

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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1 hours set for the first part of this panel and my
2 expectation is that we will go for perhaps an hour 45
3 and take a break and then open matters up for questions
4 from the various parties. I expect that we will have
5 lots of time to hear from this very distinguished group
6 of panellists this morning. My expectation is as
7 well that a couple of the panellists have some time
8 constraints and we will deal with those as time
9 goes on.

10 48926 Let me introduce, first of all, to my
11 far right, Mr. Mel Cappe. Mr. Cappe has been President
12 of the Institute of Research on Public Policy since
13 June of '06. The Mission Statement of that Public
14 Policy Institute is as follows:

15 "... to improve public policy in
16 Canada by generating research,
17 providing insight and sparking
18 debate that will contribute to
19 the public policy
20 decision-making process and
21 strengthen the quality of public
22 policy decisions made by
23 Canadian governments, citizens,
24 institutions and organizations."

25 48927 It is a nonprofit organization.

1 48928 Mr. Cappe, in reverse order, was the
2 High Commissioner for Canada to the U.K. of Great
3 Britain and Northern Ireland; Special Adviser to Prime
4 Minister Chrétien, Clerk of the Privy Council,
5 Secretary to the Cabinet and Head of the Public Service
6 from January of 1999 to May of 2002.

7 48929 He has also served as Deputy
8 Secretary to the Treasury Board, Deputy Minister of
9 Environment, Deputy Minister of Human Resources
10 Development and Deputy Minister of Labour.

11 48930 We welcome Mr. Cappe here
12 this morning.

13 48931 To my right is the Right Honourable
14 Joe Clark, who hardly needs an introduction, but he was
15 the 16th Prime Minister of Canada. In the subsequent
16 government he served as Secretary of State for External
17 Affairs, President of the Privy Council and Minister
18 Responsible for Constitutional Affairs. He also was
19 Acting Minister of Justice and Acting Defence Minister.

20 48932 After retiring from politics in
21 1993, he returned to lead the Progressive Conservative
22 Party in 1998 until retiring in 2003. Since then he
23 has taken up several academic and think tank
24 positions, including at the University of Washington
25 and McGill University.

1 48933 To my left is Ms Penny Collette,
2 who is a lawyer with extensive business and political
3 experience. She holds two positions currently at the
4 University of Ottawa as Executive-in-Residence at the
5 Telfer Management School. She guest lectures on
6 ethical and business issues relating to global, public
7 and corporate governance.

8 48934 She is also an Adjunct Professor
9 at the Faculty of Law where she designed a course
10 entitled "Whistleblowing: The busy intersection of
11 Law and Ethics.

12 48935 From 2002 to 2004 she was a Senior
13 Fellow at the Centre of Business and Government, the
14 Kennedy School of Government at Harvard University.

15 48936 In the corporate world she served
16 for six years as Director of Holt Renfrew and
17 Company and from 1998 to 2002 she held the position of
18 Vice President in the Chairman's Office of George
19 Weston Limited.

20 48937 She has recently joined the Advisory
21 Council of the Prosperity Fund, the community endowed
22 fund for long-term care.

23 48938 I can tell you that she has won
24 many awards, as have all of the panellists except for
25 the Chairman.

1 48939 To my far left, Mr. David Mitchell.

2 He became President and CEO of the Public Policy
3 Forum in January of 2009. The Public Policy Forum is
4 an independent nonprofit organization that aims to
5 improve the quality of government in Canada through
6 enhanced dialogue among the public, private and
7 voluntary sectors.

8 48940 Previously he served as Vice
9 President at three universities, Queen's the University
10 of Ottawa and Simon Fraser, directing fund raising and
11 external relations at each institution. He has served
12 as a member of the British Columbia Legislature from
13 1991 to 1996.

14 48941 He had previously worked as a Deputy
15 Clerk of the Saskatchewan Legislature. He has held
16 executive positions within western Canada resource
17 industries, including Vice President of Marketing,
18 General Manager of Industrial Relations, and he holds a
19 Master Degree in Canadian and American History from
20 Simon Fraser.

21 48942 Those, then, are the panellists for
22 this session.

23 48943 What I expect we will do this morning
24 is, I will ask a particular panellist to lead off on a
25 question and then ask a subsequent panellist for a

1 response and then open the session if the other two
2 panellists have anything that they would like to add.

3 48944 So I will start with Ms Collette.

4 48945 What is the objective of ethics
5 rules? Is it to shape behaviour, to communicate
6 publicly a commitment to values, or something else
7 entirely?

8 48946 PROF. COLLETTE: Thank you very
9 much, sir.

10 48947 Good morning, Commissioner and
11 distinguished colleagues.

12 48948 May I first say how delighted I am
13 to take part in this panel today. My years in a Prime
14 Minister's Office -- which I'm not sure that we
15 mentioned -- and my years in the corporate world have
16 eventually led me to the academic world where, as you
17 have heard, I have studied, researched and written
18 both about governance and ethics, topics about which
19 I am passionate.

20 48949 May I say first of all that I wish
21 that we could routinely discuss these matters, perhaps
22 at an annual conference rather than just after a
23 scandal or an apparent scandal.

24 48950 As I read the excellent policy papers
25 already written and the testimony of expert witnesses

1 who have already presented and the depth to which this
2 Commission has already investigated the issues before
3 you, I wondered how much more there is to add. But
4 perhaps we, this panel that has a lot of practical and
5 political experience, can add some further insights.

6 48951 My own experience and assessment is
7 that while there are encouraging signs of ethical
8 growth in our systems in government, we are still years
9 away from a coherent Canadian framework of ethical
10 fitness. That's a phrase I have heard from one of my
11 colleagues at the University of Ottawa. Rather, our
12 ethical standards remain a work in process which
13 presents us with both opportunities and challenges.

14 48952 You have asked about the ultimate
15 objective of ethical rules. I propose five. Some of
16 them are already -- you have heard some of them and I
17 will skip over them quickly, but I would like to add
18 maybe just a few more.

19 48953 The first objective is to ensure that
20 ethical rules for politicians or public servants make
21 it crystal clear that the public interest trumps any
22 private interest. I understand that the Values and
23 Ethics Code for the Public Service is under review. I
24 can only hope that they don't remove a portion of their
25 Code that says that:

1 "- Public servants, in
2 fulfilling their official duties
3 and responsibilities, shall make
4 decisions in the public
5 interest.
6 - If a conflict should arise
7 between the private interests
8 and the official duties of a
9 public servant, the conflict
10 shall be resolved in favour of
11 the public interest."

12 48954 That's pretty clear and that
13 phrase should constantly be enforced in all our codes
14 and rules.

15 48955 Number two, a second objective of
16 ethic rules is education and education with a
17 multifaceted approach.

18 48956 As you have heard from other
19 presenters, good ethics rules should make us think,
20 create awareness of potential conflicts, should warn,
21 should guide and perhaps should punish.

22 48957 Realistically the rules have to be
23 flexible because they cannot cover every situation.
24 Not every ethical dilemma has a right solution.
25 Reasonable people often disagree. That's why it is

1 important for discretion to be built into these rules
2 and the individuals who exercise discretion must
3 themselves have wisdom, maturity and strength.

4 48958 Rules which educate also need to be
5 drafted in a thoughtful way and with good consultation,
6 as you are doing here today. A challenge with
7 developing ethical rules is to find a nexus between
8 fairness and firmness and to find it in a calm,
9 collected and workable way so that that can be
10 communicated, not just to citizens but people in the
11 political workplace.

12 48959 If drafted badly, ethical rules may
13 be too complex and create too many competing bodies
14 which in turn lead to confusion, dysfunction and
15 excessive litigation. Often, as we know, bad rules are
16 formed quickly after a scandal in a reactive response.

17 48960 Number three, ethics rules themselves
18 need to fit into an ethical framework. They can't be a
19 standalone out here or out there. I'm thinking about
20 the actual architecture of laws, codes and rules. I'm
21 not thinking about culture, I know we are going to get
22 to that later.

