did not establish an independent office for the Code's administration; instead, responsibility for its application was given to the Office of the Assistant Deputy Registrar General (the ADRG), the senior civil servant who had been administering the Trudeau Guidelines. The Code was significantly more detailed in its regulation of conduct than the one recommended by the Task Force.

Several well-publicized scandals involving Cabinet Ministers in the early years of the Mulroney government demonstrated that the Conflict of Interest Code was not adequately addressing the issue. In particular, the inquiry conducted by former Chief Justice of Ontario William Parker into activities of Sinclair Stevens illuminated a number of problems with the Code and the system in force for dealing with conflict of interest matters.[3] In response to Parker's report, the Mulroney government prepared legislation to establish a new conflict of interest system, that would apply this time to all Members of Parliament, not only Cabinet Ministers and Parliamentary Secretaries. This legislation died on the order paper of several successive sessions of Parliament, until ultimately it was re-introduced as Bill C-43 and given first reading on November 22, 1991 in the House of Commons. At that point, a Special Joint Committee was established and the Bill passed to that Committee for pre-study.

The Special Joint Committee on Conflict of Interests

The Special Joint Committee was allotted an unusually large number of Members — 21 — with 14 Members from the House of Commons and 7 from the Senate. Under the joint chairmanship of Senator Richard J. Stanbury and Don Blenkarn, M.P., the Committee included representatives of each of the three major political

parties, as well as former Cabinet Ministers and former and current Parliamentary Secretaries. Several of its Members had devoted substantial study to the issue of conflict of interest regulation at either the provincial or federal level. The Committee included Patrick Boyer, former Executive Director of the Starr-Sharp Task Force; Michael Breaugh, who as a Member of the Ontario legislature had chaired the committee that drafted what became the *Ontario Members' Conflict of Interest Act, 1988*; and Don Boudria, who had served as the Liberal party critic on the issue for many years.

The mandate of the Special Joint Committee was unusual. It was to study and report not simply on the Bill, but rather on "the subject matter" of Bill C-43. The Committee was provided significant latitude for its report. It was authorized to report Bill C-43, with or without amendments; propose an entirely new Bill; or simply propose principles to be later embodied in legislation. Ultimately, the Committee prepared an entirely new Bill, recommended for incorporation as a new Part of the *Parliament of Canada Act*, which it submitted to Parliament together with a substantive report on its conclusions.

The fundamental task of the Committee was to design a system that would ensure that Members of Parliament (including Cabinet Ministers and Parliamentary Secretaries) always act in the public interest, and furthermore, are seen always to act in the public interest. The Committee recognized that one of the greatest dangers to Parliament is the growing public perception, based on the actions of a few politicians, that all politicians are dishonest or unethical. To address this perception, it would not be sufficient to ensure that in fact, Members act ethically; they must be publicly seen to be acting ethically.

The easiest way to guarantee that no conflict of interest problem arises would be to require all Members of Parliament to sell all their assets and interests, pay off all loans and other liabilities, sever all ties to any associations, businesses, professional or other occupations, and cut themselves off entirely from family, friends and business associates. This would effectively ensure that each Member is not motivated by personal interests when fulfilling a public duty. (Indeed, when Plato designed his ideal republic, he stipulated that all members of the guardian class, from whom the rulers were to be drawn, must be prohibited from owning private property. Plato recognized, in the 4th century B.C., that conflicts of interest are unavoidable insofar as the rulers are permitted to participate in the society over which they govern.)

To state the solution is to show its impossibility. As with Plato's Republic, the utopian is also the unattainable. To state the most obvious problem, if all Members had to pay off any and all outstanding loans and satisfy all other liabilities, this would restrict membership in Parliament to the wealthy few; a restriction that is patently unacceptable.

More importantly, however, as emphasized in the Committee's report, requiring Members to divest themselves of all assets and interests is not necessarily desirable. The Canadian political system, in contrast to that of the United States, is not comprised even primarily of "professional" politicians. To the contrary, it prides itself on its mix of individuals with diverse backgrounds, reflective of the Canadian population at large. The Committee reiterated throughout its report that one of its fundamental goals was to permit this diversity within Parliament to continue, encouraging not only professional politicians to run for office, but also "citizen-politicians", individuals who enter public life after enjoying successful, active lives, whether in the professions, business or other occupations. The Committee stated in its Report that Parliament must not be an ivory tower, insulated or divorced from the reality for which it legislates. As Co-Chairman Don Blenkarn noted, it should not be a Parliament comprised solely of "preachers and teachers and welfare widows."[4]

A significant concern underlying the Committee's recommendations was that the system should not dissuade capable and talented individuals from running for public office. Electoral politics is a risky business. Again in contrast to the United States, there is a very high turnover of Members of the Canadian House of Commons. If a future Senate is also elected, then similar considerations will apply there, too. Members do not even know when an election will be held (except within very broad parameters). A Member can thus very easily find him or herself suddenly back in the private sector. A conflict of interest regime that effectively requires a Member to sever all ties with his or her former private sector life would cause serious hardship once the public service ends. This alone could serve as a powerful deterrent to someone — especially someone with dependants — entering public life.

