Parliamentarians and the New Code of Ethics

by C.E.S. Franks

The Act to Amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in Consequence, received royal assent on March 31, 2004, and was proclaimed two months later, on May 17. It has already made vast changes to the legal and administrative structure for ensuring ethical conduct of parliamentarians. This article deals mainly with two questions about the new code of ethics for the House of Commons. First, what are the substantive differences in approach between this code and the previous provisions of the Parliament of Canada Act? Second, how well does the code distinguish between public and private interests, and what are the implications of the distinctions it makes? A final section looks at progress that has been made in transforming the legislation into a working code of ethics for members of Parliament and public office holders.

The new Act repeals the clauses of the *Parliament of Canada Act* dealing with questions of conflict of interest for senators (clause 14), and those dealing with conflict of interest for MPs (clauses 34 to 40). The repealed clauses are replaced with much shorter clauses which create the position of Senate Ethics Officer (clause 20) and Ethics Commissioner for the House of Commons (Clause 72), and list the duties, position, and powers of the two offices.

The Ethics Commissioner for the House of Commons also has responsibility for ethical matters related to public office holders, a category which include ministers of the Crown and ministers of state, political staff of ministers, parliamentary secretaries, full-time ministerial appointees designated by a minister of the Crown as public office holders, and other Order-in-Council appointments, with specified exceptions. For these public office holders the Ethics Commissioner applies the Privy Council Office's code of ethics (often referred to as the "Prime Minister's Code") rather than the code established for the House of Commons. Both the Senate Ethics Officer and the Ethics Commissioner are appointed by the Governor in Council after consultation with the leaders of every recognized party in their respective houses.[1]

Dr. Bernard Shapiro has been appointed Ethics Commissioner for the House of Commons and the Government, and a *Conflict of Interest Code for Members of the House of Commons*[2] has been in force since the first sitting of the 38th Parliament in October 2004. The *Conflict of Interest Code for Members of the House of Commons* is not a statute, but can be found as Appendix 1 to the Standing Orders of the House of Commons. The Office of the Ethics Commissioner has also promulgated a revised (2004) version of the Privy Council Office's *Conflict of Interest and Post-Employment Code for Public Office Holders*.[3]

The *Conflict of Interest Code* for MPs is a more extensive document than the sections of the *Parliament of Canada*

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Act it supersedes. It establishes general principles, spells out in much more detail what conflict of interest means, establishes rules of conduct and procedures for resolving issues, and includes such matters as sponsored travel and prohibitions against gifts and other benefits that were not previously covered by the Act. It also requires members, at the beginning of each new Parliament and annually thereafter, to file with the Ethics Commissioner "a full statement disclosing the Member's private interests and the private interests of the members of the Member's family" (Clause 20(1)). The blank document to be filled out by each member, and for each family member, is 21 pages long. These statements are to be kept confidential by the Ethics Commissioner, but a disclosure summary is to be placed on file in the office of the Ethics Commissioner and made available for public inspection (23(2)). These provisions reduce the private space of members of Parliament and their families. A negative side effect might be that people who treasure their privacy, or, for example, who have reason to fear kidnapping or terrorist attack if even a summary of their assets is disclosed, might be deterred from running for public office.

> ***In the committee proceedings and debates leading up to the Ethics Act, the Senate was insistent that it have its own ethics officer and code of ethics.***

Clause 26 permits the Ethics Commissioner to give confidential opinions and recommendations upon written request by a member. Clauses 27 and 28 permit members on reasonable grounds or the House itself to request the Ethics Commissioner to make inquiries into questions of compliance with the code by other members, and for reporting on these inquiries to the Speaker, who is to present the report to the House when it next sits. Clause 29 instructs the Commissioner to suspend an inquiry and refer the matter to the proper authorities if there are reasonable grounds to suspect that a member has committed an offence under an act of Parliament.

