A Perspective from the Senate

Recent Developments in Canadian Parliamentary Ethics

by Jean T. Fournier

This article looks at how Canadian legislatures have established ethics regimes over the years and illustrates how such regimes and codes of conduct can promote good governance. The first section is a brief description of the ethics or conflict of interest regimes applicable to Canadian parliamentarians and legislators. The second section highlights recent changes concerning the Conflict of Interest Code for Senators. The third section explores a few interesting developments that occurred in 2008. The final section draws some tentative conclusions about the utility of parliamentary codes of conduct based on Canada's experience over the last twenty years.

Parliamentarians serve the public interest and play a vital role in our system of government. For example, they review and approve government legislation, propose private bills to address a specific issue, bring their constituent's concerns to the government's attention, and press for changes in existing policies and programs. Parliamentarians in both the House of Commons and Senate debate and approve government spending and fulfill a "watchdog" role by calling the government to account for its actions. They also take an active part in the work of committees, hold hearings and produce reports on a wide-range of issues of importance to Canadians.

Given that service in Parliament is a public trust, parliamentarians are expected to act in the public interest at all times, with openness and impartiality. They must not use their official position for personal gain, or to obtain any benefit for their family or third parties. Parliamentarians are expected to uphold the highest standards so as to avoid real or apparent conflicts of interest. Moreover, they are expected to arrange their private affairs to prevent any conflicts from arising, and if conflict does arise, to resolve it in a way that promotes public confidence. Parliamentarians are also expected to comply with their obligations as detailed in the Senate or House codes, with integrity and transparency, so the public can make informed judgments and hold them accountable for their behaviour while holding office.

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Parliamentary Ethics Regimes in Canada

Canada's Senators are subject to the *Conflict of Interest Code for Senators* (the Code). The position of Senate Ethics Officer was established under the *Parliament of Canada Act* and the duties and functions are set out under the Code. The first appointment was approved by the Senate and became effective as of April 1, 2005.

The Ethics Officer is an independent, non-partisan Officer of the Senate. The interpretation and application of the Code as it relates to individual Senators is his sole responsibility. The most important aspect of the mandate is an advisory function. In this respect, the Ethics Officer provides confidential advice to Senators in order to assist them in meeting their obligations under the Code. This advice includes identifying any

foreseeable real or apparent conflicts of interest and providing recommendations respecting particular courses of action that may be required to resolve any such conflicts. Some of the areas in which the Ethics Officer provides advice include outside activities, gifts and other benefits, sponsored travel, declarations of private interests and contracts or business arrangements with the federal government.

Since my appointment, I have provided several hundred opinions and advice on these and other matters. I meet with individual Senators at least once a year. Much of my work is focused on preventing conflicts from arising, rather than addressing them once they have arisen. If required, I conduct investigations into alleged violations of the Code.

Similarly, the members of the House of Commons are subject to the *Conflict of Interest Code for the Members of the House of Commons* which was adopted in 2004. My counterpart on the House of Commons side, the Conflict of Interest and Ethics Commissioner, is responsible for this Code. In addition, she is also responsible for interpreting and applying the *Conflict of Interest Act*. This Act is relatively new, having been passed in 2006. It is applicable to Ministers of the Crown, Ministers of State, Parliamentary Secretaries, ministerial staff and ministerial advisors, Deputy Ministers within the public service, and most full and part-time Governor in Council appointees who serve on federal boards or agencies.

Prior to the adoption of this legislation, these public officials were governed by a code of conduct entitled the *Conflict of Interest and Post-Employment Code for Public Office Holders*. Different versions of this code existed at different points in time dating back to 1985. Before this, a series of guidelines on conflict of interest issued by the Prime Minister of the day applied to federal Cabinet Ministers.

