

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

**Policy Review
Public Hearing**

**Examen de la Politique
Audience publique**

Commissioner

L'Honorable juge /
The Honourable Justice
Jeffrey James Oliphant

Commissaire

Held at:

Bytown Pavillion
Victoria Hall
111 Sussex Drive
Ottawa, Ontario

Monday, June 15, 2009

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salle Victoria
111, promenade Sussex
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1 Ottawa, Ontario / Ottawa (Ontario)

2 --- Upon resuming on Monday, June 15, 2009,

3 at 9:35 a.m. / L'audience reprend le lundi

4 15 juin 2009 à 9 h 35

5 46314 COMMISSIONER OLIPHANT: Good morning,
6 ladies and gentlemen. My name is Jeff Oliphant. I am
7 the Commissioner of this Inquiry.

8 46315 We are now moving into Part II of the
9 Inquiry, which is the policy review. It will take
10 place over three days this week, Monday, Tuesday,
11 Wednesday, and on Monday of next week.

12 46316 We have arranged for a number of
13 panels of experts in the field of conflict of interest
14 and ethics, as well as some politicians and former
15 politicians. I firmly believe that this part of the
16 Inquiry can result in some very substantial work being
17 done in the area that the mandate given to us requires
18 us to do.

19 46317 This morning we have a panel of three
20 experts.

21 46318 The way that we have set this up is
22 that each panel will be chaired by one of the senior
23 counsel. I merely wanted to introduce the subject this
24 morning very briefly to welcome all of you here.

25 46319 Craig Forcese, Professor Forcese,

1 from the University of Ottawa is our Director of
2 Research. He is seated to my right and I would just
3 ask Craig to make some opening remarks.

4 46320 You will find, those of you who are
5 veterans of the Inquiry -- and I see that there are at
6 least two here -- this part of the Inquiry will be run
7 a lot less formally than the factual inquiry was run
8 and I think that that augurs well for the success of
9 the policy review.

10 46321 So, Craig, with that, I will turn it
11 over to you.

12 46322 MR. FORCESE: Thank you,
13 Mr. Commissioner.

14 46323 What I will do just to begin our
15 session today is amplify a few comments that the
16 Commissioner has made and then turn it over to Evan.

17 46324 The purpose of this portion of the
18 Inquiry, as you know, is to put in front of
19 Commissioner Oliphant information that goes to Terms 14
20 and 17 in the Terms of Reference.

21 46325 To that end we have assembled a
22 series of panels, the first of which is today, of
23 experts in the area of ethics law and also persons who
24 have done research on the issue of prime ministerial
25 correspondence handling.

1 46326 Our experts today are the three
2 individuals who were charged by the Commission to
3 prepare expert papers. Those are now in draft form.
4 They are up on the web and have been since the end of
5 March.

6 46327 They will be addressing a number of
7 issues that stem from those papers, responding to
8 questions, and then we will also be participating in
9 the panels that will occur tomorrow and on Wednesday.
10 And those conclusions and observation they take from
11 those panels and the discussion today will then be
12 incorporated into final versions of their paper, which
13 will then be published again on the website.

14 46328 The way we have set up the structure
15 for this panel and all the others is with a series of
16 questions; that is, questions that are raised both by
17 the mandate and were viewed as important to bring out
18 for the purpose of informing the Commissioner, and
19 those questions in part are available on the official
20 agenda for the expert policy forum.

21 46329 I know everyone at this table has a
22 copy and there will be copies at the back in due
23 course.

24 46330 The conversation that we will have
25 with these experts will be followed, then, by whatever

1 statements the parties wish to make themselves and then
2 an opportunity to continue the conversation through
3 questions of the experts by the parties themselves and
4 any outstanding issues that Commission counsel might
5 have.

6 46331 That is all laid out in the actual
7 agenda.

8 46332 That pattern will be more or less
9 reflected in the subsequent panels with the opportunity
10 for persons who are part of that panel to make initial
11 statements, respond to questions and then answer and
12 respond to questions from other participants sitting
13 around the table.

14 46333 So that's all I have to say in terms
15 of logistics and I will turn it back to you.

16 46334 COMMISSIONER OLIPHANT: Thank you.
17 Thanks, Craig.

18 46335 Just before I invite the Chair of
19 this panel to speak, I should indicate that Part II,
20 the policy review, the parties involved here include
21 the Attorney General of Canada represented by
22 Mr. Vickery, Mr. Landry and Mr. Lacasse.

23 46336 Mr. Vickery, I know that you have
24 with you some representatives of the government. Would
25 you care to introduce the people that are with you,

1 sir?

2 46337 MR. VICKERY: Yes. Thank you,
3 Mr. Commissioner.

4 46338 I have with me today as resources to
5 whom I invite the panel to turn if they have any
6 particular questions that arise in the course of the
7 discussion.

8 46339 First, Mr. Joe Wild is with me.
9 Joe...?

10 46340 And he is the Executive Director of
11 Strategic Policy with Treasury Board of Canada
12 Secretariat.

13 46341 I can tell you that he had a
14 significant role to play with regard to the drafting of
15 the Accountability Act, for example, and is steeped in
16 considerations of ethics.

17 46342 I also have with us today Sheila
18 Powell, who was previously a witness before the
19 Commission in Phase I.

20 46343 Ms Powell is Director of Corporate
21 Information Services at Privy Council Office and in
22 that role has management of the executive
23 correspondence function.

24 46344 Third, I have Annie Comtois, who is
25 Manager of the Executive Correspondence Services Unit

1 at Privy Council Office and who was involved in the
2 day-to-day management of the correspondence function in
3 that role.

4 46345 Thank you, sir.

5 46346 COMMISSIONER OLIPHANT: Thanks very
6 much, Mr. Vickery.

7 46347 Also as a party to Part II is
8 Mr. Schreiber, Karlheinz Schreiber, who is represented
9 by Richard Augur seated to my left.

10 46348 Mr. Auger, good morning.

11 46349 And the third party to Part II is
12 Democracy Watch represented by Duff Conacher who is
13 seated to my right.

14 46350 I have beside me senior Commission
15 counsel, except for Mr. Roitenberg, who is seated
16 beside the panellists, and behind me are the junior
17 counsel to the Commission: Peter Edgett, Myriam
18 Corbeil, Sarah Wolson and Martin Lapner.

19 46351 So I think that covers pretty well
20 everybody that is here, except for the senior counsel
21 beside me, Nancy Brooks to my far left; Richard Wolson,
22 who is Lead Senior Council; and Maître Guiseppe
23 Battista who is here as well.

24 46352 So welcome again to everybody.

25 46353 Mr. Roitenberg, I turn the floor over

1 to you.

2 46354 I should also say that Professor
3 Forcese has with him his Research Assistant, Elizabeth
4 Montpetit, who is seated to his left.

5 46355 Mr. Roitenberg...?

6 46356 MR. ROITENBERG: Thank you,
7 Mr. Commissioner.

8 46357 On this panel we are privileged to
9 have with us, to my immediate right, Mr. Gregory
10 Levine, who is a Barrister and Solicitor in London,
11 Ontario. To Greg's right is Lori Turnbull, Assistant
12 Professor, Department of Political Science at Dalhousie
13 University. To Lori's right, Dr. Paul Thomas, the Duff
14 Roblin Professor of Government at St. John's College at
15 the University of Manitoba.

16 46358 This panel -- or the panellists on
17 this panel have provided papers in draft to this
18 Commission which have been posted. Those papers deal
19 with the topics of management of correspondence. They
20 deal with the topics of ethics and in particular the
21 ethics as they pertain to office-holders leaving office
22 and returning to private life.

23 46359 That is, in my view, where I suspect
24 we should commence.

25 46360 I am going to turn to Lori, if I

1 could, and ask: As to the ultimate objective of ethics
2 rules and their role in the parliamentary system, is it
3 to shape behaviour, to communicate publicly commitment
4 to values, or is there another raison d'être for ethics
5 guidelines?

6 46361 DR. TURNBULL: I'm just testing.

7 There we go. Is that okay? Great.

8 46362 The objective of ethics rules, I have
9 seven objectives listed here that I can talk briefly
10 about. I think six of them are moving toward the
11 ultimate seven, which is to maintain and enhance public
12 trust in political actors and institutions. But before
13 that I will kind of explain the six leading up; that if
14 those six objectives are met, enhancing public trust is
15 sort of a logical conclusion.

16 46363 So first, we have conflict of
17 interest legislation or codes, depending on the system,
18 in order to clarify rules for public office holders,
19 Members of Parliament, Cabinet Ministers; so initially
20 to sort of explain what is expected of you.

21 46364 So, you know, you are expected to
22 disclose your income, assets, liabilities. You are
23 expected to divest certain interests that could create
24 conflict of interest situations. The rule set of
25 things like when is it appropriate to accept gifts,

1 when is it appropriate to accept, you know, funding for
2 travel and what circumstances you want to avoid.

3 46365 So the first point is clarity so that
4 people generally understand what is expected of them.

5 46366 Second, ethnic rules can build a
6 consensus among Members of Parliament, public
7 officeholders, whichever group of people you are
8 talking about, about what's okay and what's not okay.

9 46367 The consensus is probably only going
10 to apply to the things that are actually in the code,
11 but once Members of Parliament or public officeholders
12 understand what's expected of them, there should be
13 some sort of a common -- I guess you could call a
14 culture or a set of norms or expectations about what,
15 you know, this group of people expects from their
16 peers.

17 46368 Three, an ethics code can be taken as
18 a sort of communication to the public that government,
19 Parliament, considers ethics to be a priority and that
20 there is some mechanism by which public officeholders
21 and Members of Parliament will be held to account for
22 putting the public interest before their private
23 interest. So it is about communicating ethics as a
24 priority to the public.

25 46369 Four, it helps to maintain

1 transparency. So because Members of Parliament and
2 public officeholders are expected to disclose their
3 income, assets, liabilities, their relationships with,
4 you know, some aspects of the private sector, it helps
5 us to understand what they are doing and I guess it
6 helps perhaps build trust because their relationships
7 are sort of out in the open and we can go and gain
8 access to their disclosure forms and things like that
9 and see what their interests are and kind of get to
10 know them little better that way.

11 46370 Five, ethics rules -- and Andrew
12 Stark, by the way, writes very convincingly on this if
13 you wanted to look at it in more detail.

14 46371 Ethics rules are supposed to restrict
15 opportunities for impaired judgment. So when we are
16 thinking about regulating conflicts of interest and
17 managing these kinds of relationships between public
18 officials and private sector entities, the purpose is
19 to try to protect the public interest from impaired
20 judgment. And because we are not able to get into the
21 mind of the public official or the Member of Parliament
22 or the Cabinet Minister to see exactly what is
23 affecting his or her judgment, one of the things --
24 some of the things that we can control are the
25 situations they end up in. So we regulate the kind of

1 relationships they can have with the private sector.

2 So that's why we have these.

3 46372 Like for instance, if you look at the
4 Conflict of Interest Act on the post-employment rules,
5 there is a list of things that people can't do when
6 they leave office and the reason is to try to eliminate
7 the possibility for impaired judgment on the part of
8 sitting officials.

9 46373 Six, these things are often
10 political. Often codes of conduct and reforms to
11 existing codes of conduct are done in response to some
12 sort of scandal, whether something wrong actually
13 happened or not. You know, crime or corruption is not
14 necessarily a prerequisite of scandal, so if something
15 bad happens, a government wants to be seen to be
16 responsive. A government takes responsibility, says
17 here is our ethics code. We are not going to let
18 any -- you know, we are never going to let this happen
19 again. We are monitoring people closely. We are, you
20 know, setting the public interest here as a priority.

21 46374 So often these things are political
22 tools. That's not a judgment. They are political
23 tools sometimes.

24 46375 If all of these things happen the way
25 they are supposed to, the logic is that the public has

1 reason to trust actors and institutions. That is the
2 logic anyway. Things are transparent. The
3 relationships are out in the open. There are
4 regulations about the type of relationships they can
5 have, so therefore people have a reason to trust that
6 government is clean.

7 46376 MR. ROITENBERG: Now, do these ethics
8 rules help to create this culture of norms of which you
9 spoke or does the creation of the culture of norms
10 lends itself to a manifestation of these ethical
11 guidelines?

12 46377 DR. TURNBULL: Would you like me to
13 take that or Greg?

14 46378 MR. ROITENBERG: I think I would ask
15 you to follow up on what you were espousing.

16 46379 DR. TURNBULL: Okay. I actually have
17 a couple of quotes here. I have two -- and I will keep
18 them short -- about what other people have written
19 about the relationship between codes of conduct and
20 what they call integrity.

21 46380 Joel Fleishman -- I will just read
22 one.

23 46381 Joel Fleishman in an article he
24 published in 1981 said:

25 "...no regulatory edifice,

1 however far-ranging or minutely
2 detailed, will ever be an
3 adequate substitute for
4 integrity in officials."

5 46382 So this is sort of the same thrust of
6 a lot of the quotes I have written on this subject
7 about the connection between a regulatory regime and a
8 culture of ethics, the culture of integrity, this sort
9 of thing.

10 46383 I think that -- well, in my own
11 opinion I guess, on the basis of the research I have
12 done, I would say that ethics rules can be a part of
13 it. They can inform a culture of ethics. I see them
14 as sort of a basis or a foundation, but they certainly
15 can't -- they can't create a culture of ethics. A set
16 of rules is not going to create integrity or any sort
17 of political culture, in my own view anyway. They can
18 only be part of it. I have a couple of reasons for
19 thinking that.

20 46384 One is that if you read I guess the
21 tone of ethics rules or if you consider ethics
22 regulation as a phenomenon, there are a number of
23 scholars who make the argument that the whole idea of
24 ethics regulation from the outside is built on a sense
25 of distrust or mistrust, not a sense of trust. So I

1 will try to follow that out a little bit more.

2 46385 The assumption here is that we don't
3 have to trust the voluntary integrity of public
4 officials or Members of Parliament because we have
5 rules that are going to catch them if they do something
6 wrong. You don't have to trust them to voluntarily
7 make the right choice. It doesn't matter if these are
8 people of integrity or not, because the rules are so
9 well-defined and comprehensive and the punishments are
10 set up so that even if there was a tendency toward
11 corruption or wrongdoing, it is not going to manifest
12 itself anyway.

13 46386 So in that way the ethics rules are
14 really not purporting to create a culture of ethics at
15 all; they are not talking about that. They are saying
16 we don't even need a culture of ethics because we have
17 all these regulations over here. So to me that's kind
18 of a disconnect from step one.

19 46387 Two -- and this is something that I
20 and other people have written about at length other
21 places if you wanted to read it.

22 46388 To me ethics rules run the risk of
23 directing the public officeholders or the Member of
24 Parliament's attention toward the rules as opposed to
25 appearances. So for instance, if you are a Member of

1 Parliament and you are asking yourself is it okay for
2 me to do this, is this something that I am going to get
3 in trouble for sort of thing, you are looking for some
4 guidance about it. If you look to the rules, you are
5 asking the question is this going to violate any of
6 these rules. If no, then okay.

7 46389 But if you asked yourself instead how
8 is this going to look to my constituents, am I going to
9 be able to justify this, how is this going to look to
10 my peers, what is the Prime Minister going to think, if
11 you are a member of that party, then it might be that
12 that threshold is harder to meet.

13 46390 The fear here is that a person might
14 be able to, you know, look at the rules and as long as
15 something is not regulated or not prohibited they are
16 going to do it, even though it might not be all that
17 great for appearances, it might not be great for the
18 collective reputation of Members of Parliament.

19 46391 The threshold, if you rely strictly
20 on rules, you run the risk of it being too low. You
21 might find more thoughtful, reflective responses to
22 those kinds of questions if you are thinking instead
23 about how the public is going to feel about it.

24 46392 Three -- and this doesn't necessarily
25 mean that a code of conduct is not a good thing. But

1 one could make the argument that cultures of ethics are
2 best cultivated through deliberation by Members of
3 Parliament, by public officeholders and that type of
4 deliberation might include the public, might include an
5 Ethics Commissioner. A real culture of ethics is a
6 living, breathing thing that is ongoing and that is
7 not -- you know, you don't write it down in a code and
8 forget about it.

9 46393 This is something that
10 Parliamentarians have to, at an individual level and at
11 a collective level, public officeholders as well, take
12 responsibility voluntarily for their shared reputation,
13 their shared responsibility to the public interest.
14 That is not something you can codify, to me.

15 46394 Thanks.

16 46395 MR. ROITENBERG: Greg, do you have a
17 view as to this dichotomy between the ethics rules
18 regime and the culture of ethics and the import of one
19 versus the other?

20 46396 MR. LEVINE: Can you hear me, I hope?

21 46397 Well, the short answer to that is
22 yes, I do have a view. I tend to think of this as a
23 false dichotomy. We tend to have a debate between
24 culture and rules. You know, is it culture or is it
25 rules? They really are not separate.

1 46398 I think it is true, rules and values
2 and ethics statements cannot cover every situation, but
3 they can provide a backdrop. They provide models.

4 46399 Lori has already alluded to this.

5 46400 They set the limits of acceptable
6 behaviour.

7 46401 I would add to part of Lori's
8 comments. It seems to me there is actually a real need
9 to set these limits; that if we just say well, we will
10 rely on everyone's integrity and we don't have a
11 concept of what that is, we are in deep trouble. And
12 we have ended up in deep trouble in a number of cases
13 because different people have different ideas of what
14 it was they needed to do to be a person of integrity or
15 probity or propriety.

16 46402 And I think this is particularly true
17 in a society such as ours. We have a multicultural,
18 pluralist society in which it isn't always clear that
19 we all agree on what is appropriate behaviour.

20 46403 I gave a seminar not long ago on
21 corporate financial integrity to a group of officials.
22 I won't say where or when. I asked them what do you
23 think about accepting gifts? And I can tell you, the
24 range was incredible about what was an appropriate gift
25 to accept; from a doughnut to a trip to somewhere.

1 46404 We don't have a common understanding
2 and these codes help us develop it.

3 46405 The other thing I would say is that
4 rules of conduct are inevitable. They are part of the
5 construction and habitualization of society, what
6 Berger and Luckmann called many years ago the social
7 construction of reality. You can't avoid rules.

8 46406 We have had codes -- well we have had
9 codes forever.

10 46407 I don't dispute that ethics
11 education, though, and values development is important.
12 I think this development is necessary. We do have to
13 have this dialogue. The codes have to have meaning.

14 46408 But again I would just leave it with
15 saying you can't leave everyone with a values statement
16 without some rules.

17 46409 Langford's critique of the Federal
18 Strong Foundation Initiative, which is published in the
19 Canadian Public Administration Journal, I think is
20 important in this sense; that people can be told here
21 are all these values, but unless you have instruction,
22 training and some guidance through rules you are going
23 to just be confused.

24 46410 I will just leave it that way.

25 46411 MR. ROITENBERG: Now, Greg, if I

1 could just take that to its next step, obviously you
2 think that we need these rules.

3 46412 How best can we structure these rules
4 to create accountability while not making them so
5 onerous that we are imposing limitations that have the
6 effect of deterring qualified individuals who would
7 otherwise want to serve publicly from seeking public
8 office because of the onerous nature of these rules?

9 46413 MR. LEVINE: Okay, thanks.

10 46414 I can -- how best to start.

11 46415 In a sense I -- the assumption of
12 course in question is that there will be deterrents if
13 the rules are onerous, and in theory I can see that.
14 In practice we are so far away from onerous, except in
15 a couple of cases, that I question whether we have
16 deterrents now as an empirical fact. I don't know.

17 46416 But what I hear about this is really
18 anecdotal. I haven't seen a study that suggests that
19 there is real deterrent.

20 46417 So I would just preface my comments
21 with that thought. We ought not to be overly concerned
22 about expecting people to be honest and proper in their
23 conduct when they are public servants or when they are
24 politicians. I think that is minimal.

25 46418 There are some rules. Rules around

1 blind management trust, divestments, and so on, could
2 inhibit people. I accept that. Total divestment, as
3 seems to be the case in some American jurisdictions,
4 seems to me to be fairly harsh, although some of the
5 positions are extraordinarily responsible ones.

6 46419 There does have to be some way of
7 distancing people from their holdings because of the
8 potential for conflict and corruption.

9 46420 Another area which may seem harsh is
10 post employment rules, but they reflect the move toward
11 rules generally. They have their origin in public law
12 attempts to limit conflicting interest and to promote
13 integrity and in private sector contracts directed at
14 preventing competition.

15 46421 Restrictive rules can harm the
16 creative capacity of individuals, but I do think there
17 is actually a balance in most legislation across the
18 country.

19 46422 If you said to me, "How would I
20 structure it," it's not really problematic in that
21 sense, in terms of deterrence, per se.

22 46423 MR. ROITENBERG: Paul, in terms of
23 adverse consequences that may flow from the regulation
24 of ethical behaviour, would you like to wade in?

25 46424 DR. THOMAS: I would go back, first,

1 to Greg's point about avoiding a false dichotomy
2 between rules and values which we want to see embedded
3 in the culture and embodied in the behaviour of public
4 office holders.

5 46425 I think it is a false dichotomy,
6 because one of the values we want to see upheld in the
7 culture of public organizations is respect for the
8 rules and the authorized procedures, and the disclosure
9 requirements, and that whole set of legal and
10 quasi-legal regulations that apply to the public sector
11 today.

12 46426 So it is not a case of either-or.
13 Someone going into elected public office or an
14 appointed public office you would expect to operate
15 within the context of a set of rules and procedures and
16 so on.

17 46427 I think a more interesting debate to
18 have, actually, on that point is to what extent we
19 should, at this juncture, which is still in the
20 relatively early days of the ethics regimes in the
21 country, and other countries -- we should emphasize the
22 enforcement of a narrow set of legal obligations versus
23 a broader educational process of dialogue around what
24 it means to be responsible and ethical in the
25 performance of public duties. That is a debate that, I

1 think, we are not very far along with in Canada yet.

2 46428 We are taking care of some of the
3 more legalistic aspects of it, like conflict of
4 interest, post-employment, and things like that, but
5 there is a broader kind of culture that we would want
6 to have instilled in office holders, so that they are
7 ethically aware, can reason ethically, that the
8 organizations they work in are what some writers have
9 called ethically competent.

10 46429 That is happening more, I think, on
11 the public service side than it is happening on the
12 political side at this juncture, in the countries that
13 I have examined on this.

14 46430 We want to not only -- as the phrase
15 goes, not only protect and deal with wrongdoing, we
16 also want to promote "rightdoing", to use a phrase, and
17 that is the trickier part of that.

18 46431 I have done work over the last year
19 with the Government of New Brunswick on the development
20 of a values and ethics regime, and they are trying not
21 to put as much emphasis on an enforcement and
22 compliance model, and more on an educational learning
23 model.

24 46432 And getting the balance right is not
25 scientific activity. It is not something that you can

1 prescribe very precisely.

2 46433 We know that from the corporate
3 world. They have had legal and ethical lapses, serious
4 ones, and trying to make codes of conduct come alive
5 and be living, breathing documents has proven to be
6 very tricky.

