

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

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Victoria Hall
111 Sussex Drive
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1 Ottawa, Ontario / Ottawa (Ontario)

2 --- Upon resuming on Tuesday, June 16, 2009,
3 at 9:05 a.m. / L'audience reprend le mardi
4 16 juin 2009 à 9 h 05

5 47246 COMMISSIONER OLIPHANT: Good morning,
6 ladies and gentlemen. This is the second round of Part
7 II, the policy part of the Inquiry.

8 47247 Today we have another panel. I will
9 leave it to my colleague, Mr. Battista to introduce the
10 panel members, but I want just to note that it is an
11 international panel. We have a guest from the United
12 States. I welcome you and all the other panellists.

13 47248 We also have, as a panellist,
14 Mr. Conacher, who is a party to the Commission, which
15 is a first and I think this is the only panel where
16 that will happen, but I personally am looking forward
17 to hearing from each of the panellists.

18 47249 With that, I will turn the matter
19 over to Maître Battista.

20 47250 MR. BATTISTA: Thank you,
21 Commissioner, good morning.

22 47251 And good morning everyone, all the
23 panellists and yesterday's panel as well. Thank you
24 for coming along and we will be looking forward to your
25 involvement in this part of the panel work.

1 47252 I'm going to start with a brief
2 introduction of our panellists.

3 47253 I will start from my far right,
4 Professor Kathleen Clark. She is from the University
5 of Washington in St. Louis. She is a lawyer and in the
6 past has worked as a Justicial Clerk to Judge Harold
7 Greene in the U.S. District Court for the District of
8 Columbia.

9 47254 She has published, and I will read
10 some of the titles which will inform you, Commissioner,
11 on the expertise she brings to this Commission:
12 Confidentiality of Norms and Government Lawyers;
13 Regulating the Conflict of Interest of Government
14 Officials; The Legacy of Watergate for Legal Ethics
15 Instruction; Be Careful What You Accept From Whom:
16 Restrictions on Gifts and Compensation for Executive
17 Branch Employees; and so forth. The list is very long
18 of the publications she has authored.

19 47255 She writes generally about ethics and
20 national security. She has also taught at the
21 University of Michigan and Cornell Law Schools and has
22 led government and legal ethics workshops in Europe,
23 Africa and South America, amongst the many things she
24 has done.

25 47256 So welcome aboard.

1 47257 To her left is Professor Charles Ian
2 Greene. He teaches at the University Master McLaughlin
3 College, Professor Department of Political Science. He
4 has also taught at the University of Lethbridge,
5 University of Calgary.

6 47258 He has authored six books on matters
7 that are of concern to ethics and the administration of
8 government. He has contributed to books, 15 chapters
9 and articles. He has written 16 articles on subjects
10 of very close importance to our matters: The Ethics of
11 Innovation and the Development of Innovative Projects;
12 The Government of Canada Approach to Ethics: The
13 Evolution of Ethical Government, among the numerous
14 publications he has had.

15 47259 I welcome you on board.

16 47260 I have also Professor Lorne Sossin.
17 He is a Professor at the Faculty of Law at the
18 University of Toronto. He is a former Associate Dean.
19 His interest in teaching covered administrative law,
20 public administration, professional regulations, civil
21 education, ethics and professionalism in the legal
22 process. He was a former litigation lawyer with what
23 used to be called Borden and Elliott, now Borden Ladner
24 Gervais, and a former Law Clerk of the Chief Justice of
25 the Supreme Court of Canada.

1 47261 He has also authored numerous
2 articles and books. He is a frequent advisor to
3 government and has been commissioned to write papers
4 for the Gomery Inquiry, the Ipperwash Inquiry, the
5 panel on the role of government and the expert
6 commissions on pensions, amongst other things.

7 47262 Professor Sossin is the Director of
8 the Faculty of Law's new Centre for the Legal
9 Profession.

10 47263 I welcome you with us.

11 47264 And last but not least, Commissioner,
12 you have already introduced Mr. Duff Conacher and so I
13 will be brief. Everyone knows he is a party here. He
14 is the Coordinator for Democracy Watch, one of the most
15 important voices in terms of acting as a watchdog
16 organization on government action.

17 47265 I welcome you on this panel.

18 47266 So I will begin with a broad
19 question -- and I am going to ask Ian to lead on
20 this -- a similar question that has been asked of
21 panellists yesterday: What is the ultimate objective
22 of the ethics rules? Is it to shape behaviour, to
23 communicate publicly commitments to values or is it
24 something else entirely?

25 47267 Do you have views on how ethics rules

1 should be structured to create accountability but
2 without imposing limitations of the effect of deterring
3 qualified individuals from seeking public office? Do
4 you believe that ethics rules enhance ethics or is
5 political culture the more important ingredient to
6 ethical behaviour?

7 47268 Finally, as part of this large and
8 broad question, how is an ethical political culture
9 created?

10 47269 So I will ask you to lead on that.

11 47270 PROF. GREENE: Thank you very much.

12 47271 Let me deal with these questions in
13 two parts.

14 47272 What is the objective of the rules?
15 Is it to shape behaviour, communicate values or
16 something else entirely?

17 47273 Well, I think the practical ethics is
18 principle applied to practice. The purpose of ethics
19 rules is to set out principles of behavioral standards
20 that have been set by the legislature.

21 47274 In a democracy, I think that these
22 standards are intuitively or deliberately derived from
23 the basic principle of mutual respect. Mutual respect
24 means that all human beings in our society are
25 intrinsically important and deserve to be treated with

1 equal concern and respect.

2 47275 Public officeholders, whether they
3 are elected or appointed, are therefore expected to
4 serve the public interest in fulfilling their public
5 roles. There are always opportunities for public
6 officeholders to use their public office to advance
7 their private interests, but in a democracy this is not
8 acceptable. Public officeholders are in a position of
9 trust in which they have the opportunity to advance the
10 public interest.

11 47276 So ethics rules are there to
12 discourage those who may be tempted to use public
13 office for private gain or to advance the private
14 interests of their families or friends, including their
15 partisan political friends.

16 47277 I think that the ethics rules are
17 there primarily to discourage unethical behaviour
18 rather than to shape behaviour. Because different
19 people may have differing views about what constitutes
20 unethical behaviour, the rules are there to clarify
21 what constitutes unethical behaviour so that there is a
22 uniform standard.

23 47278 The rules don't make people good, but
24 they are designed to prevent them from engaging in what
25 is recognized as bad behaviour.

1 47279 There are two kinds of rules.

2 47280 First, there are those that define
3 unethical behaviour, such as not removing oneself from
4 a real conflict of interest situation; and, second,
5 there are those designed to promote transparency so
6 that the public can judge whether public officeholders
7 are acting appropriately, such as the public disclosure
8 rules.

9 47281 So the second part of that list of
10 questions: Do I have any views on how the ethics rules
11 should be structured to create accountability; do I
12 believe that the ethics rules enhance ethics or is
13 political culture more important; how is an ethical
14 political culture created?

15 47282 Well, I think that the ethics
16 education is a more important variable in promoting
17 ethical behaviour than ethics rules. As of 2009 there
18 will be independent ethics commissioners in every
19 provincial and territorial jurisdiction in Canada.
20 Ontario was the first jurisdiction to create an
21 independent ethics commissioner in 1988 and Québec will
22 be the last with the introduction of its new ethics
23 legislation last month.

24 47283 Independent ethics commissioners were
25 appointed to the House of Commons and Senate in 2004

1 and 2005, respectively. The various ethics
2 commissioners have described their roles as 10 per cent
3 policeman and 90 per cent priest.

4 47284 With the exception of the conflict of
5 interest and ethics commissioner for Parliament, the
6 commissioners meet with elected members one-to-one
7 shortly after they are elected and then annually after
8 that to review disclosure documents and advise on how
9 to comply with the ethics rules.

10 47285 The Federal Conflict of Interest and
11 Ethics Commissioner does not meet one-on-one with all
12 federal MPs because there are too many of them, but the
13 Commissioner is available to provide advice when
14 requested.

15 47286 As well, the commissioner is
16 responsible for administering the Conflict of Interest
17 Act, which covers 2,650 public officeholders, including
18 members of the Cabinet. Again, it is not possible for
19 the commissioner to meet one-on-one with all these
20 public officeholders.

21 47287 However, her first annual reports
22 indicate that she is pursuing the prevention of
23 conflicts of interest through education, through
24 addressing those covered by the Code or the Act in
25 groups, and by disseminating information through the

1 Internet and other forms of communication.

2 47288 I think that poorly drafted ethics
3 rules can be mostly effective if there is an effective
4 educative component, and carefully drafted rules can be
5 ineffective if there isn't an effective educative
6 component.

7 47289 The use of independent ethics
8 commissioners in the provinces and territories has
9 proven to be effective in reducing the incidence of
10 conflict of interest scandals. I have tracked conflict
11 of interest allegations reported by major newspapers in
12 Canada from 1986 to 2004, and after the appointment of
13 an independent ethics commissioner in a province there
14 was a very significant drop in the number of conflict
15 of interest allegations in all provinces that had a few
16 years of experience with the independent ethics
17 commissioner system.

18 47290 This is evidence that the provincial
19 ethics regimes are not only effective but very
20 effective.

21 47291 From my perspective, the major
22 weakness of the federal regime is that because of the
23 scope of the jurisdiction of the Conflict of Interest
24 and Ethics Commissioner, there is insufficient
25 opportunity for her to play an effective educative

1 role.

2 47292 The earliest proposed conflict of
3 interest legislation dating back to the days of the
4 Mulroney government would have created a three-person
5 ethics commission, perhaps in recognition that the
6 educative role would require that. A three-person
7 commission would result in about the same ratio of MPs
8 to commissioners as MPPs to the integrity commissioner
9 in Ontario, for example.

10 47293 If such a model is adopted, one of
11 the commissioners should be designated as the chief
12 commissioner. A three-person ethics commission would
13 make it possible for all MPs, and especially Cabinet
14 Ministers, to meet on a one-on-one basis with a
15 commissioner. Meeting with the commissioner carries
16 more weight than meeting with a commission staff
17 person.

18 47294 From my perspective, an ethics
19 culture is more important than rules, because the
20 existence of independent ethics commissioners in the
21 provinces and territories has led to a culture in the
22 legislatures where there is a consistent understanding
23 of the rules and why the rules are there.

24 47295 In the provinces my sense is that
25 there is a culture of integrity, as defined by Greg

1 Levine, a culture of understanding ethics proprieties
2 and of accepting probity.

3 47296 Rules are also important. The annual
4 reports of the provincial commissioners often contain
5 recommendations for changes to the rules that would
6 plug loopholes that had not been anticipated.

7 47297 I agree with the recommendations of
8 Greg Levine that there should be slight enhancements of
9 the federal rules. I particularly agree with his
10 recommendation that the rules should recognize apparent
11 conflicts of interest.

12 47298 With regard to whether the
13 post-employment rules should cover international
14 governments and organizations, of course they should.
15 A public officeholder could improperly use his or her
16 office for personal benefit, whether with regard to
17 domestic or international issues.

18 47299 Very often conflict of interest
19 issues involve in some way ministerial exempt staff.
20 In general they need better training about the nature
21 of government ethics.

22 47300 I think I will leave it at that for
23 now.

24 47301 MR. BATTISTA: Thank you for that.

25 47302 I am going to now invite Kathleen

1 Clark, Professor Clark, to comment on that and bring
2 your perspective on this.

3 47303 PROF. CLARK: Yes, thank you so much.
4 And thank you to the Commissioner for inviting me to
5 participate in these proceedings. I am very happy to
6 be here.

7 47304 In terms of this sort of broad
8 theoretical set of questions that you have us started
9 with, it seems to me that many, if not all, ethics
10 regulations are aimed at protecting the public trust,
11 are aimed at expressing the fact that public office is
12 a trust and involves a trust relationship.

13 47305 So as a lawyer what I would say is
14 many of those ethics regulations that I have seen, that
15 I have studied, are expressions of government
16 officials' fiduciary obligation to the government, to
17 the public.

18 47306 Some of the ethics rules are aimed at
19 prohibiting specific types of behaviour that actually
20 cause harm to the public. An example of course would
21 be statutes against bribery, that kind of thing, where
22 the public is clearly harmed.

23 47307 But of course ethics rules go beyond
24 those specific prohibitions and also prohibit other
25 behaviour that may not actually cause harm to the

1 public in and of itself, but it may be difficult to
2 determine whether the public is harmed. I think this
3 sort of is a parallel to or another way of expressing
4 the appearance standard.

5 47308 Sometimes this is viewed as the
6 appearance of impropriety, where you can't really tell
7 whether certain behaviour actually is a bribe or is not
8 a bribe. Is it a gift? Is it compensation? We may
9 have parallels to that in your factual inquiry here.

10 47309 And so ethics rules, certainly in the
11 United States and I believe elsewhere, have developed
12 to prohibit behaviour that may not actually cause the
13 harm of a bribe, but nonetheless it would be too
14 difficult to determine whether it actually was a bribe.
15 So we prohibit that kind of transaction, say.

16 47310 So in coming up with these
17 prophylactic rules to protect the public trust, what I
18 have seen in the United States is what I believe is a
19 tendency to go full force on the codification of
20 prohibitions as opposed to a more sort of an approach
21 where an organization would adopt principles that
22 people should apply, and instead the U.S. executive
23 branch, the federal government's executive branch, has
24 ended up adopting very specific ethics regulations, so
25 specific and detailed with their prohibitions and their

1 exemptions and so on -- well, it is a slight
2 exaggeration to say that our ethics rules are as
3 complicated as our tax code. It is hyperbole, but
4 there is some truth in that parallel.

5 47311 And of course when you go that route,
6 one of the things that you do is you take away from
7 what could be a kind of culture of aspiration of
8 complying with -- and having public servants think
9 about well, is this in the public interest or not? Is
10 this violating the public trust or not and instead
11 focusing on is there an exemption that allows me to
12 take this gift or not? Like what is it? I'm just
13 going to try to comply with the rules.

14 47312 I think some of the papers that have
15 already been presented talk about the benefits and the
16 costs of that kind of approach which the U.S., as I
17 say, has adopted full force.

18 47313 So I guess I would just throw out to
19 you that in thinking about what kinds of
20 recommendations you will be making to your government,
21 there are these lessons from the United States
22 regarding the record of going the codification
23 compliance route as opposed to a more generalized
24 principle-based approach to ethics.

25 47314 MR. BATTISTA: Thank you.

1 47315 I am going to ask Duff Conacher do
2 you have any comments you would want to share on the
3 aspect of political culture versus regulation and
4 obviously the more broader questions that have been
5 asked?

6 47316 MR. CONACHER: Thank you very much
7 again for this opportunity to present today as both a
8 party and a member of the participant in the panellist
9 presentations.

10 47317 Because I did present yesterday on
11 many of these questions and various points and will be
12 participating again tomorrow, what I have prepared is a
13 summary of references to the written submission that
14 Democracy Watch has submitted.

15 47318 So I will stick just to that summary
16 and I have copies here to distribute to everyone.

17 47319 So on this topic I won't of course go
18 through the whole of pages 6 to 14 of Democracy Watch's
19 written submission, which is essentially on this topic
20 of the framework and reasons for establishing an
21 effective enforcement system.

22 47320 I will just say that what Democracy
23 Watch favours based on its experience and looking at
24 other jurisdictions and overall looking at law
25 enforcement within society in Canada, that as in other

1 areas of society where systems are established to set
2 standards of socially acceptable behaviour, what is
3 needed is loophole-free rules, fully independent, fully
4 empowered and well resourced enforcement agencies and
5 penalties significant enough to discourage violations.

6 47321 That is Democracy Watch's position,
7 along with training programs, as Professor Greene
8 highlighted, so that overall you create a culture
9 through a combination of incentives, the proverbial
10 carrots, penalties, the proverbial sticks and then
11 education to ensure everyone is aware of the standards.

12 47322 So just to note through the day, I
13 will be just pointing again to the summary because
14 again I have presented many points yesterday on these
15 questions and will have an opportunity again tomorrow,
16 and that is why I prepared this written summary for
17 easy reference.

18 47323 So I won't be going into the details
19 of really any of our recommendations through the day on
20 any of these questions, just providing the summary
21 points and indication to parts of the written
22 submission where you can see the details.

23 47324 MR. BATTISTA: Thank you. I
24 appreciate your indicating that to us. Obviously it
25 would be difficult to cover each and every proposal,

1 but by all means do feel free if at times there is one
2 proposal in particular that you feel should be
3 elaborated on in the context of what is being said,
4 please do so. I think it will be helpful and useful
5 for everyone.

6 47325 I will ask you, Lorne Sossin, to
7 conclude on this, if you want.

8 47326 PROF. SOSSIN: Well, first of all,
9 thanks again for including me as well and thanks also
10 for inviting me to go last because it gives me the
11 opportunity to reinforce and incorporate by reference
12 much of what you have heard, much of which I agree
13 with.

14 47327 I would probably phrase the overall
15 purpose just a slight variation on the public trust
16 theme. I like that theme but I think when you pick a
17 legal term, lawyers can get overly excited about it and
18 read more into it than is healthy.

19 47328 So I think that is going to be the
20 challenge on the fiduciary front. So I tend to see it
21 more as enhancing public confidence and I would see
22 that as very much aligned with the notion of a public
23 trust to be discharged. But I would see it as
24 different than the standard contours of a legal
25 fiduciary relationship and hopefully will have a chance

1 to elaborate that.

2 47329 I would also share with Ian the sense
3 that a separate pillar, so if one pillar is public
4 confidence the other is developing and enhancing a
5 culture of accountability. I think you will hear a lot
6 about the culture aspect, because the rules get, by
7 definition, episodic and uneven application in any
8 large organization. So unless you are changing how
9 people view themselves, their roles, responsibilities,
10 the best rules are never going to be enough, even if
11 loophole free and fully resourced.

12 47330 And in Duff's fantasy rules, many of
13 which I would love to explore as well, I still wouldn't
14 see that as doing the trick. I think the focus on
15 culture does invariably turn to things like training,
16 orientation.

17 47331 What is it that one drinks in by
18 osmosis when one joins an organization? How do you
19 keep continuity through an institution and how do you
20 define its aspirations?

21 47332 Well, one way to do it is by rules,
22 by codifying those aspirations and expectations.

23 47333 And I share with I think both
24 speakers the view that a principles-based approach is
25 better than a rules-based approach to do that. There

1 is no rules-based approach that will ever, for example,
2 approach the loophole-free goal. Only broad inclusive
3 principles can do that.

4 47334 But when it comes to mechanisms, the
5 challenge was broad inclusive principles is it's
6 motherhood, it sounds wonderful, but what does it tell
7 me about, you know, this deal I have on Thursday and I
8 have sponsors coming and there are 1,000 people and can
9 I sell tickets in my community?

10 47335 The principle is great, but it
11 doesn't help me on Thursday.

12 47336 So having an ability both to get the
13 right institutional figure, the ethics commission or
14 commissioner developing advice over time is key.

15 47337 I think the mix of hard law and soft
16 law is key and I hope to be a theme today. So that if
17 you have the principles-based regulation, the rules,
18 they give way to non-binding guidelines, to
19 commentaries, to examples.

20 47338 I find the most significant work done
21 by these officials is typically not reports on
22 investigations or complaints, but the day-to-day advice
23 giving. The problem with the day-to-day advice giving
24 is it's not disseminated in a transparent fashion that
25 other colleagues can learn from.

1 47339 So a creative use of annual reports,
2 ombudsman style documents that can say, without
3 identifying the individuals, here is the list of FAQs,
4 questions that were asked as a commissioner, answers
5 given, things you can learn from; not things you can
6 treat as binding necessarily, although advice typically
7 given is binding to the person it's given to, but all
8 sorts of great learning opportunities, training
9 opportunities.

10 47340 And I think that false dichotomy
11 between principles and rules, between hard and soft
12 law, is one of the things I hope by the end of the day
13 we will have disabused ourselves of and look forward to
14 the specific questions in the discussion.

15 47341 I want to commend the authors of all
16 the papers that were commissioned, which were terrific
17 and thought-provoking and engaging, and the discussion
18 paper that got the ball rolling for the commission.

19 47342 I think it has been a very positive
20 process and I hope positive things come out of it at
21 the end of the day.

22 47343 MR. BATTISTA: Thank you.

23 47344 This will lead us to our next subject
24 and topic and I'm going to ask you, Lorne, to lead on
25 this; maybe talk to us about your views on how ethics

1 rules should be structured to create accountability,
2 but without imposing limitations that have the effect
3 of deterring qualified individuals from seeking public
4 office. Then maybe to address what other adverse
5 consequences may flow from the regulating of ethical
6 behaviour, if there are such negative consequences.

7 47345 PROF. SOSSIN: It is a very good
8 question, although one that is rarely put to any
9 empirical testing, the sense of the chill or, if there
10 is too much disclosure it will keep wealthy people away
11 or qualified people with a skeleton in the closet, what
12 have you.

13 47346 So I'm never sure how much that is
14 the case.

15 47347 Justice Oliphant will remember a
16 similar debate around hearings for judicial
17 appointments. If you have to get grilled before you
18 are through the process, will that keep great lawyers
19 away? And, again, I am not aware of a lot of great
20 lawyers that actually said, "I am not going to go near
21 it if I have to be part of that."

22 47348 I think the same thing can be said
23 here, but because it's a perception, and because it is
24 widely held, I think it's real.

25 47349 To me, the key is -- and it comes

1 back to the hard law/soft law idea -- to be in a
2 constant state of responsiveness to the world around
3 us, and I mean that in at least two ways.

4 47350 One is responsiveness to the
5 realities. There was a time when, if you held stock in
6 a company that was coming before you as an adjudicator,
7 that was just a conflict. That was a definition of a
8 conflict. That was a pecuniary conflict.

