

Commission of Inquiry into Certain Allegations  
Respecting Business and Financial Dealings  
Between Karlheinz Schreiber and  
the Right Honourable Brian Mulroney



Commission d'enquête concernant les allégations  
au sujet des transactions financières et commerciales  
entre Karlheinz Schreiber et  
le très honorable Brian Mulroney

## **Part II – Policy Review**

### **Public Consultation Paper**

**December 15, 2008**

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## I CALL FOR SUBMISSIONS

### A Introduction

As laid out in the Rules of Procedure and Practice, the proceedings of the Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney are divided into two parts. Part I, the Factual Inquiry, will focus on questions relating to the business and financial dealings between Mr. Schreiber and Mr. Mulroney. These questions are set out in paragraph (a) sections 1 through 16 of the Inquiry's terms of reference. Part II, the Policy Review, focuses on the questions set out in paragraph (a) sections 14 and 17. These policy questions are the subject of this paper.

In the policy review, the Commissioner is charged with reporting and making recommendations on two issues of policy. They centre, first, on the content of Canada's federal ethics rules and, second, on the policies and practices at the Privy Council Office (PCO) governing the handling of the prime minister's correspondence. These two policy issues are described in more detail below, under the headings Ethics Questions and Correspondence Question.

As part of its policy deliberations on these matters, the Commission has undertaken a multi-stage policy review. First, it has commissioned three research studies from leading researchers in the field – two on ethics rules and the third on correspondence-handling policies. These studies will be published in draft form in early 2009, and the authors will participate in an Expert Forum in late spring 2009, at which they will present their findings and be questioned by the Commission and those with party standing in the policy review. (The hearing of applications for standing and funding for the Part II – Policy Review will be held on January 21, 22, and, if necessary, January 23, 2009. The Notice for this hearing is posted on the Commission's website.)

In addition, at this time the Commission is requesting written submissions on the policy questions from interested persons and the general public. All submissions will be carefully reviewed. After this review, the Commission will offer some of the submitters the opportunity to present their views at a public session in late spring 2009.

Selection of the presenters is at the sole discretion of the Commission and will depend on the Commission's assessment of the usefulness of the presenters' arguments to the Commission.

This consultation paper outlines in greater detail the issues raised by the two policy questions and poses a series of more detailed questions. The paper should guide those interested in providing written submissions.

### B Making Submissions

Members of the public who wish to respond to the matters raised in this consultation paper should do so in writing by 5 p.m. eastern time, **March 23, 2009**. Written submissions should be sent by mail, courier, or fax to the following address:

Director of Policy Research  
Commission of Inquiry into Certain Allegations Respecting  
Business and Financial Dealings Between Karlheinz  
Schreiber and the Right Honourable Brian Mulroney  
P.O. Box 2740, Station D  
Ottawa, Ontario K1P 5W7  
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Fax: (613) 995-0785

Submissions may also be delivered by sending PDF (portable document format) files via e-mail to

**research@oliphantcommission.ca**

### **C Disclaimer**

The Commission has not completed its fact-finding functions. 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 prior examinations of these matters. In no manner should this consultation paper 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.

## **II ETHICS QUESTIONS**

### **A Overview**

Paragraph (a) section 14 of the Commission’s terms of reference reads:

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

The words “these business and financial dealings” refer to other questions raised in the terms of reference concerning the alleged business and financial dealings of Mr. Karlheinz Schreiber and the Right Honourable Brian Mulroney, as follows:

1. What were the business and financial dealings between Mr. Schreiber and Mr. Mulroney?
2. Was there an agreement reached by Mr. Mulroney while still a sitting prime minister?
3. If so, what was that agreement, when and where was it made?
4. Was there an agreement reached by Mr. Mulroney while still sitting as a Member of Parliament or during the limitation periods prescribed by the 1985 ethics code?
5. If so, what was that agreement, when and where was it made?
6. What payments were made, when and how and why?
7. What was the source of the funds for the payments?
8. What services, if any, were rendered in return for the payments?
9. Why were the payments made and accepted in cash?
10. What happened to the cash; in particular, if a significant amount of cash was received in the U.S., what happened to that cash?

As noted, the parameters of any business and financial dealings between Messrs. Schreiber and Mulroney are the subject of the factual inquiry of the Commission. They are not, therefore, an issue to be decided in this policy review, and the Commission will

not accept submissions connected to the alleged relationship between Messrs. Schreiber and Mulroney as part of the policy review. For the purposes of this policy review – and without any bearing on the factual review – this consultation paper defines the ethics questions raised by paragraph (a) section 14 as follows:

### *Consultation Questions*

- 1. Are there ethical rules or guidelines that *currently* cover business and financial dealings between a sitting prime minister or a sitting member of parliament and a third party?**
- 2. If so, what sort of business and financial dealings are covered?**
- 3. Are there deficiencies in the scope and nature of this coverage?**
- 4. In particular, should there be additional ethical rules or guidelines concerning the activities of politicians as they transition from office or after they leave office?**
- 5. In this last regard, are the current rules on the post-employment of politicians appropriate?**
- 6. Are the existing enforcement and penalty regimes sufficient?**

In the sections that follow, this consultation paper provides a succinct overview of the Commission's current understanding of federal ethics rules to assist those wishing to make submissions on these questions.

