PART II – POLICY REVIEW

PRE–EXPERT POLICY FORUM – DRAFT RESEARCH REPORT

Regulations on Post-Public Employment: A Comparative Analysis

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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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 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

The period of time before and after an individual leaves public office to move to the private sector can present unexpected opportunities for conflicts of interest to occur. Prior to such a switch, a public office holder might be considering prospects for future employment with a private entity. Officials who find themselves in this situation are both trustees of the public interest and private citizens in pursuit of personal interests. It is conceivable that their concern for their own well-being could compromise their ability to exercise impartial judgment on behalf of the public interest. For instance, would they feel pressured to favour a private entity with which they are seeking employment down the road? Even if the public office holder's impartiality is not affected, the perception that it *could* be might have implications for public trust in the integrity of government actors and institutions. Once a public office holder leaves the public sector, ethical issues of a different sort arise. For instance, is it acceptable for former public office holders to lobby former colleagues on behalf of a private corporation, when their previous position would have made them privy to information that would give their client an unfair edge over competitors? Increasingly, governments have taken to adopting codified conflict of interest rules in an attempt to regulate this transition period and to clarify how to navigate it in an ethical way. Before leaving their positions, public office holders in Canada are expected to observe restrictions on their behaviour as private citizens in order to preserve their capacity to protect the public interest. Some governments, including those of Canada and the United States, have developed comprehensive, detailed ethics laws that seem to be trying to anticipate and prohibit every type of misconduct imaginable, while countries such as Australia have adopted codes of conduct that enumerate only the most flagrant and objectionable of ethical transgressions.

B.A. Rosenson explains that, "by reducing the potential influence of private economic concerns on legislators' decisions, conflict of interest laws should also promote accountability and public trust in government."[1] In other words, we ought to trust politicians and public officials because there are rules in place to prevent them from

[1] B.A. Rosenson, "The Costs and Benefits of Ethics Laws," in Denis Saint-Martin and Fred Thompson, eds., *Public Ethics and Governance: Standards and Practices in Comparative Perspective*. *Research in Public Policy Analysis and Management Volume 14* (Oxford, UK: JAI Press, 2006), 137.

abusing our trust. However, he goes on to acknowledge a common refrain among scholars of political ethics that "ethics laws actually decrease public trust by generating a sense that all lawmakers are fundamentally untrustworthy and strongly motivated by the pursuit of private gain from public office."[2] Oonagh Gay, author of a comparative study of the ethics rules in place in the United Kingdom, Australia, and Canada asserts that, despite the proliferation of parliamentary ethics regimes in the past four decades, "public trust had not increased."[3] Keeping in mind that ethics regulations carry costs as well as benefits and that they do not guarantee improved public trust, it is vital that governments resist the temptation to over-regulate in response to alleged misconduct. It has been well documented that reforms to ethics rules tend to come at the heels of political scandals.[4] The logic is clear: governments want to assure the public that they are "tough" on ethics and that they will repair the possible loopholes that might have given way to previous improprieties. The underlying message is that ethics regulations, if properly crafted, can remedy the problem of ethical misconduct in government by explaining the difference between right and wrong and by deterring wrongdoing via threat of punishment for non-compliance. Ethics rules do not purport to persuade the public that public office holders are inherently or voluntarily "ethical." To reiterate Rosenson's point, ethics regimes do not explicitly refute the idea that many public office holders, if left to their own devices, would engage in misconduct, either out of ignorance or deliberate intent. Public trust in government is based, therefore, on our confidence in the ethics regime's capacity to deter and punish corruption. This theme is addressed at greater length later in the paper.

The alleged business and financial dealings at issue before this Commission occurred at a time when Canada's political ethics regime was not nearly as developed as it is now. In the years that have passed since Prime Minister Brian Mulroney left office, the Canadian government has established a code of ethics for members of parliament and a Conflict of Interest and Ethics Commissioner (referred to below as the ethics commissioner) to interpret the rules and investigate alleged non-compliance. Parliament passed the *Conflict of Interest Act* in 2006 to clarify standards of ethical conduct for

[2] Ibid.
[3] Oonagh Gay, "Comparing Systems of Ethics Regulation," in Denis Saint-Martin and Fred Thompson, eds., *Public Ethics and Governance: Standards and Practices in Comparative Perspective*, 93.
[4] Calvin Mackenzie with Michael Hafken, *Scandal Proof: Do Ethics Laws Make Government Ethical?* (Washington, D.C.**:** Brookings Institution Press, 2002).

public office holders, including ministers and their appointees. Finally, the *Lobbying Act* has been amended and the Office of the Commissioner of Lobbying in Canada has been established to interpret and enforce the legislation.

The primary objective of this paper is to assess the Canadian ethics regime in terms of its ability to detect, deter, and address non-compliance, with particular attention to the post–public employment rules. It is a point worth emphasizing that no matter how comprehensive a code of conduct is, it will never inoculate a system from either the perception or the reality of ethical misconduct. Behaviour that is forbidden still occurs and, even if it does not, some people will remain skeptical. This is to say that, even if the alleged events that gave rise to this Commission are enumerated as offences under the current ethics rules, this is not a guarantee that they will not happen in the future or that such offences will be detected. Ethics laws can and do set standards and clarify expectations but they cannot guarantee compliance.

This paper has four major sections. The first considers the consequences and implications, both positive and negative, of regulatory ethics. As mentioned previously, a common response to an ethical breach, especially a high-profile one, has been to make existing ethics rules stricter, more comprehensive, and/or more punitive. This course of action can place a heavier burden on reporting public office holders, while possibly giving the impression that the government places a high priority on ethics and that it will not tolerate impropriety. It is entirely appropriate to take stock of Canada's post–public employment regulations in light of the alleged Mulroney-Schreiber relationship, but it is important to maintain a "measured" approach when considering changes to the ethics regime. Canada's is already rated as one of the more heavily regulated in the world and, as is explained in the first section of this paper, over-regulation can have a negative effect on recruitment and retention.

The second section outlines the themes and issues raised by the alleged business relationship to which the Commission must respond. If the post–public employment regulations that apply today had existed in 1993, the individuals involved would have had a number of responsibilities under the *Conflict of Interest Act*, the *Lobbying Act*, and the Conflict of Interest Code for Members of the House of Commons.

The third section consists of a comparative analysis of the post–public employment ethics rules in place in Canada, the United States, the United Kingdom, and Australia to determine whether better practices exist elsewhere. There are obvious similarities between the Canadian and American post–public employment regulations; both countries have passed legislation that explicitly forbids former public office holders from exerting undue influence on former colleagues and from "side-switching,"[5] among other things. By comparison, the procedure in the United Kingdom is far less formulaic. All former ministers are required to consult a committee on offers of employment for the first two years after leaving public office. There is no conflict of interest legislation or specific prohibitions, which means that much is left up to the committee's discretion. However, guidelines to assist the committee's deliberations stress the need to avoid the *appearance* of impropriety. None of the other regimes places quite the same degree of emphasis on appearance. Australia's post–public employment ethics regulations are the least onerous by far; the code of conduct prohibits side-switching for the first 18 months after a minister leaves office.

The fourth and final section of the paper offers conclusions and recommendations on the basis of the comparative analysis. The four countries under consideration in this study can be grouped into two smaller categories according to their approaches to conflict of interest management. Canada and the United States have developed legislative ethics regimes consisting of statutory obligations and penalties, while Australia and Britain have relied on non-statutory codes of conduct, or "soft law," to encourage compliance with ethical standards. Internationally, Canada is considered one of the more highly regulated systems in terms of lobbying activities. The post-employment restrictions set out in the *Conflict of Interest Act* and the *Lobbyist Act* are comprehensive by international standards and failure to abide by the restrictions on post–public employment lobbying could lead to serious punishment. It is my view that heavier regulations would not increase the ability of current ethics legislation to meet its objectives. We do not have enough evidence to suggest that broader or more punitive laws would have a stronger deterrent effect, nor is there any reason to believe that they would be more effective in enhancing public

[5] This is a term often used to describe the actions taken by individuals who, after leaving public office, work against state interests on matters on which they had worked on behalf of the state while in public office.

confidence in the integrity of political actors and institutions. The alternative to Canada's current legislative ethics regime is to return to a true "soft law" approach that ultimately relies on voluntary compliance, but a step in that direction is unlikely. It would be interpreted as a sign of regression by critics and members of the attentive public who pressure governments to be "tough" on political misconduct.

A Cautionary Note on "Best Practices"

Prior to embarking on a comparative analysis of ethics rules that relate to the post–public employment period specifically, it is useful to consider the purpose and utility of codified ethics regulations in general and their capacity to meet their goals. One of the objectives of this study is to determine whether the current ethics regime is comprehensive and whether it would "cover" the allegations in question. It is important to consider that enumerating an action or omission on a list of "thou shalt nots" is not a guarantee that the rules will be complied with or that violations will be detected or punished, nor does it mean that public trust in politicians' integrity will improve even if the compliance rate is high. Ethics codes have limitations as well as costs of their own. Despite these, the past few decades have seen the creation and expansion of written ethics rules for elected and public officials in many countries. Governments have modified their approaches to conflict of interest management in response to both external and internal pressure. The Organization for Economic Co-operation and Development (OECD) has identified and encouraged "good practice" in conflict of interest policy. Its 2003 *Recommendation on Guidelines for Managing Conflict of Interest in the Public Service* has had a significant effect on several member countries' ethics regimes, including their mechanisms for managing public office holders' re-entry into the private world following public employment. The document encourages member countries to revisit their conflict of interest policies to ensure adequate attention to such principles as the public interest, transparency, scrutiny, and individual responsibility.[6] There are a variety of institutional tools available for conflict of interest management including recusal, divestment, blind trusts, disclosure, internal audit, and external review. Many countries rely on some

[6] Organization for Economic Co-operation and Development, *Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service* (June 2003), online: http://www.oecd.org/dataoecd/13/22/2957360.pdf.

mixture of these, but only some of them apply to former public office holders in the post–public employment period.