9 47351 In a world in which everyone has a
10 mutual fund, and at a period of time in Canada there
11 were only four people who didn't own Nortel stock in
12 one way or another, what does it mean to say, "I have
13 an interest in Nortel"?

14 47352 If you are responsive, you develop
15 rules and approaches that have a reality check. If you
16 are in a mutual fund that happens to have holdings in
17 that area, that is not the same as having a material
18 interest in Nortel.

19 47353 If you have a zillion dollars in it,
20 and if you have given specific instructions that you
21 want to overweight Nortel, then it might.

22 47354 So, to me, the idea of responsiveness
23 would include things like not just the changing
24 commercial realities, but the changing social
25 realities. We live in a world where we expect both

1 spouses, for example, to be working, to be engaged in,
2 potentially, areas that will intersect. So to say that
3 there is a spousal connection to some of the matters
4 that a politician or public official is going to deal
5 with may simply not be a realistic test to apply in the
6 21st Century. It might have been realistic in 1954.

7 47355 The question for me is, if the soft
8 law, if the advice giving, if that ability to adapt is
9 current and is engaged with the society around it,
10 there ought to be ways to deal with almost all of the
11 things that could be identified as a chill for people
12 coming in. That is to say, "I can't come in because my
13 wife does this," or, "My husband is involved in that,"
14 or, "My partner is an employee in this place."

15 47356 There are always ways, I think, to
16 structure around that if you are responsive and if you
17 are dynamic, as opposed to static.

18 47357 I suppose that is a general response
19 to the chill, but, obviously, the more specific way to
20 do that is to be very transparent. There is a process.
21 If you want to stand for election, or, if elected, want
22 to be considered for cabinet, there is a process
23 whereby you can get anonymous advice, or individualized
24 advice: How would I deal with this potential
25 disclosure? What would happen if I put all of my

1 holdings in this kind of trust versus that kind?

2 47358 Having that ability for ex-ante
3 solutions, rather than an ex post approach to
4 accountability, I think, would do a lot and would go a
5 long way to allaying the concerns.

6 47359 And I think if the culture is
7 working, if it's responsive, if it's practical, if it's
8 realistic, and if it's ultimately designed not for the
9 "Gotcha" moment, but for enhancing public confidence in
10 the system, then there are ways around almost all of
11 the barriers that I can think of, and if that goal is
12 the one disseminated to potential people in the market
13 for these positions, then I think that these are,
14 again, easily surmountable barriers.

15 47360 Those are the themes that I wanted to
16 highlight, and I am sure we will get into other
17 mechanisms with the other speakers, and hopefully a
18 broader conversation, as well.

19 47361 MR. BATTISTA: Thank you.

20 47362 I will now go to Kathleen. Is there
21 anything we can learn from the American experience in
22 terms of structuring accountability and the possible
23 adverse consequences that may flow from the regulating
24 or over-regulating of ethical behaviour?

25 47363 PROF. CLARK: It seems to me that in

1 the creation of ethics rules there is always a
2 balancing of competing values or competing concerns,
3 and this balancing is inevitable, so there are going to
4 be compromises in any ethics regime between certain
5 values and other values.

6 47364 It would be possible, for example, to
7 come up with post-employment rules that would have the
8 effect of, essentially, preventing public servants from
9 ever entering the private sector, or severely limiting
10 their ability to enter the private sector, because of
11 concerns about confidentiality or influence peddling or
12 favouritism.

13 47365 In thinking about your question, it
14 strikes me that there is the issue of deterring people,
15 in general, from going into the public service, but
16 there is also perhaps a narrower question, particularly
17 relevant in the post-employment context, and that is,
18 deterring fluidity, or preventing fluidity between the
19 public and private sectors.

20 47366 In the United States we have, in many
21 ways, adopted and embraced fluidity between the public
22 and private sectors, and tried to ensure that public
23 servants are not prevented from joining the private
24 sector, and, frankly, vice versa.

25 47367 Nonetheless, we see attempts to

1 protect, as I say, the public trust with certain kinds
2 of compromises for this need for fluidity.

3 47368 In the United States the compromise
4 is really reflected in the details of some of the
5 rules, for example, some of the distinctions that we
6 draw in our post-employment rules, like distinctions
7 between particular matters involving specific parties
8 where the rules apply, and there are restrictions
9 versus policy debates, where we say: Yes, even if you
10 were involved in a policy, or setting a policy, you can
11 go off into the private sector and later attack that
12 policy, or advise people based on that policy.

13 47369 You also see it reflected in a
14 parallel distinction between specific matters and
15 regulations, and also in the ability of the government
16 to waive certain restrictions under particular
17 conditions.

18 47370 I guess I would say that, in the
19 nitty-gritty details, one sees both the absence of
20 perhaps clear theory, but really how clear theory gets
21 applied and is compromised on the ground with other
22 values.

23 47371 MR. BATTISTA: Thank you for that.

24 47372 Ian, is there anything that you want
25 to add on the issue of accountability and the

1 structuring of rules?

2 47373 PROF. GREENE: Yes, I think that
3 rules always work best if there is, if possible, a
4 bottom-up approach. If rules are imposed from the top,
5 they tend not to be taken so seriously. So I think it
6 is useful to have people who are affected by the rules
7 involved in drafting the rules.

8 47374 I think it is useful to look at other
9 examples of rules, and take what seems to be working
10 from other jurisdictions.

11 47375 In the provinces there has been a
12 dialogue between the commissioners, the ethics
13 commissioners, and the legislatures, because in the
14 annual reports of the commissioners they make
15 recommendations for how the ethics regime could be
16 improved, and this leads to, in a sense, a discussion
17 between the commissioner and the members of the
18 legislature about whether or not those recommendations
19 should be implemented.

20 47376 I think that sort of discussion is
21 really necessary because, if the rules are changed
22 according to the commissioner's recommendations, that
23 means that members of the legislature have really
24 bought into the rules.

25 47377 I think that rules evolve from year

1 to year and decade to decade. It is interesting,
2 looking at the earliest ethics rules in Canada, the
3 letter that Prime Minister Pearson would send to his
4 cabinet ministers. That evolved into the Trudeau
5 letter, into the Clark letter, and then into the
6 informal code, and now into the current code for
7 members of Parliament, and the ethics legislation for
8 cabinet ministers and others, and you can see
9 continuity in terms of that evolution.

10 47378 Should codes be legislated, or should
11 they remain as informal codes?

12 47379 I think that's where there is a real
13 debate that needs to take place.

14 47380 If a code is not legislated, it can
15 be broader, it can be more principled. As long as
16 there is a good educative system to help members
17 understand the code, it can be very, very effective.

18 47381 There has been criticism that codes
19 that aren't legislated don't have the force of law, and
20 there can't be judicial review. That might be
21 advantageous. If we judicialize the process too much,
22 it could become too rule-bound, like in the case of the
23 United States, and members might actually not take the
24 rules seriously if there can always be a judicial
25 review.

1 47382 So I think that's something that is a
2 possible adverse consequence.

3 47383 MR. BATTISTA: Duff, I know you have
4 outlined a number of points on this question. Is there
5 anything in particular, in light of the comments that
6 have been made, that you would like to draw the
7 Commissioner's attention to on this aspect?

8 47384 MR. CONACHER: Yes. In terms of
9 structure, whether it's a code or a law, I don't think
10 is one of the biggest issues. It makes it less likely
11 to be changed easily if it's a law, and it would have
12 to go through a full parliamentary review.

13 47385 That is a good point, but in terms of
14 enforceability, Democracy Watch has had judicial review
15 cases on the codes. They have been considered to be
16 law, even if they are not statutory instruments.

17 47386 But, overall, in terms of whether you
18 have general principles or specific rules, Democracy
19 Watch favours -- our position is favouring specific
20 rules, but principles are fine, as well, as long as
21 they actually set an enforceable standard, as opposed
22 to something that is so vague that, if anyone was ever
23 found to be in violation of it, they would have a case
24 to say that it's vague and didn't draw any lines.

25 47387 That is where interpretation

1 bulletins, case studies and things can be set out
2 defining those general principles.

3 47388 The wording is very important in
4 order to, essentially, establish an enforceable
5 standard.

6 47389 In terms of the effect on individuals
7 seeking public office, Democracy Watch's position,
8 again, is that good rules and strong rules will drive
9 bad people out of seeking public office, not good
10 people, and that you won't impose an unreasonable
11 burden if you have a sliding scale, in every way, of
12 rules, restrictions and penalties, which matches and is
13 based upon the power of the public official to make or
14 impose decisions.

15 47390 I think the Commissioner should focus
16 on the point in this area, that even if you have a very
17 strong system, the two biggest things that are raised
18 in this area -- although, again, Professor Sossin noted
19 that there is not a lot of empirical evidence -- is
20 that people will not want to disclose what they own,
21 essentially. They see that as an invasion of privacy.

22 47391 At the very least, though, you can
23 always structure it so that the greatest disclosure is
24 only to the Ethics Commissioner or other enforcement
25 agency, so there isn't that invasion of privacy in

1 terms of the public knowing.

2 47392 Secondly, no matter how burdensome
3 the rules and overall restrictions are going to be in
4 terms of someone who is in public office, all you are
5 really going to be asking them to do is recuse
6 themselves from some decisions. It's not like they are
7 going to jail because of this rule system, it's just:
8 No, you can't act and exercise this power or function
9 you have, because you have a conflict of interest.

10 47393 I don't see how that could drive
11 anyone away from seeking public office, unless they
12 wanted to act in that area in order to further their
13 private interest.

14 47394 Again, the penalty is not that great
15 that they are ever going to face, no matter how strict
16 the standards and enforcement system.

17 47395 MR. BATTISTA: Thank you.

18 47396 We are now going to move to another
19 topic, and I will ask Lorne to lead on this again, and
20 then we will be looking at the current federal law.

21 47397 Do you believe that the concept of
22 conflicts of interest contained in federal law is
23 adequate, and, further, in your view, is the
24 distinction between a real and a potential or apparent
25 conflict of interest important in effecting the scope

1 of conflict of interest rules?

2 47398 PROF. SOSSIN: Thank you. This is an
3 area that a few of us have already touched on a bit.

4 47399 I think it is useful to disentangle
5 what we are talking about. I think it is clearly not
6 contentious that actual conflicts of interest be
7 covered. I am not sure what an actual conflict of
8 interest would look like. You would have to be inside
9 someone's heart and mind and know what they are
10 actually thinking at that moment, but in criminal law
11 we take it as a given that the courts can get inside
12 people's minds to discover intent on all sorts of
13 things.

14 47400 Even though I am coming from an
15 administrative law background, administrative law has
16 given up on the idea of there being such a thing in law
17 as bias, because it is so hard to get inside the hearts
18 and minds of decision-makers, so the reasonable
19 apprehension of bias has become the only standard that
20 is meaningful for administrative decision-makers.

21 47401 And it is not just the difficulty of
22 getting inside the hearts and minds of individuals, it
23 is also the onerous burden of demonstrating what is
24 going on inside the hearts and minds of individuals.
25 If you have the full arsenal of the state, as the

1 criminal justice system has, that is a help in making
2 these cases.

3 47402 If you are an individual complainant,
4 let's say, to have the resources necessary to purport
5 to get inside the hearts and minds, it's a very tough,
6 uphill climb.

7 47403 But to be able to show, on an
8 objective standard, that a reasonable person would
9 apprehend or perceive bias or a conflict, is seen as
10 the right saw-off, the right middle ground, something
11 that has to be demonstrated on real evidence. There is
12 a burden on the balance of probabilities to show it.
13 But it is not so stringent as to have to meet a
14 standard that, I think, is really difficult to align
15 with the overall goals you heard from all three of us
16 about public confidence and public trust.

17 47404 It is public confidence and public
18 trust that seems to be a natural fit for the
19 appearance, which is the appearance in the mind of a
20 reasonable observer.

21 47405 So from real conflicts, which I think
22 make perfect sense, to apparent conflicts, which I
23 think are aligned well with the philosophy of ethics
24 and the methodology of a legal standard -- my only
25 reservation is actually around potential conflicts.

1 Certainly it is not a concept that I work with in the
2 administrative law area on the reasonable apprehension
3 of bias. A potential conflict is slippery. Is it
4 imminently potential? Is it tomorrow? Is it something
5 that could arise years down the road?

6 47406 There is a kind of challenging
7 subjectivity to it. Potentiality is very difficult to
8 divine a test for like the reasonable apprehension one
9 that we use for the appearance.

10 47407 I am not quite sure how these all got
11 bundled together in one term, that you are either in
12 favour of only actual conflicts, or actual, apparent
13 and potential, beyond the fact that a legislative
14 drafter came up with it one day and put them together.
15 I think that real and apparent, or actual and apparent
16 have some logic to them. Potential -- and I am open to
17 hearing a compelling view on why potentiality is less
18 slippery than I see it, but I would probably see that
19 as a separate category, and would want to see some real
20 specificity behind time periods, the kind of scrutiny
21 you would bring to it, the kind of evidence you would
22 want to see.

23 47408 I guess the only last point on
24 potentiality is, if you do stick with actual, and you
25 don't include, or extend, as suggested, the standard to

1 cover apparent, then you wouldn't want to create a
2 situation in which something was sufficient to meet the
3 standard of an actual conflict, but it simply was going
4 to happen tomorrow, as opposed to yesterday.

5 47409 Maybe there is some rationale like
6 that that one could imagine, but, generally, I would
7 see real and apparent as well known to law, well
8 understood in the public eye, and well suited to the
9 philosophy and methodology of an ethics regime.

10 47410 So, in that sense, I would endorse
11 the recommendations of Greg in that regard, and I would
12 be eager, as I am sure you are, to hear the views of my
13 colleagues on the panel.

14 47411 MR. BATTISTA: Thank you.

15 47412 Ian, do you want to share your views
16 on that point?

17 47413 PROF. GREENE: Yes. The first
18 jurisdiction in Canada to include apparent conflicts of
19 interest in its ethics legislation was British
20 Columbia, and the first case that arose with regard to
21 apparent conflicts of interest was with regard to a
22 cabinet minister in the NDP regime in the 1990s, Robin
23 Blencoe. He was in charge of approving new housing
24 developments under British Columbia legislation, and it
25 turned out that one of the applications for a new

1 housing development was put forth by a person who had
2 been his campaign manager in the past and had supported
3 him for many years.

4 47414 Now, according to the strict letter
5 of the law, Blencoe would not have been in conflict of
6 interest in terms of making a decision about the
7 housing development, because there was nothing
8 financially to be gained by Mr. Blencoe in making the
9 decision.

10 47415 But Ted Hughes, who was the ethics
11 commissioner at the time in British Columbia, said that
12 a reasonable person would ask, how could Mr. Blencoe
13 possibly be impartial in making the decision about the
14 housing development when he really owed his career to
15 the person putting forth the proposal?

16 47416 So that was an example of an apparent
17 conflict of interest, and I think it is a very
18 instructive example. That is one of the reasons I
19 think that either codes or legislation should include
20 the term "apparent conflict of interest". It means
21 something in law now, and it covers loopholes that
22 might otherwise be there.

23 47417 With regard to potential conflicts of
24 interest, that is where you are in a conflict of
25 interest situation -- if you are a public servant or a

1 cabinet minister, you are probably in a potential
2 conflict of interest situation at least once a week.
3 There is nothing wrong with being in a potential
4 conflict of interest situation, but if you don't take
5 the appropriate action to divest or recuse, or other
6 appropriate action, then it becomes a real conflict.

7 47418 I don't see any problem with the
8 term. When I was a public servant in Alberta, I was in
9 charge of distributing funds to the not-for-profit
10 agencies that provided government services in southern
11 Alberta.

12 47419 My wife was an auditor, and she ended
13 up being the auditor for one of the agencies that I was
14 distributing funds to.

15 47420 We were both in a potential conflict
16 of interest situation, so we had to take the
17 appropriate action. We discussed it with the people we
18 reported to, and one or the other of us had to recuse.

19 47421 That is how we prevented the
20 potential conflict from becoming real.

21 47422 So I don't see any problem with
22 understanding what a potential conflict is.

23 47423 MR. BATTISTA: Kathleen, do you have
24 any views on real, potential, or...

25 47424 PROF. CLARK: The only thing that I

1 would add here is that there is a kind of related, not
2 exactly parallel, but kind of related debate within the
3 United States, not with regard to the appearance of a
4 conflict of interest, but instead with a different
5 standard, the appearance of impropriety.

6 47425 In general, I think it is accurate to
7 say that that kind of approach, looking at whether
8 there is an appearance of impropriety, is, I think, in
9 general, a disfavoured approach to ethics analysis at
10 this point, although it's a little bit sticky.

11 47426 It certainly has been rejected in the
12 field of legal ethics. It used to be a standard that
13 you would find not just in government ethics codes, but
14 also in codes governing lawyers, and in reforms over
15 the last three decades, bar associations and state
16 supreme courts have mostly rejected that approach.

17 47427 I guess I would say that it seems to
18 me that, to the degree that an apparent standard is
19 really a prophylactic standard, or a way of adopting
20 prophylactic rules that then can be applied, that, I
21 think, makes all sorts of sense.

22 47428 But to apply an apparent standard on
23 an ad hoc basis, I think, can raise questions about
24 fairness, unless you inject into it all sorts of
25 reasonableness provisions -- reasonableness

1 restrictions on that appearance, because of the
2 unpredictability of what an appearance is to someone.

3 47429 MR. BATTISTA: Thank you.

4 47430 I will give Duff the last word. I
5 know that you have specific points on conflict of
6 interest, private interest, a definition, and the need
7 for general rules.

8 47431 Is there something that you want to
9 draw the Commissioner's attention to, particularly, in
10 light of what has been said?

11 47432 MR. CONACHER: Yes. First of all, I
12 agree with the concern that Professor Sossin has
13 expressed concerning the standard of potential. I am
14 just not sure how you avoid the unknown future. That
15 is, I guess, the best way I could put it.

16 47433 Secondly, in terms of Democracy
17 Watch's position on what is the proper, legally correct
18 definition of "private interest" in the current
19 Conflict of Interest Act, we believe that the proper
20 definition is "any interest that could influence you".

21 47434 You could add to that definition, if
22 you were adding something to the statute, "any interest
23 that might reasonably be seen to be something that
24 could influence you", but, from my understanding, the
25 courts would read that in anyway in interpreting such a

1 standard. If it just said "any interest that could
2 influence you", it would be interpreted based on where
3 a reasonable person would draw the line.

4 47435 Just one specific note, though, with
5 regard to the MPs' code and senators' code. Those are
6 limited to financial interests, and Democracy Watch's
7 position is that there shouldn't be that limit.

8 47436 Some may think, okay, but then MPs
9 can engage in outside activities, so how do you square
10 that with a rule that says they can't have any
11 interests that could influence them?

12 47437 Again, the remedy is that they may
13 have to recuse themselves from some policy-making or
14 decision-making processes. It's not that they won't be
15 able to continue their outside profession, it is just
16 that they will not be able to participate in certain
17 decisions.

18 47438 That, combined with bringing in a
19 general ethics rule standard to set a general standard
20 that goes outside the strict conflict of interest
21 realm, is another recommendation that we are making in
22 this area, in line with what others have said, to have
23 some general principles.

24 47439 Our position is that there should be
25 a general ethics rule, so that we are outside the

1 conflict of interest realm, so that the Ethics
2 Commissioner has a broader mandate in terms of
3 upholding just general standards of activity of public
4 officials, as well.

5 47440 MR. BATTISTA: Thank you.

6 47441 The next topic you will be leading
7 on, Duff, and the general questions are the following:
8 Do you believe that the ethics rules that currently
9 cover business and financial dealings between a sitting
10 prime minister or a sitting member of Parliament and a
11 third party are adequate?

12 47442 If not, how could they be improved?

13 47443 Should there be additional ethical
14 rules or guidelines concerning the activities of
15 politicians as they transition from office, or after
16 they leave office?

17 47444 MR. CONACHER: Thank you very much,
18 Mr. Battista. I will not be going through, again, all
19 of the details in this area, as it is on the summary
20 that I have prepared. It takes up most of page 2, and
21 on to page 3 -- a list of changes that Democracy Watch
22 believes need to be made.

23 47445 The initial answer is that our
24 position is that the current rules covering business
25 and financial dealings are not adequate.

1 47446 I would like to make a general point
2 first. When we talk about these things a lot in the
3 public sphere, the usual response is: Oh, well,
4 Democracy Watch's position is that all public officials
5 are crooks, and that's why they don't trust anybody,
6 and that's why they are so harsh on these issues.

7 47447 We have actually never said that
8 statement in any written or verbal form. It is not
9 even an assumption that all, or even many, or most are
10 there to pursue their private interests -- people who
11 are in public service.

12 47448 It is simply the point that when you
13 look at the details of the system, there are all sorts
14 of ways in which people can have unethical influence or
15 be engaged in unethical activities and it is currently
16 legal. So we are just saying: Why would you not close
17 these loopholes, and strengthen the enforcement, in
18 order to make sure that those who, even if it's very
19 few, want to exploit weak rules and weak enforcement
20 and loopholes won't be able to, legally at least.

21 47449 Again, you will never be able to stop
22 any of these activities, no matter how strong your
23 system, because of the nature of the activities.

24 47450 Just to go through it very quickly --
25 and I won't cite the page numbers and recommendation

1 numbers in these areas of the improvements that
2 Democracy Watch thinks are needed, I will just
3 generally, quickly, go through the list.

4 47451 I have mentioned already a general
5 ethics rule.

6 47452 In terms of the disclosure threshold
7 for assets, blind trusts and gifts, we see that, in
8 terms of the assets, as being too high. It's \$10,000.
9 You wouldn't have to have public disclosure of assets
10 below that, but at least disclosure to the Ethics
11 Commissioner.

