PART II – POLICY REVIEW

PRE-EXPERT POLICY FORUM – DRAFT RESEARCH REPORT

Employment and Post-Employment Restrictions on Prime Ministers and Members of Parliament in Canada

An independent background research study prepared for the Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney

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March 2009

Disclaimer

This draft study has been prepared for the Part II (Policy Review) phase of the Commission's mandate. The Commission has not completed its fact-finding functions associated with the Part I (Factual Inquiry) phase. The Commissioner takes no views on the truth or otherwise of any of the allegations that led to this Commission of Inquiry or on any of the facts described in previous examinations of these matters. In no manner should this study be read as taking a position on these issues. To the extent that it presumes facts, it does so entirely to ground the policy questions in a manner that has no bearing on the fact-finding function of the Commission.

This study will be distributed to the parties in the policy phase and published on the Commission's website. It will be the subject of discussions during the Export Policy Forum, scheduled for June 2009. Following the forum, the study will be reviewed and published in its final form.

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INTRODUCTION

Order in Council 2008–1092 has established a commission of inquiry into certain aspects of the business dealings between former prime minister Brian Mulroney and businessman Karlheinz Schreiber. The Terms of Reference for the Inquiry outline 17 questions concerning the alleged dealings of these two men as well as the regulatory regime and the guidelines for ministers and parliamentarians that may have related to or governed matters such as conflict of interest, outside employment, and post-employment restrictions.

The focus of this report is Question 14:

> 14. Are there ethical rules or guidelines which currently would have covered these business and financial dealings? Are they sufficient or should there be additional ethical rules or guidelines concerning the activities of politicians as they transition from office or after they leave office?

The question presupposes that the nature of the agreement between Messrs. Mulroney and Schreiber is known and understood. At the time of preparing this study, this supposition is not the case. For purposes of discussion, therefore, and for consideration of ethical issues related to a prime minister and a parliamentarian making business agreements while in office, this study assumes that an agreement was made, that the agreement was a retainer of some sort, and that it was related to work which was to be conducted by the former prime minister and parliamentarian. This study also assumes that the work itself would be legitimate in the normal course of business – that is, that the work per se would be legal in Canada and elsewhere.

ANALYTICAL FRAMEWORK: METHOD AND DATA

In order to answer Question 14 in the Terms of Reference, several further questions appear to be relevant. In addition, current statutes, regulations, and guidelines and the relevant case law must also be consulted.

FURTHER QUESTIONS

To help explore Question 14, it is instructive to pose further questions. The six questions that follow seem particularly pertinent:

1. Can a retainer agreement involving private business be made by a prime minister with a third party while that prime minister is in office? Does it matter if the agreement is made at the end or toward the end of the term of office of the prime minister?
2. Can a retainer agreement be made by a member of parliament who was prime minister, where the prime minister has resigned from that position but retains his seat in the Commons? Does it matter if the agreement is made toward the end of his or her term of office?
3. Does it matter if the retainer is for work to be performed after the prime minister leaves office? Does the length of time after the prime minister leaves office matter? Are these answers different for a member of parliament who has been prime minister?
4. Does the type of work (the subject matter) of the agreement matter? Is one kind of work acceptable but not another?
5. A retainer agreement in legal work usually implies that money is paid for future work. Does it matter if no money was paid for the retainer until the prime minister left office? Does the length of time after the prime minister left office matter?
6. Does it matter if the retainer was for work with a foreign entity or government rather than for work directed at the Canadian government? If not, is this a gap in the current legislation which should be filled? If so, should the legislation be amended in some way?

These questions follow various scenarios and hypotheses based on the status of someone who is a minister of the Crown – indeed, the first minister – and who then becomes an "ordinary" member of parliament. They are intended to delve into the appropriateness of seeking "outside" work while in office, the timing of looking for such work, the timing of the work itself, the subject matter of the work, the receipt of money for a retainer, the timing of the receipt of retainer money, and, finally, the entities that are involved in the work.

The questions are an attempt to probe whether private interests may compromise the public interest. This question, in turn, is determined by reviewing the various scenarios in light of current law, regulation, policy, and practice.

INFORMATION

The focus of this study is on the current law, regulation, and policy that would govern elected parliamentarians who seek, and engage in, employment outside their work as parliamentarians and/or ministers. The main focus is on the *Conflict of Interest Act*,

which was enacted as part of the *Federal Accountability Act* and is now in force.[1] Other legislation, including the *Parliament of Canada Act* and the *Lobbying Act*, are also consulted, as are the corruption sections of the *Criminal Code*.[2]

The Conflict of Interest Code for Members of the House of Commons, a standing order of the House, is a pivotal document because it provides ethics rules for members of the House of Commons.[3] The former Conflict of Interest and Post-Employment Code for Public Office Holders, which has had several iterations through many federal administrations, is also very important. The 1985 edition of that Code is critical because it provides a base line of ethics rules by which comparisons can be drawn with contemporary rules.

Other codes and legislation, such as the Ontario's *Members Integrity Act*, Ontario's *Public Service for Ontario Act*, and British Columbia's *Members Conflict of Interest Act*, also provide useful comparisons to assess and understand the contemporary ethics regimes at the federal level.[4] Similarly, the federal Values and Ethics Code for the Public Service, apparently under revision, also provides a useful interpretive backdrop.[5] Interpretive bulletins from various Canadian jurisdictions concerning employment issues related to public officials have also been consulted for this study.

In addition, the common law related to employment contracts is relevant. Case law respecting post-employment restraints is instructive and, although it is not the focus here, it too has been consulted.

METHOD

Although this study uses concepts from ethics, political science, public administration, and law, its method is traditional legal analysis. Statutory interpretation, contract interpretation, and case law analysis are the basis of the analysis.

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[1] *Conflict of Interest Act*, SC 2006, c. 9, s. 2, as am. by SC 2006, c. 9, ss. 35–37.
[2] *Criminal Code*, RSC 1985, c. C-46; *Lobbying Act*, RSC 1985, c. 44 (4th Supp.).
[3] Standing Order of the House of Commons. Appendix 1.
[4] *Members Integrity Act*, SO 1994, c. 38, as am. by *Public Service for Ontario Act, 2006*, SO 2006, c. 35, Schedule A; *Members' Conflict of Interest Act*, RSBC 1985, c. 287; see also O. Reg. 381/07.
[5] Canada Public Service Agency, *Values and Ethics Code for the Public Service* (Ottawa: Minister of Public Works and Government Services, 2003).

The study begins with an appreciation of the 1985 Conflict of Interest and Post-Employment Code for Public Office Holders. In particular, the sections dealing with "outside" employment are considered. A discussion of contemporary law follows.

ANALYSIS AND DISCUSSION

Each of the six questions listed above will be answered in turn. However, it is instructive first to consider the purpose of "outside" employment restrictions in a general way. It is also useful to outline the framework within which the legislation has been enacted, and in which the common law of contract has dealt with this issue.

THE PURPOSE OF RESTRAINING OUTSIDE EMPLOYMENT AND IMPOSING RESTRICTIONS ON POST-EMPLOYMENT ACTIVITY

Restraints on outside activities and employment and on post-employment activity form part of many contemporary public sector ethics codes. They reflect the move toward rules intended to promote integrity in government. Such restrictions have their origins, first, in public law attempts to limit conflicting interests and to promote integrity, and, second, in private sector contracts directed at preventing competition and attempting to restrain trade in certain contexts. Although the first set of origins is of paramount concern here, the second set, along with case law in the area, is instructive and will be considered briefly.

Integrity and Employment Restraints

Integrity in government, and ethical conduct based on it, are critical for maintaining democratic government, which is founded on ideals of mutual respect and equity.[6] Integrity is about probity and propriety – "the importance of accountability to, responsibility in relation to[,] and respect for others amidst changing and difficult circumstances."[7]

[6] I. Green and D. Shugarman, *Honest Politics* (Toronto: James Lorimer, 1997), chap. 1.
[7] G. Levine, *The Law of Government Ethics: Federal, Ontario and British Columbia* (Aurora: Canada Law Book, 2007), 13 (see chapter 2 generally, also).

Integrity in government is about uprightness in government operations and fair dealing. It is, as the Supreme Court of Canada has indicated, about being free from "under the table" dealing and from securing personal advantage or gain.[8]

To this end – to protect the public interest in government – various laws and codes have been enacted and promulgated. The *Criminal Code* makes various forms of public corruption illegal – such as bribery, selling offices, and frauds on the government.[9] Governments at all levels in Canada have also been concerned with behaviour that is not conducive to the public weal and which may be seen as proto-corruption and certainly misbehaviour, though not corruption in the criminal sense. To this end, statutes, codes, and bylaws have been enacted or adopted. These instruments typically contain guidance respecting conflict of interest as well as prohibitions against misuse of government property, inappropriate influence and use of office, and inappropriate receipt of gifts. Among these prohibitions, various types of outside employment and post-employment restrictions are often included.

Where outside activity and/or employment restrictions are found, they should always be viewed in context. A detailed analysis of the restrictions within current legislation and the 1985 Conflict of Interest and Post-Employment Codes for Public Office Holders is set out later in this study. For now, however, it is important to note that the context within which these restrictions were created was an attempt to prevent situations where public office could be used for private advantage. Moreover, they were intended to prevent public office holders from using information and advantage gained while they were in office to the detriment of the public good. In this latter respect, there are echoes of the common law of contract and its restraint of trade doctrine.

Contract and Employment / Post-Employment Restrictions

Employers often attempt to limit by contract what outside employment activities their employees may undertake. Covenants restricting activities typically relate to the post-employment period, but they have been used for current employees as well. They are

[8] For example, see *R. v. Hinchey*, [1996] 3 SCR 1128, para. 16 in particular.
[9] *Criminal Code*, RSC 1985, c. C-46, ss. 118–26.

intended to prevent direct competition with the employer.[10] With respect to the post-employment period, typical concerns relate to the possibility of employees working for competitor employers, setting up their own competing businesses, revealing confidential information, or soliciting their former employer's clients or employees.[11] For both current employees and the formerly employed, there is concern about competition, misuse of trade secrets, and loss of goodwill, which may ensue from outside activity or post-employment activity.[12]

These concerns are not dissimilar to public sector concerns about misuse of office. They reflect a concern for misuse of something that belongs to another. In the private sector, the business is concerned about itself, whereas in the public sector, restrictions are intended to protect the public interest in a larger sense.