Finally, particularly insofar as the system applies to private Members as well as Cabinet Ministers, it must recognize and provide for Members fulfilling their fundamental duties to their constituents. It is not uncommon for a Member to be elected by a constituent precisely because that Member shares interests and concerns with the constituent. To require a Member to divest of those interests and ignore the concerns clearly would defeat his or her very purpose in being in Parliament.

The Committee recognized that insofar as Members may continue to be active in the "outside world" — owning property, holding assets, maintaining business interests — then there will be times when their public duties may affect their private interests: a classic conflict of interests. Having decided that it would be both inappropriate and impossible to isolate Members from the outside world, such conflicts of interest are unavoidable. The Committee therefore concluded that what is important is not to prohibit conflicts of interest (an aspiration that could not be sustained), but rather to establish rules and mechanisms that will ensure that all such conflicts are, and are always seen to be, resolved in the public interest.

The Committee decided that a three-part solution is required:

- appointment of an independent officer to advise and guide Members as to what is and is not proper behaviour, and as to any steps that should be taken to ensure the Member conforms to the law;
- full public disclosure of all interests, assets and liabilities of the Member and the Member's spouse, as well as certain other family members, so that the public can see that the Member is always acting properly; and
- establishment of clear rules stating what is and is not proper in various circumstances, and the procedures that must be followed when problems arise.

These were the major recommendations contained in the Committee's report, each of which is integral to the effective operation of the whole regime. Each will be discussed in detail below.

The Office of the Jurisconsult

One of the most important recommendations of the Committee was that an independent office be created, called the office of the Jurisconsult, to advise and assist Members of Parliament in ensuring that their obligations under the legislation are fulfilled.[5]

As discussed above, Cabinet Ministers and Parliamentary Secretaries (not private Members) presently have access to the office of the ADRG for guidance as to the appropriate measures to take in order to comply with the existing Conflict of Interest Code. The ADRG does not have any powers of investigation or enforcement. Issues of non-compliance therefore remain within the political forum. The office is not independent; the ADRG is a civil servant. It has been criticized for adopting at times a legalistic or formalistic approach to issues of conflict of interest, sometimes preferring "black-letter" compliance mechanisms (for example, filing a letter promising no unethical conduct in certain circumstances), rather than substantively examining a situation and deciding how that situation should best be addressed to ensure it can be seen that there is no unethical conduct.

Private Members of Parliament have no office to which they can turn for clear guidance as to whether certain conduct or activities would pose a problem. Members have been able to seek advice from the respective offices of the law clerks and legal counsel to each House of Parliament. However, as representatives from those offices testified, their advice is in no way binding, either on the Member or on anyone who would adjudicate any allegation of impropriety. The law clerks and legal counsel can only recommend what they believe the Act to require in any circumstance; that opinion is no different from a legal opinion obtained from any lawyer, whether in the private or public sector. As the Assistant Law Clerk and Parliamentary Counsel to the Senate testified, such advice of counsel can be cold comfort to a Member if the court disagrees and finds the Member violated his or her obligations.[6]

The role of the Jurisconsult, as envisaged by the Committee, would be significantly different. The Jurisconsult would be an independent officer of Parliament. The Committee stressed in its report that it is crucial the Jurisconsult be someone "of impeccable integrity, stature in the community, and basic common sense." The Jurisconsult would serve as confidential advisor to Members of Parliament; he or she would also investigate alleged breaches of the rules, and ultimately recommend appropriate sanctions to Parliament. Finally, the Jurisconsult's advice would be binding on any subsequent investigation, so that even if it is later decided that the Jurisconsult's advice was wrong, that Member would not be made to suffer for the Jurisconsult's error.

The advisory role would operate at two levels. First, when a Member is elected to Parliament, and at least annually thereafter, each Member would be required to file an extensive statement with the Jurisconsult, detailing all the interests, assets and liabilities held by the Member, the Member's spouse and certain other defined family members. The Jurisconsult would review those statements and then advise the Member if any steps need be taken with respect to any of those interests, assets or liabilities in order to enable the Member to fulfil his or her obligations under the law. For example, the Jurisconsult may advise a Member that in order to fulfil certain ministerial or other responsibilities, a particular asset or interest should be sold or placed in a trust on terms and conditions specified by the Jurisconsult. The Jurisconsult would then assist each Member in the

preparation of the public disclosure statements, discussed below.

Once a Member has made the required disclosure to the Jurisconsult, has taken any further steps recommended by the Jurisconsult to ensure that the obligations under the Act can be fulfilled, and filed the public disclosure statement, then the Jurisconsult will provide a written certificate to the Member, confirming that the disclosure obligations have been satisfied. If subsequently an issue is raised whether a particular asset or interest was properly disposed of, or appropriately placed in a trust, and those steps were taken at the direction of and in accordance with recommendations by the Jurisconsult, then the Member can rely on the certificate to demonstrate his or her compliance with the Act.