## **B Federal Ethics Rules**

### **1 Overview of Statutory and Regulatory Framework**

Ethics rules pertaining to politicians at the federal level have evolved since the early 1990s. By the end of Mr. Mulroney's tenure in office (as prime minister until June 24, 1993, and as a member of parliament until September 8, 1993), the ethics rules of plausible relevance to the Commission's work were contained in the *Conflict of Interest and Post-Employment Code for Public Office Holders*,<sup>1</sup> the *Parliament of Canada Act*,<sup>2</sup> and the *Criminal Code*.<sup>3</sup> The *Lobbyist Registration Act*,<sup>4</sup> while not strictly including ethics rules at the time, has since become more relevant as an ethics instrument.

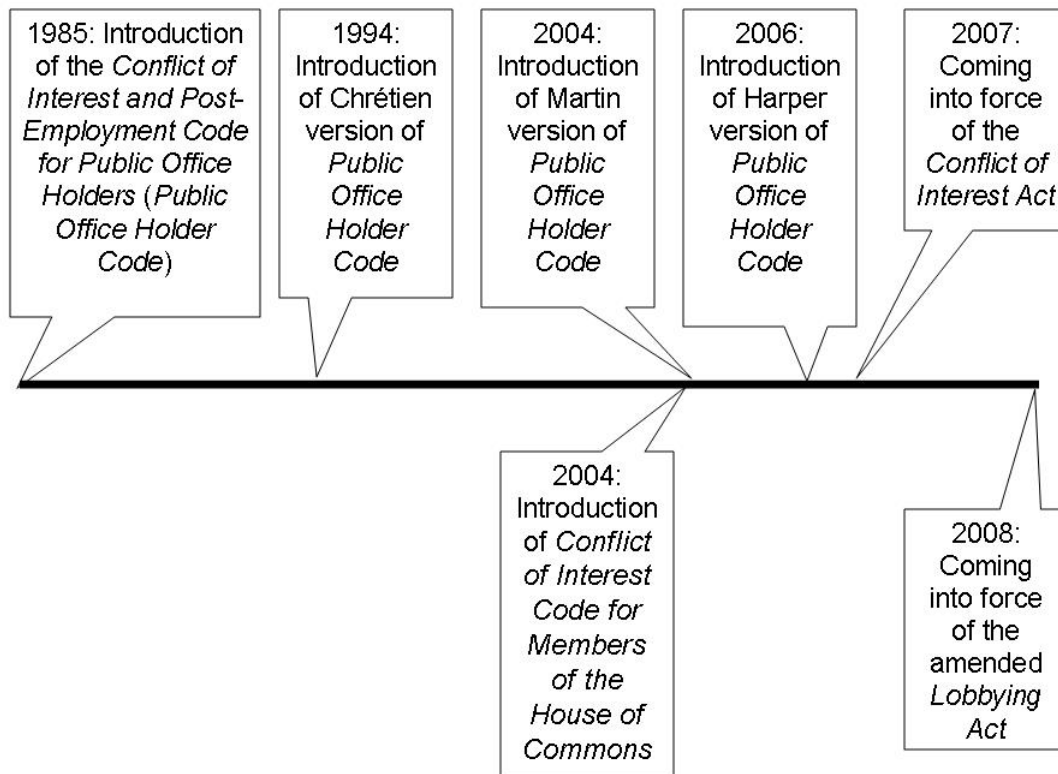
The content of each of these instruments changed with time. The most sweeping renovation came in 2006 with the passage of the *Federal Accountability Act* (FAA).<sup>5</sup> A core component of that statute was the *Conflict of Interest Act*,<sup>6</sup> which replaced the non-statutory *Conflict of Interest and Post-Employment Code for Public Office Holders*. The

FAA also introduced changes to what was renamed the *Lobbying Act* with implications for the federal ethics regime.

Also of note is the *Conflict of Interest Code for Members of the House of Commons*,<sup>7</sup> which came into effect in October 2004 as part of the Commons Standing Orders. The Senate adopted an analogous instrument on May 18, 2005: the *Conflict of Interest Code for Senators*.<sup>8</sup>

Figure 1 is a chronology showing the sequencing of key federal ethics instruments.

**Figure 1: Chronology of Key Federal Ethics Instruments**



## 2 Comparative Content of Ethics Instruments

The content of these instruments varies. Table 1 outlines our understanding of the rules and restrictions found in Canada's federal conflicts of interest regime, as it applies to politicians and former politicians.

At present, the core instruments for a member of parliament with a ministerial post are the *Conflict of Interest Act*, the *Lobbying Act*, the *Conflict of Interest Code for Members of the House of Commons*, the *Parliament of Canada Act*, and the *Criminal Code*. These instruments apply to different (although overlapping) categories of public officials, and impose varying requirements.

**Table 1: Comparative Content of Federal Ethics Rules**

Rule	<i>Conflict of Interest and Post-Employment Code for Public Office Holders</i>				<i>Conflict of Interest Act (2007)</i>	<i>Conflict of Interest Code for Members of the House of Commons (2004)</i>
	1985	1994	2004	2006		
Definition of “conflict of interest”					✓	
Must arrange affairs to avoid conflict of interest	✓	✓	✓	✓	✓	✓
Must recuse oneself where decision creates conflict			✓	✓	✓	✓
Not to give preferential treatment based on identity of person	✓	✓	✓	✓	✓	
Not to use non-public information to further private interest	✓	✓	✓	✓	✓	✓
Not to use position to influence decision-making in favour of private interest		✓	✓	✓	✓	✓
Not to be influenced in conduct of powers by prospects for outside employment	✓	✓	✓	✓	✓	
Not to accept gifts that might be seen to influence office holder	✓	✓	✓	✓	✓	✓
Gifts of a certain value are forfeited to the Crown			✓	✓	✓	
Not to accept travel on private aircraft, subject to exceptions			✓	✓	✓	
Not to be a party to a contract with a public sector entity					✓	✓
Not to have an interest in a business enterprise that is party to a contract with a public sector entity					✓	✓
Not to contract on behalf of the government with immediate family		✓	✓	✓	✓	
No outside business activities	✓	✓	✓	✓	✓	
No use of government property for anything other than official activities	✓	✓	✓	✓		
No solicitation of funds where would create a conflict			✓	✓	✓	
No holding of “controlled assets”	✓	✓	✓	✓	✓	
No circumvention of these rules	✓ <sup>a</sup>	✓ <sup>b</sup>	✓	✓	✓	
Compliance with rules as a condition of employment	✓	✓	✓	✓	✓	
Once a former public office holder, not to act in a manner so as to take improper advantage of previous public office	✓	✓	✓	✓	✓	
Once a former public office holder, not to act for someone in connection with any specific matter on which acted for government while in office	✓	✓	✓	✓	✓	