Clause 21 of the *Ethics Act* states that the Ethics Commissioner enjoys the privileges and immunities of the House of Commons. In other words, the information provided to the Ethics Commissioner by members, and the Commissioner's discussions and correspondence with members, except where otherwise stated, enjoys the same privileges as the proceedings of the House, and cannot be quoted, ordered for, or be used in, court proceedings. This provision is clearly designed to protect parliamentary privilege, and members and the House from intrusion by the courts. Quite likely, it also is behind the fact that the *Conflict of Interest Code* itself is appended to Standing Orders rather than embodied in a statute, though another reason for this approach might be that Standing Orders are much easier to amend than are statutes.

The Senate has had, and continues to have, a somewhat divergent view on interest and conflict of interest from the Commons. It should be remembered that among the motives behind the establishment of the Senate was to create an upper chamber that would be a hedge against unruly democracy and would help preserve the interests of the propertied classes. Many senators historically, and still at present, have had distinguished careers in business and the professions, and retain business and professional activities after becoming senators. The Senate has accepted the potential conflicts of interest inherent in having senators who retain strong connections with business and other groups not only participate in proceedings but also hold positions of responsibility and influence such as chair of the Senate Banking and Finance Committee. This has not protected the Senate against criticism for being the "lobby within" for big business.[4] It is not yet clear how the Senate will resolve these potential conflicts of interest. As of January 2005 the Ethics Officer for the Senate had not been appointed, nor had a code of ethics been promulgated for the Senate.

Explicit Prohibitions Versus Positive Exhortations.

The clauses governing ethical conduct found in Division B (Conflict of Interest) of the *Parliament of Canada Act* formed a succinct list and description of prohibitions against improper activities such as influence peddling and entering into contracts with government. These prohibitions were a reasonably clear and unambiguous list of "thou shalt nots." Much of the new *Conflict of Interest Code* has the same characteristic of listing specific prohibitions.

But in addition the new code states that members are expected "to fulfill their public duties with honesty and uphold the highest standards so as to avoid real or apparent conflicts of interests, and maintain and enhance public confidence and trust in the integrity of each Member and in the House of Commons" (2(b)). This is a more modest demand than appeared in an earlier draft, which proposed that members were expected "to fulfil their public duties with honesty and uphold the highest ethical standards, so as to maintain and enhance public confidence and trust in the integrity of each parliamentarian and in the institution of Parliament…."[5] Both, however,

are alike in making a positive demand that members act in an ethical way rather than making a negative prohibition against specific undesirable behaviour.

The phrasing of the earlier draft seemed to demand that members act according to the highest ethical standards in all aspects of their lives. But it is far from clear what are "highest ethical standards". Conceivably high ethical standards could include both stands on, and personal involvement in private matters such as sexual orientation or abortion. To many Canadians a person who has, condones, or aids in abortion has failed to meet the "highest ethical standards." Others consider abortion to be a right, and ethically justified. Many other issues, such as same sex marriage, produce the same sort of disagreement about ethical standards. Political disagreements and ethical disagreements often overlap, as do the private and public spheres of activity. Perhaps it is far-fetched to consider it possible that persons or groups with strong views on these and many other political and ethical issues might use the goal of "highest ethical standards" to attack political opponents, but stranger things have happened in politics.

The new code resolves these problems in demands and expectations. Not only does it leave out the "ethical" but also makes it clear that these positive demands relate to conflict of interest and public duties rather than to private aspects of a politician's life, or to stands taken on ethical issues that are the subject of public debate. The current code provides a more modest, but more realistic and less contentious standard.

MacGregor Dawson observed that "one of the greatest merits of [the House of Commons] is derived from the fact that it is not a selection of the ablest or most brilliant men in the country, but rather a sampling of the best of an average run that can survive the electoral system…."[6] Members of Parliament are fallible human beings like the rest of us, and I for one am comforted to know that they, rather than secular saints, represent us in Parliament. Not the least of my concerns about embodying unrealistically high expectations of behaviour in a code of ethics is that when some slip, if only in a trivial way, from these high standards, they and the institution become vulnerable to over-zealous criticism. We all fail to meet the highest ethical standards from time to time. We leave undone those things which we ought to have done, and do those things which we ought not to have done. To demand that people behave otherwise is to demand personal and institutional hypocrisy. The statement of general principles in the present code is an improvement over earlier drafts. The expression of positive expectations in clause (2) of the new code adds something useful, and avoids the risk of unreasonable demands and expectations. It offers a good balance between ideals and positive exhortations for goodness on the one hand and specific prohibitions of unwanted behaviour on the other.