Canadian courts have been cautious about enforcing restrictive covenants that amount to restraint of trade. They will protect such restrictions only where a proprietary interest is involved and where the covenant is reasonable in terms of the activities it covers and its duration, geographical breadth, and overall fairness.[13] Moreover, it is well understood that a covenant of this nature must cause minimal harm to the employee to whom it applies.[14] General clauses that restrict activity, regardless of the reasons, for a period of time will not be upheld.[15]

The nature of the concerns expressed in restrictive covenants relating to private sector employment is instructive, as is the caution exhibited by the courts in interpreting such covenants. With respect to the former, the concerns are broadly similar to those in the public sector, while the latter provides a window onto the way to approach public sector restrictions that may limit an individual's ability to gain a livelihood. Given their reluctance about inappropriately restraining trade, the courts may well tread cautiously with respect to restrictions on a public sector official or worker who leaves the public

[10] H. O'Reilly and P.N. Gupta, "The Annotated Executive Employment Agreement," in Law Society of Upper Canada, *The Annotated Employment Contract, 2004* (Toronto: LSUC, 2004), 23, section 11.
[11] J. Kollmorgen and S. John, "Post-Employment Restraints," 2007, on Deacons Law website. See also R. Prince, *Employment Law in Principle* (Pymont, NSW: Thomson, 2007), 20.
[12] S.R. Ball, *Canadian Employment Law* (Aurora, Ont.: Canada Law Book, 2008), chap. 7, s. 7:10; see also G. England, *Individual Employment Law* (Toronto: Irwin Law, 2008), 51–57.
[13] Ball, *Employment Law*; England, *Individual Employment Law*, 52.
[14] England, *Individual Employment Law*, 53.
[15] S.R. Ball, "Comment on *Jostens Canada Ltd. v. Zbieranek*" (1993) 42 *Canadian Cases on Employment Law* 271.

sector, notwithstanding that public duty and protecting the public interest are usually understood differently from private duty and protecting private interest. Against this, one could argue that the difference between public and private sector employment is sufficiently acute that both outside employment and post-employment activities of public sector employees ought to be subject to more severe restrictions. Public employment and public sector activities are public trusts in a way in which private sector activity is not. As L'Heureux-Dubé J stated in the Supreme Court of Canada decision in *Hinchey*:

> In my view, given the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe.[16]

It is arguable, though, that the post-employment situation may be different from the current employment and outside activity situation. It is true that, either way, there is a public trust, but it is also true that to unduly restrict people who have left the public service would not only be unfair to them but could reasonably be seen to constitute an inappropriate restraint of trade, just as in the private sector. Nonetheless, some restriction seems appropriate given the importance of information to which public officials, especially senior public officials, have access.

LEGISLATION AND POLICIES DEALING WITH THE EMPLOYMENT AND POST-EMPLOYMENT ACTIVITIES OF ELECTED PUBLIC OFFICIALS

The Commission's policy consultation document has outlined the key legislation at play in the Inquiry.[17] Nevertheless, it is useful to outline some of the legislation and specific sections relevant to the questions posed in this study.

The *Criminal Code*

As the questions have been posed and the assumptions made thus far, the matters being discussed here are not criminal in nature. The *Criminal Code* does serve, however, as a useful interpretive backdrop. The corruption sections represent the most egregious attacks

[16] *R. v. Hinchey*, [1996] 3 SCR, para 18.
[17] Oliphant Commission, "Part II – Policy Review: Public Consultation Paper" (December 15, 2008), www.oliphantcommission.ca.

on governmental integrity that the law prohibits and punishes. For example, section 121 deals with frauds on the government. It states in part:

> Every one commits an offence who
> (a) directly or indirectly
> (i) gives, offers, or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or
> (ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person, a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with
> (iii) the transaction of business with or any matter of business relating to the government …
> whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be;
> …
> (c) being an official or employee of the government, directly or indirectly demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind for themselves or another person, unless they have the consent in writing of the head of the branch of government that employs them or of which they are an official;
> (d) having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with
> (i) anything mentioned in subparagraph (a)(iii) or (iv);
> …
> (f) having made a tender to obtain a contract with the government,
> (i) directly or indirectly gives or offers, or agrees to give or offer, to another person who has made a tender, to a member of that person's family or to another person for the benefit of that person, a reward, advantage or benefit of any kind as consideration for the withdrawal of the tender of that person, or
> (ii) directly or indirectly demands, accepts or offers or agrees to accept from another person who has made a tender a reward, advantage or benefit of any kind for themselves or another person as consideration for the withdrawal of their own tender.

This section clearly deals with financial and business matters and with dealing gone awry – that is, dealings that are dishonest and corrupt. To date, no one has suggested any such dealings in the matters at issue in the Commission of Inquiry, and they are not the focus here.

However, the assault on integrity of government posed by corrupt acts is only partially dealt with by the *Criminal Code*. Lesser dealings may also taint government, and it is the recognition of this fact that has led to a series of federal reports and policies, and finally to the *Federal Accountability Act*, which included the *Conflict of Interest Act* noted above.

The Conflict of Interest and Post-Employment Code for Public Office Holders, 1985

There have been several iterations of the federal Conflict of Interest and Post-Employment Code, notably in 1985, 1994, and 2006. For purposes of this study, however, it is the 1985 Code that provides an important baseline for the analysis: this version would have been in force in 1993, at the time of the alleged agreement between the parties in this inquiry.

In order to provide some insight into whether current ethics regimes provide anything new, it is important to consider briefly what system was "in force" at the time. The legal status of the Code, known as the Conflict of Interest Code and its successors, has been ambiguous, although some of its sections have been referred to in court cases and have formed elements of contractual disputes related to senior public servants.[18] It is fair to say that it was a standard, or set of standards, by which the actions of ministers and other public office holders could be assessed.

The 1985 Code applied to "public office holders," which included ministers of the Crown.[19] It contained sections labelled, respectively, Object, Application, and Principles. The object of the Code was to establish clear rules of conduct respecting conflict of interest and post-employment practices and to minimize the possibility of conflicts between the private interests and public duties of public officers.[20] Interestingly, this minimization of conflict was to be done in the context of "facilitating interchange between the public and private sector."[21] There was, from the beginning, an understanding that private interests would always be at play and, in some sense, had to be tolerated or even encouraged and legitimized. Facilitating interchange between the

[18] C. Forcese and A. Freeman, *The Laws of Government* (Toronto: Irwin Law, 2005), 445–49.
[19] Conflict of Interest and Post-Employment Code for Public Office Holders (Ottawa: Government of Canada, 1985) [1985 Code], s. 2(a).
[20] Ibid., s. 4 (c) and (d).
[21] Ibid., s. 4 (a).

private and public sectors would mean that accommodations such as blind trusts and blind management agreements would have to be made and that they would recognize that private sector actors would come into government and likely return to the private sector. This approach carries through to the current legislation, as will be seen below. What was unacceptable, or more accurately what was to be minimized, was the clash of private interests with public duties.

In the application section, the Code is seen as providing "general and specific direction to assist public office holders in the furtherance" of the Code's principles.[22] The Code was not definitive, however, as public office holders were held responsible to "take such *additional* action as may be necessary to prevent real, potential or apparent conflicts of interest."[23] Guidance was provided, but public office holders were expected to go beyond this guidance to assess the situations in which they found themselves and consider whether their actions might not only be real conflicts of interest but also (or instead) apparent or potential conflicts of interest.[24]

The principles section contains many exhortations and prohibitions. Among the most general affirmative requirements are the following:

> (a) public office holders shall perform their official duties and arrange their private affairs in such a manner that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced;
> (b) public office holders have an obligation to act in a manner that will bear the closest public scrutiny, *an obligation that is not fully discharged by simply acting within the law*.[25] [Emphasis added.]

The Code also contains general prohibitions against misuse of information obtained in the course of official work and against misuse of government property.[26]

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[22] Ibid., s. 5 (1).
[23] Ibid., s. 5 (2).
[24] The terms "apparent conflict of interest" and "potential conflict of interest" were not defined in the Code. Potential conflict of interest may be seen as the moment when a person realizes that he or she has an interest in a matter at hand, and apparent conflict of interest as the time when a generally well-informed person could reasonably conclude that an official's ability to perform a public duty was affected by his or her private interest. For a discussion of these issues, see Levine, *The Law of Government Ethics*, 8–12; see also *Members' Conflict of Interest Act*, RSBC 1996, c. 287, s. 2 (2).
[25] The 1985 Code, s. 7 (a) and (b).
[26] Ibid., s. 7 (g) and (h).

Some of the specific prohibitions that may relate to business and financial dealings are as follows:

> (c) public office holders shall not have private interests, other than those permitted pursuant to this Code, that would be *affected particularly or significantly by government actions in which they participate*;
> …
> (e) public office holders, shall not solicit or accept transfers of economic benefit, other than incidental gifts, customary hospitality, or other benefits of nominal value, *unless the transfer is pursuant to an enforceable contract or property right of the public office holder*;
> (f) public office holders shall not step out of their official roles *to assist private entities or persons in their dealings with the government where this would result in preferential treatment to any person*;
> …
> (i) public office holders shall not act after they leave public office in such a manner as to take *improper advantage* of their previous office[.][27] [Emphasis added.]

The Code divided public office holders into two categories, "A" and "B." It required all office holders to sign a document saying they had read and understood the Code and, as a condition of holding office, they would observe the Code.[28] Category A public office holders included ministers of the Crown.[29]

For Category A public office holders, methods of compliance – including avoidance, confidential reporting, public declaration, and divestment – were outlined.[30] The Code also listed assets that were for the official's private use and those that were exempt from compliance.[31] These officials were required to produce summary statements that provided public evidence of compliance.[32] They were also to divest "controlled assets."[33]

For Category A public office holders, there were a number of additional prohibitions. Except for their official duties, they were not to do the following:

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[27] Ibid., s. 7 (c), (e), (f), (i).
[28] Ibid., s. 8 (1).
[29] Ibid., s. 14 (a).
[30] Ibid., ss. 16 and 21.
[31] Ibid., s. 19.
[32] Ibid., s. 22.
[33] Ibid., s. 27. These assets included publicly traded securities, self-administered RRSPs and commodities, and futures and foreign currencies held or traded for speculative purposes. Interestingly, they did not include – and, logically, could not include – prospective business arrangements.

> *(a) engage in the practice of a business or profession*;
> (b) actively manage or operate a business or commercial activity;
> (c) retain or accept directorships or offices in financial or commercial corporations;
> (d) hold office in a union or professional association;
> (e) *serve as a paid consultant*[.] [Emphasis added.][34]

Other outside activities were permissible, but they could not be inconsistent with official duties.[35] Moreover, they were reportable, and one senses that they were seen to be things such as involvement with non-commercial activities.[36]

Category A public office holders were also to avoid preferential treatment. Further, they were to avoid the appearance of it:

> (2) A Category A public office holder shall take care to avoid being placed or the appearance of being placed under an obligation to any person or organization that might profit from special consideration on the part of the office holder.

Hence there were a number of principles and prohibitions in place which could be seen to be relevant to the formation of business agreements by public office holders.

The *Conflict of Interest Act*

Having considered what was in place, what follows is a discussion of key provisions of the current legislation and codes, beginning with the *Conflict of Interest Act*.