7 46434 MR. ROITENBERG: Lori, I know this is
8 an area that you have certain views on, in terms of
9 over-regulation in this area, and I am wondering if you
10 could wade in, as well.

11 46435 DR. TURNBULL: This question about
12 how do we have a set of rules that enforces
13 accountability, but at the same time doesn't cost us
14 anything in terms of deterring people that we might
15 want to run for office, this is about striking that
16 balance between the public interest and the member of
17 Parliament or public officer holder's right to privacy,
18 right to earn a living, et cetera.

19 46436 A lot of the information that I have
20 gathered in terms of research about the possible
21 deterrent effect of onerous regulations comes from the
22 United States. As Greg was saying, it is possible to
23 create rules that are so onerous, in terms of
24 disclosure requirements, or divestment, or the
25 penalties for violations, that you actually can

1 empirically see the results of that.

2 46437 Some people have been able to do
3 these studies where there is a direct relationship
4 between the extent to which the ethics rules are
5 considered to be onerous, burdensome, and a lower
6 number of candidates in state elections.

7 46438 So there is some empirical evidence
8 to suggest that you can go too far with this.

9 46439 However, at the same time, in Canada,
10 from most of what I hear, members of Parliament
11 sometimes get annoyed with what they have to do, but
12 that doesn't necessarily mean they won't do it.

13 46440 One area that I know sometimes can
14 create problems is if a member of Parliament has to
15 disclose not only her own income, assets and
16 liabilities, but those of her spouse, or those of his
17 spouse. That's a different thing. Then you are
18 compromising the privacy of a private citizen who
19 doesn't necessarily want his or her information to be
20 available to the public, or to the Ethics Commissioner,
21 or anybody else.

22 46441 I think, again, that it might come
23 back to education, reasoning, and saying, "Listen, this
24 is important." It might be just a case where we have
25 to make sure that public officer holders and members of

1 Parliament understand why this stuff is important.

2 46442 Now, having said that, even though I
3 have talked to some members of Parliament who don't
4 like the disclosure business, I spoke with the Ethics
5 Commissioner's office about this a few months ago, and
6 there are very few requests from the public to ever see
7 the disclosure summaries that come out.

8 46443 So is there a real, tangible
9 compromise of privacy here? Probably not, because even
10 when we force disclosure, very few members of the
11 public ever go looking for the information. So the
12 loss of privacy is probably quite minimal.

13 46444 MR. ROITENBERG: I want to move on to
14 a different topic, but before I do, I know that Paul
15 had a comment he wanted to add.

16 46445 DR. THOMAS: Just a bit of
17 information. There was a recent article published
18 which investigated the extent to which parliamentarians
19 in the U.K., both in the House of Commons and in the
20 House of Lords, were aware of the legal and ethical
21 guidelines for parliamentarians. They were, in general
22 terms, aware of it, they were aware of the main
23 features, but they were not aware of the evolving
24 meaning of some of the general terms that are contained
25 in those documents.

1 46446 They don't conduct their everyday
2 life mindful of the rules and the interpretations of
3 those rules.

4 46447 The author of this article was also
5 making the suggestion that parliamentarians hold to a
6 narrower definition of what it means to be ethical in
7 the performance of public duties than what the public
8 currently subscribes to. We live in a fairly
9 suspicious era now, where people don't have a high
10 opinion of the motives and intentions and the
11 behaviours of public office holders generally.

12 46448 So there is this gap between the
13 public expectation, where standards and expectations
14 have risen, and what the politicians believe they have
15 to -- what level they have to come up to in terms of
16 ethical standards.

17 46449 The third observation I would draw
18 from that article is that there may be a generational
19 change happening here. We may be, as I suggested
20 earlier, in a transition period, where older
21 generations of politicians, who served in a less
22 rule-bound era, may think that their private life
23 should be off base, in terms of having to publish
24 information about the income of their spouse, or
25 something like that, but newer generations of

1 politicians coming into public life have grown up in
2 this world of transparency and ethical rule-making and
3 the rest of it.

4 46450 It may mean that there will be more
5 acceptance of this as one of the requirements of public
6 office.

7 46451 MR. ROITENBERG: We have -- and they
8 are on our website -- some wonderfully informative
9 papers that you have provided regarding what regimes
10 are in place currently to govern conflicts of interest.

11 46452 But, Greg, what I am interested in
12 now is, do you believe that the concept of conflicts of
13 interest contained in federal law, as we have it now,
14 is adequate?

15 46453 And I want you, if you could, to also
16 go on to speak of this distinction, or lack of
17 distinction, in the current regimes between a real and
18 an apparent conflict of interest, and is that
19 distinction important in effecting the scope of
20 conflict of interest rules.

21 46454 MR. LEVINE: I was going to say that
22 it is either not wholly inadequate or wholly adequate.

23 46455 MR. ROITENBERG: Well, then, I guess
24 we are done.

25 --- Laughter / Rires

1 46456 MR. LEVINE: It is evolving,
2 obviously, and part of why I say that is that it is not
3 uniform in the federal area. Conflict of interest is
4 seen differently in the Conflict of Interest Act and in
5 the MPs' and senators' code, for example, and
6 differently again in the Values and Ethics Code of the
7 Public Service.

8 46457 Although, if one said that we are
9 only looking at hard law, then there is only the
10 Conflict of Interest Act, and it is uniform in itself,
11 so I suppose that is all right, but I do think there
12 are differences between them that are problematic.

13 46458 I don't want to read too much to you,
14 but I think it is important to understand some of the
15 differences between the codes and the Act, and it
16 raises this difference around real and potential or
17 apparent conflict of interest.

18 46459 Section 4 of the Conflict of Interest
19 Act gives us a definition of conflict of interest: A
20 public officer holder is in a conflict of interest when
21 he or she exercises an official power, duty or function
22 that provides an opportunity to further his or her
23 private interest, or to improperly further another
24 person's private interest.

25 46460 That is an important definition.

1 46461 The Senate code talks about senators
2 being expected to arrange their private affairs so that
3 foreseeable, real or apparent conflicts may be
4 prevented, and section 2 of the House code says that
5 members are expected to fulfil their public duties with
6 honesty and uphold the highest standards so as to avoid
7 real or apparent conflicts of interest.

8 46462 But, of course, they don't define
9 conflict of interest. The meaning of conflict of
10 interest is left fairly vague in the codes of either
11 the House or the Senate.

12 46463 The Conflict of Interest Act has the
13 virtue of defining it, but falls short in its ambit.
14 The Conflict of Interest Act does not refer to apparent
15 conflict of interest. I have talked about this quite a
16 bit in my paper, I won't belabour it, but I do want to
17 outline what apparent conflict of interest is, and to
18 consider why it should be included in the Conflict of
19 Interest Act, notwithstanding that the House has
20 rejected having it in the Act, and also rejected --
21 apparently rejected defining it within the code of the
22 House.

23 46464 The appearance of conflict of
24 interest is important, because it derives from the law
25 around reasonable apprehension of bias. Government

1 processes should be seen to be fair, and they should be
2 fair, of course, and actions of government officials
3 should be seen to be above reproach.

4 46465 Being involved in situations where a
5 reasonably well-informed person could reasonably
6 believe that an official was in conflict and could
7 bring government action into disrepute -- that
8 formulation is out of the B.C. members' Conflict of
9 Interest Act, which is a legislated Act, obviously, and
10 a legislated code. It has been analyzed and used a
11 number of times by B.C. commissioners, and I know we
12 are going to have a B.C. commissioner come in a few
13 days to talk about how things operate out there, but it
14 is an important concept and tool.

15 46466 It is interesting that the Values and
16 Ethics Code of the Public Service recognizes this -- I
17 won't discuss it, but they define the effects of
18 appearance of conflict of interest, and they say that
19 there is a responsibility to avoid conflicts of
20 interest.

21 46467 It seems to me somewhat bizarre that
22 public servants have to adhere to this, and ministers
23 and parliamentary secretaries, and the like, who are
24 under the Conflict of Interest Act, don't.

25 46468 I just leave that thought with you.

1 46469 A word on definitions; you used the
2 term "potential" -- and this has been raised a number
3 of times. I tend, in my own work, not to talk about
4 potential conflict of interest, and I will try to
5 explain why, although it can be a useful concept.

6 46470 The Parker Commission, which was the
7 inquiry into allegations of conflict of interest
8 regarding Sinclair Stevens, talked about conflict of
9 interest this way, potential conflict of interest. The
10 key to understanding it is the notion of
11 foreseeability. The potential for conflict exists as
12 soon as the public office holder can foresee that he or
13 she has a private economic interest that may be
14 sufficient to influence a public duty or
15 responsibility.

16 46471 As soon as a real conflict of
17 interest is foreseeable, the public office holder must
18 take all appropriate steps to extricate him or herself.

19 46472 I think there is utility to that. My
20 own sense of conflict of interest is, it is all about
21 potentiality.

22 46473 Conflict of interest can go either
23 way, it seems to me. You can be in a conflict of
24 interest, that is, where a private interest is about to
25 clash with a public duty, and withdraw from that or act

1 on it -- act inappropriately on it.

2 46474 If you act inappropriately on it, you
3 are going to have biased decision-making or corruption.

4 46475 Having conflicts of interest is
5 inevitable, and each one represents a potential
6 situation. My own sense of it is that it is better to
7 focus on apparent and real conflicts, but I don't
8 necessarily disregard the utility of potentiality.

9 46476 MR. ROITENBERG: Lori, if you could
10 narrow the focus for us a little bit, in terms of the
11 ethics rules that currently cover business and
12 financial dealings between a sitting prime minister or
13 a sitting member of Parliament and a third party, and
14 if you could address the adequacy of those rules, as
15 they exist now.

16 46477 DR. TURNBULL: I am actually going to
17 do that, at least partially, by going back to the
18 question about appearances and apparent conflicts of
19 interest, because I agree with Greg that this is a
20 problem.

21 46478 If not only real conflicts of
22 interest but apparent conflicts of interest are
23 prohibited in a code of conduct, then it allows for a
24 broader interpretation, a broader application of the
25 rules. So the public office holder knows that it's not

1 just about avoiding the conflict, it is about making
2 sure that your behaviour is, as Greg said, beyond
3 reproach, and that the appearances of what you are
4 doing do not suggest to the public that there is
5 something wrong.

6 46479 If there is widespread suspicion, or
7 even concentrated suspicion that there is a problem, is
8 that really any better than if the problem had actually
9 occurred? If everybody is assuming that there is
10 something wrong, that there is a group of bad apples,
11 then the damage is already done. It really doesn't
12 make any difference if the conflict happened or not,
13 because that damage to the public trust, which is the
14 point of ethics rules in the first place -- the damage
15 is already done.

16 46480 I am just going to give an example,
17 quickly, of a time when the apparent standard or the
18 appearance standard actually did make a difference.

19 46481 I think the first case that Ethics
20 Commissioner Shapiro had to deal with was about the
21 violation of the apparent conflict of interest rule.
22 An MP had gotten into the practice of asking for
23 personal bonds in exchange for helping constituents
24 on -- I think it was immigration applications, or
25 something about immigration.

1 46482 At any rate, a member of
2 Parliament -- it was actually the Minister of
3 Immigration -- complained to the Ethics Commissioner
4 because he was concerned that even though the member
5 wasn't in a conflict of interest and wasn't benefiting
6 personally, or privately, or financially, because he
7 hadn't actually taken any of these bonds himself, and
8 it didn't turn into a financial thing, he was concerned
9 about appearances, and he was concerned about the
10 damage that this activity might be doing to their
11 collective reputation, and could the Commissioner look
12 into that.

13 46483 So he did, and he didn't find that
14 there was any kind of intentional breach of the code or
15 the standards, but he did acknowledge that this -- I
16 guess he found a good faith breach of the prohibition
17 of apparent conflicts of interests, and he asked the
18 member of Parliament to stop the personal bond
19 business. He did, and that was the end of it.

20 46484 So you had this accountability for
21 breaching the appearance standard, and it mattered.

22 46485 It was a positive thing, I think, in
23 terms of the deliberation between members of Parliament
24 on what is acceptable, because the code and the
25 prohibition of apparent conflicts of interest allowed

1 this other member to go to the Commissioner and say:
2 Look, all of us has responsibility for our shared
3 reputation, and that man is doing something that I
4 don't think is good for our shared reputation, and we
5 need to have a discussion about that.

6 46486 So the Commissioner's report kind of
7 allowed there to be sort of a public deliberation and a
8 decision about whether or not this was a good thing to
9 do.

10 46487 That is just sort of an example of
11 why I agree with Greg. I think that should be dealt
12 with, and that might be a way to make the rules a
13 little bit more in line with what people want.

14 46488 MR. ROITENBERG: Paul, should there
15 be additional ethical rules or guidelines concerning
16 the activities of politicians as they transform from
17 public life to private life?

18 46489 DR. THOMAS: It is very hard to do a
19 cost-effectiveness analysis of existing ethics regimes
20 and ask the question: Are we getting what we promised
21 the public, in terms of more integrity and more
22 responsibility in public office.

23 46490 Over the last several decades we have
24 expanded the web of rules and set parameters on the
25 exercise of discretion, tried to curtail certain types

1 of behaviours, increased monitoring through new
2 enforcement bodies and more publicity about problems
3 that have arisen, potential abuses of public office and
4 so on.

5 46491 There was a set of reforms during and
6 after the sponsorship inquiry, led by Minister Alcock,
7 the President of the Treasury Board, and then another
8 set of reforms embodied in the federal Accountability
9 Act.

10 46492 So we have a more extensive array of
11 rules now, but in terms of the ultimate aim that Lori
12 cited, enhancing public trust and confidence in
13 government, we don't see improvement. It may be that
14 there is a kind of perverse effect here, that the more
15 we disclose people's behaviour, where they don't live
16 up to the highest standards the public may have, the
17 more we may deepen the suspicion that people are using
18 public office for their private goals and aims, and so
19 on.

20 46493 I don't know whether there is a right
21 balance to be found, but certainly this debate has been
22 more extensive and, I think, more in-depth in the U.K.,
23 where there has been this process of the discussion of
24 standards of conduct in public life and so on, and a
25 standing committee of the House of Commons has had

1 ongoing hearings on the operations of their ethics
2 rules.

3 46494 Beyond a certain point you can't
4 completely eliminate the need to trust. If you don't
5 trust politicians, whether they be ministers or
6 parliamentarians, and if you don't trust public
7 servants, then you are going to have to create
8 monitoring bodies, like information commissioners,
9 public sector integrity commissioners, other bodies
10 that oversee the behaviour of people in public office,
11 and, up to a point, you are going to have to trust
12 them, because they are going to have to, in complicated
13 factual situations, where different values are at
14 stake -- they are going to have to make judgment calls
15 about whether people acted appropriately or not.

16 46495 So we shouldn't presume that because
17 individuals serve Parliament, as opposed to serving in
18 the public service, they have wisdom about, in
19 particular circumstances, what the right behaviour is.
20 These are areas where we need to have more dialogue
21 than glib, absolute judgments.

22 46496 Often the most difficult cases are
23 ones where there are, often, multiple values at stake,
24 and the facts may be in dispute as well.

25 46497 Making a judgment call is inherently

1 subjective, quite frankly, and it would be better if
2 everyone working in public life had more of a
3 conscience in the back of their head which led them to
4 ask themselves the question: How will this look, am I
5 doing anything wrong in the circumstances, and what are
6 the values that I need to have in the forefront of my
7 mind as I think through this situation?

8 46498 MR. ROITENBERG: Greg, I know that
9 you had a follow-up to Paul's comments.

10 46499 MR. LEVINE: A couple of things, and
11 the last statement first. Sure, it would be better if
12 people had a conscience, and I am sure they do.

13 46500 I don't see these systems, actually,
14 negating that. What I think they are doing is trying
15 to set some common standards.

16 46501 I won't belabour that. I said that
17 at the start.

18 46502 The other thing I wanted to comment
19 on, though, is that the Accountability Act and the
20 regimes it has established are pretty new, and I don't
21 know that we can say, one way or another, that they
22 have or haven't worked.

23 46503 My hope would be that we don't say,
24 "Well, no more rules," but that we be careful about
25 what rules we add, and I have proposed some changes.

1 46504 I guess, again, I would approach this
2 as it's not one or the other.

3 46505 MR. ROITENBERG: Greg, if we take it
4 as a given that these rules governing post-employment
5 conduct are relatively new and unproven, do they reach
6 far enough in terms of the sort of post-employment
7 activity they regulate?

8 46506 For example, do they currently reach
9 the actions of a former public official directed at
10 their dealings with governments outside of Canada, or
11 government entities outside of Canada?

12 46507 MR. LEVINE: Thanks. Can I just
13 clarify something? I didn't say that these rules -- I
14 said that the federal regime was fairly new.

15 46508 MR. ROITENBERG: Yes.

16 46509 MR. LEVINE: I think it is important
17 to understand that the provinces have had systems in
18 place for some time, and I think one could say that
19 there has been considerable success at the provincial
20 level of some of these systems.

21 46510 The existence of ombudsmen, integrity
22 commissioners, access and privacy commissioners has had
23 important positive effects.

24 46511 That is by way of clarification.

25 46512 The current rules, are they

1 appropriate? Yes. It is appropriate to have some
2 regulation of this, I think, because, again, it is
3 about officials potentially taking advantage of
4 knowledge and situations and contacts they had when
5 they leave office -- unfair, undue advantage.

6 46513 So I think that they are appropriate.
7 Should they reach further?

8 46514 In my paper -- and, again, I won't
9 belabour this -- I tried to argue for some
10 clarification of the rules. The nexus of offer
11 acceptance and outside employment sections in the
12 Conflict of Interest Act needs to be made very, very
13 clear. You can read it logically, so that, for
14 instance, you aren't holding two jobs at the same time,
15 but it would help if there were clarification.

16 46515 The last question you asked -- no, it
17 doesn't extend to -- or overtly extend to foreign
18 bodies, and I think there is a case for that. I
19 haven't discussed it a lot in my paper, but there is a
20 case for that, in the sense that people, foreign
21 ministers, for instance, prime ministers, make a lot of
22 contacts, and so on, and there is the potential for
23 exercising an unfair advantage.

24 46516 MR. ROITENBERG: Lori, if you could
25 pick up that banner and comment on to what extent you

1 believe the rules should reach those sorts of
2 international activities.

3 46517 DR. TURNBULL: For the countries that
4 I looked at, the only one that had regulations that had
5 to do with foreign entities was the United States, and
6 it lasts for a year after a person leaves public
7 office. Officials are prohibited from representing,
8 aiding or providing advice to foreign entities with the
9 intent to influence the official decisions of American
10 officials or employees.

11 46518 There are a couple of objectives
12 here. One, as Greg said, you are thinking that this
13 person who is just leaving public office continues to
14 have networks within public office, and you want to
15 protect sitting public officials from impaired judgment
16 that might result from some continuing loyalty to the
17 person who has left office. You want to eliminate the
18 possibility that the person who has left is going to
19 have undue influence over people who are still there,
20 just by virtue of the relationship and the familiarity
21 that would have built up over time.

22 46519 The other thing, I think, that this
23 rule is trying to do is to protect information that is
24 the property of the state, not the person who is
25 leaving.

1 46520 For instance, you want to protect the
2 use of sensitive information, particularly as it kind
3 of flows across international borders, so you want
4 public officials to be mindful of continuing to protect
5 the public interest even after they leave.

6 46521 But that is the only one that I know
7 does it specifically as part of the legislation.

8 46522 MR. ROITENBERG: Let's take it to an
9 idealistic perspective. Assuming for the moment that
10 there is no impropriety when it comes to information
11 gathered, and use of information, what is wrong with an
12 exiting office holder taking advantage of the contacts
13 they have made on an international basis and furthering
14 themselves in a private capacity, or furthering the
15 interests of an employer in a private capacity, just
16 through the contacts they have made; and should that be
17 regulated?

18 46523 DR. TURNBULL: You mean the contacts
19 they have made within government.

20 46524 MR. ROITENBERG: The contacts they
21 have made from their position as being an office
22 holder.

23 46525 DR. TURNBULL: I guess there could be
24 a couple of problems here that people might be
25 concerned with.

1 46526 For one, if you are talking about
2 using the familiarity and the relationships that the
3 former public office holder has built up with former
4 colleagues inside government, the risk, again, is that,
5 when the departed public office holder comes back to
6 make representations before former colleagues, that
7 person's familiarity and influence is going to be more
8 than it should be.

9 46527 So you want to avoid that because
10 then the perception is that the judgment of the sitting
11 public officials is impaired by their relationship or
12 their friendship with their departed colleagues. And
13 even if that is not the case, the idea is to regulate
14 the perception that that is going on.

15 46528 But then there are situations where
16 you can think there is no possible risk of impaired
17 judgment. What happens if the person leaves public
18 office, uses the information and contacts that they
19 gathered for purposes that have nothing to do with the
20 Canadian government. They are just -- you know, they
21 are out there. They are using their contacts, they are
22 helping their employer. Are they not entitled to the
23 skills and the information and the networks that they
24 gained in their former job as any of us would be,
25 arguably?

1 46529 In my paper I call that profiteering.
2 And there are questions around why that is a problem,
3 especially if there is no risk of impaired judgment for
4 sitting public officials.

5 46530 I think it might have to do with
6 public questions about why you went to government in
7 the first place.

8 46531 If the idea is that someone is doing
9 very well in the private sector and then they leave and
10 they enter the PMO or they enter Parliament or some
11 aspect of government and they come back out again after
12 three or four years, is this a long-term investment in
13 order to sort of increase your own contacts and
14 networks? All along was your interest public or was it
15 private?

16 46532 So it raises questions about what you
17 were doing there in the first place. Those may or may
18 not be valid cynicisms or criticisms, but I think
19 that's what those rules around profiteering are about.

20 46533 And some of it is just straight up.
21 You know, you still have a responsibility to protect
22 the state's interest and just because you leave public
23 office doesn't mean that sensitive information is yours
24 to sell, distribute, use, you know.

25 46534 And I think that's right. You know,

1 we are always going to have state and state interests
2 and we are going to have, you know, an open door which
3 people work for a while and then they leave. So they
4 have to be able to continue to -- they have to continue
5 to accept a responsibility to the public interest.

6 46535 MR. ROITENBERG: Greg, you have a
7 comment?

8 46536 MR. LEVINE: Just a quick follow-up
9 to that, because I think one of the problems is a
10 potential conflation between the person's new role and
11 their old role and how that gets perceived by the
12 government they are dealing with. That has potential
13 to harm our public interest and probably the public
14 interests of the other place.

15 46537 MR. ROITENBERG: Okay. I think the
16 next logical prism to look through is the enforcement
17 and penalty regimes that we have when it comes to these
18 ethical codes.

19 46538 Do the various sources of ethics and
20 lobbying rules provide a coherent enforcement mechanism
21 or do they create overlap or leave gaps?

22 46539 Greg, if you could move through that
23 one first, I would appreciate it.

24 46540 MR. LEVINE: Sure. Thanks. Sorry, I
25 keep forgetting the button.