12 47453 We have a political finance system
13 that says you can't have a donation above \$1,100 to a
14 candidate. Presumably that threshold of Parliament
15 shows that, saying anything above that creates some
16 sort of influence and that is why we are setting the
17 donation limit at that level.

18 47454 But then you don't have to disclose
19 assets that are worth less than \$10,000, which leaves
20 quite a wide gap for someone to gift something to you
21 without you having to disclose that you have received
22 it.

23 47455 So a simple enforcement mechanism;
24 again, disclosure doesn't have to be public in those
25 lower levels, but at least to the Ethics Commissioner.

1 47456 Other donations, gifts, loans that
2 are donated, though should be disclosed on a timely
3 basis so voters know who is bankrolling candidates and
4 parties before they vote; simple voters rights.

5 47457 Just to note, these may seem to not
6 cover business and financial dealings, but Democracy
7 Watch's position is interpreting that broadly; that
8 financial dealings include all of the ways of providing
9 benefits of money, property or services to public
10 officials. These loopholes are in this area.

11 47458 In terms of business dealings, the
12 secret lobbying is allowed. We need to close those
13 loopholes so that it is not legal to lobby in secret.

14 47459 Interconnections between all of these
15 people need to be more disclosed by requiring lobbyists
16 to disclose past work in government or politics in
17 Canada and disclosing -- there are new loopholes that
18 have been introduced in the MPs Code, that allow
19 lobbyists to do volunteer work for MPs to an unlimited
20 level.

21 47460 That was the loopholes I mentioned
22 yesterday that were created a week and a half ago and
23 those need to be closed.

24 47461 Generally preventing secret donations
25 and trust funds, limiting loans in the same way

1 donations are limited are all part of support that
2 lobbyists and other third parties can provide as a
3 favour currently and that those loopholes that allow
4 those favours should be closed.

5 47462 Turning to the post-employment and
6 the transition rules, we currently require under the
7 Act disclosure of firm offers of outside employment.
8 That leaves open the technical loophole that the public
9 official can go out and seek employment for months and
10 months, not receive a firm offer, but nobody knows that
11 the official is out there asking people for a job.

12 47463 So close that second loophole and
13 require disclosure to the commissioner when and if a
14 public official begins to seek outside employment. If
15 they are thinking about leaving, then they may change
16 their decisions to help themselves get a job during
17 that period.

18 47464 We talked about it a lot in terms of
19 various terms of improper advantage, employment and
20 official dealings that are part of the post-employment
21 rules and how those need to be defined.

22 47465 Lengthening the cooling-off periods,
23 again on a sliding scale based upon the power of the
24 public official, is needed because there is lots of
25 people not covered at all by any post-employment

1 restrictions or cooling off period.

2 47466 And as we explored a bit yesterday,
3 requiring disclosure again to the Ethics Commissioner
4 only of assets and liabilities through the cooling-off
5 period will I think provide effective -- as effective
6 as you can have -- restriction on and help enforcement
7 of who exactly public officials are dealing with in
8 their post-employment cooling-off period, where they
9 are getting income, where they are getting benefits.
10 And that all ties into of course whether they are in a
11 conflict of interest based on their former public
12 service.

13 47467 So I will leave it at that and
14 welcome the comments of others in this area.

15 47468 MR. BATTISTA: Thank you.

16 47469 I am going to go to Kathleen on this
17 matter and ask if you can bring us the perspective of
18 the American experience on these issues?

19 47470 PROF. CLARK: Yes. First of all, let
20 me just say that I am going to focus in these few
21 minutes on the regulations dealing with current public
22 officeholders. I think in a minute you will ask
23 another question more focused on post-employment and so
24 I will have other comments on post-employment then.

25 47471 The second thing I want to mention is

1 that in thinking about the Canadian rules, I really am
2 grateful to and dependent on the analysis found in the
3 papers by Mr. Levine and Professor Turnbull. The
4 papers were just really enormously helpful to me and I
5 found much of the analysis to be very compelling.

6 47472 But my understanding of Canadian
7 rules is based only on what I found in their documents,
8 in their reports.

9 47473 On current officeholders, there are
10 four restrictions that I focused on that I think were
11 referred to as anti-ingratiation measures, borrowing
12 the analysis of Andrew Stark.

13 47474 The first one prohibits I guess --
14 well, it is almost post-employment, but in any case it
15 prohibits former public officeholders from accepting a
16 contract with a private firm with whom they have had
17 direct and significant official dealings during the
18 last year of public employment.

19 47475 I'm not really sure how to analyze
20 that restriction at all, because I don't know what a
21 significant official dealing means. My understanding
22 is that it is that it will be up to the Ethics
23 Commissioner to interpret.

24 47476 There are two other -- several other
25 restrictions that are a little bit clearer: that

1 public officeholders must report all firm offers of
2 employment within seven days of receiving them; and
3 that they must report all accepted offers to the Prime
4 Minister or other appropriate Minister.

5 47477 On these I guess I would just say
6 that the U.S. Executive Branch has taken a different
7 approach on this that may be instructive: focusing not
8 on job offers, and firm offers in particular, but
9 instead on negotiations and prohibiting an employee
10 from making a government decision with respect to firms
11 that the employee is negotiating with for employment.

12 47478 The way it works in the United States
13 is that there is this criminal conflict of interest
14 statute, criminal financial conflict of interest
15 statute that makes it a crime for a government employee
16 to make a decision on an issue in a matter where they
17 have a financial interest and the U.S. statute
18 attributes to the government employee the financial
19 interests of the firm with which the employee is
20 negotiating for employment and then applies the
21 financial conflict of interest statute to the employee.

22 47479 I guess I would just say that on this
23 I think the approach of looking at negotiating partners
24 as opposed to limiting the scope to firm offers has a
25 lot to recommend it, because a problem of a conflict of

1 interest can arise not just where a firm offer has been
2 given, but where the negotiation is ongoing.

3 47480 So I guess I would recommend that you
4 consider that other approach that the previous
5 panellists recommended as well.

6 47481 I guess the fourth anti-ingratiating
7 measure which is referred to in the reports is a
8 prohibition on public officeholders allowing outside
9 employment offers to influence them in the performance
10 of their duties. This again I would just say is an
11 example of not a prophylactic measure but instead a
12 prohibition on conduct that clearly would harm the
13 public. But it would be, it seems to me, very
14 difficult to prove such an offence and which I think
15 illustrates the need for prophylactic measures that go
16 beyond that more limited approach.

17 47482 MR. BATTISTA: Thank you.

18 47483 Ian, do you want to add on this
19 particular subject?

20 47484 PROF. GREENE: Yes. The
21 post-employment rules are -- well, first of all, with
22 regard to the current rules for conflict of interest, I
23 think that the current rules are, with the suggestions
24 that Greg Levine has made, are adequate.

25 47485 But the really important thing, as I

1 mentioned before, is the educative component in just
2 ensuring that there is a commission structure that
3 allows one-on-one meetings with all Members of the
4 Cabinet and Members of Parliament. I think that is the
5 most critical part.

6 47486 Now, post-employment is difficult
7 because we always bring our experience in any role that
8 we play forward to the next part of our career. That
9 is just natural. What is not acceptable is using
10 specific privileged information that we obtain from
11 working in the public sector for personal gain, because
12 we are using the public trust for ourselves in a way
13 that is not open to citizens in general. So it
14 violates the equality principle.

15 47487 But there is a huge grey area between
16 bringing our experience forward to the next part of our
17 career and using privileged information in ways that we
18 ought not to.

19 47488 I think it is very difficult to draft
20 rules and regulations that cover all possibilities,
21 because there are so many varied possibilities.

22 47489 So I think that we could learn
23 something from the commission approach. In the United
24 Kingdom there is mention in a couple of the papers,
25 because that commission can really look at individual

1 situations and provide advice.

2 47490 So I think a commission like that in
3 the Canadian situation might be very useful to advise
4 people when they are considering leaving public office
5 or have left public office, but also to advise the
6 commissioner -- and I think the final decision about
7 what is acceptable and whatnot should rest with the
8 commissioner.

9 47491 I agree with Kathleen that there
10 should be focused on negotiations and reporting
11 negotiations rather than firm offers. It just closes a
12 loophole that I think otherwise might be taken
13 advantage of by a few people.

14 47492 MR. BATTISTA: Lorne, do you want to
15 wade in on this, on the transition?

16 47493 PROF. SOSSIN: Just briefly. Just
17 briefly.

18 47494 Let me just say as a preface to a
19 brief thought, that I don't like the question. I think
20 when it comes to ethics and accountability, I don't
21 want to live in a country that aims for adequacy. So
22 if that is the only place that we think we ought to be,
23 I would be kind of deeply worried.

24 47495 And it goes to, you know, the
25 Attorney General's submissions and others that are

1 looking at the rules and essentially saying, you know,
2 they are fine and they will be interpreted and it's all
3 fine. We have had lots of amendments, it has evolved
4 and now we are there.

5 47496 And I don't think that that is ever
6 the case. In other words, this is such a dynamic field
7 that to ever suggest that we have got there and now we
8 can relax and we are one of the more regulated
9 jurisdictions in the OECD and we should sleep more
10 soundly because of that, I just don't think that is a
11 compelling view to aspire to.

12 47497 That said, we also don't live in a
13 world in which we want to change the rules every year
14 and a half and have this constant flux and confusion
15 about what the standards are and what people live by.
16 Well, did the transaction happen between 2004 and
17 2005 -- oh, it was March. It's a whole different set
18 of rules in March.

19 47498 So what is the answer? Well, I think
20 the U.K. experience is instructive and I think it is
21 the advice giving. I don't know a ton of former
22 politicians who have gone into private life; I know a
23 few. And every one of them got a cleansing letter from
24 someone with expertise in this area, a former Integrity
25 Commissioner, a retired judge, to say look at what I

1 did, look at the rules, look at the world I am about to
2 enter, give me some advice.

3 47499 If that is part of the jurisdiction
4 of a commission or Integrity Commissioner, all the
5 better. But I don't know people who would just run
6 headlong into some new venture without clarifying what
7 their roles and responsibilities would be.

8 47500 So what is the challenge? Why isn't
9 that just a good solution?

10 47501 In my view the challenge is -- you
11 have heard it from Duff, from a few people now -- that
12 it is just to the commissioner only. It is
13 confidential. It is private advice. I think that may
14 do good things for the individual. It does nothing for
15 public confidence and does nothing for consistency,
16 predictability, coherence.

17 47502 We have standards like improper
18 advantage that we might say well, the common law has
19 evolved and interpretation is the answer and it may
20 well be precisely because it is transparent. We all
21 read that judgment on what improper advantage means and
22 the next court can opine on it and advocates can make
23 submissions on it. The public can come to internalize
24 it.

25 47503 So at the City of Toronto where I am

1 serving as interim Integrity Commissioner, one of the
2 things that we have done -- and David Mullen, my
3 predecessor, pioneered this -- is take all that advice,
4 or at least the significant pieces of it, and then
5 create FAQs, create guidelines, put things on the
6 website. A person asked this, here is the answer.

7 47504 So what is an improper advantage?

8 Well, here I agree that interpretation really is better
9 than coming up with 16 different factors to be
10 considered or itemizing everything you think might be
11 and invariably missing out on the thing that will be
12 for the individual whose case is eccentric and
13 different.

14 47505 But if you have this idea of the
15 yardsticks, the signposts, the guides that we all are
16 used to reasoning by analogy to, so the commentaries
17 and the rules of professional conduct governing lawyers
18 in most provinces, these are the real-life examples of
19 what we mean by taking advantage improperly.

20 47506 Greg mentioned well, it must connote
21 that you can take advantage properly. What would that
22 look like?

23 47507 Well, having an example of taking
24 advantage of this previous experience because it gave
25 you expertise and judgment and intuition about how

1 government works versus taking advantage of the
2 privileged information that puts you in an unfair
3 position to know is not rocket science. One can easily
4 imagine clear examples of each.

5 47508 And simply by putting out clear
6 examples of each in a transparent fashion you have done
7 more, I think, than you could by itemizing 16
8 subsections to the Code.

9 47509 So that would be a strong
10 recommendation again in favour of a practical realistic
11 hard law, soft law mix that is responsive to change but
12 keeps focused on enduring principles.

13 47510 MR. BATTISTA: Before we move on to
14 the next topic, maybe I will ask you to continue just
15 on the comments that have been made on the firm offer
16 versus seeking as was proposed by Mr. Conacher and
17 while negotiating, which I think sort of captures the
18 seeking and negotiating.

19 47511 Do you have any comments on that?

20 47512 PROF. SOSSIN: Yes. I think again to
21 finding the language that is inclusive and
22 principles-based is going to be better than language
23 about well, it says an offer. I didn't have an offer
24 so I'm okay, even though I did all the sorts of things
25 that are clearly the values that were meant to be

1 caught by it.

2 47513 But, you know, if you bring that
3 precision to language, as people are justified in
4 doing, right? If it is arranging my affairs and I want
5 to know if I am liable or not, I am going to bring
6 precision to whatever language is there.

7 47514 So if the language says that you
8 can't, you know, engage in decision-making around
9 entities that you have dealings with that could result
10 in a private advantage, or whatever a more articulate
11 drafter would come up with, I don't see why it has to
12 be a choice between offer and negotiation.

13 47515 In other words, there is a lawyer out
14 there right now who is thinking well, offer and
15 negotiation, those are extremely precise terms.
16 Negotiation has a definable set of contours. I am
17 outside of it, so I'm okay, because we just had
18 dealings, you know, that were entirely not about
19 negotiating.

20 47516 So I would rather see something that
21 has no loopholes in that sense, because it goes after
22 the value that we were looking at, which is not gaining
23 that private advantage in your mind when you are making
24 a public decision.

25 47517 And again, to the extent that thing

1 creates problems of predictability and coherence,
2 create examples, create guidelines, create FAQs, give
3 texture that is going to be easily accessible to the
4 public and to the people involved and you have achieved
5 far more than the most precise wording on negotiating
6 or offer.

7 47518 MR. BATTISTA: Thank you.

8 47519 We are going to move on now to the
9 post-employment situation and I'm going to ask Ian to
10 lead on this point.

11 47520 Are the current rules on the
12 post-employment of politicians appropriate? Should
13 they reach further in terms of the sort of
14 post-employment activity that they regulate?

15 47521 Then, further, do rules currently
16 reach the actions of former public officials directed
17 not at Canadian governments but at international
18 governments and organizations? To what extent do you
19 believe that the rules should reach the latter sorts of
20 activities?

21 47522 PROF. GREENE: Well, I think that I
22 had anticipated that question and dealt with it in many
23 ways already.

24 47523 So I think the important part to deal
25 with is what about international governments and

1 organizations: Should dealings with those be covered
2 in the rules?

3 47524 I definitely think so, particularly
4 if you are a Cabinet Minister and you have through that
5 knowledge of international issues, international trade
6 issues in particular, that is really -- much of that
7 could be privileged information that you could take
8 advantage of improperly when you leave office.

9 47525 So I think that one of the reasons
10 that the international dimension is not really covered
11 in the current rules is because really the provinces
12 were the pioneers in developing ethics legislation and
13 ethics rules and although there are international
14 dimensions to provincial activities, not nearly as many
15 with regard to the federal government.

16 47526 So I think that is a loophole that
17 needs to be covered, needs to be filled in. I think
18 that could strengthen the current rules quite a bit.

19 47527 MR. BATTISTA: Thank you.

20 47528 Kathleen, would you have any comments
21 on that in relation to the American experience and
22 post-employment and dealing in international affairs
23 and international matters?

24 47529 PROF. CLARK: Sure. My first
25 comments aren't on the international question, though.

1 I guess I just wanted to let you know sort of what may
2 already be indicated in some of the reports.

3 47530 That is that one of Canada's statutes
4 with regard to post-employment actually does I think a
5 much better job than the parallel statute in the United
6 States with respect to post-employment restrictions.
7 This I think is section 34(1) and it limits the ability
8 of a former officeholder to participate in a proceeding
9 on behalf of a private party if they acted on behalf of
10 the state, on behalf of the government earlier.

11 47531 And I guess I just wanted to say that
12 I am impressed that this prohibition reaches not just
13 communicating on behalf of a private party with the
14 government, but actually reaches I think any kind of
15 representation at all.

16 47532 The parallel federal statute in the
17 United States is much narrower in scope although the
18 legal ethics rule in the United States actually
19 parallels the Canadian version.

20 47533 So my opinion is I think you have it
21 right on that, that it is as broad in scope as it is.

22 47534 The second comment I have an
23 post-employment restrictions has to do with lobbying
24 and that certain designated public officeholders are
25 prohibited from becoming lobbyists for five years, and

1 my understanding is that the definition of lobbying is
2 limited to lobbying for compensation, if I understood
3 the reports correctly.

4 47535 I guess it wasn't really clear to
5 me -- I mean that is a pretty broad restriction,
6 five-year prohibition. On the other hand it is not
7 clear to me why it would be limited to compensation.

8 47536 So rather than really a comment, I
9 think I have just a question to be considered, which
10 is: Does that make sense that it should only cover
11 lobbying for compensation?

12 47537 It may make sense because maybe there
13 are two different classes of lobbying entities out
14 there, and people who are doing it not for compensation
15 should be treated differently. But it wasn't obvious
16 to me the reason for that.

17 47538 A third post-employment related
18 restriction has to do with I think what is referred to
19 as profiteering or memoir writing. I don't know that
20 this is a close focus for the Commission, but I guess I
21 just wanted to acknowledge that in the United States
22 there certainly is a long tradition of former federal
23 officials writing memoirs with very little regulation
24 or restriction outside of the intelligence related
25 information.

1 47539 And then it was in that context of
2 intelligence related memoir -- that is a memoir, a book
3 written by a former CIA employee -- that the United
4 States imposed a constructive trust upon the proceeds
5 of that book. And this approach of coming up with
6 constructive trusts to disgorge the benefits of a
7 violation of a rule or a standard really has been
8 incorporated in a number of different ethics provisions
9 now and may be something, an example, kind of sanction
10 or remedy that may be worth considering.

11 47540 On the international dimension, again
12 I think I have a question, because I will say this: In
13 the United States there are a number of very specific
14 and rather strict prohibitions and restrictions having
15 to do with a former government official who works for a
16 foreign government, say, or a foreign political party.
17 And there are also concerns about former public
18 officials using their inside information about trade or
19 other treaty negotiations on behalf of private parties.

20 47541 But I take it that your question
21 really isn't aimed at that kind of situation but is
22 instead aimed at a situation where a former Canadian
23 public official would be representing a client before
24 some kind of international body. So I gather that the
25 issue, the concerns are really quite distinct, and that

1 is perhaps sort of foreign relations concerns about
2 what the impact is on Canada's relations with other
3 governments or the appearance of something being an
4 official Canadian position when it is simply a former
5 government official doing this private sector work.

6 47542 And so there I guess I just wanted to
7 confirm that it is a different distinction, and beyond
8 that I don't know that I have any experience or
9 analysis from the U.S. that would be helpful to you
10 there.

11 47543 MR. BATTISTA: Thank you.

12 47544 Lorne Sossin, do you want to weigh in
13 on this?

14 47545 PROF. SOSSIN: I can just briefly.

15 47546 First of all, I just want to say,
16 having expressed my reservations about the fiduciary
17 model because of all the legal baggage that that might
18 bring in around the public trust, this is one aspect of
19 it that I really, really like, the sanctioning around
20 disgorgement. Which is to say administrative penalties
21 or monetary penalties always seemed to me kind of
22 inherently unfair. If you make it, say, \$50,000, and
23 my annual salary is \$80,000, that seems hugely
24 punitive. If my salary is \$6 million, it seems just an
25 easy price of doing business and why would we want a

1 sanction to be only meaningful in relation to someone's
2 wealth, which is not a predictive or principled basis
3 on which to express a collective sanction?

4 47547 So the idea of saying well, you know,
5 the penalty is whatever you got that you shouldn't have
6 got, whatever you got by virtue of using privileged
7 information or information that was prohibited or it
8 would be unfair to have that kind of advantage, it
9 seems to me just to have a sort of elegant logic to it.

10 47548 So I like the idea of a disgorgement
11 remedy and of course they are becoming more popular in
12 administrative settings, most recently our own Ontario
13 Securities Commission, and I think they will be all the
14 rage from environmental regulation through to ethics
15 regulation. I think there is something far more
16 appealing about it than simply set fines, which again
17 you have no way of knowing the impact on and we have of
18 course lots of people languishing in prison for the
19 inability to pay set fines, which again seems awfully
20 punitive.

21 47549 So I want to take a page from
22 Kathleen's note, except without the excuse of not being
23 a Canadian, which is I don't get the distinction that
24 was intended to be drawn between the domestic and the
25 international either.

1 47550 I'm sure there is actually a scenario
2 they had in mind. I'm not sure it is exactly the one
3 that you mentioned, but I'm not sure that I understand
4 what it is as well. If I understood the logic behind
5 why you would care about post-employment work or
6 lobbying domestically but not internationally, I would
7 be I think better situated.

8 47551 I can imagine lots of situations
9 where that distinction would be completely arbitrary,
10 artificial and seem quite puzzling, and I can think of
11 settings where it would just make a lot of sense; that
12 what we are really after is a particular kind of use of
13 information that if you are in a totally different
14 jurisdictions appearing in front of a totally different
15 body, the interests of Canada and knowledge about
16 Canada wasn't engaged at all. I can see why you might
17 draw that line.

18 47552 So I would want to understand the
19 line drawing a bit better and hopefully we have the
20 experts around the table with the brainpower to do
21 that.

22 47553 MR. BATTISTA: We will come back on
23 that. I think you have, however, highlighted some of
24 the concerns precisely.