23 48961 But right now we have -- and correct
24 me if I'm wrong -- two codes, three different pieces of
25 legislation, two Commissioners and, of course, several

1 sections of the Criminal Code which are all relevant to
2 this particular situation.

3 48962 How we set up our rules and our
4 ethical framework is crucial. Are the rules and the
5 persons who administer the rules accessible or do we
6 fashion our ethical rules into a frightening hierarchy
7 that turns people off and tunes them out.

8 48963 Furthermore, what assumptions do we
9 make? When we are fashioning this kind of ethical
10 framework for Canada do we make the assumption that a
11 Prime Minister is ethical? What if he is not?

12 48964 Fourth, we also have to be realistic
13 about these rules. Rogue behaviour, corrupt actions,
14 fraud and excessive greed will never be eliminated, but
15 ideally good ethics rule should have the objective of
16 reducing the scope of bad behaviour.

17 48965 Someone said that if you think of
18 history as what was and journalism as what is that
19 ethics is, then ethics is really what ought to be. I
20 think perhaps that's a very strong objective of rules.

21 48966 Shaping behaviour, helping people,
22 that's part of the ethical rules, too. It's sometimes
23 not so easy.

24 48967 First is a field of study. We
25 know that ethics is not a simple concept, it's a

1 blend of moral philosophy and of human behaviour and,
2 in addition, when dealing with institutions and
3 government organizational management is also a key
4 component. Therefore, ethic rules are both
5 theoretical and practical.

6 48968 Second, making an ethical decision
7 is simple when the facts are clear and the choices
8 black and white. You don't steal. It's a very
9 difficult choice when there is ambiguity, incomplete
10 information, different views, or when perspectives or
11 values collide.

12 48969 I just want to speak about this for a
13 minute before I wrap up.

14 48970 A good example of a possible
15 collision of values can be found in the political
16 workplace. It's when truth and loyalty collide. That
17 truce or loyalty collision is very applicable to
18 someone in a Minister's officer or a Prime Minister's
19 office.

20 48971 Assistants owe their positions to
21 their boss, but their boss may not be behaving in an
22 ethical manner. Where are the ethical rules to
23 guide these ministerial exempt assistants? Where do
24 these employees go to even discuss issues and who
25 will protect them? Too often we forget that political

1 employees may be witness to all kinds of events,
2 employees who have their own moral compasses and
3 who may be relying on rules to help them deal with
4 tough situations.

5 48972 Reviewing, updating and training
6 staff on ethical rules is of paramount importance and I
7 know others have emphasized that as well.

8 48973 So finally, a fifth objective for
9 ethic rules, it is not only to shape behaviour, but to
10 give an agenda for workplace behaviour which hopefully
11 in turn assists in fostering the development of
12 character and courage.

13 48974 MR. WOLSON: Thank you.

14 48975 Mr. Cappe, please, to respond.

15 48976 MR. CAPPE: Commissioner, a pleasure
16 to be here and good luck in your work and if we can be
17 of any assistance we look forward to that.

18 48977 I don't disagree with anything that
19 Ms Collenette has said, although I do have some slight
20 differences of perspective of some items.

21 48978 I would like to make four points.

22 48979 The first is that I think ethics
23 rules or guidelines are intended to build trust in
24 government and that's a very rare characteristic and
25 one that is easy to lose and hard to build. So I would

1 emphasize that element of trust.

2 48980 All the other, I think, good
3 objectives that Ms Collenette identified are
4 instruments by which you get there. They are on the
5 way to building trust. The actual behaviour, it
6 strikes me, that you are trying to engender by either
7 rules or guidelines, is to build trust in government.
8 And there is a duty of trust in government and, as I
9 say, I think it is very easy to lose, but very hard to
10 build back.

11 48981 In that regard, my second point would
12 focus on judgment, that there is no way rules can
13 replace good judgment. You cannot anticipate all the
14 circumstances that might lead to particular kinds of
15 behaviour and therefore rules run the risk of building
16 an entitlement mentality.

17 48982 I would just point to, as Mr. Wolson
18 pointed out, I had spent four years in the U.K. and I
19 continue to watch U.K. politics and it has been an
20 extraordinary period in the U.K. and this recent set of
21 scandals -- quasi-scandals, they are public perceptions
22 of a scandal, but they were all -- most of the
23 activities, not all of them, but most of the activities
24 were perfectly legal and they were within the rules.

25 48983 They were actually subject to

1 advice from staff of the House of Commons, but
2 people didn't use their judgment. They had developed a
3 sense of entitlement to the benefits that were allowed
4 under the rules of Parliament and therefore I think
5 abused the public trust by using those rules to their
6 personal advantage. So judgment cannot be replaced.

7 48984 And the problem is that the more
8 prescriptive the rules are the less you induce people
9 to use their judgment.

10 48985 I will give one quick anecdote. When
11 I was in the U.K. I sat as Commissioner of the
12 Commonwealth War Graves Commission and in my public
13 disclosure of potential conflicts of interest I
14 disclosed this and I got a letter from the Ethics
15 Commissioner telling me that I would have to stand down
16 from the Commonwealth War Graves Commission because
17 there was a potential conflict of interest.

18 48986 I said that this was the most
19 preposterous letter I had ever received in my life and
20 I said I'm going to use my judgment and I wrote back a
21 letter that said that in my capacity as High
22 Commissioner I could also sit as a member of the
23 Commission on the Commonwealth War Graves to look after
24 the graves of the fallen Canadian soldier around the
25 world and that this was not a conflict of interest.

1 And I rejected their exhortation to step down.

2 48987 I never received a response, but I
3 felt that I was on high ground in defending my actions
4 and I felt I didn't owe any further explanation. They
5 apparently thought that I didn't -- they didn't owe me
6 an explanation either. But I do think that in the end
7 you want to use judgment.

8 48988 The third point I was going to
9 make -- and this one gets to be a little difficult and,
10 frankly, when I was a public servant I would never have
11 been able to say this publicly but now I feel that it
12 actually is important to say publicly -- and that is
13 that there is an optimal quantity of fraud, that there
14 is an optimal quantity of malfeasance. You cannot
15 stamp out all inappropriate behaviour.

16 48989 The question is: What use of
17 different instruments can you bring to bear that will
18 lead to the socially optimum quantity of fraud?

19 48990 Of course we aim for zero fraud and
20 zero inappropriate behaviour, but the fact is that we
21 are, unfortunately, only human, and we are going to be
22 tempted and people will make mistakes and they will use
23 their judgment and sometimes they will be led astray.

24 48991 The question is: Can you stamp out
25 all that inappropriate behaviour or should you allow

1 for some recognition that there are some things that
2 are dreadful and you need to stamp them out; there are
3 other things that are unfortunate and you need to try
4 to induce behaviour not to go in that direction; and
5 there are others that you may just have to accept as
6 bad judgment with appropriate punishment or retribution
7 that has to come beyond that.

8 48992 The fourth point, and my final point,
9 is that to achieve these potentially conflicting
10 objectives you will need multiple instruments. So that
11 the dichotomous choice of rules versus guidelines or
12 rules versus culture is a bit of a false dichotomy in
13 that there should be rules to -- and we have criminal
14 prohibitions on some kinds of activity, but there also
15 should be guidelines and, more importantly, there
16 should be initiatives which build a positive culture
17 and the culture of respect.

18 48993 Ms Collenette talked about those
19 words that she hopes are not going to be left off of
20 the Public Service Code which says that when you are
21 faced with a conflict always behave in the interest of
22 the public. It's the public interest that dominates
23 the private interest.

24 48994 So it strikes me that in looking at
25 this -- and I will come back to this perhaps in some

1 further questions -- you don't want people to be
2 dissuaded from entering public life because the burden
3 of responsibilities is too great, but neither is it
4 appropriate that individuals enrich themselves from
5 that contribution to public life and finding that
6 balance is very difficult.

