

## Ethics Rules Undermine Democracy.

By Brent Timmons

The Public Consultation Paper dated December 15, 2008 (the “**Consultation Paper**”) issued by the Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney (the “**Commission**”) summarizes as follows:

In the policy review, the Commissioner is charged with reporting and making recommendations on two issues of policy. They centre, first, on the content of Canada’s federal ethics rules and, second, on the policies and practices at the Privy Council Office (PCO) governing the handling of the prime minister’s correspondence.

This paper focuses only on the first of these two issues.

The Consultation Paper sets out a list of 6 Consultation Questions designed to discharge the Commission’s duty. The Questions are focused on the content and sufficiency of current ethics rules. This paper addresses all of these questions but from a prior position. It steps back and looks at the need and justification for ethics rules governing our elected officials. I argue that the apparent benefit of ethics rules governing elected officials is greatly outweighed by the harm to our democracy and freedom. Therefore, this paper presents the position that our current ethics rules are overly broad and destructive.

### Federal Ethics Rules

This paper focuses on elected members of government only. An elected official is essentially different from other “Public Officer holders” as the legislation tends to refer to high ranking, yet appointed, members of the civil services. The latter are employees the former are expressions of the democratic will of the people. All public offices are not the same and treating them the same, or at least without recognizing their different essential natures, contributes to the undermining of democracy that this paper analyzes. For these reasons, rules that address only elected members, such as the *Conflict of Interest Code for Members of the House of Commons*, should be paramount.

Ethics rules focus on two aspects. The first relate to “conflicts of interests” and are aimed at preventing elected members from advancing their private interest or the private interests of another, ostensibly at the expense of the public good. Officer holders are precluded from giving preferential treatment to anyone based on their identity. Likewise, when the officer holder leaves office, they are subjected to post-employment rules preventing them from improperly taking advantage of the fact that they held office to promote their personal interest.

The second aspect of ethics rules relates to disclosure and divestment rules. These rules force elected officials to disclose their assets in a manner that would allow a third party arbiter to decide whether that office holder, by virtue of the officer holder's property or relationships, is too interested in a matter to take part in the public decision making process.

### Acts vs Virtue

When ancient philosophers considered the study of ethics, they were considering the good life and the good person. This focused on virtue and how to develop virtues such as justice, courage, temperance, prudence and honesty. In contrast, contemporary thinkers view ethics more in terms of the rightness or wrongness of individual acts: abortion, theft, dishonesty, rather than the good person.

The ancients did not spend a lot of time worrying about 'ethics' in this sense for it is clear that a good person will generally act well. Likewise the non-virtuous person will tend not to act well. As Aristotle famously stated, if you want to know what is good in this particular situation, then you must ask what the good person would do in this situation. There are very few rules that can apply to all situations because facts and circumstances vary in all cases.

When we speak of ethics rules as applicable to the actions of government officials, we are thinking of rules which apply to the individual acts of those officials: disclosure of conflicts of interest, lobbying, taking bribes, etc. We are not speaking of the virtues of government officials: whether they are hard workers, honest people or just people. The rules focus on individual acts and try to make rules for all officials in similar situations.

We cannot make, nor would it be desirable, rules to govern the character of our elected officials. That is why we have elections: to examine the character of those seeking office and decide as a body of citizens who is best fit to hold that office. This is no easy task and it is serious business. But if the citizens elect people of good character, there is generally no need to have ethics rules, for those people of good character will generally do good things. However, if the citizens get the decision wrong and elect people of bad character: whether unjust, dishonest or imprudent, generally those people will act in accordance with their character: badly.

It is the second group of actions that governments aim to prevent with ethics rules. The reasoning goes that if we have ethics rules in place, then it will not matter if we elect people of good character or bad character, everyone will have to follow the ethics rules and will be forced to act in the best interest of the public as a whole.

But if it does not matter who the citizens elect, is that not contrary to democracy? If it does not matter who is elected then people will not bother to vote. It is surely no

coincidence that the level of voter turnout in elections in all democratic countries is inversely correlated to the number and scope of ethics rules.