In this section, I consider the following criticisms of codified ethics regulations: (i) that they are reactionary and poorly designed; (ii) that they do not help to enhance public trust; (iii) that they undermine politicians' ability to demonstrate their moral fibre; (iv) that they are ineffective at detecting and deterring corruption; and (v) that they might have negative effects on recruitment and retention.

Ethics Codes Are Reactionary and Poorly Designed

Governments are encouraged to maintain ethics rules that meet the international standards and expectations identified by the OECD; pressure to do so is greatest when suspicions of misconduct arise. Political scandals give opposition parties and the attentive public reason to criticize the government for inadequate ethics rules and to demand reforms. Understandably, governments might be tempted to respond to ethical scandals and their political consequences by making the rules more comprehensive, more onerous, or more punitive; however, if this is done hastily it might not produce the best policy. The fact that the rules have been broken does not necessarily mean that they are deficient. Rosenson points out a related criticism of ethics regulations, which is that, if they are enacted quickly in response to a scandal and are considered "poorly designed," they often lack the support of legislators, which could affect their willingness to comply.[7] Nevertheless, it seems that no Canadian government in recent history has rejected legislative ethics. Michael Atkinson and Gerald Bierling explain that the evolution of Canada's ethics regime has continued over the years "irrespective of the party in power … [N]o political party in Canada has seriously proposed dismantling the current ethics regime in favour of a return to politics as practiced before 1960."[8]

Ethics Codes Do Not Enhance Public Trust

The scholarship suggests that ethics codes, although they differ in scope, breadth, and phrasing, have several general objectives in common. Dennis Thompson explains that

[7] Rosenson, "Costs and Benefits of Ethics Laws,", 139.
[8] Michael M. Atkinson and Gerald Bierling, "Politicians, the Public and Political Ethics: Worlds Apart," *Canadian Journal of Political Science* 38 (December 2005), 1006.

ethics rules usually "proscribe only a small area of conduct."[9] By drawing distinct parameters around what constitutes appropriate behaviour in public life, ethics rules can help to clarify expectations and to create a convergence of standards among those to whom the rules apply.[10] In addition to these, ethics rules have more subtle, political purposes as well. When a government constructs a complex "ethics infrastructure" consisting of rules, penalties, and administration, it serves as tangible evidence of its commitment to clean governance. Alan Rosenthal sees this as an attempt to appease the media, the opposition, and the public in the short term and as an investment in public trust in the long term.[11] This strategy assumes that misconduct among public and elected officials contributes to a decline in public trust and that ethics rules can help to solve this problem.

Although the bulk of ethics rules are directed at sitting elected and public officials, there is some evidence to suggest that the public is attentive to the conduct of former public office holders, which means that impropriety on their part might contribute to public perceptions about corruption in government. The Independent Commission Against Corruption (ICAC) in New South Wales released a discussion paper in 1997 entitled "Managing Post Separation Employment" after having received public complaints about the conduct of former public office holders.[12] Complainants were concerned about side-switching. For instance, the ICAC received complaints directed at a former premier who had accepted elite-level positions on boards of corporations that the government had been dealing with. There were complaints when former public office holders took new jobs that were linked to their previous public positions and when it appeared that access to government information or personnel might be used to exert undue influence on former colleagues. The ICAC reported a sense of public concern when former public office holders extract private gain, such as employment, because of their "inside knowledge of government information, programs or plans."[13] After

[9] Dennis Thompson, *Political Ethics and Public Office* (Cambridge, Mass.: Harvard University Press, 1987), 97.
[10] Ibid.
[11] Alan Rosenthal, "The Effects of Legislative Ethics Law," in Saint-Martin and Thompson, eds., *Public Ethics and Governance: Standards and Practices in Comparative Perspective*, 166.
[12] New South Wales, Independent Commission Against Corruption (ICAC), "Managing Post Separation Employment, Discussion Paper" (April 1997), 5, online: http://www.icac.nsw.gov.au.
[13] Ibid., 6.

accumulating a list of complaints, the ICAC urged the New South Wales government to create a regulatory regime for the post-employment period. When the discussion paper was released in 1997, only a few public office holders faced restrictions on the sorts of positions they could accept after leaving public office.

The proliferation of ethics regulations continues even though there is much doubt among scholars of political ethics that ethics codes meet their objectives. First, as Rosenthal explains, the long-range goal of an ethics regime is to restore public confidence.[14] Although there is evidence of public support for conflict of interest and ethics regulations both in Canada and elsewhere,[15] there is no guarantee that an ethics regime helps to prevent public suspicions of impropriety. Some ethics codes articulate clearly the government's desire to affect public attitudes, but others are more discrete. Section 3 of the *Conflict of Interest Act* 2006 identifies the following purposes:

(a) to establish "clear conflict of interest and post-employment rules;"
(b) to minimize the possibility for conflicts to arise between "the private interests and public duties of public office holders" and to see that such conflicts are resolved in favour of the public interest;
(c) to provide the Ethics Commissioner with the power to "determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred;"
(d) to "encourage experienced and competent persons to seek and accept public office;" and
(e) to "facilitate interchange between the private and public sector."

These goals are clear and reasonable. There is no explicit mention of a desire to boost public trust in government but, as Rosenson explains, this would be a logical outcome if the legislation were successful at meeting its stated objectives. Conceivably, rules that are clearly designed to favour the public interest and that are supported by penalties to deter misconduct could alleviate public suspicions about corruption. The idea is that the public can trust the ethics regime to keep government "clean," even if some individuals within it have less than noble intentions. However, we lack the empirical evidence to support this

[14] Rosenthal, "Effects of Legislative Ethics Law," 168.
[15] In 2002, Prime Minister Jean Chrétien introduced plans for an ethics regime that would include new conflict of interest rules and an independent officer of Parliament to enforce them. An Ekos Research Associates survey revealed that 50 percent of respondents, once they were told about the proposal, thought it was a good idea. For more information, please see Ekos Research Associates, "Trust and the Monarchy: An Examination of the Shifting Public Attitudes toward Government and Institutions" (May 30, 2002), online: http://www.canadian-republic.ca/pdf_files/Ekos%20Monarchy%2005-31-02.pdf.

conclusion. Rosenthal claims that there is "little reason to believe that the public's confidence changes as a result of changes in ethics law," which suggests that striving to make ethics rules as comprehensive as possible will not necessarily affect public attitudes toward public office holders.[16]

Rosenthal argues that the other purpose of ethics law is to "placate the media, defend against partisan attack … and move on to other lawmaking business." In his view, the strategy works for a time but, after a while, the media "continue to dig" despite the depth and scope of ethics regulations.[17] The media's willingness to keep political ethics on the agenda depends on their own needs, not the state of ethics law; in other words, an ethics regime is not a remedy for political scandal, for which the occurrence of actual misconduct is not a prerequisite. Rosenthal contends that media "coverage can be just as intense (and unfair) when there is more law as when there is less." Despite this reality, Denis Saint-Martin predicts that ethics reforms will continue due to the political difficulty associated with changing course.[18]

Ethics Codes Undermine Politicians' Attempts to Demonstrate Moral Fibre

Mackenzie, Rosenthal, and others have argued that regulatory ethics encourages a minimalist interpretation of what it means to be "ethical" in public life. It does so by encouraging basic compliance with the rules rather than by cultivating a "culture of integrity" as is discussed by Ken Kernaghan.[19] Rosenthal explains that public office holders, either current or former, who are accused of impropriety can use ethics law as a shield; even if an action or omission offends commonly held notions of propriety, the accused can claim innocence if it is not explicitly prohibited.[20] Presumably, this type of behaviour would only add to public frustration and distrust. Atkinson and Bierling expand on this theme by identifying two approaches to ethics in politics and government.

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[16] Rosenthal, "Effects of Legislative Ethics Law," 168.
[17] Ibid, 166–7.
[18] Denis Saint-Martin, "Path Dependence and Self-reinforcing Processes in the Regulation of Ethics in Politics: Toward a Framework for Comparative Analysis," in Saint-Martin and Thompson, eds., *Public Ethics and Governance: Standards and Practices in Comparative Perspective*, 5–27.
[19] Kenneth Kernaghan, "Rules Are Not Enough: Ethics, Politics and Public Service in Ontario," in John Langford and Allan Tupper, eds., *Corruption, Character and Conduct: Essays on Canadian Government Ethics* (Toronto: Oxford University Press, 1993).
[20] Rosenthal, "Effects of Legislative Ethics Law," 169–71.