The federal *Conflict of Interest Act*[37] codifies much of what the various iterations of the Conflict of Interest and Post-Employment Code for Public Office Holders contained and, in addition, includes definitions that empower the new Conflict of Interest and Ethics Commissioner and clarify elements of the previous rules. Because the Act is a statute of Parliament, its legal status is much clearer than that of the Codes. As such, it is law, and mot "merely" policy or convention.

The *Conflict of Interest Act* has very similar purposes to the Objects section of the Code. The multifaceted purpose is stated as follows:

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[34] Ibid., s. 29.
[35] Ibid., s. 28.
[36] Ibid., ss. 30 and 31.
[37] *Conflict of Interest Act* [*CIA*], SC 2006, c. 9, s. 2, as am. by SC 2006, c. 9, ss. 35–37.

> The purpose of this Act is to
> (a) establish clear conflict of interest and post-employment rules for public office holders;
> (b) minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise;
> (c) provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred;
> (d) encourage experienced and competent persons to seek and accept public office; and
> (e) facilitate interchange between the private and public sector.[38]

The one principal difference between the purposes of the Act and the Code is the mandate given to the Conflict of Interest and Ethics Commissioner. Although this position is a new mechanism for compliance with respect to ethics rules for public office holders, it is not an alteration of the rules per se. The goal of facilitating interchange between the private and the public sector has been retained.

The *Conflict of Interest Act* applies to public office holders and, as with the Code, these officers include ministers of the Crown.[39] The Act attempts to provide further clarifications to concepts such as "private interest."[40] It also establishes different types of public office holders, among which are "public office holders" and "reporting public office holders." The latter group includes ministers of the Crown.[41]

Part 1 of this new Act creates a series of ethics rules dealing with conflict of interest, and it sets out both obligations and prohibitions, just as the Code did. Matters such as preferential treatment, insider information, and influence of office are included, as they were in the Code. The Act contains a general prohibition against public office holders being in conflicts of interest and provides a definition of this term:

> s. 4. Conflict of interest
>
> For the purposes of this Act, a public office holder is in a conflict of interest

[38] Ibid., s. 3.
[39] Ibid., s. 2.
[40] Ibid., s. 2: "Private interest" is defined negatively as not including matters of general application or matters that affect a public office holder as one of a broad class of people.
[41] Ibid., s. 2.

> when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.
>
> s. 5. General duty
>
> Every public office holder shall arrange his or her private affairs in a manner that will prevent the public office holder from being in a conflict of interest.
>
> s. 6(1). Decision-making
>
> No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest.

This definition of conflict of interest reflects the typical notion of public sector conflict – that is, where a private interest clashes with a public duty.

The sections on preferential treatment and influence are of particular relevance to Part II (Policy Review) of the Commission's mandate. They are as follows:

> s. 7. Preferential treatment
>
> No public office holder shall, in the exercise of an official power, duty or function, give *preferential treatment* to any person or organization based on the identity of the person or organization that represents the first-mentioned person or organization.
>
> s. 9. Influence
>
> No public office holder *shall use his or her position* as a public office holder to seek to influence a decision of another person so as *to further the public office holder's private interests* or those of the public office holder's relatives or friends or to improperly further another person's private interests. [Emphasis added.]

Offers of outside employment are also dealt with.

> s. 10. Offers of outside employment
>
> No public office holder shall allow himself or herself to be influenced in the exercise of an official power, duty or function by plans for, or offers of, outside employment.

Section 10 is interesting because it anticipates that offers of outside employment will be made, and it legitimizes them in keeping with one of the Act's purposes. So long as an offer does not interfere with an official's duties, the public office holder will not violate the Act.

Part 1 of the Act also contains several rules about contracting. For example, it prohibits ministers of the Crown from being parties to contracts involving public sector entities.[42]

The Act contains the same prohibitions as did the Code with respect to outside activities. Subsection 15(1) says:

> No reporting public office holder shall, except as required in the exercise of his or her official powers, duties and functions,
> (a) *engage in employment or the practice of a profession*;
> (b) manage or operate a business or commercial activity;
> (c) continue as, or become, a director or officer in a corporation or an organization;
> (d) hold office in a union or professional association;
> (e) *serve as a paid consultant*; or
> (f) be an active partner in a partnership. [Emphasis added.]

Note that this section applies to *reporting* public office holders (including ministers).

Just as with Category A public office holders under the Code, reporting public office holders under the Act are required to divest "controlled assets." These assets are defined in a similar way as

> "controlled assets" means assets whose value could be directly or indirectly affected by government decisions or policy including, but not limited to, the following:
>
> (a) publicly traded securities of corporations and foreign governments, whether held individually or in an investment portfolio account such as, but not limited to, stocks, bonds, stock market indices, trust units, closed-end mutual funds, commercial papers and medium-term notes;
> (b) self-administered registered retirement savings plans, self-administered registered education savings plans and registered retirement income funds composed of at least one asset that would be considered controlled if held outside the plan or fund;
> (c) commodities, futures and foreign currencies held or traded for speculative

[42] Ibid., s. 13. See s. 14 as well.

> purposes; and
> (d) stock options, warrants, rights and similar instruments.[43]

The inclusion of stock options and the other items is a further refinement of the earlier Code.

Part 2 of the Act is about compliance measures. Reporting public office holders are to prepare a confidential report on assets for the Conflict of Interest and Ethics Commissioner which is to be provided within 60 days of assuming office.[44] Interestingly, all reporting public office holders "shall disclose in writing to the Commissioner within seven days all firm offers of outside employment."[45] In addition, where employment is accepted, this fact must be disclosed within seven days.[46]

Employment in this context should be viewed broadly, and not merely as working for wages as a salaried employee of someone or some entity. Depending on the context, "employ" can mean a common dictionary meaning, such as to use the services of someone in some business.[47] It would seem almost pointless in the context of an ethics code or ethics law to prohibit or inhibit only those employment relations defined narrowly as waged positions and to allow individuals to take other forms of paid work such as consulting or professional work. The potential for conflict of interest and conflict of duty is surely just as great with the latter type of work.

Part 2 of the Act also contains other important reporting requirements. It requires reporting public office holders to report recusal respecting matters on which they have not participated in decision making; to make a public declaration of all their assets; to state what liabilities they have; and to declare what gifts they have received and what travel they have undertaken. A central feature of this Act is to use reporting both as a form of monitoring and as a way to achieve better public monitoring.

Part 3 of the Act deals with post-employment obligations. The central prohibition remains the same as it was in the Code:

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[43] Ibid., s. 20.
[44] Ibid., s. 22.
[45] Ibid., s. 24 (1).
[46] Ibid., s. 24 (2).
[47] See discussion of the term "employ" in *Words and Phrases* (Toronto: Carswell, 2008) and in particular the discussion of *Cormier v. Alberta Human Rights Commission*, [1984] 14 DLR (4th) 55 (Alta. QB).

> No former public office holder shall act in such a manner as to take *improper advantage* of his or her previous public office.[48] [Emphasis added.]

The Act contains a number of prohibitions which apply only to reporting public office holders. They include prohibitions on contracting, on representation generally, and on representations by former ministers:

> 35(1) Prohibition on contracting
>
> No former reporting public office holder shall enter into a contract of service with, accept an appointment to a board of directors of, or accept an offer of employment with, an entity with which he or she had direct and significant official dealings during the period of one year immediately before his or her last day in office.
>
> 35(2) Prohibition on representations
>
> No former reporting public office holder shall make representations whether for remuneration or not, for or on behalf of any other person or entity to any department, organization, board, commission or tribunal with which he or she had direct and significant official dealings during the period of one year immediately before his or her last day in office.
>
> 35(3) Prohibition on former ministers
>
> No former reporting public office holder who was a minister of the Crown or minister of state shall make representations to a current minister of the Crown or minister of state who was a minister of the Crown or a minister of state at the same time as the former reporting public office holder.

These prohibitions apply for a period of one year after leaving office for reporting public office holders generally, and for two years for former ministers.[49]

It is also noteworthy that former reporting public office holders who lobby and, in doing so, arrange meetings with ministers are to report that activity to the Conflict of Interest and Ethics Commissioner (hereafter ethics commissioner).[50]

Unlike the Code, much of the Act deals with enforcement issues and with monitoring and enforcement by the new ethics commissioner. These aspects of the new

[48] *CIA*, s. 33.
[49] Ibid., s. 36. Note that these periods may be waived or themselves limited on application to the Conflict of Interest and Ethics Commissioner; see s. 39.
[50] Ibid., s. 37.

Act need not be summarized here, but they make a critical difference. Although the rules have been enhanced in the new Act, the creation of the position of ethics commissioner, with advisory, monitoring, reporting, and administrative order powers, provides a break with past systems. The new system has the force of law and some means of enforcement. It represents a transition in part from a values-based approach to a more coercive approach.[51]

The Conflict of Interest Code for Members of the House of Commons

The Conflict of Interest Code for Members of the House of Commons is a Standing Order of the House of Commons. It applies to all members of the House, including ministers, who are also covered by the *Conflict of Interest Act*.[52] The legal status of the Code has been seen to be non-justiciable and not law in the same sense as the *Conflict of Interest Act*.[53]

The Members Code establishes rules respecting conflict of interest and disclosure of assets and liabilities. With respect to conflict of interest, it contains prohibitions on the misuse of information and on inappropriate use of influence.

The general prohibition concerning members' furthering their own interests is as follows:

> 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 or entity's private interests.[54]

[51] See, for example, T. Cooper, "Big Questions in Administrative Ethics: A Need for Collaborative Focussed Effort" (2004) 62 *Public Administration Review* 141–61, which outlines the classic Friedrich Finer debate as well as more recent concerns in administrative ethics.
[52] Conflict of Interest Code for Members of the House of Commons [Members Code], s. 4.
[53] Forcese and Freeman, *The Laws of Government*, 444. The Code is seen as part of the procedures of the House and subject to parliamentary rules and privilege. It could be argued, however, that because an inquiry system is embedded in the Code, it may attract fairness obligations in the conduct of the inquiry. In turn, these obligations may be justiciable, even though the ethics commissioner himself (or herself) does not exercise a statutory power of decision (he or she reports opinions and makes recommendations under this Code). It is interesting and significant that the federal Parliament has seen fit not to codify rules for members of the House and the Senate within statutory law. This decision stands in marked contrast to the approach taken in the provinces, where there is statutory codification.
[54] Members Code, s. 8.

This prohibition provides a general backdrop of concern – namely, that private interest should not prevail over public duty.

The section on influence is as follows:

> A Member shall not use his or her position as a Member to influence a decision of another person so as to further the Member's private interests or those of a member of his or her family, or to improperly further another person's or entity's private interests.[55]

This prohibition too is general, although it is intended to protect the integrity of office of members of parliament and to safeguard the public interest.

Members are required to disclose conflicts, and they are not to participate in debates or to vote on matters when they have such conflicts.[56] This part of the Code adopts the classic common law position respecting how to deal with conflicts of interest – disclose, withdraw, and do not participate or vote.