1 46541 Well, there are gaps in the rules
2 between the -- in particular between the Lobbying Act
3 and the Conflict of Interest Act. One example of this
4 is the time limits around which you can make
5 representations as a former public office holder under
6 the Conflict of Interest Act and then under the
7 Lobbying Act. That needs to be cleared up. I mean, it
8 is much longer in the Lobbying Act, five years, than it
9 is in the Conflict of Interest Act.

10 46542 So that is one example of kind of an
11 incoherence.

12 46543 The penalty regimes vary. I mean,
13 the Lobbying Act actually has fairly severe penalties
14 and the others don't, although something like the
15 Criminal Code does have fairly onerous penalties.

16 46544 I think that's all I would say on
17 that.

18 46545 MR. ROITENBERG: Paul, can you wade
19 in on the sufficiency of these penalty regimes?

20 46546 DR. THOMAS: Not with a great depth
21 of expertise. I guess --

22 46547 MR. ROITENBERG: But could you do it
23 with your microphone on?

24 46548 DR. THOMAS: I'm sorry, yes.

25 46549 MR. ROITENBERG: There we go.

1 46550 DR. THOMAS: Not with a great depth
2 of expertise in terms of the detailed provisions of the
3 various legal codes and laws, and so on.

4 46551 You know, I think that you have to
5 keep a sense of proportion about this. You could try
6 to regulate any number of dimensions of the behaviour
7 of existing and former public office holders and it
8 might look foolproof to the outside, although
9 presumably somebody who is devious enough would find
10 ways to exploit a loophole in that.

11 46552 I guess one of the things that I note
12 when I have studied whistleblowing legislation in
13 Canada and other jurisdictions is that we tend to enact
14 such pieces of legislation in the aftermath or during a
15 scandal, which is often not the best time for
16 thoughtful, in-depth consideration because you want to
17 get to the heart of the problem and put something in
18 place to assure the public that the wrongdoing won't
19 happen again.

20 46553 Then we add additions to the existing
21 laws over time.

22 46554 So at some point presumably it would
23 be useful to have a stock-taking about what set of
24 legal instruments have developed over time, how they
25 are working in practice.

1 46555 We now have a Standing Committee of
2 the House of Commons on Access to Information, Privacy
3 and Ethics, and so on. And presumably there could be
4 almost like a sunset provision in this legislation,
5 that you could go back to them at some point in time
6 and hear testimony from expert witnesses about what is
7 working and what is not working.

8 46556 Presumably you don't -- I mean, when
9 we make other changes, say to the compensation of
10 politicians, when we ask for them to disclose and put
11 in blind trust their assets, including their partners
12 and others, how much do we want to build a set of legal
13 rules around every aspect of their life and what we pay
14 them and what separation arrangements are, what pension
15 plan they have, and all of that.

16 46557 Those are all germane to this issue
17 about how much we seek to restrict their post
18 employment opportunities beyond their time in public
19 life.

20 46558 I don't think we are at the stage
21 where we are ever going to have trouble finding enough
22 people to fill the seats in the House of Commons. I
23 think there will always be people coming forward. But
24 will there be some people who have second thoughts
25 about the idea of going into public life because given

1 the nature of their business, they will have trouble
2 perhaps appearing to be -- avoid any conflict
3 whatsoever?

4 46559 I think that there is that
5 possibility. Again, there is no empirical evidence
6 that I know to tell us whether we have had that
7 inhibiting effect on it.

8 46560 I think the more general suspicion of
9 politicians as a group of citizens is a far more
10 discouraging factor in terms of people running for
11 public office than the rule framework that we have put
12 in place.

13 46561 MR. ROITENBERG: Lori, on this
14 question of sanctions or penalties, can you assist in
15 what other jurisdictions offer in terms of insight as
16 to how we might address that tableau?

17 46562 DR. TURNBULL: Okay. If you look at
18 the differences between the Conflict of Interest Act
19 and the Lobbyist Act in Canada, in a way it seems a bit
20 perplexing because if you violate the Lobbyist Act it
21 is a \$50,000 fine, and if you violate the Conflict of
22 Interest Act it is possibly nothing, possibly a rap on
23 the knuckles from the Prime Minister, possibly a very
24 minor administrative fine from the Commissioner. So
25 one is left scratching one's head to say well, why is

1 it so bad to violate this and not that when they seem
2 to be working toward pretty much the same objective?

3 46563 Now, in the United States all of the
4 rules that are -- like the rule framework that is
5 around the post public employment period, all of it is
6 statutory and so those violations are subject to, you
7 know, a hefty fine and possible imprisonment. So the
8 United States has dealt with it differently by
9 attaching quite severe penalties to all of those rules.

10 46564 Some place like Australia, a place
11 like the U.K., the punishments are not legal, they are
12 political. So for instance, in Australia if the
13 Minister is accused of breaking the Code of Conduct, it
14 is up to the Prime Minister to decide whether an
15 investigation goes ahead. It is up to the Prime
16 Minister to decide whether or not there is a penalty.

17 46565 And in Canada if there is a violation
18 of the Conflict of Interest Act, the Commissioner makes
19 a report to the Prime Minister, issues it publicly. It
20 is up to the Prime Minister to decide if anything
21 happens.

22 46566 So the penalties mostly that we are
23 dealing with are in the political realm and not the
24 legal realm.

25 46567 So then that raises questions of

1 course for the former public officeholder who really is
2 no longer politically accountable.

3 46568 Like for instance, if a Cabinet
4 Minister is accused of doing something wrong under the
5 Conflict of Interest Code, and the Commissioner goes
6 through the process of doing the investigation, making
7 the report, it goes to the Prime Minister but it is
8 also public.

9 46569 There is a public political
10 accountability there whether the Prime Minister does
11 anything about it or not. He might decide to remove
12 the Minister from Cabinet, he might decide to remove
13 him from caucus, or he might do nothing.

14 46570 But we all know about it and the
15 Cabinet Minister carries that forward and is
16 accountable and, as Peter Aucoin would say, has been
17 named, blamed and shamed for what has gone on, even if
18 there is no real tangible punishment.

19 46571 But for the person who has departed,
20 who has left public office, there is no longer the risk
21 of political punishment. So if we don't hold this
22 person legally accountable for what he has done, then
23 what is the alternative?

24 46572 They continue to bear a
25 responsibility for the collective reputation of

1 politicians and public officeholders. They continue to
2 have the ability to damage that reputation
3 considerably, but they don't have the same political
4 accountability that sitting officers or Ministers do.

5 46573 MR. ROITENBERG: Greg...?

6 46574 MR. LEVINE: Yes. Thanks.

7 46575 Yes, I agree with those comments that
8 Lori has made.

9 46576 This pertains to the Conflict of
10 Interest Act. In terms of the whole regime, for
11 instance, you could still be charged under the Criminal
12 Code for corruption and so on and there are...

13 46577 One thing I wanted to say, though,
14 about the enforcement regimes -- and I'm sorry, I
15 should have said it earlier -- what we have in the
16 Conflict of Interest Act and in the federal system
17 generally, as in the provinces, is kind of a specialty
18 ombudsman regime where the Commissioner, in this case
19 the Conflict of Interest and Ethics Commissioner,
20 investigates, reports, makes recommendations, does not
21 have order power. There is a very limited order power
22 in the federal regime.

23 46578 My own sense of that is that is
24 appropriate at this time.

25 46579 One of the things I suggested in the

1 paper was, though, that if this doesn't work out that
2 it might be something that Parliament may wish to
3 consider, is to move into ethics tribunals that are
4 more similar to the United States.

5 46580 That wouldn't be my preference, but
6 it could be an issue.

7 46581 MR. ROITENBERG: Paul, you have
8 provided the Commission was a draft paper commenting on
9 the federal government's current prime ministerial
10 correspondence handling policies, and I would like you
11 to comment on the appropriateness of that regime as it
12 currently stands and offer some insights, if you could,
13 as to recommendations for improvement that you can see.

14 46582 DR. THOMAS: Okay. This was a bit
15 of a sleeper of an issue. I hadn't expected it to
16 arouse as much interest as it has from the centre of
17 government. Partly it is because of the way in which I
18 chose to interpret the topic.

19 46583 The premise for the study was that
20 understanding this relatively narrow but important
21 aspect of communications flows at the centre of
22 government required you to have some in-depth
23 appreciation of the wider context; that the
24 communications environments around government, both
25 external and internal, are becoming more complicated,

1 dynamic and risky, dare I say.

2 46584 So therefore what seems to be and is
3 for the most part routine operational and somewhat
4 technical can in the high-profile cases become highly
5 political and sensitive.

6 46585 In order to investigate this area I
7 needed to use some research techniques that weren't the
8 familiar ones to social scientists, namely of reading
9 everything that is in the literature, consulting
10 Internet material and so on. It required me to go into
11 conducting some interviews with people in the
12 Government of Canada, in the provinces, in a number of
13 the provinces and a number of overseas countries.

14 46586 Dr. Johnson, when he wrote the Terms
15 of Reference for the Inquiry, suggested they wanted a
16 comparative perspective.

17 46587 What I found was that the Government
18 of Canada has a structure and organizational design,
19 administrative guidelines, criteria for handling
20 correspondence and tracking systems which are very
21 similar to what exists in other countries and in all
22 the countries I looked at, and the four provinces I
23 looked at, there is this division of labour between
24 incoming communications of all kind, whether it is
25 regular mail, e-mails, fax, telephones, between

1 communications of all kinds that is part routine and
2 part of the governing process, like requests for
3 letters from the Prime Minister, raising points with
4 the government and so on, and then this other category
5 of correspondence which is described as political and
6 personal.

7 46588 So the more routine administrative
8 communications is handled in the Privy Council Office
9 and political and personal correspondence directed to
10 the Prime Minister is forwarded on to the Prime
11 Minister's Communications Unit in the Prime Minister's
12 Office.

13 46589 My conclusion about the PCO was that
14 over the years they have refined and developed a quite
15 professional comprehensive, very prescriptive process
16 for handling incoming correspondence of all kinds. In
17 terms of the information processing technology they
18 use, it is state-of-the-art, in my judgment.

19 46590 So I thought that even when they
20 handle all the initial incoming correspondence and they
21 designate some as political and personal, I thought the
22 criteria for labelling those documents that way were
23 well-established and clear.

24 46591 There is training done for staff so
25 they know how to handle sensitive information that

1 comes in. There are referrals to superiors when it's
2 necessary.

3 46592 The Privy Council has offered me some
4 helpful corrections on my paper and I am going to be
5 pleased to incorporate those.

6 46593 But basically I concluded that that
7 half of the process was handled in a very professional
8 manner.

9 46594 It is not to say that mistakes cannot
10 occur, will never occur, because, as was seen in the
11 testimony on the witness stand before the Commission in
12 the earlier portion of its activities, there was a
13 piece of correspondence that didn't get forwarded
14 appropriately and it was acknowledged by PCO officials
15 that a mistake was made.

16 46595 The other half of the process
17 involving the Prime Minister's Office involves the most
18 sensitive types of information and it is far more
19 difficult to understand that process. There is less
20 written about it. The PMO's initial submission to the
21 Commission ran to only five pages, so you didn't get a
22 lot of content out of that about who handles it.

23 46596 The PMO Correspondence Unit is small,
24 six to eight employees. It handles a large volume of
25 correspondence during the year and many of it is

1 politically sensitive. So I looked at that and I
2 expressed some concerns of that.

3 46597 One of the integrating concepts for
4 the paper was whether there was ever, either directly
5 or inadvertently, the creation of a condition of
6 plausible deniability where an action by government
7 became unpopular, where there were accusations of
8 wrongdoing, something like that. And it has happened
9 in other countries, in the U.K. and Australia and in
10 the United States and once in Canada, the so-called Al
11 Mashat Affair.

12 46598 And in all the cases I looked at
13 elsewhere it was political staff who were identified as
14 being responsible for either conveying incomplete
15 information, misinformation or failing to correct
16 information that went up to the Prime Minister.

17 46599 So I think that there is this new set
18 of actors in and around politicians, among Ministers
19 rather, who play an influential gatekeeping role. They
20 control access to information that gets to the Prime
21 Minister. These political staff are essential. They
22 perform an important role, they have a quite legitimate
23 role to play and it is just a question about whether we
24 have set a series of guidelines for them and providing
25 adequate training to them to deal with this sensitive

1 type of information that comes into the Prime
2 Minister's Office.

3 46600 So there wasn't much specific
4 information.

5 46601 I guess what I came up with was the
6 idea that up to a point you can regulate this, you can
7 create structures and processes, but at the centre of
8 government, the very centre of government on the
9 political side, a lot depends on the character and the
10 integrity of the leadership in that office.

11 46602 And in some countries, particularly
12 now in Australia, they have a Code of Conduct for
13 ministerial staff, both in the Prime Minister's Office
14 and the Minister, the political staff and others,
15 Minister's offices. That is to avoid the potential for
16 political staffers seeing it as their number one
17 priority to protect the Prime Minister or other
18 Ministers at all costs.

19 46603 We don't want to lapse into that kind
20 of thinking so we have to try to create people who are
21 attuned to the broader values of working in the public
22 service.

23 46604 So that is a longer probably
24 introduction than you asked for, but I will stop at
25 that point.

1 46605 MR. ROITENBERG: No, but it was quite
2 informative and I thank you for that.

3 46606 I don't know if either Lori or Greg
4 have a comment to make on that issue?

5 46607 All right, then. What I would like
6 to do is move into the statements by parties on any
7 issues raised by the Commission experts. And
8 arbitrarily, and not improperly, I don't think, Craig
9 and I have thought that matters should proceed
10 alphabetically. And whether I use the "A" from
11 Attorney General or the "C" from Canada, it goes before
12 Democracy Watch.

13 46608 But I think before we embark on that
14 we should probably take five minutes so that people
15 have a chance to have a health break.

16 46609 COMMISSIONER OLIPHANT: Well, I don't
17 know about a health break, but we will take a break and
18 I think we will go for 15 minutes to give the people
19 that are now going to be addressing the Commission an
20 opportunity to gather their thoughts while the rest of
21 us partake in coffee, tea, juice and water, whatever
22 else is out in the hall.

23 46610 I have just about 10 to 11:00. We
24 will come back at five after. Okay?

25 46611 Thank you.

1 --- Upon recessing at 10:52 a.m. / Suspension à 10 h 52

2 --- Upon resuming at 11:11 a.m. / Reprise à 11 h 11

3 46612 COMMISSIONER OLIPHANT: All right,
4 ladies and gentlemen. We are back in session with
5 respect to the first panel.

6 46613 Before we continue, Mr. Roitenberg, I
7 would just like to make a very brief announcement that
8 for media and those members of the public that are
9 here, copies of all papers filed in respect of Part II
10 are at the table to my left, and for those members of
11 the public who may be watching this via CPAC, copies of
12 all of the papers filed in respect of this part are on
13 the Commission website.

14 46614 With that, I will turn the matter
15 back to you, Mr. Roitenberg.

16 46615 MR. ROITENBERG: Thank you,
17 Mr. Commissioner.

18 46616 Mr. Vickery for the Attorney General
19 of Canada has advised me that the presentation for the
20 Attorney General of Canada will be split in part
21 between himself and Mr. Wild, who he introduced earlier
22 from Treasury Board Secretariat.

23 46617 So I will turn to Mr. Vickery now to
24 present for the Attorney General of Canada.

25 46618 MR. VICKERY: Thank you, Evan and

1 Mr. Commissioner.

2 46619 I will be quite brief and will then
3 turn the matter over to Mr. Wild who has a number of
4 comments that we believe may usefully assist the
5 discussion that the panel is engaged in.

6 46620 Just before I do that, I simply
7 wanted to note with regard to Professor Thomas'
8 comments that it is clear that there is somewhat of an
9 academic debate which is not central to matters under
10 consideration by the Commission which involves the role
11 and the parameters of the role of political or exempt
12 staff.

13 46621 As you are aware, the PMO has
14 submitted a response with regard to those issues.

15 46622 I wanted to make it clear that we
16 accept that these are matters on which there can be
17 differing views. Professor Thomas has made his clear
18 in his report and PMO has responded with its views.

19 46623 Those issues are, however, not in our
20 view within the parameters of questions 14 and 17 of
21 the Commission. What is within the parameter of those
22 questions is the question of the nature of the
23 organization with regard to prime ministerial
24 correspondence. And I wanted to make it quite clear
25 that on those points the government in fact fully

1 endorses Professor Thomas' comments and agrees with the
2 conclusions that he has reached with regard to the
3 operation of the PCO and PMO Correspondence Units.

4 46624 I simply wanted to make that clear.

5 Thank you.

6 46625 At this point, if I could turn the
7 matter over to Joe Wild.

8 46626 MR. WILD: Thank you.

9 46627 I will just preface my comments by
10 stating that my comments are not meant as advocacy for
11 one position or the other. They are simply meant to
12 provide some information that I think may be useful to
13 the Commissioner as you deliberate on your policy
14 review.

15 46628 I guess I will start with the
16 conversation that was happening around real versus
17 appearances.

18 46629 As I believe it was Mr. Levine noted,
19 there was a discussion of that issue of whether or not
20 to include appearances of conflict in the Conflict of
21 Interest Act. That discussion happened during the
22 Senate Committee on Legal and Constitutional Affairs
23 review of the Federal Accountability Act.

24 46630 That committee I guess had access to
25 the experiences in British Columbia. The B.C.

1 Commissioner did appear before that committee. In the
2 end that committee did propose an amendment to include
3 appearances. That amendment was rejected by the House
4 of Commons, and the Senate in the end agreed with that
5 rejection by the House of Commons and therefore you do
6 not find the notion of appearances in the Conflict of
7 Interest Act.

8 46631 I think just to try to give I guess
9 some enunciation as to the why behind that, the federal
10 scheme in terms of the various pieces of legislation
11 and codes that govern ethical or conflict of interest
12 in post-employment behaviour for public officeholders
13 is a bit complex in the sense that it is not all found
14 in one piece.

15 46632 The decision was made when the
16 Conflict of Interest Act was introduced that there was
17 some difficulty in taking what were more ethical
18 principles or values and trying to espouse those in
19 law; that there were issues around how one would put
20 into law the notion of acting with honesty.

21 46633 So the focus very much in the
22 Conflict of Interest Act was on what one would perhaps
23 call the crunchier bits, but the areas where law seemed
24 to be an appropriate venue: conflict of interest,
25 disclosure of assets and post-employment provisions,

1 and all of which really with premium being put on -- in
2 terms of newness from the prior code on public
3 disclosure of those things.

4 46634 And then putting in place an enhanced
5 Commissioner with certain powers to oversee that
6 regime.

7 46635 The appearances I guess question --
8 certainly I guess in the other documents that exist
9 that provide the full set of guidance to Ministers and
10 public officeholders, the appearances issue was dealt
11 with more so in those, in that there is a particular
12 guide called Accountable Government Guide for Ministers
13 And Ministers of State.

14 46636 It was updated after the Federal
15 Accountability Act was brought into force.

16 46637 Specifically it includes now an Annex
17 "G", which is Ethical Guidelines for Public
18 Officeholders. Those guidelines -- it is a bit of a
19 misnomer to call them guidelines in a certain sense
20 because they are actually incorporated as terms and
21 conditions of appointment for those who are appointed
22 by the Governor in Council that fall within the
23 definition of public officeholders in that Annex.

24 46638 I think what is important just to
25 take note of is that the public officeholders have

1 within those guidelines -- specifically it says, you
2 know, thou shalt act with honesty and uphold the
3 highest ethical standards so that public confidence and
4 trust in the integrity, objectivity and impartiality of
5 the government are not only conserved but enhanced.

6 46639 Public officeholders also have an
7 obligation to perform official duties and arrange their
8 private affairs in a manner that will bear the closest
9 public scrutiny and that that obligation is not simply
10 discharged by following the law. So it goes beyond
11 that notion.

12 46640 As well, it provides that public
13 officeholders, when they are making decisions, are to
14 do so in the public interest with due regard to the
15 merits of each case. So the idea there being avoidance
16 of biased or private interests.

17 46641 And just simply to note for the
18 Commission that that Annex "G" does put out or I guess
19 continues to carry forth very much the ideas of kind of
20 the ethical side or the principal side of what was in
21 the former public officeholder's code of conduct back
22 in the early nineties.

23 46642 The other I guess issue that has been
24 discussed this morning is the issue around the Conflict
25 of Interest Act and the Lobbying Act and enforcement.

1 46643 I think there are a couple of points
2 I would make.

3 46644 One of the issues that came out was
4 around -- and I think this is right -- that the
5 Conflict of Interest Act primarily operates on a
6 political basis in terms of enforcement outside of the
7 administrative penalties regime that the Commissioner
8 has access to, and I think what it is important to
9 recognize is the context from which that comes and the
10 reason for that.

11 46645 It very much flows out of the idea
12 that, you know, particularly when we talk about
13 ministers who are one of the groups of people that are
14 subject to the Conflict of Interest Act, there is a
15 very, I guess I would call it fundamental tenet of the
16 Westminster system of government, and that is the role
17 of the Prime Minister.

18 46646 If you go back through history, the
19 role of the Prime Minister really first emerges in the
20 Westminster system when the Crown, the king, gives up
21 the power to appoint and remove ministers from the
22 Ministry. Fundamentally that is the key power or
23 authority of a Prime Minister, is the ability to
24 appoint and remove his or her Cabinet.

25 46647 And there are a whole host of reasons

1 why that is important.

2 46648 It is pretty much the democratic
3 foundational cornerstone of our system of Cabinet
4 government and it plays into the notion of collective
5 responsibility and so on.

6 46649 And very much the idea behind the
7 enforcement regime that is in the Conflict of Interest
8 Act is that it is best left to the political realm
9 where one has to make decisions about the removal of
10 Cabinet Ministers. The idea is to put as much of this
11 into the public domain through transparency provisions
12 that then allow for public debate around whether or not
13 the Prime Minister is acting in a sufficient way in
14 regards to a particular issue.

15 46650 Recognizing that that is the primary
16 focus and drive behind the enforcement regime that is
17 in that Conflict of Interest Act, what do you do with
18 former public officeholders?

19 46651 I would simply draw to the attention
20 of the Commission that there is a specific subsection,
21 41(1) of the Act, that provides the Commissioner with
22 the power that if a former public officeholder has been
23 found to be violating the Act or has violated the Act,
24 the Commissioner can order any current public
25 officeholder to not have official dealings with that

1 person.

2 46652 So the idea was, beyond the public
3 shaming that would occur by the Commissioner making
4 that finding and putting it in a registry, which will
5 have an impact arguably on whether or not current
6 public officeholders would then deal with that
7 individual, the Commissioner has a specific authority
8 that allows the Commissioner to basically prohibit
9 current officeholders from engaging in official
10 dealings with a former public officeholder that has
11 violated the Act.

12 46653 And I think one can simply work
13 through that if a current public officeholder
14 contravened that order, again it becomes a political
15 issue for the Prime Minister as to how to address that
16 problem, and because it is a current public
17 officeholder is well within the Prime Minister's
18 authority to address it.