Electing government officials is an important and difficult task. Ethics rules may take away some of the consequence of getting that task wrong, but the cost is an erosion of democracy (it does not matter who is elected and people will not vote). Freedom can be messy. A free populace means that not everyone will read poetry, sip wine and attend the opera. People will choose reality TV, beer and guns. That is the price of freedom. The price of democracy is that sometimes the leaders and former leaders we elect will do things that we do not approve. That is a small price to pay to ensure our freedom.

### The Illusion of Impartiality

It might be argued that, even if what I argued above is correct, the damage caused by ethics rules is far outweighed by the impartiality created among office holders who accordingly govern in the common good. However this “forced impartiality” is nothing more than the forced appearance of impartiality.

It is entirely impossible to force elected members of government to be impartial. Members of Parliament are elected to represent their constituency. They are not expected to be impartial in that regard, although they should keep an eye on the greater good. There are times when the good of their constituents coincides with their own personal interests. There is nothing wrong with that. This shows us that we do not really want impartiality, what we want is elected officials who have sufficient judgment to know when to pursue the goods that may coincide with their own personal interest and when to make a decision that may be against their own interest (just as we expect politicians to sometimes make decisions based on the good of the country as a whole, perhaps at the expense of their own constituency). This calls for character and judgment. It is not possible to develop rules to determine what to do in these situations just like one cannot make rules for character. The people alone should be the judges of these actions with their ballots or their regard for a politician.

The illusion is a pleasant thought, with dangerous consequences.

### Disclosure Rules

In theory, there is nothing harmful about rules requiring office holder to disclose their personal holdings and interests. Again, however, the application of current disclosure rules leads to an undermining of democracy.

Our current ethics rules mandate disclosure of personal interests of office holders when they take office. A fully informed and engaged electorate, however, would have demanded such disclosure from candidates prior to the election. Such an electorate would refuse to support anyone who did not voluntarily disclose this information. In deference to reality, there would be nothing wrong with ethics rules mandating the disclosure of such information by each candidate. Then the electorate could decide for themselves

how likely the candidate is to act in their private interest at the expense of the public interest, and could judge the office holder as their term progressed.

The current system, however, leads to passive electorate. Instead of requiring individual candidates to disclose their personal interest, we mandate it for office holders and delegate the adjudication of such conflicts to a third party, not to the electorate. This takes away valuable information from the electorate and leads to an even more passive electorate. We don't have to worry about conflicts of interest, as the ethics rules can take care of that for us.

### Ethics Rules After Leaving Office

Ethics rules aimed at the post-term employment of office holders are generally aimed to prevent lobbying. The reasoning goes that the public does not want a revolving door approach to governing, whereby the government is influenced by private interests who are promoted by former office holders. There is an appearance of impropriety for a former office holder to use hers or his knowledge of and contacts with a government to profit themselves and their acquaintances.

Once again, however, the problem is focusing on a rule, not the underlying virtue. To prevent one from lobbying post government service, says more about the current office holder being lobbied than it does about the former office holder doing the lobbying. Can the office holder be persuaded to act in means that are not for the greater good? It is also a statement about the former office holder: would she act in a way that was consistent with the good of the country or try to persuade others (the current office holder) to act in way that is not good for the country?

By systematically taking the responsibility for judging candidates on their character away from the electorate, we create an even greater need for expanding ethics rules. By electing people of good character we would not need post employment lobbying rules. For even on the chance that the electorate makes a mistake in its judgment, the lobbyist would need another 'mistake' in officer to have any influence.

### Conclusion

I have argued that ethics rules, while well meaning, undermine our democracy. The rules take away the important responsibility, and therefore an important motivator, of the electorate to judge the character of the candidates and decide who should fill the office. The rules themselves focus on individual acts rather than the virtue and character of the holders. Once this process is started, there is an ever growing need for ethics rules as character is removed and each and every act will have to be regulated and our democratic choice will be severely limited and inconsequential.