The Distinction Between Public and Private Interests.

Clause 3(2) of the code states that "A Member is considered to further a person's private interests, including his or her own private interests, when the Member's actions result, directly or indirectly" in, among other things, "an increase in, or the preservation of, the value of the person's assets." Clause 8 states that "When performing parliamentary duties and functions, a Member shall not act in any way to further his or her private interests or those of a member of the Member's family, or to improperly further another person's private interests." Clauses 9 and 10 extend the scope of activities prohibited because they would further private interests.

In 2002 Howard R. Wilson, then Ethics Counsellor, used the example of C.D. Howe to show how ethical principles on the distinction between public and private interest have changed over the past decades:

> …C.D. Howe was a successful businessman who went into public life, becoming known as "Minister of Everything" after the Second World War.
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> The story goes that every week, Howe would review his extensive stock portfolio on the basis of the government's decisions and the information he had learned during the week. No one thought anything of the fact that Howe was an active investor and a Minister at the same time. There were [sic] no chorus of claims that he was corrupt or that his decisions were tainted by his own personal interests. It was felt that he would never take a decision as Minister that was not in the public interest.
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> There was a high level of trust in public officials. Those days are long gone now. It because there has been an increasingly sturdy expectation of what citizens expect from government and from those in government.[7]

C.D. Howe's sort of behaviour would no longer be tolerated in cabinet ministers or any other holder of public office.

C.D. Howe made a huge contribution to the economic and industrial development of Canada. He prospered as the country prospered. He made no distinction between doing good and doing well, and indeed the two categories are not necessarily mutually exclusive. Howe lived and operated within a political tradition and way of thinking that is now almost in disrepute: that a politician ought to have, and represent, interests, that one of a politician's duties is to promote the interests of constituents, of interest groups and of persons whom he or she represents, and that it is a virtue, and an assurance of sincerity and zeal, when the politician's interests coincide with

those represented. This is not to say that politicians should not also have more general concerns about public policy and the public interest, but that these should not be the sole focus of concern. The interests of those who elect the politicians – the people in his or her constituency – are, and should be, a first concern. Concern with political survival is one of the most sincere of political interests.

Responsibility for a broader and more intense focus on the general public interest, rather than on local and particular interests, comes at the level of the cabinet, the Crown in formal constitutional terminology. As L.S. Amery observed, Parliament represents the various factions and regions of the country, while the Crown represents the collective national interest. Governance involves a continuous parley between people and government in Parliament.[8] Expression of general public interest also, of course, comes, or should come, at the level of political parties in their articulation of the public interest and their attempts to convince voters to support their approach over those of the other parties.

Within all of these notions about faction, interest, roles of members, parties, etc., I find some difficulty with the bald assertion that "When performing parliamentary duties and functions, a Member shall not act in any way to further his or her private interests or those or a member of the Member's family, or to improperly further another person's private interests." I would hope that members do both good and well at the same time, and that a member's personal and political interests would be reasonably congruent with the interests of his or her constituents, and with the interest groups he or she belongs to and cares about.

> ***Do we want to be governed by philosopher kings or by partisan warriors, or, if both, what is the appropriate balance between the two?***

A strict reading of Clause 8 of the code would lead to the strange conclusion that members should not act in Parliament in a way that would benefit their constituents and interest groups if those benefits and interests coincided with those of the member. Nor, to indulge in *reductio ad absurdum*, should a member vote on a tax bill if it would reduce his or her capital gains tax, or for old age pensions if he or she is a pensioner, or for other legislation such as planning or environmental laws that would have a similar sort of benefit. I suspect that none of these perhaps far-fetched interpretations of the provisions of the code are intended, nor are they likely to produce the dire consequences I portray, but a problem could conceivably arise. It certainly does in the Senate. These are the sorts of problems that the Senate must wrestle with in its efforts to create an appropriate code of conduct for senators. Identifying the appropriate boundary between private and public interests is an immensely complex task, and the boundary itself changes over time as public expectations of the behaviour of politicians and public office holders change.