7 48995 Thank you.

8 48996 MR. WOLSON: I'm going to call on
9 Mr. Clark to respond to that, if you will, please.

10 48997 THE RIGHT HON. JOE CLARK: Thank you
11 very much.

12 48998 I am pleased to have the
13 opportunity to put some of these views forward and
14 I will be very brief here. I agree generally with
15 what has been said before.

16 48999 I want to make a fairly quick and
17 sharp point, though. In my view the question of public
18 trust, of public confidence, has to be very much the
19 primary objective of ethics rules.

20 49000 There was reference made to
21 penalties. While penalties may be a consequence of
22 having a regime, but having a system that doles out
23 penalties should certainly not be the purpose of
24 ethics rules.

25 49001 I was interested in Ms Collenette's

1 accurate reference to the conflict between truth and
2 loyalty. As a former Minister I have to say that I
3 think that there has to be a real emphasis upon
4 settling that conflict in favour of truth, not just in
5 the public interest, important -- overwhelmingly
6 important though that is -- but also very much in the
7 interest of the public and elected official who is
8 being served.

9 49002 It is no advantage to have people
10 protect you against -- to allow people to have you
11 continue along a course that is unhelpful -- that is
12 going to be unhelpful.

13 49003 Mel raised it and we are not here to
14 discuss the U.K. travails now, but I'm interested in
15 the facts are very often trusted organizations that
16 have earned legitimacy by their actions can become very
17 inward looking and by their inwardness can become
18 isolated from the larger society. That means that
19 there is in that case a great need for transparency to
20 penetrate an inner circle that would otherwise perhaps
21 not be adequately self-examining, and there is some
22 need for some formal description, whether as rules or
23 as guidelines, of the rules of the road.

24 49004 I think that's all I would comment
25 at this stage.

1 49005 MR. WOLSON: Thank you.

2 49006 Mr. Mitchell, last word on
3 the subject.

4 49007 MR. MITCHELL: Yes, thank you.

5 49008 I concur with the general direction
6 of my fellow panellists.

7 49009 I want to just touch briefly on a
8 word that was mentioned by Mr. Clark, "transparency",
9 because I feel that transparency is and should be one
10 of the ultimate objectives of ethics rules.

11 49010 We want, I think, as citizens, to
12 have confidence in government, and transparency, I
13 think, has been one of the goals of most of the efforts
14 over the last generation and more, informally and
15 formally, toward achieving that confidence.

16 49011 So transparency, I think, is a word
17 that needs to be included in one of the objectives of
18 ethics rules.

19 49012 The other comment I would like to
20 make, which refers to both the comments of Ms
21 Collenette and, in particular, Mr. Cappe, resolves
22 around the word "trust", and I believe that we will
23 likely talk about trust further today.

24 49013 But surely trust -- and I agree with
25 Mr. Cappe on this -- is one of the, if not the ultimate

1 ethics rules, the creation of trust or the restoration
2 of trust when it has been lost or damaged.

3 49014 What is the opposite of trust, one
4 might ask. I would submit that it is suspicion,
5 suspicion that perhaps there is something wrong, that
6 there is something not quite right.

7 49015 In order to allay suspicion, we
8 strive in many different ways, sometimes successfully,
9 sometimes not, to build or rebuild trust.

10 49016 I think that many of the other
11 objectives or goals of ethics rules really come under
12 that umbrella of trust, and I think that is, to a large
13 extent, what we are discussing here today.

14 49017 MR. WOLSON: Let me move on, then, to
15 a question for Mr. Clark, to be responded to initially
16 by Mr. Mitchell, and then, hopefully, the balance of
17 the panel.

18 49018 Mr. Clark, have public expectations
19 concerning the ethics of political leaders changed, and
20 are these expectations realistic?

21 49019 THE RIGHT HON. JOE CLARK: Yes, they
22 have clearly changed, but let's put this in the broader
23 context.

24 49020 The other thing that has changed is
25 the atmosphere of deference. Questions are asked of

1 all aspects of public life, whether political or
2 non-political, that were not asked before. Standards
3 are established that were not established before. By
4 and large, that is good for democracy. That is a
5 healthy feature of our system, matters that were off
6 limits in the public interest and in public debate in
7 an earlier time are now clearly on limits, and as
8 public officials become revealed in that process as
9 being more human, more like the rest of us, then that
10 is going to have some impact upon their reputation,
11 including potentially in the field of ethics.

12 49021 I want to make the point here that
13 this has to do with more than politicians. I think
14 that there is a general issue of a declining respect
15 for public servants in Canada, whether they are
16 appointed or elected, and I think there is a declining
17 respect, also, for institutions in the country, and a
18 decline, consequently, in their legitimacy.

19 49022 That, in a country like ours in
20 particular, with all of our differences and
21 challenges -- any decline in the legitimacy of national
22 instruments which cause us and allow us to act together
23 is serious to the public good.

24 49023 We have to act together. We are
25 dealing with increasingly complex problems, and we are

1 losing something important if the sense of the
2 legitimacy of the institutions, which are the
3 instruments of establishing public purpose, declines.

4 49024 This inquiry is one of a series of
5 inquiries that have been dealing with related issues,
6 and if I might, I want to refer to something that arose
7 out of earlier discussions and the whole focus upon
8 accountability, because I think that the current
9 definition of accountability has become a symptom of
10 this change in attitude toward the purpose of people in
11 public life.

12 49025 Let me just say that I know something
13 about accountability. I went to the Governor General
14 when I was foolish enough to let a budget of mine be
15 defeated in the House of Commons. I served several
16 vigorous years as the Leader of the Opposition in the
17 House of Commons, trying to keep various governments
18 accountable. There is no question that accountability
19 is an essential element of our system.

20 49026 But what is happening now, with this
21 insistence upon the rules that are designed to find
22 some easy way to lead to accountability, is that we are
23 turning government to "gotcha". The emphasis is no
24 longer upon the judgment that Mel was talking about
25 earlier, and the incentive is not to the imagination

1 that is essential to a public service; instead we have
2 a series of rules that will catch people. The emphasis
3 is on some kind of punishment, the consequences for
4 straying from rules, rather than the spirit that would
5 lead one to respect rules.

6 49027 I am saying this because it has been
7 said before by others whose words should have been
8 heeded. The late Arthur Kroeger, one of the really
9 distinguished Canadian public servants, a rural
10 Albertan like myself, characterized the last round of
11 regulations, really a cascade of rules and regulations
12 and prohibitions, as being massive overkill, in his
13 phrase.

14 49028 I raise that now because, as we have
15 been discussing here today, there are obvious balances
16 that have to be struck. I guess my argument would be
17 that we have to look very carefully as to whether we
18 are moving so far down a road toward regulation, toward
19 prohibition, toward detail, toward an emphasis on
20 rules, that we are making it more difficult to
21 establish that balance.

22 49029 And in raising the question the way I
23 do, obviously, I am betraying my opinion. I think we
24 are moving in a direction that can be
25 counterproductive, and will not only cause

1 inconvenience for people who are in the public eye,
2 but, much more seriously, will lead to, will add to the
3 decline in legitimacy that is so essential to public
4 institutions, particularly -- and I emphasize this --
5 in a diverse country facing very complex issues.

6 49030 MR. WOLSON: David Mitchell for a
7 response, please.

8 49031 MR. MITCHELL: Let me add to Mr.
9 Clark's comments by saying that, yes, expectations, I
10 agree, have certainly changed, and over the broad sweep
11 of Canadian history this is important to note, because
12 of the dynamic, changing nature of both expectations
13 and standards when it comes to ethics.

14 49032 In fact, at the time of
15 Confederation -- I should say, first of all, that
16 almost every Canadian government since Confederation
17 has been plagued by some ethical issues, scandals of
18 various kinds. It has been a constant throughout
19 Canada's political past.