Other prohibitions deal with gifts and permissions and with cautions respecting sponsored travel. In relation to the subject of this study, the most important prohibition perhaps is the partial one that concerns contracting with the government. Subsection 16(1) of the Code states:

> 16(1) A Member shall not knowingly be a party, directly or through a subcontract, to a contract with the Government of Canada or any federal agency or body under which the Member receives a benefit *unless the Commissioner is of the opinion that the contract is unlikely to affect the Member's obligations under this Code*. [Emphasis added.]

Contracting is not impossible, then, but it requires approval. Similarly, members may hold securities with corporations that deal with the Government of Canada unless the ethics commissioner is "of the opinion that the size of the holdings is so significant that it is likely to affect the Member's obligations under this Code."[57] Business dealings and holdings are not as restricted under the Members Code as they are in the *Conflict of Interest Act*.

[55] Ibid., s. 9.
[56] Ibid., ss. 12 and 13.
[57] Ibid., s. 17.

As noted above, disclosure statements are required of each member. They must be made after 60 days of entering the House.[58] A public summary statement, based on their disclosure statements, is then prepared.

The Members Code is neither as stringent nor as wide ranging as the *Conflict of Interest Act*. A crucial area of difference is the absence of post-employment restrictions in the Members Code. Such an absence is logical, in the sense that members are permitted to engage in outside activities while they are members, so it would appear inappropriate to have heavier restrictions after they have left office. In addition, members do not hold executive or administrative positions in the same sense that ministers and other public office holders do, so they are not seen to have the same post-employment clout or influence and should not be subject to the same level of restriction. In a sense, the *Lobbying Act* restrictions discussed below signal this kind of difference. It would be possible to argue, however, that many members, particularly on the government side, may have behind-the-scenes influence that bears scrutiny in the post-employment period.

The *Lobbying Act*

The federal *Lobbying Act*, formerly the *Lobbyists Registration Act*, sets rules for conduct of lobbyists. It also requires them to register and to file returns on their activities.[59] It requires filing both from individuals who lobby on behalf of others and from those who are employed in house by businesses and other organizations.[60]

The Act contains a prohibition on lobbying for a five-year period for designated public office holders. Section 10.11 states in part:

> 10.11(1) No individual shall, during a period of five years after the day on which the individual ceases to be a designated public office holder,
> (a) carry on any of the activities referred to in paragraph 5(1)(a) or (b) in the circumstances referred to in subsection 5(1);
> (b) if the individual is employed by an organization, carry on any of the activities referred to in paragraph 7(1)(a) on behalf of that organization; and
> (c) if the individual is employed by a corporation, carry on any of the activities referred to in paragraph 7(1)(a) on behalf of that corporation if carrying on those activities would constitute a significant part of the individual's work on its behalf.

[58] Ibid., s. 20.
[59] *Lobbying Act*, RSC 1985, c. 44 (4th Supp.).
[60] Ibid., ss. 5 and 7.

Designated public office holders include ministers, but not MPs, who are public officer holders under the Act but are not "designated."[61] The Commissioner of Lobbying may exempt someone from the five-year limitation period.[62] The absence of a restriction respecting members of parliament per se, as opposed to ministers, reflects the lower restrictions on MPs generally. It is interesting, however, that parliamentary secretaries are not expressly included in the definition of designated public office holder, yet such individuals could be very influential. Similarly, long-serving members of House or Senate committees could be, and could be seen to be, very influential beyond Parliament and in the executive. To exclude members without any consideration of their potential influence seems problematic.

The *Parliament of Canada Act*

The *Parliament of Canada Act* governs the House and the Senate.[63] One of its rules is germane to the subject of this study. Section 41 of the Act states in part:

> (1) No member of the House of Commons shall receive or agree to receive any compensation, directly or indirectly, for services rendered or to be rendered to any person, either by the member or another person,
>
> (a) in relation to any bill, proceeding, contract, claim, controversy, charge, accusation, arrest or other matter before the Senate or the House of Commons or a committee of either House; or
> (b) for the purpose of influencing or attempting to influence any member of either House.

Although it is not stated as such, this rule is a restriction on MPs lobbying each other as paid lobbyists.

Comment

This summary reveals that a number of provisions exist in Acts and Codes which could apply to situations in which ministers (and prime ministers) or members of parliament

[61] Ibid., s. 2(1).
[62] Ibid., s. 10.11(3).
[63] *Parliament of Canada Act*, RSC 1985, c. P-1.

make business arrangements. It also shows that there is a great deal of ambiguity. Terms such as "improper advantage" require further interpretation, and sections such as those dealing with employment restrictions invite comparisons with other similar laws and policies. Such interpretation and comparison are best done in the context of exploring the questions outlined above.

THE QUESTIONS: ANSWERS AND INTERPRETATIONS

Messrs Schreiber and Mulroney allegedly entered into an agreement. Not much is known about the agreement, but it is alleged to have been a retainer of some sort. Because retainer agreements usually involve an upfront payment before services are rendered, it is instructive to consider what a retainer is before providing some answers to the questions. It is understood, though, that the exact nature of the agreement is a key element of this Inquiry. It is also understood that there may have been no formality or even much structure to the agreement, whatever it was, between the parties involved in this Inquiry. Nonetheless, the idea of a retainer or an agreement requiring payment upfront provides a potentially useful construct for analyzing the obligations of a former public office holder and former member of parliament respecting outside employment, future employment, and future lobbying. The retainer construct provides a vehicle for understanding the obligations stemming from payment in advance.

It may be that the agreement between the parties was so loose that the money amounted to a gift or was a symbol of a vague promise or statement with no real obligations attached to it. Here, it is assumed that the payments are not gifts and that they relate to the retention of a former public office holder and a former member of parliament to do some work related to something in which the party paying the retainer had an interest or was seeking to obtain an interest.

Retainers have been defined in many ways. A retainer can mean a fee paid in advance to obtain someone's services, a fee paid to engage a professional, or a sum of money paid in advance to secure the services of a professional.[64] For professionals, especially lawyers, the term retainer may mean the act of employing a counsel, the

[64] See YourDictionary.com; *Collins Essential English Dictionary*, 2nd ed. (New York: HarperCollins, 2006); *The American Heritage Dictionary* (New York: Houghton Mifflin, 2000); and *The Oxford Paperback Dictionary* (Oxford: Oxford University Press, 1994).

document by which a lawyer's employment is secured, or the amount of money deposited to secure a lawyer's services.[65] In some contexts it can mean simply a sign-up fee,[66] and in other contexts it means a security against work done and a guarantee of payment. The latter is usually the case in legal contexts, where a lawyer takes an amount of money from the client at the beginning of their relationship, places it in a trust account, and then draws on it once services have been performed. It appears in the present case that the retainer was both a preliminary agreement, the exact nature of which is unknown at this time and is the subject of the Inquiry, and an amount of money paid at least somewhat upfront (three payments) which was to be for services performed and for expenses.

The implications of a retainer that constitutes a sign-up fee alone may be somewhat different from those in which money is intended to be applied to the project. A sign-up fee retains someone in the sense that he or she may be on call for a certain period, and the fee is paid whether any work is done or not. It is lost to the person who pays if no work is done in that period. A typical retainer in legal circles involves paying money up front which will be applied to work later on. If the work is not done, or only some work is done, the payment, or part of it, will be returned. Typically, more work is done and further payments are required, but return of funds is possible. This latter form of retainer will be the focus of the discussion below.

Retainer Agreements Made by a Prime Minister

Question 1 pertains to whether a prime minister could make a retainer agreement and whether the timing of such an agreement matters:

> Can a retainer agreement involving private business be made by a prime minister with a third party while that prime minister is in office? Does it matter if the agreement is made at the end or toward the end of the term of office of the prime minister?

Assuming, as this study has throughout, that the deal per se was not illegal in a general sense, the legislation and policy that would currently govern Question 1 are the *Conflict of Interest Act* and the Conflict of Interest Code for Members of the House of

[65] Law Society of Upper Canada, *Establishing the Retainer Agreement* (Toronto, 2008), p. 3, citing Thomas Baldwin, "Solicitors Retainer," 1998.
[66] This appears to be happening, for example, in various arrangements being made to hire integrity commissioners in Ontario municipalities.

Commons [Members Code]. The previous policy that would have relevance to Question 1 was the Conflict of Interest and Post-Employment Code for Public Office Holders [1985 Code].

Application

There is no question that the Members Code applies to the prime minister as a member of the House of Commons. That would be true today, and it would have been true in the past had the Code been in effect.

The *Conflict of Interest Act* applies to ministers of the Crown, as noted previously. Although the former Code was structured such that it could be argued that the intent was for prime ministers to have accountability of their ministers to themselves, the current Act is structured such that accountability is to Parliament through the Conflict of Interest and Ethics Commissioner, and the prime minister is no less accountable than other ministers of the Crown.

Private Business, Offers, and the Prime Minister

Much of this question ultimately hinges on what the agreement actually required. If it did not require any work related to the Government of Canada or the official duties of the prime minister, many concerns and questions simply evaporate because of the wording of the Act and the Members Code. Moreover, we should bear in mind that one of the purposes of the *Conflict of Interest Act* (s. 3) and the 1985 Conflict of Interest Code was to facilitate interchange between the private and the public sectors.

Turning to the Act first, there are, as noted above, some general cautions and prohibitions. Sections 4 and 5 contain these general statements:

> s. 4. Conflict of interest
>
> For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person’s private interests.

s. 5. General duty

> Every public office holder shall arrange his or her private affairs in a manner that will prevent the public office holder from being in a conflict of interest.

Section 4 hinges on whether an official duty or function was to be performed *and* there is an opportunity to further private interests. Interestingly, unlike in some Canadian legislation[67] (and in the former Conflict of Interest Code), there is no prohibition concerning the appearance of conflict of interest. There must be an actual conflict of interest and having business dealings per se does not put a public office holder into an automatic position of conflict of interest. Having such dealings does not necessarily create an appearance of conflict, though the ambit of the appearance concept is decidedly wider.

Appearance of conflict of interest is an important concept deriving, as it does, from the law related to reasonable apprehension of bias. Governmental processes should be fair and be seen to be fair, and actions of government officials should be seen to be above reproach. Being involved in situations where a reasonably well-informed person could reasonably believe that an official was in conflict could bring governmental action into disrepute. This formulation of apparent conflicts is used in the *Members Conflict of Interest Act* of British Columbia, and it has been analyzed and used in a number of BC Commissioners' reports.[68] It is an important concept and tool. While naysayers claim that it is unfair to castigate those who are not in any actual conflict, and that no one should be condemned for appearance only,[69] appearances are important. In those situations where the actions of senior officials or ministers may seem untoward because of potential or perceived conflicts, it is appropriate to expand the regulatory framework to include apparent conflict of interest.