19 46654 The last point that I would make,
20 then, is that the Conflict of Interest Act and the
21 Lobbying Act are really two different pieces of
22 legislation. Yes, there is overlap, no question. The
23 post-employment provisions, there is overlap.

24 46655 But the Lobbying Act is aimed at
25 regulating the activity of lobbying. It applies to a

1 different set of persons than the Conflict of Interest
2 Act. It has a different definition of designated
3 officeholders that it uses, and that definition is
4 broader than who was captured in the Conflict of
5 Interest Act. And it certainly deals with matters in a
6 different way in terms of enforcement.

7 46656 I would just simply point out that,
8 good or bad, that that method or that approach is very
9 deliberate and not only is there the penalties that
10 were mentioned in terms of the finding, but the
11 lobbying Commissioner also has the ability to ban a
12 person from lobbying for up to two years if they are
13 found to have contravened the Act.

14 46657 So there is also again a registry of
15 public shaming element to it. But in addition to the
16 fine possibility there is the possibility of being
17 banned for two years from lobbying.

18 46658 And I won't go too far down this
19 path, but just simply to note that I realize if one
20 looks to try to explain, you know, why is there only a
21 one or a two-year post-employment provision in the
22 Conflict of Interest Act versus a five-year under the
23 Lobbying Act, they are dealing with two different sets
24 of activities in two different sets of factors.

25 46659 Yes, there is overlap, but the

1 Lobbying Act is really meant to be a specific regime
2 unto itself and you see the provisions that you see out
3 of the view of Parliament ultimately for the importance
4 that they see in having restrictions on the ability of
5 public officeholders to go into lobbying activities
6 versus the other forms of employment.

7 46660 I would also note that, because you
8 are into the former realm, you don't have those same
9 types of issues around enforcement as you would with
10 current public officeholders in terms of the Prime
11 Minister's prerogative. Nobody who is being caught in
12 the lobbying act provisions where the penalty regime
13 exists with the \$50,000 fine would be a current public
14 officeholder.

15 46661 Anyway, that is just to draw those
16 matters to the Commission's attention. I hope that
17 those comments are useful.

18 46662 Thank you.

19 46663 COMMISSIONER OLIPHANT: Thank you,
20 Mr. Wild.

21 46664 MR. ROITENBERG: Thank you, sir.

22 46665 Mr. Conacher on behalf of Democracy
23 Watch, please.

24 46666 Mr. Conacher, there is the button on
25 the microphone. There we go.

1 46667 MR. CONACHER: Thank you very much.
2 I am very pleased to be here today representing
3 Democracy Watch and our various coalitions of citizen
4 groups across the country who have struggled mightily
5 in this area for the past more than 15 years to try and
6 close the loopholes in the rules in all the key good
7 government areas and also strengthen the enforcement
8 systems so that they would be effective.

9 46668 Just to note, I am here as well
10 representing the public, but no taxpayer dollars are
11 paying for my participation and we are not requesting
12 that reimbursement from the Commission.

13 46669 As I have made on behalf of Democracy
14 Watch an extensive written submission, which I am happy
15 to answer questions about from any of the parties or
16 the Commissioner or Commission counsel at any time, I
17 won't go into details in terms of responding to what
18 the researchers have presented this morning.

19 46670 As well, I will be participating over
20 the next couple of days and so will have plenty of
21 opportunity to go into the details concerning Democracy
22 Watch's answers to the questions that have been posed
23 this morning.

24 46671 With regard to that submission, I
25 just wanted to note that while they are not the worst

1 mistakes of my life, I did make a few mistakes in the
2 submission and I do have corrections, copies of
3 corrections, that can be distributed.

4 46672 There are 10 copies so at least every
5 party will be able to get one and the key counsel.

6 46673 Just a couple of additions. There
7 were errors of commission and omission that I made and
8 I will be referring to those.

9 46674 I understand under Rules of Procedure
10 the Commissioner may not want to accept these kinds of
11 amendments after the due date for written submissions,
12 but I will be referring to them in my oral presentation
13 and as a result, for that reason you might as well have
14 them in hand in writing.

15 46675 COMMISSIONER OLIPHANT: We will
16 accept what you have done here without reservation,
17 Mr. Conacher.

18 46676 MR. CONACHER: Thank you.

19 46677 I'm sorry to send you around the
20 table again, but I also have an appendix to our
21 submission that I am just submitting today.

22 46678 It is a response to what Democracy
23 Watch views as an unfortunate event a week and a half
24 ago or so, which was preceded by more unfortunate
25 events, which was the House of Commons Procedure and

1 House Affairs Committee Meeting behind closed doors,
2 off the record, including with the Ethics Commissioner,
3 over eight meetings and then deciding and recommending
4 that loopholes -- in Democracy Watch's viewpoint,
5 loopholes be added to the MPs' Code and those were
6 unanimously accepted or approved by the House of
7 Commons Members a week and a half ago, which was after
8 the date I had submitted our submission.

9 46679 So there are a few more supplementary
10 recommendations in that appendix responding to these
11 new loopholes that have just been created in the Code a
12 week and a half ago, an unfortunate step backwards, but
13 not the first certainly in the past 23-year history of
14 the Ethics Code and Ethics Rules at the federal
15 government level.

16 46680 As one of the frontline people, head
17 of the organization that has pursued many more
18 complaints than anyone else in Canada concerning the
19 ethics rules and also some of the other areas, lobbying
20 and open government political finance, about 20
21 complaints in total over the past 15 years, Democracy
22 Watch's overall view is that the ethics enforcement
23 system in the federal government and open government
24 enforcement system and lobbying enforcement system has,
25 since the various systems and rules were introduced,

1 been essentially a self-interested Cabinet driven and
2 controlled loophole filled ineffective sham that
3 unfortunately when you are talking about the ethics
4 code for public officeholders, a 23-year-old sham that
5 has been propped up by half a dozen people who have
6 acted like lap dogs and they have been dedicated to
7 letting almost everyone off the hook when they have
8 clearly violated ethics rules, in doing so neglecting
9 their legal duties to be watchdogs that strictly
10 enforce those ethics rules.

11 46681 And they have, on purpose, refused to
12 define key terms in the key laws and codes. That has
13 been a shell game that one can say has actually been
14 going on for 142 years, since the country was created,
15 because while there weren't necessarily these codes in
16 place, there was still the Parliament of Canada Act and
17 other public expectations and scandals and things
18 happening and court cases, and the shell game has been
19 initially lets just play with the rules, make sure
20 there are loopholes, technical or otherwise, so that
21 there is always a way to let people off the hook.

22 46682 Then when enforcement started to come
23 with the Ethics Code for Public Officeholders for
24 example in 1994, the enforcer was completely
25 ineffective with no investigative powers and no

1 independence at all. That was the Ethics Counsellor
2 position.

3 46683 Then when enforcement increased and
4 became more independent in 2004, with the establishment
5 of the Ethics Commissioner position, the rules were
6 gutted essentially by a loophole being introduced by
7 then Prime Minister Paul Martin that essentially
8 removed almost everything that Cabinet Ministers and
9 their staff do from the scope of the Conflict of
10 Interest Rules.

11 46684 Then the third part of the shell
12 game -- and I use that term directly because it has
13 been for Democracy Watch and others like chasing the
14 pea through the shell game and the person on the street
15 and trying to guess under which shell is the nut or the
16 pea.

17 46685 The third has been the area of
18 penalties and that is the area that has just been kept
19 extremely weak for the most powerful decision-makers
20 throughout this entire process. We have already heard
21 some discussion of that.

22 46686 Just to give a couple of examples of
23 this sham, Democracy Watch is still waiting on five
24 complaints that were filed five to seven years ago
25 concerning violations of the Lobbyist Code of Conduct.

1 We pursued through the courts and the Registrar of
2 Lobbyists for nine years until we had one complaint
3 actually ruled on in a fair and impartial and legally
4 correct way.

5 46687 The gifts guideline which the Ethics
6 Commissioner issued last year, unfortunately undated so
7 I'm not quite sure when it comes into enforcement
8 because it is not a dated guideline. That is the first
9 clear legal interpretation bulletin that has been
10 issued of the Conflict of Interest Code For Public
11 Officeholders, and it came 22 years after that Code
12 came into force.

13 46688 The accountable government guide
14 that, as Mr. Wild has noted, updates or takes some of
15 the old principles and puts them into this new guide
16 that is enforced supposedly by the Prime Minister, is
17 just an updated useless version of the old Code that
18 was enforced by the Prime Minister until 2004.

19 46689 I filed a complaint, for example,
20 last year about a Minister being dishonest. The
21 Minister had taken what I had said and essentially
22 ignored half of what I said and quoted me as defending
23 the Minister's position and the government's position,
24 which was completely dishonest.

25 46690 I filed a complaint with the Prime

1 Minister, who is the enforcer of that Code. That was
2 filed a year ago and I'm still waiting for even an
3 acknowledgment letter from the Prime Minister that he
4 has received it, let alone considered it.

5 46691 And this is supposedly -- it is a
6 condition for being a Minister to comply with this
7 Code. But these conditions are very slippery.

8 46692 If the Commissioner in your report
9 concludes that anyone violated the politicians or
10 lobbyist rules, it will be the third time since 1986
11 that allegations about anyone have been investigated
12 and ruled upon in an independent manner and a legally
13 correct manner and only the third time anyone has been
14 found to have violated the code, despite more than 80
15 known cases of serious allegations backed up by clear
16 evidence, none of which were ever investigated in an
17 independent, legally correct manner.

18 46693 And then who knows how many more
19 incidents there have been of violations of the Code
20 that insiders know about but the public doesn't.

21 46694 I mentioned this in my written
22 submission. I think it is completely accurate and
23 provable that it is more likely that any Canadian will
24 be caught and punished for parking illegally anywhere
25 in Canada than it is likely that the most powerful

1 politicians or government officials or lobbyists in
2 Canada would be caught and punished for violating
3 fundamental good government rules, that the Supreme
4 Court of Canada in the case R. v. Hinchey has said that
5 if these rules are not enforced we do not have a
6 democracy.

7 46695 That is a perverse system.

8 46696 What do we need to do? Well, I will
9 start -- and you will hear me say these a few more
10 times in the next few days -- with a couple of my
11 father's favourite sayings that probably come from
12 raising three boys.

13 46697 The first is when all is said and
14 done, more is said than done. The second is people do
15 what you inspect, not what you expect.

16 46698 And those should be the informing
17 framework for looking at this system, realizing that
18 when all is said and done usually more is said than
19 done and that you can expect people to do things, but
20 usually they don't do them unless you inspect them.

21 46699 And we don't have a system, even
22 though we are hundred and 42 years in as a country
23 where we have rules that are clear and enforcement that
24 is effective to ensure that expectations are met, both
25 the public's and the expectations that are set out in

1 the rules.

2 46700 With all due respect, I am not at all
3 surprised with the Attorney General of Canada's
4 submissions, both written and what has been presented
5 today, that essentially everything is fine as is, given
6 the Attorney General's submissions in the various court
7 cases that Democracy Watch has pursued in the past
8 decade.

9 46701 I mentioned the Federal Court of
10 Appeal decision that came recently after nine years
11 chasing the Registrar of Lobbyists for a legally
12 correct interpretation of the Lobbyists Code's key
13 conflict rule. That decision came in March.

14 46702 The Attorney General was defending
15 the Registrar throughout the entire process.
16 Thankfully the Federal Court of Appeal called the
17 position that the Attorney General and the Registrar
18 were defending bizarre and also said it fundamentally
19 confused corruption standards and what it means to be
20 corrupt with conflict of interest standards.

21 46703 Essentially that attitude has been
22 the attitude of people in government and the watchdogs;
23 that if you haven't actually furthered your private
24 interest and profited from it, then you haven't done
25 anything wrong.

1 46704 But conflict of interest is no, if
2 you have the opportunity to do that then you have to
3 step aside; and if you act when you have that
4 opportunity you have done something wrong.

5 46705 That has been the problem. The
6 standard has been if there is not real corruption,
7 there is nothing wrong here and we won't enforce an
8 actual conflict of interest standard.

9 46706 Very unfortunately that has been
10 where things have been at.

11 46707 Turning specifically to responding to
12 what has been presented by the researchers, I will just
13 have a few more general comments.

14 46708 I won't go through all of the
15 loopholes again that we have identified in the system,
16 both in rules and enforcement, in effect of
17 enforcement, but just I will mention a few of them.

18 46709 But just to say generally I agree
19 with the point that it's a false dichotomy to say there
20 is something different or not a connection between
21 rules and values and that you can just pursue values,
22 education as a way of raising standards and you don't
23 need rules, or that you can just pursue rules and not
24 need the education and training.

25 46710 Both are very important. I think a

1 few years ago some economists won the Nobel Prize for
2 their work in determining why people make the decisions
3 they do on an economic basis. I think if some
4 political scientists or sociologists could figure out
5 whether politicians act because of rules or a culture
6 they will win the Nobel Prize in their areas as well,
7 because it is not -- how could you ever do a study that
8 would be able to determine whether politicians or the
9 public respond to the rules or societal culture or
10 everything else that is going on at the time in terms
11 of societal discussions about issues, scandals that are
12 in the news, et cetera, et cetera? It is almost
13 impossible to split those out.

14 46711 So I believe -- and have as much
15 proof as anybody -- that the rules and enforcement
16 system have not just decreased public trust. It is the
17 dishonest, unethical, secretive, unrepresentative and
18 wasteful actions of public officials that have
19 decreased public trust.

20 46712 So when you have these new rules or
21 if you have any more rules, I believe it will be the
22 actions of the public officials breaking those rules
23 that will decrease public trust, not rules themselves.
24 I can't prove it, but no one can prove otherwise. We
25 are in the realm of belief.

1 46713 I also believe that requiring a high
2 standard of ethics will not discourage good people from
3 entering the public service. It will discourage bad
4 people from doing so. The evidence that there may be
5 fewer candidates for certain elections because of
6 higher standards, well, maybe the people who wanted to
7 run to pursue their private interests while they were
8 in office are the ones who dropped out. So bad people
9 were discouraged from running. That is a good thing.

10 46714 Good is often a euphemism for elite;
11 that there is a certain type of person we are looking
12 to be in public office: wealthy, and they wouldn't
13 want to give up their interest in their wealth in order
14 to serve the public and therefore we shouldn't have
15 this.

16 46715 But that is not the definition of a
17 good person. That is the definition of an elite person
18 on a class basis, not on the basis of morals or their
19 qualifications for standing.

20 46716 Overall, Democracy Watch's position
21 is why would you leave a loophole open, why would you
22 have an ineffective enforcement system? If in doubt,
23 close the loopholes, make the enforcement system
24 effective, in the same way that we have done in so many
25 other areas of law, including parking illegally across

1 the country. There are inspectors running around all
2 day.

3 46717 In my experience, if you are three
4 minutes late getting to the meter in Ottawa, you have a
5 ticket. The fine is higher than any public official
6 has ever been fined for violating a fundamental
7 government rule. It can be as high as the maximum
8 penalty for violating the Conflict of Interest Act
9 currently.

10 46718 Parking illegally does far less harm
11 to society in almost every case, unless you happen to
12 be in front of a hydrant and there is a fire, than the
13 most powerful politician or government official
14 violating the most fundamental good government rule.

15 46719 So we have a perverse system and it
16 is really because politicians have written the rules
17 and they have written them for themselves and the rest
18 of society and, as I offered in the first section of my
19 written submission, many examples where they argue very
20 strongly for strong rules, need strong penalties,
21 deterring an effective system, 100 per cent chance of
22 getting caught, in all these areas when it comes to
23 good government, not loophole filled rules, no chance
24 of getting caught or very little, no inspections, no
25 random audits.

1 46720 And penalties, forget it, we don't
2 need them. And if you say we need them, you are saying
3 we are all crooks.

4 46721 It is a double standard and the polls
5 that show the lack of public trust in the integrity of
6 government I think, again I can't prove it, I believe
7 are really a reaction to that double standard overall.

8 46722 So what we have done in our written
9 submission and I will be doing for the next few days is
10 very much arguing and putting forward points about all
11 the ways in which we need to bring the standards that
12 politicians have imposed on the public in their lives
13 in many ways, depending on what they do, many
14 professions and others, taxpayers, welfare applicants,
15 immigrants have all sorts of rules on honesty, ethics,
16 openness; that we need to raise the standards of
17 politicians to the same standards that they have
18 imposed on members of the public.

19 46723 I do have some specific questions for
20 the researchers, but we are going to be doing that this
21 afternoon, so I will leave it at that for now.

22 46724 Thank you very much again for this
23 opportunity. I look forward to the next two and half
24 days or so.

25 46725 COMMISSIONER OLIPHANT: Thank you

1 very much, Mr. Conacher.

2 46726 MR. ROITENBERG: Thank you,
3 Mr. Conacher.

4 46727 Mr. Auger, on behalf of
5 Mr. Schreiber, are there any opening comments that you
6 wish to make in response to the Commission experts'
7 positions put forward?

8 46728 MR. AUGER: I have no opening
9 comment, thank you.

10 46729 MR. ROITENBERG: Thank you.

11 46730 Mr. Commissioner, we are shockingly a
12 minute and a half ahead of schedule. We are, according
13 to the agenda, to break now until 1:15 p.m. for the
14 lunch break and I seek that from you at this time.

15 46731 COMMISSIONER OLIPHANT: I have
16 absolutely no problem with that suggestion,
17 Mr. Roitenberg.

18 46732 We will break now until 1:15 this
19 afternoon. Thank you.

20 --- Upon recessing at 11:46 a.m. / Suspension à 11 h 46
21 --- Upon resuming at 1:16 p.m. / Reprise à 13 h 16

22 46733 COMMISSIONER OLIPHANT: Ladies and
23 gentlemen, good afternoon. It is slightly past 1:15,
24 and we are ready to resume.

25 46734 Mr. Roitenberg, I turn the floor over

1 to you.

2 46735 MR. ROITENBERG: Thank you, Mr.
3 Commissioner.

4 46736 At this point it is an opportunity
5 for the Commission, through myself, to ask questions of
6 our panel of experts, and my first question is for
7 Greg.

8 46737 Mr. Conacher at one point referred to
9 his view that, on purpose, certain pieces of
10 legislation or certain commissioners have refused to
11 define certain terms.

12 46738 There is one term that strikes me as
13 having not been defined as yet, which I think begs some
14 clarity. There is a generic obligation on former
15 holders of public office not to act in an "improper
16 manner" after leaving public office.

17 46739 Do we know what "improper" means in
18 that sense? If not, how would we define it?

19 46740 MR. LEVINE: Thank you.

20 46741 Terms like "improper manner" and
21 "improper advantage" aren't defined in the various
22 codes and acts. In my paper I talk about legal
23 phrasing and definitions of impropriety. Really, it
24 comes down to honesty, and probity, and propriety.

25 46742 I'm sorry; you asked a second part to

1 the question.

2 46743 MR. ROITENBERG: Really, how could we
3 hope to define it, so that we could offer guidance to
4 those individuals leaving public office?

5 46744 MR. LEVINE: I think it is less the
6 "improper" piece than notions of advantage, and undue
7 advantage that someone may take in respect of their
8 position or former position. I think the guidance has
9 to be around what it is you are seeing impropriety
10 about.

11 46745 I will leave it at that general
12 level.

13 46746 MR. ROITENBERG: The Conflict of
14 Interest Act now, in section 33 -- and I will ask you
15 this question, Lori -- speaks of improper advantage if
16 one were a previous office holder, and you, in your
17 paper, worked that into a discussion of profiteering.

18 46747 What would the rationale be for an
19 individual, after leaving public office, for that
20 individual not benefiting from their experience, and by
21 some extension of the definition, benefiting in some
22 improper fashion from their holding of a public office?

23 46748 DR. TURNBULL: What would the
24 rationale be?

25 46749 MR. ROITENBERG: Yes.

1 46750 I understand that when we are
2 speaking of profiteering, we are not necessarily
3 suggesting, after they have left public office, that
4 they are having an influence on current public office
5 holders, but still being in a position to take some
6 form of advantage of the office they once held.

7 46751 DR. TURNBULL: Okay. I guess that
8 could happen in a couple of ways.

9 46752 For instance, one of the things about
10 section 33 -- and it is written in this way -- you
11 know, "taking improper advantage", and then it sort of
12 stops -- is that there are no examples, there are no
13 kinds of possible scenarios that would clarify what we
14 really mean by "improper advantage".

15 46753 In the way it is now, it is sort of
16 left open to a commissioner to interpret what "improper
17 advantage" means.

18 46754 Now, some jurisdictions have tried to
19 be a little bit more specific about what that might
20 mean. For instance, in the U.K., cabinet ministers
21 have to face restrictions around their ability to
22 publish memoirs after they leave office. They have to
23 clarify with the Prime Minister's Office what the
24 substance of the stuff is going to be, how long they
25 have to wait. I think it is 15 years before they can

1 share and publish information that might discuss the
2 activities of other cabinet ministers and things like
3 that.

4 46755 They are sort of expected to observe
5 this cabinet secrecy and solidarity for a period of
6 time after they leave, and the idea that they might
7 publish this information in a book that might be of
8 interest to many people means that they would actually
9 be able to benefit privately, through the sales of the
10 thing, from these opportunities and networks and
11 information and things they had as part of being in the
12 cabinet.

13 46756 What is wrong with that? You can
14 imagine what might be wrong with it if they are
15 profiting from selling information, or from
16 distributing information that is sensitive, which was
17 not intended to be used in that way, and how might it
18 affect cabinet relations in the present, when you are
19 thinking about what might people do with this
20 information in a few years' time when they are not in
21 cabinet any more. If there is no regulation around
22 that, then cabinet leaves itself -- not just cabinet,
23 but public office leaves itself vulnerable to whatever
24 might happen down the road sort of thing.

25 46757 That doesn't necessarily mean that

1 the information will be used improperly. Maybe we are
2 not talking about sensitive information at all, but
3 even when we are not, I think there is some kind of
4 public frustration around the idea that a person is
5 able to sell or make a profit from what they have done
6 in public office. Maybe the idea is that public office
7 is supposed to be something that you do purely out of
8 service to the public. You are not supposed to be
9 entering this with the idea of what you can gain from
10 it privately, which may be completely unrealistic.

11 46758 Maybe there is a perception of
12 wrongdoing here, when there is actually none.

13 46759 I think that's what those kinds of
14 rules are about.

15 46760 MR. ROITENBERG: Would it be
16 helpful -- you started off by saying that section 33
17 seems to mention this improper advantage concept, and
18 stops, without giving any examples. Do we find in any
19 other legislation any further definition of the term,
20 or do we just see occasional examples?

21 46761 DR. TURNBULL: Sometimes you see
22 things like "improper use of information". That would
23 be, I think, probably the most common example of trying
24 to be a bit more clear about what that clause means.

25 46762 But I will say that if the

1 legislature, or the government, or the crafters of the
2 legislation don't take it upon themselves to define it,
3 then they leave it up to the commissioner to define.