The second advisory role of the Jurisconsult is to assist Members as issues of possible conflicts of interest arise during their term in Parliament, or their tenure as Minister or Parliamentary Secretary. This is likely the most valuable role of the Jurisconsult for most Members. Members would be able to request the Jurisconsult, in writing, to give an opinion and recommendations on "any matter respecting any obligation of the Member under this Act". The proposed Bill provides explicitly that any such opinion is binding on the Jurisconsult in the event of a subsequent investigation. The opinion and recommendations would be confidential to the Member, and could only be made public by the Member or with the Member's written consent. Thus, a Member is encouraged to turn to the Jurisconsult and openly confide in him or her, knowing that the opinion cannot be used against the Member without the Member's consent. Conversely, if the Member follows the advice given, he or she can then be assured that there has been no contravention of the Act.

Models for these provisions can be found in the Quebec, Ontario and British Columbia regimes, each of which provides for an independent officer to advise and assist Members in interpreting and applying the respective conflict of interest rules. In Quebec and British Columbia, the statutes each explicitly provide that advice by the Jurisconsult (for Quebec) or Commissioner (for British Columbia) is binding for all purposes of the Act; in Ontario, while not explicit in the Act, this has effectively been the case.[7] In all cases, the witnesses who testified before the Committee were unanimous that the independent officer has been invaluable in assisting Members to avoid problems, and in addressing those problems that have arisen. Journalists who have followed the issue in Quebec testified before the Committee that since the measures were introduced, there have been few if any major cases of conflict of interest in that province.[8]

The Jurisconsult would also be given an investigative role under the Committee's proposal, as well as something of an adjudicative one. Whether the same person can properly advise someone on his or her obligations under an Act, and then investigate that person concerning those same obligations, raises interesting questions. Traditionally a confidential adviser ought not then to sit in judgment on the person he or she advised.

The Quebec Jurisconsult specifically stated before the Committee that he believes an investigative role might undermine the confidence placed in him by the Members of the National Assembly. (In Quebec, unlike the other Canadian provinces that have such an independent adviser, the Jurisconsult only advises; he does not also investigate alleged breaches, nor does he recommend sanctions.)

This issue was explored by Committee Members in hearings with the Commissioners from Ontario and British Columbia, and the designated adviser in New Brunswick. The Committee concluded that this combination of roles, while unusual, appears to work satisfactorily in each of these jurisdictions. Furthermore, it became clear that the knowledge that the Jurisconsult will be the one to investigate alleged breaches adds considerable force to any advice given by the Jurisconsult to the Member. As drafted, no Member is bound to follow the Jurisconsult's advice, which is simply a recommendation of a way to avoid possible problems. However, each Member would be well aware that if he or she fails to follow the advice, and problems in fact arise, the person conducting the investigation will be the Jurisconsult.

As proposed, the Jurisconsult is given discretion to initiate an investigation upon receiving a written request from a Member, or on the Jurisconsult's own initiative. The Jurisconsult would be required (no discretion) to initiate an investigation when requested to do so by the Prime Minister concerning a Minister or Parliamentary Secretary, or by either House of Parliament concerning a Member from that House.

The ability of any Member or the Jurisconsult alone to initiate an investigation should ensure that alleged breaches of the Act are properly investigated, and not covered up within the political structure. This assumes, as was repeatedly emphasized by the Committee in its Report, that the Jurisconsult is someone of impeccable integrity, who commands the respect of the public at large as well as of the Members. Discretion is given the Jurisconsult to vet any such request from a Member, to ensure that the complaint procedure is not abused with

sham or frivolous complaints brought solely for political purposes. The Ontario Commissioner, who has the same powers as would be given the Jurisconsult in this regard, testified that as a matter of practice he has asked that any Member who wishes to raise a complaint about another Member first raise it with the complaining Member's party caucus, to see if there is any merit to the complaint. This appears to work well in disposing of complaints that are completely devoid of merit.[9]

If a Member of the public, such as a journalist, believes that a matter should be investigated, then he or she could raise the issue either directly with the Jurisconsult, who could then initiate the investigation, or the matter could be raised with a Member of Parliament, who could then write the Jurisconsult.

The draft Bill requires the Jurisconsult to issue the report on the investigation no later than 90 days after the inquiry is commenced. This is intended to ensure that protracted litigation-like proceedings are avoided, with the high legal fees and extensive bureaucratic machinery that usually attends such drawn-out proceedings.

The report itself would be given to the Member, his or her party leader, and the Speaker of the House where the Member sits. Where the Member concerned is a Minister or Parliamentary Secretary, a copy would also be given to the Prime Minister. The Jurisconsult would include in the report a recommendation for a sanction, where the finding is that the Member breached an obligation under the Act. The ultimate disposition of the report would rest with the House in which the Member sits, since Parliament is and must remain master of its Members. The proposed bill sets out time limits to ensure the Jurisconsult's report is both tabled and addressed without delay.

The proposal sets out a spectrum of possible sanctions, ranging from a reprimand, to an order that the Member pay compensation or make restitution, to an order that the Member be suspended from the House with or without pay for a specified period, and ultimately to an order that the Member lose his or her seat. These sanctions are more detailed than those in place in certain of the comparable provincial legislation. For example, in Ontario the sanctions go from the mild — a reprimand — to the draconian — a declaration that the Member's seat is vacant — with nothing in between.