25 47554 I mean, should there be distinctions

1 or not? And if there should be, where should we find
2 them? I think you have highlighted some and I'm sure
3 we will be able to discuss that further with the
4 questions.

5 47555 I am going to ask Duff Conacher maybe
6 to conclude on this question and maybe with a focus on
7 the international aspect.

8 47556 MR. CONACHER: Yes, thank you. I
9 already outlined our proposals concerning the general
10 post-employment rules and changes needed.

11 47557 With regard to covering activities
12 that involve international governments and
13 organizations, Democracy Watch's position is that
14 sections 33 to 35 do cover those. If you look at the
15 language of them, they are not restrictive to domestic
16 situations.

17 47558 Section 33 is taking improper
18 advantage of your office in any way. It is not stated
19 at the end "in any way", but there is no limitation.

20 47559 Subsection 34(1) is with regard to
21 any specific proceeding, transaction -- I would
22 highlight in particular the word negotiation where I
23 think you would see issues possibly on the diplomatic
24 level. Negotiation would cover, despite our best --
25 any lawyer's attempt, I think, still be a very broad

1 term that would be difficult to narrow down.

2 47560 And subsection 34(2), you can't give
3 advice to anyone, domestic or outside of the country.

4 47561 I will just highlight again one
5 other, subsection (2) of section 35. You cannot make
6 representations, for remuneration or not, on behalf of
7 any person or entity to any department, and then I will
8 highlight again the word "organization". It doesn't
9 say domestic organization, again a very broad term.

10 47562 A board, commission or tribunal would
11 cover a lot of agencies and entities on the
12 international level, but the broadest word is
13 "organization" I think in subsection 35(2).

14 47563 But of course the Act could be
15 changed to add explicit statements that these sections
16 apply to both domestic and international organizations,
17 and then of course there could be some definitions
18 added to determine the difference between other
19 governments versus international entities.

20 47564 So I will leave it at that.

21 47565 MR. BATTISTA: Thank you.

22 47566 The next topic, Lorne, I am going to
23 ask you to lead, and it deals with the enforcement and
24 penalty regimes.

25 47567 Are those that are in effect

1 sufficient? Do the various sources of ethics and
2 lobbying rules provide a coherent whole or do they
3 create overlap or leave gaps? And we are obviously
4 referring to the Conflict of Interest Act, Parliament
5 of Canada Act, the Lobbyist Act and other legislation.

6 47568 PROF. SOSSIN: Right. So I previewed
7 a little bit of this in my words of admiration for the
8 disgorgement kind of remedy. But it speaks to a
9 broader principle I think about sanctioning and
10 remedies, which is proportionality, the ability to see
11 a remedy in relation to a number of factors, including
12 the gravity of the breach, you know, normal kind of
13 exacerbating and mitigating factors. Was it a
14 recurring problem? Is this the third time it has
15 happened. Was there a good faith attempt to get advice
16 beforehand that was simply, you know, not sufficient,
17 or was it running headlong into a situation where
18 someone knew or ought to have known better?

19 47569 So, you know, having a broad-based
20 sanctioning power I think is far better than simply,
21 you know, choosing one of three options.

22 47570 The disgorgement I think fits that
23 category nicely. One could imagine another kind of
24 spectrum of penalties that would give a similar ability
25 to implement proportionality.

1 47571 I suppose I have probably more
2 sympathy than many for just the pure shaming ritual of
3 a reprimand or to be found in breach. I think for
4 about 96 per cent of politicians this can be a career
5 limiting, if not career ending moment. You know, in a
6 sense, if you are an ethics commissioner you are given
7 just a very small chisel and a sledgehammer and it is
8 the exact same wording that is represented by both,
9 which is you are in breach of this code.

10 47572 But there is 5 per cent, the kind of
11 rogue mavericks out there who say bring it on. I love
12 the idea that you think I am in breach of this because
13 the whole system is in breach and I will tell you on a
14 soapbox all the reasons why.

15 47573 You know, we see this at City Council
16 in Toronto. There are a couple of largely ungovernable
17 counsellors whose political currency is getting into
18 trouble and being proud of it, because they feel they
19 are doing it for their constituents and they did
20 nothing wrong, et cetera, et cetera.

21 47574 So, you know, for that rogue element
22 I don't know that disgorgement or anything else is
23 really going to be effective if the goal again at the
24 end of the day is creating a culture of accountability,
25 enhancing public confidence.

1 47575 I tend to think that the monetary set
2 fines are not a particularly appealing way to go, and I
3 tend to think that, you know, anything more than a
4 reprimand is unnecessary if what you are looking for is
5 that reputational standard.

6 47576 The last thing I would say is the
7 particular problems in post-employment. I mean, if
8 someone is a sitting politician I think these
9 reputational things have enormous currency. For
10 someone who is not, I think something that has teeth --
11 and maybe more importantly is perceived to have
12 teeth -- be it disgorgement or something else that can
13 reach into ill-gotten gains from work that shouldn't
14 have been done or relationships that shouldn't have
15 been formed, is probably going to be important.

16 47577 The last thing I would say about it,
17 because I mentioned before an ombudsman model and we
18 haven't talked a lot about the models of enforcement.

19 47578 There is a trade-off that is worth I
20 think putting on the table, which is if your remedies
21 are more reporting remedies, remedies of transparency
22 and public knowledge, then typically your investigative
23 powers go way up. You can audit with little or no
24 notice, you can investigate, get all the documents,
25 records and things you need, compel people to testify.

1 47579 This is in part the logic of the
2 public inquiry as well. It is only because you don't
3 reach findings of guilt or liability that someone
4 doesn't get the protections they would in a criminal
5 justice setting, for example, to remain silent.

6 47580 So here I think there is something
7 similar, is that to the extent the remedies are
8 reporting remedies, I think the investigative powers,
9 the powers of doing all sorts of other things can be
10 much higher.

11 47581 To the extent you are doing things
12 like disgorgement or significant monetary penalties,
13 things that have the taint of guilt, even if not called
14 so but would be treated so certainly by a court, then
15 you are going to expect -- and if I were subject to it
16 I would expect -- a whole raft of procedural
17 protections. I would expect it to be a long, drawnout,
18 delayed, Stinchcombe-like disciplinary, procedurally
19 robust affair, and I'm not sure that that is really
20 what we want at the end of the day.

21 47582 But I think that is the seesaw: the
22 more you want the teeth, the more to get it you have to
23 run a gauntlet of a highly legalized system. And the
24 more you want to get that investigative public
25 education, public transparency set of ends, the more

1 things you can do along the way that are going to be
2 flexible, going to give a lot more kinds of powers to
3 the Commissioner, and so on and so forth.

4 47583 So I'm not sure exactly where the
5 right balance is, but I think we should see it as a
6 balance and aim to get it as close as we can to
7 something that works at both ends.

8 47584 MR. BATTISTA: I noticed, Ian Greene,
9 you were nodding when he was making the point about if
10 you want penalties, you are going to need a more robust
11 system of procedure and if you want a more consultation
12 approach, maybe what has been called the culture of
13 ethics as a commissioner acting more as a guide, then
14 you would have more investigative powers maybe, but not
15 necessarily the procedure that follows.

16 47585 Can you follow up on that maybe?

17 47586 PROF. GREENE: Yes. I very much
18 agree with Lorne. The currency of public office is
19 avoiding embarrassment. That is the bottom line. Just
20 like if you are in the private sector you try not to go
21 bankrupt, you hope to make a profit, in the public
22 sector you avoid embarrassment.

23 47587 So being embarrassed by being found
24 guilty of breach of the rules is, I think, a very
25 important sanction.

1 47588 Now, Lorne mentioned the problem of
2 rogues. I think as the Ethics Commissioner for the
3 City of Toronto, I think practically any municipal
4 Ethics Commissioner would be more challenged because I
5 think the culture of ethics has a longer way to go in
6 that setting than perhaps the House of Commons, the
7 Senate and the Provincial Legislatures.

8 47589 There are rogues in all these areas,
9 but fortunately because of the party discipline system
10 the rogues have been dealt with usually by the party
11 whips. Those who refuse to comply with the disclosure
12 guidelines because they think the whole system is wrong
13 and doesn't work and is too restrictive, I think
14 experience has shown that they are eventually brought
15 into line. This helps to support the culture of ethics
16 which I think has been evolving for the last 20 years
17 in Canada.

18 47590 I think that the current system,
19 whereby most of the sanctions that are imposed are
20 recommended by the Ethics Commissioner to the
21 legislature, is something that for the time being ought
22 to remain. I know Mr. Conacher has recommended that
23 more powers be given to the commissioner to impose
24 greater sanctions. I think for the moment that that
25 would be counterproductive because I think that

1 legislatures do need to maintain control in the end of
2 their own disciplinary procedures.

3 47591 I think there is a danger of
4 judicializing the system, of it becoming too
5 legalistic. Lorne Sossin has mentioned the dangers of
6 that.

7 47592 For the moment I think really the
8 current procedure, at least in the provinces has tended
9 to work. If it turns out that members of legislatures
10 do not take the sanction role seriously, then I think
11 we will move to a more judicialized system, but let's
12 see if the current system works before we move there.

13 47593 MR. BATTISTA: Kathleen, can you
14 bring us a perspective and the experience of foreign
15 jurisdictions, especially on these matters, you know,
16 of regulations and due process that accompany sanctions
17 and penalties?

18 47594 PROF. CLARK: Well, in thinking about
19 your question, which I think really calls for a kind of
20 global assessment of the various statutes and
21 regulatory regimes, I want to first say that I don't
22 feel familiar enough with statutes and their
23 enforcement to answer the question as written, but I
24 think I have something to add perhaps, which is this:
25 It might be useful, as you try to assess the adequacy

1 of the current regulatory regime that is listed here,
2 to include another factor, which is the professional
3 regulation.

4 47595 So certainly in thinking about the
5 restrictions on former government officials, including
6 high-level government officials, in the United States
7 it would be incomplete if you only looked at the
8 federal statutes and the federal regulations and didn't
9 also look at the legal ethics rules, because in our
10 country so many public officials are lawyers and when
11 they leave the public sector they go into the legal
12 profession.

13 47596 So I guess the only I think
14 substantive comment I have is that it might be worth
15 considering how the legal ethics rules apply and to
16 what degree they are playing an important role apart
17 from the specific statutes.

18 47597 MR. BATTISTA: What I was going to
19 suggest is maybe we could stop. I was going to suggest
20 we maybe take a break now and we will come back and we
21 will complete this round.

22 47598 Is that okay, Commissioner?

23 47599 COMMISSIONER OLIPHANT: Yes, thank
24 you. It's just past 20 to 11:00.

25 47600 We will take a 10-minute break and

1 come back at 10 to 11:00.

2 47601 There is coffee and juice just
3 outside in the hall there, for anyone who wishes to
4 have some. Thank you.

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

6 --- Upon resuming at 11:00 a.m. / Reprise à 11 h 00

7 47602 COMMISSIONER OLIPHANT: Mr. Battista,
8 I turn the floor back to you, sir.

9 47603 MR. BATTISTA: Thank you.

10 47604 We will just follow up on where we
11 left off and I'm going to ask Lorne Sossin to
12 intervene. He was going to make a point on the
13 overlapping of the control mechanisms in ethics
14 matters.

15 47605 PROF. SOSSIN: Yes, thanks.

16 47606 Part of the question involved I think
17 the idea should we see it as problematic that the same
18 conduct or relationship might be covered by more than
19 one instrument or mechanism.

20 47607 I think I just wanted to say briefly
21 that I am more concerned with the notion of gaps than I
22 am with the notion of overlap. In fact, the work I did
23 for the Ipperwash Inquiry was looking at all of the
24 different oversight on the police and we constructed a
25 scenario, not a hard scenario to construct, a police

1 officer engaged in, you know, the use of violence to
2 quell a demonstration in which arguably there were six
3 different accountability mechanisms, from internal
4 discipline to civilian oversight to the Police Services
5 Board, to the courts. And the very same conduct could
6 have given rise to a different proceeding with an
7 arguably different result in all of these.

8 47608 But there was a sense coming to the
9 end of that research that the nature of the public
10 trust and the nature of public confidence sometimes
11 requires overlap and the problem wasn't so much the
12 overlap, but ways of sorting it out in practice so that
13 you don't have competing investigations, so that one
14 body has a provision, as many do, for example giving
15 the discretion -- and the City of Toronto is part of
16 the Integrity Commissioners protocol -- to effectively
17 stay an investigation pending the outcome of another
18 proceeding that is dealing with the matter.

19 47609 So if it is going through the civil
20 courts or a criminal prosecution, you simply stay that,
21 as long as everyone knows the kind of pecking order,
22 what ought to stay, you know, what ought to wait until
23 something else is completed. The fact that there is
24 overlapping mechanisms just as a public inquiry will
25 often have criminal or civil proceedings swirling

1 before it or after it, I don't see as itself
2 problematic.

3 47610 So I wouldn't see that as a mischief,
4 but I would want to ensure that there was a good answer
5 to the question. So how do you work it out if more
6 than one of these codes or rules applies and there are
7 the prospect of multiple or competing investigations?

8 47611 MR. BATTISTA: Thank you.

9 47612 On this topic I am going to ask Duff
10 Conacher to conclude, and maybe I will ask you, because
11 you have outlined for us the points on the questions
12 that you think are relevant and you have taken the time
13 to identify them with great care, maybe I would ask you
14 to focus on this last point that was made by Lorne
15 Sossin on the overlap of control mechanisms and maybe
16 if you could comment on the points that have been made
17 in terms of regulatory and sanctions that the
18 Commissioner would apply versus, if the two are in
19 opposition from your perspective or not, the
20 Commissioner's role as an advisor and what that implies
21 in terms of giving the Commissioner a role of
22 sanctioning and imposing heavy penalties and what that
23 would imply in terms of guarantees of procedural
24 fairness?

25 47613 MR. CONACHER: Yes, thank you.

1 47614 In terms of the enforcement
2 penalizing role versus the education role, Professor
3 Sossin had mentioned a bit earlier within this context
4 of whether the existing enforcement penalty regimes are
5 sufficient and the overlapping gaps, had mentioned
6 briefly the gap that yes, you can get this advice, the
7 education from the enforcement agencies in the ethics
8 and lobbying area. But the problem is under the
9 statutes secret advice is allowed and in some cases
10 some of the codes cannot be released without the
11 consent of the public official.

12 47615 We have always argued against that
13 provision since it has been in the codes. It doesn't
14 match what a lot of the provinces have done, where not
15 so much again by mandate -- and we believe it should be
16 mandated that there should be disclosure of all rulings
17 and opinions made. But what a lot of the provincial
18 commissioners have done, which has not happened at the
19 federal level, is that when they do give advice they
20 then issue one of those interpretation bulletins.

21 47616 It doesn't identify the public
22 official. It just says an official has come to me with
23 this situation. I have been invited to a golf
24 tournament sponsored by a firm that is lobbying the
25 official. Can I go? Who has to pay the green fees if

1 I go? Those kinds of situations. And then saying this
2 is the line I drew.

3 47617 So that is one of the main things in
4 terms of the relationship between enforcement and
5 education that I think definitely needs to be changed.
6 It just requires always that when they have given an
7 opinion to someone -- and just to mention again, in the
8 statutes, in the codes, it usually says that opinion
9 can be relied upon by the person if they later face an
10 allegation and they can say well, I was told it was
11 fine.

12 47618 Well, then require that to be made
13 public so the public knows I can't file a complaint in
14 that area because it is fine or it is not fine.

15 47619 The other thing, by requiring that is
16 you create accountability for the enforcement agencies;
17 that if they issued one of those bulletins and someone
18 disagreed with it in terms of whether it is legally
19 correct, then it can be subject to judicial review,
20 because it would actually have been a decision.

21 47620 So that is a very important change in
22 the enforcement realm.

23 47621 We do argue for strong penalties.
24 Again, the argument is really set out in the framework
25 at the beginning of Democracy Watch's written

1 submission, which is -- it is not really our argument;
2 it is the argument of public officials themselves.
3 They have imposed very significant penalties on all
4 sorts of people, including, as was explored in some
5 detail yesterday, lobbyists who are the private actors
6 in the policymaking process, and for some reason I
7 guess they are the ones that are bad because they are
8 the ones who faced stronger penalties.

9 47622 Public officials don't need those to
10 discourage them from violating rules, just lobbyists
11 do. It doesn't make sense. It has been a 20-year
12 effort, though, by public officials to demonize
13 lobbyists and say it is their fault, as if it doesn't
14 take two to tango when you are in an unethical
15 situation as a public official with a lobbyist. It is
16 pretty difficult for a lobbyist to unduly influence you
17 and unethically influence you unless you are
18 participating and allowing them to do so.

19 47623 So I would just like to highlight a
20 couple of other areas that we think are very important
21 in the overall enforcement and overlaps, in terms of
22 overlaps and gaps.

23 47624 The first one is in terms of this UN
24 Convention against Corruption, and I would be very
25 interested in hearing the response of the others to

1 this question.

2 47625 The UN Convention against Corruption
3 signed by 140 countries says that public officials'
4 bank accounts -- it actually says and the accounts of
5 their family members and close associates -- should be
6 required to be tracked for suspicious transactions by
7 financial institutions.

8 47626 Canada has implemented that in law
9 under the Proceeds of Crime, Money Laundering and
10 Terrorist Financing Act for foreign government
11 officials. So our domestic financial institutions have
12 to track the bank accounts of any foreign government
13 official or their family member or close associate, but
14 not any domestic government official.

15 47627 That would be an overlap because it
16 would be not -- it would complement the disclosure of
17 assets and liabilities requirement in terms of
18 disclosure to the Ethics Commissioner, but would be
19 tracking that as an auditing mechanism as to whether
20 something else is going on in the accounts of an
21 official that they are not telling the Ethics
22 Commissioner about, something that is reported to the
23 agency called FINTRAC for investigation if there is a
24 suspicious transaction identified.

25 47628 That would be overlap, but Democracy

1 Watch's viewpoint is it is a gap currently. It is
2 pretty easy to flow secret money into some account
3 somewhere and that was what the UN Convention Against
4 Corruption was aimed at.

5 47629 I have talked briefly about
6 increasing penalties generally, and again see
7 definitely that the education side is just as
8 important. I will just highlight one another, which is
9 that not all whistleblowers are protected under our
10 federal law and, like many of the accountability laws
11 in terms of what the Auditor General can do, what the
12 Information Commissioner can do, the offices of
13 parliamentarians, politicians, are not covered.

14 47630 So if a staff person in a
15 politician's office saw clear wrongdoing they could be
16 fired for reporting it, I suppose, as they weren't
17 being loyal or some -- in any case, they are not
18 protected as a whistleblower from retaliation, nor any
19 system of compensation if they were penalized.

20 47631 I don't see why these offices should
21 be exempt from these kind of basic accountability
22 measures like the Access to Information Act, review by
23 the Auditor General, which is actually starting a bit
24 now in terms of expenses and spending by the offices
25 and some of their activities, but also of the

1 whistleblower protection.

2 47632 But the politicians write the rules
3 for themselves and they have written a system where
4 rules don't apply in many areas where they should and
5 also the enforcement agencies therefore can't act on
6 their own political offices.

7 47633 So I will leave it at that. Again,
8 there is the detail there on page 3 and 4 with the
9 references to our specific recommendations in our
10 written submission in this area of strengthening
11 enforcement and penalties.

12 47634 MR. BATTISTA: Thank you for that.

13 47635 We are going to go to our last topic
14 and then we will go to the panellists and see if they
15 have questions, and the parties.

16 47636 The prime ministerial correspondence
17 handling procedures, I am going to ask Ian Greene to
18 lead on this.

19 47637 Do you believe that the federal
20 government's current prime ministerial correspondence
21 handling policies are appropriate? Are there
22 recommendations for improvement that you would make?
23 And are you aware of any other models and precedents
24 that might improve on the system, maybe your experience
25 in Alberta?

1 47638 PROF. GREENE: Yes. I worked for a
2 bit over a year as an assistant to a Cabinet Minister
3 in Alberta and probably 30-40 per cent of my job
4 involved correspondence that was sent to the Minister.

5 47639 I think in any democracy it is
6 important to reply to personal correspondence
7 appropriately. I think that citizens have a right to
8 communicate with their elected members and their
9 Cabinet Ministers and with the First Minister, and I
10 think appropriate responses are very important in terms
11 of promoting a democratic culture.

12 47640 I found Professor Thomas' paper
13 incredibly interesting. I just was so fascinated I
14 couldn't put it down, just thinking of my own
15 experience in Alberta and comparing that very modest
16 experience of handling 10 or 20 letters a day to the
17 thousands of letters and e-mails that go into the Prime
18 Minister's Office every day.

19 47641 How you handle that appropriately?
20 The impression that I got is that the system in the
21 Privy Council Office works very well, but there may be
22 some gaps in the Prime Minister's Office for the
23 correspondence that goes there.

24 47642 I think a lot of it has to do with
25 appropriate training for ministerial exempt staff. I

1 think across the board in terms of improving the ethics
2 regime federally, I think there needs to be more
3 appropriate training for ministerial exempt staff in
4 terms of a real deep understanding of the nature of the
5 principles behind ethics and politics and why it is so
6 important to make a democracy work.

7 47643 I am currently the director of a
8 graduate program at York University. We have 83
9 students who work in the public sector and are working
10 on their master's degree part-time, and some of them
11 are ministerial-exempt staff in the Province of
12 Ontario.

13 47644 I have just finished teaching a
14 six-week course on ethics in politics, and I think you
15 need that amount of time, 18 contact hours, to
16 thoroughly go through the literature on ethics in
17 politics, and to go through a number of examples, and
18 to ensure that people really do understand why ethics
19 in politics is so important to making a democracy
20 function.