4 46763 So there is kind of a relationship, a
5 power struggle here between the legislature or the
6 government trying to define standards of conduct and
7 the commissioner doing it.

8 46764 If you want to be vague about it,
9 then you are leaving it to this commissioner and
10 commissioners in the future to decide.

11 46765 COMMISSIONER OLIPHANT: May I ask a
12 question, Mr. Roitenberg, please?

13 46766 Professor Turnbull, just looking at
14 the language in that section, "a former public office
15 holder shall not act in such a manner as to take
16 improper advantage of his or her previous public
17 office," that wording implies that there are situations
18 where proper advantage could be taken, and I am
19 wondering whether you could conceive of a situation
20 where somebody is taking advantage of her or his former
21 office in a proper way, in terms of dealings.

22 46767 DR. TURNBULL: In terms of dealings.

23 46768 I think you could imagine -- and this
24 is something that Andrew Stark writes about, if you
25 wanted to read his books about it -- you could imagine

1 a public office holder leaving office with a skill set.
2 I am a very good manager. I am a very good researcher.
3 I am a very good human resources development -- these
4 sorts of skills, which aren't specific to public
5 office.

6 46769 I think that is the type of thing
7 that might be considered taking proper advantage -- I
8 have acquired skills that now I can use in the private
9 sector.

10 46770 For instance, a deputy minister might
11 come away from public office as a very skilled manager,
12 leader, team builder, mover and shaker -- whatever --
13 and you take those skills and you are able to apply
14 them well in the private sector. Now you are qualified
15 to do it.

16 46771 But is there ever a proper
17 circumstance to share information that was privy to you
18 only because you were a public office holder? That is
19 harder for me to think of examples.

20 46772 Maybe after a certain period of time
21 has passed, where the people who were cabinet ministers
22 with you are no longer vulnerable to this, you are not
23 hurting anybody else, this is not an issue of national
24 security, you are far enough away from it, then it is
25 really you just sharing your life story. There is no

1 damage there, maybe.

2 46773 I hope that makes sense.

3 46774 COMMISSIONER OLIPHANT: Thank you.

4 46775 MR. ROITENBERG: Greg, I have another
5 question for you.

6 46776 Some of the provinces make it a
7 regulatory offence to violate post-employment rules,
8 and these offences carry with them some significant
9 fines in certain instances. Would this be a good idea
10 at the federal level, the upping of the ante, as it
11 were, of the fines for violations of the
12 post-employment rules?

13 46777 MR. LEVINE: Yes, in the sense that
14 there should be consequences to violating the rules.

15 46778 And it is a significant problem, I
16 think.

17 46779 If I could echo something that Lori
18 just said, what you don't want -- proper advantage is
19 about applying your broad skills and experience, but
20 not about taking advantage of particular knowledge,
21 related to particular matters. So you have to have
22 some way of ensuring that that doesn't happen.

23 46780 So the more severe the penalty, in a
24 sense, the more likely the compliance.

25 46781 MR. ROITENBERG: Currently we have,

1 as it pertains to enforcement provisions, as we heard
2 earlier, a very large chasm between those penalties
3 that can be imposed under the lobbying restrictions as
4 opposed to the Conflict of Interest Act.

5 46782 Do you suggest that there should be
6 an increase in the potential penalties under the
7 Conflict of Interest Act, or would that be, in any way,
8 counterproductive?

9 46783 MR. LEVINE: I don't see it as
10 counterproductive, and I do see some utility and
11 consistency in the legislation.

12 46784 MR. ROITENBERG: Paul, from your
13 perspective, do you see any other enforcement
14 mechanisms that would be of benefit to impose at the
15 federal level?

16 46785 DR. THOMAS: I will start by going
17 back to the opening part of the conversation about the
18 words we use to describe activities and the outcomes we
19 desire to see in public life.

20 46786 The words matter. They affect how
21 the public perceives their elected representatives and
22 appointed public servants.

23 46787 And the words are elusive. They are
24 not self-defining. So we are worried about the
25 legality of actions. We are also worried whether they

1 are ethical. We are worried about the morality of
2 public office holders, and we want them to act with
3 integrity.

4 46788 All of those are big ideas. All of
5 them you could have long philosophical debates about.

6 46789 It seems to me that we have embarked
7 on this ethics revolution, if that's what it is, by
8 focusing mainly on the legal side of things, where the
9 types of activities can be proscribed more clearly, and
10 the language can be more precise.

11 46790 As you get into the softer zone of
12 the values and ethics of people, you are into a more
13 subjective area, and the terms are not self-defining,
14 and you are going to have to, probably, evolve, in
15 effect, almost like a case-by-case jurisprudence of
16 what those terms might mean in particular factual
17 situations.

18 46791 The evidence about codes of conduct
19 in organizations is that people make progress, in terms
20 of upholding higher ethical standards, by dialogue and
21 by talking about cases, and looking at it in that way.
22 These terms don't lend themselves to straightforward
23 interpretation, a lot will depend on the circumstances.

24 46792 Then you go on to the question of:
25 What is the appropriate penalty? Presumably that is

1 related, clearly, to the nature of the violation of
2 public trust that has happened. It's a cliché, but the
3 punishment should fit the crime.

4 46793 We talked this morning mainly about
5 legal or financial penalties. I have watched public
6 servants get grilled before parliamentary committees on
7 matters that are highly controversial, in a partisan
8 forum, and watched grave damage be done to their
9 professional reputations, and to their career prospects
10 probably. They paid a price. Even if they weren't
11 dismissed, or even if they weren't demoted or moved to
12 a different location, they still paid a significant
13 psychological price for that.

14 46794 So I think that we shouldn't stop
15 looking at it in terms of the array of potential
16 sanctions for misconduct, legal or material, penalties
17 of various kinds. There are other types of
18 consequences.

19 46795 Accountability can't be
20 consequence-free, but you have to make sure that the
21 accountability remedy also will prevent a recurrence of
22 the problem, and it's not just about being punitive in
23 the first instance.

24 46796 Again, this is not a precise art
25 form, let alone a science about matching particular

1 transgressions to particular penalties. I think we are
2 still in the experimental stage in that, and we have to
3 get it right.

4 46797 We encourage public servants,
5 particularly, to take risks and to be innovative, and
6 to be prudent in their risk-taking, and so on, but we
7 can't then say to them: If you make mistakes, or if
8 unforeseen errors arise, you will pay a huge price for
9 it. It has to be a balanced approach.

10 46798 MR. ROITENBERG: Thank you.

11 46799 Lori, we had discussed, or we had you
12 discuss earlier the concept of improper advantage.
13 Does this extend outside of the Canadian context?

14 46800 By that I mean, does the improper
15 advantage, or any foreseeable definition, include one's
16 conduct on the international stage, or does it only
17 pertain to what goes on they might engaged in in
18 Canada in terms of dealing in their private business
19 matters?

20 46801 DR. TURNBULL: I would only think
21 that it was relevant to us if the conduct has the
22 capacity to impair the judgment of sitting public
23 officials.

24 46802 For instance, the American
25 legislation around this is specifically aimed at former

1 public office holders and how they might work with
2 foreign entities to pressure or to influence sitting
3 American officials.

4 46803 To that extent, that is relevant, and
5 it is relevant if the information -- even if they never
6 come back to the Canadian government. If a public
7 office holder leaves and conveys sensitive information,
8 or information to which that person was privy as part
9 of his or her role in government, I would think that
10 that would be improper.

11 46804 MR. ROITENBERG: Just to follow that
12 up, in your paper, where you speak of the concept of
13 profiteering, and you draw a distinction between those
14 actions of an individual who causes some effect upon
15 current office holders and those actions which really
16 don't affect current office holders in any way, would
17 it matter whether the profiteering is based within
18 Canada or from some external source?

19 46805 DR. TURNBULL: I don't think so.

20 46806 Could you ask that question one more
21 time, so I know that I am saying what I want to say?

22 46807 MR. ROITENBERG: Absolutely.

23 46808 A former office holder in Canada is
24 engaged in activities that are taking advantage of
25 their position as being a former office holder in

1 Canada, but these activities are taking place outside
2 of Canada. Does that make it any different? Does it
3 make it any better?

4 46809 DR. TURNBULL: No, no.

5 46810 MR. ROITENBERG: Greg...?

6 46811 MR. LEVINE: I think that's because
7 it is still about abuse of office and abuse of power,
8 and the potential to damage the public interest.

9 46812 You don't know how that is going to
10 interfere with relationships outside, and that will
11 have an impact inside. That's the problem.

12 46813 MR. ROITENBERG: Thanks.

13 46814 Paul, in answering your last question
14 you mentioned -- having to do with a softer approach, a
15 soft law approach. Considering the statutes and codes
16 that we have in place now, which actually specify and
17 proscribe certain conduct, would any imposition of
18 softer laws now be seen as a regression of sorts by the
19 public, or a lack of being tough on this kind of
20 conduct?

21 46815 DR. THOMAS: I think they would be,
22 and that's a dilemma.

23 46816 We have embarked on this path, and
24 the movement has gained momentum toward setting
25 stricter parameters for the exercise of discretion, and

1 we now consider that dimensions of the life of
2 politicians, public servants, that were not considered
3 important in terms of public policy, should be
4 regulated.

5 46817 We regulate political parties, which
6 were once regarded as private institutions, serving the
7 interests of their members and so on.

8 46818 I think that the general public mood
9 of disillusionment with politics, particularly, and to
10 a lesser extent with the role of the public service, is
11 such now that, if you said you were going to relax some
12 of the regulations and the penalties that were
13 potentially applied to misbehaviour of some kind, there
14 would be a backlash against that.

15 46819 It would happen in Parliament. It
16 would happen, certainly, in the media, which sees
17 itself as custodians of the public good. They have
18 their own agendas, in terms of investigating the
19 behaviour of public office holders.

20 46820 I think the public is in a mood to
21 believe the worst about the people who serve in public
22 office, and that is unfortunate, because the jobs are
23 difficult and challenging, and ethically demanding,
24 quite frankly. You don't want absolute deference or
25 unconditional trust in people who exercise power, but

1 you have to find an appropriate balance.

2 46821 The Public Policy Forum did a paper
3 last year on the future of the public service in
4 Canada, and said that if you entangle people in this
5 web of rules, then they are not likely to exercise
6 judgment and make the kind of choices that need to be
7 made in a highly dynamic environment, in which we can't
8 plan and control everything that will happen.

9 46822 We need a balance between an approach
10 to accountability which is focused on the individual,
11 legalistic, procedural, and is about finding fault and
12 applying penalties, and a more positive construction of
13 accountability, which is more collective in character,
14 is more about trying to understand the circumstances
15 behind inappropriate behaviour, or mistakes, unwanted
16 events that take place, and more of a learning
17 perspective.

18 46823 To have a constructive conversation
19 along those lines, the second approach, which is more
20 cultural in nature, is very, very difficult in the
21 current climate of suspicion, where no one, really, is
22 beyond suspicion.

23 46824 MR. ROITENBERG: Greg, taking that
24 one step forward, we now have these two pieces of
25 legislation, the Lobbying Act and the Conflict of

1 Interest Act, and we heard from Mr. Wild, in the
2 statement from the Attorney General for Canada, his
3 view in terms of the gaps that those two pieces of
4 legislation fill.

5 46825 Even though they do in places
6 overlap, do they still leave gaps, and is there a way
7 to close those gaps?

8 46826 MR. LEVINE: Yes, they do have gaps.

9 46827 Are they so conceptually different
10 that they ought not to be consistent is, I guess, how I
11 would ask a question, were I allowed to ask one.

12 46828 What I mean by that is, if you are
13 regulating, say, a former public office holder's
14 ability to represent or make representations to
15 government in one statute, which amounts to lobbying in
16 another statute -- and it may not because you have to
17 look at the specific definition of lobbying, and then
18 look at the activity of the person, which may be
19 broader, because the term "representation" isn't
20 defined -- you may end up with no consistency between
21 the two acts.

22 46829 I think that several things need to
23 be made more coherent. What activities are you trying
24 to cover the former public office holder from doing,
25 and what are you trying to stop them from doing in the

1 Lobbying Act. Those need to be made consistent. The
2 law can't be this incoherent, that's a problem.

3 46830 MR. ROITENBERG: So there is still,
4 in your view, clearly, room for improvement in terms of
5 the coexistence of those two pieces of legislation.

6 46831 Paul, do you have an opinion in that
7 regard?

8 46832 DR. THOMAS: No, I am going to take a
9 pass. I am usually never at a loss for an opinion, but
10 I think I will pass on that one.

11 46833 MR. ROITENBERG: Since I want one
12 more opinion, I am going to turn to Lori, to see if she
13 wants to wade in on that, the dichotomy between those
14 two acts.

15 46834 DR. TURNBULL: The Lobbying Act sets
16 out, in particular, a specific type of behaviour that
17 it is getting at. You are talking about someone who is
18 getting in contact with a public office holder for the
19 purposes of either setting up a meeting or to do the
20 lobbying him or herself, and the second prerequisite is
21 that the person must be receiving payment for doing it.

22 46835 So you have those specific conditions
23 that have to be met for the Lobbying Act to kick in in
24 the first place, and then you have a fairly severe
25 penalty in the event that there is a violation.

1 46836 With the Conflict of Interest Act,
2 there is a broader range of things that are being dealt
3 with.

4 46837 For instance, there is a certain time
5 period for which a former public office holder cannot
6 come back to lobby former department members, or former
7 colleagues. That goes whether or not he or she is
8 being paid. It makes no difference.

9 46838 The Lobbying Act would kick in
10 specifically if the former public office holder is
11 coming forward him or herself, in person, either to set
12 up the meeting or to do the lobbying; whereas, in the
13 Conflict of Interest Act, some of the sections apply
14 even if you hold employment with a private sector
15 entity, whether you are the one making the
16 representations or not.

17 46839 So the things they are trying to do
18 aren't exactly the same. There seems to be kind of --
19 it's not so much that they conflict as that, in some
20 spots, they seem to be a bit incongruent.

21 46840 Like, why is there a two-year waiting
22 period in one and a five-year waiting period in
23 another? That doesn't seem to make a lot of sense,
24 but, at the same time, they are dealing with different
25 activities.

1 46841 MR. ROITENBERG: Aside from the
2 comparison -- and this is for you again, Lori -- aside
3 from the comparison between the two acts and any gaps
4 that might still be left, are there other changes that
5 you would want to make to the current federal law as it
6 governs this area?

7 46842 DR. TURNBULL: I want to make a
8 couple of points going back to the issue of more severe
9 penalties, and I preface this by saying that I am not a
10 lawyer and I don't have a law degree.

11 46843 In the event that we were to attach
12 more severe penalties to violations of the Conflict of
13 Interest Act, that would almost certainly mean that the
14 enforcement procedures, the investigation procedures,
15 the Office of the Ethics Commissioner, would have to be
16 different than it is now.

17 46844 If we were talking about very severe
18 penalties, then I would think that -- I would expect
19 that there would have to be changes to the office, in
20 terms of how it is structured, and just sort of an
21 appointment, as it is now.

22 46845 Perhaps you would have to have -- it
23 would seem to me that to have harsher punishments for
24 violations of that law would turn the Ethics
25 Commissioner into a judicial office, or a tribunal, and

1 if you did that, what would that mean for Parliament's
2 right to self-regulation, which has been part of
3 parliamentary tradition.

4 46846 So I would expect that, if those
5 types of changes to penalties precipitated those types
6 of changes to the Office of the Ethics Commissioner, we
7 would expect serious resistance on the part of
8 parliamentarians, cabinet ministers, public office
9 holders.

10 46847 That is just one thing.

11 46848 Otherwise, in terms of changing the
12 legislation as it exists now, I have in my paper the
13 sort of four areas of post public employment activity
14 that we regulate, and the United States does something
15 similar. The U.K. and Australia, their approach is
16 more informal. Instead of having strict, codified
17 prohibitions, their approach is more --

18 46849 For instance, when a public office
19 holder leaves in the U.K., you have a cooling off
20 period of three months, and then that person is
21 required to consult an advisory committee on private
22 sector employment for two years after they have left
23 office.

24 46850 So every specific instance is treated
25 by a committee on its own merits, and the committee is

1 thinking of things like how is this going to look to
2 the public and should you wait a year before you take
3 this job, should you wait six months, should you
4 restrict your activity to this particular portion and
5 not that.

6 46851 So instead of having kind of a mapped
7 out piece of legislation, there is a committee that
8 deals with each one.

9 46852 I am not necessarily saying that we
10 should do that, but in terms of alternatives, that is
11 an alternative system. Instead of the codification you
12 have kind of a more of a deliberative process.

13 46853 MR. ROITENBERG: Paul...?

14 46854 DR. THOMAS: I just want to insert a
15 point here that I should have brought out more in my
16 paper, and it has to do with the changing contours of
17 the public sector in Canada but in other countries.

18 46855 I am talking about the emergence of
19 network government, joined up government in which
20 individual departments and programs often work across
21 departmental boundaries, across orders of government,
22 rely on third parties outside of government to produce
23 and deliver programs and services, and so on.

24 46856 So we have created this set of rules
25 and regulations and procedures and standards and

1 penalties and so on for a public sector of the past,
2 which was the traditional bureaucratic integrated
3 department model. But now there is more and more,
4 there are parties who operate outside of that, and we
5 don't know in terms of the area that I was assigned to
6 look at what the rules are about the retention and
7 management of information and correspondence and
8 communications of all kinds.

9 46857 The concern may be that the ability
10 of the system to fulfil requirements for legal
11 liability, for accountability purposes, for
12 transparency purposes, may come down to the lowest
13 common standard amongst the partners in this new
14 collaborative form of government, and it may also mean
15 that the corporate memory for these programs that may
16 get in trouble at some point in the future may be very,
17 very weak. You may not be able to retrieve the
18 information when there is intergovernmental or third
19 parties involved in these programs. So I think that's
20 an important one if you are going forward; that we are
21 tending to presume here that we are dealing with
22 individual departments and politicians at the head
23 those departments and more and more this is a
24 constellation of joined up actors and institutions
25 operating internally for their own accountability

1 purposes, but in the process we may lose information
2 that becomes important if there was ever to be an
3 inquiry of this sort in the future.

4 46858 MR. ROITENBERG: Greg, you have a
5 point?

6 46859 MR. LEVINE: Yes. I was just
7 thinking about the issue of severity of the penalty and
8 necessarily enhancing the judicial nature of the
9 process, because I'm not sure that that is necessarily
10 the case.

11 46860 Two things about the severity of the
12 penalty.

13 46861 I agree with the comment that Paul
14 made earlier about it seems to me you want a continuum
15 of penalties. It's not about chopping people's heads
16 off for the simplest of errors, but you want a system
17 that protects the integrity of the public service and
18 for which there are genuine consequences for serious
19 problems.

20 46862 In terms of the enforcement, though,
21 if you have what we have, which is a specialty
22 ombudsman system in which essentially a Commissioner is
23 reporting to -- investigating and reporting to someone
24 else, either Parliament or to the Prime Minister, you
25 leave it to that responsible body to make the final

1 determination on what the penalty will be.

2 46863 And it seems to me you can do that
3 whether it is a small penalty or a large penalty,
4 although I do agree that the more severe the
5 consequences, the more you will want people to have a
6 fair hearing if they are to suffer those consequences.

7 46864 MR. ROITENBERG: Lori, Mr. Conacher
8 had mentioned the concept of people being deterred and
9 that that was a possible explanation for changes in
10 participation rates in response to ethics rules in the
11 United States, and the thought was that it is not a bad
12 thing if we are dissuading people of ill motive from
13 wanting to run for public office.

14 46865 Do we want the people or can you
15 actually see over regulation having the effect of
16 dissuading good people just because you are enhancing
17 the onerous nature of these provisions?

18 46866 DR. TURNBULL: I am going to stay
19 away from comments about good people and bad people,
20 but I am going to say I think for some people it is not
21 necessarily that they won't participate, but do we want
22 to make participation disinvasive in terms of privacy?

23 46867 I have talked to some Members of
24 Parliament about the disclosure requirements that they
25 deal with and some are honestly concerned about the

1 fact that their spouse has to go through the same
2 process even though this person isn't a public official
3 and they do consider it to be a fairly extensive
4 violation of their privacy that is ultimately
5 unnecessary.

6 46868 Just because we can lay down fairly
7 onerous regulations doesn't mean we ought to and I
8 think that -- I mean, the right conversation has to be
9 had with the people who are facing these regulations
10 about what is appropriate and, you know, at what point
11 is the public interest and the public need for
12 knowledge about this stuff quenched.

13 46869 MR. ROITENBERG: Paul, we have heard
14 of the British model from Lori.

15 46870 Do you suggest or do you think that
16 having such a body as they have in Great Britain for
17 individuals to approach following their leaving of
18 public office would add an additional bureaucracy that
19 we don't need or would it be the kind of measure that
20 would give individuals leaving high public office some
21 measure of certainty about prospective employment when
22 they leave?

23 46871 DR. THOMAS: When we ask people to
24 serve in public office they are making sacrifices in
25 many cases. It is not that it is all altruistic, but

1 clearly there is an element of service attached to it.

2 46872 In this current climate of political
3 cynicism it is difficult to get people to run for
4 public office, and they are entitled to have advisory
5 opinions about what their obligations are, whether
6 those be legal or ethical in nature.

7 46873 I gather that Commissioners of
8 various kinds can be approached to provide such
9 advisory opinions.

10 46874 And how much of it is, in real terms,
11 public various. In Manitoba under the Conflict of
12 Interest laws the information resides in the Clerk's
13 Office. You ask the Clerk's Office does anybody ever
14 come and look at the holdings of MLAs? And nobody ever
15 does, so de facto there is secrecy, but in principle it
16 is open.

17 46875 So in the event that there was -- as
18 there was a few years ago about defeated MLAs taking
19 office equipment away, you know, you can explore the
20 background of people if you wish to do that.

21 46876 You know, there is a blend here of
22 approaches that needs to be available, and it may be
23 that a committee of Parliament with the advice of a
24 Commissioner is a way in which these dialogues which
25 are not staged in the context of an upheaval of some

1 kind, some scandal of some kind, but are more calm and
2 thoughtful, honest.

3 46877 I think British MPs say in the survey
4 that I cited earlier that they will never say in public
5 what Lori has just said; that their spouse is mad at
6 them for the fact that he or she has to declare
7 everything that is involved in their private life in
8 order to satisfy some rule of the legislature. They
9 won't dare to say that in public because they will be
10 seen to be wanting to avoid strict standards and
11 evading accountability.

12 46878 So they will harbour the resentment
13 of having to do it, but they don't want -- they don't
14 want to speak up in public because they know there will
15 be a backlash against them if they do that.

16 46879 MR. ROITENBERG: Greg, if I could for
17 you, we have a regime in place currently. There are
18 matters of improving it, there are manners of looking
19 outside of Canada to other regimes, there are manners
20 of looking to provincial regimes and finding ways in
21 which we can improve the system.

22 46880 The question is: How do we improve
23 the system without over regulating? And is over
24 regulation going to not only deter individuals, but is
25 it going to cost the system to a greater degree than

1 maintaining the status quo?