The role of the Jurisconsult as proposed by the Special Joint Committee is significantly different from the regime that would have been established by Bill C-43. Among other things, Bill C-43 would have split these same responsibilities between a three-person Conflict of Interests Commission, which would have possessed the advisory and investigative functions, and a Registrar of Interests, an officer of the Commission, who would have supervised the disclosure by Members and possibly would have acquired additional functions as delegated by the Commission. The Bill anticipated the appointment of two Deputy Registrars of Interests, as well as other officers and employees to carry out the Registrar's functions.

The Special Joint Committee emphasized in its Report its wish that any conflict of interest regime not give birth to another large government bureaucracy. Each of the provincial conflict of interest offices have managed successfully with one independent advisor supported by a small staff (usually one person). While the size of the combined House of Commons and Senate may make it impossible to keep the federal office as small as the provincial ones, a small office is clearly the recommended goal. It keeps the cost low; reinforces Members' trust that confidential information will be kept confidential; improves the rapport between a Member and the adviser, which rapport is essential to encouraging open communication and thus proper working of the system; and ensures that the adviser will have the necessary overview of all the facts of each case. Finally, as several of the provincial advisers testified, resolving issues of conflict of interest requires a great deal of common sense, as much as application of black-letter legal principles. One person may be better able to develop a consistent body of advisory opinions and approaches than a three-person Commission.

> ***The Jurisconsult can advise a Member to sell a particular asset or dispose of a certain interest, or to place an asset or interest in a trust, on terms and conditions specified by the Jurisconsult.***

The issue whether to allow recourse to any type of trust vehicle to enable a Member to fulfil his or her obligations under the law, has been a controversial one. The problems with trusts, and particularly with so-called "blind" trusts, were demonstrated most sharply in the Sinclair Stevens case. There Stevens purported to comply with the Conflict of Interest Guidelines (and later, with the Conflict of Interest Code) by placing a family business in a blind trust, with his wife, a lawyer, as trustee. In the result, Justice Parker found that Stevens had failed to comply with the Guidelines and then the Code, because the trust was not in fact "blind".

Most commentators — including Justice Parker — agree that a blind trust can truly be blind only for certain assets, such as a diversified portfolio of publicly-traded

securities and bonds that can be readily sold without the Minister's knowledge. The trustee must be an individual at arms length to the Minister.

The difficult issue is how to deal with other assets, and in particular a family business that a Member (probably a Minister) wishes to retain, perhaps for his or her children, or simply as something built up to which the Minister may wish to return at a later date. Justice Parker concluded that in some cases, there is no way to avoid the "hard decisions", and those assets that must be divested must truly be divested, namely in an arms length sale. One cannot retain something and pretend it is not really there, and that it will not influence one's actions as a public office holder.

Various jurisdictions have tried different approaches. In Ontario, the *Members' Conflict of Interest Act 1988* permitted use of a so-called "management trust" for certain family businesses. That trust did not permit the Member's involvement or consultation on managing the trust property, but did provide for notification to the Member of all changes to the property, after those changes have occurred. Thus the Member knew what was in the trust, but was neither involved in the day-to-day operations nor knew whether or not a change was contemplated or in process. This trust, clearly not blind, is of limited value in assuring the public that a Minister is not motivated by personal interests in making any decisions that would affect that business.

Ontario Premier Bob Rae subsequently issued guidelines for his Ministers prohibiting use of that trust for businesses, and requiring instead full divestment of all such interests. This approach — the opposite extreme of the spectrum — has been criticized by Ontario Commissioner Evans as "draconian". Commissioner Evans testified before the Committee that based on his experience, there is a place for a management trust in a conflict of interest regime (provided no one pretends it is blind if it is not); there is a place for divestiture on occasions, but only rarely.[10]

The Special Joint Committee recommended that the legislation not seek to dictate stringent rules governing either divestment or the use of trusts. Instead, it entrusted the Jurisconsult with the responsibility to assess each case on its own facts, and decide individually what approach can best achieve the public interest. Trusts are enumerated as one vehicle available to the Jurisconsult, with the Jurisconsult closely supervising the trust through appropriate terms and conditions.

This solution is consistent with the general approach adopted by the Committee manifest throughout its report, namely that regulation of conflict of interest is an art not a science, and it is foolhardy to attempt to render it scientific. It requires judgment and good sense, based always on the highest ethical standards and integrity, to ascertain what is an appropriate solution in any particular case. The testimony of each of the Commissioners from Ontario and British Columbia, the designated person under the Nova Scotia law, and the Jurisconsult in Quebec, all demonstrated that the right person requires discretion to do the job properly. In this regard, it is noteworthy that the highly respected Ontario Commissioner, Gregory Evans, testified that he found it necessary to exercise more discretion than that afforded under the Ontario Act, and simply took it upon himself to exercise that discretion.

The Report makes it clear that the Committee wanted to leave open the possibility that where appropriate, a Member and even a Minister could retain certain family businesses so long as this can be accomplished without undermining the public interest, and particularly ensuring complete impartiality of decision-making. Cognizant of the fact that public perception of partiality is as much a threat to the credibility of a government as actual partiality, there would have to be sufficient safeguards to ensure that the Member/Minister cannot do anything to prefer his or her private interests. These can include, in addition to placing a business interest in a management trust (not a blind trust), establishing lines of authority so that the Minister is not in any way involved with any decisions that could impact upon the business. Whether this approach can effectively work remains to be seen; that judgment, as well as the arrangements, are for the present left to the Jurisconsult to make, on the basis of all the circumstances of each case.