According to the first, to be ethical in public life is simply to follow the rules laid out in the applicable code of conduct. In the second, ethics is understood not as a procedural exercise but as one that involves the voluntary, thoughtful selection of the "morally correct course" by a trustee of the public interest.[21] Voters have an interest in knowing whether their representatives have the capacity for integrity. As ethics becomes more and more codified, opportunities for discretion are squeezed out. It is no surprise then that scholars doubt the ability of regulatory ethics to enhance public trust if it is the case that these rules reduce the number of opportunities for elected and public officials to demonstrate their moral character. Nevertheless, one could argue that, given the ambiguity of codified ethics rules in Canada and elsewhere, much is left up to the judgment of public office holders. It is difficult to know with certainty whether and to what extent ethics regimes affect public trust given the number of other factors in the equation.

Ethics Codes Are Ineffective at Detecting and Deterring Misconduct

The capacity of ethics rules to detect and/or deter misconduct is another unknown variable. There is skepticism about this as well. Governments do not cite this goal explicitly as a reason for creating or changing regulations, as it might be interpreted as an acknowledgement that corruption has occurred under their watch. Surely, arguments for expanding or strengthening ethics laws would be stronger if backed by evidence that they reduce corruption demonstrably. Somewhat paradoxically, regulatory ethics might have increased the number of reported incidents of corruption over the years, at least in some jurisdictions, by pushing the boundaries of the definition of corruption so that it includes a longer list of actions and omissions. Mackenzie's research on U.S. federal public office holders charged with public corruption shows that, although there were 480 indictments and convictions in 1999, there were only nine in 1970.[22] There are a number of possible valid explanations for this, one of which is that the sheer number of activities that constitute breaches of ethics law has increased. Things that used to be acceptable are now against the rules. Even if public office holders' behaviour and attitudes have not changed,

[21] Atkinson and Bierling, "Politicians, the Public and Political Ethics: Worlds Apart," 1007.
[22] Mackenzie with Hafken, *Scandal Proof: Do Ethics Laws Make Government Ethical?* 102–7.

the standards used to judge them have. Therefore, keeping a tally of accusations and convictions of corruption from one year to the next is not enough to know whether intentional abuse of office is becoming more of a cause for concern.

As is the case with any law aimed at prohibiting a type of behaviour, it is very difficult to know how much of it is being deterred. If the frequency of the prohibited action seems to have decreased after a new law has been established, it could be an indication of a deterrent effect or it could be evidence that perpetrators have found ways to achieve their ends without being caught. Arguably, ethics rules have a better chance of deterring misconduct if the likelihood of detection and the cost of getting caught outweigh the benefits of committing the deed in question. The creation of ethics officers and committees to monitor and enforce ethics laws could increase the likelihood of detection. A possible side effect of this, of course, is that, if more episodes of misconduct are detected, it gives the appearance that corruption is becoming more frequent, which is not necessarily the case.

In addition to ethics officers, there has been a proliferation of civil society groups dedicated to keeping a watchful eye on governments and exposing abuses of office. Democracy Watch is an example of such an organization in Canada. The punishments for ethical breaches vary by jurisdiction and according to the perceived severity of the deed. Some breaches of ethics law are punishable by serious fines and possible imprisonment but, for most, the punishment is political rather than legal.

The detection, deterrence, and punishment of misconduct by former public office holders is especially tricky, given that they are “private” citizens who are not subject to the same degree of scrutiny as they once were and are no longer vulnerable to political punishments like removal from cabinet. For instance, Canadian public office holders are required to file comprehensive disclosure forms that document their financial interests. They are obliged to report changes in their status to the ethics commissioner in a timely fashion. However, once they leave public office for the private sector, they are not required to communicate with the ethics commissioner except if they engage in lobbying as per the terms of the *Conflict of Interest Act*. If a former public office holder accepts a position with a firm with which he or she had significant dealings during his or her last year of public office – a breach of the *Conflict of Interest Act* – it might very well go

undetected. The ethics commissioner is forced to rely on current public office holders and private firms to report misconduct among former public office holders.

Ethics Regulation Might Undermine Recruitment and Retention

OECD publications that deal with conflict of interest management acknowledge the need for a balanced approach between the public interest and the private interests of public and elected officials. Regulations that are too strict or invasive could have negative effects of their own. For instance, there is some evidence to suggest that ethics rules deter some people from continuing in public office or from running in the first place.[23] Rosenson found that disclosure laws in place for state legislative primaries had the effect of reducing the number of candidates. Disclosure laws invade privacy by forcing public office holders to open up their own private lives – and in many cases, those of their spouses and dependent children – to public inspection and judgment. Rosenson fears that these laws might discourage wealthy and also highly qualified persons from contesting public office.[24] Their unrealized contribution must be recognized as a casualty of strict disclosure laws. None of this implies that disclosure laws ought to be discarded, but we must be cognizant of their costs.

When it comes to post–public employment rules in particular, the ICAC acknowledges that people moving from public office to the private sector should not be "unduly restricted in their choice of employment."[25] This is especially true in jurisdictions where government downsizing and outsourcing have made public office more of a short-term than a long-term career choice. Elected office is by definition a limited-term position. Faced with the possibility of defeat at the polls, elected officials ought not to be severely limited when deciding what to do after leaving office. Finally, as the skill sets required for public and private sector work align themselves more closely, the flow of traffic between the two worlds is likely to increase.[26] Post–public employment restrictions should not be so onerous as to discourage qualified people from offering themselves for public service.

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[23] F. Anechiarico and J.B. Jacobs, *The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective* (Chicago: University of Chicago Press, 1996).
[24] Rosenson, "Effects of Legislative Ethics Law," 142–4.
[25] ICAC, "Managing Post Separation Employment – Discussion Paper," 5.
[26] Ibid.

The preceding paragraphs were meant as a cautionary note about the costs and limitations of regulatory ethics. There is no guarantee that prohibiting an action will deter public office holders from committing it if it is their intent to do so. In 2004, after studying the incidence of corruption at the state level between 1993 and 2002, the Corporate Crime Reporter made the following assessment: "Our review of public corruption convictions in the states indicates that there is apparently little correlation between strong laws and integrity – if a public official wants to violate his or her trust, the laws don't stand in the way."[27]

The Alleged Business Relationship Between the Right Honourable Brian Mulroney and Karlheinz Schreiber

The alleged business relationship between former prime minister Brian Mulroney and lobbyist Karlheinz Schreiber is the primary subject of this Commission. Although its mandate goes beyond the details of the alleged relationship to include a systemic review of the ethics regulations for the post–public employment period, it is important to understand the particulars of this specific case. It provides an opportunity to test the current ethics regime to see if it is equipped to respond to allegations of ethical misconduct involving the political executive. Throughout the duration of the alleged relationship, Prime Minister Mulroney wore three different hats: those of prime minister, member of parliament, and former public office holder. Each of these roles entails specific responsibilities under the current ethics regime. The events and actions that comprised the alleged business relationship between Mr. Mulroney and Mr. Schreiber, if it arose today, *could* raise questions under the *Conflict of Interest Act*, the *Lobbying Act*, and the Conflict of Interest Code for Members of the House of Commons. The fact that two of these, the *Conflict of Interest Act* and the code for MPs, require interpretation by the Conflict of Interest and Ethics Commissioner means that we cannot predict with certainty if and how the ethics regime would respond to a specific set of allegations. This is especially true given that the *Conflict of Interest Act* is relatively new and untested.

At the time of writing, the ethics commissioner has yet to act on a complaint involving the post–public employment regulations in the legislation. Therefore, we have

[27] Corporate Crime Reporter, *Public Corruption in the United States* (Washington, DC, 2004), 7.

no precedent to refer to in an attempt to draw conclusions about how the rules might be interpreted. In both the *Conflict of Interest Act* and the code of conduct for MPs, a number of clauses contain words and phrases that require interpretation. For instance, section 33 of the *Conflict of Interest Act* prohibits a former public office holder from taking "improper advantage of his or her previous public office."[28] It is not immediately clear what constitutes an offence under this section, as there is no definition of "improper advantage" in the legislation. This is to say that the written rules are only one component of the ethics regime; the ethics commissioner's approach is an important factor as well.

The Conflict of Interest Act

The *Conflict of Interest Act* applies to both current and former public office holders. If the current rules were in effect during the period in which the alleged business dealings between Mr. Mulroney and Mr. Schreiber occurred, the former prime minister would have had a number of obligations relating to several sections of this legislation. Section 24 of the legislation stipulates that sitting public office holders, including cabinet ministers, are required to report any serious offers of outside employment to the ethics commissioner within seven days of receiving them. It is alleged that Karlheinz Schreiber met with Prime Minister Brian Mulroney on June 23, 1993, at which time they entered into an agreement regarding a consulting retainer for Mr. Mulroney. The term "employment" is not defined in the *Conflict of Interest* Act, but it is possible that an ethics commissioner could decide that a consulting retainer qualifies as employment. Mr Mulroney was still the Prime Minister at the time, which means that, if today's rules had applied, it is likely that he would have been expected to report the offer and its acceptance to the ethics commissioner. However, it is possible that other restrictions on post–public employment in both the *Conflict of Interest Act* and the *Lobbying Act* would have prohibited Mr. Mulroney from accepting Mr. Schreiber's offer of a contractual arrangement.