2 46881 MR. LEVINE: I'm sorry, I just want
3 to collect my thoughts.

4 46882 I have, just as I had a problem with
5 the deterrence argument, I have some concern about the
6 notion of over regulation.

7 46883 Conceptually and theoretically I can
8 see that we could get to a point where any regulation,
9 whether it is about ethics or something else, can
10 become burdensome, but we are not remotely in that
11 area. I mean, it's like we are not on that planet yet.

12 46884 What we have actually are sets of
13 laws and codes with considerable ambiguity at the
14 federal level that we need to clarify and make
15 understandable and enforceable. I don't think we are
16 in this territory of exceeding over regulation. So I
17 have some difficulty with the question in that sense
18 because I don't -- well, conceptually and theoretically
19 one could say well, you could burden people
20 inordinately. I don't think we are there.

21 46885 I do understand the point about
22 disclosure laws and privacy, but for the most part I
23 don't think we are there.

24 46886 MR. ROITENBERG: Lori, if I could
25 turn that question to you, because in reading your

1 paper I sense some concern about over regulation in
2 this regard.

3 46887 DR. TURNBULL: My concern I guess is
4 placing our energy and concentration on expanding
5 regulation and expanding penalties at the expense of
6 thinking about what our objectives are and whether or
7 not they could be met with a more comprehensive
8 approach.

9 46888 Like, for instance, you can go on for
10 a while about, you know, trying to make sure that all
11 of the loopholes are closed, which I understand
12 entirely, and in order for a regulatory regime to have
13 integrity it can't be full of holes, obviously.

14 46889 But I mean you can go on at length to
15 anticipate problems and codify them and to lengthen the
16 cooling off periods from six months to a year to two
17 years to five years, and you can go on forever. But my
18 concern is that if we do that at the expense of paying
19 attention to other considerations, we are not any
20 closer to the objectives of the regime in the first
21 place.

22 46890 Like if you look back and why are we
23 doing this, it is to make the public trust Members of
24 Parliament but to trust public officeholders. And
25 having to wait two years or five years or seven years,

1 that doesn't have anything -- that has nothing to do
2 with it. That is not going to make anybody trust
3 politicians any more.

4 46891 If you avoid some sort of an ethical
5 question or scenario because you don't want to pay the
6 penalty for it, that is not integrity; that is a
7 cost-benefit analysis.

8 46892 The public wants to see that there is
9 a reason to trust Members of Parliament and public
10 officeholders, so I guess I am more concerned with
11 generating a culture of integrity. I am more concerned
12 with us, as Paul was saying, having a debate about
13 ethics and decency that is not about corruption or
14 negativity. It is about being more aware of what
15 politicians and public officeholders are expected to do
16 in terms of right doing, not wrongdoing.

17 46893 MR. ROITENBERG: Paul, we have spent
18 a good deal of time speaking of regulation and of
19 enforcement. The one thing we haven't really discussed
20 is the nexus that joins the two, which is detection.

21 46894 How, in our current system, do we
22 determine whether the question has even arisen in any
23 given situation?

24 46895 DR. THOMAS: Let me come to that, but
25 let me just piggyback on Lori's last comment.

1 46896 I think there is a whole strategic
2 area here that gets neglected and it has to do with
3 communication about ethics; that you can write all the
4 sound laws and adopt ethics codes in the soft law
5 category, but then the challenge really is to make
6 those documents come alive and make them matter in the
7 culture of the organizations.

8 46897 It becomes a strategic communications
9 challenge, then, about how you get that message out.
10 Whether it is in the corporate world or public sector
11 organizations where values codes operate, that remains
12 to be a challenge because you are communicating at
13 different levels within the organization for people who
14 are on the frontline as well as people who are in the
15 executive suites in those organizations.

16 46898 Now, if you would refresh my memory
17 about the question, please.

18 46899 MR. ROITENBERG: The question
19 involved about how we go from regulation to enforcement
20 by way of actually detecting that there is an issue.

21 46900 DR. THOMAS: Detection, yes.

22 46901 I guess, you know, in somewhat simple
23 terms there is sort of active monitoring, scrutiny of
24 what documents have been filed by officeholders, what
25 behaviours are observed, whether people have come into

1 compliance, and then there is I guess a complaints
2 based model in which citizens, other parliamentarians,
3 the media bring matters to the attention of Information
4 Commissioners -- or Commissioners of various kinds.

5 46902 So again, you want a mix of those.
6 You don't want simply people sitting around in offices
7 presumably waiting for someone to arrive with a dossier
8 and put it on your desk. As part of the communications
9 function, presumably Commissioners do outreach and
10 educational efforts and in the course of doing that
11 they may learn things about behaviours that are
12 borderline, questionable in some ways, and they could
13 take note of that.

14 46903 They may, through their handling of
15 individual cases, see a prevalent pattern of behaviour
16 in a particular part of government where they think it
17 requires more systemic investigation. They may be able
18 to see across boundaries of organizations to see
19 patterns that are emerging and deal with them by way of
20 general statements that they might make as opposed to
21 waiting for something to arrive.

22 46904 So there could be an anticipatory act
23 part of this.

24 46905 For example, through the use of
25 contracting out in public-private partnerships more and

1 more we are blending public sector values and private
2 sector values. Does that lead to ethical dilemmas that
3 are uncharted territory? Well, someone who is an
4 Ethics Commissioner, a voice of ethics in government,
5 could say something about that in a way before some
6 crisis or scandal emerged and that would be helpful.

7 46906 To raise the level of the
8 conversation, elevate the debate so it isn't all about
9 pointing the finger or blame after the fact but instead
10 getting out ahead and identifying it as an emerging
11 area of concern. So I think ombudsmen particularly can
12 play a very valuable educational role in that regard
13 because they do tend to look across a number of domains
14 in government.

15 46907 MR. ROITENBERG: Greg, taking Paul's
16 comment and moving it forward, would you foresee that
17 bringing in the British model of pre-approval for
18 post-employment -- post holding of office employment
19 would almost take away the need for detection because
20 you are getting that pre-approval before taking the
21 employment?

22 46908 Would it be of benefit in that
23 regard?

24 46909 DR. THOMAS: That's interesting. I
25 think there are two -- I'm not sure that that is

1 necessary, although I could see that it would be
2 helpful.

3 46910 What I think -- two things that could
4 be done that would help both the government and
5 individuals take responsibility, which it seems to me a
6 number of the comments that both Paul and Lori have
7 raised are about instilling a culture and instilling
8 understanding of these rules.

9 46911 A couple of techniques that are
10 important in doing that are advisory functions of
11 Commissioners. And interestingly, section 43 of the
12 Conflict of Interest Act allows someone to seek advice
13 about whether they are fulfilling their obligations.
14 It doesn't allow somebody who is outside of the system,
15 like a former public officeholder, to seek that advice.
16 That might be an interesting tool to allow former
17 public officeholders to seek the same kind of advice
18 that current public officeholders do.

19 46912 The other technique that might be
20 useful that is found in provincial legislation is to
21 have -- as opposed to pre-approval of employment, it is
22 to have government in some way monitor former public
23 officeholders' attempts to contract with the
24 government.

25 46913 So you are not in a way limiting what

1 former public officeholders can do in a general sense,
2 but you are in a specific sense.

3 46914 MR. ROITENBERG: Lori, I will give
4 you the last word on the issue of detection if you
5 choose to take it.

6 46915 DR. TURNBULL: Sure. I will take it
7 quickly.

8 46916 The committee in the U.K. only a
9 couple of years ago was it actually part of the
10 ministerial code that people had to consult the
11 committee. So, for instance, there is no legal
12 obligation that upon leaving public office you must
13 consult this committee and if you don't something is
14 going to happen to you. It's not that.

15 46917 But there is a clause in the
16 Ministerial Code that says it is expected that upon
17 leaving Cabinet, you do consult this committee about
18 future offers.

19 46918 Now, from what I can gather about
20 this, compliance with this regime is quite high. When
21 Ministers or former Ministers go to ask the Committee
22 about, you know, firm offers of employment, the
23 committee will come back with the decision. And if the
24 committee recommends that the employment go forward,
25 the decision is public.

1 46919 So there is a sense in which there is
2 kind of a precedent being set here that these types of
3 things are appropriate, you know, within certain
4 circumstances.

5 46920 If the Committee advises that you
6 don't take the appointment, the report is filed to the
7 Prime Minister and to the person in question but it is
8 not made public.

9 46921 However, once that report comes back,
10 you know, the Prime Minister's office is aware of the
11 fact that the person was looking -- might have been
12 looking for employment in this area. I think it would
13 raise the possibility of detection because you are
14 thinking okay, that person was advised against that.
15 Is he going to go ahead with it. Is he going to try
16 the same thing?

17 46922 Perhaps it would sort of put a Prime
18 Minister's office on notice that this person is outside
19 now looking for something. So you have information
20 that you didn't have before.

21 46923 So I would suspect that that model
22 might be helpful in detection.

23 46924 MR. ROITENBERG: Thank you very much.

24 46925 Mr. Commissioner, at this point I'm
25 going to move the process forward to questioning of our

1 Commission experts by the parties. And as we went in
2 alphabetical order of the parties before, I'm going to
3 suggest that we go in reverse alphabetical order and
4 commence with Mr. Schreiber.

5 46926 COMMISSIONER OLIPHANT: Just before
6 you do that, Mr. Vickery has been kind enough to bring
7 with him some support personnel, one of whom has
8 already addressed the Commission, Mr. Wild, and during
9 one of the answers that Mr. Levine gave he said that he
10 would like to be able to ask a question. I think we
11 were dealing with gaps there, perhaps something else.

12 46927 I'm wondering, Mr. Wild, if you would
13 be prepared to answer the question that Mr. Levine has
14 to ask?

15 46928 MR. WILD: Certainly.

16 46929 COMMISSIONER OLIPHANT: Could I just
17 ask you to come up to the table, please.

18 46930 Thank you very much, Mr. Wild.

19 46931 I hope you remember the question that
20 you wanted to ask, Mr. Levine.

21 46932 MR. LEVINE: Yes, I do.

22 46933 COMMISSIONER OLIPHANT: Can you turn
23 your microphone on, please, sir?

24 46934 MR. LEVINE: I'm sorry. I'm not used
25 to that.

1 46935 What I wanted to ask, I believe, was
2 around the gaps and coherence between the Lobbying Act
3 and the Conflict of Interest Act.

4 46936 It is the case that they serve
5 different purposes.

6 46937 Actually, I have two questions, if I
7 may, but one is related to that.

8 46938 What is lost by ensuring that there
9 is coherence and consistency between the two Acts when
10 they are dealing with matters that are essentially the
11 same?

12 46939 I realize that representation is
13 different under the Conflict of Interest Act than it is
14 under the Lobbying Act, but wouldn't you expect that
15 the consequences of, say, lobbying by a former public
16 officeholder would be treated the same in both sets of
17 legislation?

18 46940 MR. WILD: I think the complicating
19 factor in this is that if there is lobbying going on
20 that actually falls within the definition of lobbying
21 under the Lobbying Act, there is no actor that I can
22 think of under the Conflict of Interest Act that isn't
23 actually caught under the Lobbying Act.

24 46941 So the Commissioner of Lobbying would
25 have purview to address a post-employment situation of

1 a public officeholder that falls under the Lobbying Act
2 and would address the situation in terms of that
3 particular requirement.

4 46942 Now, it may mean at the same time the
5 Conflict of Interest and Ethics Commissioner is
6 assessing the violation that that activity may have
7 triggered under the Conflict of Interest Act, but given
8 the nature of the way the Lobbying Act is written, the
9 nature of the enforcement mechanism under it, it would
10 certainly seem to me that that is going to be the
11 proceeding, if you will, that would have priority in a
12 certain sense.

13 46943 It is not barring the Conflict of
14 Interest and Ethics Commissioner from not dealing with
15 it at all, although I think generally speaking there is
16 some purview in her legislation that she could decide
17 look, the Lobbying Commissioner has -- the Commissioner
18 of Lobbying has jurisdiction here. This particular
19 violation is one more about the activity of lobbying
20 and therefore that Act shall prevail and I will step
21 aside.

22 46944 I think the idea is more or less
23 captured somewhat by Professor Turnbull's comments in
24 that there are two different sets of activities being
25 covered. There may be some overlap between the

1 activities, but they Conflict of Interest Act is
2 dealing with post-employment in a much broader fashion
3 than the Lobbying Act is. The Lobbying Act definition
4 is narrower in scope than the Conflict of Interest Act
5 definition is.

6 46945 At the end of the day I guess, when
7 you look at the Lobbying Act, you have to look I guess
8 at the totality of that legislation to understand the
9 regulation that it is trying to do around the lobbying
10 activity.

11 46946 Conflict of Interest Act, I look at
12 it, I mean realizing there is some overlap, it is a
13 different piece of legislation trying to do a different
14 thing.

15 46947 The Lobbying Act is really about
16 trying to regulate lobbying that is going on in the
17 government: who can do it, how they can do it and the
18 disclosure of requirements around the act of doing it.

19 46948 The Conflict of Interest Act is
20 something different. I mean, I know this is the
21 difficulty of it, because when you come back to it, it
22 keeps coming back to but they both have post-employment
23 provisions, and yes they do.

24 46949 But while it is true the Lobbying Act
25 would be a subset of the post-employment provisions in

1 the Conflict of Interest Act, it is a subset that has a
2 very specific statutory regime around it.

3 46950 So at least in my view, I guess, you
4 can see them as, you know, two separate pieces of
5 legislation. Granted I understand the point of view
6 that perhaps there is some overlap there and why isn't
7 it more coherent.

8 46951 I think that raises other issues if
9 you start to go down the path of coherence and what do
10 you mean by that in that context. Are you talking
11 about wanting to, you know, broaden the enforcement and
12 penalty regime in the Conflict of Interest Act or are
13 you talking about narrowing the enforcement and penalty
14 regime that is in the Lobbying Act?

15 46952 The point, why I raised that, is
16 because the Lobbying Act has a broader scheme to it
17 that has other penalties and the penalty provision in
18 the Lobbying Act that applies for post-employment
19 applies for a host of other activity under that Act as
20 well. It is a whole scheme.

21 46953 You know, when these things were
22 being done -- I wouldn't suggest that, you know, they
23 were done in isolation of each other, because they were
24 not. I think all parties involved in the drafting of
25 the Accountability Act and in the movement of that

1 piece of legislation through the House and the Senate
2 were well aware of how the interplay between these two
3 pieces of legislation would operate and would work, at
4 least as much as we could tell based on the language
5 that we were using, without knowing how Commissioners
6 would potentially define some of that language in the
7 future.

8 46954 The view again was that lobbying was
9 going to be treated differently than other forms of
10 post-employment. I think there are primarily political
11 reasons for that and at the end of the day, from my
12 perspective, that is what Parliamentarians -- that was
13 their intent and that was with kind of their full
14 knowledge.

15 46955 You see that again in the way the
16 penalty scheme was constructed. That is why a
17 five-year and a two-year.

18 46956 I realize some people look at it and
19 they say well, why isn't it the same for both. It is
20 an interesting question, but from my perspective that
21 is what Parliamentarians wanted. They decided that
22 they wanted lobbying to be treated in a tougher way
23 than other issues.

24 46957 You know, there is arguably public
25 policy reasons behind why lobbying may have been more

1 of a concern that some of the other more general issues
2 of post-employment that the Conflict of Interest Act is
3 looking at and dealing with.

4 46958 MR. LEVINE: May I...?

5 46959 I understand what you are saying and
6 I have to assume it was the intent of Parliament to
7 create something different and lawyers being who they
8 are, we tend to try to see the logic. So I don't have
9 any question about that.

10 46960 But I do think it is sort of odd that
11 the one that has the wider potential of range of --
12 lobbying in a general sense, in a generic sense as
13 opposed to lobbying how it is defined under the
14 Lobbying Act, that the more severe penalties and the
15 more severe restriction on contact is for something
16 that could be less -- less problematic than the general
17 scope of potential representations to the government.

18 46961 That is how I would phrase my
19 concern.

20 46962 MR. WILD: The difference is clearly
21 the payment of money.

22 46963 MR. LEVINE: Yes.

23 46964 MR. WILD: And the public policy view
24 that is being expressed by Parliamentarians is that if
25 lobbying is engaging the payment of money -- in other

1 words, you are going off and representing somebody
2 else's interests and you are being paid to do that --
3 and that in any way can cast some doubt or view that
4 you are taking advantage of your office as a result of
5 doing so, that is just simply seen as being worse than
6 going off and advocating as a private citizen or on a
7 volunteer basis for an organization.

8 46965 Again, I mean I can't judge, I'm not
9 here to advocate one way or the other. That is simply
10 I think the view that was being expressed, is that the
11 payment of money does mean that it is something more
12 serious and is to be treated more seriously.

13 46966 MR. ROITENBERG: Thank you, Mr. Wild.
14 46967 Mr. Auger, on behalf of
15 Mr. Schreiber, do you have any questions for the
16 experts?

17 46968 MR. AUGER: Professor Turnbull, you
18 had introduced the concept of -- I think you have
19 referred to it as focusing on rightdoing as opposed to
20 wrongdoing. And I thought that was an interesting
21 concept because we spent a lot of time on sort of
22 regulation and focusing on wrongdoing.

23 46969 I was wondering if you could develop
24 that a little further in terms of rightdoing. What do
25 you mean by that? What is an example and how could

1 that perhaps be achieved?

2 46970 DR. TURNBULL: Depending on which
3 scholar you read on this particular issue, rightdoing
4 might be things like informing your constituents, you
5 know, conducting business in a transparent way.

6 46971 It might be how you behave in
7 Parliament. Do you interrupt your colleagues? Are you
8 respectful? Those kinds of things might speak to your
9 sense of Parliamentary decency.

10 46972 Then some other things, if you were
11 to look at some of the cases that have come before
12 Ethics Commissioners, you might look at some examples
13 and think those are not necessarily decisions that --
14 or those aren't necessarily things that you want to be
15 put through a judicial process. These are things that
16 you want to, you know, have a conversation about and
17 that the public probably has something to say about
18 whether or not this person, you know, is doing
19 something ethical.

20 46973 Like, for instance, one debate we had
21 a couple of years ago was whether or not it is ethical
22 to leave one party and cross the floor to another party
23 without going to your constituents for a by election.
24 I mean that might not be something you want to prohibit
25 in legislation, that somebody might receive a very

1 hefty penalty for. But you could make the argument
2 that the ethical thing to do, the right thing to do is
3 this, you know, the decent thing to do is "X".

4 46974 So instead of thinking about whether
5 or not your actions are violating the Code of Ethics,
6 it is: Is this decent, is it defensible, is it
7 transparent?

8 46975 I hope that helps.

9 46976 MR. ROITENBERG: Mr. Auger, you still
10 have time for more, if you choose.

11 46977 Mr. Conacher...?

12 46978 MR. CONACHER: Thank you very much
13 and thank you to all three researchers for the papers
14 which were all very informative, especially in terms of
15 what is happening in other jurisdictions and what has
16 happened in other jurisdictions.

17 46979 For Mr. Levine, first, I just wanted
18 to clarify something in your paper. It's on page 52.

19 46980 I think it is probably just a typo,
20 but I just wanted to clarify because you write on page
21 52:

22 "Parliamentary secretaries, for
23 example, are not expressly
24 included in the Conflict of
25 Interest Act."

1 46981 MR. LEVINE: That's incorrect, yes.

2 I need to clarify that, yes.

3 46982 MR. CONACHER: I was thinking maybe
4 you just meant the Lobbying Act because they aren't --
5 yes, okay.

6 46983 MR. LEVINE: That's correct. Thank
7 you.

8 46984 MR. CONACHER: Okay. To that general
9 point about covering everyone, I have a question for
10 all three of you and that is: Should some rules apply
11 to everyone who works in or for government or for
12 opposition parties or as a lobbyist or a former public
13 officeholder?

14 46985 And when I say "some rules", if you
15 have had a chance to look at Democracy Watch's
16 submission you will see in several places we propose a
17 sliding scale in terms of restrictions, cooling off
18 periods, penalties, even definitions of what a friend
19 would be in certain positions, the scope of what you
20 could be in a conflict of interest for.

21 46986 So that's what I mean by some rules;
22 that there would be some sort of sliding scale.

23 46987 The general question is there are,
24 again if you have looked at our submission, lots of
25 people are not covered by lots of different rules.

1 Should some rules apply to everyone who works in
2 government as a lobbyist for an opposition party or as
3 a former public officeholder?

4 46988 MR. LEVINE: Just to clarify that
5 last, who works in government, who is contacting
6 government, right? Should there be rules for anyone
7 who contacts government?

8 46989 MR. CONACHER: No, for those both in
9 and for those contacting; so whether they are in
10 government as a politician, appointee, political staff
11 person, public servant or in the opposition party side
12 and then leaving any of those positions, and also some
13 rules -- should some rules apply to anyone who is
14 contacting government as a lobbyist, as part of an
15 organized lobbying effort?

16 46990 MR. LEVINE: Oh, I see. Yes.

17 46991 DR. THOMAS: I will react to that. I
18 read that passage in your submission with interest.

19 46992 It goes back to the point a moment
20 ago about the balance between detecting and dealing
21 with wrongdoing and the promotion of rightdoing.

22 46993 And rightdoing, it seems to me,
23 involves the upholding of enduring and cherished values
24 within the political system and within the public
25 service, and we don't agree on what that list should be

1 of those values necessarily and we certainly don't
2 agree always on the interpretation of those values.
3 And we disagreed, often profoundly, about how the
4 values should be interpreted and traded off when there
5 are conflict situations.

6 46994 But the idea is that it shouldn't be
7 all negative and policing in focus. We should also
8 look at promotion of positive behaviours that would
9 stand a reasonable test of observation, and so on.

10 46995 Now, to Duff's suggestion, a sort of
11 umbrella set of values that everybody across the entire
12 public sector and perhaps now this extended universe of
13 organizations that interact so closely now with the
14 public sector, I think if we say there is a lot of
15 platitudes and generalities in existing Codes, I think
16 anything along those lines would be at a high level of
17 abstraction and would be I think very difficult to
18 interpret in a legal sense.

19 46996 So I think they would be open to
20 subjective interpretation, and so on.

21 46997 We have in some of the jurisdictions
22 where ethics codes have been developed, a public
23 service wide set of codes and then we have below that
24 tailor-made departmental codes of conduct.

25 46998 So in the Conservation Department,

1 environmental sustainability might be another value
2 that would be one of their primary values, and so on.

3 46999 Then we have professional groups
4 within the public service, whether they be lawyers,
5 accountants, and so on, who have their own Codes of
6 Ethics and so on.

7 47000 So I think we are increasingly
8 getting into a layered world where we have sort of a
9 cascading set of statements to set parameters around
10 the exercise of discretion and the use of judgment and
11 responsible behaviour. I think I would be hard-pressed
12 to develop a matrix which said appropriate to the scope
13 of your authority and your independence, you should be
14 subject to more or less stricter rules and more or less
15 severe penalties if you violate those rules.