I have only touched on the surface of this problem here. There are risks that the guts will be taken out of politics if private interest is construed too broadly, and politicians are hampered in advocating the interests of groups to which they belong, support and benefit from belonging to. Public and private interest are both essentially contestable concepts, the meaning of which partakes of ideological, social, and cultural as well as strictly legal construction. How far Canada should go down the path of preventing representatives from supporting general or particular policies which are in their own interest before politics itself becomes denatured, will remain an issue for parliamentarians. Have we gone too far already?

Getting the New Ethics Regime Under Way

In October 2004 the Standing Committee on Procedure and House Affairs of the House of Commons interrogated the new Ethics Commissioner, Dr. Shapiro. Members expressed concern, which they felt was shared by most members, over the amount of detail requested in the disclosure statement, and about the amount of information that would be made public. The committee decided to establish a sub-committee to look into the matter.[9] Subsequently the House created a new committee, the Standing Committee on Access to Information, Privacy, and Ethics, to which the Ethics Commissioner is, in part to report.

The wording of this committee's title would suggest that it was intended to deal with most aspects of the work of the three parliamentary officers concerned with access to information, privacy, and ethics. However, with legislation and standing orders already in place relating to the Ethics Commissioner and the ethics code, the current solution to fitting the new committee into the existing structure has created a somewhat awkward solution.[10] Both the *Ethics Act* and the ethics code adopted by the House in 2004 refer to the Standing Committee on Procedure and House Affairs, but not to the new committee. This has caused some unnecessary confusion and complexity. For example, the current rules require that the annual report of the Ethics Commissioner on his activities related to the House of Commons to be referred to the

Standing Committee on Procedure and House Affairs, while his report relating to public office holders be referred to the new Standing committee. This and other Byzantine convolutions in reporting and other functions still need to be sorted out.

Of more direct importance to the members of Parliament is the question of how investigative reports from the Ethics Commissioner will be handled by Parliament. The procedures here are relatively straightforward. When the commissioner makes an investigation under the code for members of the House (and ministers and parliamentary secretaries when they have acted in their capacity as members rather than public office holders), he reports his findings to the Speaker, who presents the report to the House. The member who is the subject of the report has the right to make a statement in the House after question period. If the commissioner has found that a member contravened the code, members of the House may move concurrence and a debate not to exceed two hours follows. When the commissioner does not find that a breach of the code has occurred, unless a member moves concurrence the matter lapses and the report is deemed adopted after ten days.

When the Ethics Commissioner reports on investigations into public office holders after a complaint is made by a member of Parliament the commissioner reports to the Prime Minister, provides a copy of the report to the member of Parliament who made the complaint, and to the subject of the complaint. The report is made public, but is not tabled in the House. The new Ethics Commissioner, Dr. Shapiro, has suggested that the procedures for making these reports public might be simplified by, for example, submitting them to the Speaker of the appropriate House.[11]

There is no provision for any of these investigative reports to be referred to a parliamentary committee. By way of contrast, investigative reports from the registrar of lobbyists are referred to the Standing Committee on Access to Information, Privacy, and Ethics. The fact that these reports under the ethics code will not be referred to a standing committee relieved many of the concerns of many members. Some others felt that if a report were controversial, it would in any case likely wind up being referred to a committee by the House.

Members expressed concern about the release of information contained in their disclosure documents. Dr. Shapiro reassured the committee that the full documents would be kept fully confidential, but that the summary documents would be available in his office. These summaries would not include figures on assets or debts, but simply indicate that they existed in an amount in excess of $10,000. Dr. Shapiro also suggested that these summaries might be available in a variety of ways so that an inquirer does not have to be in Ottawa in order to access them. Before the House was adjourned in December 2004 the Standing Committee on Procedure and House Affairs resolved this problem by approving a motion that the summary statements be made available by fax, as well at the commissioner's office.[12] The bulk of the budget of the office – between $3.5 and $4 million – has gone into processing these disclosure statements from members. There is a cost to transparency.