Public Disclosure

The second major axis of the Committee's proposed regime is the requirement that there be extensive public disclosure of each Member's interests, assets and liabilities. The purpose of this is to ensure transparency of each Member's actions: with full public disclosure, the public can see that each action of a Member is not motivated by a personal interest, and that if any personal interest would be affected by a decision of the Member, that the appropriate steps of declaration and withdrawal have occurred.

In his report on the Stevens inquiry, Judge Parker stated that in his view, "public disclosure should be the cornerstone of a modern conflict of interest code." He continued:

> If modern conflict of interest codes are to ensure that public confidence and trust in the integrity, objectivity, and impartiality of a government are conserved and enhanced, they must be premised on a philosophy of public disclosure. In addition to the individual effort that is expected on the part of public office holders to avoid

> conflicts of interest, public confidence in the integrity of its public officials requires a healthy measure of public vigilance. Public vigilance, however, depends upon reasonable access to information, first, about the fact that a public duty or responsibility of public office is being exercised, and, secondly, about the existence of any related private interest on the part of the public office holder. The first is normally within the public domain; the latter needs disclosure.[11]

The Committee decided to recommend introduction of a broad regime of public disclosure. This was one of the points on which its recommendations differ with the regime that would have been imposed by Bill C-43. Bill C-43 clearly anticipated some public disclosure of Members' private interests, but delegated to the regulations the question what information was to be made available to the public. The Bill stated that only a summary of the information disclosed to the Registrar of Interests was to be made public; however the nature of that summary was not spelled out.

The Committee recognized that public disclosure is an invasion of Members' right to privacy. However it concluded that such an invasion is now required, if the public is to be assured that ulterior private motives are not behind the exercise of public duties.

Under the regime proposed by the Special Joint Committee, disclosure would take place in two stages. First, each Member would be required to provide a written statement to the Jurisconsult of every interest, asset and liability held by the Member as well as every interest, asset and liability held by any partnership or corporation in which the Member, alone or together with anyone in his or her family, holds 10% or more of the shares. The definition of the interests, assets and liabilities to be so revealed is extensive, designed to encompass every interest, asset and liability that one could hold.

The statement to the Jurisconsult would include a description of the interest, asset or liability, and also a statement of its value or quantity. The Jurisconsult would thus have the information to decide whether a particular interest is or could be a factor in a Member's actions on a particular issue. The question whether an interest is significant cannot be determined absolutely on the basis of a set mathematical equation: a 15% interest in a closely-held corporation may actually be less significant than a 1% interest in a large, publicly-held corporation, both in terms of the absolute amount of the shareholder's interest, and therefore his or her possible motivation to help that corporation, and also in terms of the shareholder's ability to affect the corporation's actions. The Jurisconsult would be given broad discretion to assess each situation on its own particular facts, including not only the Member's interest in the corporation but also that Member's responsibilities in public office.

The Committee heard substantial testimony from witnesses who said that there is neither a public right nor a need to know the quantity or value of a Member's assets, interests or liabilities. So long as the Jurisconsult has that information, then someone is in a position to judge whether an interest could affect a Member's actions on a particular matter. Providing that information to the public may satisfy the public's curiosity about the relative wealth or poverty of a particular Member, but would do little or nothing to advance the cause of ensuring ethical conduct in the public sector. The Committee decided that a Member's right to privacy outweighed any arguable public right to know this information, and therefore recommended that the public disclosure statement not include any quantification of Members' interests, assets or liabilities.

For those situations in which the extent of a Member's interests could be relevant, the Jurisconsult would be given discretion to recommend that the Member specify in the public disclosure whether a particular holding is "nominal", "significant" or "controlling". However the ultimate decision to do so rests with the Member, whose privacy would thus be invaded. In this regard it may develop that in the absence of any such qualifying description the public concludes that any interest so noted is in fact either significant or controlling. It may thus end up that Members themselves desire to include some such qualifier in the public disclosure, to indicate where an interest is in fact nominal.

The Committee recommended that certain interests, assets and liabilities be excluded from the public disclosure obligation. These include the family home, cottage and car; personal or household effects; assets, liabilities or financial interests worth under $10,000; government bonds; guaranteed investment certificates; and similar interests, enumerated in the proposed legislation. These exclusions reflect the fundamental balancing that must be achieved between a Member's right to privacy and the public's right and need to know. Each of the excluded interests, assets and liabilities defined in the proposal is either sufficiently small that it would not likely sway someone to do something unethical; or by its nature could not be affected by any action the Member could take (as is the case, for example, with guaranteed investment certificates); or is an interest that the Jurisconsult has certified can be treated as an excluded private interest. All excluded private interests must still be declared and quantified to the Jurisconsult, notwithstanding that they need not be disclosed publicly.

The Committee proposed that the legislation require Members to update the information provided to the Jurisconsult whenever there is a material change to an interest, asset or liability, and in any event, annually.