21 47645 I think this is an issue that -- I
22 don't think it can be addressed, necessarily, in
23 legislation. I think that universities have a big
24 role, in terms of providing more opportunities for
25 education to current ministerial-exempt staff and those

1 who would like to be in the future, through graduate
2 programs, undergraduate programs, non-credit
3 certificates.

4 47646 I had the privilege of having lunch
5 last summer with Preston Manning, and he is very
6 concerned about the need for providing appropriate
7 education to ministerial-exempt staff.

8 47647 I think that there need to be some
9 recommendations for improvements to educational
10 opportunities for ministerial-exempt staff, but I don't
11 think we can rely simply on in-house training to
12 provide those opportunities, I think the universities
13 and other institutions have a responsibility there.

14 47648 MR. BATTISTA: Thank you.

15 47649 Lorne, do you want to make any
16 comments on this aspect?

17 47650 PROF. SOSSIN: I would endorse much
18 of what Ian said. I think the world of running an
19 office as large and as complex as the Prime Minister's
20 is daunting, and there is a fair bit of material in the
21 paper around the systems and practices that have been
22 put in place.

23 47651 I think, as part of the development
24 of that office, there ought to be -- and, again, there
25 is some contention in the submissions that followed the

1 paper as to what extent this is actually going on, but
2 there ought to be a focus on documenting and providing
3 a trackable element to the practices that are in place.
4 That is to say, you have pieces of correspondence, it
5 ought to be not all that different from an ordinary
6 person's experience with a courier these days. There
7 is a bar code, an ability to see who signed for it,
8 what happened to it once it was signed for, what
9 category did it go into, and to have clear guidelines
10 about what the categories are for.

11 47652 To expect someone to think back
12 months ago to what happened to this letter might not be
13 realistic, but to be able to go back and simply track
14 the documentary record of exactly when it came in, what
15 happened to it, what category it went into and why, I
16 think, is a reasonable expectation to bring.

17 47653 And, again, I am not speaking about
18 what was actually done in the matters that gave rise to
19 the inquiry, but just as an aspiration for an office
20 with that kind of complexity, and the need for
21 accountability.

22 47654 Accountability, I think, is where
23 there is this requirement for documentation and having
24 systems in place that can generate, months or years
25 later, the ability to track a letter, no differently

1 than I might want to track a courier package and know
2 exactly where it went, and how it landed, and where it
3 landed.

4 47655 Beyond those kinds of technical
5 questions, in other words, having the systems in place,
6 there are broader issues that are brought into play in
7 this area. The distinction, for example, between
8 political and partisan staff is a challenging and
9 provocative one.

10 47656 But I would look for guidance around
11 the table as to the extent to which those issues are
12 really engaged by the fairly narrow question being
13 addressed in this area, and if they are engaged, I
14 think it would be great to get other views on whether
15 that distinction holds.

16 47657 There is reference in the Privy
17 Council Office's "Guidance to Ministers and Political
18 Staff" that the people in these offices, who are not
19 departmental public servants, share the political
20 commitment of the ministers.

21 47658 Again, this is one of those terms
22 that one would puzzle around. The distinction between
23 sharing a political commitment and not being partisan
24 is based on a definition of partisan that is entirely
25 tied to party status and party affiliation.

1 47659 I am not sure that most people in the
2 public would approach it in that way.

3 47660 To me, that's a discussion worth
4 having, it's just not clearly yet, to me, a discussion
5 that is before us.

6 47661 So I would say, probably, no more
7 about it, unless we are going to go into it more, and
8 then, again, I would be happy to offer more thoughts on
9 it.

10 47662 MR. BATTISTA: Before I invite
11 yesterday's panellists to intervene and ask questions,
12 I would offer, maybe, Kathleen Clark or Duff Conacher a
13 last word on this, if you have any comments that you
14 want to make.

15 47663 Kathleen, is there anything you
16 wanted to add on the correspondence issue?

17 47664 PROF. CLARK: I don't have anything
18 to add on the correspondence issue, but let me take
19 this opportunity to say that, in addition to the
20 wonderful papers, more generally, I wanted to put on
21 the record something that I didn't find in the papers,
22 which is another thing that may be useful, which is,
23 believe it or not, a report on U.S. government ethics
24 from 1993 by Cynthia Farina.

25 47665 If you referred to it, I am afraid

1 that I missed it, but in case it is in the record, it
2 just does a great job of looking at these general
3 principles, and then trying to apply them in the U.S.
4 context.

5 47666 It's called "Keeping Faith:
6 Government Ethics & Government Ethics Regulation".

7 47667 It's actually by an American Bar
8 Association commission, but it is going through a
9 similar kind of analysis that you all are going through
10 here.

11 47668 Anyway, I just wanted to make sure
12 that was on the record.

13 47669 MR. BATTISTA: Thank you.

14 47670 Duff Conacher...

15 47671 MR. CONACHER: I will just say
16 briefly that on page 42 of our written submission we
17 have seven or eight recommendations, and we approached
18 the correspondence handling issue as part of the
19 overall access to information issues, which are the
20 regulations concerning the creation and maintenance and
21 disclosure of documents.

22 47672 Essentially, the recommendations
23 are -- right now there is not a requirement to make a
24 record of all actions and decisions, including what
25 happens to a document as it goes through the government

1 under the Access to Information Act.

2 47673 That should be put in place, and the
3 Information Commissioner given powers, as the
4 commissioners have in various provinces, to make
5 binding orders, and, in other jurisdictions, to have
6 those binding orders include how information is managed
7 within government institutions.

8 47674 And if you extend those powers to the
9 commissioner and require actions and decisions to be
10 documented --

11 47675 And, also, we have some
12 recommendations concerning the exemptions that should
13 apply to disclosure, but that is more in the open
14 government area specifically.

15 47676 But if you extend these powers to the
16 Information Commissioner over the information
17 management systems in government, then you can give the
18 Information Commissioner, also, the role of education
19 and setting best practices and doing audits, not to
20 catch people and say, "You have done something wrong,
21 in violation of the Act," but to say, "You are not
22 maintaining documents in a way that you need to in
23 order to ensure access and proper tracking."

24 47677 I will end by saying that this is
25 obviously not a small issue, although it seems like it,

1 because it's just, "Oh, what happens when letters come
2 in," but who sees those letters can establish whether a
3 minister has civil liability, or even possibly criminal
4 liability, in terms of negligence, if they do not react
5 to what they have been sent in a proper way.

6 47678 So it is not a small issue, or a side
7 issue, really, it is very central and part of the
8 overall access to information and information
9 management system, and there are some changes that need
10 to be made to strengthen that system very much.

11 47679 MR. BATTISTA: I would like to thank
12 all of the panellists for what I think has been a very
13 informative morning of presentations. I think that
14 everyone appreciates it, and I am sure the Commissioner
15 will be able to draw much from what you have said.

16 47680 In order to enrich this discussion
17 and debate, I would invite yesterday's panellists to
18 either make observations or ask questions to further
19 the debate in whatever way they feel is appropriate.

20 47681 I will start from my farthest, and
21 invite Lori Turnbull to raise a question or make
22 comments or observations.

23 47682 DR. TURNBULL: Thank you very much,
24 and thank you so much to the panellists today.

25 47683 I have a question, which is kind of a

1 general question, I guess, for Kathleen, just because
2 my paper dealt a bit with some comparative material,
3 but I didn't go into a lot of depth in any of the
4 countries I considered.

5 47684 I wondered if Kathleen might be able
6 to comment, generally, on some of the general
7 differences in the ethics infrastructure, Canada versus
8 the United States.

9 47685 For instance, although it is part of
10 the debate there, the United States doesn't have the
11 Ethics Commissioner model federally that we have.
12 Instead, there is a bipartisan committee in the House
13 that deals with some of the kinds of questions that the
14 Ethics Commissioner deals with here.

15 47686 I wondered if you might be able to
16 comment on that, just so the Commission knows about
17 that alternative.

18 47687 PROF. CLARK: I will try to be really
19 brief.

20 47688 Most of my comments have been about
21 the executive branch ethics in the United States, and I
22 guess I just want to mention, on the question of not
23 specific rules, but instead enforcement, or structural
24 issues, that we have in the United States an Office of
25 Government Ethics within the executive branch that

1 issues regulations, but generally doesn't investigate
2 anything. It simply issues regulations, it issues
3 ethics opinions, and does training and that kind of
4 thing.

5 47689 Then, enforcement within the
6 executive branch is really done administratively,
7 sometimes through Inspector General investigations, or
8 otherwise administratively through employment channels.

9 47690 And, of course, there are some
10 criminal statutes involved, so sometimes enforcement is
11 done through prosecution.

12 47691 You are really asking, I think, about
13 legislative ethics, and in both the House and the
14 Senate on Capitol Hill there are ethics committees, and
15 limited professional staff who are involved in
16 providing opinions, advice about how to construe the
17 ethics rules that have been adopted by each House of
18 Congress.

19 47692 But one key lesson, I think, from any
20 look at Congressional ethics in the United States,
21 particularly in the House of Representatives, is the
22 lack of any political will toward enforcement for more
23 than a decade or so. That is, there was a record of
24 ethics allegations being used in a kind of political
25 "Gotcha" game, just as any other kind of political

1 weapon, and in reaction to that they changed the
2 procedures so that only members of the House could file
3 ethics allegations against another member of the House,
4 and that essentially resulted in, in broad brush, a
5 truce.

6 47693 So one thing to think about is,
7 essentially, who has standing, who has the ability to
8 initiate an inquiry, to initiate an investigation,
9 because I believe that the record from the House of
10 Representatives is that, to the degree it is very
11 limited to the members themselves, you will have the
12 story that I think Duff was narrating, the narrative of
13 politicians protecting other politicians, for the good
14 of the politicians, but not actually for the good of
15 the institution and the institutional standing.

16 47694 Is that helpful?

17 47695 DR. TURNBULL: Yes, thank you.

18 47696 MR. BATTISTA: Dr. Thomas, please, go
19 ahead.

20 47697 DR. THOMAS: I really enjoyed the
21 conversation this morning. I wish my university
22 seminars were at such a high level as that. It was
23 clear that everybody was right on top of their game and
24 knows this world inside out.

25 47698 I am sympathetic to the overall view

1 that a cultural approach at the end of the day probably
2 has more potential, and I like the sort of ombudsman
3 style of outreach and education and so on.

4 47699 It may require that we write that
5 more explicitly into the mandate of officers or agents
6 of Parliament of various kinds. Maybe it shouldn't be
7 implicit in what they do.

8 47700 I have had conversations with past
9 and present information commissioners, who say that if
10 central agencies who are close to their political
11 leaders don't like where information commissioners are
12 poking and prying around, they may say that they are
13 trying to address systemic issues and they have more a
14 complaints model, and I don't think it is appropriate
15 to try to rein them in in that way.

16 47701 I found Ian Greene's point
17 interesting, that maybe parties, who are the main
18 actors in our legislatures, Kathleen, unlike yours,
19 where you have more individual entrepreneurs -- here we
20 are all team members. We should actually wear uniforms
21 when we come into the arena, with our party logo on the
22 front, and so on.

23 47702 So things happen, and our individual
24 MPs and senators don't have the scope to make
25 independent judgments and decisions. They don't

1 actually formulate the laws in the way that some
2 powerful actors in Congress do.

3 47703 Ian suggested that maybe there is a
4 role for the party whip and the party caucus in making
5 people more aware. I think there is some potential
6 there. It might be that if an individual commissioner
7 cannot make it to see individual MPs one-on-one, they
8 might be able to go to a caucus committee and invite
9 all of the members of a caucus to come along.

10 47704 The other time I have been beaten up
11 in public, apart from this week, by the PMO was as an
12 expert witness in Saskatchewan, when the Devine
13 government had a group of MLAs go to jail for using
14 caucus money, because there were no rules. They had
15 golf tournaments, and pop-up toasters were given out,
16 and all sorts of things went on, but there were no
17 guidelines. There was nothing whatsoever.

18 47705 I was on the defence side, and I
19 wasn't grilled as much as the PMO would like to get at
20 me today, but anyways...

21 47706 Partisanship sometimes can work
22 against the ethics requirement, but if it became
23 incorporated into partisanship in a way that said that
24 part of our job is to enhance the reputation and the
25 esteem of politicians, rather than presume that they

1 are all knaves and ne're-do-wells and all the rest of
2 it, then maybe there is a role for parties to play in
3 candidate schools, in the school of government that I
4 am advertising now. I have a sort of crusade going to
5 promote the idea of a school of government for
6 politicians and so on.

7 47707 On my particular issue, on the
8 correspondence issue, there was almost nothing written
9 about this topic before I began to investigate it. I
10 sought volunteers to co-author this, and I found no one
11 who was prepared to help me out, because at first
12 glance it looked narrow and technical, and it was about
13 creating a system and getting the right software, and
14 all of that.

15 47708 When I got into it more, I realized
16 that it intersected with a whole series of other things
17 and trends that are going on within government,
18 including the development of network-style governing,
19 in which more and more third parties are being involved
20 directly in decision-making in government. You are
21 sharing authority, you are sharing resources, you are
22 sharing risk, and you should be sharing accountability.

23 47709 So there is more sensitive
24 communication going in both directions.

25 47710 And I didn't find a neat

1 organizational fix, or a set of rules for this.

2 47711 It sounds hokey and clichéd to say
3 that I believe in the character of leaders, and I
4 believe in people who have integrity.

5 47712 And when Lester Pearson hires
6 Mitchell Sharp at a dollar a year to give advice to
7 ministers, that may seem like a small thing and
8 wouldn't come up to the contemporary standards of what
9 we need to be able to convince the public that people
10 act honestly in public life, and so on, but it says
11 something about the tone and culture of the
12 organization in which you work.

13 47713 With respect to ministerial staff,
14 that is an area where, in the view of the current Prime
15 Minister's Office, I went overboard, or outside the
16 mandate, although I was writing for the Commission, not
17 for them, clearly.

18 47714 They say that they do some training.
19 They have no documentation on the type of training they
20 get.

21 47715 And there was one witness on the
22 stand, under examination, who was at the time 26 years
23 old, and working for the Prime Minister; a very heady,
24 seductive experience, I am sure, for a young person.
25 You just wonder to what degree they understood

1 fundamental principles like ministerial responsibility,
2 and the whole array now of ethical and legal
3 requirements, and so on.

4 47716 Australia has gone this route, and
5 Senator Faulkner, now in the Rudd government, has a
6 code ready to go on ministerial staff, and it's not
7 just an adjunct to a ministerial code, it specifically
8 recognizes a new, separate group of actors, with an
9 influential location and role to play within our policy
10 system.

11 47717 And just as we didn't used to
12 regulate political parties, now we are moving to
13 regulate this new set of actors, and I think it is
14 necessary. It has to happen because staffs have grown
15 in size and influence.

16 47718 I will stop there, that was longer
17 than I intended.

18 47719 MR. BATTISTA: It is very much
19 appreciated.

20 47720 Does anyone want to comment or
21 follow-up on that?

22 47721 Yes, please, go ahead.

23 47722 PROF. SOSSIN: I think the last
24 question you raise is probably one worth underscoring,
25 or at least getting more feedback on, which is,

1 irrespective of systems in place and the software you
2 choose, where does responsibility lie?

3 47723 In a sense, how one chooses to open
4 one's letters -- and recognizing the huge volume and
5 the need for systems and categories, and that one
6 person is not going to be able to be a guiding mind to
7 every single piece of correspondence -- I think there
8 is no escaping the reality that in our system of
9 accountability there ultimately is only one place
10 answerable for what gets opened and not and what gets
11 read and not.

12 47724 I think the idea of saying, "I can't
13 be held responsible for what I didn't read," for
14 example, if that is an argument one would make in a
15 minister's office, is just not compatible with the
16 current understanding of ministerial responsibility.

17 47725 There are all sorts of explanations
18 that one can make for why something wasn't done that
19 ought to have been done, or justify why what was done
20 was properly done, but I think the answer that "The
21 software made me do it," or, "I bear no responsibility
22 because I have staff and this is their job" -- it may
23 be the new way, and it may require new training, new
24 understandings, new codes.

25 47726 But I worry, if we go down that path,

1 we do lose sight of what the underlying logic of
2 ministerial responsibility was supposed to be, which
3 not just extended to departmental non-partisan public
4 servants, but to -- in that sense, the alter egos of a
5 minister or a prime minister, I think, necessarily,
6 fall within it as well.

7 47727 MR. BATTISTA: Do you want to follow
8 up on that, Ian Greene, please?

9 47728 PROF. GREENE: I think that a code of
10 conduct for ministerial-exempt staff would be very,
11 very important to develop.

12 47729 I recall the days when I was working
13 as an assistant to a cabinet minister in Alberta, and I
14 already had a master's degree in political science, but
15 it seemed to me that all of the other
16 ministerial-exempt staff were pretty well educated.
17 Thinking back to it, I think that probably Peter
18 Lougheed almost required this, that ministerial staff
19 understand the basic principles of government, or else
20 they shouldn't be employed.

21 47730 It seems to me that a code of conduct
22 for all exempt staff might be useful; not just for the
23 ministers, but for all MPs.

24 47731 And I think that the exempt staff
25 should be involved in developing that code.

1 47732 MR. BATTISTA: Duff Conacher, would
2 you like to make a comment?

3 47733 MR. CONACHER: Just to say, briefly,
4 because I know that everyone knows that ministerial
5 staff, at least most of them, there are a few
6 exemptions, are covered by the Conflict of Interest
7 Act.

8 47734 But I think the gap has been, where
9 are the interpretation bulletins, the frequently asked
10 questions summaries, the case studies, on the website
11 of the Ethics Commissioner that would specifically
12 address ministerial staff?

13 47735 They have these rules, but they are
14 vague, and they are doing different things than the
15 ministers.

16 47736 Where is the guidance that sets out
17 publicly, so that everyone knows, "Here are the lines
18 that this Act draws"?

19 47737 That is the gap that is there.

20 47738 Other staff, of any other politician,
21 even an opposition party leader in a minority
22 government, who, I think, is almost equivalent to,
23 certainly, a parliamentary secretary, if not a minister
24 of state in a cabinet, when you are in a minority
25 government situation, are not covered at all.

1 47739 So I heartily endorse what Ian Greene
2 has raised as the need for rules to cover all of the
3 staff of MPs, and senators as well.

4 47740 MR. BATTISTA: Kathleen, did you want
5 to add a comment to that?

6 47741 DR. THOMAS: Could I just add one bit
7 of information to the conversation, so it doesn't go
8 missing?

9 47742 There is a Guide to Ministers that
10 the Privy Council Office produces, and we heard
11 reference yesterday to Appendix G, I think it was,
12 which is the softer statements of broad, inclusive,
13 public sector values.

14 47743 I have asked people over the time
15 since yesterday morning: That is meant to apply to
16 ministers. Does it apply to ministerial staff, the
17 general statements about living according to an ethos
18 of public service?

19 47744 They are not listed, and my sources,
20 who are reliable, say that it's not clear whether,
21 because ministers are covered, staff fall within the
22 ambit of ministerial responsibility.

23 47745 Just to finish up, I take your point,
24 Lorne, that at the end of the day I would like to go
25 back to putting more meaning into the concept of

1 ministerial responsibility. It has lost a lot of its
2 content.

3 47746 At the end of the day, I think we
4 rely a lot in the political realm, as Ian said and you
5 suggested, on reputation, and anybody who is in public
6 life and is the subject of an investigation pays a
7 psychological price, and many of the people that they
8 love and share their lives with pay a price, as well.

9 47747 That shouldn't be minimized, but in
10 the cynical era in which we live, a lot of people
11 dismiss that as inconsequential. It's not real. There
12 should be something more tangible. It shouldn't be a
13 price that is just in your mind, you should be fined or
14 you should go to jail or something.

15 47748 It is that sort of punitive model
16 that the public is calling on politicians to accept.

17 47749 MR. BATTISTA: Do you want to follow
18 up on that, Duff Conacher?

19 47750 MR. CONACHER: To mention another
20 issue that we have raised consistently, including in a
21 court case that did not reach fruition -- this was a
22 case on which the Supreme Court of Canada dismissed our
23 leave to appeal application last week. But one of the
24 issues we were raising that relates, in terms of
25 whether political staff are covered by these rules if

1 the minister is covered, is that the definition of
2 "conflict of interest" includes furthering the
3 interests of a friend, and the question we were posing
4 is: Are political staff, by definition, friends of the
5 minister, in that they are all partners in one
6 enterprise, the same way that --

7 47751 We actually cited the classic case,
8 the MacDonald case, with law firms. If one lawyer is
9 in a conflict, then the whole firm is in a conflict,
10 because they are friends, they are in partnership, and
11 we were hoping to make that argument before the Court.

12 47752 In some ways, I think that the word
13 "friend" is in there, and that if you can't improperly
14 further another person's interest, as well, those two,
15 I think, mean that the minister cannot delegate to
16 staff or use staff as an excuse, because if the staff
17 were furthering someone's interest and the minister was
18 escaping that, the staff would be considered a friend,
19 or would be considered to be improperly furthering the
20 minister's interest, and it would be improper because
21 they had essentially done it through the delegation of
22 the minister.

23 47753 That is an area that should be
24 cleared up, as opposed to leaving it to what I think is
25 within the scope of the Act, but certainly not well

1 defined.

2 47754 MR. BATTISTA: I am going to move on
3 now to Greg Levine.

4 47755 Do you have any questions or comments
5 that you would like to make following the
6 presentations?

7 47756 PROF. SOSSIN: Just before you move
8 on, I did have one matter to raise, which is probably
9 of a technical nature, but I think that it does bear on
10 the communication question.

11 47757 I am happy to raise it later, or
12 raise it now, whichever you would like.