In a sworn affidavit filed in November 2007, Mr. Schreiber alleged that he hired Mr. Mulroney to support his "efforts in obtaining approval of the establishment of a light

[28] *Conflict of Interest Act*, SC 2006.

armoured vehicle facility in either Nova Scotia or Quebec."[29] The post–public employment regulations place limitations on the types of support that a former public office holder can legitimately provide in a case like this. Section 35 (2) of the *Conflict of Interest Act* states that former public office holders are not to "make representations" on behalf of any person or entity to any "department, organization, board, commission or tribunal with which he or she had direct and significant official dealings" during the last year of their public employment.[30] The restriction applies to former ministers for two years. Presumably, this clause would prohibit a former prime minister from making representations to *any* department, as a prime minister would have "direct and significant dealings" with each and every one during his time in office. If the alleged business relationship between Mr. Mulroney and Mr. Schreiber occurred today, this clause would have forbidden Mr. Mulroney from approaching former colleagues on Mr. Schreiber's behalf, but it would not have ruled out Mr. Mulroney's working for Mr. Schreiber as long as he did not make direct contact with public office holders in relation to Mr. Schreiber's file. The *Lobbyist Act* applies a similar restriction but extends the cooling-off period to five years. The *Conflict of Interest Act* also prohibits former cabinet ministers from making representations to any sitting ministers who had been part of the ministry at the same time as the former public office holder.[31] If this rule had existed in 1993, it would have applied to Mr. Mulroney from June 25, when he resigned as prime minister, until June 1995.

Section 35 (1) of the *Conflict of Interest Act* prohibits a former public office holder from entering into a contract with or accepting a position or appointment from any private entity with which he had "direct and significant official dealings" during his last year of public employment. This clause would prohibit a former prime minister from entering into such an arrangement with any private entity with whom he or she worked in his or her capacity as a public official, whether it involved making direct representations to public office holders or not. Whether the clause would apply to a situation like the alleged Mulroney-Schreiber relationship would depend on whether the public office

[29] David Johnston, *Report of the Independent Advisor into the Allegations Respecting Financial Dealings Between Mr. Karlheinz Schreiber and the Right Honourable Brian Mulroney* (2008), 1, online: http://www.pco-bcp.gc.ca/docs/information/publications/ria-rci/complete-complet-eng.pdf.
[30] *Conflict of Interest Act*.
[31] Ibid.

holder had had "direct and significant official dealings" with the private entity during the year before he resigned. The facts on this are not clear in this case and, at any rate, it would be up to the ethics commissioner to decide whether the threshold for "direct and significant dealings" had been met. In his reports, Independent Advisor David Johnston summarized the 25-year history between the two men. It has been alleged that they were connected through Air Canada's relationship with Airbus. As Johnston points out, though, this report is concerned only with the circumstances and allegations surrounding Mr. Schreiber's payment to Mr. Mulroney in 1993. Mr. Schreiber has maintained that, in exchange for this money, Mr. Mulroney was expected to "help to promote a light armoured vehicle plant, known as the Bear Head project, for Mr. Schreiber's client, Thyssen AG."[32] Mr. Schreiber was the director of BMI, which controlled Bear Head Industries – a lobbying firm created to pressure Ottawa for support on the Bear Head Project. The federal government confirmed its support for the project in September 1988, but withdrew it in the early 1990s as a result of public opposition and internal review.

The date on which the project was cancelled is relevant. According to today's rules, if the file had been open during Prime Minister Mulroney's last year of office, and, if the Prime Minister had had "direct and significant official dealings" with Mr. Schreiber as an "entity" as understood by the *Conflict of Interest Act*, then he would not be permitted to work or act for him in any capacity for two years post–public employment. One could argue that because a prime minister has the authority to affect any file and has dealings with every department, if this rule were to be applied to the alleged relationship in question, the clause ought to be interpreted broadly to prohibit a prime minister in Mr. Mulroney's position from working or acting for someone in Mr. Schreiber's circumstance. At any rate, the previously mentioned clause banning former ministers from making representations to former ministerial colleagues would have prohibited a former prime minister in Mr. Mulroney's position from *contacting* ministers directly to encourage support for the project.

Section 34 (1) of the *Conflict of Interest Act* prohibits "side-switching." It states that former public office holders shall not

[32] Brodie Fenlon and Rheal Senguin, "Mulroney had nothing to do with Airbus: Schreiber," *Globe and Mail*, December 4, 2007.

> 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.

Again, the applicability of this clause depends on how the ethics commissioner interprets it, but its wording suggests that if a minister was at all active on a file, even in an advisory role, he or she would be forbidden from acting against state interests on that file upon entering the private sector. The ethics commissioner is granted the authority under the legislation to investigate suspected non-compliance. If the ethics commissioner received a request to investigate an alleged breach of this clause, his or her investigation would undoubtedly include an attempt to determine the degree of the minister's involvement on the file in question.

Subsection (2) of the same clause explains that former public office holders are not to give advice to a private client that is based on information obtained in their former role and to which the general public is not privy. This means that even after leaving public office, public office holders are required to maintain some loyalty to the state. Sensitive information is not for former public office holders to use to confer an unfair advantage on a particular private firm over its competitors. It might be difficult to detect infringements of this clause, but nevertheless the rule is meant to discourage former public office holders from abusing the privileges of public office once they enter the private world.

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

On June 25, 1993, Brian Mulroney resigned as prime minister and was succeeded by Kim Campbell, but he remained the member of parliament for Charlevoix until September 8 of that year. Under the current rules, the Conflict of Interest Code for Members of the House of Commons would have applied while Mr. Mulroney was Prime Minister and after he resigned from the executive until Parliament was dissolved in September. Section 7 of the code explains that, unless an MP is a minister of the Crown or parliamentary secretary and so long as other provisions of the code are observed, he or she is entitled to engage in outside employment or carry on a business. However, section 21 of the code requires

MPs to file disclosure forms with the ethics commissioner that give an overview of the private interests of both the MP and the dependent family. A summary of these forms is made available for public inspection. MPs are required to report income greater than $1,000 that was earned during the 12-month period prior to filing the report, as well as all income over $1,000 expected in the year to come.[33] This means that, if these rules applied during the period between June 25 and September 8, 1993, Mr. Mulroney would have been required to disclose all income received in the previous year and expected in the upcoming one and to reveal its source(s). (There are disclosure requirements in the *Conflict of Interest Act* as well that require current ministers to disclose their assets, liabilities, and income, among other things. Even if they had been applicable during the alleged Mulroney-Schreiber relationship, they would not have applied after Mr. Mulroney resigned from executive office.)

With respect to the code of conduct for parliamentarians, a fact worth considering is that MPs fill out their first disclosure forms within 60 days of being elected and, unless their circumstances change, updates are on an annual basis. They have a full 60 days to report material changes to disclosure forms. This means that if an MP were to acquire a private interest that conflicted with the requirements of the code, the ethics commissioner might not know about it for two months.

Summary

The preceding section explains how the current ethics regime might have responded to the allegations with respect to the business relationship between Karlheinz Schreiber and the Right Honourable Brian Mulroney. One of the questions referred to this Commission is the following: “Are there ethical rules or guidelines which currently would have covered these business and financial dealings?” The Canadian government’s ethical guidelines for the post–public employment period are comprehensive by international standards and *could have* covered the alleged events. The *Conflict of Interest Act* would have required Mr. Mulroney to report the offer of a consulting retainer from Mr. Schreiber that is said to have been made on June 23, 1993. As well, the disclosure

[33] Parliament of Canada, *Conflict of Interest Code for Members of the House of Commons* (2004), online: http://www.parl.gc.ca/information/about/process/house/standingorders/appa1-e.htm.

requirements in the Conflict of Interest Code for Members of the House of Commons would have conferred an obligation to report all three payments that are alleged to have come from Mr. Schreiber. Even though two of them are said to have come after Mr. Mulroney resigned as an MP, the disclosure rules for MPs require that they report all income over $1,000 that they expect to receive in the upcoming year. Both the *Conflict of Interest Act* and the *Lobbying Act* impose a cooling-off period during which former public office holders must refrain from lobbying former colleagues in public office. The *Conflict of Interest Act* forbids former public office holders from working in any capacity with private firms with which they were involved "directly and significantly" during their last year of public office; this ban applies to cabinet ministers during the first two years following the termination of their public employment.

The main reason for concluding that the current ethics regime *could* cover the alleged events and circumstances is that some of the clauses in the *Conflict of Interest Act* are worded in ways that make them subject to interpretation by the ethics commissioner. The ethics commissioner has a significant degree of discretion in determining what constitutes a breach of the legislation. For instance, it is up to the ethics commissioner to decide whether a public office holder's official dealings with a private firm qualify as "direct and significant" or whether a former public office holder has taken "improper advantage" of his or her previous public office. The ethics commissioner's approach is an unknown variable, especially since, at the time of writing, there has not been a single investigation involving the post–public employment regulations in place at the federal level.

In the following section, I compare Canada's post–public employment rules to those in place in the United States, the United Kingdom, and Australia. I make some reference to the ethics regimes in place in the Canadian provinces as well. There is evidence of policy convergence in the field of ethics regulation among federal and provincial governments in Canada. Although they have developed at different paces, provincial ethics regimes are similar to the federal one in terms of the content of ethics codes and the mechanisms for their enforcement.