One of the most controversial issues before the Committee was whether to require public (or any) disclosure from a Member's spouse or other family members. The Committee heard testimony on two separate occasions from representatives of the Parliamentary Spouses Association. The issue was also addressed in the testimony of many other witnesses.

Fundamentally any disclosure obligation violates one's right to privacy. When he testified before the Special Joint Committee, Mitchell Sharp criticized as "offensive and unwise" the proposed requirement in Bill C-43 that private Members of Parliament (as distinct from Cabinet Ministers) disclose their personal financial affairs. He anticipated it would be "a discouragement to the recruitment of candidates for election to Parliament who are involved in business and community affairs."[12]

Requiring a Member's spouse to publicly disclose financial interests is even more an invasion of privacy. The usual argument in favour of requiring public disclosure of Members is that they have voluntarily entered public life, and cannot complain at a certain loss of privacy attendant thereto. This argument is significantly weaker when applied to a Member's spouse.

Furthermore, considerable concern was expressed that requiring such spousal disclosure would be a throwback to the days when a spouse (usually, a wife) was considered only an appendage to the Member (usually, a husband), with neither career nor financial interests of her own. Today, spouses are likely to be strong, independent beings, with significant interests and assets, separate and distinct from those of the spouse-Member. Requiring disclosure of a spouse could serve to undermine that independence.

To date, there has never been any requirement at the federal level that any Member's spouse disclose his or her interests to anyone, on either a public or confidential basis. This was a significant issue in the Stevens inquiry, where a major issue concerned Mr. Stevens' knowledge of financial transactions to which Mrs. Stevens was a party. In the result, Justice Parker found it simply not credible that one spouse would be deeply involved in major negotiations, and the other spouse have no knowledge of those dealings. Recognizing that spouses can be, and often are, wholly independent beings with separate interests, assets and lives, he nonetheless stated that the nature of the spousal relationship — and the impact of current family law reforms, which give one spouse rights in property and interests of the other spouse, upon marital breakdown — is that spouses and spousal concerns usually have a profound impact upon one another. Given this social reality, he stated that a modern conflict of interest regime requires public disclosure of the financial interests of spouses, whether male or female.

In response to Parker's report, in 1988 the Government of Canada issued a directive asking that spouses of Cabinet Ministers and Parliamentary Secretaries voluntarily file statements with the ADRG setting out their interests, just as their Minister/Parliamentary Secretary spouse is required to do. The current ADRG, Georges Tsaï, testified before the Committee that this information is kept confidential and in fact, destroyed once it has been analyzed. Under the current regime, therefore, the information is not available to the public but is used simply by the ADRG and the Minister or Parliamentary Secretary in their attempt to anticipate areas of possible future problems. Mr. Tsaï testified that this spousal statement is provided on a voluntary basis; if a spouse declines to provide the information, there is nothing further that is done. In fact, there has been almost (but not quite) complete compliance. One or two spouses have refused to provide the requested statements.[13]

In contrast, each of the provincial and territorial jurisdictions that require disclosure from a Member also require coextensive disclosure from the spouse. The Ontario Commissioner pointed out that there is no mechanism to enforce the spousal disclosure obligation, nor is any such mechanism feasible. One could not reasonably deny a seat to someone who has been duly elected, on the basis that his or her spouse has refused to provide the requisite disclosure. Commissioner Evans testified that when a spouse has declined to comply, he has included a notation to this effect on the Member's public disclosure statement. In his experience, this appeared to persuade spouses of the importance of the disclosure procedure, and he has had absolute compliance since.

Among foreign jurisdictions, there is a split on the issue of requiring spousal disclosure. The United States does require disclosure of spouses; Britain does not; in Australia, a Member of the House of Representatives is required to disclose interests of the Member's spouse or dependent children, to the extent the Member is aware of them.

Bill C-43 would have required some spousal disclosure, but again left the nature and extent of the obligation to be established in the regulations. Interestingly, the Bill would have required disclosure by the spouse and each "dependant" of the Member. A "dependant" was defined to mean anyone who is "dependant in whole or in part on the Member or the

Member's spouse for support." "Support" was not defined in the Bill, nor was "in part". The Bill would thus have required coextensive disclosure of financial interests not only of the spouse and certain other family members, but also of every friend or business associate who receives any financial assistance from the Member or the Member's spouse.

The Special Joint Committee recommended a different approach that is similar to the Australian precedent. Recognizing the difficulties of compelling disclosure about spousal interests, the proposal would require each Member to file a statement with the Jurisconsult stating, to the best of the Member's knowledge, information and belief, each interest of the Member's spouse and certain defined family members. The interests to be thus disclosed would be identical to those required in relation to the Member, and the public disclosure obligations would be coextensive as well. Thus all interests, assets and liabilities of the spouse and certain other family members, as well as those of partnerships and corporations in which those individuals hold a certain level of interest, would be identified and quantified to the Jurisconsult, to the best of the Member's knowledge, information and belief. All but excluded private interests would be identified, although not quantified, to the public.