16 47001 I am thinking of my short-lived and
17 not so brilliant career chairing the Board of the
18 Manitoba Telephone System and we developed a matrix of
19 primary and shared responsibility for certain types of
20 decisions between the Board, the Executive, the
21 Minister, the government as a whole, and so on. We
22 tried to think through those issues more clearly and
23 then we had codes of conduct for all the parties as
24 well.

25 47002 It was a difficult exercise to flesh

1 out, to operationalize in many ways. I just think it
2 could become artificially precise in a way. Well,
3 where does a committee Chair of a Standing Committee of
4 the House of Commons rank? Below a Parliamentary
5 Secretary?

6 47003 But what about in a minority
7 situation when you are chairing the Ethics Committee on
8 the eve of the Oliphant Inquiry? I mean, does that get
9 you into more tricky areas of responsibility?

10 47004 You know, there is a limit to how far
11 we can go I think in delineating the zones of
12 responsibility and prescribing rules, and so on. At a
13 certain point you have to accept a certain amount of
14 humility about your ability to anticipate all possible
15 situations that would arise with all different actors
16 and more and more, again this interdependence and
17 interaction amongst different parties, and so on.

18 47005 Looking back at events where things
19 went wrong and there is controversy, we are going to
20 have to diagnose and attribute relative portions of
21 blame, if you like, to who did what in what
22 circumstances. And so that I think becomes tricky if
23 you are going to attach a sliding scale of penalties to
24 that in a context where there may be another order of
25 government involved, an influential private party

1 involved, and so on.

2 47006 I will stop there.

3 47007 DR. TURNBULL: One thing I was
4 thinking about in terms of the applicable of certain
5 rules is that from my understanding Members of
6 Parliament in Canada don't necessarily face post-public
7 employment restrictions as Cabinet Ministers do. So
8 these things are set out in the Conflict of Interest
9 Act which doesn't apply to your, you know, just average
10 Member of Parliament.

11 47008 Now, in the American system, American
12 Senators and congress people in the House of
13 Representatives do face post-public employment
14 restrictions in terms of their ability to come back and
15 lobby former colleagues. I think the difference there
16 speaks to just the different roles, you know, and the
17 differences in terms of power, autonomy when you
18 compare the American Congress to the Canadian
19 Parliament.

20 47009 But it does mean that a Member of
21 Parliament can sit, perhaps for several terms, and
22 develop a relationship, a familiarity with people in
23 positions of power and then walk out and not face these
24 restrictions.

25 47010 So that's an issue we are thinking

1 about, you know, different applicabilities.

2 47011 MR. ROITENBERG: Mr. Levine, I'm not
3 sure if you want to wade in as well.

4 47012 MR. LEVINE: I agree with the comment
5 about -- having said, sort of defending a greater
6 proliferation of rules, I can see that we could
7 over-complexify, which isn't to say, though, that
8 everyone in the public sector shouldn't be subject to
9 values and ethics codes. They are in fact, with some
10 exceptions.

11 47013 It is presumably the exceptions you
12 want to get at, which I wholeheartedly would agree with

13 47014 MR. CONACHER: For all of you again,
14 if you would like to respond to this, Mr. Levine on
15 pages 32 and 54 you talk about that Members of
16 Parliament -- you are not really saying it's a solid
17 rule, but you do say they have to be more cognizant of
18 apparent conflict of interest because of their
19 statement of principles.

20 47015 I'm sure you saw also section 3.1 of
21 the MPs' code, that makes it very clear that the
22 principles are just principles, they are not
23 enforceable; that the Commissioner can take into
24 account the principles while enforcing the rules, but
25 the rules don't mention "apparent" at all.

1 47016 MR. LEVINE: Yes.

2 47017 MR. CONACHER: So on that -- and the
3 principles are not just about apparent, but also all
4 sorts of other things that essentially set a general --
5 if you took out the very vague ones and left the more
6 concrete ones, they do send out a general enforceable
7 rule. If it was moved to the Rules section, you could
8 actually enforce some of them: honesty.

9 47018 I don't think you can enforce acting
10 in a way that enhances the public's confidence and
11 trust in the integrity of the House of Commons, because
12 that means everything you do would have to increase the
13 public trust, which would be a pretty difficult
14 standard to hold anyone to.

15 47019 But some of them you could take.

16 47020 So what about if you are not going to
17 get into specific rules for everyone with a sliding
18 scale of penalties, cooling off periods, et cetera,
19 what about at least having one general enforceable rule
20 that applies to everyone?

21 47021 Just to give you an example, which I
22 do in our submission, a ministerial adviser who works
23 less than 15 hours a week could also lobby for a
24 corporation less than 20 per cent of their time, be
25 working for the Minister, but also lobbying the

1 Minister, because the person would not be covered by
2 either the Lobbying Act or the Conflict of Interest Act
3 if they were in that position. And then they could
4 leave working for the Minister and lobby anyone in the
5 government the next day, because they weren't covered
6 as long as they worked less than 15 hours a week as a
7 ministerial adviser.

8 47022 So if we are not going to have a
9 sliding scale that captures the kind of person, what
10 about the idea of one enforceable rule requiring them
11 to be ethical and honest so at least they are captured
12 by something which would mean that they can't do that
13 scenario I just worked out, because no Act covers you
14 specifically, but you still can't be working for a
15 Minister while you are lobbying the Minister at the
16 same time, which currently is legal.

17 47023 MR. LEVINE: Yes, you are right.

18 47024 What the question is going to is
19 about application and how broad is the application of
20 this set of rules. I agree that it should be broad
21 enough to cover any actually working within government
22 and then moving outside of it.

23 47025 So in that sense I agree, yes.

24 47026 DR. TURNBULL: Okay. I'm going to
25 take your last point first and then I'm going to get

1 back to the rules and principles and the allocation of
2 the principles outside the enforceability section.

3 47027 First, if this person who works
4 part-time for the Minister can also lobby the Minister
5 as long as they do so within a specific time period,
6 that person is not caught by either of these pieces of
7 legislation. But to me the person of interest in this
8 equation is the Minister. And as long as the Minister
9 doesn't allow -- and I guess I'm looking for maybe your
10 feedback on that.

11 47028 As long as the Minister doesn't allow
12 his own judgment to be impaired and he is sort of aware
13 of what is going on, is it not the Minister's
14 responsibility to -- and the Minister is obviously
15 covered by a conflict of interest code which expects
16 him to act in a proper way with regard to the public
17 interest.

18 47029 So if I can let you think about that.

19 47030 MR. CONACHER: Oh, I have thought
20 about it a lot.

21 47031 DR. TURNBULL: Okay, great.

22 47032 MR. CONACHER: Actually for about 15
23 years.

24 47033 But Cabinet wrote this this way.

25 47034 The Minister wouldn't be dealing with

1 a friend or furthering their own interests by having
2 this arrangement, so the Minister is not covered either
3 in deciding to hire a person who is lobbying them.

4 47035 It is one of the scenarios I have. I
5 mean, it just shows how huge the loopholes are; that
6 you can actually legally do this, have a lobbyist
7 working for you as a Minister and then have that person
8 leave and lobby anyone in government the next day.

9 47036 So I would trust the Minister, except
10 the Minister was involved presumably in writing this.

11 47037 I would ask Mr. Wild those questions,
12 but I know he can't answer them. And no Minister
13 probably could either.

14 47038 Okay, so -- yes, Mr. Thomas?

15 47039 DR. THOMAS: Can I just make an
16 observation?

17 47040 On page 27 in your document you say
18 at one part of the sentence:

19 "... dishonesty is the most
20 prevalent problem in politics in
21 Canada today and prohibiting it
22 will be one of the positive
23 steps that can be taken to
24 restore public trust in
25 government."

1 47041 I don't take as negative and
2 pessimistic a view of what is the current problem in
3 Canadian politics. I can think of quite a number of
4 issues that come out ahead of corruption in public
5 office, and so on.

6 47042 But I mean that's debate and we could
7 have an honest disagreement over that.

8 47043 In the work I have done on trust in
9 political institutions and in the public service, and
10 so on, we often conflate the two notions of trust and
11 confidence because that is the way the pollsters ask
12 the question quite often: Do you have trust and
13 confidence?

14 47044 I might have trust in a particular
15 individual because I believe their motives and
16 intentions and behaviours are above reproach. They may
17 not be competent and I may not have confidence in them.
18 I think there are two distinct ideas there.

19 47045 So therefore when we try to make
20 politics as clean and above reproach as possible, we
21 still may find that people register a lack of
22 confidence in government because they don't believe
23 governments have the capability or the political will
24 to do what needs to be done.

25 47046 I know that is a bit of a

1 philosophical digression, but I think we have -- it
2 goes back to my point earlier about the language
3 matters and what we call these things matters a great
4 deal.

5 47047 So trust, I think we should be
6 careful about how we use that word. It has so
7 multitude of meanings. It is such a multi-faceted
8 phenomena and how we gain trust and how we repair trust
9 when it is lost is very, very tricky.

10 47048 There is brand new work out now about
11 repairing trust in political institutions and it is a
12 very, very complicated process. You can make headway
13 in the aftermath of a dramatic event like a 9/11 event
14 or something like that, and people's faith in
15 government is temporarily restored. But then another
16 inquiry comes along or something like that and people
17 lapse back to the old negative stereotypes of what
18 politicians are like most of the time.

19 47049 So going back to Lori's original set
20 of aims and the bottom line, maybe the goal is to
21 ensure public trust and confidence. I would say we
22 have to be careful about what we can promise can be
23 fixed by writing more rules and better enforcement,
24 better detection and reading people's sermons on what
25 their duties are in public life.

1 47050 There will be events that happen that
2 will detract from trust at particular points. It will
3 fluctuate, it will go up and down, levels of trust.
4 There isn't a steady process of decline of trust or a
5 steady process of increased trust in public
6 institutions.

7 47051 MR. CONACHER: Thank you very much,
8 and I very much agree, which is why I think our
9 position at Democracy Watch is close the loopholes and
10 set up the system with effective enforcement and then
11 what will happen with public trust will happen with
12 public trust. It is not something that you can just
13 predict as a cause and effect. It depends a lot on
14 compliance record.

15 47052 Turning to some of the terms in the
16 Conflict of Interest Act, first of all I will note for
17 the record, because it does mention in our submission,
18 that we were applying for leave to appeal a case
19 challenging the Ethics Commissioner's definition of
20 private interests essentially, a decision that she had
21 made on a complaint that we had filed.

22 47053 So I just wanted to note for the
23 record that last Thursday the Supreme Court of Canada
24 dismissed our application for leave to appeal, so that
25 litigation is now completed.

1 47054 As a result, we do have a public
2 statement from the Commissioner as to the definition of
3 private interest, that phrase within the Conflict of
4 Interest Act. It is not the same as was used by the
5 Parker Commission in a way.

6 47055 My question for you, Mr. Levine, is:
7 What do you think the legally correct definition of
8 private interest is? And do you see any bar in the
9 Act, as it is currently without changing at all, just
10 to having that term defined as any interest that might
11 reasonably or could reasonably be seen to influence a
12 politician?

13 47056 The reason I'm asking this question
14 is that I think that it is possible, without even
15 changing the Act, that there could be a change simply
16 in that definition to bring in the appearance of a
17 conflict standard just by the way you define private
18 interest, not by the way you define conflict of
19 interest; that is defined in the Act. But it says you
20 cannot further a private interest.

21 47057 If a private interest is defined as
22 any interest that could be reasonably seen to influence
23 you, then the appearance standard is brought in because
24 you are in a conflict whenever you have an opportunity
25 to further that interest that could be reasonably seen

1 to influence you.

2 47058 Do you see any legal bar to having
3 that definition of private interest?

4 47059 MR. LEVINE: To redefining it, yes.
5 As it is now, it is negative in the sense of it doesn't
6 include things that are general that affects a public
7 officeholder as one of a broad class and affect it --
8 actually, it codifies the common law exceptions to what
9 a conflict of interest is.

10 47060 MR. CONACHER: Yes.

11 47061 MR. LEVINE: That is what the current
12 definition is.

13 47062 MR. CONACHER: Just to clarify, I
14 meant to say ignore those exemptions, just the phrase
15 "private interests".

16 47063 MR. LEVINE: Right.

17 47064 MR. CONACHER: Do you think the
18 legally correct definition of private interest is any
19 interest that could influence you?

20 47065 MR. LEVINE: I think that's the
21 intent actually, because it -- I'm hesitant as a lawyer
22 when you said to me what is absolutely legally correct.
23 You didn't use the word "absolutely", but my own mind
24 goes to a I don't want to answer that.

25 47066 But the point of private interest --

1 and it is an extension from the Parker Commission, the
2 inquiry into allegations concerning Sinclair Stevens.
3 It is an extension of that, because that definition
4 only deals with economic interests.

5 47067 The point of putting private
6 interest, which happened in British Columbia shortly
7 after the Parker Commission reported, was to extend the
8 meaning of this beyond economic. The common law deals
9 with pecuniary interest, with financial matters, and it
10 was acknowledged that other interests matter.

11 47068 MR. CONACHER: Right.

12 47069 MR. LEVINE: And so it seems to me
13 that is the point about private interest, but I don't
14 know that that necessarily covers appearances though.

15 47070 MR. CONACHER: Right.

16 47071 Yes, it depends whether you would
17 define that as an interest that might reasonably be
18 seen --

19 47072 MR. LEVINE: Yes. Yes.

20 47073 MR. CONACHER: -- as something that
21 could influence.

22 47074 MR. LEVINE: Yes.

23 47075 MR. CONACHER: Right.

24 47076 When you look at those exemptions in
25 the definition of private interest in the Act,

1 Democracy Watch's position is essentially about almost
2 100 per cent of what Ministers and staff and appointees
3 do other than the extent, which is supposed to be very
4 limited, that they participate in handing out any
5 contracts.

6 47077 Actually, the handing out of those
7 contracts which Ministers are only supposed to do for
8 their own advisers, no one else -- and staff the
9 same -- ministerial staff, Cabinet appointees, maybe
10 they are in a position at a Crown Corporation or
11 something where they are directly involved in handing
12 out contracts.

13 47078 But for a Minister or ministerial
14 staff on the policymaking side as opposed to a Crown
15 Corporation with operations, is anything covered?

16 47079 In your opinion as a lawyer, what is
17 not of general application? What does not affect the
18 public officeholders, one of a broad class of persons?

19 47080 The example I use in the paper is,
20 Democracy Watch's position is that the Environment
21 Minister could own a shipping company and still
22 shepherd through changes to the Marine Liability Act
23 because the Marine Liability Act doesn't just apply
24 to -- let's say the Minister's name was Smith and it
25 was Smith Shipping Lines. The Marine Liability Act is

1 not called the Smith Shipping Lines Act; it is a matter
2 of general application.

3 47081 So I'm wondering what your opinion
4 is, if it differs or not in terms of Democracy Watch's
5 position that these exemptions mean almost nothing that
6 Ministers do is actually covered by the Conflict of
7 Interest Act.

8 47082 And similarly for MPs, because it is
9 in the MPs' Code as well that they are exempted from
10 these things.

11 47083 MR. LEVINE: Yes, that's true. I
12 would think, actually, for MPs, that the position is
13 clearer that you are articulating, because there will
14 almost be few things that they are making a particular
15 decision on.

16 47084 MR. CONACHER: Even hiring their own
17 staff.

18 47085 MR. LEVINE: Yes. I would think it's
19 very narrow.

20 47086 It's interesting, because a lot of
21 the conflict of interest law in the country, and a lot
22 of key cases, are actually municipal cases, and the law
23 that grew up around conflict of interest is at the
24 municipal level. There you see the potential for
25 activity which directly benefits the decision-maker a

1 lot more clearly.

2 47087 A re-zoning of a piece of property
3 which could affect property owned by the
4 decision-maker -- and there are a number of cases like
5 this. It is so much clearer than at the federal level,
6 and the provincial level for that matter.

7 47088 And so much of our law comes from the
8 lower level, and it is more directly applicable to that
9 level.

10 47089 But I am hesitant to absolutely agree
11 without knowing the broad panoply of chores that a
12 minister may do. I would say that any potential that
13 the minister has for making decisions that are
14 particular in nature, it will have meaning in that
15 context.

16 47090 MR. ROITENBERG: Mr. Conacher, I will
17 advise you that you have time for one more question.

18 47091 MR. CONACHER: All right, and it will
19 be to Mr. Levine and Ms Turnbull.

20 47092 With these ambiguous terms, which you
21 both highlighted at various points, do you think that
22 the acts and codes can be enforced by the respective
23 commissioners when there are ambiguous terms?

24 47093 To flip it over, do you think that
25 anyone can comply if these terms are not defined, and

1 what do you think the commissioners would have to do
2 beyond defining these terms in order to ensure
3 compliance?

4 47094 Because both the Registrar -- we have
5 a new Commissioner of Lobbying, but the Registrar, in
6 the past, and the Ethics Commissioner have both
7 testified before parliamentary committees, saying that
8 they don't do any inspections, audits, of anything, of
9 anybody, at any time.

10 47095 So the first one is, can you comply
11 when you have ambiguous terms, and can you enforce?

12 47096 Secondly, what do they have to do to
13 increase the chance of getting caught to a level that
14 would encourage compliance, or other enforcement
15 actions, such as inspections?

16 47097 DR. TURNBULL: I think that the
17 ambiguity of the language doesn't necessarily deter
18 people from filing complaints with the commissioner, it
19 just means that there is less clarity about how it is
20 going to turn out.

21 47098 For instance, if there is something
22 in the legislation that says, "One shall not take
23 improper advantage of either current or previous
24 office," the fact that "improper advantage" is
25 undefined means that if a parliamentarian suspects a

1 colleague or a former colleague of some improper
2 advantage, they are going to refer that question to the
3 commissioner, or at least they might, and then it is up
4 to the commissioner to go through the investigative
5 process and come up with some sort of conclusion.

6 47099 But the hope is that that process
7 will encourage some type of debate about what
8 "improper" means.

9 47100 To take, for instance, the code of
10 conduct for members of Parliament, and to go back to
11 the example that I used before, the fact that apparent
12 conflict of interest was prohibited -- the appearance
13 of conflict of interest was prohibited in the code,
14 meant that it allowed a member of Parliament to come
15 forward when he felt that there was something going on
16 that shouldn't be going on.

17 47101 And then, because the commissioner
18 could act on that, it allowed for a dialogue -- a
19 public dialogue -- and some sort of public conclusion
20 about what that really meant and what the parameters
21 are.

22 47102 So I don't think it is necessarily
23 the case that ambiguity means the thing can't be
24 enforced, it just means that you are leaving a little
25 bit more up to the interpretation of the commissioner,

1 and it means that members of Parliament who want to
2 refer possible violations might be a little bit
3 inventive with the ambiguous language.

4 47103 MR. LEVINE: I agree with that,
5 although I think that what you get out of trying to
6 define some of the language is, hopefully, more
7 clarity, and then more potential for people actually
8 complying with it, if they know what it means.

9 47104 The second part -- sorry?

10 47105 MR. CONACHER: The former registrar
11 and commissioner have both said that they don't do any
12 inspections. They don't check any financial statement,
13 they don't see whether anyone is communicating with any
14 department as a lobbyist, whether currently or a former
15 public office holder.

16 47106 Other than the gifts guideline, they
17 haven't issued any interpretation bulletins of any of
18 the key measures in the acts.

19 47107 Do you think that not doing any
20 inspections, audits, at all is encouraging compliance?
21 If not, what enforcement actions, inspections, are
22 needed to encourage compliance?

23 47108 MR. LEVINE: That's an interesting
24 question.

25 47109 If you look at the ombudsman world,

1 generally, and the provincial ombudsmen across the
2 country, all but one have the power to investigate a
3 matter on their own initiative. They don't have to
4 wait for a complaint.

5 47110 And I think that's an extraordinarily
6 important power. What it says to the administrations
7 throughout the country is that we are watchers of the
8 administration, and if we see something critical, we
9 are going to start investigating. We are going to use
10 our investigative powers.

11 47111 I think there is a case for
12 encouraging that kind of mechanism to allow for audit
13 and investigation.

14 47112 And I do think it's an important
15 function for ensuring compliance, even the knowledge
16 that it might happen.

17 47113 MR. CONACHER: Right.

18 47114 Just a quick response to wrap up
19 that; one, just to note, as you did in your paper, that
20 the Sinclair Stevens case, which was essentially the
21 Federal Court, in 2004, concluding that you are not
22 guilty because there was no line drawn, and, therefore,
23 you can't cross a line you don't know about.

24 47115 MR. LEVINE: Yes.

25 47116 MR. CONACHER: Secondly, the

1 commissioners, yes, across the country, but in every
2 case it says "may initiate" --

3 47117 MR. LEVINE: Yes.

4 47118 MR. CONACHER: -- whereas, for the
5 lobbyists -- the Commissioner of Lobbying, it says
6 "shall", if there are reasonable grounds.

7 47119 I think the word "may", in that
8 situation, should be changed to "shall" across the
9 board, because the "may" allows information to be
10 placed before the commissioner, and the commissioner to
11 ignore it, even if the information shows reasonable
12 grounds to believe that there has been a violation,
13 which is not a discretion that I think a commissioner
14 should necessarily have.

15 47120 MR. ROITENBERG: Thank you, Mr.
16 Conacher.

17 47121 MR. CONACHER: Thanks.

18 47122 MR. ROITENBERG: Mr. Vickery, on
19 behalf of Her Majesty, do you have any questions for
20 our experts?

21 47123 MR. VICKERY: No, I do not. Thank
22 you.

23 47124 MR. ROITENBERG: Mr. Commissioner, it
24 is an opportunity for follow-up questions by Commission
25 counsel, and I have a couple, but before I ask them, I

1 wonder if any of my colleagues have any questions, by
2 way of follow-up, that they would like to place at the
3 feet of the experts.

4 47125 Ms Brooks...?

5 47126 MS BROOKS: Thank you, Mr.

6 Roitenberg. I do have one question.

7 47127 I notice, Greg, in your paper, at
8 pages 50 to 51, that you talk about -- and this is in
9 the context of the "improper advantage" in section 33
10 of the Act -- at pages 50 to 51 you talk about whether
11 it would be useful to itemize examples of what would
12 constitute "improper advantage", and I wondered if the
13 other panellists might comment on whether they think
14 that would be a useful addition to the statute.

15 47128 It is a common practice in
16 legislative drafting to include certain examples. It
17 is not exclusive language, and there are principles of
18 statutory interpretation that have developed in the
19 case law that a commissioner could rely upon, were he
20 or she presented with a non-exhaustive list of certain
21 examples.

22 47129 I wondered if the other panellists
23 might comment on what Mr. Levine has put forward, and
24 then Mr. Levine himself; if he has comments to add to
25 what he has in his paper, I would be interested in

1 that.

2 47130 Finally, directing it to Mr. Wild,
3 who is in the wings, if he has any comments to add, I
4 would be interested in what he has to say on that
5 issue.