20 49033 At the time of Confederation, if a
21 minister sitting around the cabinet table wasn't paying
22 close attention to where railway lines were being
23 approved for potential personal benefit of friends and
24 family, they would have been considered to have been
25 asleep at the switch, Mr. Chairman.

1 49034 I can tell you that times have
2 changed. In the early years of the 20th Century a
3 Liberal premier of Ontario, Premier Ross, was
4 simultaneously, while serving as premier, chairman of
5 the London Life Insurance Company. This would be
6 unacceptable by today's standards.

7 49035 I could go on, but expectations of
8 the public have changed and our own standards of ethics
9 have certainly been transformed over the broad sweep of
10 history.

11 49036 In the modern era, commencing
12 particularly in the 1960s, when written guidelines were
13 first approved in the government of Lester Pearson, in
14 1964, when the prime minister distributed a letter
15 about cabinet ethics to his ministers in response to
16 public concern about political corruption, public
17 expectations had increased, and they have increased
18 exponentially since that time.

19 49037 In the 1960s, in the 1970s, in part
20 because of a more aggressive news media, especially
21 post-Watergate in the United States, public
22 expectations have simply grown and grown.

23 49038 And it should be noted, I think, that
24 conflict of interest rules and regulations were
25 implemented typically in response to scandals of a

1 political nature. The expectations of the public have
2 been ratcheted upwards as a result.

3 49039 The evolution and elaboration of
4 conflict of interest codes and rules and legislation
5 has almost always occurred as incremental adjustments
6 to political crises, rather than as carefully reasoned
7 responses to principles of good governance, and these
8 have been implemented either by governments in a mode
9 of damage control or by newly elected governments
10 seeking to redress the sins of their predecessors.

11 49040 It is these same governments whose
12 actions have unwittingly helped raise public
13 expectations.

14 49041 Are they unrealistic? Well, where
15 public expectations are based on high ideals of public
16 service, I don't think they can ever be unrealistic.
17 Surely there is room for idealism in public life.

18 49042 However, I agree with Mr. Clark that
19 where expectations have been raised to a level of
20 suspicion of all those who would offer themselves for
21 public service, we do have a serious problem, and I
22 think that it's a problem of trust.

23 49043 This is a commodity that has been in
24 steady decline in Canadian public life over the last
25 generation or more, during the same period in which we

1 have seen the implementation of conflict of interest
2 codes and rules and legislation, and, in my view, this
3 is no coincidence.

4 49044 MR. WOLSON: Mr. Cappe, I know that
5 you want to say something on the matter.

6 49045 MR. CAPPE: Three very quick points.
7 I totally agree with Mr. Clark on the "gotcha"
8 environment.

9 49046 And don't underestimate,
10 Commissioner, the disincentive effects, the negative
11 incentive effects that are created by that.

12 49047 I remember when the FAA used to mean
13 the Financial Administration Act. People used to pay
14 attention to financial administration. It now stands
15 for the Federal Accountability Act, and what people do
16 is avoid themselves getting "gotcha'd" rather than
17 paying attention to financial administration.

18 49048 The second point, on Mr. Mitchell's
19 point -- this is an interesting example. When I was
20 high commissioner in the U.K., one of my predecessors
21 was Lord Strathcona, Donald Smith, who was the chairman
22 of the CPR. He served as high commissioner from 1896
23 to 1914, a tenure that I wanted to beat but couldn't.

24 49049 But while he was high commissioner,
25 he was chairman of the CPR, the Bank of Montreal, the

1 Hudson's Bay Company, and sat on the board of
2 Anglo-Persian Oil.

3 49050 What he did as high commissioner was
4 sit in Trafalgar Square, in the CPR offices -- Canada
5 didn't have an office then -- and hand out land grants
6 to the British to settle the west and ship grain on his
7 railway.

8 49051 That was not a conflict of interest
9 in those days.

10 49052 Have our public expectations changed?

11 Yes.

12 49053 The third point -- and I think that
13 this is really the substantive point I wanted to
14 make -- the public only sees the questionable examples.
15 They never see the good examples of highly ethical
16 behaviour that are carried out by 250,000 public
17 servants across the country, and 308 MPs every day.
18 What they do see are the peccadillos that arise.

19 49054 Some of them are more than
20 peccadillos, some of them are quite serious, but we
21 should not lose sight of the fact that most people who
22 serve the public interest actually do that, they serve
23 the public interest, and they engage in highly ethical
24 behaviour.

25 49055 So all of those public office holders

1 who have said no to temptation don't get a hell of a
2 lot of credit, and I just think that you, Commissioner,
3 should take note of that.

4 49056 MR. WOLSON: Thank you.

5 49057 Ms Collenette...

6 49058 PROF. COLLENETTE: Commissioner, I
7 certainly agree with Mr. Cappe's last comment about the
8 fact that there are many ethical people in the
9 political world and the public service world. We don't
10 promote them, we don't talk about their deeds, because
11 we are supposed to be modest and that's what you do,
12 but there is something there -- and we will get to this
13 perhaps when we talk about culture -- that needs to be
14 readdressed.

15 49059 On the question of expectations of
16 people in public life today, yes, of course they have
17 changed, but we can't be defensive about this.
18 Standards have changed for everybody -- corporate CEOs,
19 church leaders, university presidents. This is the way
20 that 2010 is going -- 2009 -- these are our years, as
21 Mr. Mitchell was saying, of transparency.

22 49060 I would hope that we don't hide from
23 that a bit in saying that we have to be careful about
24 too many rules. We do have to be careful about too
25 many rules.

1 49061 And that was my point earlier, to
2 make sure we have a coherent framework of the rules.
3 We don't need to have hundreds, but we need to have a
4 coherent framework.

5 49062 Lastly, I just wanted to mention, on
6 the expectation, that one of the challenges for anyone
7 in public life today -- it has always been tough, but
8 it is more difficult today -- is the bombardment of any
9 kind of technological way to get information.

10 49063 If you are on the campaign trail, or
11 if you are coming out of cabinet, or whatever, suddenly
12 there is a YouTube video, suddenly somebody twitters,
13 and my concern here is that incidents may not always be
14 seen in context, and I think we need to find a way --
15 if it appears that there is something terrible going
16 on, to find a way for some due process and fairness to
17 make sure there is a context.

18 49064 I know that is a difficult one with
19 rapid technology today.

20 49065 Thank you.

21 49066 MR. WOLSON: Mr. Clark, please.

22 49067 THE RIGHT HON. JOE CLARK: If I may,
23 Mr. Commissioner; I just want to make one distinction,
24 if I might, Ms Collenette.

25 49068 There is no doubt that standards are

1 more exacting everywhere. I want here to make a
2 distinction between the private interest and the public
3 interest, because what really concerns me is that, for
4 a long time, the expectation in Canada about the public
5 interest was framed in terms of the services it could
6 offer.

7 49069 Increasingly, there is a tendency to
8 look at people operating in the public interest in
9 terms of the abuses they commit. That is a very
10 serious change, and it is more serious in this domain
11 than it is in the private sector or elsewhere, because
12 there is traditionally a higher set of expectations
13 about performance in the public sector.

14 49070 I come back to the question of
15 legitimacy, and I want to tie this in, also, to the
16 comments that I think everyone on this panel would
17 agree with with regard to the creativity and the high
18 quality of people who work in the public domain,
19 generally qualities that are unrecognized.

20 49071 We need regimes which encourage those
21 strengths, rather than regimes which encourage people
22 to hunker down and not perform at their best. That
23 probably applies in the private sector, as well, but it
24 is particularly important in the public sector because
25 public sector activities are the instrument of all of

1 us.

2 49072 MR. WOLSON: Thank you.

3 49073 David Mitchell, do you believe that
4 ethical rules enhance ethics, or is culture more an
5 important ingredient than ethical behaviour?

6 49074 And how is an ethical culture
7 created -- the \$64,000 question.

8 --- Laughter / Rires

9 49075 MR. WOLSON: I am showing my age.