As stated in the report, the obligation is formulated to "require a Member to diligently address the interests of his or her family, so that they are fully declared to the Jurisconsult... We...believe that by placing the obligation on the Member — the individual who has undertaken the public duty — the obligation reflects the real purpose of the disclosure regime, namely to ensure that the Member does not act improperly. The obligation of reporting material changes should ensure that if the Member subsequently learns of interests previously unknown to him or her, those will be disclosed."

Rules of Conduct

The third axis of the Committee's proposed regime is the substantive rules of ethical conduct. In this as well, the Committee adopted a somewhat different approach from that which has become the norm in similar legislation elsewhere in Canada.

The term "conflict of interest" has become synonymous with "unethical" or even "crooked". To say someone had a conflict of interest is to say that someone acted improperly. The only "politically correct" approach therefore is unequivocally to condemn all conflicts of interest, and flatly prohibit them in legislation.

Any such approach however sacrifices a real solution in favour of an apparent one. As noted at the beginning of this paper, insofar as Members continue to own property or other assets or business interests, or continue to be active in the outside community, then situations will arise when those interests would or could be affected by government action. That is, it is inevitable that conflicts of interest will arise.

Governments have recognized this, but evidenced reluctance to reflect it in actual legislation. When the Ontario Government introduced its conflict of interest legislation, it said:

> Conflicts of interest are bound to arise in respect of matters discussed at meetings of the Assembly or Cabinet or at committee meetings, especially since non-Minister Members and spouses of all Members can carry on business and since Ministers can retain their interests if in a trust. It is not an abuse of office simply to be in a situation when a conflict of interest arises, however, it is an abuse to participate in a matter knowing you have a conflict of interest.[14]

By contrast, Bill C-43 would have required Members to "arrange the Member's private affairs in conformity with the provisions of this Act and act generally to prevent conflicts of interests from arising." Bill C-43 thus would have purported to require Members to divest themselves of all interests that could possibly lead to a conflict arising in the future.

Constituents clearly do not want their representative to cut him- or herself off from them or their community; very often, someone is elected precisely because he or she is perceived as sharing the constituents' concerns directly, and truly understanding their needs and goals in a very personal way, because the representative would be equally affected by certain governmental action. In rural communities, for example, it is not uncommon to elect a farmer, precisely because a farmer would understand the particular needs and concerns of other farmers. To require the farmer promptly to sell the farm would quickly defeat the electorate's purpose.

The Special Joint Committee recognized this problem, and decided to address it directly. It therefore expressly stated in its Report that "it is not necessarily wrong or improper for a conflict between a Member's public duties and private interests to arise... What is important is to ensure that any conflict that could arise is and is seen to be always resolved in the public interest." The draft legislation proposed by the Committee states, in the first section, four basic principles underlying the proposed regime. These are:

- That it is desirable that Members of Parliament include individuals with broad experience and expertise in diverse facets of Canadian life, including

individuals who continue to be active in their community, whether in business, professional pursuits, or otherwise, so that Parliament as a whole can better represent the Canadian public;

- That all Members are expected to perform their duties of office and arrange their private affairs in such a manner as to maintain public confidence and trust in the integrity of each Member individually, the dignity of Parliament, and the respect and confidence that society places in Parliament and Members of Parliament;
- That all Members are expected to act in a manner that will bear the closest public scrutiny;
- That all Members, in the proper exercise of their functions and duties as Members of Parliament, are expected to represent their constituents, including broadly representing the constituents' interests in Parliament and to the Government of Canada.

The Committee then proceeded to formulate a series of rules of conduct that address the various activities in which Members engage, where there may be opportunities for conflicts between Members' private interests and public duties. Specifically, the Committee prohibited a Member trying to use his or her position or access to influence anyone's decision so as to further a private interest of the Member or the Member's family; it prohibited a Member making or participating in making a decision, knowing — or where the Member should know — there is the opportunity to further a private interest of the Member or the Member's family; and it prohibited a Member using or sharing confidential information to further anyone's -- not only the Member or the Member's family — private interest.

The proposal goes on to provide that whenever a Member has reasonable grounds to believe that the Member or someone in his or her family has a private interest in a matter before either House of Parliament, including before a parliamentary committee, then the Member must disclose the interest at any meeting considering the matter, and withdraw from the meeting, without either voting or participating in the matter. As drafted, this requirement would apply equally to private, in camera meetings with one or more colleagues, as it would to public sessions of Parliament or committee proceedings.

The Committee thus sought to close off the various avenues whereby a Member could seek to advance a private interest through his or her public office, and ensure that this does not occur. At the same time, it explicitly provided that nothing in the draft legislation was to be interpreted or applied to prevent or impede a Member properly representing constituents.

The Committee also proposed rules to codify the existing, unlegislated practices governing the carrying on of outside activities by Members. Specifically, the draft legislation would provide that Ministers and Parliamentary Secretaries could not, except in exceptional circumstances, engage in outside professional or business activities. Private Members may continue to retain such outside activities if they so choose.

The Committee recommended the inclusion of rules governing the receipt of gifts or other benefits by any Member, not only Cabinet Ministers and Parliamentary Secretaries. Specifically, it recommended prohibiting the acceptance of any gift or other benefit that is connected with fulfilling the duties of office of a Member, except those that are part of the protocol, social obligations or custom of the office. In any case where a gift or benefit is received, there must be public disclosure of any gift or benefit valued over $200. This is to ensure the public can see no improper influences are being brought to bear on a Member.