As of December 2004 the Office of the Ethics Commissioner had received one request for advice from a cabinet minister, and one request for an investigation by a member of Parliament. Both referred to the same issue: the propriety of the Minister of Citizenship and Immigration's granting a residency permit to a strip-dancer from Romania who subsequently, it appeared had worked on the minister's election campaign. Judy Sgro, the minister, had requested the advice; Diane Ablonczy, an opposition front bench critic, had requested the investigation. The Ethics Commissioner explained to the Standing Committee on Access to Information, Privacy, and Ethics, that he had hired a law firm to do the fact-finding research into this matter.[13]

The minister, Judy Sgro, resigned in January 2005 after being made vulnerable in the House through persistent opposition attacks during the fall session because of the strip-dancer issue and others. The final blow to this phase of Ms. Sgro's ministerial career came from an affidavit by a failed refugee claimant which stated that Ms. Sgro had promised to help his claim if he provided pizzas and other help for her election campaign. Though this claimant was found to have a long record of criminal and other offences, and though he was found to be an entirely unreliable and untrustworthy person, Ms. Sgro resigned. There is no more fearsome voice in Canadian politics than the opposition baying for ministerial blood on the floor of the House of Commons. The commissioner had not reported on either of these requests by February 2005.

These events mark only the beginning of what is likely to be a long process of accommodation and adjustment. The code of ethics, the machinery and processes for its administration, and the mechanisms for a continuing dialogue between commissioner and the House of Commons are now in place. That goes a long way towards resolving issues that have been a public and parliamentary concern for over thirty years.

Notes

1. Attempts to establish a code of conduct for members of parliament and senators in the modern period began in 1973 with the government's green paper on "Members of

Parliament and Conflict on Interest." Government bills dealing with conflict of interest were introduced in 1978, 1983, 1988, 1989, 1991, and 1992, but none of them succeeded in passing the hurdles of the parliamentary law-making process, nor did any of the proposals find their way into *Standing Orders*. In 1997 a joint committee of the House of Commons and Senate (the Milliken-Oliver Committee) studies the issue. In 2002, committees of both houses examined two documents: the *Code of Conduct for Parliamentarians: Proposals to amend the Rules of the Senate and the Standing Orders of the House of Commons to implement the 1997 Milliken-Oliver Report*, and the Proposals to amend the Parliament of Canada Act (Ethics Commissioner) and other Acts as a consequence. The present arrangements bear a close resemblance to the 2002 documents. Standing Order 21 of the House of Commons, which until these 2004 changes was the House's only order dealing with conflict of interest issues for its members, and which had seldom been invoked, has not changed since 1867.

2. Office of the Ethics Commissioner, *Conflict of Interest Code for Members of the House of Commons*, 2004
3. Privy Council Office, *conflict of Interest and Post-Employment Code for Public Office Holders*, Rev. ed., 2004
4. For example, Colin Campbell. *The Canadian Senate: A Lobby from Within*. Toronto: Macmillan, 1978.
5. Canada, Privy Council Office, 2002, *Code of Conduct for Parliamentarians: Proposals to amend the Rules of the Senate and the Standing Orders of the House of Commons to implement the 1997 Milliken-Oliver Report*.
6. R. MacGregor Dawson, *The Government of Canada*, Fifth Edition, revised by Norman Ward, (Toronto: University of Toronto Press, 1970), p 304.
7. "The Constantly rising Ethics Bar," Notes for a Presentation by Howard R. Wilson, Ethics Counsellor, to the Canadian Centre for Ethics and Public Policy, November 7, 2002.
8. L.S. Amery, *Thoughts on the Constitution*, London: Oxford University Press, 1964, pp 4,10.
9. Standing Committee on Procedure and House Affairs, *Minutes of Proceedings*, October 14, 2004.
10. See the Standing Committee on Access to Information, Privacy and Ethics, *Minutes of Proceedings*, December 6, 2004, Number 6.
11. Standing Committee on Access to Information, Privacy and Ethics, *Minutes of Proceedings*, December 8, 2004, Number 7.
12. Standing Committee on Procedure and House Affairs, *Minutes of Proceedings*, December 9, 2004, Number 14.
13. Standing Committee on Access to Information, Privacy and Ethics, *Minutes of Proceedings*, December 8, 2004, Number 7.