Finally, each of the ten provinces and three territories province have legislation governing conflict of interest for members of the various legislative assemblies which is interpreted and applied by independent ethics commissioners. Parliamentary ethics regimes began in the provinces and territories well before the Senate and the House of Commons. The province of Ontario was the first jurisdiction in Canada to pass legislation concerning conflict of interest with an independent ethics commissioner to interpret and apply the legislation – it did so in 1988. Other jurisdictions followed suit shortly after, with British Columbia and Alberta setting up their own ethics offices in 1990 and 1992 respectively. By 2002, every province and territory adopted conflict of interest or ethics legislation. The federal ethics regime concerning legislators – in other words, members of the Senate and the House of Commons – was only established by law in 2004, with the House regime and a code of conduct being in place that same year, while a Senate regime and a code of conduct followed in 2005.[1]

There are many common features in the various ethics regimes in Canada. All are administered by independent ethics commissioners, also referred to as ethics officers, conflict of interest commissioners or integrity commissioners. These officials provide advice to the legislators in their jurisdiction concerning conflict of interest or ethics more broadly. In my view, this notion of independence is the key to the success of my office and of parliamentary ethics offices across Canada, and is the most distinguishing feature of the Canadian model of parliamentary ethics. Indeed, if ethics commissioners are to have the trust of both the public and parliamentarians in the way they discharge their mandate, this independence is vital.

Taking the Senate as an example, the independence is assured by law through the *Parliament of Canada Act*. The appointment is made by the Governor in Council after consultation with the leader of every recognized party in the Senate and after approval of the appointment by resolution of the Senate. This method of appointment ensures that the Senate Ethics Officer has the broadest support in the Chamber, irrespective of party affiliation. The incumbent is appointed for a renewable term of seven years and may be removed from office only for cause, by the Governor in Council on address of the Senate.

The *Parliament of Canada Act* ensures that he has the control and management of the office independent of the Senate. For example, he is responsible for preparing the estimates of the budget required to operate the office which is separate and distinct from the estimates of the Senate as a whole. The estimates are submitted to the Speaker of the Senate who, after considering them, transmits them to the President of the Treasury Board. They are then laid before the House of Commons with the estimates of the government for the fiscal year. The Ethics Officer is also protected by a statutory immunity. These aspects of the *Parliament of Canada Act* (sections 20.1 to 20.7) confer on the office a status of independence and autonomy and they provide an effective shield against improper or inappropriate influence. This ensures that the Ethics Officer is free to form opinions and provide considered advice in a fully impartial and transparent manner, without outside influence or coercion.

Another similarity in the ethics regimes across

Canada is that ethics commissioners also conduct inquiries and investigations into complaints concerning breaches by parliamentarians of the conflict of interest rules. Following an inquiry, they report either directly to the legislature in question or, as in the case of the Senate, through the Standing Committee on Conflict of Interest for Senators.

> ***It is gratifying that I have not had to undertake any inquiries to date regarding breaches of the Senate Code as there have been no allegations of impropriety against a Senator since the adoption of the Code. This reflects well on Senators and on the work of my office.***

The rules in the various jurisdictions in Canada are broadly similar. They cover a number of areas, including rules on gifts and other benefits, sponsored travel, outside activities, declarations of private interests, use of influence or information and federal government contracts. Almost all ethics regimes in Canada set out an annual disclosure process in which members subject to the regime must divulge to the ethics commissioner on a confidential basis certain financial interests. From this information, the ethics commissioners extract a summary that is then made available for public inspection in a Public Registry. The province of Quebec is the only jurisdiction in which there is no such disclosure process, although it has an independent commissioner known as a jurisconsult who provides advice to members of the legislature. Since the conflict of interest rules applicable to legislators in the various jurisdictions generally cover the same broad subject areas, it is useful for ethics commissioners to maintain a level of contact with colleagues across Canada in order to be able to exchange information, thoughts on best practices, and ideas on issues of common interest. The Canadian Conflict of Interest Commissioners Network (CCOIN) was founded in 1992 for this very purpose. It comprises all 15 federal, provincial, and territorial ethics commissioners with membership limited to those officials who administer regimes that apply to parliamentarians and senior public office holders, although they may have other responsibilities as well, for example, related to lobbying and whistleblowing.