10 49076 MR. MITCHELL: Mr. Chairman, even in
11 the most Utopian political culture, perhaps Plato's
12 republic, a completely principles-based approach to
13 political behaviour would not likely work on its own.

14 49077 Rules are helpful, but rules alone
15 are probably insufficient.

16 49078 Rules are helpful because they can
17 help define and enhance ethical behaviour.

18 49079 A well considered regime of rules, as
19 Ms Collenette has referred to, can, I think, promote
20 clarity about what is acceptable and what is not
21 acceptable.

22 49080 However, rules need to be rigorously
23 enforced.

24 49081 Indeed, I would suggest that rules
25 without consequence can actually undermine ethical

1 standards.

2 49082 Rules that are, however, firmly
3 enforced are consequential. They can be a deterrent.

4 49083 In fact, for elected representatives,
5 I would argue that the greatest deterrent is harm to
6 reputation.

7 49084 If one of the consequences of
8 transgressing an ethical rule is a serious damage to
9 one's reputation, then I believe that politicians, or
10 former politicians, would be especially sensitive to
11 this.

12 49085 The success of politicians and their
13 hopes of future success are hugely dependent upon
14 reputational factors. The legacies of former ministers
15 and prime ministers depend largely on stature and
16 reputation.

17 49086 Clear rules, consistently and
18 rigorously applied and enforced, can, I think, shape
19 behaviour and enhance an ethical political culture.

20 49087 Now, how is such a culture created?

21 49088 It's not a simple question.

22 49089 Surely, any culture is a product of
23 its unique history, traditions and circumstances.

24 49090 I would like to suggest, though, that
25 some of the essential ingredients for an ethical

1 culture include trust, which we have talked about, and
2 what is trust? How do you create trust? How do you
3 restore trust when it has been lost or damaged?

4 49091 I would submit that there is a
5 formula that involves communication, which leads to
6 understanding -- mutual understanding -- which, in
7 turn, leads to respect, which can breed and foster
8 trust.

9 49092 It has been remarked by many that we
10 are currently living during a time of a breakdown in
11 trust, a breakdown of trust between and among
12 institutions.

13 49093 How can it be restored?

14 49094 It starts with dialogue, I believe,
15 and a good example is the current relationship between
16 the executive and legislative branches of government,
17 which is considered to be quite troubled today, here in
18 Ottawa in particular.

19 49095 Parliamentary officers can't easily
20 do their job without having regular dialogue with the
21 executive branch of government.

22 49096 It is interesting, and, for me,
23 instructive, to note that in some Canadian provinces
24 there is a healthier dynamic than exists here in Ottawa
25 in that respect, but trust does need to be focused on

1 as one of the essential ingredients, and we can perhaps
2 talk more about that.

3 49097 A second ingredient: clear rules,
4 consistently enforced. I believe that helps build
5 trust, and sometimes requires some high-profile
6 examples to serve as deterrents.

7 49098 And, finally, leadership. One of the
8 excellent papers prepared for this Commission by Paul
9 Thomas, on communication, alludes to the importance of
10 leadership in this regard.

11 49099 The values of an organization are
12 usually shaped by their leaders, and this is in the
13 public or the private sector, but in government, in
14 particular, cultures of integrity, fairness and ethics
15 reflect the behaviours of leaders.

16 49100 So even though I have been trained as
17 an historian and been trained to distrust the great man
18 view of history, Mr. Chairman, I do believe that when
19 it comes to creating or, perhaps more appropriately,
20 restoring trust and an ethical culture, a leader,
21 especially a government leader, who leads by example,
22 can have more and greater impact, for better or for
23 worse, than rules and laws and other accountability
24 mechanisms.

25 49101 Thank you.

1 49102 MR. WOLSON: Ms Collette is the
2 first to respond.

3 49103 PROF. COLLENETTE: I agree with Mr.
4 Mitchell that it is helpful if rules and culture work
5 in tandem. Rules without culture won't work.

6 49104 David very well put out the different
7 values of culture; let me talk about some of the
8 communication part of it.

9 49105 In order to communicate culture you
10 need attitudes, you need examples, you need patterns of
11 behaviour, language is important, beliefs.

12 49106 It also touches, again, on
13 organizational behaviour. With any institution you
14 need to have a number of champions on ethical
15 behaviour, you can't just have one or two overall
16 czars. That won't work.

17 49107 There needs to be a mindset -- it
18 needs to be in the back of the mind all the time, and
19 communicated to staff.

20 49108 Let me talk for a moment about
21 political culture, not public service culture, because
22 you have to remember that there are 308
23 parliamentarians, all from different cultural
24 backgrounds, and from different political philosophies.

25 49109 The culture within the House of

1 Commons is something that has never completely been
2 addressed, I don't think.

3 49110 And I would go further and say that
4 any kind of political culture can't just begin when
5 someone gets elected. This kind of culture that we are
6 talking about, an ethical culture, needs to start way
7 back in our political parties, and it needs to start
8 when a political party has a conversation with a
9 prospective candidate. It needs to start that early,
10 and, honestly, that doesn't happen right now.

11 49111 David also mentioned leadership; I
12 use the phrase "tone from the top". It is crucial.
13 Whether it is the Clerk of the Privy Council or whether
14 it is a deputy minister, or whether it is someone in
15 the Prime Minister's Office, that person has to be
16 talking about it all the time.

17 49112 But I would go further. I don't
18 know -- and I could be wrong -- and, please, Mr. Clark,
19 correct me if I am wrong, but I have never heard a
20 Canadian prime minister speak about the need for good
21 ethical behaviour as a campaign theme, and in a major
22 address that is not in reaction to a perceived scandal.

23 49113 If I am wrong -- and I hope I am, but
24 you know that we could use more of that kind of
25 discussion.

1 49114 MR. WOLSON: Thank you.

2 49115 Mr. Cappe...

3 49116 MR. CAPPE: I just want to add one
4 point -- and I wasn't going to intervene, Commissioner,
5 but Ms Collenette raised this point about whether it is
6 someone else's responsibility, and there is a real
7 danger in setting up an office of a Commissioner of
8 Ethics.

9 49117 I know that we have one, and Mary
10 Dawson is a friend. I think that the office, though,
11 makes the job of ethics someone else's.

12 49118 Ethical behaviour is the
13 responsibility of all public office holders. You can't
14 offload that responsibility to someone else and say: I
15 will merely consult with the commissioner, or the
16 counsellor, on ethics, because they are the font of all
17 wisdom, and I won't need to use my judgment any longer.

18 49119 I think there is a real trap in
19 setting up someone whose job it is to be responsible
20 for ethics.

21 49120 MR. WOLSON: Thank you.

22 49121 Mr. Clark...

23 49122 THE RIGHT HON. JOE CLARK: I was not
24 going to comment, but culture is partly memory, and if
25 you don't know -- if you can't have that memory

1 yourself, you have to have some means by which it is
2 passed on.

3 49123 I simply want to recount an
4 experience. I was, now a long time ago, elected as a
5 young prime minister of a government, without much
6 experience in Parliament. We received, I have to say,
7 excellent procedural advice from the government of the
8 day when we took office, but there were questions that
9 wouldn't be in any textbook on which we needed advice.

10 49124 We were fortunate because, while our
11 party had been out of office for some time, we had
12 people like the late Bob Stanfield, and others, to whom
13 we could turn, and we had enough experience in both
14 government -- there were ministers of provincial or
15 other regimes who were available to us -- and enough
16 experience in the House of Commons.

17 49125 Ms Collenette properly talked about
18 the culture of behaviour in the House of Commons, which
19 is one of the most public aspects of political culture
20 in the country.

21 49126 We were able to call upon that.

22 49127 Now, moving that forward from a piece
23 of nostalgia in history, what do we do about that? The
24 hardest thing is to teach the history of things of this
25 kind, but because it is hard doesn't mean that we

1 shouldn't try to do it.