13 47758 MR. BATTISTA: Go ahead.

14 47759 PROF. SOSSIN: There is a reference
15 to one of the categories where correspondence will be
16 filed, and essentially unread, where it relates to a
17 court case, or it relates to a matter before the
18 courts.

19 47760 I think this is invoked in ways that
20 are overly broad and unhelpful in a range of contexts
21 these days, but especially so here.

22 47761 If taken literally, very little
23 correspondence from any Aboriginal community could ever
24 be read by the prime minister. One would be hard
25 pressed to imagine many situations where there is not

1 an outstanding land claim or treaty claim of some kind.

2 47762 There are whole swaths of wrongful
3 convictions, miscarriages of justice, that in fact came
4 to light through direct communication between
5 interested family members and politicians, including a
6 former prime minister.

7 47763 To me, this is one of those areas
8 where the red flag should certainly go up. This is a
9 problem. It may go into a separate category, but the
10 idea that it wouldn't, then, be read carefully, and
11 vetted for its content in a contextual way --

12 47764 There are all sorts of correspondence
13 that would be completely inappropriate for the prime
14 minister or a minister to read, and I don't suggest
15 that it is easy or always clear to draw these lines,
16 but I think a system in which no line drawing happens
17 beyond the one that says "It's before the courts in
18 some way, shape, or form..."

19 47765 The other day the matter came up of
20 SARS, Mad Cow, West Nile. It's hard to think of a
21 major matter of public policy that has not been subject
22 to a class action.

23 47766 Is it okay for ministers responsible
24 to say, I would love to say something about how this
25 government handled Mad Cow, West Nile, it is hard to

1 think of a major matter of public policy that has not
2 been subject to a class action.

3 47767 Is it okay for Ministers responsible
4 to say I would love to say something about how this
5 government handled mad cow, West Nile, SARS, but by
6 filing a class-action I have been perpetually muzzled
7 until years later when it might or might not be settled
8 would be such a fundamental abdication of the political
9 role that I think none of us would countenance it.

10 47768 And I worry if we simply have
11 language that says there is a category into which
12 everything before the courts go. Without any further
13 scrutiny we would risk being completely overbroad
14 without a principled basis.

15 47769 So I just say that as a technical
16 matter to probe deeper and more contextually into what
17 the category actually ought to be that screens out
18 correspondence relating to litigation matters.

19 47770 MR. BATTISTA: Thank you. I thank
20 you for that point and I thank you for intervening.

21 47771 Did you want to add something, Ian?
22 Go ahead.

23 47772 PROF. GREENE: Yes, I just wanted to
24 add that I think it is critically important that every
25 day the Prime Minister be given a summary of the nature

1 of correspondence that is coming in, the tone of the
2 correspondence and be given a chance to comment on what
3 kinds of replies should be given out.

4 47773 So I think that the Clerk of the
5 Privy Council and the Prime Minister's Chief of Staff
6 need to exercise oversight over the system to monitor
7 it and make sure that it is working in order to
8 accomplish those goals.

9 47774 I just wanted to mention that in New
10 Zealand the Cabinet Secretariat has prepared what I
11 think they call the Cabinet Handbook and it is a
12 commentary on the conventions of responsible government
13 as they relate to the Cabinet. This has grown over the
14 years and I think it is on the web.

15 47775 Since there obviously has been
16 disagreement recently over what is meant by the
17 conventions of responsible government, I think trying
18 to develop a Cabinet Handbook for the Canadian Cabinet
19 might be a useful exercise as well.

20 47776 MR. BATTISTA: Thank you. I am now
21 going to go to Greg Levine. Please, go ahead.

22 47777 MR. LEVINE: Thank you. Thank you
23 all for your comments and questions.

24 47778 Just to start at the start, if I may,
25 and just quickly, I would just like to reiterate the

1 notion that having rules and having a culture are not
2 exclusive. This is a false dichotomy. We have to have
3 both, I think. Several folks said that and I just
4 wanted to reiterate that.

5 47779 The advice, the advisory role I think
6 is very important and I'm glad it has been stressed so
7 much. The provincial commissioners make great use of
8 this and I think it has been the hallmark of the
9 success of the provincial system. And why it has been
10 so successful, in a sense we are in a nascent state of
11 the federal system. We will see if this evolves, but
12 it should be given an opportunity to evolve and more
13 stress should be placed on the advisory role and the
14 consequences of giving advice.

15 47780 In terms of the definition of
16 conflict of interest around where potential comes from,
17 I think if we look back at -- why we hang onto it
18 probably because lawyers are conceptual pack rats. We
19 like having a concept, and it might be useful some time
20 so we sort of keep it around.

21 47781 But I think it stems from the
22 Sinclair Stevens inquiry where Justice Parker
23 outlined -- and I read that over yesterday that I won't
24 go over that again, but I think that's where it comes
25 from, and then it just seems to hang on.

1 47782 But I think that conceptually it is
2 better to focus just on appearance and real. I think
3 that's more useful because all conflict of interest is
4 about potentiality and you just -- then you have
5 potential potentials and it just becomes confusing.

6 47783 In terms of the offer negotiating --
7 I really like that idea of focusing on negotiating. I
8 suspect why we haven't done that is around privacy
9 concerns.

10 47784 You know, talk is just talk, you
11 haven't got a job yet. What are we looking at?

12 47785 I suspect that is why our legislation
13 focuses on offers. I don't know that for sure, but
14 that is my suspicion. I think the idea seeking and
15 negotiating and dealing, I think these are all
16 important notions and I think we should move this back
17 in a way that we haven't.

18 47786 The other thing I wanted to talk
19 about was the reprimand and reputation as the
20 punishment.

21 47787 It does seem severe, doesn't it? It
22 is enough, in a way, if we look at it, but in another
23 way it really isn't enough and the difference between
24 what, say, a civic or civil servant will suffer for the
25 same problem is actually far worse.

1 47788 I mentioned yesterday from time to
2 time I do corporate financial integrity workshops for
3 Seneca College and the Association of Municipal Clerks
4 and Treasurers, and I can tell you one thing that is
5 always said is, around the new integrity commission
6 models, oh, so they -- it is usually civic servants
7 that I am holding these workshops with and they always
8 say oh yeah, well, that's cool. The counsellor will
9 get reprimanded, pat pat, go off, but I can get fired.
10 His day is ruined, but my life is gone.

11 47789 And it is true. We know that
12 political life can be drastically affected by this.
13 But the perception of the public is it is just folks
14 dealing for themselves and they are giving themselves
15 an easier ride and somehow we need to answer to that.

16 47790 That's the last thing I will say for
17 now. Thank you.

18 47791 MR. BATTISTA: Does anyone want to
19 follow up on those comments?

20 47792 PROF. SOSSIN: May I? It is a very
21 vivid example, this notion of a firing offence for a
22 civil servant versus a reprimand for a politician. I
23 mean, I can't speak on behalf of the politicians in the
24 room. If one were to speak on one's own behalf as a
25 politician, that politician might say but they have a

1 security of tenure that a politician would only dream
2 of to be able to continue to do work without fear of
3 being removed the next time there is an election. I
4 think that is part of the balancing.

5 47793 And the reprimand, again I come back
6 to this spectrum idea, because for me part of the issue
7 is really the transparency, what makes it into the
8 public realm. There was a situation not long ago in
9 the provincial Ontario Cabinet, an expense set of
10 allegations, and the Minister effectively said well, it
11 is being referred to the Integrity Commissioner and if
12 the Integrity Commissioner says to me privately that I
13 have done anything wrong, I am going to resign. And if
14 the Integrity Commissioner doesn't, then the matter is
15 over with.

16 47794 And some time later the Minister
17 resigned. We have never seen exactly what was said.
18 We have no basis of knowing what principles were
19 applied to what facts.

20 47795 That to me is what someone may or may
21 not -- you know, there is something that you say well,
22 that's unfair that you get that perk, the perk of
23 privacy when you are serving at the pleasure of the
24 electoral public.

25 47796 I'm not sure the ability to sort of

1 get that kind of private opinion in that scenario
2 satisfies the legitimate public need for transparency
3 and accountability, even though at the time, you know,
4 it seemed to be a compromise and I don't have any
5 specific reason to question its applicability then. As
6 a model I don't think it satisfies that desire for
7 accountability in a public way for a public office and
8 a public set of standards.

9 47797 MR. BATTISTA: Paul, you may have a
10 comment?

11 47798 DR. THOMAS: Yes, just on Lorne
12 Sossin's point earlier about blanket coverage perhaps
13 for any matter that may currently or potentially be
14 before the courts. It doesn't work like that in
15 practice.

16 47799 There are criteria, there are
17 referral procedures from the analysts who are the
18 intake people, to the writers, to the senior editors,
19 to the branch supervisors, and so on.

20 47800 You are also counting on the
21 experience and continuity in the Privy Council Office
22 in handling these categories. They have conducted in
23 the past updating policy reviews and practice reviews.

24 47801 So, you know, you look at some of the
25 provinces I looked at, there isn't the division of

1 labour in smaller provinces between a Privy Council
2 Office and a Prime Minister's Office. They are fused
3 and they are organizationally in proximity to one
4 another; they are all in one series of rooms all close
5 together. And the lines between the professional side
6 and the political side become very, very blurred.

7 47802 So I don't think there is any
8 architecture here which is going to solve this problem
9 in a neat way.

10 47803 I just wanted to say it is reassuring
11 that on the interpretation of what is a potential
12 appearance of interference in the administration of
13 justice, that they have that worked out to some extent
14 and they have refined their thinking on it over time
15 and they keep track of precedence. And there is memory
16 there about how they have handled it in the past.

17 47804 That is one of the things I guess
18 that this conversation has brought home to me, is the
19 importance of memory and traditions and ideas that are
20 embedded in institutions. One of the problems in
21 contemporary government now is politicians come and go
22 quite quickly and public servants move around a lot,
23 and we are increasingly in a world where there is no
24 memory and we have this transitory information
25 technology which is compounding our problem.

1 47805 So when you go back to reconstruct
2 events, these people don't have what were the
3 precedents before, what did we do in that particular
4 circumstance. It is not documented. So that is a real
5 challenge, it seems to me, to get a more comprehensive
6 system.

7 47806 MR. BATTISTA: On that I will give
8 you the last word for this morning.

9 47807 We will break, Commissioner, for the
10 lunch and reconvene maybe at 1 o'clock. I think we are
11 running a little late, but that is not, I don't think,
12 a problem.

13 47808 COMMISSIONER OLIPHANT: Actually, I
14 think we are pretty well on time. This session was
15 supposed to end at 11:30, but I think we are fine.

16 47809 I noticed that in the initial
17 schedule lunch was going to go from 11:30 to 1 o'clock.
18 Is an hour sufficient for everybody?

19 47810 All right, then, we will come back at
20 1 o'clock this afternoon following lunch.

21 47811 Thank you very much for the session
22 this morning. I have found it most instructive.

23 47812 Professor Greene, just while I think
24 of it, I am really interested in this idea of education
25 and I'm wondering, having heard you say that you have

1 just completed teaching a class to mostly public
2 officeholders, whether it would be possible to get a
3 copy of your syllabus. I would be most interested in
4 seeing what you are teaching over that extended period
5 of time.

6 47813 If you could see your way clear to do
7 that, I would really appreciate it.

8 47814 PROF. GREENE: I would be delighted
9 to share that with you.

10 47815 The next time the course is taught I
11 think the papers that were written by the experts on
12 this panel will be included on the curriculum as well.

13 47816 I just wanted to mention that it is
14 not just the curriculum that is important, but the
15 assignments. And the first assignment to the students
16 was having read the materials, think of an ethics
17 challenge that you faced at work and would you have
18 handled it any differently.

19 47817 The students wrote long, very
20 thoughtful papers about that that indicated that having
21 taken the course really did affect their thinking going
22 forward in terms of ethics issues in the public sector.

23 47818 COMMISSIONER OLIPHANT: I'm not sure
24 that I would have time to read all those papers, nor
25 would you perhaps want to send them to me, but I might

1 be interested in knowing the different challenges that
2 were spoken to in the papers along with the curriculum.
3 47819 Thank you very much.
4 47820 We will adjourn now until 1 o'clock.
5 --- Upon recessing at 11:59 a.m. / Suspension à 11 h 59
6 --- Upon resuming at 1:06 p.m. / Reprise à 13 h 06
7 47821 COMMISSIONER OLIPHANT: Good
8 afternoon. Mr. Battista, I will turn it over to you.
9 47822 MR. BATTISTA: Good afternoon,
10 everyone. We are going to start.
11 47823 We were now at the questions by the
12 parties so I will start from Mr. Auger and ask if you
13 have any questions on behalf of your client for any of
14 the panellists?
15 47824 MR. AUGER: Thank you. I have no
16 questions.
17 47825 MR. BATTISTA: Thank you.
18 47826 I am now going to go to counsel for
19 the Attorney General.
20 47827 MR. LANDRY: We have no questions.
21 47828 MR. BATTISTA: Thank you.
22 47829 Mr. Conacher, please.
23 47830 MR. CONACHER: Thank you.
24 47831 As a result of the very thankful
25 clarity and specificity and comprehensiveness of the

1 panellists, other than myself, this morning, I only
2 have very few questions, because while there was a
3 comprehensive discussion not everyone weighed in on
4 every issue and there were just a few that I wanted to
5 raise.

6 47832 They are essentially yes or no
7 questions, but of course you can expand on them a bit.

8 47833 COMMISSIONER OLIPHANT: Mr. Conacher,
9 I just observe that you are free to ask all the
10 questions that you want, except you can't question
11 yourself. Okay?

12 47834 MR. CONACHER: Okay. That would
13 change my pattern of every day, because I question
14 myself almost every day on something. However, not
15 today, not this afternoon anyway.

16 47835 The first question is -- just to give
17 a bit of context, under the Conflict of Interest Act
18 the commissioner can refuse to examine a complaint
19 essentially if it is frivolous or vexatious or made in
20 bad faith. He is only required technically to examine
21 if a Senator or a Member of the House of Commons filed
22 the complaint.

23 47836 But given there is the ability to
24 reject complaints based on whether they are frivolous,
25 vexatious or in bad faith, do you see any problem or do

1 you support allowing -- essentially requiring rulings
2 on all complaints no matter who files the complaint,
3 whether it comes from a member of the public in the way
4 it is now required that the commissioner examine and
5 rule on complaints that are brought by Senators or
6 Members of the House of Commons?

7 47837 And similarly for the Commissioner of
8 Lobbying, there isn't the same regime, but it is not
9 explicitly clear that the Commissioner of Lobbying is
10 required to rule on every complaint. It is a
11 reasonable grounds test actually. There is no
12 frivolous or vexatious or bad faith out.

13 47838 Anyway, just essentially the public
14 is now shut out of the complaint filing process and the
15 Commissioner has this discretion of examining
16 complaints.

17 47839 Democracy Watch's position is that
18 that should be changed to essentially require rulings
19 on all complaints, no matter who files them. I'm just
20 wondering your response to that, to the need for that
21 change or lack of need for that change.

22 47840 I guess I will just go down the line
23 and then we will come back with the next question.

24 47841 PROF. SOSSIN: I think there are
25 actually two issues in that question.

1 47842 One is, should there be a ruling in
2 the case of every complaint and, two, should that
3 ruling be made public in the case of every complaint?

4 47843 For example, at the City the protocol
5 is any complaint that is sustained, that is to say
6 there is a finding of a breach, is filed with the
7 council, with the legislative body and it becomes a
8 matter of public record and there is discussion on it.
9 It is on the website.

10 47844 Where complaints are dismissed, on
11 the other hand, there is a notice sent to the Clerk, so
12 there is a ruling and there is a record of it, but it
13 is not shared with the public. It is considered a
14 confidential document even though there are no
15 sanctions if the parties who do receive it choose to
16 share it with media in whole or in part.

17 47845 I think there is wide recognition
18 that that is an unsatisfactory blend. In other words,
19 you get important guidance from complaints that are
20 dismissed on the principles involved and those are not
21 captured in a public record. You get partial
22 disclosure to the media because parties are certainly
23 entitled to that.

24 47846 So if there is a ruling, I think it
25 is fair to have an expectation that all of those

1 rulings are made public, unless there is a public
2 interest reason not to have them be made public, in
3 which case they can be captured in that ombudsman style
4 of report or annual report. But the key is to keep
5 disseminating all of that.

6 47847 In terms of should every complaint
7 have a ruling, I think coming back to the beginning
8 question and what the point of this is, if it is to
9 instill a culture of accountability or enhance the
10 public trust or public confidence, I'm not sure how not
11 ruling on a complaint can further those goals.

12 47848 But that is not to say every ruling
13 need be, you know, a substantive engagement with every
14 aspect of the complaint. It may be that a previous
15 kind of ruling has dealt with it. It may be something
16 given in a summary fashion. Whatever the context
17 requires should be a flexible question, but it seems to
18 me hard to justify not ruling on a complaint unless it
19 is frivolous, vexatious or in bad faith, in which case
20 having some account for why you think it is. What is
21 the ulterior motive? Is it the 15th complaint in this
22 case?

23 47849 There always has to be a reason. It
24 can't simply be invoking that term magically transforms
25 the complaint into something for which there need be no

1 public record.

2 47850 MR. CONACHER: Excuse me, just before
3 you answer, Mr. Greene, Professor Sossin anticipated my
4 second question which was about -- is related in terms
5 of requiring publication of complaints. There is the
6 ability to give secret advice for both the Commissioner
7 of Lobbying and the Ethics Commissioner, so you might
8 as well answer both questions, as Mr. Sossin has, in
9 terms of do you think there should be a prohibition on
10 secret advice, essentially a requirement to put out
11 something, again not necessarily that would identify
12 all the details or even the member, but something that
13 yes, an opinion has been rendered or a ruling has been
14 made and require that to be made publicly in every
15 case?

16 47851 PROF. GREENE: Well, you talk about
17 secret advice, I prefer the word confidential advice.

18 47852 I think the ability for the
19 commissioner to provide confidential advice is very
20 important. It helps to create a trust relationship
21 between the Member and the commissioner.

22 47853 But I do believe it is important to
23 be able to give a summary of the advice given, either
24 in the annual reports, here are the common questions,
25 here are the answers. That provides a really good

1 record of how to interpret and how the Ethics
2 Commissioner is interpreting the rules. So rather than
3 deal with individual cases, well, this is my ruling to
4 this question where I had a confidential meeting, I
5 think the general approach is much better.

6 47854 One of the questions I think you
7 raised is should complaints be received from the public
8 as well as from other members.

9 47855 In British Columbia members of the
10 public can request investigations. I'm not sure what
11 other provinces permit this, but in B.C. they found it
12 to be quite useful; that sometimes members of the
13 public do become aware of possible breaches of the
14 legislation that other members might not be aware of or
15 might not want to raise.

16 47856 So the Commissioners in British
17 Columbia have found this to be a very important part of
18 their role to deal with these. There haven't been an
19 overwhelming number of them.

20 47857 I think many members of the public
21 don't necessarily understand the legislation so they
22 might send in requests for inquiries that aren't
23 appropriate and I think that the responses don't
24 necessarily need to be made public for those because
25 sometimes it is embarrassing. But I think that being

1 able to take questions about possible inquiries from
2 members of the public is a good step to take
3 eventually.

4 47858 With regard to the federal regime, I
5 don't think it is going to happen in the near future
6 because it is too new. Let them get their house in
7 order and make this new system work really well before
8 expanding it.

9 47859 But that might be a good step
10 sometime in the future.

11 47860 I don't know if that has answered all
12 your questions.

13 47861 PROF. CLARK: Yes, I think these are
14 really interesting questions focusing not on the
15 substance of rules, but instead on procedure and
16 mechanisms.

17 47862 My perspective of course isn't really
18 about Canada at all, but I would simply share with you
19 some cautionary tales about these issues in the United
20 States.

21 47863 As I mentioned before, back in the
22 19 -- more than 10 years ago the House of
23 Representatives changed its rules so that members of
24 the public could no longer cause investigations to be
25 initiated in the House of Representatives and that of

1 course decreased the number of investigations, which
2 may ironically actually increase public confidence in
3 politicians in the sense that there is less news about
4 investigations because there are fewer investigations.

5 47864 But I don't think it reasonably
6 increases respect for the institution.

7 47865 So yes, it is unclear to me why it
8 would be appropriate to limit the people who can
9 initiate investigations. That is how I am interpreting
10 your question really.

11 47866 The second question you have -- let
12 me just add, obviously if you are going to make it
13 possible for anyone to initiate investigation, it will
14 be important that there will be screening devices,
15 because not every inquiry deserves a full
16 investigation.

17 47867 But assuming that such screening
18 devices exist, I don't see why it would be good for
19 government or good for the public to limit the people
20 who can initiate an investigation or cause an
21 investigation to be initiated.

22 47868 Your second question -- again, I want
23 to bring out an American here, which is this, yet
24 perhaps another reason to ensure that advice should not
25 remain confidential, that there be public disclosure of

1 advice. This is a rather extreme example, but I have
2 written on it and so I have thought a fair bit about
3 it.

4 47869 In the United States we are still
5 experiencing the consequences of a confidential legal
6 opinion. It wasn't about ethics as such, it was about
7 the legality of proposed conduct within the executive
8 branch where this secret memorandum from the Justice
9 Department Office of Legal Counsel came up with
10 basically a specious legal analysis regarding the
11 President's authority to order torture despite
12 Congressional enactments against it, despite a criminal
13 prohibition, despite international treaty, et cetera.

14 47870 You know, there are many problems
15 with that opinion, but that opinion never would have
16 been able to be sustained but for secrecy, because it
17 could not withstand scrutiny. Within nine days of it
18 being leaked to the Washington Post, the Justice
19 Department was forced to withdraw it.