Amendments to the Senate Code

The Standing Senate Committee on Conflict of Interest last year conducted a review of the provisions of the Code. In my view, this is one of the Committee's most important responsibilities under the Code. As with all regulatory frameworks, any ethics code requires revision and fine-tuning from time to time and in the case of the Senate, the Code itself mandated a review within three years of its coming into force. The purpose of the exercise was to evaluate the Code's provisions and to identify areas that could be improved. For its review, the Committee heard from experts in law and procedure, such as the Clerk of the Senate, the Senate Law Clerk and Parliamentary Counsel, as well as from individual Senators who wished to participate in the process. I was also asked for my views and submitted a number of recommendations for change, which were largely accepted by the Committee and, ultimately adopted by the full Senate.[2]

One of the most important amendments the Senate adopted was to insert a specific reference in the Code as to my independence. While in practice my independence was never an issue before then, I recommended that the Committee make this point explicit in the Code, not only to emphasize its importance, but also to address any perception that I was not independent in respect of the opinions and advice I provide to individual Senators. Another important amendment involved making public declarations concerning private interests. In most conflict of interest regimes in Canada, legislators must make some form of public declaration where they have a private interest in a matter before the legislature, or one of its committees. The Senate is no exception. Under the previous version of the Code, Senators were required to make a declaration either in the full Senate or in committee, depending on where the issue first arose. However, there was some question as to whether they could then debate the matter, although it was clear they could not vote. The Code was amended to clarify that Senators are not permitted to debate any matter in which they have a private interest and, if the matter is before a committee, they must also withdraw from the proceedings altogether. And, of course, they are not permitted to vote in such circumstances.

Another amendment ensures that, where I am of the view that a meeting with a Senator is required concerning an issue that has arisen in the context of the annual disclosure process, I may require that a meeting take place. This was an important change since, in my view (and this view is shared by most of my provincial and territorial counterparts), a face-to-face meeting with individual Senators is often the most effective way of resolving a matter. It is an opportunity to obtain additional information about the Senator's financial circumstances, to clarify any inconsistencies or ambiguities in the Senator's confidential disclosure

statement, and to discuss any measures that the Senator may be required to take to meet his or her obligations under the Code.

These annual meetings are also important because they are preventive and educational in nature. In other words, they are useful in addressing problems before they arise and discussing measures that may be taken in order to ensure that any potential conflict of interest is avoided. This can avert time-consuming and costly inquiries and investigations, which may neither be necessary nor in the public interest. Prevention, here as elsewhere, is preferable to cure. As experience is gained with the existing Senate Code, I expect it will be further amended.

Examples of Canadian Codes in Practice

The following table shows the number of investigations by federal and provincial ethics commissioners in 2008 compared to the previous years. Let me briefly mention a few of the 2008 cases.

First, an inquiry was undertaken by the Conflict of Interest and Ethics Commissioner into an allegation that a Member of the House of Commons, Robert Thibault, had breached the Conflict of Interest Code for Members of the House of Commons in participating in the work of a Standing Committee dealing with the so-called Airbus affair, a matter concerning former Prime Minister, Brian Mulroney. The issue was that Mr. Mulroney had initiated a lawsuit against Mr. Thibault on a related matter which was ongoing in the courts.[3]

The question was whether Mr. Thibault had a "private interest" within the meaning of the House Code and, more specifically, whether a lawsuit constituted a "liability" and consequently, a "private interest" under the House Code. If so, Mr. Thibault would have been required to publicly declare that interest and abstain from participating, debating and voting on the matter.

The Commissioner found that a lawsuit instituting a damages claim against a Member, being a contingent liability, also constitutes a liability within the meaning of the House Code and, therefore, a private interest for the purposes of the relevant sections of the House Code (sections 8, 12, and 13).