2 49128 I think that running through the
3 commentary that we have heard today is the importance
4 of an educational aspect of Canadian experience as it
5 relates to these broad cultural, ethical questions.

6 49129 I just have to say that if there is a
7 balance to be drawn between an emphasis on culture and
8 an emphasis on rules, I am on the culture side.

9 49130 MR. WOLSON: Let me move on, then,
10 with a question for you, Mr. Cappe.

11 49131 How, or can you structure ethics
12 rules to create accountability on the one hand, but
13 without imposing limitations that have the effect of
14 deterring qualified individuals from seeking public
15 office?

16 49132 MR. CAPPE: Chairman and
17 Commissioner, if it was easy, we would have done it.
18 It isn't easy; it is pretty challenging.

19 49133 Let me offer two or three things that
20 I think can help -- and perhaps I could just take off
21 from Mr. Clark's last point.

22 49134 We should always recognize that there
23 is a one-way ratchet in the direction from culture to
24 rules. It is very difficult to establish a formal body
25 of rules and then unravel it and say, "No, from now on

1 we are going to rely on culture," so that there is a
2 monotonic direction to changes in this and we should be
3 cautious about it.

4 49135 One of the things that can be done is
5 by vaunting good behaviour. We don't celebrate success
6 often enough.

7 49136 One of the things that I recall when
8 I was Clerk, one of the Deputy Ministers who
9 unfortunately got caught up inadvertently in elements
10 of the Sponsorship Scandal and the Gomery Commission,
11 Ran Quail -- and I probably shouldn't make reference to
12 the individual, but I will.

13 49137 It became well-known that Ran had
14 such a high standard that he actually would pay the
15 government back for the use of his personal calls on
16 his government cell phone. So every month he would
17 write a cheque to the government for \$1.75 or \$2.50 or
18 whatever. That became very well known through the
19 system and it became a bit of a code word for highly
20 ethical behaviour. I have to admit that I made a few
21 phone calls on the government line and didn't pay.

22 49138 But the point was that we celebrated
23 his success by letting it be known and we need to find
24 other examples of that.

25 49139 I will come back to a point that was

1 raised in the opening set of questions and that was
2 around openness and transparency.

3 49140 Louis Brandeis' line echoes here,
4 that the best disinfectant is sunlight.

5 49141 Indeed, making this as open as
6 possible so that people have not the gotcha attitude
7 but rather here are people doing the right thing can be
8 very helpful in this regard.

9 49142 A third point would be that we have
10 to find a way of making politics less of a blood sport,
11 less of a contact sport. Here I think the media have a
12 strong role to play. This came up in an earlier
13 comment from a few other people.

14 49143 There has to be a way of raising the
15 quality of debate -- not just in the House, but in the
16 media -- dealing with issues of substance and not
17 simply the elements of gotcha.

18 49144 To conclude on this element, I
19 would just note the Federal Accountability Act
20 creates certain disincentives to people entering
21 political life.

22 49145 Citizen Cappe really wants to ensure
23 that there are going to be good people who continue to
24 enter public life and the quality of political
25 participants has to be weighed in the balance here and

1 we need to find ways of attracting good people.

2 49146 If they can go into politics and
3 never be able to use what they have learned because we
4 have rules which prohibit them from using the skills,
5 the knowledge, the experience, the friendships that
6 they will make in political life, they will not go into
7 political life. I think that is a huge loss to the
8 country and we need to ensure that that won't happen.

9 49147 Just a final point, I think there is
10 a trap when we talk about potential conflicts of
11 interest. It's true that these potential conflicts
12 of interest present themselves very widely in the
13 nature of public life and we have to be careful not to
14 say that we are going to avoid all impressions that
15 there are conflicts of interest, because if you try to
16 do that you will dissuade people from taking
17 appropriate risks and from engaging in good
18 contributions to public life.

19 49148 Thank you.

20 49149 MR. WOLSON: Mr. Clark, for a
21 response...?

22 49150 THE RIGHT HON. JOE CLARK: Mr.
23 Commissioner, one quick response to the blood
24 sport aspect. This speaks to changes in the way the
25 Canadian political system operates.

1 49151 In an era when the competition in
2 Canada was between or among genuinely national parties,
3 parties who saw their constituency as everywhere, there
4 was a restraint upon attacking people who hadn't voted
5 for you in the past election simply because you thought
6 you had a chance or a need to bring them in in the next
7 election. There was a state of mind about national
8 parties which saw the country whole.

9 49152 One of the things that has happened
10 for various reasons in the last several years and sets
11 a context which has led directly to the vigour of
12 partisan debate is that our parties are increasingly
13 sectional, not just in geographic terms but also in
14 terms of the constituencies they see.

15 49153 I come from a generation of national
16 political leaders who could not conceive of a vote we
17 wouldn't try to win, and that meant that we would try
18 to bring in the whole country and we wouldn't risk our
19 prospects by setting up some people whom we would
20 deliberately alienate. I think that the departure from
21 that practice -- and it is not confined to a single
22 party -- has increased the intensity of partisanship as
23 is seen publicly.

24 49154 I didn't mean to get into that, but
25 Mr. Cappe led me into it.

1 49155 I want to talk about the two aspects
2 of this question. One is creating accountability in a
3 more effective way, the other has to do with qualified
4 individuals, their recruitment.

5 49156 I agree with Mr. Cappe that when we
6 have started on rules we can't sort of unravel, but I
7 think that if we are embarked upon a rules-based system
8 and we think that it has deficiencies we should look at
9 other models.

10 49157 I have to say that I was very
11 impressed by the paper I had an opportunity to read by
12 Dr. Turnbull which talked about the British system.
13 This may not be the best time to salute the British
14 system, but there are aspects of it that I think have
15 some cleared advantages.

16 49158 The system that Dr. Turnbull
17 described, which has a quite eminent group of people of
18 fairly broad experience regarding whom there is an
19 expectation although not a requirement that there will
20 be an approach made by Ministers regarding actions they
21 are contemplating taking.

22 49159 That relies very heavily upon
23 judgment. Results are published in circumstances where
24 that advice is taken.

25 49160 The interesting phrase in her comment

1 was that that recourse was widely and willingly
2 exercised by Ministers in the system.

3 49161 I think that is a model that merits
4 some close examination in the Canadian system.

5 49162 I think it runs the risk to a lesser
6 degree of the issue that Mr. Cappe was raising about
7 confining that responsibility in an officer. In the
8 U.K. system, as I understand it, this is an emanation
9 of the head of the government and it is not the
10 solitary instrument here.

11 49163 So I think that that -- again,
12 speaking as someone who has been involved in active
13 political life, and having great respect for some of
14 the people who assume the offices now in place -- I
15 have had the privilege of working with Commissioner
16 Dawson and I have the highest regard for her integrity
17 and her judgment -- but I think that there would be a
18 general and more durable confidence in people whose
19 experience was somewhat similar to the people who are
20 asking the question, some element of peers of being
21 involved. That seems to me to be present in the
22 British system and that's worth looking at.

23 49164 On the question of the deterrence of
24 qualified individuals, some people who want to get into
25 public life, it would take a lot to deter their

1 interest. They are driven by ambition or by a sense of
2 public interest or by a sense of mission and I think
3 that that should always be borne in mind.

4 49165 But there is absolutely no doubt that
5 as one looks at the behaviour that people have to
6 encounter in public life now, and indeed as one looks
7 literally at the lengthening list of rules to which you
8 will be subject, both while you are in office and when
9 you are out of office, that is going to cause people to
10 say: Why exactly am I doing this? That is not the
11 kind of attitude that we want.

12 49166 This is not my domain as much as it
13 is Mr. Cappe's and others, except by observation.

14 49167 I think that there is a similar
15 question of incentive to public service of the
16 excellent people who we want to recruit to our
17 appointed public service as well as those to whom we
18 want to draw into elected life. I think that this
19 insistence, this growing range of rules is a
20 significant disincentive, particularly when married
21 with financial and other factors that people have to
22 consider when they decide whether they will serve the
23 public interest or a private interest.