Other prohibitions concerning decision making, preferential treatment, and influence of office apply only if, on the facts, it can be shown that some preference was indeed created. Again there is no prohibition concerning appearances in sections 7 and 9 of the *Conflict of Interest Act*.

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[67] See section 2(2) of British Columbia's *Members' Conflict of Interest Act*, RSBC 1996, c. 287.
[68] Ibid.
[69] See, for example, P. Morgan and G. Reynolds, *The Appearance of Impropriety: How the Ethics Wars Have Undermined American Government, Business and Society* (New York: Free Press, 2002).

The section on offers of outside employment is interesting because it clearly anticipates that public office holders per se will receive such offers. Section 10 states:

> No public office holder shall allow himself or herself to be influenced in the exercise of an official power, duty or function by plans for, or offers of, outside employment.

What this section pointedly does not say is "hear no offers" or "accept no offers." Indeed, it anticipates that there will be offers, and it anticipates moves between the public and the private sectors and public business dealings with respect to the private sector.[70] The federal Public Services Values and Ethics Code also anticipates that employees will get offers, and, in cases where they could place the public service in a position of real, apparent, or potential conflict of interest, it requires that firm offers be disclosed. It also requires that acceptance of such offers be disclosed immediately. It, like the *Conflict of Interest Act*, provides little guidance on what happens on acceptance. Because public servants, unlike reporting public office holders, can engage in outside work, though, it likely means that they will have to practise avoidance with respect to conflicts of interest rather than resign. Reporting public office holders, as discussed below, are prohibited from engaging in outside work (with limited exceptions). For such public office holders not only to accept an offer but also to take up the work, they would have to resign or be in violation of the *Conflict of Interest Act*.

The prime minister is a reporting public office holder (and, in the relevant time period, was a Category A public office holder under the 1985 Code). For reporting public office holders, there are critical restrictions, as set out below.

Section 15 of the Act clearly restricts outside activities. It states in part:

> No reporting public office holder shall, except as required in the exercise of his or her official powers, duties and functions,
> (a) engage in employment or the practice of a profession …
> …
> (e) serve as a paid consultant …

[70] Canada Public Service Agency, *Values and Ethics Code*.

Under current law, the prime minister simply could not, for example, practise law or engage in any kind of representation for hire (as employment or as a paid consultant) outside his or her official duties. Outside activity is clearly restricted.

Section 15 does not deal with future employment or retainer agreements that pertain to future work. Section 10 allows for such offers and the accepting of them, and it does not impose different rules for reporting public office holders. It could be argued that the acceptance of a retainer, even one merely entertaining the possibility of future work, is engaging in the practice of a profession. It is harder to argue that such an agreement is actual employment or serving as a paid consultant. Moreover, this interpretation of "engaging" or "serving" would vitiate those provisions of the Act which allow offers *and* acceptances of offers, and so it is likely stretching the intent of section15.

The timing of the retainer would be irrelevant if it involved actual paid work while in office. Whether at the beginning or the end of the prime minister's time in office, he or she would be in violation of the statute. The converse also appears pertinent. If a retainer is made which contemplates future work, it will not be caught by the Act unless it is of such a nature as to be considered engaging in employment or paid work in and of itself. Again, whether these arrangements happen early or late in the term of office does not matter. Further discussion on timing appears in the answers to questions below.

Private business dealing per se – that is, engaging in outside work – is prohibited in the current Act (as it was for Category A public office holders under the 1985 Code). This prohibition relates to outside activity while the individual is a public office holder. It is *not* about post-employment future work, which is explored further below.

Offers are contemplated for all public office holders. Reporting public office holders must disclose both offers of employment and acceptance of such offers. Subsection 24(1) of the Act states:

> A reporting public office holder shall disclose in writing to the Commissioner within seven days all firm offers of outside employment.

Neither the term *firm* nor *offer* is defined. It is fair to argue that the offer of a retainer as discussed above is an offer of employment in the common and general senses of both offer and employment (or, minimally, engagement for the purpose of doing paid

work). As discussed above in the section "The *Conflict of Interest Act*," employment should be seen broadly and would include independent contractors. To restrict the meaning to waged or salaried employment would virtually exempt a lot of activity which public office holders might be expected to become engaged in (paid work without an employee/employer wage-based relationship).

Subsection 24(2) of the Act states in part:

> A reporting public office holder who accepts an offer of outside employment shall within seven days disclose his or her acceptance of the offer in writing to the Commissioner as well as to the following persons:
> (a) in the case of a minister of the Crown or minister of state, to the Prime Minister[.]

It is interesting that a minister is to report offers to the prime minister – a relationship that draws a distinction between the ministers and the prime minister. However, as a minister of the Crown, the prime minister must still disclose to the Conflict of Interest and Ethics Commissioner. This new obligation was not in place in 1985.[71] The effect of the obligation remains oblique because it is not clear what is to be done with the information. Nonetheless, it is a requirement, and a prime minister receiving an offer or firming up a retainer would be obliged to report this information to the ethics commissioner.

In sum, with respect to outside activity by a sitting prime minister, there are clear and express prohibitions in current legislation against contracting directly with the government and acting for, or as a party to, such a contract. Future employment issues are dealt with below in the section "Forming a Contract for Work to Be Done after Leaving Office."

Members of the House and Retainer Agreements

Question 2 pertains to members of the House or, rather, when a prime minister becomes a "common" member again:

> Can a retainer agreement be made by a member of parliament who was prime minister, where the prime minister has resigned from that position but retains his

[71] The 1985 Code did require disclosure of outside activities, but it was anticipated that such activities would not be employment per se.

> seat in the Commons? Does it matter if it is toward the end of his or her term of office?

Application of the Members Code

The Conflict of Interest Code for Members of the House of Commons [Members Code] applies to ministers (see above). It would apply to a prime minister both in that position and as a member of parliament who was formerly prime minister.

Private Business, Offers, and MPs

The Members Code is based on principles designed to protect the public interest and to promote the integrity of the parliamentary process. Nowhere in the purpose statement or the principles section is there reference to facilitating interchange between the private and the public sectors as there is in the *Conflict of Interest Act*, or as there was in the 1985 Conflict of Interest Code.

One of the principles highlights the need to avoid both real and apparent conflicts of interest. Subsection 2(d) states:

> 2**.** Given that service in Parliament is a public trust, the House of Commons recognizes and declares that Members are expected
> …
> (d) to arrange their private affairs so that foreseeable real or apparent conflicts of interest may be prevented from arising, but if such a conflict does arise, to resolve it in a way that protects the public interest[.]

As a result, more regard is given to appearance of conflicts of interest in the Code than in the Act.

The Members Code contains general prohibitions, although far fewer than in the Act. As noted previously, this Code contains a general prohibition on furthering private interests at the expense of public duties. Section 8 states:

> 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 or entity's private interests.[72]

Furthering the interests of members is also defined in the Code. Among various things, it includes pursuing outside employment and receiving payment for outside employment. Section 3 states in part:

> (2) Subject to subsection (3) [which contains exceptions of no relevance to this report], 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 any of the following
> …
> (*d*) an increase in the person's income from a source referred to in subsection 21(2) [Note that s. 21(2) refers to employment income, income from a profession, and income from a contractual arrangement][.]

If members entered into retainers of the sort discussed above and were remunerated either through the retainers themselves or subject to them, they would be considered to be furthering their private interests. Therefore, they would have an obligation to ensure that their private interests did not interfere with or clash with their official duties.

As noted in the general section on the Members Code above, where members have a conflict, they are obliged to disclose it and not participate in debates or vote on a matter related to that interest. Depending on the nature of the retainer, they might have to disclose the interest and refrain from involvement in the matter were it before the House.

In general, members of the House are not precluded from practising a profession or being employed outside the House. Section 7 of the Members Code states:

> 7. Nothing in this Code prevents Members who are not ministers of the Crown or parliamentary secretaries from any of the following, as long as they are able to fulfill their obligations under this Code:
>
> *(a)* engaging in employment or in the practice of a profession;
> *(b)* carrying on a business;
> *(c)* being a director or officer in a corporation, association, trade union or non-profit organization; and
> (*d*) being a partner in a partnership.[73]

[72] This is a fairly stringent standard, in the sense that members are prohibited from acting "in any way" to further their interests.

Inasmuch as these outside activities are allowed, there would be little problem in a member accepting a retainer to perform a service.

There is no restriction under the Members Code which says that a former minister or prime minister may not have the same privileges and incur the same obligations as members who have never been ministers of the Crown. This Members Code also does not speak to the issue of timing – the Code applies whether members are beginning MPs or members nearing the end of their terms. It also does not apply restrictions on former ministers. The later restrictions are found in the *Conflict of Interest Act* and are discussed below.

Retainer for Work after Leaving Office

Question 3 deals with the relevance, or not, of making an agreement for work after leaving office:

> Does it matter if the retainer is for work to be performed after the prime minister leaves office? Does the length of time after the prime minister leaves office matter? Are these answers different for a member of parliament who has been prime minister?

There are two aspects at least to this question. One is whether the contract and/or retainer formation matters in terms of ethics violations if the work is to be performed later; the other is whether there are limitations on the sort of work a former public office holder can undertake after leaving office.

[73] Section 5 of the Conflict of Interest Code for Senators contains the same formulation, and the Code contains similar injunctions about furthering private interests. It is clearly acceptable among Canadian parliamentarians generally that members of parliament may partake of and maintain outside activities that are remunerative. The Canada Public Service Agency's *Values and Ethics Code* similarly allows outside employment, though it casts prohibition in terms of the likelihood of any conflict of interest arising. It states: "Public servants may engage in employment outside the Public Service and take part in outside activities unless the employment or activities are likely to give rise to a conflict of interest or in any way undermine the neutrality of the Public Service." None of these statements provides a precise explanation of what will trigger the prohibition on outside employment or activity. There must be sufficient flexibility to allow individual assessment in each case.

Forming a Contract while in Office

Whether it matters that a retainer is for work to be performed later may depend on the nature of the retainer and how formal it is. It is one thing for someone to say, "Look me up – I may have some work for you after you leave office," and quite another for a specific arrangement to be made to carry out some defined work, albeit at a later time.

Where the work has been defined and an arrangement made, the rules of the *Conflict of Interest Act* and the Members Code dealing with outside employment and activities would still seem to apply. The very act of forming the contract might be seen as outside activity, although, as noted above, it is not without ambiguity. On balance, though, given that the rules allow offers and acceptances of offers, the formation of a contract is acceptable, as discussed previously, so long as no work is done under the contract until the public employment has ended.