Once a former public office holder, not to give advice using non-public information obtained while a public office holder	✓ <sup>c</sup>	✓	✓	✓	✓	
Once a former public office holder, for a cooling-off period, not to enter into contract, accept appointment to a board of directors, or accept employment with an entity with which had direct and significant dealings for a year prior to leaving office	✓ <sup>d</sup>	✓ <sup>e</sup>	✓	✓	✓	
Once a former public office holder, for a cooling-off period, not to make representations to any public entity with which had direct and significant dealings for a year prior to leaving office	✓	✓	✓	✓	✓	
Once a former public office holder, for a cooling-off period, not to give counsel, for commercial purposes of the recipient, concerning programs or policies of the office holder’s former department or a department with which office holder had direct and substantial relationship for a year prior to leaving office	✓					
Once a former minister, for a cooling-off period, not to make representations to a former ministerial colleague who remains a minister			✓	✓	✓	
For certain senior public office holders (including ministers), no lobbying for five years				✓	✓ (under the <i>Lobbying Act</i> )	

Notes

- a Language confines non-circumvention rule to selling or transferring assets to family members or other persons for the purposes of circumvention.
- b Language confines non-circumvention rule to selling or transferring assets to family members or other persons for the purposes of circumvention.
- c This obligation is, however, found in the objects portion of the Code, not in the formal obligations portion.
- d No reference to “contracts.”
- e No reference to “contracts.”

### a) *Conflict of Interest Act and the Lobbying Act*

The *Conflict of Interest Act (CIA)* is the most detailed (and most recent) instrument. It applies to public office holders – a defined term that includes mostly senior executive branch officials, including “a minister of the Crown.”<sup>9</sup>

#### i) **Conflicts of Interest**

The *CIA* imposes specific prohibitions, designed to eliminate conflicts of interest, on the current activities of public office holders. A conflict of interest exists where a public office holder “exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person’s private interests.”<sup>10</sup> There is no limit on what might constitute a “private interest,” although the *CIA* excludes interests that are general, that affect the public office holder as one of a broad class of individuals, or that concern remuneration of benefits received in return for employ as a public office holder.<sup>11</sup>

#### ii) **Sample Specific Prohibitions**

Certain specific actions are barred by the *CIA*. For example, most public office holders are barred from engaging in employment or the practice of a profession, managing or operating a business or commercial activity, or serving as a paid consultant.<sup>12</sup> Public office holders are also precluded from giving “preferential treatment” in exercising their official powers, duties, or functions to anyone “based on the identity of the person or organization” representing that entity (for example, the identity of the lobbyist).<sup>13</sup> Likewise, no public office holders can use information obtained via their office and not available to the public to further (or to seek to further) their private interests or those of relatives or friends. Nor can they use this information to further (or to seek to further) “improperly” another person’s private interests.<sup>14</sup> The *CIA* also bars office holders from using their position to influence another official to further these private interests.<sup>15</sup>

#### iii) **Disclosure and Divestment Rules**

The *CIA* also includes detailed rules obliging disclosure to an ethics official (and, in some cases, public declaration) of, among other things, public office holders’ assets; and, in some instances, outright divestment of those assets is required. The core disclosure and divestment rules are summarized in Table 2.

**Table 2: Asset Disclosure and Divestment Rules under the *Conflict of Interest Act***

Class	Asset
Confidential disclosure	<p>Within 60 days of appointment, a confidential disclosure is made to the conflict of interest and ethics commissioner of</p> <ul style="list-style-type: none"> <li>• All income, assets, and liabilities of office holders; ministers must include similar information on family members;</li> <li>• All income during the 12 months before the appointment and all the income the public office holders are entitled to receive for 12 months after the appointment; ministers must include similar information on family members;</li> <li>• Benefits from a contract with a public service entity the public office holders (or their family members or a private corporation or partnership in which they or their family has an interest) are entitled to receive for 12 months after the appointment</li> <li>• Certain outside activities (e.g., business activities; involvement in charitable activities)</li> </ul>