20 47871 And that is when the Justice
21 Department withdrew it, was when it was leaked.

22 47872 So I'm sure that in -- I guess I just
23 wanted to point out that there is an additional problem
24 with confidential advice and that is the possibility of
25 sort of collusive advice along those lines.

1 47873 Let me just add, though, I don't
2 think that is the whole picture. I think there may be
3 reasons I haven't thought of that could justify
4 confidentiality under some conditions. I guess I just
5 wanted to point out that there is a problem with
6 confidentiality, which is this collusive, this
7 possibility of collusion essentially.

8 47874 MR. CONACHER: Thank you very much
9 for your responses.

10 47875 I have one other question, but just
11 on this topic because I did not include details in
12 Democracy Watch's written submission, I just wanted to
13 give a brief summary of the situation in Canada because
14 I do not believe that this was covered in any of the
15 research papers.

16 47876 In Ontario and Prince Edward Island
17 only Members of the legislature are specifically
18 allowed to file a complaint with the commissioner, the
19 Ethics Commissioner. I am not going to cover the
20 lobbying side except in one case in this description.

21 47877 And some provincial Ethics
22 Commissioners, namely Alberta, British Columbia, New
23 Brunswick, Manitoba, Ontario, Prince Edward Island and
24 in Québec with its Lobbyist Commissioner, have full
25 discretion in deciding to examine a complaint even if

1 the complaint is filed by a Member of the Legislature.

2 47878 To put it another way, provisions in
3 the statutes that govern those commissioners state that
4 they may, but are not required to, examine a complaint
5 and that similar to subsection (1) of section 45 of the
6 Federal Conflict of Interest Act that states the Ethics
7 Commissioner may, but is not required to, examine the
8 matter if it is brought to her attention by anyone
9 other than a Member of Parliament, a member of the
10 House of Commons or Senate.

11 47879 So I just wanted to outline that
12 information for the Commissioner's benefit.

13 47880 To turn to the third question I had,
14 it is tied into the other two: that when you have
15 rulings or decisions or actions, what do you think
16 about allowing judicial review of decisions by the
17 Commissioners of Lobbying and Ethics and others on any
18 grounds?

19 47881 I am asking this question because
20 currently, for example, the federal Ethics Commissioner
21 cannot be judicially reviewed on errors of law. There
22 is a restrictive clause that restricts the grounds on
23 which you can review the commissioner, to things like
24 errors of jurisdiction.

25 47882 Democracy Watch's position is that

1 there should be allowed to be judicial review on
2 anything.

3 47883 And just to add one subpart that you
4 could respond to: If you did have a requirement to
5 issue some sort of opinion when you have given an
6 opinion to a member, whether it states the member's
7 name or not, should you be judicially reviewable?
8 Should the commissioners face the possibility of
9 judicial review even on those summary statements or
10 interpretation bulletins where they are setting out
11 their enforcement standard or policy?

12 47884 And if someone disagreed and said I
13 think that is legally incorrect, there is no specific
14 case, I'm not a complainant, but should they still be
15 subject to judicial review to ensure that they are
16 setting legally correct standards in every way?

17 47885 PROF. SOSSIN: Those are good
18 questions and I take them, you know, to be about a
19 broader question of the accountability of the
20 Accountability Officer, because I think the way you
21 frame it will invoke a long-standing and I think
22 generally understood as progressive tradition of
23 insulating expert bodies that have been appointed
24 because of a particular skillset, that is quite
25 different from the judicial one from judicial review.

1 47886 So the conservative position, with a
2 small "c", has traditionally been, you know, let courts
3 come in and second-guess any judgments that the expert
4 makes on fact or law and the progressive tradition
5 traditionally was no deference is appropriate to these
6 expert bodies, Tribunals, administrative
7 decision-makers, and so on and so forth.

8 47887 So I worry when you limit it to
9 judicial review you invoke in service of a kind of
10 progressive end of accountability, what is often seen
11 as a very conservative tradition of second-guessing a
12 whole range of expert bodies in our administrative and
13 accountability state.

14 47888 So to my end, to my mind, I should
15 say, judicial review, you know, on questions of law has
16 some logic to it, because that is an area where the
17 courts have expertise. But even here there has been, I
18 think, a long-standing and valuable tradition of seeing
19 expert bodies as having a particular insight on their
20 statute or their code of conduct that is different than
21 the generalist courts.

22 47889 I think to second-guess those
23 judgments without deference would be problematic. It
24 would be having courts come in and trying to interpret
25 statutes that are the core element of expertise of an

1 ethics officer or commissioner.

2 47890 So I wouldn't be in favour of
3 judicial review of that, and separately I wouldn't
4 think that it is appropriate to judicially review
5 things like the FAQs, guidelines, protocols,
6 interpretation bulletins, for two reasons. One is the
7 same as the first: the expertise isn't there on the
8 courts. But more importantly, those by definition are
9 not law and they are being designed to be flexible and
10 adaptive in the way the guidelines can be.

11 47891 And as a matter of law guidelines
12 cannot purport to be law or it would be usurping a
13 legislative function and they would be ultra vires.

14 47892 So I think that is not to say my dim
15 view of judicial review in those two areas, first that
16 it isn't important to have judicial review on
17 jurisdictional matters -- if an Ethics Commissioner or
18 an Integrity Commissioner purports to do something that
19 that individual in that office doesn't have the
20 jurisdiction to do or does it in a way that is unfair
21 or loses jurisdiction for having ulterior motives,
22 improper purposes, all the things that can take away
23 jurisdiction, I think there should be, and the rule of
24 law demands I think that there be some ability to go to
25 court.

1 47893 And again, I think the last point you
2 leave us with is what ought to be the accountability.

3 47894 What I have suggested today in a
4 variety of different answers to the questions is that
5 that accountability principally comes through
6 transparency, through having a documented record of
7 decision-making and rationales, whether through
8 published decisions or anonymized reports in an annual
9 report, and that that ventilation that comes from
10 transparency and openness performs a valuable
11 accountability function, so that if there is a mistake
12 in law it will both come to light and be able to shape
13 future action in a way that is probably going to have a
14 much more lasting impact than the episodic, uneven
15 mechanism of judicial review.

16 47895 PROF. GREEN: Well, I agree
17 completely with Lorne Sossin has said. I would only
18 add to it that we now -- as soon as an Ethics
19 Commissioner is appointed in Québec, there will be 15
20 Ethics Commissioners across the country and perhaps
21 this is an issue that they could consider amongst
22 themselves.

23 47896 I think there should be very, very
24 limited judicial review, for the reasons that Lorne
25 Sossin mentioned. But in some cases there might need

1 to be some sort of appeal mechanism on some of the
2 issues. All of the legislation or Codes of Conduct are
3 fairly similar in terms of standards, and it might be
4 advantageous at some point for the commissioners
5 themselves to set up some sort of review or appeal body
6 because ultimately if they don't, my fear is that we
7 will have a broader system of judicial review.

8 47897 This ethics in government is a very
9 specialized area and I fear what might happen with too
10 much judicial review, just like with too much judicial
11 review in the labour relations area, the system is
12 spoiled.

13 47898 PROF. CLARK: I have nothing.

14 47899 MR. CONACHER: Thank you. I have no
15 further questions.

16 47900 MR. BATTISTA: Thank you for that.

17 47901 I will now leave my co-counsel and
18 lead counsel, ask if they have any questions for the
19 panellists

20 47902 MR. WOLSON: I just have one question
21 and it deals in the post-employment area.

22 47903 Professor Turnbull, in your paper on
23 page 6 -- and I know that Professors Greene and Sossin
24 talked about it today -- the U.K. system that has a
25 committee that all former Ministers must consult on any

1 offer of employment, and I know that you talked about
2 it today favourably. But is there a negative to that?

3 47904 Can anybody here contemplate a
4 negative? Is it too intrusive, too onerous, or are
5 there other areas that you would be concerned about?

6 47905 DR. TURNBULL: Okay, I will start. I
7 can think of a couple off the top of my head.

8 47906 I think I mentioned yesterday that it
9 is now part of the ministerial code that Ministers --
10 which is non-statutory; that Ministers are asked to
11 consult this committee before they take any offers of
12 employment.

13 47907 So it is not an obligation for them
14 to consult, but it is an expressed preference that they
15 consult and they know that.

16 47908 When the committee comes to a
17 decision, if it is affirmative -- which by that I mean
18 if they do recommend that the employment go ahead --
19 their decision is made public. But if they decide
20 against it, their decision isn't released at all.

21 47909 So in terms of the transparency and
22 in terms of trying to cultivate a sense of where the
23 boundary is here, what is right, what is wrong, there
24 is a gap there. So that is one problem in terms of
25 trying to understand why they decide the things that

1 they do.

2 47910 Another problem I guess is that their
3 decisions, whether positive or negative, aren't binding
4 on this person; they are advisory. So the person could
5 continue to go on and take the employment, even if the
6 committee recommended against it. It is just entirely
7 advisory.

8 47911 So in terms of accountability, you
9 really only have that transparency and this person is
10 now in the post-employment phase. They are outside of
11 the public sector and there is no political
12 accountability any more. So unless the media make it a
13 point to stay on this person and make hay about the
14 fact that they have, you know, accepted a position that
15 might be seen as improper, there is really nothing you
16 can do about it. It is just an advisory system.

17 47912 So it has limitations.

18 47913 MR. BATTISTA: I know Duff Conacher
19 expressed a desire to respond and then it will be you,
20 Professor Sossin.

21 47914 MR. CONACHER: Thank you.

22 47915 Beyond those couple of problems that
23 have been highlighted by Ms Turnbull, I have in
24 Democracy Watch's written submission, pages 11 to 13
25 setting out essentially our position on why Members of

1 Parliament should not be involved in ruling on any of
2 these issues.

3 47916 It would be nice to think that a
4 committee could be set up that would treat people
5 fairly, but the experience over the last 20 years,
6 there were 80 allegations through the majority
7 governments from '93 to -- sorry, from '88 to 2004
8 about members of the government and a couple of cases
9 members of opposition, and no hearings were held by any
10 committee looking into any actions of any member of the
11 ruling party because the committees were controlled by
12 members of the ruling party. But a couple of times
13 members of the opposition parties who faced allegations
14 were hauled before the committee.

15 47917 And then since we have had minority
16 governments, every allegation has been examined by
17 committee involving the ruling party, because the
18 opposition parties control the committees.

19 47918 So that is not speculation about
20 whether they can fairly and impartially do these kinds
21 of tasks like determining whether someone could take a
22 job when that person comes from one of the parties that
23 would be represented on a committee.

24 47919 I think from the pattern of the last
25 20 years in Canada it would depend on whether you had a

1 majority government or minority government at the time
2 and who the person was who was coming before the
3 committee, unfortunately. But that is Members of
4 Parliament in their own actions over a 20-year period.
5 I think they have proven it very clearly that they
6 can't have these roles of deciding about their own
7 ethics or other members of other parties ethics because
8 they just can't set aside their partisanship when in
9 those deliberations.

10 47920 MR. BATTISTA: Professor Sossin...?

11 47921 You wanted to respond to that?

12 47922 DR. TURNBULL: If I could follow-up
13 very briefly.

14 47923 I agree that the limitations of the
15 partisanship there, but there would certainly be no
16 requirement to appoint such a committee on that basis.
17 You can have an Order in Council appointment, an
18 arm's-length appointment where Parliamentarians, former
19 or sitting, aren't involved.

20 47924 MR. BATTISTA: Professor Sossin, go
21 ahead.

22 47925 PROF. SOSSIN: Yes. So I think it's
23 a very interesting possibility. I think it opens up
24 the door to a lot of upsides in the ability to -- I had
25 referred to it earlier as kind of a cleansing letter

1 which many people seek, not because they have to, but
2 because there are all sorts of good things that will
3 come from it, not the least of which is a kind of
4 insurance policy on future investigations or
5 allegations of wrongdoing, plus a lot of people are
6 actually interested in making sure they are doing the
7 right thing and the rules are not always simple.

8 47926 So a mechanism that means you are not
9 just shopping around for your trusted retired judge or
10 lawyer but can go to someone who has current and both
11 expertise and continuity of advice across different
12 settings and again captures that in a way that could be
13 translated into guidelines and the soft law mechanisms
14 we have talked about would be really good.

15 47927 The one thing I wanted to add,
16 though, is too often we see that role as really just a
17 bright line drawing one: this you can do, this you
18 can't do.

19 47928 I see actually the real value add to
20 that kind of role and to advice giving generally as
21 tell me the legitimate thing you want to do and I will
22 tell you the way you can get there and stay compliant
23 with the principles and rules. There almost always is
24 a way.

25 47929 If you put thought in, for example,

1 to take this position, should you have a letter on the
2 record to the Board of that new corporation indicating
3 the limitations that you are under because of your
4 prior political role, to create screens, mechanisms and
5 practices for example that will enable you to say you
6 are not seeing material relating to a bid, you know,
7 that indirectly benefits a party that could be seen as
8 within the sphere that you had in government.

9 47930 In other words, the kinds of things
10 that wouldn't be caught by the rules, but are close
11 enough they are rule adjacent that you might want extra
12 comfort.

13 47931 So it is about what do I have to do
14 to do the right thing, not is this good or bad. Can I
15 do it or not do it? I think too often we see it as an
16 on/off switch when it really ought to be about the
17 mechanisms and practices that allow you to do
18 legitimate things but making sure it is in a legitimate
19 way.

20 47932 MR. BATTISTA: Professor Greene, go
21 ahead.

22 47933 PROF. GREENE: Well, I think the
23 experience in the provinces and territories is that
24 many elected members have found the ethics rules and
25 Ethics Commissioners to be very beneficial to them

1 because it insulates them from what they consider to be
2 illegitimate pressure and they have a reason for saying
3 no to that pressure.

4 47934 I think it is the same with
5 post-employment. If you have the kind of cleansing
6 letter that Lorne Sossin talks about, I think that many
7 people going back to the private sector from the public
8 sector would find this incredibly useful.

9 47935 I spent much of my career
10 interviewing judges and lawyers about various aspects
11 of the justice system, and one thing that many lawyers
12 have told me over and over again is the one thing that
13 they have to sell is their reputations. Their
14 reputations are absolutely crucial to their careers. I
15 think it is the same for most people going back into
16 the private sector from the public. They want to make
17 sure that the reputation is intact.

18 47936 I am intrigued by the Advisory
19 Committee in Business Appointments that I learned about
20 in Lori Turnbull's paper. One of the wonderful things
21 about being invited to this workshop today is I have
22 learned a great many things that are very, very useful.

23 47937 I see this Advisory Committee as
24 being an experiment, and in fact many of the ethics
25 rules in democracies have evolved over the past 30

1 years. We have experimented in many ways. What we
2 need to do is to evaluate those experiments, find what
3 works, what doesn't work, what could be improved.

4 47938 I am looking forward next time I'm in
5 England to investigating how this committee is working
6 and learning as much as I can about it. I think it is
7 a very useful innovation.

8 47939 MR. BATTISTA: Professor Clark, do
9 you have a comment that you want to make?

10 47940 PROF. CLARK: Yes, I have a short
11 comment, maybe an aside really.

12 47941 It is not about the specifics of the
13 U.K. procedure, but this discussion draws me back to
14 perhaps the first question of the morning about an
15 ethical culture.

16 47942 I teach ethics, I teach legal ethics
17 and government ethics in a law school and one of the
18 things I try to mention at the end of the semester is
19 that I think that encouraging my students to, you know,
20 thrive professionally and avoid problems professionally
21 as well, I encourage them to dialogue on issues that
22 arise rather than trying to figure it all out on their
23 own.

24 47943 So in a sense this is just an example
25 of what is a dialogue, because it is non-binding,

1 right.

2 47944 In that sense it also reminds me of
3 something that perhaps I should have said earlier about
4 the U.S. experience, the U.S. Executive Branch
5 experience, which is that in addition to the huge
6 numbers of rules there are also huge numbers of ethics
7 advisers within the Executive Branch, people who have
8 some training and then other employees can go to them
9 and they can have conversations.

10 47945 And my opinion is this is something
11 that was probably done correctly, like having lots of
12 embedded people within the bureaucracy who you can go
13 to, who you can have these discussions with.

14 47946 So I guess I just wanted to add that
15 I look at this U.K. procedure really in that light, not
16 as an enforcement mechanism but instead as a way of
17 encouraging that aspect of ethical culture that is
18 encouraging dialogue, ethical dialogue, which I think
19 is a very positive thing.

20 47947 I certainly didn't highlight it
21 earlier in my discussion of specific rules and
22 prohibitions and so on, but I think it's actually -- I
23 think it's really important on an individual basis as
24 well as an institutional basis.

25 47948 MR. BATTISTA: I'm going to go to my

1 counsel again, Ms Brooks.

2 47949 MS BROOKS: My question focuses a
3 little bit on -- picks up where Mr. Wolson left off
4 with this idea of the Advisory Committee, but it goes a
5 step back to what a number of panel members were
6 discussing, which was the ability or the advisability
7 of the commissioner, him or herself filling that role.

8 47950 And from an administrative law
9 perspective I wonder if you could comment on how you
10 see it playing out if you were to have a system where
11 the commissioner gives such advice and then there is a
12 subsequent complaint filed regarding a matter on which
13 he has already given advice and the possibility that a
14 party, whether it is the complainant, MP or Senator, or
15 the MP who was the subject of a complaint, will claim
16 that the commissioner is then tainted, no longer
17 independent and impartial.

18 47951 Does this cause any of the panellists
19 or our experts a concern? If it does, does the
20 Advisory Committee route get some more credence because
21 of that?

22 47952 MR. BATTISTA: Does anyone volunteer
23 to go first?

24 47953 Mr. Conacher, go ahead, please.

25 47954 MR. CONACHER: Thank you.

1 47955 Yes, one of the bases of Democracy
2 Watch's recommendation of no secret opinions or advice
3 and requirement to publish those, and also to allow for
4 judicial review of those as well, because they are
5 rulings that are being rendered, is because of this
6 problem of if legally incorrect advice has been given
7 and then a complaint follows, and the Ethics
8 Commissioner is already bound to the advice they have
9 given.

10 47956 This problem was raised by Ethics
11 Commissioner Shapiro in an annual report and he
12 actually recommended that he no longer be allowed to
13 give confidential advice for that reason, because he
14 could end up in a conflict of interest himself if a
15 complaint was then filed and either side alleged that
16 he was tainted or biased because of his previous
17 rendering of an opinion.

18 47957 So I think it is a very real concern
19 and the way to solve it is to require any ruling that
20 they make -- because when they are asked for an opinion
21 or advice they are giving a ruling; they are saying
22 this is the line that the rules draw and I'm advising
23 you of that -- that that be made public but then that
24 those be subject to judicial review as rulings, because
25 they could be legally incorrect on the whole system

1 should not be tainted.

2 47958 I would defer to the expertise of the
3 commissioners on deciding these issues. Unfortunately
4 with respect to the Commissioners and Ethics
5 Counsellor, et cetera, that have served in those
6 positions, I haven't seen a lot of expertise in their
7 decision-making in terms of making legally correct
8 decisions. So that's why we think judicial review
9 should apply to those kinds of opinions and rulings.

10 47959 MR. BATTISTA: I will go to Lori
11 Turnbull next.

12 47960 DR. TURNBULL: Okay. Just picking up
13 on what Kathleen had said earlier, I think it is really
14 important to have the dialogue and deliberation to sort
15 of facilitate this culture of ethics and for that
16 reason I think whether it is a three-person committee
17 or a five-person committee, it would be able to
18 facilitate a dialogue that a one-person commissioner
19 could not.

20 47961 So I think even from that perspective
21 I like the sound of having several people entertain the
22 idea because then you are seeing different angles and
23 these people might come with different backgrounds and
24 experiences and skillsets. So it would probably allow
25 for a kind of broader consideration and interpretation

1 of, you know, what is in front of them.

2 47962 Not only that, but one strength I
3 think of the U.K. approach to political ethics and
4 ethics in public life is something that Paul had talked
5 about yesterday, the Committee on Standards in Public
6 Life, which is something that we haven't really talked
7 much about here.

8 47963 This is a non-partisan independent
9 committee that is appointed by the Prime Minister. I
10 think its complement is seven, maybe nine, but these
11 people serve for a number of years. They are not
12 Parliamentarians. They might be former
13 Parliamentarians.

14 47964 Their role is to study and to publish
15 on matters of public and political ethics. So there is
16 a constant dialogue about political ethics and ethics
17 in public life that is not connected to partisanship,
18 that is not connected to whatever is going on
19 politically that day. It is its own sort of separate
20 dialogue.

21 47965 So I guess when I'm thinking of an
22 advisory committee, if you were to appoint one, that is
23 independent, that is not, you know, connected to that
24 current Parliament, there would be strength to that
25 because you are dealing with people in the post public

1 employment era who are no longer Parliamentarians and
2 should no longer be treated as Parliamentarians or as
3 members of parties.

4 47966 These are now people going back into
5 the private world and I can see the strengths I guess
6 of an independent committee that way. Thanks.

7 47967 MR. BATTISTA: I will go to Lorne
8 Sossin, please.

9 47968 PROF. SOSSIN: Yes, that is a very
10 challenging question because, you know, administrative
11 law creates both the rock and the hard place. I think
12 the idea of tainting the investigation into a complaint
13 because you have given advice is a real one and,
14 similarly, the possibility of conflicting and competing
15 views on the operating principles and language from
16 some independently appointed committee and the Ethics
17 Commissioner or Integrity Commissioner or giving advice
18 that can't in fact be relied on because in any
19 subsequent investigation a different view could
20 prevail, all of those creates real challenges to
21 fairness and to consistency and coherency.