Section 15 of the *Conflict of Interest Act* indicates that reporting public office holders are not to engage in certain activities that constitute outside employment. Still, as noted above, the Act contemplates that they may receive offers of employment. Logically, then, even though it is not stated expressly, it is reasonable to expect that, if a person accepts the offer, he or she must cease to be a reporting public office holder at the time the new work is actually started. It is important to note that engagement in a profession or a commercial or business activity is not the same as having controlled assets. A reporting public office holder can deal with controlled assets by putting them in a blind trust (s. 27(1)), but this concept has no meaning in the context of direct employment – which is prohibited by section 15(1). While reporting public office holders may get offers of employment, if they accept and the employment is to begin during their time of tenure, they must surely resign from their positions as reporting public office holders. All of this may imply, with respect to timing, that a reporting public office holder is able to accept offers of outside work nearing the end of the term of office so long as the work is to begin after the office holder leaves office. This interpretation is not explicitly stated, but it is a logical conclusion of the interplay of rules related to offer, acceptance, and outside employment which are in the legislation. While there is a logic here, there is also considerable ambiguity, and the nexus of offer, acceptance, and no

outside work for reporting public office holders should be expressly clarified in the legislation (see the section "Amending the *Conflict of Interest Act*" below).

Forming a Contract for Work to Be Done after Leaving Office

Doing work after leaving office or even planning to do such work raises questions about post-employment obligations. As noted earlier, having some restrictions on post-employment activity serves interests in both the private and the public sectors. Both the *Conflict of Interest Act* and the *Lobbying Act* deal with these obligations.

Post-Employment Restrictions and the Conflict of Interest Act

The most general prohibition related to the post-employment of former public office holders is in section 33, which states:

> No former public office holder shall act in such a manner as to take improper advantage of his or her previous public office.

Depending on the nature of the work which the retainer required, the former public office holder might be placed in a position of taking improper advantage.

The term "improper advantage" is not defined in the statute. Variants of it occur in case law in various areas of law and in statute law and regulation.[74] The term "improper" from a common-sense point of view means unseemly, indecent, unsuitable, and ill adapted.[75] "Improper" may also denote abuse, as in "abuse of process," and connote unfairness. "Improper influence" may amount to prejudicing decisions and unfairly influencing outcomes.[76] "Advantage" may be seen as bettering position, superiority, or favourable circumstance.[77]

Former public office holders have the advantage of having worked with the methods of government, knowing key personnel in areas that may be of interest to clients,

[74] Section 17 of Quebec's Regulation respecting the Ethics and Professional Conduct of Public Office Holders, OC 824-98, for example, uses the term "undue advantage." See also cases such as *Turner-Lienaux v. Campbell*, [2004] 3 CPC (6th) 289 NSCA, where the court found that a lawyer had used his position to "improper advantage" by acting in a high-handed manner and being deceptively manipulative.
[75] See the reference in Carswell's *Words and Phrases* to the Shorter Oxford Dictionary.
[76] Carswell's *Words and Phrases*. See the reference to the case *Lakeshore Workmen' Council v. Lakeshore Mines* Ltd., [1944] 1 DLR 53 at 56.
[77] Carswell's *Words and Phrases*. See the reference to the Concise Oxford Dictionary.

having developed working relationships with other officers, and being familiar with precise information related to certain issues. Moreover, as a federal Interpretation Bulletin related to lobbying has indicated, former Cabinet ministers, even one who had been out of office for some time, might command attention simply by virtue of their previous position.[78] This knowledge, person, and position is advantageous vis-à-vis other officials. To misuse it, to use it other than in the promotion of the public good within the public service, could be seen to be taking improper advantage. Conceptually, this misuse is akin to exercising improper influence and, similarly, it is about manipulation and the abuse of power through a kind of misappropriation of knowledge and/or relationships that were meant to be used in the service of the public. If public office holders form retainers on this basis, they might be seen as taking improper advantage and, thereby, violating part of the *Conflict of Interest Act*.

Is there a "proper" advantage to be had, or is there something of which proper advantage can be taken? The phrasing implies that there is, and it is the flip side of what has been said above. Former office holders surely should be able to take advantage of the broad skills and experience they have gained. Taking advantage of particular knowledge related to particular matters and taking advantage of relationships could lead not only to violations of the Act but also to corruption and criminal offences. But using knowledge and experience broadly and in general is surely permissible.

The *Conflict of Interest Act* contains specific prohibitions about misusing information, about representing someone with respect to matters with which the office holder dealt while in office, and about contracting. Sections 34 and 35 state:

> 34(1) Previously acting for Crown
>
> No former public office holder shall act for or on behalf of any person or organization in connection with any specific proceeding, transaction, negotiation or case to which the Crown is a party and with respect to which the former public office holder had acted for, or provided advice to, the Crown.
>
> 34(2) Improper information
>
> No former public office holder shall give advice to his or her client, business

[78] See Interpretation Bulletin, *Disclosure of Previous Public Offices* (Ottawa: Office of the Commissioner of Lobbying of Canada, website, 2009); see, in particular, the section entitled "Considerations."

> associate or employer using information that was obtained in his or her capacity as a public office holder and is not available to the public.
>
> Rules for Former Reporting Public Office Holders
>
> 35(1) Prohibition on contracting
>
> No former reporting public office holder shall enter into a contract of service with, accept an appointment to a board of directors of, or accept an offer of employment with, an entity with which he or she had direct and significant official dealings during the period of one year immediately before his or her last day in office.
>
> 35(2) Prohibition on representations
>
> No former reporting public office holder shall make representations whether for remuneration or not, for or on behalf of any other person or entity to any department, organization, board, commission or tribunal with which he or she had direct and significant official dealings during the period of one year immediately before his or her last day in office.
>
> 35(3) Prohibition on former ministers
>
> No former reporting public office holder who was a minister of the Crown or minister of state shall make representations to a current minister of the Crown or minister of state who was a minister of the Crown or a minister of state at the same time as the former reporting public office holder.

There are many restrictions here: not contracting for service in areas where former reporting public office holders had direct and significant dealings, not making representations where they had direct and significant dealings, and not making representations to a minister who was a minister at the same time as the reporting public office holders. Provincial legislation has similar if not as exhaustive restrictions. Section 17 of Ontario's *Members Integrity Act*[79] is interesting because it not only restricts former members but puts an onus on the Executive Council not to award contracts or take representations from former members. This restriction allows for more complete monitoring and for a system of broader control of potential misuse of office than the federal system does.[80] Section 32 of Alberta's *Conflicts of Interest Act*[81] makes it a

[79] SO 1994, c. 38.
[80] See also section 8 of British Columbia's *Members' Conflict of Interest Act*, RSBC 1996, c. 287.

breach of that legislation for a minister to knowingly award a contract to a former minister who is in breach of the post-employment restrictions. Such systems make it clear that the Executive Council or current ministers individually have responsibility as well, and the onus is not simply put on former ministers to act responsibly.

The obverse of direct and significant dealings is indirect and inconsequential dealings, and, presumably, if that was the level of contact, it is permissible. Ministerial non-involvement is of obvious importance here, and if the task, the goal, of the retainer is to contact those whom the minister knew and worked with, then there is a serious problem. The problems may be more complex and wide ranging in some circumstances, where the minister was the prime minister, and less so in others. For example, the prime minister would have had a level of inside information available to few others in government, so the potential for misuse of information is likely higher. However, because other ministers and their officials and administrators do most of the actual operational work of government, it is not as likely that the prime minister will have had direct dealings with many government officials. The prime minister will have had significant dealings with many, but direct dealings with few. The issue of representations and appointments may be an important gap in the legislation because the influence of a prime minister and former prime minister will likely be considerable. In this case, then, the test "significant and direct" may be too narrow; "significant or direct" might be more appropriate.

Finally, there are time limits on the federal restrictions. With respect to public office holders, the time limit is two years after their last day of office. Ministerial staff can seek a waiver of this time limit, but not ministers. A former prime minister would have a two-year cooling-off period.

Post-Employment Restrictions and the Lobbying Act

As discussed in the general legislation and policy section on the *Lobbying Act*, there are limits to lobbying by "designated public office holders." These public office holders include ministers of the Crown (*Lobbying* Act, s. 2(1)(a)).

The prohibition on lobbying is as follows:

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[81] RSA 2000, c. C-23.

> 10.11(1) No individual shall, during a period of five years after the day on which the individual ceases to be a designated public office holder,
>
> (a) carry on any of the activities referred to in paragraph 5(1)(a) or (b) in the circumstances referred to in subsection 5(1);
> (b) if the individual is employed by an organization, carry on any of the activities referred to in paragraph 7(1)(a) on behalf of that organization; and
> (c) if the individual is employed by a corporation, carry on any of the activities referred to in paragraph 7(1)(a) on behalf of that corporation if carrying on those activities would constitute a significant part of the individual's work on its behalf.

In the case at hand, section 10.11 (1)(a) seems most relevant. The lobbying activity outlined in section 5 is as follows:

> 5(1) An individual shall file with the Commissioner, in the prescribed form and manner, a return setting out the information referred to in subsection (2), if the individual, for payment, on behalf of any person or organization (in this section referred to as the "client"), undertakes to
>
> (a) communicate with a public office holder in respect of
> (i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons,
> (ii) the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament,
> (iii) the making or amendment of any regulation as defined in subsection 2(1) of the Statutory Instruments Act,
> (iv) the development or amendment of any policy or program of the Government of Canada,
> (v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada, or
> (vi) the awarding of any contract by or on behalf of Her Majesty in right of Canada; or
> (b) arrange a meeting between a public office holder and any other person.

If a retainer was formed for lobbying in general and for any of the lobbying purposes above, then the five-year restriction will apply. There are exceptions in section 10.11, but none of them apply to someone who was a minister for a significant period.

Violating this prohibition is a serious offence and carries a fine of up to $50,000 (s. 14(2)).

Subject Matter of the Retainer

Question 4 relates to whether the subject matter of the retainer itself matters with respect to the rules and prohibitions:

> Does the type of work (the subject matter) of the agreement matter? Is one kind of work acceptable but not another?

Subject Matter

The subject matter respecting issues of a retainer in the lobbying context is outlined above in the section "Forming a Contract for Work to Be Done after Leaving Office." If a former designated public office holder is lobbying on a given set of issues – for example, lobbying with respect to contracting – then he or she is in violation of section 10.11 and is committing an offence.

Type of Work

The type of work to be done in a retainer does matter in a general sense. As noted above, there are clear prohibitions on some kind of work for reporting public office holders (see the above section "Private Business, Offers, and the Prime Minister") and for former reporting public office holders (see the above section "Retainer for Work after Leaving Office"). Reporting public office holders when in office cannot engage in employment or practice a profession, for example. Former reporting public office holders are prohibited from representation work and contracting work in certain contexts, as described above.