The Commissioner, however, recommended that no sanction be imposed because this was a novel question that had not arisen in the past and, as such, any obligations under the House Code in this regard might be unclear to Members. She did, however, recommend

Investigations/Inquiries by Parliamentary Ethics Commissioners (2004-2008)*

	Date of Establishment of Offices	Number of Parliamentarians	2004	2005	2006	2007	2008
Ontario	1988	103	3	1	2	1	2
British Columbia	1990	58	1	0	1	0	1
Nova Scotia	1991	52	0	0	0	0	0
Alberta	1992	83	1	1	0	3	0
Newfoundland and Labrador	1993	48	0	0	0	0	0
Saskatchewan	1994	58	2	1	0	0	2
Québec	1996	125	na	na	na	na	na
Northwest Territories	1998	19	1	0	0	0	0
Prince Edward Island	1999	27	0	0	0	0	2
New Brunswick	2000	55	0	0	1	1	0
Nunavut	2000	19	1	0	0	0	2
Manitoba	2002	57	0	0	0	0	0
Yukon	2002	18	0	0	0	0	2
House of Commons	2004	308	0	3	4	1	6
Senate	2005	105	na	0	0	0	0
Total			**9**	**6**	**8**	**6**	**17**

* All jurisdictions have independent commissioners and rules or codes of conduct
Source: Canadian Conflict of Interest Network (CCOIN)

that Mr. Thibault disclose the existence of his private interest to the Speaker of the House.

Interestingly, after the Commissioner's report was made public, the House of Commons adopted a motion to amend the House Code to exclude a matter that "consists of being a party to a legal action relating to actions of the Member as a Member of Parliament" from the concept of "private interest". The House of Commons then referred the matter back to the Commissioner for further consideration of her conclusions in light of the amendment. She reconsidered the matter and issued a new opinion in which she found that, if the amendment had existed before her decision on the matter, Mr. Thibault would not have failed to comply with the House Code and, therefore, as of the date of the amendment to the House Code, Mr. Thibault no longer had any obligations under the relevant sections of the House Code in relation to his previous private interest resulting from the lawsuit.

Another interesting case arose as a result of a complaint made by an organization called Democracy Watch – a public interest advocacy group promoting democratic reform, government accountability and corporate responsibility. It involved the current Prime Minister, Stephen Harper, and the Minister of Justice, Rob Nicholson. However, unlike the Thibault matter, this case was decided under the *Conflict of Interest Act*.

It was alleged that the Prime Minister was in a conflict of interest in making certain decisions concerning the method of proceeding with allegations raised concerning the former Prime Minister, Mr. Brian Mulroney, given that Mr. Mulroney had advised Mr. Harper in the past, and since the current Minister of Justice had served under Mr. Mulroney. Democracy Watch contended that decisions taken by Prime Minister Harper gave preferential treatment to the former Prime Minister. It was argued that both public office holders had a private interest in that they were acting to preserve their own reputations. The Commissioner was of the view that there was insufficient credible evidence to suggest that either Prime Minister Harper or his Minister of Justice were lacking in impartiality and in a conflict of interest. Democracy Watch challenged that decision in the Federal Court of Appeal. In early 2009, the Court refused to hear the case, having decided that Democracy Watch had no statutory right to have its complaint investigated by the Commissioner.

Another case that was decided this year involved the federal Minister of Finance, James Flaherty, and an interest he and his wife held in a mortgage extended to a private school. Mr. Flaherty participated in the decision-making process that led to a measure introduced in the 2007 Federal Budget that extended the tax exemption for scholarship, fellowship and bursary income to elementary and secondary students. The allegation by an Opposition Member of Parliament was that Mr. Flaherty had an interest in a private school that stood to benefit from the tax exemption, and therefore was in a possible conflict of interest situation.

The Commissioner decided the matter under the previous Conflict of Interest and Post-Employment Code for Public Officer Holders, rather than the *Conflict of Interest Act*, since the alleged conflict of interest would have taken place prior to the passing of the *Conflict of Interest Act*.

The Commissioner concluded that although Mr. Flaherty participated in the deliberations that led to the inclusion of the tax exemption in the 2007 Budget, there was no direct or specific connection between the tax exemption and his financial interest as a joint mortgagee for the loan extended to the school. The school had not offered scholarships, fellowships or bursaries; therefore Mr. Flaherty's private interest could not have been particularly or significantly affected by his participation in the budget deliberations. As such, there was no need for him to recuse himself from these deliberations.