Class	Asset
	<p>from two years before they became office holders; ministers must include outside activities of family members.</p> <p>Within 30 days of any material change in the above, a confidential report is made to the the conflict of interest and ethics commissioner.</p> <p>Within 30 days of gifts from any one person other than a family member or friend exceeding \$200 in a single year, the gifts shall be disclosed to the conflict of interest and ethics commissioner.</p>
Public declarations	<p>Within 120 days of appointment, public office holders must publicly declare all of their assets that are neither “controlled” nor “exempted.” Ministers must also publicly disclose all liabilities in excess of \$10,000.</p> <p>Within 120 days of appointment, public office holders must publicly declare whether they are a director or officer in a charitable, philanthropic, or non-commercial corporation.</p> <p>Within 60 days of a recusal done to avoid a conflict of interest, public office holders must make a public declaration describing in sufficient detail the conflict of interest avoided.</p> <p>Within 30 days of receipt of a gift with a value of \$200 or more from anyone other than a friend or relative, public office holders must make a public declaration describing the gift.</p> <p>Within 30 days of accepting travel in a manner that falls within the permitted exceptions contained in the Act, ministers must make a public declaration describing the travel and circumstances.</p>
Mandatory divestment (controlled assets)	<p>Within 120 days of appointment, public office holders must divest themselves of controlled assets by selling them in an arm’s length transaction or placing them in a blind trust.</p> <p>Controlled assets are those that “could be directly or indirectly affected by government decisions or policy,” including</p> <ul style="list-style-type: none"> <li>• publicly traded securities of corporations and foreign governments, whether held individually or in an investment portfolio account;</li> <li>• self-administered registered retirement savings plans, self-administered registered education savings plans, and registered retirement income funds, if composed of at least one asset that would be considered “controlled” if outside the fund;</li> <li>• commodities, futures, and foreign currencies held or traded for speculative purposes; and</li> <li>• stock options, warrants, rights, and similar instruments.</li> </ul>
Exempt assets and interests	<p>Assets and interests for the private use of public office holders and their families and assets that are not of a commercial character, including</p> <ul style="list-style-type: none"> <li>• residences, recreational property, and farms used or intended for use by public office holders or their families;</li> <li>• household goods and personal effects;</li> <li>• works of art, antiques, and collectibles;</li> <li>• automobiles and other personal means of transportation;</li> <li>• cash and deposits;</li> <li>• Canada savings bonds and other similar investments issued or guaranteed by any level of government in Canada or agencies of those governments;</li> <li>• registered retirement savings plans and registered education savings plans that are not</li> </ul>

Class	Asset
	<ul style="list-style-type: none"> <li>self-administered or self-directed;</li> <li>• investments in open-ended mutual funds;</li> <li>• guaranteed investment certificates and similar financial instruments;</li> <li>• public sector debt financing not guaranteed by a level of government, such as university and hospital debt financing;</li> <li>• annuities and life insurance policies;</li> <li>• pension rights;</li> <li>• money owed by a previous employer, client, or partnership; or</li> <li>• personal loans receivable from the members of the public office holder’s relatives, and personal loans of less than \$10,000 receivable from other persons where the public office holder has loaned the moneys receivable;</li> <li>• money owed under a mortgage of less than \$10,000;</li> <li>• self-directed or administered registered retirement savings plans, self-administered registered education savings plans, and registered retirement income funds composed exclusively of assets that would considered exempt; and</li> <li>• investments in limited partnerships that are not traded publicly and whose assets are exempt assets.</li> </ul>

Source: *Conflict of Interest Act*, ss. 20 *et seq.*

#### **iv) Post-Employment Rules**

The *CIA* regulates post-employment activities – that is, what public office holders may do once they leave office.

##### ***While Still in Office***

While still in public office, public office holders must not permit themselves to be influenced in their official activities “by plans for, or offers of, outside employment.”<sup>16</sup> The public office holders must disclose all “firm offers” of outside employment to the conflict of interest and ethics commissioner within seven days.<sup>17</sup> Similarly, acceptance of an offer of outside employment must be disclosed to the commissioner within seven days. Ministers who accept such an offer must also report this fact to the prime minister.<sup>18</sup>

##### ***Indefinite Rules Once Holders Depart Office***

The *CIA* also purports to regulate conduct once the person has left public office. Some of these rules are permanent; that is, they endure for an indefinite period of time. Thus, the Act specifies that “[n]o former public office holder shall act in such a manner as to take improper advantage of his or her previous public office.”<sup>19</sup> More specifically, it prohibits the former office holder from acting for a person in respect to any specific matter in relation to which the former public office holder had acted for the government. Likewise, the former public office holder may not give advice to a client, business associate, or employer using non-public information obtained by virtue of the office holder’s former position.<sup>20</sup>

##### ***Time-Limited Rules Once Holders Depart Office***

The *CIA* also imposes so-called “cooling off” periods – additional prohibitions that endure for a limited period of time. For ministers, this period is two years. During this time, among other things, former public office holders may not enter into a service contract with an entity with which they had “direct and significant” dealings for one year before their departure from office. Likewise, they may not make representations on

behalf of any entity to a public agency with which the former office holders had “direct and significant official dealings” for one year before their departure from office. This rule is supplemented for former ministers: they may not make representations to a current minister who was a former ministerial colleague.<sup>21</sup>

The *Lobbying Act* now augments these post-employment rules. Under that statute, certain public office holders – including ministers – may not lobby for five years after leaving office. Thus, the former minister may not (for payment and on behalf of a client or, in some instances, employer) arrange a meeting between a public office holder and another person, or communicate with a public office holder in respect of a number of public policy initiatives, including the promulgation of a statute or making of a regulation, the development or amendment of any government policy or program, or the awarding of any contract, “grant, contribution, or other financial benefit by or on behalf” of the government.<sup>22</sup>

**b) *Conflict of Interest Code for Members of the House of Commons and the Parliament of Canada Act***

Members of Parliament are governed by a separate instrument, appended to the Standing Orders of the House of Commons – the *Conflict of Interest Code for Members of the House of Commons* (MP Code). This is not a legislative instrument – that is, it was never introduced as a bill, assessed by both the Commons and the Senate and accorded royal assent from the Governor General. It is instead a set of rules created by the House of Commons as a manifestation of its inherent parliamentary privilege to discipline its own membership.