A Comparative Assessment of Post–Public Employment Regulations

The comparative analysis is divided into two main sections. The first deals with post–public employment restrictions in Canada, the United States, the United Kingdom, and Australia. I identify the four main types of behaviours that are prohibited in post–public employment regulations and compare the ethics regimes in terms of whether and how they regulate each one. The second section focuses on the mechanisms in place in each of the regimes to administer these rules and to encourage compliance. I have organized the comparative analysis section of the paper according to themes instead of dealing with each country individually. This is to prevent repetition and to allow the reader to compare the components of the regimes more easily.

What Behaviours and Circumstances Do Post–Public Employment Rules Regulate?

In his book *Conflict of Interest in American Public Life*, Andrew Stark explains that post–public employment rules are designed to prohibit four types of behaviour: influence, ingratiation, profiteering, and side-switching.[34] In this context, the *influence* being targeted is that which former public office holders would be able to exert over former colleagues on behalf of a private client once they enter the private sector. Attempts at *ingratiation* start before an individual leaves public office; these could involve favouring a private entity in the hope that such special treatment would be rewarded in the future, perhaps with an offer of employment. To *profiteer* is to gain personally or privately from one's experience in public office. *Side-switching* is to act *against* state interests once out of office on an issue on which the office holder acted *for* state interests while in public office. In this section, I explain these concepts more fully while reviewing the four ethics regimes to demonstrate how each one attempts to regulate these behaviours. I also discuss briefly U.S. President Barack Obama's January 2009 regulations and give a short explanation of American regulations regarding foreign entities.

[34] Andrew Stark, *Conflict of Interest in American Public Life* (Cambridge, Mass.: Harvard University Press, 2000), 96–104.

Influence

Rules against *influence* seem to assume that former public office holders might be able to exert special pressure on former colleagues when representing a private client, which would confer upon this entity an unfair advantage over competitors. By extension, these rules assume that the judgment of the current public office holders could be impaired by their vulnerability to lobbying from a former colleague, which *could* mean that the public interest is compromised in order to accommodate the requests of the former colleague. The possibility for impaired judgment on the part of current public office holders is the perceived threat to the public interest. Rules against influence seek to remove the possibility for impaired judgment by shielding public office holders from the ethical dilemma of how to maintain neutrality when pressured by a former colleague. The public is to take comfort in the assurance that public office holders will not have to face a situation like this; therefore, their capacity to distinguish right from wrong on their own is inconsequential.

Most ethics codes prohibit influence by requiring that former public office holders abstain from making representations to former colleagues for a time, but they differ in terms of the length of the prescribed cooling-off period. Canada's *Conflict of Interest Act* forbids former public office holders from making representations "for or on behalf of any 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] For most former public office holders this rule applies for one year after leaving public office, but former ministers of the Crown and ministers of state must observe it for two years. A number of provinces in Canada have codes of ethical conduct that prohibit former ministers and senior officials from making representations to former colleagues, with cooling-off periods ranging from six months in Prince Edward Island to two years in British Columbia. The federal *Conflict of Interest Act* states former ministers are not to make representations to any current ministers who were part of the ministry at the same time as the former public office holder. The assumption is that the association between ministerial colleagues in the

[35] *Conflict of Interest Act*.

latter instance and between departmental colleagues in the former gives the recently retired minister an enhanced capacity to influence the other person's decisions.

In Canada, the *Lobbying Act* is part of the regulatory ethics regime that relates to influence. It requires that designated former public office holders refrain from becoming lobbyists for a period of five years post public employment. To "lobby" is to, in exchange for payment, arrange a meeting between a public office holder and another person, or to communicate with a public office holder in respect of initiatives including statutes, regulations, government policies and programs, grants, contributions, or "other financial benefit by or on behalf of the government."[36] Therefore, to qualify as a lobbyist, one must be receiving payment of some kind. This is one of several incongruities worth noting between the *Conflict of Interest Act* and the *Lobbying Act*. The *Conflict of Interest Act* prohibits former public office holders from making representations to former departmental colleagues on behalf of private clients whether for payment or not. Therefore, the *Conflict of Interest Act* addresses a loophole that might have been left open by the *Lobbying Act.* A second difference between the two statutes is that the *Lobbying Act* prohibits designated former public office holders from lobbying *any* current public office holders regardless of what department or agency they are associated with. The *Conflict of Interest Act* prohibits former public office holders from making representations to former colleagues with whom they had "direct and significant official dealings" during their last year of office.[37]

Thirdly, the *Lobbying Act* prohibits designated former public office holders from *making contact* with current public office holders on behalf of private, paying clients, whether to set up a meeting or to do the lobbying themselves. There is nothing in the statute that prevents former public office holders from accepting a position or appointment with such a private firm; the only thing the former office holder cannot do is actively lobby current public office holders until the five-year cooling-off period is up. The *Conflict of Interest Act* is more demanding; it prohibits former public office holders from accepting an appointment, a contract, or any sort of employment with a private firm with whom they dealt during the last year of their public employment. However, as

[36] *Lobbying Act*, 1995.
[37] *Conflict of Interest Act*, ss. 35 (1).

mentioned above, the relationship would have had to involve "direct and significant official dealings" in order to invoke the *Conflict of Interest Act*. For the purposes of the legislation and its enforcement, it is up to the ethics commissioner to interpret what this means, but this does not prevent the media and attentive public from drawing their own conclusions on what is appropriate.

In the United States, former officers, employees, and elected officials in both the legislative and executive branches are prohibited by law from influencing former colleagues. Former officers and employees of the executive branch are prohibited by 18 USC 207 (c) from communicating with or appearing before personnel from their former department, on behalf of someone else, with intent to influence them.[38] This rule now applies for two years post–public employment for all employees, thanks to changes under the *Honest Leadership and Open Government Act* that took effect in 2007 and new rules introduced by President Barack Obama's administration in January 2009. Also as a result of President Obama's recent changes, executive branch appointees who leave the government to become lobbyists are prohibited from lobbying "any covered executive branch official or non career Senior Executive Service appointee for the remainder of the Administration."[39]

Senators are required to wait for two years after leaving public office before communicating with or appearing before any member, officer, or employee of either house of Congress, or any employee of a legislative office, on behalf of another person with intent to influence them in their official duties. Members and officers of the House of Representatives must observe the same restrictions but only for one year.[40]

American legislators are subject to these rules presumably to prevent the possibility that sitting legislators' judgment could be impaired by pressure from former colleagues. As Moncrief and Thompson explain, the U.S. Congress is a "lawmaking" chamber as opposed to a "confidence" chamber, which gives its individual members considerably more freedom and autonomy.[41] Their voting behaviour is not bound by

[38] 18 USC 207.
[39] U.S., White House, *Executive Order – Ethics Commitments by Executive Branch Personnel* (January 21, 2009).
[40] *Honest Leadership and Open Government Act* 2007.
[41] Gary Moncrief and Joel Thompson, "Contrasting the American and Canadian Subnational Legislatures," *Canadian Parliamentary Review* 13(3) (1990).

party discipline in the same way that Canadian MPs' is, and they have the power to introduce spending measures, including contracts and grants. These factors make sitting members of Congress the targets of outside influence from pressure groups, constituents, and lobbyists. Former members must observe a cooling-off period upon leaving public office before making representations to former colleagues on the assumption that their familiarity with sitting members would enable them to wield undue influence.

In comparison, Canadian members of parliament who are not part of the ministry are not required to observe restrictions on their employment opportunities after they leave public office. Canadian MPs have less power and autonomy by comparison to their U.S. counterparts and therefore are less likely to be the targets of undue influence; thus restrictions on post-public employment seem unnecessary.

Ministers in the United Kingdom who are considering their options for post-public employment are expected to seek the advice of the Advisory Committee on Business Appointments before accepting any offers. This is not a statutory obligation but it is enumerated in the Ministerial Code, a publication of the Cabinet Office.[42] Despite its lack of statutory authority, it is reported that the requirement to seek committee approval for post-public employment is "widely and willingly" respected.[43] The committee is an independent, non-departmental public body that consists of seven members appointed by the prime minister.

The only restriction relating specifically to the types of employment that a former minister can accept that is mentioned in the code is to seek the committee's input. Each case is decided individually and according to its own circumstances. As former ministers consult the committee on employment prospects, the committee's responses to their requests are made public. However, the public list is limited to those cases in which the committee's response was positive and the job was taken. The list is updated on a monthly basis.

There are no explicit rules in the Ministerial Code prohibiting influence, ingratiation, profiteering, or side-switching as there are in Canada and the United States.

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[42] UK, Cabinet Office, *Ministerial Code*: *A Code of Ethics and Procedural Guidance for Ministers* (July 2007), online: http://www.cabinetoffice.gov.uk/media/cabinetoffice/propriety_and_ethics/assets ministerial_code_current.pdf .

[43] Gareth Griffith, *The Regulation of Lobbying* (New South Wales: Parliamentary Library Research Service, June 2008), 24.