24 49168 MR. WOLSON: Penny Collette,
25 please...?

1 49169 PROF. COLLENETTE: Well, I'm very
2 glad that Mr. Clark made the point that there is no end
3 to candidates who want to run for public office. We
4 should debunk the myth that, you know, people are
5 turning away in droves. We know that from nomination
6 meetings and we know that from interest. The reasons
7 why are as varied as Mr. Clark said.

8 49170 I don't think that that interest or
9 passion in wanting to serve the country is really going
10 to take a huge nosedive because of the number of rules.

11 49171 I also have a little different view
12 on this, too, because as a candidate in the last
13 election I was actually quite pleased that I had to go
14 and get a criminal check and credit check before my
15 party would green-light me.

16 49172 So, you know, for a lot of people
17 that are in the professional world as lawyers,
18 accountants, doctors, nurses, teachers, we are all used
19 to having professional codes of conducts, we are all
20 used to being concerned about conflict of interest. It
21 would be odd if you went into politics and no one asked
22 that of you.

23 49173 So I think we have to temper this
24 kind of new ask of people with the understanding that
25 this should be happening everywhere in society.

1 49174 How long people need to be concerned
2 after they have been elected is another question and
3 this is much newer. For example, as you know from your
4 papers, I didn't even realize that there weren't
5 post-employment guidelines for MPs. We will get into
6 that a bit more in a minute.

7 49175 But again I would come back to this
8 is something that needs to be discussed with candidates
9 right from the get-go so they understand what happens
10 at the end.

11 49176 The reference to the committee in the
12 U.K. is really interesting and I'm wondering, we have
13 an organization here in Ottawa, Former Canadian
14 Parliamentarians Association, which is pretty well
15 respected. I don't know if there is a possibility of
16 perhaps asking them to form a committee to look at this
17 or asking their advice at any rate. I mean they are
18 the people that were there before.

19 49177 COMMISSIONER OLIPHANT: Just a quick
20 question. That organization, is that the organization
21 headed by Jack Murta?

22 49178 PROF. COLLENETTE: Yes, it's
23 nonpartisan.

24 49179 COMMISSIONER OLIPHANT: Okay. I'm
25 familiar with it.

1 49180 PROF. COLLENETTE: Okay.

2 49181 COMMISSIONER OLIPHANT: Just as a
3 matter of interest, Mr. Clark, the British system that
4 you cite is a system that we use within the judiciary
5 where we have ethical guidelines and an advisory group
6 to which judges can turn if they have questions of an
7 ethical situation that they want to have resolved or at
8 least to receive advice upon.

9 49182 MR. WOLSON: Mr. Mitchell, what are
10 other adverse consequences which may flow from
11 regulating ethical behaviour?

12 49183 MR. MITCHELL: Mr. Chairman, I'm sure
13 there is a line or a balance or equilibrium between
14 regulation and over regulation.

15 49184 Rules can create clarity and
16 coherence; unnecessary rules can create an obsession
17 with compliance rather than promoting ethical
18 behaviour, which is often their intention.

19 49185 By focusing on compliance the
20 public and the news media will in turn fixate on
21 scandal or potential scandals. Instead of a culture
22 of ethics which we discussed earlier, we therefore
23 breed a culture of something else, a culture of
24 scandal perhaps.

25 49186 This is, I believe, one of the

1 unintended consequences of the various codes, rules
2 and laws dealing with conflict of interest and ethics
3 over the past generation or more. Rather than
4 building or rebuilding trust in government they have
5 sometimes coincided with and contributed to a steady
6 decline in trust.

7 49187 Mr. Chairman, I agree with Lori
8 Turnbull who concludes her excellent paper for this
9 Commission with an observation and recommendation that
10 over regulation ought to be resisted.

11 49188 If we aren't careful and sensitive to
12 this we can actually further erode trust and confidence
13 in public institutions and further weaken civic
14 engagement and civil society.

15 49189 But I would like to return to the
16 discussion of another potential negative consequence
17 from these various efforts, which is the often cited
18 discouragement of good people running for public
19 office, because we have had an interesting discussion
20 about that this morning.

21 49190 I think this extends to candidates
22 for recruitment to the public service as well, because
23 while I agree that we don't have any shortage of either
24 individuals willing to come to the fore and offer
25 themselves for public service -- either seeking

1 nominations for political parties for elected office or
2 applying for positions in the public service.

3 49191 There is an interesting question
4 about whether or not the natural leaders of our
5 communities today are generally offering themselves for
6 such service in manners, in numbers, in quantities that
7 they once did. And while I cannot cite any empirical
8 data on this I can certainly raise the question that,
9 with some exceptions, our Canadians, who might be
10 considered to be the leaders of their community as
11 easily offering themselves for either elected office
12 today or are the best and the brightest graduates of
13 our universities and schools offering themselves as
14 candidates for public service, anecdotally the evidence
15 suggests not in as great numbers as would have been the
16 case in generations gone by.

17 49192 Why might that be if that is so? I
18 contend that it is.

19 49193 Well, the scrutiny that is
20 associated with government today generally, whether
21 elected office or in the public service, is
22 considered to be one factor.

23 49194 The culture of government is
24 considered to be one factor.

25 49195 The culture of suspicion associated

1 with rules accountability.

2 49196 A culture which few aspire to be
3 associated.

4 49197 This also affects retention, not
5 simply recruitment.

6 49198 I will simply cite a study that we
7 did at the Public Policy Forum on our current
8 membership in the House of Commons which shows that
9 more than two-thirds of the current Members of the
10 House of Commons have served for less than five years.
11 The memory, the culture of memory and experience is
12 sadly lacking.

13 49199 Now, we have always had a high rate
14 of turnover of membership in our House of Commons in
15 Canada, higher than in Great Britain, higher than in
16 the American House of Representatives by comparison,
17 but today it's extraordinarily so. Some attribute this
18 to successive periods of minority Parliament. Surely
19 that is a factor.

20 49200 But the increasing lack of experience
21 of Members of Parliament, the fact that Members of
22 Parliament don't often seek reelection to the same
23 extent that they once did, creates a loss of memory,
24 institutional and otherwise.

25 49201 I fear that this is also reflected

1 within the public service, that while there is no
2 shortage of individuals applying for jobs in the public
3 service some of the very best and brightest young
4 Canadians who enter public service don't remain for
5 very long. They flee from the calling to which they
6 were initially attracted.

7 49202 Why might that be? I would contend
8 that this is one of the adverse consequences that may
9 flow from the good intentioned, the well-intentioned
10 efforts to legislate ethical behaviour.

11 49203 MR. WOLSON: Ms Collette to
12 respond, please...?

13 49204 PROF. COLLENETTE: I don't have
14 the numbers on candidates going forward to political
15 parties nor do I have the number on applicants to
16 the public service, so I take both Mr. Mitchell --
17 and I don't know if it was Mr. Cappe that also
18 suggested that -- at their word. I think that
19 requires more study.

20 49205 Certainly on the turnover in members,
21 David, as you suggested, members don't usually leave
22 because they want to, you know, they leave because they
23 are defeated. You know, again, just maybe a deeper
24 look at that.

25 49206 But in terms of the question of what

1 other adverse consequences may flow, I think what we
2 have talked about earlier is that over compliance, too
3 many rules, too much complexity is going to lead to a
4 system that is stymied. People won't take risks. We
5 heard this a lot in the corporate world.

6 49207 Now, I know in the public service you
7 may not want people to take risks, but there still has
8 to be some sort of creativity, there still has to be
9 some courage about going forward to a Minister to say
10 why don't we try this or that.

11 49208 In the corporate world, after the
12 Sarbanes-Oxley legislation came down there was great
13 complaints that everybody was so stymied with all these
14 new rules nobody could take risks and corporations
15 became risk-averse.