The Code applies to “all Members of the House of Commons when carrying out the duties and functions of their office as Members of the House, including Members who are ministers of the Crown or parliamentary secretaries.”<sup>23</sup> It applies, therefore, to ministers, at least when acting in their parliamentary capacity (for example, voting on a measure in the House of Commons). Ministers and regular MPs are, however, treated slightly differently by the Code: MPs who are not ministers may carry on a business or engage in employment in a profession. This authorization is tempered by the requirement that, in so acting, the MP is not in breach of the conflict of interest rules in the Code.<sup>24</sup>

Those conflict of interest rules are broadly similar to those found in the *CIA* (although less numerous) and, at core, are directed at precluding MPs from exercising their functions in a manner that favours their private interest (or those of relatives) or improperly favours the private interest of some other party. Unlike in the *CIA*, “private interest” is defined in the Code. Furthering a private interest exists when the member’s actions result, directly or indirectly, in any of the following:

- (a) an increase in, or the preservation of, the value of the person’s assets;
- (b) the extinguishment, or reduction in the amount, of the person’s liabilities;
- (c) the acquisition of a financial interest by the person;
- (d) an increase in the person’s income from a source referred to in subsection 21(2) [income from employment, a contract, or a business];

- (e) the person becoming a director or officer in a corporation, association, or trade union; and
- (f) the person becoming a partner in a partnership.<sup>25</sup>

Also of note, the *Parliament of Canada Act* bars MPs from receiving or agreeing to receive any compensation for services to any person “in relation to any bill, proceeding, contract, claim, controversy, charge, accusation, arrest or other matter before the Senate or the House of Commons or a committee of either House; or ... for the purpose of influencing or attempting to influence any member of either House.”<sup>26</sup> Violation of this prohibition is a criminal offence, potentially disqualifying the MP from membership in the House of Commons or any position in the federal public administration for five years.

The Code includes substantial disclosure requirements, obliging MPs to report their most important assets to an ethics official (described below). A summary of this disclosure is available for public inspection.

A significant distinction in the rules governing MPs (as opposed to senior executive officials under the *CIA*) is that neither the Code nor the *Parliament of Canada Act* includes specific rules on post-employment of the sort found in the *CIA*.

### c) *Criminal Code*

The *Criminal Code* prohibits the most serious forms of unethical conduct by public officials, including politicians. For instance, the *Criminal Code* criminalizes the actual or attempted bribing of (or acceptance of a bribe by) “members of Parliament.”<sup>27</sup> Other sections extend to “officials,” a term defined broadly to include all those who hold a government office or who are appointed or elected to “discharge a public duty.”<sup>28</sup> The *Criminal Code* makes fraud or “breach of trust” committed in connection with an official’s duties a crime.<sup>29</sup> The *Criminal Code* also criminalizes what is colloquially known as “influence peddling” – in essence, the selling of or the offering to sell influence with the government for a fee. This *Criminal Code* provision applies to anyone who makes (and any official who accepts) an offer to sell influence, whether or not the official actually has the power to influence a government decision.<sup>30</sup>

## C Enforcement and Administration

Enforcement of the criminal provisions discussed above – including the *Criminal Code* and the *Parliament of Canada Act* – is a police matter, carried out by the RCMP. The *Conflict of Interest Act* and the *Conflict of Interest Code for Members of the House of Commons* are administered by a special official – the conflict of interest and ethics commissioner.

The commissioner is appointed by the Governor in Council (in essence, the federal Cabinet) “after consultation with the leader of every recognized party in the House of Commons and approval of the appointment by resolution of that House.”<sup>31</sup> He or she must be a former judge or someone who has served on a government board, commission, or tribunal and who has, in the federal Cabinet’s view, relevant expertise.<sup>32</sup> The commissioner enjoys substantial security of tenure – he or she is appointed for seven years (with the possibility of an additional seven-year renewal) during “good behaviour.” This means the commissioner can be dismissed only for cause, and even then the

government cannot fire the person: the firing must be approved by a vote in the House of Commons.

Under both the *CIA* and the MP Code, the commissioner administers the disclosures made by public officials of their assets. Under the *CIA*, he or she reviews these disclosures annually and may order the public office holder to take certain steps to bring them into compliance with the Act – including recusals on certain matters or divestment.<sup>33</sup>

The commissioner also has responsibilities in relation to the post-employment rules. Former public office holders must notify the commissioner of any lobbying they do during the “cooling off” period.<sup>34</sup> The commissioner then assesses compliance with the post-employment rules, and if he or she concludes that there has been non-compliance, the commissioner may order that current public office holders have no dealings with the former official.<sup>35</sup> The commissioner is also authorized to relax some of the post-employment restrictions for certain former public office holders should a number of listed criteria be met.<sup>36</sup>

The commissioner is charged with giving confidential advice to the prime minister and individual public office holders concerning compliance with the Act. He or she also investigates complaints of non-compliance, made by a senator or member of parliament “who has reasonable grounds to believe that a public office holder or former public office holder has contravened this Act.”<sup>37</sup> The commissioner may also initiate his or her investigation where he or she has “reason to believe that a public office holder or former public office holder has contravened” the Act.<sup>38</sup> The commissioner reports his or her findings to the prime minister, the complainant, the public office holder in question, and also to the public.<sup>39</sup> The conclusions of the commissioner that “a public office holder or former public office holder has or has not contravened this Act may not be altered by anyone but is not determinative of the measures to be taken as a result of the report.”<sup>40</sup>

The commissioner’s responsibilities under the MP Code are broadly analogous. He or she administers the disclosure process, is empowered to issue opinions on compliance questions to inquiring MPs, and investigates complaints concerning non-compliance made by MPs (or may investigate on his or her own initiative). The commissioner’s findings concerning investigations are tabled in the House of Commons, and the matter is then debated in the House of Commons.

