
Crossing the Floor, Conflict of Interest and the Parliament of Canada Act

by David Gussow

On March 20, 2006 the Ethics Commissioner of the House of Commons issued a report on an allegation that Prime Minister Stephen Harper contravened the rules of conduct set out in the Conflict of Interest Code for Members of the House of Commons by offering an inducement to David Emerson, the newly re-elected Liberal member of Parliament for Vancouver-Kingsway, to join the Cabinet of the new Conservative government. His conclusion was that neither Mr. Harper nor Mr. Emerson contravened any of the specific sections of the Members' Code. And he accepted Mr. Emerson's claim that accepting Mr. Harper's offer seemed, at least to him, a way to better serve his city, province and country. However the Ethics Commissioner stated that "the discontent expressed by Canadians on this matter cannot be attributed merely to the machinations of partisan politics. Fairly or unfairly, this particular instance has given many citizens a sense that their vote – the cornerstone of our democratic system – was somehow devalued, if not betrayed. Relative to the Office of the Ethics Commissioner, this disquiet is reflected in the gap between the values underlying the principles of the Members' Code and the detailed conflict of interest rules within the Code itself. The gap can only be addressed through rigorous political debate and the development, through the political process, of the appropriate policies to address it." This topic will certainly be an issue of debate in the 39th Parliament. The present article outlines how our perspective on what constitutes a conflict of interest has changed over the years, particularly insofar as accepting a position in the cabinet is concerned. It offers some ideas about how to eliminate the possibility of similar situations in the future.

One of the topical questions at the moment is whether it is a conflict of interest for a Member of Parliament to cross the floor and become a cabinet minister. The quick answer as far as the *Parliament of Canada Act* is concerned is that it is not. The Act specifically provides an exemption for all cabinet ministers as set out in sections 32, 33 and 35 as follows:

Division B: Conflict of Interest

32. (1) Except as specially provided in this Division...no person accepting or holding any office, commission or

employment, permanent or temporary, in the service of the Government of Canada, at the nomination of the Crown or at the nomination of any of the officers of the Government of Canada, to which any salary, fee, wages, allowance emolument or profit of any kind is attached...is eligible to be a member of the House of Commons or shall sit or vote therein.

33. (2) Nothing in this Division renders ineligible to be a member of the House of Commons, or disqualifies from sitting or voting therein, any member of the Queen's Privy Council for Canada by reason only that the member...is a Minister...and receives a salary in respect of that position...if the member is elected while holding that...position or is, at the date when nominated by the Crown for that...position, a member of the House of Commons...

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35. If any member of the House of Commons accepts any office or commission that, by virtue of this Division, renders a person incapable of being elected to, or of sitting or voting in, the House of Commons, the seat of the member is vacated and the member's election becomes void."

As one can see the crucial words that are emphasized above provide all members of the cabinet, including the prime minister, with a blanket exemption.

What is not generally known is that for nearly half of the time after Confederation whenever there was a change in the political party forming the government every cabinet minister with a salary, including the prime minister, to avoid what is today considered a conflict of interest, vacated their seats in the House of Commons and ran in a by-election¹.

Only when the member was re-elected in a by-election was he allowed to hold the paid position of a cabinet minister at the same time as being a member of the House of Commons. This was the case for the ministries of Alexander Mackenzie in 1873, Sir John A. Macdonald in 1878, Wilfrid Laurier in 1896, Robert Borden in 1911, William L. M. King in 1921 and 1926, Arthur Meighen in 1926², and Richard B. Bennett in 1930. In the last case this was governed by sections 10, 13, 14 and 16 of the *Senate and House of Commons Act* that existed in 1927 (prior to that comparable provisions applied). This Act provided as follows:

Independence of Parliament: Members of the House of Commons

10. Except as hereinafter specially provided...no person accepting or holding any office, commission or employment, permanent or temporary, in the service of the Government of Canada, at the nomination of the Crown or at the nomination of any of the officers of the Government of Canada, to which any salary, fee, wages, allowance, emolument or profit of any kind is attached...shall be eligible as a member of the House of Commons or shall sit or vote therein...

13. Nothing in this Act contained shall render ineligible, as aforesaid, any...person holding...any office...to be held by a member of the King's Privy Council for Canada and entitling him to be a minister of the Crown, or shall disqualify any such person to sit or vote in the House of Commons, if he is elected while he holds such office and is not otherwise disqualified.

14. Whenever any person, member of the King's Privy Council holding...any office ...entitling him to be a minister of the Crown, and being at the same time a member of the House of Commons, resigns his office, and, within one month of his resignation, accepts any of the said offices, he shall not thereby vacate his seat, unless the administration of which he was a member has

resigned, and a new administration has been formed and has occupied the said offices³.

16. If any member of the House of Commons accepts any office or commission...for which any public money of Canada is paid...the seat of such member shall thereby be vacated, and his election shall thenceforth be null and void."

When this act was amended and the need for a by-election for all cabinet ministers in those circumstances was dispensed with in 1931⁴, the very point of a member crossing the floor to become a cabinet minister was raised by three of the six members who spoke against the bill⁵.