Type of work is less of an issue for members of parliament per se, who may engage in business and professions provided the work does not interfere with their official duties and they declare conflicts when appropriate (see the above section "Members of the House and Retainer Agreements"). They cannot directly contract with the Government of Canada without obtaining an opinion from the Conflict of Interest and Ethics Commissioner that this work is unlikely to affect their official duties.[82] Members

[82] Interestingly, the Conflict of Interest and Ethics Commissioner has received few requests from members for advice in respect to outside activities and contracts. See Conflict of Interest and Ethics Commissioner, *Annual Report, 2007–2008.*

are also prohibited from receiving compensation for services rendered to any person respecting bills, contracts, and other matters before the House or Senate.[83]

Retainer Payment after the Individual Has Left Office

Question 5 relates to the time when a retainer payment is actually taken:

> A retainer agreement in legal work usually implies that money is paid for future work. Does it matter if no money was paid for the retainer until the prime minister left office? Does the length of time after the prime minister left office matter?

Retainer Paid when the Prime Minister Left Office

The nature of retainers was explored at the beginning of the above section "Retainer Agreements Made by a Prime Minister." On one level it could be argued that there is no retainer if no payment has been made – at best there was an agreement to agree before the retainer was formed. It is arguable that it does matter a great deal if the prime minister accepted no money before leaving office because no agreement, while in office, had been made. The formality or informality of the retainer is irrelevant here. What is critical is whether any agreement that attracts contractual obligations or statutory and common law obligations related to employment was created.

As noted previously, lawyers and other professionals often demand retainers in the form of money before doing any work. If that was the situation in the present case, then the working relationship between the prime minister and the businessman would not have begun until after the prime minister left office, but he would have formed a contractual arrangement of some sort, and elements of the *Conflict of Interest Act* relating to outside employment might apply, as discussed above. In the situation where no payment is made, in the absence of any other consideration supporting the existence of a contract, no retainer agreement and no contract of any sort are formed, and the rule respecting contracting in the *Conflict of Interest Act* would not apply. As the Act permits receiving and accepting offers, the mere seeking of business is not likely to be prohibited under the Act and should not likely be interpreted as engaging in employment under section 15.

[83] *Parliament of Canada Act*, RSC 1985, c. P-1, s. 41(1).

Moreover, if the former prime minister did accept the retainer when he was simply a member of parliament, then the Members Code applies. It permits business relationships so long as they do not interfere with official duties.

Does the Length of Time after Leaving Office Matter?

The length of time after leaving office matters with respect to the subject matter and lobbying or contracting with government and the like, as noted above. The *Lobbying Act*, for example, prohibits lobbying by public office holders such as a former prime minister for a five-year period. By way of example, and as noted previously, there are also prohibitions on contracting with government by former ministers. Some activities are clearly prohibited for certain time periods for former ministers. These prohibitions are not about payment or contract formation per se; rather, they are about restricted or prohibited activities occurring within a designated "cooling-off" period.

Contacting Foreign Entities

Question 6 deals with whether it matters if the retainer pertained to work concerning foreign entities or governments:

> Does it matter if the retainer was for work with a foreign entity or government rather than for work directed at the Canadian government? If so, is this a gap in the legislation which should be filled?

The legislation and policies do not really deal with foreign-directed activities. Their focus is on behaviour within the Canadian government and Parliament and toward the Canadian government and Parliament.

Rules such as the rule against taking "improper advantage" of one's position may come into play. For example, if a prime minister had developed close relationships with foreign leaders and members of their governments, and then flaunted or misused that relationship, the rule might come into play. Clearly it would not be in the Canadian government's interest for a former minister or prime minister to damage government relationships while taking advantage of his or her former position. Beyond this general understanding, however, this rule in this context is highly ambiguous.

It is interesting that the prohibitions in the *Conflict of Interest Act* regarding contracting and representation with respect to boards, agencies, departments, and the like do not specify that these bodies must be Canadian. However, that is likely the intent of the sections that appear to be geared to preventing misuse of office and undue influence in arenas in which the former reporting public office holder had some sway.

Inasmuch as there may be concern with damaging Canadian relations and interactions with foreign entities and governments, amendment of the current legislation would be appropriate.

Summary

The key legislative sections, exclusive of the definition and interpretative sections, canvassed in relation to these six questions are outlined in table 1.

TABLE 1: The Key Legislation relating to the Six Questions Posed in This Study

Situation	***Legislation***
Prime Minister in office	*Conflict of Interest Act*, ss. 4, 5, 10, 15, 24
Member of parliament in office	Conflict of Interest Code for Members, s. 2(a), ss. 7, 8
Post-employment	*Conflict of Interest Act*, ss. 33, 34, 35; *Lobbying Act*, ss. 5(1), 10.11(1)

There are important distinctions in obligations between the responsibilities of ministers (and the prime minister) and members of parliament. As a minister of the Crown, a prime minister is subject to the *Conflict of Interest Act* and is a reporting public office holder under that statute. As such, by virtue of section 15 of the *Conflict of Interest Act*, with two exceptions (working for a Crown corporation and engaging in philanthropic work), the prime minister is prohibited from engaging in various employment activities such as practising a profession or being a paid consultant.

Reporting public office holders are not prohibited from accepting offers of employment (and by implication from accepting retainers for future work). If an employment contract or retainer is not for future work, though, and is to begin immediately, the reporting public office holder cannot continue as a reporting public office holder (unless he or she repudiates the contract, which would negate the whole

point of accepting the offer). As stated previously, this work is not analogous to controlled assets, which can be divested through a blind trust. Reporting public office holders cannot simply rearrange their business in the case of outside employment. If the work entails lobbying government, such former officers would also, under the *Lobbying Act*, be prohibited from lobbying government for five years. If the work entails contracting with the government or making representation to it, where the former minister had official dealings with the government, there are prohibitions in place today, some of which are time limited and others more enduring.

Members of the House of Commons are freer than public office holders, especially reporting public office holders, to engage in outside activity and to accept outside remuneration. They are under fewer restrictions both in and out of office. While in office, they must not further their own private interests at the expense of performing their public duties, and their private interests must not supersede their official duties. The principles in their Code are broader as there is express concern with apparent conflict of interest.

STRENGTHENING THE CURRENT LEGISLATION

As has been highlighted throughout this study, certain absences and ambiguities in the current legislative regime could be tightened or eliminated. To explore this suggestion further, it is instructive to consider some of the differences between the original Conflict of Interest and Post-Employment Code for Public Office Holders and the current legislation and then to suggest some specific enhancements to the latter.

TRANSFORMATION OF THE CONFLICT OF INTEREST AND POST-EMPLOYMENT CODE TO THE CONFLICT OF INTEREST ACT

There are considerable differences between the 1985 Code and the current *Conflict of Interest Act*. The creation of a statutory Code with an independent Conflict of Interest and Ethics Commissioner who oversees and monitors the Code and reports to Parliament is a very important and interesting change. The creation of administrative monetary penalties creates a preliminary order power for the ethics commissioner, and that in turn may lead

to further transformation of the ethics system.[84] At present these penalties relate to disclosure requirements. Though significant, that authority is clearly restricted. The ethics commissioner does not have the power to make orders respecting major prohibitions and ethics rules embedded within the statute. Nevertheless, as the first order power of its kind in a model for a Canadian ethics commissioner, it is important and it may lead to broader order powers. For the purposes of this study, the key positive changes between the Code and the Act are the enhanced prohibitions around contracting. There are now more expressly prohibited actions respecting contracting than there were previously.[85]

One rule that appeared in the 1985 Code and is somewhat reflected in the principles in the Members Code, but which has not found its way into the current Act, is the rule concerned with apparent conflict of interest. Subsection 5(2) of the 1985 Code said:

> Conforming to this Code does not absolve individual public office holders of the responsibility to take such additional action as may be necessary to prevent real, potential or apparent conflicts of interest.

The principles of the Members Code refer to apparent conflicts, but this idea is not in the current *Conflict of Interest Act*. Although apparent conflict of interest may not always be easy to ascertain, it is a worthwhile concept. Despite the Federal Court's 2004 decision in *Stevens v. Canada*,[86] the idea of apparent conflict of interest was credibly

[84] Note, however, that the ethics commissioner has downplayed this aspect of the new legislation in a question and answer session given after a speech to the ethicscentre.ca in Toronto, May 2008.
[85] See, for example, sections 13 and 14 of the *Conflict of Interest Act*.
[86] [2005] 2 FCR 629. In this case the Federal Court found that the Parker Commission, which looked into allegations of conflict of interest concerning the Hon. Sinclair Stevens, had exceeded its jurisdiction by defining the concepts of real and apparent conflict of interest. The mandate of the commission had been to find whether the former minister had been in violation of the conflict of interest sections of the Conflict of Interest and Post-Employment Code for Public Office Holders (1985). The commission, the court held, ought not to have interjected its own definitions of real and apparent conflicts. The oddity of this finding, it is respectfully submitted, is that, as the court notes, the Code did not define the terms, yet the commission's mandate was to determine whether there were conflicts! Some understanding of the terms was necessary, or the commission could not have done its work. The court's judgment is based on the understanding that the former minister could not have known a standard devised by a commission investigating his behaviour some time after his actions occurred. What is troubling about the decision is that it does not acknowledge the lineage of the concepts of conflict of interest in administrative and other areas of law. The Parker Commission drew on well-understood concepts involving natural justice and reasonable apprehension of bias. The government did not appeal the Federal Court decision. In a sense, though, from a conceptual point of view, the state of the *Stevens* case in itself does not matter. The idea of apparent conflict of interest has taken hold and, although by no means universally accepted, has come into statute and policy over the years.

explored and outlined in the Parker Commission Report.[87] Mr. Justice Parker indicated that a real conflict was indicated when a public office holder had a private interest of which he or she was aware and which had a nexus with his or her public duties that was sufficient to influence the exercise (performance) of those duties. He defined an apparent conflict of interest as something that could be seen "when a reasonably well informed person could reasonably conclude as a result of surrounding circumstances that the public official must have known about his or her private matter."[88] More recently, the Bellamy Inquiry respecting Toronto Computer Leasing has affirmed the utility of the idea of apparent conflict of interest.[89] For Madam Justice Bellamy, an "apparent conflict of interest exists when somebody could reasonably conclude that a conflict of interest exists."[90] The idea is known to law and arises from the idea of reasonable apprehension of bias – that is, a reasonable apprehension that reasonably well-informed persons could have a bias.[91] Such a concept may be pertinent in a case such as the present one where appearances of official action may have mattered and, indeed, may continue to matter. Interestingly, the 1985 Code dealt with this possibility while the current legislation does not.