## **D Penalties**

Penalties under the instruments described in this consultation paper vary. They include disqualification from sitting as an MP (for violation of the *Parliament of Canada Act*); potentially significant fines (for *Criminal Code* violations or the limitations on post-public office lobbying under the *Lobbying Act*) or terms of imprisonment (*Criminal Code* violations); and more indefinite sanctions for violations of the *Conflict of Interest Act* and the MP Code. Although the *CIA* imposes modest fines for violations by public office holders of disclosure obligations,<sup>41</sup> it is silent on penalties for other instances of non-compliance with the Act. Ultimately, the sanctions imposed on non-compliant public office holders are a matter for the prime minister to decide.

Similarly, the imposition of penalties for violation of the MP Code lies in the hands of MPs themselves. As a manifestation of parliament’s inherent parliamentary privileges, MPs are entitled to vote disciplinary measures on their colleagues.

**E Application of Ethics Rules: A Hypothetical Example**

As the discussion above suggests, different rules apply to different officials – and officials whose status changes with time would be subject to a variety of different standards over the course of their careers. Table 3 provides a more specific – but hypothetical – context for this general discussion of the federal ethics rules: it highlights our understanding of the rules as they would apply to a member of parliament who becomes prime minister (at “Year 0”) and who then resigns after a year to sit again as a regular member of parliament for one year before leaving public life completely.



**Table 3: Timeline of Application of Ethics Obligations: A Hypothetical Example**

	Time Horizon					
	Yr minus 2	Yr minus 1	Yr minus 1 plus 60 days	Yr 0	Yr 0 plus 60 days	Yr 0 plus 120 days
Status of individual	Private citizen	Elected MP	Sitting MP	Appointed prime minister	Sitting prime minister	
Applicable ethics instruments	<i>Criminal Code, Parliament of Canada Act</i>	<i>Criminal Code, Parliament of Canada Act, and MP Code</i>		<i>Criminal Code, Parliament of Canada Act, MP Code (insofar as acting in parliamentary capacity), and Conflict of Interest Act</i>		
Ethics/ financial disclosure obligations	N/A		File confidential statement with the commissioner disclosing the MP's private interests and the private interests of the members of the MP's family. A summary of the statement is prepared by the conflict of interest and ethics commissioner and placed on file at the office of the commissioner and made available for public inspection. <sup>a</sup>		Confidential disclosure obligations per Table 2 above	Public disclosure obligations per Table 2 above
Obligations relevant to business transactions	General obligations, including <i>Criminal Code</i> rules concerning bribery, influence peddling, etc., and <i>Parliament of Canada</i> rules in relation to offering any compensation for services to an MP in connection with a matter before the Commons	<ul style="list-style-type: none"> <li>o General obligations, including <i>Criminal Code</i> rules concerning bribery, influence peddling, etc., and <i>Parliament of Canada</i> rules in relation to receiving or agreeing to receive any compensation for services to any person in connection with a matter before the Commons</li> <li>o MP-specific obligations about not advancing "private interest" and, e.g., being a party in a contract with a public entity</li> </ul>		<ul style="list-style-type: none"> <li>o General obligations, including <i>Criminal Code</i> rules concerning bribery, influence peddling, etc., and <i>Parliament of Canada</i> rules in relation to receiving or agreeing to receive any compensation for services to any person in connection with a matter before the Commons</li> <li>o MP Code obligations continue insofar as PM acting in parliamentary capacity</li> <li>o Specific obligations under the <i>CIA</i> barring advancement of "private interest," the giving of preferential treatment, or the acceptance of gifts that might be seen as influencing actions</li> <li>o Specific obligations about, e.g., being a party in a contract with a public entity</li> <li>o Bar on, e.g., engaging in employment, the practice of a profession, managing or operating a business or commercial activity, or serving as a paid consultant</li> </ul>		
Specific obligations relevant to post-employment	N/A	N/A		<ul style="list-style-type: none"> <li>o Must not allow plans for or offers of outside employment to influence exercise of official power</li> <li>o Disclosure of all "firm offers" (and acceptance) of employment to the conflict of interest and ethics commissioner within seven days</li> </ul>		