During the debate for the House to go into committee on the bill in July 1931 Fernand Rinfret suggested that in 1920 the only reason that an opposition member had not been appointed to the cabinet was because he would have had to run in a by-election. He pointed out "that when a new minister is called from the ranks of his own party it does not matter very much if he has not to submit to re-election by his constituents...but when...the government tries to seduce a member from the opposition party...to accept a portfolio, then I do say that the necessity for the minister to be re-elected by his constituency is a very important safeguard."⁶ Charles Marcl spoke on the same motion as follows: "I believe that if a member who was elected...walks over to the other side of the house and accepts a portfolio with a different party, it is only fair that his constituents, whose representative he is, should be consulted on the new stand he takes."⁷ And when Ernest Lapointe spoke during committee study he said the following: "If a government goes to another group in the house and invites to the cabinet a member who has been elected by his constituents to oppose the government, and that gentleman is willing to accept the invitation, I object to his transferring his electors with him to the government side. That is my strongest objection to the bill..."⁸.

Samuel Jacobs, who supported the measure, was the last speaker on the bill and had this to say: "There has been some suggestion that members from another side of the house might be purchased. That might be. ... The electors will deal with them in due time. Any person who sells himself for the temporary pleasure or advantage of being a member of the cabinet, will find he has been living, so to speak, for a short time only in a fool's paradise."⁹

Back to the Future?

When it comes to members crossing the floor to become Ministers as in the case of David Emerson in 2006, Belinda Stronach in 2005 and Jack Horner in 1977 maybe

it is time to revert, in part, to the law that existed from the time of confederation to 1931.

It could be reinstated for members that cross the floor to become cabinet ministers. That way there would be no apparent conflict of interest. It could entail adding a few words to sub-section (2) along with a new sub-section (2.1) to section 33 of the *Parliament of Canada Act* to remove those members from the exemption from ineligibility, possibly to read as follows:

(2) Nothing in this Division renders ineligible to be a member of the House of Commons, or disqualifies from sitting or voting therein, any member of the Queen's Privy Council for Canada by reason only that the member...is a Minister...and receives a salary in respect of that position...**if the member is elected with the same political affiliation on the ballot as the Prime Minister** while holding that...position or is, at the date when nominated by the Crown for that...position, a member of the House of Commons last elected with the same political affiliation on the ballot as the Prime Minister.

(2.1) With respect to sub-section (2), if the Prime Minister is not a member of the House of Commons then the person recognized as the Leader of the Government in the House of Commons is substituted therefor.¹⁰

The above provisions, if they had been in effect, would have applied to the cases of Mr. Horner, Ms Stronach and Mr. Emerson. In the three cases, the prerogative of the Prime Minister to invite who he would want in his cabinet would have been unfettered, but their seats in the House of Commons would have been vacated and they would have had to run in a by-election. Or conversely, if they had not wanted to run in a by-election, it would not have denied them the option of crossing the floor and remaining a member of the House of Commons, but they would not have been able to accept a cabinet position until they had run in the next general election.

The electors eventually pronounced on the cases of Mr. Horner and Ms Stronach. If it is desired that the electors should be allowed to decide sooner than a general election on the case of Mr. Emerson, then if any legislation were contemplated a transitional provision could be included. A possible wording would be as follows:

Thirty days following Royal Assent being given to this Act, the seat of any member of the House of Commons not elected with the same political affiliation on the ballot as the Prime Minister who holds any office in the service of the Government of Canada, at the nomination of the Crown, to which any salary, fee, wages, allowance, emolument or profit of any kind is attached is vacated and the member's election becomes void.

In drafting and debating such a change a couple of subsidiary points need to be kept in mind. First if we ever change to Proportional Representation and coalition governments become the norm the aforementioned change would require any coalition members of the cabinet to run in by-elections confirming their participation in cabinet. This could be addressed by some further wording in the exemption such as: "or any party in coalition with the Prime Minister's party".

Secondly Parliamentary Secretaries are also receiving a salary and fall within the ambit of the legislation. It may be desirable, for those that cross the floor, to include some wording in their exemption as well.

Notes

1. Not counting the coalition ministry where Prime Minister Borden remained as prime minister in 1917. In any event, the coalition ministry was formed after a dissolution and all members of the cabinet ran in the general election.
2. The Prime Minister vacated his seat which would have resulted in a by-election but a general election ensued almost immediately obviating the necessity of a by-election.
3. It should be noted that when Prime Ministers Abbott and Borden resigned in 1892 and 1920 respectively, the continuing cabinet ministers with the new Prime Ministers Thompson and Meighen did not vacate their seats. Presumably if there were a continuing cabinet minister with a change in the administration to the opposition then this section would have applied.
4. Chapter 52 of the Statutes of Canada, 1931; 21-22 Geo V. Parts I-II. *An Act to remove the necessity of the re-election of Members of the House of Commons of Canada on acceptance of office.*
5. Altogether twelve members spoke on the bill (not counting questioners) with six supporting and six against. Interestingly it started as a Private Members' Bill introduced by a member of the official opposition and was taken over as a Government Bill by the Minister of Justice after it was voted off the agenda. The others who spoke in support were two members of the U.F.A. (later joining the C.C.F.) an independent and another member of the official opposition. The three members that spoke against the bill for other reasons were the Leader of the Opposition, the Deputy Speaker (a government member) and another member of the official opposition.
6. *Debates of the House of Commons*, July 23, 1931, p. 4089.
7. *Ibid.*, July 23, 1931, p. 4090.
8. *Ibid.*, July 23, 1931, p. 4091.
9. *Ibid.*, July 23, 1931, p. 4094.
10. Parliamentary Counsel would have to confirm definitive wording and verify whether any provision of the *Constitution Act of 1982* or other Act might apply.