However, committee members are expected to observe official guidelines that explicitly discourage profiteering and the appearance of ingratiation. These are discussed in the applicable sections below. At this point, I draw attention to the fact that the committee's guidelines are focused on the *appearance* of impropriety as much as on its actual occurrence. For instance, committee members are asked to consider whether the acceptance of an appointment would "give rise to public concern of a degree or character to justify advising the former minister that there should be a delay ... in taking up the appointment, or that the appointment is unsuitable?"[44] The introductory clauses acknowledge that, while it is important and "in the public interest" for former ministers to explore private opportunities after leaving public office, their pursuits must not cause "any suspicion of impropriety." Former ministers are required to seek committee advice on appointments for the first two years after leaving public office. Committee members are permitted to contact an applicant's former department to determine whether it has had any sort of relationship with the private entity that would make the appointment a source of suspicion.

The guidelines do not make mention of the behaviours that constitute "influence." Its priorities are the appearance of ingratiation, which would involve offers of employment that could compromise a minister's judgment before he or she left office, and the improper use of information. There is no explicit concern with the possibility that current ministers' judgment could be impaired by lobbying from former colleagues. The guidelines are concerned primarily with forbidding ministers from working for companies with which they might have had contact while in public office. The guidelines state that former ministers will be expected to wait three months before entering the private sector, but otherwise there is no cooling-off period. Therefore, former ministers might not have to wait long before they are in a position to lobby former colleagues on behalf of a private entity. However, committee members have demonstrated sensitivity to the possibility of undue influence and have taken it upon themselves to discourage former ministers from lobbying former colleagues. After leaving public office in June 2007, for instance, former prime minister Tony Blair sought the committee's advice on several

[44] UK, Advisory Committee on Business Appointments, *Guidelines on the Acceptance of Appointments or Employment outside Government by Former Ministers of the Crown* (December 2008), online: http://www.acoba.gov.uk/media/acoba/assets/guidelines.pdf.

opportunities for post–public employment. One of them was with JP Morgan Chase and Co., with whom Blair was invited to work as a senior adviser and consultant. The committee advised that Blair take the position "forthwith" but qualified their approval by stating that "for 12 months after leaving office, he should not be personally involved in lobbying UK Government Ministers or officials on behalf of his new employer or its clients."[45] In its Ninth Report, published in 2008, the committee acknowledged a recommendation that the parliamentary Public Administration Select Committee had made to government regarding lobbying – specifically, that "it (was) inappropriate for former Crown servants to move almost directly to positions in which they may lobby former Ministers or colleagues."[46] The government responded by echoing the concern, while insisting that the decision to restrict the lobbying activity of a former public office holder must be made "on the merits of individual cases."[47]

There are no lobbyist regulations for multi-client public affairs companies as there are in Canada and the United States, but at the time of writing the Public Administration Select Committee is conducting an inquiry into the subject. It is possible then that former public office holders could face codified restrictions on their lobbying activities at some point in the near future, especially if the committee looks to its North American counterparts for guidance.

Ingratiation

The behaviours that result in *ingratiation* begin before a public official enters the private realm. Specifically, a public office holder could show favouritism toward a private entity in the hope of being rewarded privately later. Canada's *Conflict of Interest Act* aims to address this in three ways. The first is by forbidding a former public office holder from accepting a contract of service, an appointment to a board of directors, or an offer of employment from "an entity with which he had direct or significant dealings during the

[45] UK, Advisory Committee on Business Appointments, "Advice Given on Appointments Taken up by Former Ministers: 1 April 2006 – 31 March 2008," *Ninth Report 2006–2008*, 18, online: http://www.acoba.gov.uk.
[46] UK, HC, Public Administration Select Committee, "The Business Appointment Rules," para. 27, HC 651 – Sixth Report of Session 2006–07.
[47] UK, HC, "The Business Appointment Rules: Government Response to the Committee's Sixth Report of Session 2006-07," HC 1087 – Third Special Report of Session 2006–07, 2.

period of one year immediately before his or her last day in office."[48] The meaning of "significant dealings" depends on how the Conflict of Interest and Ethics Commissioner interprets it. The second is by requiring that public office holders report to the ethics commissioner all "firm" offers of employment within seven days of receiving them. Accepted offers must be reported also to the prime minister or the appropriate minister. This will allow the ethics commissioner to flag possibilities for ingratiation before the public office holder leaves office. The third is listed in section 10 of the legislation, which prohibits public office holders from allowing "plans for, or offers of, outside employment" to influence them in the performance of their official duties.[49] The point of prohibiting ingratiation is to remove the possibility that public office holders, while employed as trustees of the public interest, will be affected by offers for future employment. The fear is that their judgment could be impaired by such prospects, as their private interests could run counter to the public interest.

There are rules against ingratiation in some provinces as well. In Alberta, the *Conflicts of Interest Act* prohibits former ministers from accepting employment from persons or entities with which they had had significant dealings during their final year as members of the executive branch. This restriction applies for one year after leaving public office.[50]

Ingratiation is a crime in the United States. American law prohibits current officers and employees of the executive branch from participating in government decisions that could affect the interests of outside organizations with which they are seeking employment.[51] American public officials are permitted (and expected) to recuse themselves from government decisions and transactions so that they are free to seek outside employment. As long as they are not on both sides of the fence, which could impair their judgment as public officials, they are within the parameters of the rule. The Office of Government Ethics, the agency responsible for preventing and resolving conflicts of interest in the U.S. executive branch, offers some clarification as to what activities constitute "seeking employment":

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[48] *Conflict of Interest Act*.
[49] Ibid.
[50] *Conflicts of Interest Act*, RSA 2000, c. C-23
[51] 18 USC 208.

- the employee is engaged in actual negotiations for employment
- a potential employer has contacted the employee about possible employment and the employee makes a response other than rejection, and
- the employee has contacted a prospective employer about possible employment (unless the sole purpose of the contact is to request a job application or if the person contacted is affected by the performance of the employee's duties only as part of an industry). [52]

As mentioned previously, the Ministerial Code in effect in the United Kingdom requires that former ministers seek the advice of the Advisory Committee on Business Appointments before accepting offers of employment in the first two years after leaving public office. The guidelines that steer committee decisions encourage members to consider whether an appointment could give the appearance of ingratiation. Specifically, they are to think about whether the individual had, as a minister, been in a position that could "lay him or her open to the suggestion that the appointment was in some way a reward for past favours."[53]

Profiteering

Profiteering occurs when former public office holders reap personal or private benefits or profits from their work in the public domain, whether influence or ingratiation has occurred.[54] Andrew Stark explains that profiteering could include such things as drawing on knowledge, skills, or status acquired as a result of one's former public position to gain financially in the private sector.[55] Prohibitions on profiteering exist despite the fact that even if a former public office holder reaps private benefits from previous experience in office, there is no risk of impaired judgment on the part of current public office holders.[56] As Stark explains,

> Pure private gain from public office takes place in a realm beyond even the twilight zone of quid pro quo, where the official is neither capable of affecting the interests concerned nor beholden to them, and where the official's in-role

[52] U.S., Office of Government Ethics, "Seeking Other Employment," online: http://www.oge.gov/common_ethics_issues/seeking_other_emp.aspx.
[53] UK, Guidelines on the Acceptance of Appointments or Employment Outside Government by Former Ministers.
[54] Stark, *Conflict of Interest in American Public Life*, 96.
[55] Ibid., 97.
[56] Andrew Stark, "Beyond Quid Pro Quo: What's Wrong with Private Gain from Public Office? *American Political Science Review* 91 (March 1997).

> judgment is thus in no way compromised. Though private gain from public office comes within the colloquial embrace of conflict of interest problems, it in fact involves no conflict of interest.[57]

Even if profiteering does not carry a risk of impaired judgment on the part of current public office holders, it makes sense to employ prohibitions against profiteering to discourage people from seeking public office if even part of their justification for doing so is for the purpose of private gain later.[58] Another reason for restricting former public office holders' use of the knowledge and information that is accumulated in the public sector is to protect the interests of the state. Public officials are privy to sensitive information while serving as trustees of the public interest. This information is not theirs to publish in a memoir or leak in an interview once out of office; they are expected to maintain some degree of loyalty to the state.

The post-employment section of Canada's *Conflict of Interest Act* begins with what could be considered a general prohibition against profiteering: "no former public office holder shall act in such a manner as to take improper advantage of his or her previous public office."[59] The definition of "improper advantage" is not clear and would be subject to the ethics commissioner's interpretation. Australia's "Standards of Ministerial Ethics" requires that former ministers "not take personal advantage of information to which they have had access as a Minister, where that information is not generally available to the public."[60]

The Ministerial Code introduced by UK's Prime Minister Gordon Brown in 2007 contains specific restrictions on former ministers who wish to publish memoirs on the basis of their time in public office. The code forbids British ministers from writing and/or publishing books on their ministerial experiences while in office and from entering into any sort of agreement for the future publication of their memoirs. Once they have left public office, former ministers are required to forward copies of draft manuscripts to the cabinet secretary and are expected to observe the principles articulated in the Radcliffe

[57] Ibid., 119.
[58] Ibid., 114.
[59] *Conflict of Interest Act*, s. 33.
[60] Australian Government. "Standards of Ministerial Ethics." December 2007, 5, online: http://www.dpmc.gov.au/guidelines/docs/ministerial_ethics.pdf.

Report of 1976. The Report of the Committee of Privy Counsellors on Ministerial Memoirs, under Lord Radcliffe's leadership, recommended that former ministers be "free" to publish memoirs that document their own work, but that information relating to national security and international relations be left out. Also, the committee recommended that former ministers not publish material that fits any of the following descriptions: "information about the opinions or attitudes of colleagues regarding any Government business; advice tendered to Ministers in confidence by individual officials; and personnel matters."[61] The committee recommended that former ministers refrain from publishing material that could fall into one of these categories for a 15-year post–public employment period. Members' preference was to rely on voluntary compliance with these guidelines rather than to impose statutory obligations.