22 47969 So given that there is no, you know,
23 kind of purity to be found and one has to choose
24 between trade-offs, I think the trade-off that I would
25 suggest and that I think has worked reasonably well in

1 the past is in fact to be able to give advice, even if
2 confidential to the person, subsequently disseminated
3 in some fashion that is transparent, and to the person
4 it is given it can be relied on.

5 47970 And that I think we also should see
6 the practical upside of it. It actually makes a lot of
7 people come out and get advice. It is your insurance
8 policy that you can engage in this conduct free of any
9 fear of subsequent, you know, downside risk, I guess.

10 47971 So when the complaint comes I think
11 the first response -- and this is how we deal with it
12 again in the city context where there is an obligation,
13 having given advice, to be bound by it; is that that is
14 disclosed to a complainant, that if there is conduct at
15 issue to which advice covers, to say here is the view
16 that has been given.

17 47972 And I think as long as it is -- there
18 is a transparent process, if you disagree with it, then
19 I think the trade-offs amount to a more fair and
20 effective system than if you had either differing and
21 potentially competing views out there or if you had
22 advice that could be given but not relied on by the
23 individuals.

24 47973 So to come up with a response I guess
25 to the also intrinsic benefits of more heads being

1 better than one and dialogue being better than
2 monologue, one can imagine an Ethics Commissioner
3 simply delegating a particular function over
4 post-employment decision-making to a committee
5 appointed by the commissioner and subject to whatever
6 guidelines or other direction the commissioner gives as
7 to broad principles or provisions, but on a
8 case-by-case basis being dealt with by the Committee.

9 47974 I think a structure like that works
10 better than one in which you close a commissioner off
11 from the advice giving, because in my experience the
12 advice giving is the meat and potatoes of the job. It
13 is what keeps you relevant. It is what builds
14 relationships of trust and accountability.

15 47975 The complaint and investigative role,
16 while higher profile, while dramatically important in
17 particular cases, again happens infrequently, is not a
18 good basis on which to build education and training
19 initiatives, and to close off a commissioner from that
20 world would seem to me to attract far more downsides
21 than upsides.

22 47976 And to the extent there are
23 downsides, I think there are administrative law
24 principles that can fairly deal with them within the
25 existing template.

1 47977 MR. BATTISTA: Professor Thomas, yes,
2 please.

3 47978 DR. THOMAS: Yes. I think there is
4 another feature of the U.K. system, as I understand
5 it -- and I will have to go back and check this more
6 carefully.

7 47979 But I think this outside body on
8 standards of conduct in public life has a Parliamentary
9 home as well. There is a committee, I think the
10 Standing Committee on Public Administration of the
11 House of Commons, which shows the importance of
12 individuals. It led by an MP named Tony Wright and
13 gave a quite remarkable lecture recently on making
14 politics a more noble profession.

15 47980 It appeared on the website of the
16 Journal Political Quarterly.

17 47981 The partisanship inside this
18 committee is very, very muted. It is almost
19 non-existent. There is no media present. It isn't
20 about trying to catch a fellow politician engaged in
21 wrongdoing. That is not the tone at all.

22 47982 So you have this blue ribbon panel of
23 people who give reports and then the people who have to
24 live in the reality of politics day-to-day, the
25 pressures and the moral challenges that they may face,

1 talk about it in real terms amongst themselves. So you
2 at least have a minority contingent of Members of
3 Parliament who are ethically aware, reason ethically
4 well and understand about how that matters in their
5 day-to-day concrete circumstances of life of going back
6 to constituencies, meeting segments of the population
7 within the constituency.

8 47983 That is where it resonates with MPs.
9 You put it up in the abstract, away up in the sky, and
10 they will nod their heads and say who can be against
11 that. But if you make it more practical and then they
12 are in some ways a voice within that community of
13 Parliament, that village called Parliament, who can
14 carry on some of that tradition. You need some of
15 those people.

16 47984 In our system there are Senators who
17 served that role, who are not as tied down by partisan
18 considerations and raise public interest considerations
19 in a way that Members of Parliament, House of Commons
20 Members, are not prepared to do.

21 47985 So I think these commissioners are
22 emanations of Parliament. They are not part of
23 emanations of the political executive. They may have
24 been created by that, but their organizational home is
25 Parliament and Parliament can be lax in holding them

1 accountable.

2 47986 I did work in the past on so-called
3 officers of Parliament and we had the famous Radwanski
4 Affair, a former Privacy Commissioner, and Parliament
5 for years and years ignored officers of Parliament,
6 which they had established, never asked them to account
7 for their behaviour, what they were doing. They were
8 allowed to interpret what constituted success for them
9 in their operations.

10 47987 They shouldn't be completely free to
11 do that. We want them to have semi-independence. We
12 want them to exercise good judgment, but we want them
13 also periodically to boast and confess before
14 Parliament.

15 47988 MR. BATTISTA: Professor Greene, I
16 believe you expressed a desire to make a comment.

17 47989 PROF. GREENE: Yes. I think that
18 Ms Brooks' question is a very good one.

19 47990 I must admit in 1987 when the Ontario
20 integrity system was being suggested we, as academics,
21 are trained to be sceptical and to ask hard questions
22 and I thought that the system was not going to work
23 very well, and one of the reasons was that the
24 commissioner would both provide advice and investigate.

25 47991 Anyway, much to my surprise and

1 delight, the system has worked very well, including the
2 system where the commissioner investigates and in a
3 number of decisions has said well, I gave this advice
4 and the advice was taken and so the Member has behaved
5 appropriately.

6 47992 So it is a departure from the usual
7 administrative law norms. But if you wanted to do
8 something different, if you wanted to separate the
9 advice role from the investigative role, it would be
10 more expensive. It would be more cumbersome, more
11 bureaucratic and there always would be the danger that
12 somebody has acted by taking the advice of the
13 commissioner, but then another commissioner says no,
14 that was the wrong advice.

15 47993 So I think it would be less
16 successful than the current system.

17 47994 The federal regime is so big that
18 perhaps the advice giving and the adjudication of
19 investigations could be separated. That is possibly
20 something that could be looked into.

21 47995 I also would like to mention that
22 ethical dialogue is incredibly important. That is why
23 it is important for the commissioners to have
24 one-on-one chats with elected members.

25 47996 Also, amongst the for example

1 ministerial exempt staff, there need to be people that
2 they can talk to who have been trained in ethics issues
3 that they can discuss issues with.

4 47997 MR. BATTISTA: Thank you for that.

5 47998 That is it for you, Nancy?

6 47999 MS BROOKS: Thank you very much.

7 48000 MR. BATTISTA: Okay. I'm going to go
8 to Evan Roitenberg.

9 48001 MR. ROITENBERG: Thank you.

10 48002 Yesterday in prompting a question to
11 our panel, Mr. Conacher referred to the Conflict of
12 Interest Act and the definitions, particularly the
13 definition of private interest, and he suggested that
14 we could widen the application of the Act by defining
15 private interest as any interest that could reasonably
16 be seen to influence you. A very wide definition.

17 48003 He suggested that there was no legal
18 bar to doing so and by doing so you would encompass
19 many more situations.

20 48004 The question is: What practical bar
21 do you see to making the application of that Act so
22 wide?

23 48005 MR. BATTISTA: Does anyone volunteer?

24 48006 Yes, go ahead, Professor Sossin.

25 48007 PROF. SOSSIN: Yes. This is another

1 variation on the problem of improper advantage of a
2 variety of these terms where there is a real risk of
3 over or under inclusive interpretations, and I think
4 one risks that more by trying to define it more.

5 48008 The more words you put there, the
6 more it looks like the legislature, or if it is a
7 non-legislative code the commissioner, the more it
8 looks like you are trying to create a tax code; you are
9 trying to be precise, and the more people will read it
10 to find where it ends and, you know, where your conduct
11 can begin.

12 48009 So I worry a little bit about those
13 kinds of definitions.

14 48010 I think there is a practical danger
15 to conflating individual benefit, which private in the
16 sense of to me or my family or friends or people I have
17 an interest in, and what may be a whole variety of
18 other factors that influence me that could range from,
19 you know, moral convictions to value-based
20 associations, religious communities, you know, a whole
21 bunch of things where you are going to start losing
22 your consensus on whether that is private or not.

23 48011 I think there is actually a good
24 scope for dialogue and debate on things like broad
25 associational membership. I'm not here thinking of

1 political parties but thinking here of, you know, broad
2 kinds of I am a member of Amnesty International or I
3 belong to this religious group.

4 48012 Does that have an influence on some
5 decisions I may make? It is conceivable that all
6 values are playing into decision-making in lots of ways
7 that are not always transparent but often are there.

8 48013 The question becomes what is private
9 in that context. I think it is best, as I said
10 earlier, articulated through transparent examples of
11 something that you think clearly is and something that
12 you think clearly isn't private.

13 48014 Those can be the point of departure
14 for a dialogue and for refinements to get it right.

15 48015 But the definition suggested, as you
16 have reported it, would seem to cluster together a
17 whole range of things that benefit you and specific
18 members of your family, and your friends, as well as a
19 whole bunch of those kinds of value or associational
20 connections that, at some point, become so broad as to
21 give little meaning to the distinction between public
22 and private.

23 48016 That would be my worry, and more
24 words and more precision, I don't think, gets you
25 there. Good, practical, accessible examples, and

1 commentary on them, I think, would.

2 48017 MR. BATTISTA: Do you want to go
3 ahead, Professor Greene?

4 48018 PROF. GREENE: To begin with the
5 conflict of interest rules only dealt with financial
6 situations, and over the years they have become
7 broader, to include other types of situations as well.

8 48019 The importance of the conflict of
9 interest rules is that they promote impartiality.
10 Ministers of the Crown administer the law, and they
11 have to do so according to the rule of law impartially.

12 48020 So they shouldn't be subject -- well,
13 there are many influences on them, so I don't think we
14 can talk about preventing any influence, but anything
15 that is undue influence, something that is unfair or
16 violates the equality principle.

17 48021 I think it would be normal to broaden
18 the definition of "conflict of interest". This is
19 something that has really been accepted in
20 jurisdictions across Canada, especially in the last 10
21 or 15 years. But, I think, in order to understand how
22 that definition could be broadened, we have to think
23 about the meaning of impartiality, which is what the
24 whole system is promoting.

25 48022 MR. BATTISTA: Thank you.

1 48023 Evan, did you have a follow-up
2 question on that?

3 48024 MR. ROITENBERG: It flows from that
4 and something Professor Greene had said earlier, when
5 you opined whether or not these codes should be
6 legislated is something that should be debated.

7 48025 My question is, what would you
8 recommend, should they be legislated or shouldn't they?

9 48026 PROF. GREENE: I agree with Duff
10 Conacher about this, I don't think it is a major issue.
11 When I have compared the legislated codes to the ones
12 that haven't been legislated, I think they have had
13 about the same impact.

14 48027 The disadvantage of legislated codes
15 is that you get into areas of judicial review, where
16 this might not always be beneficial, partly because
17 judicial review takes such a long time.

18 48028 One of the purposes of having
19 independent ethics commissioners is that you can
20 provide competent advice to elected members, and if
21 there is a dispute about whether that advice has been
22 taken or whether the rules have been followed, the
23 issue can be settled quickly, without being taken
24 through the media for months and months, and without
25 going through the courts for years.

1 48029 So I think one disadvantage of the
2 legislated code is the possibility of judicial review,
3 and an issue that ought to be settled very quickly, so
4 that members can get on with their business, is dragged
5 out for years. I don't think that helps the system, so
6 I would be in favour of codes.

7 48030 MR. BATTISTA: Professor Sossin, do
8 you want to make a comment?

9 48031 PROF. SOSSIN: Just on that, you are
10 always fighting, I think, this battle between reality
11 and perception in this world of ethics and
12 accountability, and whether or not it is empirically
13 true that it makes a difference in the way that Ian and
14 Duff were speaking of it, I think it is a fairly
15 widespread consensus that it is perceived as a stronger
16 act to legislate the code, rather than to make it
17 simply a non-binding feature of self-government within
18 a parliamentary body.

19 48032 It becomes a game of expectations.
20 If the expectation is that, if you are serious about
21 it, you will legislate it, and you keep it flexible,
22 for all of the right reasons, let's say, or you are
23 worried about judicial review, I think that then you
24 need to suddenly be on the defensive and justify why
25 you didn't do what was widely perceived to be a signal

1 of commitment.

2 48033 If, on the other hand, you only
3 legislate because you think it is going to be perceived
4 as being tougher, or caring about ethics more, I don't
5 think that is discharging good judgment in the
6 circumstances.

7 48034 If we legislated only to respond to
8 perception and not based on good empirical study and
9 evaluation, I think we would be in an undesirable
10 place, as well.

11 48035 If you had to fall on one side of the
12 fence or not, I think, if you have a compelling case
13 for why you have chosen to recommend the method you
14 have, ultimately that is also how public perceptions
15 get changed.

16 48036 When you actually probe and say, "Why
17 do you think it is more important when it's legislated?
18 Why do you think it is more significant," ultimately
19 people believe things like, "That means it has teeth.
20 That means it matters."

21 48037 And if they find out that, in fact,
22 some of these non-legislative instruments or
23 non-binding committees are actually more effective and
24 result in demonstrably better outcomes, then that also
25 performs a really valuable function to issues like

1 this.

2 48038 MR. BATTISTA: Mr. Levine, would you
3 like to answer?

4 48039 MR. LEVINE: Just an empirical thing;
5 in fact, all of the provincial codes are legislated,
6 and they are all working. So there is something about
7 that that's kind of good.

8 48040 The other piece to it is that, while
9 legislation takes a long time to go through, there is
10 an openness to it. There is not a sense that --

11 48041 It is true that in second reading the
12 committees can do all sorts of things, but there is an
13 openness to the process of establishing the code that
14 matters a lot to people.

15 48042 If you believe that the code can be
16 changed by a committee of Parliament, behind closed
17 doors, and so on, and there is a new code the next day,
18 and "Wait a minute, what happened here," that is a
19 problem.

20 48043 So the flexible fixidity, if I could
21 put it that way, of legislation is a real advantage.
22 It is there, it's firm, and it's not so easily
23 changeable, and we know how they got to it, and all of
24 that matters.

25 48044 MR. BATTISTA: Now I am going to move

1 to our Research Director, Craig Forcese, to ask
2 questions.

3 48045 MR. FORCESE: Thanks very much. I
4 just have two questions.

5 48046 We had a fairly substantial
6 discussion of the U.K.'s independent committee. Just
7 to clarify, as I understand it, no one is proposing
8 that we abandon our post-employment rules, what we are
9 talking about is a mechanism for operationalizing those
10 rules that allows us discourse.

11 48047 Because the U.K., of course, has this
12 mechanism, but they don't really have any rules, in
13 terms of strictures on post-employment, so I want to
14 clarify that that's what we are talking about.

15 48048 That is my first question.

16 48049 The second question is for Professor
17 Greene.

18 48050 At one point, in relation to our
19 discussion about enforcement and penalties, you
20 endorsed the standard model where penalties are decided
21 by the legislature itself, which is true, obviously, at
22 the provincial level very often, at least in relation
23 to existing public office holders.

24 48051 But when it comes to former public
25 office holders, in, I believe, seven of the provinces

1 there is a penalty regime that is independent of
2 anything that a legislature might decide, presumably
3 the rationale being that the legislature has very
4 little control over a former public office holder, in
5 terms of the sanctions mechanism.

6 48052 So would you also, in terms of the
7 mechanism you endorse, make a distinction between
8 current and former public office holders?

9 48053 MR. BATTISTA: There are two
10 questions. Who is going to respond to the first
11 question?

12 48054 Do you want to start on the first
13 question and the second question?

14 48055 PROF. GREENE: My answers to both
15 will be very brief.

16 48056 First of all, I see something like
17 the U.K. model as being a way of operationalizing the
18 current rules, and I think that the current rules, with
19 the modifications suggested by Greg Levine, are quite
20 adequate, we just need a way of operationalizing them
21 more effectively.

22 48057 Is there a distinction between
23 penalties for post-employment sanctions, as opposed to
24 people currently sitting in a legislature? Yes, there
25 is, and I do think that there ought to be a separate

1 mechanism -- different mechanisms for imposing
2 sanctions with regard to people that, post-employment,
3 violate the rules.

4 48058 MR. BATTISTA: Ms Turnbull...?

5 48059 DR. TURNBULL: I was going to say,
6 about the committee in the U.K., that there are no
7 rules specifically about post-employment like we have,
8 but there are guidelines for the committee members to
9 follow when they make their decisions. Specifically,
10 there are some clauses that prohibit -- not prohibit,
11 but recommend against anything that would be seen as
12 profiteering, ingratiating, and, in fact, part of the
13 committee's mandate is to actually go back to talk to
14 the former public office holder's department to see
15 what sorts of relationships they had and what kind of
16 work they did, and which private entities they were
17 involved with while they were inside, so that they can
18 make decisions with this kind of information.

19 48060 And the guidelines talk a bit about
20 appearances. Actually, they talk a lot about
21 appearances.

22 48061 So even though there aren't rules,
23 per se, the committee is coming at it with a certain
24 sense of priorities, these guidelines are coming from
25 the Prime Minister's Office.

1 48062 MR. BATTISTA: Mr. Conacher, go
2 ahead, please.

3 48063 MR. CONACHER: I was looking at this
4 and discussing it briefly with Mr. Levine yesterday,
5 and I think there is an argument that a former public
6 office holder could go to the commissioner for advice.

7 48064 It says in subsection 43(b) that the
8 commissioner shall provide confidential advice to
9 individual public office holders with respect to their
10 obligations under this Act.

11 48065 So they become a former public office
12 holder, but their obligations under the Act are because
13 they were a public office holder.

14 48066 If you look at subsection 34(2), you
15 can't ever give advice, for the rest of your life,
16 using information that was obtained in your capacity.

17 48067 You can't ever act to take improper
18 advantage or ever switch sides under 33 and 34.

19 48068 So beyond the cooling off period,
20 this Act applies to public office holders. Now, they
21 are former, but...

22 48069 In a way, I think you could -- if the
23 commissioner decided to give advice, and hopefully
24 would then publish an interpretation bulletin, or
25 commentary after that to a former public officer

1 holder, I don't think anyone would go to court and say,
2 "That's not allowed under section 43." I think that
3 most people would say that it must be. Who else can
4 they go to to find out whether they are complying with
5 these other provisions, like 33 and 34, that apply for
6 the rest of their lives, not just in the cooling off
7 period?

8 48070 So, in that way, make it more clear
9 and add under 43(b), "provide confidential advice to
10 individual public office holders, current or former,
11 with respect to their obligations," and require the
12 commissioner to issue commentaries or opinions after
13 giving that advice.

14 48071 Then you just extend that whole
15 educational training and standard setting. It's not,
16 in terms of compliance, an investigation, but just
17 standard setting and education, right through the
18 public office holder's realm.

19 48072 I just don't see a need to create
20 another body that may conflict with what the
21 commissioner is doing.

22 48073 The commissioner, under the
23 Parliament of Canada Act, can delegate their authority
24 to others. I think it's only to staff, though, if I
25 remember correctly, not to a committee.

1 48074 So you would have to change the Act
2 to allow that to occur.

3 48075 And Democracy Watch has always argued
4 for a three-person commission, so you would have that
5 dialogue, rather than just having one person trying to
6 decide it by themselves.

7 48076 But we don't see a need for another
8 separate committee to continue making that kind of
9 standard setting practice, just bring it within the
10 commissioner's realm and require it to be done
11 publicly.

12 48077 MR. BATTISTA: Does anybody else want
13 to comment on this point?

14 48078 Mr. Levine, go ahead, please.

15 48079 MR. LEVINE: I can see the reading
16 that Mr. Conacher suggested. I do think, though, that
17 the intent --

18 48080 I am not sure what the intent was. I
19 shouldn't phrase it that way.

20 48081 -- the effect of it is not to include
21 former public officer holders, and I think it would be
22 better to explicitly include them in this advice
23 section.

24 48082 MR. BATTISTA: Craig, do you have any
25 follow-up questions on this?

1 48083 MR. FORCESE: No, just one
2 information item. The article which Professor Clark
3 referred us to earlier, "Keeping Faith", I have some
4 copies here for Commission personnel.

5 48084 MR. BATTISTA: Mr. Commissioner, do
6 you have any questions for our panellists?

7 48085 COMMISSIONER OLIPHANT: No, I do not,
8 thank you. I am here to listen.

9 48086 MR. BATTISTA: If no one else has any
10 questions, I think we have covered a lot of ground. We
11 did a lot, certainly, yesterday, and I am sure that the
12 Commissioner drew a lot from our panellists yesterday,
13 and your expertise today completed that, I think, to a
14 large extent. It was a very insightful, very thorough
15 panel discussion, with the present and former
16 panellists involved.

17 48087 Professor Clark, Professor Greene,
18 Professor Sossin, Mr. Conacher, the coordinator for
19 Democracy Watch, thank you very much on my behalf, and
20 on behalf of Commissioner Oliphant.

21 48088 COMMISSIONER OLIPHANT: Thanks very
22 much, Mr. Battista.

23 48089 Let me join in thanking the
24 panellists and the experts of the Commission, and
25 everybody else who has contributed to the success of

1 today's proceedings. I really do appreciate your help.
2 Thank you very much.

3 48090 We will adjourn now until 9 o'clock
4 tomorrow morning.

5 --- Whereupon the hearing adjourned at 2:16 p.m., to
6 resume on Wednesday, June 17, 2009 at 9:00 a.m. /
7 L'audience est ajournée à 14 h 16, pour reprendre
8 le mercredi 17 juin 2009 à 9 h 00

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10 We hereby certify that we have accurately
11 transcribed the foregoing to the best of
12 our skills and abilities.

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