6 47131 Thank you.

7 47132 DR. THOMAS: I will start. I find
8 the idea attractive. I think it's a good idea, given
9 the fact that there are a lot of grey zones in here.
10 The more outright forms of violations of public trust
11 may be obvious to everyone, and we will all nod our
12 heads in agreement, but it's the less well defined,
13 ambiguous areas where public office holders, both
14 elected and appointed, might legitimately be looking
15 for guidance.

16 47133 We did, in finalizing a document for
17 the Government of New Brunswick, 12 focus groups, and
18 asked people to tell us what they understood these
19 rather vague statements of values meant to them in
20 practical, day-to-day terms, and it was interesting,
21 depending on where you worked, the type of job you had,
22 whether you were frontline or closer to the political
23 level in your job, you would have different
24 interpretations of some of these terms.

25 47134 Their advice to us was, if you are

1 going to communicate about this across the breadth of
2 the Government of New Brunswick, then it would be
3 helpful if you would put in the document illustrative
4 examples that would capture different contexts and
5 different types of problematic ethical areas, or legal
6 areas, and so on.

7 47135 I think that would be very, very
8 helpful.

9 47136 To finish up on this point, one of
10 the debates they had in that province, and in my home
11 province of Manitoba, was what we call these documents.
12 There was a discussion in New Brunswick about adopting
13 the label of a charter, which, for many people in the
14 focus groups, evoked a kind of legal connotation. It
15 was up there with the Charter of Rights and Freedoms
16 perhaps.

17 47137 People thought that "guide" was too
18 wishy-washy. They said: Well, if you want to be
19 guided by it, then go ahead and be guided by it.

20 47138 "Code" is somewhere in the middle, I
21 guess.

22 47139 It does matter what you call these
23 things, and I think you can get around the question
24 about how compelling and binding these are by
25 identifying situations where people might be required

1 to think through what it is.

2 47140 Most people, most of the time, are
3 not going to work daily and coming up against ethical
4 dilemmas that they have to confront, so it is not usual
5 for them to have to reason ethically about what is a
6 right and wrong principle in this situation: How do I
7 think about the potential consequences of this, how do
8 I think about the appearances of this, and so on.

9 47141 Unless you help them by giving some
10 examples, this becomes something that is laminated on a
11 card, or is on a plaque on the wall, and it doesn't
12 mean very much to them, quite frankly.

13 47142 They are responsive in their ethics.
14 They respond to particular cases, I think. That is my
15 observation. And few of them neither have the
16 necessity nor the time to sit back and say, on a Monday
17 afternoon: I think I will spend the next couple of
18 hours reflecting on the ethics within the public
19 service of Manitoba.

20 47143 That is just not the way life is
21 lived. They are doing their job day in and day out.

22 47144 DR. TURNBULL: I agree that it would
23 be very useful, especially in terms of the code's
24 ability to achieve clarity and help members of
25 Parliament and public office holders understand what is

1 expected of them.

2 47145 To me, it makes complete sense to
3 have a non-exhaustive list that you might imagine they
4 would revisit on an annual or biannual occasion, as new
5 questions present themselves.

6 47146 I am also thinking about our previous
7 discussions about generating a culture of ethics. It
8 would be interesting to see parliamentarians, including
9 cabinet ministers, have a deliberation and a debate
10 about what "improper advantage" means, both for current
11 public office holders and members of Parliament, and
12 then after they have left. I think that kind of
13 process, if parliamentarians could see their own
14 submissions reflected in the legislation, might
15 encourage them to take greater ownership of the
16 standards to which they are held.

17 47147 MR. LEVINE: Do you want me to
18 respond?

19 47148 MR. BROOKS: Mr. Levine, if you have
20 anything to add, I would welcome your views on whether
21 the inclusion of that non-exhaustive list might be
22 something that we would like, because it would give the
23 Ethics Commissioner guidance, when he or she applies
24 it, to refer to statutory interpretation principles in
25 applying it to conduct which is not one of the itemized

1 items on the list.

2 47149 MR. LEVINE: I think it is a helpful
3 mechanism, and the idea is, indeed, to help the
4 commissioner interpret it and extend it, which is what
5 you are getting at, through normal statutory
6 interpretation.

7 47150 When I was asked about this before, I
8 was very brief in my response about what it means, in a
9 sense, and it isn't defined. There are variants of it
10 throughout the law.

11 47151 "Improper" really means unseemly,
12 indecent, unsuitable, and so on.

13 47152 There are ways of giving examples of
14 gaining access to channels of power, for instance,
15 using influence in a certain way -- and I would think
16 that that's what we need to do, so I don't want to add
17 much really. Thanks.

18 47153 MR. ROITENBERG: Mr. Wild, if you
19 want to wade in.

20 47154 MR. WILD: I don't know that I want
21 to wade in, but I will respect the Commission and
22 answer the question.

23 47155 I think, again, what you have before
24 you in the statutes is a particular scheme intended by
25 Parliament, in terms of the role of the commissioners

1 of Conflict of Interest and Ethics. Whether or not one
2 wishes to change that statutory scheme -- you know, the
3 commissioner is going to, then, take on whatever he or
4 she gleans from that legislation.

5 47156 At the end of the day, would case
6 examples be of assistance? Possibly.

7 47157 I think that the commissioner, when
8 going through the Act, is going to apply principles of
9 statutory interpretation to any terms that are
10 nebulous.

11 47158 I think the bigger question may be
12 whether or not one should be looking at the statute as
13 kind of the end-all of any discourse that happens
14 around ethics, and whether, through the powers that the
15 commissioner has -- whether it's interpretation
16 bulletins, whether it's educational materials, and so
17 on -- if perhaps those are the places where those
18 examples will be sourced out and sussed out over time,
19 as experience with the Act is gained.

20 47159 I think I will leave it there.
21 Again, I don't want to weigh in one way or the other on
22 whether it's a good thing or a bad thing. I think
23 that's a judgment for the Commissioner to make at the
24 end of the day, in terms of recommendations.

25 47160 I would simply point out that I don't

1 see anything that precludes the use of examples in a
2 non-statutory form, which would also provide education.
3 It could be done in a statute. I think it's pretty
4 open.

5 47161 MR. ROITENBERG: I should point out
6 that Mr. Conacher, while not being a family member of
7 mine in any way, has successfully lobbied me to ask one
8 more question, with your permission, Mr. Commissioner.

9 47162 MR. CONACHER: Thank you very much
10 for your exercise of discretion in my favour.

11 47163 My question is with regard to
12 sections 33, 34 and 35 of the Conflict of Interest Act,
13 the general rules for former public office holders, and
14 it is something that we could take up further tomorrow,
15 if you would like to think about it further.

16 47164 When I look at it, especially,
17 subsection 34(2), about not giving advice using
18 information that was obtained in his or her capacity as
19 a public office holder, and is not available to the
20 public, I look at these rules and essentially say: I
21 don't think that anyone could really do anything for
22 anyone, in terms of dealing with the federal
23 government, especially because of 34(2), because, if
24 they were going to be of any help, that is how they
25 would be of help, giving them inside information, and

1 it is illegal to do so.

2 47165 That is the general question, about
3 how you see that matrix working to, essentially,
4 prohibit doing anything for anyone, domestically or
5 abroad, depending on the situation.

6 47166 But in terms of the enforcement of
7 those rules, I am wondering what you think about
8 requiring the disclosure of assets and liabilities to
9 the commissioner, at least through the cooling off
10 period. That would require you to disclose that, hey,
11 I have this new source of income. Where is that from?
12 Someone has hired me. To do what? Lobby the
13 government, et cetera, including, as 140 countries
14 agreed -- and Canada signed and ratified, but hasn't
15 implemented domestically -- including, as well,
16 following the UN Convention on Corruption and tracking
17 the bank accounts of public officials and former public
18 officials, as Canada has done for any foreign official
19 that sets up a bank account in Canada, but hasn't
20 applied to any domestic official.

21 47167 So I am wondering, first, what you
22 see 33 to 35 prohibiting, in essence, and the overall
23 effect; and secondly, what about some disclosure
24 through that period, and tracking and monitoring as an
25 enforcement mechanism.

1 47168 MR. LEVINE: I don't share the view
2 that a person would be necessarily useless because they
3 couldn't reveal secrets of the government, that that's
4 all they have to sell, in a sense.

5 47169 They are going to have knowledge of
6 government and knowledge of process that few of us
7 have, but I think is acceptable to sell.

8 47170 I think what 34(2) is about is really
9 about prohibiting particular information that is gained
10 while you are an office holder, and particular to
11 particular situations. It is not about a general
12 understanding of government or your ability to persuade
13 people, and so on, which may be enhanced through your
14 career as a public servant or a politician.

15 47171 And it does say "and is not available
16 to the public". You will have a lot of knowledge, as
17 well, that others have, or could have, and it's that
18 "could have" where you will probably have an advantage,
19 in a sense, because you will know how to figure out
20 where it is, which most of us putz around about, trying
21 to figure it out.

22 47172 So I think the prohibition there
23 makes sense.

24 47173 The question you asked about
25 enhancing disclosure so you would cover former public

1 office holders and make them disclose -- in theory, I
2 can see why you would do that, because it would allow
3 the commissioner, in fact, to monitor these
4 prohibitions.

5 47174 The theory of it is the same as
6 having financial disclosure for the current officers,
7 and I understand that theory.

8 47175 I wonder, though, because they are
9 outside, what should be made public and what shouldn't
10 of such disclosure, because they have another life to
11 live, and what would be fair to them in trying to
12 pursue that livelihood -- you know, I can understand
13 the logic, but I would be worried about the breadth of
14 the disclosure.

15 47176 MR. CONACHER: I suggested disclosure
16 just to the commissioner, for the cooling off period,
17 or the five-year period, as well.

18 47177 MR. LEVINE: I can see that, but I
19 think I would want to think a bit more about it.

20 47178 DR. TURNBULL: Yes, I guess that was
21 going to be my point, that I couldn't justify having
22 those sorts of things on the public record.

23 47179 But, again, if it was just to the
24 commissioner, then that's a different story.

25 47180 But, of course, then, I am going back

1 to your previous point, about how the commissioner has
2 testified that they don't audit. What's the point? It
3 sounds like a lot more bureaucracy and paperwork, with
4 probably not very much result.

5 47181 MR. CONACHER: Unless we made a
6 change to require the commissioner to actually take
7 some enforcement actions.

8 47182 DR. TURNBULL: Sure, but then that
9 would be a whole other bureaucratic exercise, and the
10 role would change.

11 47183 DR. THOMAS: This is a more general
12 observation about the role of elected officials in
13 public life.

14 47184 The job of the politician is to
15 represent ideas, to represent people, to represent
16 interests within his or her constituency.

17 47185 I have done interviewing with members
18 of Parliament for an article called "Home Style", about
19 the way in which they conceive of their constituency
20 and the way in which they represent different
21 components and different sectors within that
22 constituency, and this is part of their job
23 description.

24 47186 So, when they come to Ottawa, they
25 are expected to carry the opinions and interests of

1 people in their riding, and that includes powerful,
2 well organized, well financed, well connected companies
3 and other groups within society, and so on.

4 47187 So you don't want to try to restrict
5 unduly the performance of politicians in their
6 representative role, whether that is participating in
7 caucus deliberations, participating in cabinet, working
8 on parliamentary committees, and so on. You want them
9 to do that.

10 47188 And sometimes there will be the
11 perception, to put it crudely, that they are in the
12 back pocket of powerful interests within their
13 constituency, but you can't take it as proven just
14 because someone can get up and accuse them, in a riding
15 that has a number of one-industry towns, for example,
16 that they are beholden only to the mining industry.

17 47189 It is good rhetoric; it is poor
18 analysis. It may be that they regard their
19 representative role as being far more complicated than
20 that, than just listening to one set of voices.

21 47190 So we are not close to restricting
22 MPs in how they interpret their representative role.

23 47191 They are also bound in a way that
24 members of Congress, in the United States, aren't, by
25 party discipline.

1 47192 Even if they wanted to go and pursue
2 narrow interests that were most vocal within their
3 constituency, they are somewhat restricted in what they
4 can do publicly, in terms of voting and acting on
5 behalf of those narrow interests.

6 47193 Congressmen can wheel and deal, in
7 committees particularly, on behalf of rather narrow
8 interests, and money plays a much bigger role.

9 47194 Again, the remedies that we invent
10 for these problems have to be built to fit our context
11 and our constitutional traditions, and the size of the
12 problem. We don't want to overbuild a big apparatus to
13 give the assurance to people, symbolically at least,
14 that we have covered every potential misuse of public
15 power, because we would never stop building that
16 architecture. It would go on and on and on.

17 47195 I don't think there is one best set
18 of structures and procedures and rules that are out
19 there, that you can borrow and transpose to the
20 Canadian situation. I think the notion of best
21 practice is overworked. I think we need smart practice
22 that fits with our circumstances, and the size of the
23 problem we are faced with.

24 47196 That was an editorial comment, Mr.
25 Commissioner, it wasn't a social science observation.

1 47197 COMMISSIONER OLIPHANT: That's fine.
2 47198 Mr. Roitenberg, we are just about at
3 the limit for this segment. I am wondering -- because
4 the answer to the question will dictate what we do
5 next, I am wondering whether the panellists have final
6 comments or observations to make. If they do, it has
7 been almost two hours since we last had a break, so if
8 there are final comments or observations, I think we
9 will take a break. If not, we will adjourn until
10 tomorrow morning.

11 47199 I would just ask the panellists,
12 through you, Mr. Roitenberg, whether there is anything
13 that they wish to add to what they have said thus far
14 today.

15 47200 I am not suggesting that anybody said
16 too much today, I have found it helpful and
17 interesting.

18 47201 MR. ROITENBERG: Two of our
19 panellists have indicated to me that they don't.

20 47202 I am trying to get Dr. Thomas'
21 attention.

22 47203 DR. THOMAS: I will join them.

23 47204 MR. ROITENBERG: There won't be final
24 comment from the panellists.

25 47205 COMMISSIONER OLIPHANT: All right. I

1 take it that that is the end of the day's proceedings?

2 47206 MR. ROITENBERG: There was one
3 question, I know, that our Director of Research had
4 said he wanted to pose to the panel. Other than that,
5 that would be it for the panel.

6 47207 COMMISSIONER OLIPHANT: I am
7 certainly not going to deny Mr. Forcese the right to
8 have a word today.

9 47208 MR. FORCESE: Thank you.

10 47209 I wanted to circle back to the
11 observation that Mr. Roitenberg made about detection,
12 and throw out a proposition or an idea.

13 47210 When we are talking about
14 post-employment, we are on a different footing than we
15 are for incumbent public office holders, in the sense
16 that they are in the private sector and perhaps not
17 amenable to detection in the same way as those who are
18 sitting in public office positions.

19 47211 It seems to me that, in those
20 circumstances, there is an argument to be made -- a
21 fairly compelling argument to be made that there should
22 be room not just for elite complaints, that is,
23 complaints by MPs, but also a broader public complaints
24 mechanism.

25 47212 And I am cognizant here that, for

1 seven of the provinces, they do open the door to any
2 person raising a complaint, and sometimes not just in
3 relation to post-employment, but more generically.

4 47213 But I would argue that it is probably
5 more important for post-employment.

6 47214 So I will throw out that possibility.

7 47215 The second observation I would make
8 is that, for the same reason, the difficulty in
9 detection, is there not an argument for what I will
10 call double reporting; that is, existing public
11 officeholders when they encounter a former public
12 officeholder that they know are within that window,
13 that cooling-off window, have an obligation then to
14 disclose that to the Ethics Commissioner.

15 47216 How would you react to those two
16 propositions?

17 47217 DR. TURNBULL: Okay. First, in terms
18 of the public complaints, personally I don't see a
19 problem with that and I think -- and I also know that
20 even though, for instance, the Ethics Commissioner's
21 jurisdiction over the MPs' Code of Conduct doesn't
22 include the sort of avenue for public complaints, that
23 doesn't stop members of the public from calling the
24 Ethics Commissioner when they -- some of them at least,
25 when they feel as though something is wrong. And

1 because, as Greg said earlier, the Ethics Commissioner
2 does have the power of investigation, there is nothing
3 stopping an Ethics Commissioner from deciding, at least
4 as far as I can tell, there is nothing stopping that
5 person from acting on that information from the public.

6 47218 And there is a section, although I
7 don't remember the number, in the Conflict of Interest
8 Act that says the Commissioner can act on public
9 information.

10 47219 So it sounds like especially in the
11 detection business -- although to get to your second
12 question, it would seem to me that it would be obvious
13 on the part of current public officeholders to call to
14 light any breaches of the rules by former public
15 officeholders. You know, they could bring it to the
16 Ethics Commissioner.

17 47220 MR. LEVINE: Thanks. On the public
18 complaints piece, I think that's very important. I
19 think that there should be in these mechanisms a way
20 for the public to be involved and to be able to make
21 complaints, whether it is about former or current
22 public officeholders. I just think that's an important
23 part of the system actually, and it is about public
24 accountability.

25 47221 So in general, from a philosophical

1 and practical point of view, I think it's important.

2 47222 In terms of the obligation to report,
3 I hadn't thought about it exactly the way you put it,
4 but it seems to me that is what the sections in the
5 provincial legislation are trying to do by having the
6 Executive Councils monitor the attempts to contract by
7 former officeholders.

8 47223 I do think that is a responsibility
9 not just to the former public officeholder, but those
10 who are contracting. So I think that's a good idea,
11 you know.

12 47224 DR. THOMAS: I think I would agree
13 with both propositions. I know of no studies that have
14 been done that tell you the extent to which the public
15 would make use of this opportunity and how they would
16 come upon information that was beyond rumour perhaps.
17 So I don't think from a practical, administrative
18 standpoint that it would create a wave of complaints
19 being filed.

20 47225 I like the idea of current
21 officeholders having an enforcement role in effect,
22 being delegated authority to ensure that when they
23 interact with other parties that were formerly in
24 public office that they would be expected to uphold the
25 existing standards. I think that is a useful idea.

1 47226 MR. ROITENBERG: Mr. Commissioner, it
2 has been indicated to me by the Attorney General for
3 Canada that there was one comment that they wished to
4 put forth.

5 47227 MR. WILD: Just to ensure that I
6 guess the fullness of the regime is kind of fleshed
7 out, a couple of points I would make on this question
8 that has come up is, first of all, it was very much a
9 subject of debate before the House and the Senate, what
10 role current public officeholders should hold in terms
11 of enforcement of the legislation. And, again,
12 Parliament provided its view in terms of the provision
13 of the Act.

14 47228 There is a reporting requirement on
15 former reporting public officeholders during their
16 period, whether it is the one or the two-year period,
17 depending on the nature of them. If the activity or
18 the communication they are engaged in with a public
19 officeholder, or anything that falls under -- I guess
20 falls under the definition of lobbying under the
21 Lobbying Act, so if they are paid to lobby the federal
22 government -- and that is a pretty vast, large activity
23 in the way that Act is constructed -- they have a
24 requirement under the Conflict of Interest Act, under
25 section 37, to file a report with the Commissioner that

1 sets out the name of the public officeholder that they
2 were in communication with, the date of that
3 communication or that meeting, the subject matter of
4 the meeting and any other information that the
5 Commissioner then may require subsequent.

6 47229 So there is a scheme in there for
7 trying to have former reporting public officeholders,
8 again, report if they are involved in communication
9 that would arguably fly in the face of some of the
10 post-employment provisions that are found through
11 sections 33, 34, 35, but it does so by particularly
12 drawing attention to the Lobbying Act activity, right.
13 So it is specifically for lobbying activity if that is
14 what it constitutes.

15 47230 Then there is an expectation under
16 the Conflict of Interest Act that they are reporting,
17 and that then allows a mechanism for the Commissioner
18 to have a view as to whether or not former reporting
19 public officeholders are actually abiding by the
20 prohibitions that have been placed on them.

21 47231 And in terms of both pieces of
22 legislation, the Conflict of Interest Act and the
23 Lobbying Act, the scheme really was designed to try to
24 have people self-report.

25 47232 The idea was that if you bore the

1 obligation, it was your responsibility to abide by the
2 prohibition or the rule that has been in place; that it
3 is your obligation to then report and self-report.

4 47233 That is very much the scheme of those
5 pieces of legislation.

6 47234 MR. FORCESE: He has given me the nod
7 as I just wanted to ask a follow-up question on that
8 section 37 reporting requirement.

9 47235 Essentially as I read section 37,
10 there is an obligation for the reporting public
11 officeholder to effectively report a violation of the
12 Lobbying Act, because they are also subject to the
13 five-year ban on lobbying.

14 47236 So I am wondering how this obligation
15 to report to the Conflict of Interest Commissioner of
16 violation in essence of the Lobbying Act, whether that
17 is likely to be an effective mechanism.

18 47237 MR. WILD: I wouldn't say it is
19 actually a violation of the Lobbying Act. It is using
20 the definition of lobbying to define the activity of a
21 requirement to report under the Conflict of Interest
22 Act.

23 47238 So it is not about the five-year ban.
24 It is about the one or two-year prohibition, but it is
25 about that part of the prohibition that would dovetail

1 with what constitutes lobbying activity.

2 47239 So if they are paid to represent a
3 party with respect to -- whether it is a Bill or a
4 grant or obtaining a contract, any of those things, if
5 they are seeking to have communication with public
6 officeholders to try to influence the outcome of any of
7 those deliberations, they are under an obligation to
8 file a report to the Commissioner that they have
9 undertaken that activity.

10 47240 MR. ROITENBERG: Mr. Commissioner, I
11 recognize that our Commission experts are going to be
12 with us for the next two days, but with your
13 indulgence, as the Panel Chair, I want to thank them
14 for a very informed and informative start to Phase II.

15 47241 COMMISSIONER OLIPHANT: Yes. Thank
16 you very much. I certainly endorse that.

17 47242 The discussion today, as I indicated
18 earlier, has been both interesting and helpful. I
19 thank as well the parties for attending and their
20 participation and perhaps to Mr. Wild a special thank
21 you. You were called upon unexpectedly, I think, but
22 your contribution has been one of value as well.

23 47243 So thank you to everyone for
24 contributing today.

25 47244 We will adjourn now until tomorrow

1 morning at 9 o'clock, and we have another panel of
2 experts set to go then. That panel will be chaired by
3 my colleague, Mr. Battista.

4 47245 So thank you very much for coming,
5 ladies and gentlemen. We are adjourned until tomorrow
6 morning at 9 o'clock in the same place.

7 --- Whereupon the hearing adjourned at 3:25 p.m.,
8 to resume on Tuesday, June 16, 2009 at 9:00 a.m. /
9 L'audience est ajournée à 15 h 25, pour reprendre
10 le mardi 16 juin 2009 à 9 h 00

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We hereby certify that we have accurately
transcribed the foregoing to the best of
our skills and abilities.

Nous certifions que ce qui précède est une
transcription exacte et précise au meilleur
de nos connaissances et de nos compétences.

Lynda Johansson

Jean Desaulniers

Fiona Potvin

Sue Villeneuve