Integrity in government is crucial. Both actual integrity and the appearance of integrity must be manifest in the workings of government for public trust to be fostered and maintained.[92] If an official appears to be biased or in conflict, that image compromises his or her impartiality and integrity. In the *Hinchey* case,[93] while discussing the purpose of section 121 of the *Criminal Code*, Madam Justice L'Heureux-Dubé indicated that the section was "not merely to preserve the integrity of government but to preserve the appearance of integrity as well." She cited the *Greenwood* case[94] and approvingly quoted Mr. Justice Doherty when he said that "the governments business

[87] Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair Stevens, *Report* (Ottawa: Ministry of Supply and Services, 1987).
[88] Ibid., p. 32.
[89] Toronto Computer Leasing Inquiry and Toronto External Contracts Inquiry, *Report*, vol. 2 (Toronto: City of Toronto, 2005) (Bellamy Inquiry).
[90] Ibid., p. 39.
[91] Levine, *The Law of Government Ethics*, 11.
[92] See, for example, M. Young, *Conflict of Interest Codes for Parliamentarians: A Long Road* (Ottawa: Parliamentary Library, Legislation and Government Division, 2006).
[93] *R. v. Hinchey*, [1996] 3 SCR, para. 16.
[94] *R. v. Greenwood* (1991), 5 OR (3rd), 71 (Ont. CA).

must be free of any suggestion of 'under the table' rewards."[95] Where there is potential for appearances to harm government, surely they must be taken into account. In this sense the current *Conflict of Interest Act* is deficient.

AMENDING THE CONFLICT OF INTEREST ACT

There are conceptual and practical amendments that could enhance the *Conflict of Interest* legislation.

Apparent Conflict of Interest

The Act should include a specific statement about apparent conflict of interest. This term could be defined as it is, for instance, in British Columbia's *Members Conflict of Interest Act*.[96] Subsection 2(2) of that Act states:

> (2) For the purposes of this Act, a member has an apparent conflict of interest if there is a reasonable perception, which a reasonably well informed person could properly have, that the member's ability to exercise an official power or perform an official duty or function must have been affected by his or her private interest[.]

In the BC formulation, where there is apparent conflict of interest in a matter, members of the Legislative Assembly violate the statute only where they act on the matter. MLAs do not violate the statute merely by being in a situation where they have an apparent conflict. Former commissioner Oliver stated it this way:

> For an apparent conflict of interest, the question is whether the member exercised a power or performed an official duty or function when there was a reasonable perception, which a reasonably well informed person could properly have, that the member's ability to exercise a power, duty or function must have been affected by his private interest. The potential for an appearance of conflict arises whenever there is a reasonable perception that a member is in a position to further his or her private interest through the exercise of an official power, duty or function, i.e. that he or she has the "ability" to do so. However, there is only a violation of the Act if the member actually exercises an official power or performs an official duty or

[95] *R. v. Hinchey*, [1996] 3 SCR, para. 16. For a fuller discussion and citation of the *Hinchey* decision, see Levine, *The Law of Government Ethics*, 13.
[96] RSBC 1996, c. 287.

> function when he or she appears to be in a position to further his or her private interest.[97]

A formulation of the apparent conflict of interest test in British Columbia should be adopted in the federal legislation. The BC legislation stands almost alone at the provincial level in including a standard dealing with apparent conflict of interest for members of the legislature.[98] It is a workable standard and has stood the test of time.

Appearances do matter. Public trust can be enhanced or destroyed by actions that appear unseemly or dishonest even where they may not be. Society cannot rely absolutely on appearances, and ought not to, because appearances can be tragically unfair and also plain wrong. However, a case can be made for an objective standard and for rules that deal with apparent conflict of interest in the current Act.

Monitoring Contracting by Former Reporting Office Holders

Contracting obligations and monitoring, whether former ministers are involved in contracts or not, should not be left solely to the Conflict of Interest and Ethics Commissioner. As discussed above in the section "Forming a Contract for Work to Be Done after Leaving Office," provincial legislation often indicates that the Executive Council or the minister(s) awarding a contract have a responsibility to ensure that former ministers are not contracting with government. This is important because it indicates a collective responsibility of government to monitor itself. A similar requirement should be placed on either the Privy Council Office or Cabinet itself.

Offer, Acceptance, and Employment

The nexus of the offer, acceptance, and outside employment sections in the Act should be made crystal clear. It has been argued above that, in terms of the purposes of the Act,

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[97] Conflict of Interest Commissioner, *Opinion in the Matter of a Request by the Executive Council and an Inquiry pursuant to s. 21 of the* Members Conflict of Interest Act *into Whether the H. Glen Clark has been in Breach of Any of the Sections of the* Members Conflict of Interest Act *in Connection with the Approval in Principle of a Gaming License for the North Burnaby Inn / 545736 BC Ltd* (Victoria: Office of the Conflict of Interest Commissioner, 2001), 53.

[98] The standard is included in the Members Code and in the federal Values and Ethics Code. It was also suggested in the Bellamy Inquiry *Report* as a standard to be used for Toronto, and it has found its way into the *Public Service of Ontario Act*, SO 2006, c. 35, s. 119 (a section dealing with referrals). Recent trends suggest it is an important standard.

reporting public office holders can, logically and consistently, have offers of employment and accept employment. They cannot, however, continue to work as a reporting public office holder if they move beyond offer and acceptance and actually begin the new work (unless it is as a reporting public office holder in another job or it fits the two exceptions set out above in the section "Forming a Contract while in Office"). This type of restriction is obviously consistent with the purpose of the statute. The offer and acceptance sections of the Act should refer back to section 15, the outside employment section, and make it clear that reporting public office holders cannot hold down two jobs at once.

Retainer

Retainers or other contractual arrangements that demand upfront payment as part of the offer and acceptance should be prohibited for public office holders. This restriction would prevent the unseemly spectacle of officials bargaining while in office for payments to be applied to later work. It would also help alleviate any concern about bias in favour of the new "boss" while the official is still obliged to be acting in the public interest.

Ambiguities

Ambiguities in terms such as "improper advantage" and "significant dealings" should be ironed out. The concerns need to be more clearly specified through interpretive sections. For significant dealings, interpretive work such as Alberta's Ethics Bulletin entitled *Post Employment* should be consulted.[99] Although it would be impossible to have an exhaustive list of such dealings, it makes sense to itemize examples as the bulletin does and to include them in the legislation. For example, the bulletin indicates that "significant official dealing" includes ministerial direction of a matter irrespective of whether the minister has had personal contact with the personnel who carry out his or her directions. It also indicates that constant and routine contact could indicate significant dealing between an agency and a person or a department and an agency. It indicates that regular input into the policy process of a department or agency would be seen as significant

[99] Office of the Ethics Commissioner, *Ethics Bulletins – Post Employment* (Edmonton: Office of the Ethics Commissioner, January 1997).

dealing, as would the preparation and presentation of matters for Cabinet consideration. All these indicators are useful, and it would be helpful for the federal regime to adopt this kind of thinking. At a minimum, it ought to work out its own definitions, and it should separate the concepts of significant dealing and direct dealing.

Clarification of the term "improper advantage" – which would outline the misuse of prior knowledge, contacts, and position – would be helpful. Gaining access to channels of power on the basis of current or previous position in order to further private interests, and using influence that was to be applied only in the public interest, are examples of taking an improper advantage. The term has certain ambiguities, and clarification through definitions would be helpful.

AMENDING THE MEMBERS CODE

Three major issues are important with respect to the Code. One relates to status, and the others to conceptual and substantive rules issues – apparent conflict of interest and post-employment restrictions.

Status

The Code is ostensibly non-justiciable. The time has come for Parliament to legislate its code. All the provinces have established such codes within their members' conflict of interest or integrity statutes. The legislatures retain the decision-making power as to what is to happen to those who violate the rules, but the rules have the force of law. It is past time for Parliament to enact rules at the federal level.

Apparent Conflict of Interest

With respect to apparent conflict of interest, the Members Code sees its avoidance as a matter of principle – a view that is important and even impressive. What is needed is to clearly articulate the "appearance" standard throughout the rules in the Code. A standard analogous to the BC standard discussed above in the section "Amending the *Conflict of Interest Act*" should be adopted.

Post-Employment Restrictions

For the most part, it seems appropriate that the Members Code does not contain post-employment restrictions for most members of parliament. Consideration should be given to having some form of post-employment restriction for members of Parliament who are not covered by the *Conflict of Interest Act* as former ministers or advisers but who have influential positions in Parliament. Parliamentary secretaries, for example, are not expressly included in the *Conflict of Interest Act*. Heads of committees might also be subject to some form of post-employment restriction.

CULTURE AND ENFORCEMENT ISSUES

This study focuses on integrity rules as they were and as they might be. In the absence of meaningful culture change and enforcement mechanisms, the rules, no matter how clear, may go unheeded. Rules alone are insufficient. Although the focus of this study is on interpreting and enhancing the rules, it is worthwhile to mention briefly issues of acculturation and enforcement that would make the rules meaningful.

Culture

> Values must be more than "ethical art": a nicely framed code of conduct hanging on the wall. The ethical dimensions of each decision must be taken into account, and must be seen to be taken into account. They should animate everyday decisions by everyone at all levels of activity. What makes an ethical culture strong is acceptance by individuals through involving them in the process of articulating those values. As an oft-quoted saying attributed to Confucius puts it: "Tell me and I forget: show me and I remember; involve me and I understand."[100]

The inculcation of values and ethics is an ongoing process. Involvement in ongoing dialogue concerning the values and ethics in the *Conflict of Interest Act* and the Members Code, training in them, and experience in using them are all imperative if there is to be genuine adherence to them. The Act and the Code ought not to be for show but, rather, to genuinely inform public office holders and influence members' actions.

[100] Bellamy Inquiry, 25.

Enforcement

As the current legislation stands, the Conflict of Interest and Ethics Commissioner can levy some administrative monetary policies. Beyond this role, the office is a form of specialty ombudsman which investigates and reports on potential breaches of the Act and the Code. This latter aspect is appropriate at this juncture. The specialty ombudsman model has worked very well at the provincial level, and it should be given a chance to blossom at the federal level. The provincial models have, for years, been far superior to the federal regimes in place. However, the process should be subject to review and, in time, if it is not working at the federal level, Parliament should consider having an ethics commissioner with a wider array of direct sanction powers.

CONCLUSION

The questions raised in this study are difficult to answer in the absence of specific facts about the nature of the particular retainer between the parties named in this Inquiry and the work it would have entailed.

The overview of the current (and past) ethics framework reveals ambiguities and generalities that it would be helpful to correct in amendments to statute and policy. However, this sort of legislation and policy must, to some extent, be sufficiently open ended to allow for changing conceptions of problems as well as to cover a range of ethics problems without trying to delineate every possibility – which itself would be impossible.

In respect to the six further questions posed above, it is relatively clear under current law that reporting public office holders could not engage in outside employment such as consulting and professional practice (and, by implication, lobbying the Canadian government). Such office holders could accept offers of outside employment, but, once undertaking that work, they would surely have to cease to be office holders, as discussed above. Reporting public office holders would, under the lobbying legislation, be restricted from lobbying the Canadian government. Members of parliament would be freer to engage in outside employment but would have to be cautious about such work interfering with their particular official duties (here, as elsewhere, the facts matter – what were/are the duties and what was the precise employment?). Finally, members of

parliament would have to be more cognizant of apparent conflict of interest than would public office holders.