Another interesting case took place in British Columbia. The provincial Minister of Forests and Range was involved in two discretionary decisions that involved the forestry industry in which his brother was employed. The allegation was that the Minister was in an apparent conflict of interest in the exercise of his power, duty or function resulting from his brother's employment with companies that benefited from the Minister's decisions.

The Commissioner found that there was no apparent conflict of interest in the exercise of the Minister's powers, duties and functions, since the brother was employed as a middle manager not a senior manager, and as such, his responsibilities were entirely operational. He had no responsibility for corporate policy or organization. Moreover, he was not part of any discussions or negotiations concerning the matters with which the Minister was dealing, nor did he in any way benefit financially or by employment promotion as a result of the decisions made by the Minister.

A case from Ontario involved the Speaker of the Assembly, Michael Brown. After a general election, and while he was still the Speaker, Mr. Brown attended a post-election celebratory dinner for Liberal caucus members. The allegation was that, in doing so, he had

breached the parliamentary convention that Speakers must remain non-partisan. The Acting Integrity Commissioner concluded that she did not have the jurisdiction to deal with the issue, leaving the question concerning the type of conduct by the Speaker that could compromise his impartiality to the Legislative Assembly itself.

This is just a sampling of the dozen or so investigations conducted by federal, provincial and territorial ethics commissioners in 2008, involving allegation that ministers or parliamentarians had not complied with their obligations under the Codes applicable to them. Additional information about these and others cases may be found on the various commissioners' websites.

In conclusion, I want to draw attention to the results of a comparative study undertaken by Professor Ian Greene of York University, in which he assessed the number of reported conflicts of interest in provincial and territorial jurisdictions, before and after the introduction of independent ethics commissioners and rules of conduct for parliamentarians some twenty years ago.[4] The findings do not apply to the Senate or the House of Commons as neither House had established its own parliamentary ethics regime when Professor Greene undertook his study. Even so, the results of this 2005 report and its conclusions are of particular interest and are well worth repeating here.

First, Professor Greene noted "there has been a dramatic drop in the number of reported conflict of interest media stories since the introduction of ethics commissioners". Second, he reported "there has been an even more dramatic drop in the number of substantiated 'events' in most jurisdictions". His findings are all the more significant since, as he notes, "unlike in the pre-commissioner days, there is a quick and credible way of resolving conflict of interest allegations" and therefore more incentive to make a complaint. Even so, he added "the amount of time taken up by conflict of interest stories on radio/television, and the number of columns in the print media has been substantially reduced..."

These findings reflect well on the performance to date of the Canadian model of parliamentary ethics at the provincial and territorial level, and suggest that the combination of independent commissioners and explicit codes or rules of conduct provides a solid foundation on which to build. With ethics systems now in place for the House of Commons and Senate, one hopes that conflict of interest allegations will drop at the federal level as well over the coming years. Over time, this should result in greater public confidence in the political system and in government generally. All of which underlines the critical importance of strong ethics codes and their diligent enforcement in contributing to the strengthening of public trust in our parliamentary institutions. Having said that, much more will be required to rebuild Canadians' confidence in our political institutions, given the low turnout at recent general elections and the low esteem in which parliamentarians are held, as reflected in many opinion polls over the years.

Notes

1. Jean T. Fournier "Emergence of a Distinctive Canadian Model of Parliamentary Ethics," *Journal of Parliamentary and Political Law*, Vol. 11:3, 2009.
2. Annual Report, Office of the Senate Ethics Officer, 2007-2008.
3. Annual Report in respect of the Conflict of Interest Code for Members of the House of Commons, Office of the Conflict of Interest and Ethics Commissioner, 2007-2008.
4. Ian Greene, Presentation, Workshop on Conflict of Interest, Center for Practical Ethics, McLaughlin College, York University, March 24, 2005.