	Time Horizon			
	Yr 1	Yr 2	Yr 3 to Yr5	After Yr 5
Status of individual	No longer PM; sitting MP	Private citizen		
Applicable ethics instruments	<i>Criminal Code, Parliament of Canada Act, MP Code, and post-employment provisions in Conflict of Interest Act, Lobbying Act</i>	<i>Criminal Code, Parliament of Canada Act, MP Code, and post-employment provisions in Conflict of Interest Act, Lobbying Act</i>		
Ethics/ financial disclosure obligations	<ul style="list-style-type: none"> <li>Continuing obligations to file material changes to the disclosure statement made under the MP Code (see Yr minus 1 plus 60 days)</li> <li>Obligation to report any lobbying done to the commissioner</li> </ul>	<ul style="list-style-type: none"> <li>Obligation to report any lobbying done to the commissioner</li> </ul>		
Obligations relevant to business transactions	<ul style="list-style-type: none"> <li>General obligations, including <i>Criminal Code</i> rules concerning bribery, influence peddling, etc., and <i>Parliament of Canada</i> rules in relation to receiving or agreeing to receive any compensation for services to any person in connection with a matter before the Commons</li> <li>MP-specific obligations about not advancing “private interest” and, e.g., being a party in a contract with a public entity</li> </ul>	<ul style="list-style-type: none"> <li>General obligations, including <i>Criminal Code</i> rules concerning bribery, influence peddling, etc., and <i>Parliament of Canada</i> rules in relation to offering any compensation for services to an MP in connection with a matter before the Commons</li> </ul>		
Specific obligations relevant to post-employment	<ul style="list-style-type: none"> <li>Must not act in such a manner as to take improper advantage of previous public office</li> <li>Must not act for a person in respect to any specific manner in relation to which the PM had acted for the government</li> <li>Must not give advice to a client, business associate, or employer using non-public information obtained by virtue of the PM’s former position</li> <li>Must not enter into a service contract with an entity with which the PM had “direct and significant” dealings for one year before his or her departure from office</li> <li>Must not make representations on behalf of any entity to a public agency with which the PM had “direct and significant official dealings” for one year before his or her departure from office</li> <li>Must not make representations to a current minister who was a former ministerial colleague</li> <li>Must not lobby – that is, for payment and on behalf of a client/employer; arrange a meeting between a public office holder and another person; or communicate with a public office holder in respect of a number of public policy initiatives, including the promulgation of a statute or making of a regulation, the development or amendment of any government policy or program, or the awarding of any contract, “grant, contribution, or other financial benefit by or on behalf” of the government</li> </ul>		<ul style="list-style-type: none"> <li>Must not act in such a manner as to take improper advantage of previous public office</li> <li>Must not act for a person in respect to any specific manner in relation to which the PM had acted for the government</li> <li>Must not give advice to a client, business associate or employer using non-public information obtained by virtue of the PM’s former position</li> <li>Must not lobby</li> </ul>	<ul style="list-style-type: none"> <li>Must not act in such a manner as to take improper advantage of previous public office</li> <li>Must not act for a person in respect to any specific manner in relation to which the PM had acted for the government</li> <li>Must not give advice to a client, business associate, or employer using non-public information obtained by virtue of the PM’s former position</li> </ul>

a MP Code, ss. 20 *et seq.*

### III CORRESPONDENCE QUESTION

#### A Overview

Paragraph (a) sections 15 to 17 of the Commission’s terms of reference read:

15. What steps were taken in processing Mr. Schreiber’s correspondence to Prime Minister Harper of March 29, 2007?

16. Why was the correspondence not passed on to Prime Minister Harper?

17. Should the Privy Council Office have adopted any different procedures in this case?

Paragraph 17 encapsulates the policy question posed to the Commission, on which the Commission is now eliciting comments. The specific question on which the Commission invites submissions is as follows:

#### *Consultation Question*

**Are there practices that the Privy Council Office should be employing in deciding which letters received from the public should be communicated directly to the Prime Minister?**

The Privy Council Office is a central agency of the Government of Canada, sometimes labelled the “Prime Minister’s department.” As described by its website:

The Privy Council Office (PCO) is the hub of public service support to the Prime Minister and Cabinet and its decision-making structures. ... Some of PCO’s main roles are:

- Providing professional, non-partisan advice to the Prime Minister and Cabinet;
- Managing the Cabinet’s decision-making system (including coordinating departmental policy proposals and conducting policy analysis);
- Arranging and supporting meetings of Cabinet and Cabinet committees;
- Advancing the development of the Government’s agenda across federal departments and agencies and with external stakeholders;
- Providing advice on the government’s structure and organization;

- Managing the appointment process for senior positions in federal departments, Crown corporations and agencies;
- Preparing Orders-in-Council and other statutory instruments to give effect to Government decisions;
- Fostering a high-performing and accountable public service;
- Submitting an annual report to the Prime Minister on the state of the Public Service.<sup>42</sup>

## **B Context**

As noted at the beginning of this paper, the Commission has not concluded its fact-finding functions. It has not yet examined questions 15 and 16 of the terms of reference. The Commission believes, however, that those making submissions on paragraph 17 require additional context. Strictly for the purposes of this consultation paper, therefore, it reproduces the discussion of this correspondence issue prepared by David Johnston, the Independent Advisor into the Allegations Respecting Financial Dealings Between Mr. Karlheinz Schreiber and the Right Honourable Brian Mulroney, in January 2008.<sup>43</sup> The Commission takes no position on the accuracy of this assessment at this time.

### A. Schreiber's Correspondence with Government Officials

#### 1. *The Correspondence Review Process*

As noted above, Mr. Schreiber wrote a letter to Prime Minister Harper in March 2007, enclosing another letter that referenced the Harrington Lake meeting [and described below]. This letter was part of more than one million pieces of correspondence addressed to the Prime Minister or his office annually.

Between June 2006 and September 2007, the Executive Correspondence Services (the "ECS"), the correspondence management arm of the Privy Council Office (the "PCO") comprising 35 full-time employees, received 16 letters from Mr. Schreiber, contained in 15 separate mailings. These letters were vetted and categorized in accordance with the ECS's standard procedure and were tracked using its automated Correspondence Management Information System. The ECS receives a vast amount of correspondence each year. During the last documented 12-month period, which spanned both 2006 and 2007, the ECS received over 1.7 million items of correspondence.

Of the 16 letters received, 10 of the letters remained under the ECS's control and were directed to be filed without response. According to the ECS, these 10 letters did not warrant responses pursuant to standard procedure for the following reasons: first, the letters described matters that were before the courts and it is standard procedure not to comment on ongoing litigation; second, the letters attached copies of letters between Mr. Schreiber and other individuals and it is standard procedure not to reply to letters that are copies.

The ECS sent Mr. Schreiber's November 30, 2006 letter to the PCO, seeking its advice on handling ongoing correspondence from Mr. Schreiber. The letter was reviewed and the Clerk's Office advised the ECS that no response was necessary, and the ECS filed the letter.