Switching Sides

The *Conflict of Interest Act* prohibits former public office holders from acting "for or on behalf of any person or organization in connection with any specific proceeding, transaction, negotiation or case to which the Crown is party and with respect to which the former public office holder had acted for, or provided advice to, the Crown." The subsection that follows prohibits former public office holders from sharing information with private clients that they obtained while in public office and that is not in the public domain.[62] These rules have no expiry date, and therefore former public office holders will never have permission to "switch sides" on a matter in which they were directly involved on the government's behalf. As Stark points out, to work for a private client *against* the state is interpreted as disloyalty to the public interest. This action qualifies as the ultimate ethical transgression for a public official, as it has the potential to breach the rules against influence, ingratiation, and profiteering simultaneously.

Most codes of ethical conduct for public office holders at the provincial level in Canada prohibit side-switching. For example, the *Members and Public Employees Disclosure Act* in place in Nova Scotia requires that, for six months post-public employment, members shall not

[61] UK, HC, "Ministerial Memoirs" (Radcliffe Report) Hansard, January 22, 1976, Vol. 903 cc521-3W.
[62] *Conflict of Interest Act*, s. 34.

> act for or on behalf of any person or entity in connection with any specific proceeding, transaction, negotiation or case to which a department is party, if the former member acted for advised the department in connection therewith while holding such office.[63]

Nova Scotia's post–public employment rules are somewhat unique in that they apply to all former members of the legislature. In most parliamentary systems, these restrictions apply only to former members, employees, and appointees of the executive branch.

In the United States, 18 USC 207 (a) prohibits former officers and employees of the executive branch from communicating with or appearing before "any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia" on behalf of anyone else on any matter that meets the following conditions:

- "the United States or the District of Columbia is a party or has a direct and substantial interest"
- "the person participated personally and substantially as an officer or employee"
- "involved a specific party or specific parties at the time of such participation."

This is the equivalent of the Canadian rule against side-switching mentioned previously.

Australia's Standards of Ministerial Ethics forbids ministers from lobbying, advocating, or having business meetings with members of the government, parliament, public servants, and defence force personnel on any matter in which they had "official dealings" during their last 18 months in public office.[64] This rule is also enumerated in the Lobbying Code of Conduct. The cooling-off period lasts for a year and a half, but Canada's restriction on such matters lasts for life. Former public office holders are *never* permitted to switch sides by acting for a private entity on a matter in which Canada is a party on which they had acted for or advised the Crown while in public office. Former ministers in Australia would be permitted to begin lobbying former colleagues immediately, as long as their efforts related only to matters in which they were not involved as public officials. From this perspective, Canada's post-employment regulations are more demanding.

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[63] *Members and Public Employees Disclosure Act*, 1991, SNS, c. 4, s. 1.
[64] Australian Government, "Standards of Ministerial Ethics" (December 2007), 5.

A Note on President Barack Obama's 2009 Regulations

In January 2009, U.S. President Barack Obama introduced new rules in an attempt to stop the "revolving door" between the private sector and the executive branch. Although some of the changes focus on the post–public employment period, others deal with the converse situation – the period during which an individual moves from the private sector into public office. It is worthwhile to consider these reforms alongside the post–public employment regulations because they both attempt to eliminate opportunities for impaired judgment on the part of public officials in the performance of their official duties. It is now forbidden for new executive branch appointees to participate in matters involving their former employers or clients for the first two years of their governmental appointments. This rule seeks to eliminate the possibility that new public officials would be influenced by relationships with former employers, as preferential treatment could compromise their roles as trustees of the public interest. Former lobbyists entering government are prohibited from participating in specific matters – and on any general issues – with respect to which they had lobbied the government during the two years prior to their public appointment.[65]

Restrictions Relating to Foreign Entities

The post–public employment restrictions for employees who held senior positions in the United States extend to their interactions with foreign entities for the year immediately following their public employment. Specifically, these officials are prohibited from representing, aiding, and/or providing advice to foreign entities with intent to influence the official decisions of American officials or employees. The category of "foreign entity" includes foreign governments as well as political parties.[66] Canada has no equivalent to this rule; there are no post–public employment restrictions on former public office holders that relate specifically to their interactions with foreign entities. The U.S. restrictions on relations with foreign entities could be read as a prohibition against influence and side-switching. Not only would former public office holders be prohibited

[65] White House, Executive Commitments (2009).
[66] 18 USC 207 (f).

from making representations to former colleagues on behalf of a private entity, but they would also be forbidden from providing advice "behind closed doors" that is mean to assist the foreign entity in influencing the decisions of American officials.

How Are Post–Public Employment Rules Applied and Enforced?

A significant challenge facing post–public employment ethics regimes is the difficulty associated with detecting non-compliance once former public office holders enter the private world. The ethics regimes in place in Canada at both the federal and provincial levels rely on current public office holders and the attentive public to come forward with suspected violations. If a former public office holder breaks regulations relating to influence and side-switching by making representations to former colleagues prior to the expiry of the cooling-off period, it is up to current officials and parliamentarians to inform the authorities. The *Lobbying Act* requires active lobbyists to register and relies on other lobbyists in the industry, members of the public, or parliamentarians to report suspicions of non-compliance. It has been suggested in the past that Canada adopt a system of dual reporting, in which both the lobbyist and the public office holder would be obliged to report communication from the lobbyist, but this system has never been implemented.

The Office of the Conflict of Interest and Ethics Commissioner is responsible for advising current and former public office holders on how to navigate the transition between the public and private spheres. If any member of the Senate or House of Commons has reason to believe that a current or former public office holder has violated the *Conflict of Interest Act*, he or she is entitled to ask the ethics commissioner to conduct an investigation. The commissioner is authorized to examine matters on "his or her own initiative" as well. Upon concluding an investigation, the ethics commissioner must file a report with the prime minister that lays out the facts related to the allegation as well as the commissioner's analysis and conclusions. Concurrently, the ethics commissioner is to forward the report to the current or former public office holder who is the subject of the complaint and make it available to the public.

The legislation is clear on the parameters of the ethics commissioner's power; he or she is authorized to draw conclusions based on the findings of his or her investigations,

but in most cases the commissioner cannot enforce punishment. Violations of sections 22–27 of the legislation relating to disclosure may be subject to administrative fines not exceeding $500. The ethics commissioner determines whether to apply such a penalty; the office's website explains that monetary penalties are "set with a view to encouraging compliance rather than punishment." The only post–public employment requirement that falls within this category and that could be subject to monetary penalty is the obligation to report a serious offer of employment to the ethics commissioner within seven days of receiving it. Aside from being subject to monetary penalties, the other punishment that a public office holder could face for failing to comply with the post–public employment rules in the *Conflict of Interest Act* is a form of blacklisting. According to section 41 of the legislation, the ethics commissioner can order current public office holders to avoid official dealings with former public office holders who have been found to be in violation of the rules.

If the ethics commissioner reports that any section of the code has been violated, it is up to the prime minister to decide whether and how to respond with anything further than monetary penalties (if applicable). Section 47 states that the findings and conclusions of the ethics commissioner's reports "may not be altered by anyone but (are) not determinative of the measures to be taken as a result of the report."[67] In other words, a conclusion by the ethics commissioner that non-compliance has occurred, does not guarantee that any tangible punishment will follow. It is the prime minister's decision either to apply a sanction or to give the public office holder a "pass." Forms of punishment might include dismissal from cabinet or caucus. The fact that the report is put on the public record means that a prime minister would be under some pressure to reprimand a public office holder who did not fulfill the requirements of ethics rules.

The sanctions for violations of the *Lobbying Act* are quite severe. Section 10.11 of the legislation stipulates that designated former public office holders may not engage in lobbying activity during the five years immediately following the day on which they resigned from public office. Non-compliance with this rule is considered an offence that is punishable by a fine not exceeding $50,000. If an individual acting as a lobbyist fails to file a return or knowingly includes false or misleading information in documents

[67] *Conflict of Interest Act*, s. 47.

submitted to the commissioner, that individual could be punished on summary conviction with a fine not exceeding $50,000 and/or six months of imprisonment.[68] The Office of the Commissioner of Lobbying in Canada enforces the legislation by assisting lobbyists in the registration process and analyzing and verifying the information provided on disclosure forms. The office monitors media content in search of articles relating to lobbying or alleged lobbying. If it appears that unregistered lobbying could be taking place, the office sends advisory letters to the appropriate individuals and/or organizations to explain their responsibilities. As an additional measure to encourage compliance, the office educates public office holders about lobbyists' responsibilities under the legislation in the hope that they encourage the lobbyists with whom they work to comply with the legislation. The office has the authority to investigate alleged breaches of the rules.[69] As of March 2008, 10 investigations had been initiated and four had been completed.[70]

In the United States, violations of 18 USC 207 and 208, which stipulate restrictions on influence, side-switching, and ingratiation, are punishable by fine and/or imprisonment. In Canada, the post-employment restriction on lobbying former officials that applies to designated former public office holders carries the possibility of legal sanctions under the *Lobbying Act*. However, the rules against influence and profiteering enumerated in the *Conflict of Interest Act* do not carry an automatic sanction, other than the possibility of "blacklisting" under section 41. Because there is no "penalties regime" in the legislation, aside from the administrative monetary penalties that apply only to violations of the disclosure requirements, the *Conflict of Interest Act* could be described as de facto "soft law" even though it is a statute.