The existing provisions of the *Parliament of Canada Act* governing government contracts would also be significantly revised by the proposal. The Committee recommended doing away with the now-obsolete "public work" distinction, discussed above, and replacing it instead with a provision that flatly prohibits Members knowingly and wilfully, directly or indirectly, being a party to a contract with the Government of Canada, except in certain clearly stated circumstances (such as publicly tendered contracts or contracts for goods or services made in an emergency).

Finally, the Committee recommended legislating rules governing what a former Minister or Parliamentary Secretary can and cannot do after leaving office. It recommended imposing a one-year ban on certain activities of former Ministers and Parliamentary Secretaries, to ensure that they cannot leave office and seek to exploit their former positions for financial gain, primarily through continued influence over the individuals in the department for which they were responsible.

Conclusion

The three axes of the proposed regime are all closely interdependent. The Jurisconsult would be expected to assist a Member in anticipating how a Member may find him- or herself in a situation where the substantive rules of conduct would apply, given the nature of the particular interests held by the Member and the nature of the Member's public responsibilities. As situations subsequently arise, the Jurisconsult would be available

to advise the Member on the proper approach to be taken to ensure compliance with the substantive rules of conduct. Finally, if it is wished that a Member undertake certain responsibilities notwithstanding the ownership of particular assets, then the Jurisconsult would be the one to determine whether adequate steps can be undertaken to ensure that the Member can satisfy the standards established in these rules, for example by the combination of a trust vehicle with the establishment of appropriate lines of authority within a department or ministry.

Public disclosure of a Member's interests enables the public to act as ultimate watchdog over a Member's activities. If inappropriate actions are undertaken, then the public will be able to know. For a politician, adverse publicity can be the worst possible sanction.

The success of the proposed conflict of interest regime would depend to a very significant extent on the quality of the individual appointed to the Jurisconsult position. The Committee was greatly encouraged by the success of similar offices in the various provincial legislatures, and the ability of each such officer to exercise the necessary broad discretion in the proper fulfillment of the position. Hopefully if such an office is instituted at the federal level, this will be a large step toward ensuring that conflicts of interest are always resolved in favour of the public interest, and so contribute to restoring lost public confidence in our political system.

Notes

1. A detailed discussion of the early history of conflict of interest regulation at the federal level may be found in Michael Starr and Mitchell Sharp, *Ethical Conduct in the Public Sector: Report of the Task Force on Conflict of Interest*, Ottawa: Minister of Supply and Services, 1984, chapter 7.

2. Bills C-62 and C-6, entitled *An Act respecting the independence of Parliament and conflicts of interest of Senators and Members of the House of Commons and to amend certain other Acts in relation thereto or in consequence thereof.* Bill C-62 had first reading on June 26, 1978; Bill C-6 on October 16, 1978.

3. The Honourable W.D. Parker, Commissioner, *Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens*, (Ottawa, Canada: 1987) (hereinafter "The Stevens Commission of Inquiry Report").

4. "Conflict Legislation Under Fire", *Globe and Mail*, Saturday, February 8, 1992, p. A-4.

5. The proposed title "Jurisconsult" derives from Roman law, where it was applied to jurists who served as advisers on the law to both private citizens and the magistrates. The term is the same used for the independent adviser on conflict of interest matters for the Quebec National Assembly. It avoids the unfortunate Orwellian overtones that might accompany the title "Ethics Commissioner".

6. Testimony of Mark Audcent, Assistant Law Clerk and Parliamentary Counsel to the Senate, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Conflict of Interests*, Issue No. 9, Tuesday, March 24, 1992, page 9:8.

7. See: for Quebec, *An Act Respecting the National Assembly*, S.Q. 1982, c. 62 (32nd Leg., 3rd Sess.), Section 81; for Ontario, *Members' Conflict of Interest Act, 1988*, S.O. 1988, c. 17 (1st Sess., 34th Leg., 36-37 Eliz. II); and for British Columbia, *Members' Conflict of Interest Act*, S.B.C. 1990, c. 54 (4th Sess., 34th Parl.).

8. Testimony of Rhéal Séguin, Quebec City correspondent for *The Globe & Mail*, and Normand Delisle, Quebec City correspondent for *Canadian Press; Minutes of Proceedings and Evidence of the Special Joint Committee on Conflict of Interests*, Issue No. 11, Thursday, April 2, 1992, pages 11:5-11:6.

9. Testimony of the Honourable Gregory T. Evans, Commissioner, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on Conflict of Interests*, Issue No. 7, Tuesday, March 17, 1992, page 7:31.

10. *Id.*, page 7:13.

11. The Stevens Commission of Inquiry Report, page 348.

12. Testimony of the Honourable Mitchell Sharp, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Conflict of Interests*, Issue No. 1, Tuesday, February 11, 1992, page 1:16.

13. Testimony of Georges Tsaï, Assistant Deputy Registrar General, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Conflict of Interests*, Issue No. 2, Thursday, February 13, 1992, page 2:16.

14. Quoted in the Report of the Special Joint Committee on Conflict of Interests, at page 7.