The ECS acknowledged Mr. Schreiber's January 16, 2007 letter and forwarded it on to the DOJ [Department of Justice] for information purposes.

The remaining four letters (June 16, 2006, August 23, 2006, May 3, 2007 and September 26, 2007) were sent to the Prime Minister's Correspondence (the "PMC"), which is a smaller correspondence review arm of the Prime Minister's Office, for its review and comments. From time to time, the ECS sends correspondence to the PMC to give it the opportunity to determine if it wishes to reply to correspondence on a subject on which the ECS received no specific PMC instructions. According to the ECS, these letters were not sent for any particular reason; rather they were chosen from all Mr. Schreiber's letters and sent to the PMC only to receive feedback from its perspective on Mr. Schreiber's correspondence generally on how the correspondence should be handled and to raise any concerns. The PMC did not provide the ECS with any direction on how to handle the correspondence.

The PCO, ECS and PMC, following their respective standard procedures, reviewed Mr. Schreiber's letters in the normal course and all three departments determined that the letters that they reviewed should not be sent to Prime Minister Harper for his review.

Prime Minister Harper has also confirmed that he never received any of Mr. Schreiber's correspondence sent during

this period. On November 29, 2007, Mr. Schreiber testified before the Ethics Committee that he has never spoken with or met with Prime Minister Harper.

## 2. *The Schreiber Letters*

The letters sent between June 2006 and September 2007 primarily addressed Mr. Schreiber’s claim of a “political justice scandal” against him and Mr. Mulroney, and the “Airbus Affair”, and the RCMP. In those letters, Mr. Schreiber attached various pieces of correspondence that he had sent to Government officials over the years, various newspaper articles and summaries of events from his perspective.

In a March 29, 2007 letter to Prime Minister Harper, Mr. Schreiber enclosed a copy of a letter sent to Mr. Mulroney on January 29, 2007. The January 29, 2007 letter stated that he and Mr. Mulroney had reached an agreement on June 23, 1993 at Harrington Lake for services related to the Bear Head Project, while Mr. Mulroney was still prime minister. According to Mr. Schreiber’s letter, he and Mr. Mulroney, “agreed to work together and I [Schreiber] arranged for some funds for you [Mr. Mulroney].”

Mr. Schreiber sent additional letters dated April 8 and 10, 2007 to Prime Minister Harper. They primarily discussed his impending extradition to Germany, and provided copies of various correspondence between Mr. Schreiber and Government officials, such as Mr. Mulroney and Ms. Kim Campbell.

## Endnotes

<sup>1</sup> *Conflict of Interest and Post-Employment Code for Public Office Holders* (Ottawa: Office of the Assistant Registrar General of Canada, 1985).

<sup>2</sup> *Parliament of Canada Act*, RSC 1985, c. P-1.

<sup>3</sup> *Criminal Code*, RSC 1985, c. C-46.

<sup>4</sup> *Lobbyist Registration Act*, RSC 1985, c. 44 (4th Supp.).

<sup>5</sup> *Federal Accountability Act*, SC 2006, c. 9.

<sup>6</sup> *Conflict of Interest Act (CIA)*, SC 2006, c. 9, s. 2.

<sup>7</sup> The *Conflict of Interest Code for Members of the House of Commons* (MP Code) is available at <http://www.parl.gc.ca/information/about/process/house/standingorders/toc-E.htm>.

<sup>8</sup> Because the Commission’s mandate does not raise questions about ethics rules specific to senators, the Senate code will not be discussed further.

<sup>9</sup> *CIA*, s. 2.

<sup>10</sup> *CIA*, s. 4.

<sup>11</sup> *CIA*, s. 2.

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- 12 *CIA*, s. 15.
- 13 *CIA*, s. 7.
- 14 *CIA*, s. 8.
- 15 *CIA*, s. 9.
- 16 *CIA*, s. 10.
- 17 *CIA*, s. 24.
- 18 *CIA*, s. 24.
- 19 *CIA*, s. 33.
- 20 *CIA*, s. 34.
- 21 *CIA*, s. 35.
- 22 *Lobbying Act*, s. 10.11.
- 23 MP Code, s. 4.
- 24 MP Code, s. 7.
- 25 MP Code, s. 3.
- 26 *Parliament of Canada Act*, s. 41.
- 27 *Criminal Code*, s. 119.
- 28 *Criminal Code*, s. 118.
- 29 *Criminal Code*, s. 122.
- 30 *Criminal Code*, s. 121.
- 31 *Parliament of Canada Act*, s. 81.
- 32 The person may also have been a former ethics commissioner or Senate ethics officer. The ethics commissioner was the office that existed before the enactment of the *Federal Accountability Act* in 2006.
- 33 *CIA*, s. 26 *et seq.*
- 34 *CIA*, s. 37.
- 35 *CIA*, ss. 40–41.
- 36 *CIA*, ss. 38 *et seq.*
- 37 *CIA*, s. 44.
- 38 *CIA*, s. 45.
- 39 *CIA*, ss. 44 and 45.
- 40 *CIA*, s. 47.
- 41 *CIA*, ss. 52 *et seq.*
- 42 PCO website, *About PCO*, available at <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=about-apropos>.
- 43 *Report of the Independent Advisor into the Allegations Respecting Financial Dealings Between Mr. Karlheinz Schreiber and the Right Honourable Brian Mulroney* (Ottawa, January 2008), pp. 15 *et seq.*, available at [http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=riar-ci/table\\_e.htm](http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=riar-ci/table_e.htm).