The post–public employment regimes in the United Kingdom and Australia do not impose legal restrictions on former public office holders. The rules are enshrined in codes of conduct as opposed to legislation, which means that there are no legal punishments for non-compliance. In the United Kingdom, there is an Independent Advisor on Ministers' Interests whose responsibilities are to advise ministers on how to avoid conflicts of interests and to investigate allegations of non-compliance with the

[68] *Lobbying Act*, s. 14.
[69] Ibid., s. 10.4
[70] Office of the Commissioner of Lobbying in Canada, Key Events and Evolution of the Act, "Key Events in the History of the Canadian Lobbyists Registration Regime," online: http://www.ocl-cal.gc.ca.

Ministerial Code. However, the advisor can launch an investigation only at the prime minister's request and is not authorized to apply a penalty even if he or she finds that a breach has occurred. It is the prerogative of the prime minister to determine how to respond to non-compliance. The fact that the prime minister determines whether alleged misconduct is investigated and punished means that ministerial ethics is a political rather than a legal matter. The prime minister is accountable to the House of Commons for the behaviour of ministers and appointees. If he or she were to choose not to punish a minister after the advisor found that minister to be in breach of the Ministerial Code, the prime minister would have to answer to the House.

In 2005, former British home secretary David Blunkett was accused of breaching the Ministerial Code by failing to consult the Advisory Committee on Business Appointments (ACBA) about a position of employment that he accepted only shortly after resigning from cabinet. His earnings with the Organization for Research and Technology became a matter of public record in April of that year with the release of Parliament's Register of Members' Interests. He was still an MP and therefore was required to disclose outside earnings. Prime Minister Tony Blair's official response was that because Blunkett's behaviour did not "stop him (from) doing his job" as a member of parliament, there would be no sanction.[71] It is unknown whether Blunkett's failure to consult the committee would have been detected had it not been for the fact that he was still an MP and therefore required to register his private interests.

The "Implementation" section of Australia's Standards of Ministerial Ethics states that it is up to the prime minister to decide whether a minister who is under investigation for alleged "illegal or improper conduct" ought to resign. Ministers charged with criminal offences will be required to resign automatically, as will those who the prime minister feels have committed a prima facie breach of the ministerial standards. In the event that a minister, including the prime minister, is accused of a breach under the ministerial standards, "the Prime Minister may refer the matter to an appropriate independent authority for investigation and/or advice."[72] If the common punishment for failure to comply with ethics rules is a demand for resignation from cabinet, it is not clear how a

[71] "Blunkett accused of third breach of job code," *The Independent*, November 1, 2005, online: http://www.independent.co.uk.
[72] Australian Government, "Standards of Ministerial Ethics," 5.

former minister would be punished for non-compliance. It would seem that the purpose of the post–public employment restrictions in this case is to clarify expectations and to encourage "good behaviour" rather than to deter or punish questionable conduct.

Conclusions and Recommendations

In a report written for the OECD on public integrity and post–public employment, Kenneth Kernaghan argues that the deterrent effect of legislation is stronger than that of codes of conduct or "soft laws." He goes as far as to say that "codes are likely to be especially ineffective in regulating the post-employment activities of *former* officials." Laws are designed to "prevent and punish wrongdoing" but "codes (and value statements) are often designed to foster 'right doing' through the use of aspirational and inspirational language and gently worded admonitions."[73] In other words, they can clarify goals and expectations but cannot enforce them. Although Kernaghan is more optimistic about the deterrent effects of laws than of codes, he is hesitant to rely on either of them as remedies for post–public employment issues. In his view, there is not enough evidence on the effectiveness of existing ethics regimes to be confident of their capacity to deter misconduct in the post–public employment period.[74]

Kernaghan's reservations about the deterrent effect of codes of conduct ought not to be interpreted as a reason to reject them entirely. The deterrence of wrongdoing is only one of the objectives of ethics regimes. Ethics regulations, whether statutory or not, can assist both current and former public office holders by clarifying expectations. There is evidence to suggest that the "soft law" approach used in the United Kingdom has been effective in helping former ministers to navigate the post–public employment period. The Ministerial Code requires ministers to consult an advisory committee on employment activities in the first two years after leaving public office. There is no legal sanction for failure to comply with this rule, but as mentioned previously, the Advisory Committee on Business Appointments has reported that the system is complied with "widely and

[73] Kenneth Kernaghan, "Public Integrity and Post-Public Employment: Issues, Remedies and Benchmarks," Organization for Economic Co-operation and Development, Prepared for an Expert Group Meeting on Conflict of Interest: Ensuring Accountability and Transparency in the Public Service, May 7, 2007, 15.
[74] Ibid., 14–16.

willingly."[75] This does not mean that it is deterring non-compliance, as it might be that those who cooperate would so regardless of whether a penalties regime existed or not.

This paper has discussed two main approaches to ethics regulation: the "soft law" approach, which relies on codes of conduct to encourage ethical behaviour, and the "hard law" approach, which uses legislation to discourage and penalize misconduct. In both Canada and the United States, former public office holders are subject to legal restrictions on their post–public employment activities while their colleagues in the United Kingdom and Australia refer to non-statutory codes of conduct to help them to navigate this period. The legislative approach has the advantage of clarity. Ethics laws prohibit specific actions, omissions, and circumstances such as conflicts of interest and the improper use of information, but it is impossible to create an exhaustive list of all types of political misconduct. Many codes of conduct prohibit specific behaviours as well, but in addition they often contain "value statements"[76] that are open to interpretation by a committee or commissioner. The ambiguity of the phrasing in these clauses can make codes of conduct more malleable than legislation. Thus, codes of conduct can "cover" a wider variety of transgressions than laws as long as they are interpreted broadly; laws can only prohibit that which is specifically enumerated as an offence. As Kernaghan points out, however, soft law puts less emphasis on deterrent and punishment than hard law does; punishments for breaches of codes of conduct, where they exist at all, are political rather than legal. Codes of conduct are able to cast a wider net with which to catch various types of misconduct, but compliance is ultimately voluntary. Laws take a narrower approach but have the capacity to deter and punish non-compliance via legal sanction. Again, as Kernaghan reminds us, evidence of the deterrent effect of either soft or hard ethics law is lacking.

Let us revisit the approach used in the United Kingdom as an example of soft law. There are no hard rules restricting the types of employment that ministers can accept in the post–public employment phase. However, the Ministerial Code confers a duty to consult the Advisory Committee on Business Appointments on all employment prospects during the first two years after leaving public office. The guidelines that this committee

[75] UK, Advisory Committee on Business Appointments, Third Report 1999–2000, 11.
[76] Kernaghan, "Public Integrity and Post-Public Employment," 15.

relies on in its deliberations emphasize the importance of avoiding the perception or appearance of wrongdoing. As a result, the committee's decision in any particular case depends not simply on whether there is a breach of law, but whether a former minister's actions are likely to arouse public suspicion. In the event that a former prime minister was considering employment with a well-known lobbyist who had attempted to influence the decisions of his or her government in the past, it is very likely that the committee members would discourage him or her from going forward regardless of whether any specific rule would be broken. This approach offers transparency, openness, and flexibility, but some might see it as too intrusive and as a breach of former ministers' privacy. An ethics regime has to strike a comfortable balance between the public interest and the public office holders' personal well-being; the "comfort zone" depends on a regime's institutional history and cultural expectations.

Prior to the enactment of the *Conflict of Interest Act* in 2006, Canada relied on codes of ethical conduct to manage conflicts of interest in the post–public employment phase. It is unlikely that Canada will return to soft law, given the steady progression toward a legislative ethics regime. A return to a code of conduct might be interpreted as a sign that a government is going "soft" on ethics. However, because the punishment for breaching the post–public employment rules relating to ingratiation and profiteering is political rather than legal, these clauses could be described as a form of soft law. The clauses that prohibit former public office holders from lobbying former colleagues are repeated in the *Lobbying Act*, which contains a more severe penalties regime.

The ethics regime in Canada would not be improved by creating a longer list of prohibited activities; it is already among the most regulatory of OECD countries. As mentioned previously, if the allegations relating to the business relationship between Karlheinz Schreiber and the Right Honourable Brian Mulroney were to come forward now, the current ethics regime could cover it. This is not to say in any certain terms that the alleged events would qualify as breaches of ethics rules, but rather that Mr. Mulroney would have a number of responsibilities relating to them. Specifically, he would be obliged to report any serious offers of employment, to disclose the alleged payments, to avoid lobbying former colleagues for a five-year period, and to refrain from working for

a private entity with which he had "direct and significant dealings" as a public official during his last year of office.

I conclude with a reminder of the inherent limitations of ethics regimes. First, the existence of the rules does not guarantee compliance with them. Second, non-compliance with the rules will not necessarily be detected or punished. Third, even the most comprehensive ethics regime will not necessary enhance public trust in the integrity of political actors and institutions. For these reasons, over-regulation ought to be resisted.