16 49209 As I say, we don't particularly want
17 our public service to be too risky, but I do think, as
18 I said, there needs to be some room for manoeuvring,
19 some room for flexibility, and certainly room for
20 discussion, dialogue and asking questions. That's just
21 so important.

22 49210 So if there are too many rules you
23 feel: Gosh, I guess it's all figured out, I can't ask
24 anything else.

25 49211 The one point I want to make on the

1 scrutiny of ethical behaviour where, you know, it does
2 touch a real chord and aside from potential
3 post-employment restrictions.

4 49212 I think there is a concern with a
5 lot of candidates, today anyway, on the very
6 widening net around the scrutiny on the family and
7 the family assets.

8 49213 That's a tough one, especially in
9 this day and age where you have two career couples
10 often. The spouse, whether it's the husband or the
11 wife, has his or her own career with assets.
12 Disclosing them, you know, is of concern. Even though
13 it's being disclosed to the Ethics Commissioner we all
14 know there can be leaks.

15 49214 And I think that one, I have had a
16 lot of people suggest to me that that bothers them,
17 that the net is that wide.

18 49215 The third point David made is, if the
19 compliance mechanism is so strong that every time there
20 appears to be a breach, then there is a scandal, that's
21 tough, because again it's not just the MP or the public
22 servant that is involved, it is the family as well.

23 49216 So I think I will just stop there.

24 49217 MR. WOLSON: Mr. Cappe, please...?

25 49218 MR. CAPPE: Just a quick point on

1 adverse consequences, and that is we talked earlier
2 about openness and transparency as an instrument of
3 managing the stuff. I think the point of that is that
4 there are political consequences to political
5 inappropriate behaviour and I think it's really
6 important to valorize that kind of political
7 consequence, because I would leave it to that rather
8 than having other remedies or other penalties for a
9 large array of political activity. So if there is
10 political malfeasance in some respects, political
11 consequences may be sufficient.

12 49219 I would urge the Commissioner not
13 to underestimate the reputational consequences of these
14 revelations or political -- the openness and
15 transparency and that people will take that into
16 account in managing their own behaviour.

17 49220 So I just think that's an important
18 element of the adverse consequences of over regulating.
19 It's also the adverse consequences which induce
20 appropriate behaviour.

21 49221 MR. WOLSON: Mr. Clark, please...?

22 49222 THE RIGHT HON. JOE CLARK: Thank you.

23 49223 Mr. Commissioner, I have as much
24 evidence as David Mitchell does, which is to say
25 nothing we could bring before you, except my impression

1 is that there is a greater inhibition to entering
2 public life on the part of leaders of the community. I
3 absolutely take Ms Collette's point that there are
4 lots of candidates available. I think that, as she
5 mentioned, this question of family assets is an
6 important factor in all of that.

7 49224 I should say that I think also that
8 that kind of disclosure transparency is also necessary.
9 So I don't think this is something we can do away with
10 to encourage candidacy, but I think it is a case that
11 it has an impact upon candidacy.

12 49225 I want also, if I might pick up on a
13 phrase that Ms Collette used about risk -- I
14 certainly don't want to misinterpret it.

15 49226 The best public servants with whom I
16 had the privilege of working were people who were
17 prepared to take risks and they did it in an
18 appropriate way. I mean the Minister didn't wake up in
19 the morning to find that something absolutely eccentric
20 had been done, but they proposed things that were risky
21 to propose and there was then a system internally from
22 Ministers who, remember, know less about the portfolio
23 than the professional public servants do in most cases.

24 49227 I think there has been an inhibition
25 of the willingness to risk within the public service to

1 great cost now as a consequence of the emphasis upon
2 rules and consequences.

3 49228 Now, I raise this in part because in
4 some of the -- the Commission was good enough to
5 provide us with summaries of earlier testimony and part
6 of the earlier testimony included a couple of
7 observations -- not a consensus, but a couple of
8 observations -- to the making the case that because the
9 emphasis had gone -- on rules, the emphasis on rules
10 had gone so far and because there was public interest
11 in them it would be politically difficult to undo that,
12 to roll some of them back.

13 49229 That's not a good reason for not
14 acting. If we have embarked upon a course that is
15 counterproductive, then there is an obligation to try
16 to move away from that course, not to nothing, but to a
17 regime that would be more successful.

18 49230 COMMISSIONER OLIPHANT: May I ask a
19 question, Mr. Clark, please?

20 49231 What do you see as being the cause
21 of the inhibition to take risk presently? What has
22 caused that?

23 49232 THE RIGHT HON. JOE CLARK: It may be
24 that Mr. Cappe -- I don't want to embarrass him -- is
25 better able to answer that than I, because he is a

1 professional public servant who deals in these things
2 all the time.

3 49233 My observation in some of the
4 departments I know best is that there is a
5 preoccupation with being identified as someone who made
6 a mistake. There is an emphasis on caution because, on
7 the one hand, the focus is upon how accountable is the
8 public servant rather than how efficient is the public
9 servant. And if you are being judged not for your
10 creativity or for your judgment, but increasingly by
11 your willingness -- by your adherence to a fairly
12 precise and growing set of rules, that creates a
13 disincentive to innovate.

14 49234 I believe that is happening in
15 departments which I know reasonably well.

16 49235 MR. CAPPE: If I may, Commissioner,
17 and indeed I agree with Mr. Clark's assessment of this,
18 but it is the blame game that becomes a disincentive.

19 49236 It's not a question of -- I
20 remember one former Clerk, when I had just become an
21 Assistant Deputy Minister, gave a talk to the Assistant
22 Deputy Minister's collectivity and said "I want
23 everybody to take more risk". Well, I was about to get
24 on a plane that day and I hoped that the guy
25 responsible for air safety waited until the next day

1 before he took more risk.

2 49237 So there is an appropriate amount of
3 risk that you are looking for here and you want to know
4 what risks to take.

5 49238 But there is a real problem when
6 nobody says "Congratulations, nice try. Too bad it
7 didn't work".

8 49239 And what you want to do is
9 encourage people to experiment, to try out good
10 ideas, recognizing that you don't want to put the
11 public at risk, you don't want to -- you don't want
12 to take inappropriate risk, but the entire activity
13 of government in some respects is managing risk. So
14 knowing what risks to take, knowing how to
15 experiment properly and being congratulated and
16 rewarded for a good attempt, even when it's
17 unsuccessful, is very valuable.

18 49240 But if we create this climate of
19 people being punished because they didn't work, then
20 I think you are going to find an under investment in
21 that risk-taking.

22 49241 So I started off by saying there is
23 an optimal quantity of inappropriate behaviour, but
24 there is an optimal quantity of failed attempts and you
25 want to encourage people to try harder.

1 49242 MR. WOLSON: Mr. Mitchell...?

2 49243 MR. MITCHELL: Yes, if I could

3 just add.

4 49244 Mr. Cappe referred earlier to the FAA

5 which is in today's parlance the Federal Accountability

6 Act which is a piece of legislation that essentially

7 institutionalizes risk aversion.

8 49245 Even intelligent risk is not

9 encourage, in fact it's actively discouraged today. So

10 the climate that we are in, sadly, is not one where the

11 balance that Mr. Cappe referred to is easily achieved

12 today, as desirable as that is.

13 49246 So this, in my view, is an

14 interesting example of one of the unintended and

15 adverse consequences of over regulation, Mr. Chairman.

16 49247 MR. WOLSON: Ms Collenette, dealing

17 with ethics rules, how can we ensure that past public

18 office is not exploited in some improper manner while

19 at the same time allowing former public officeholders

20 to develop their professional lives upon return to

21 their private life?

22 49248 I know that we have talked about

23 the U.K. system here. You might want to deal with

24 that as well.

25 49249 Thank you.

1 49250 PROF. COLLENETTE: Okay.

2 49251 Well, let me say first of all this is
3 a relatively new trend in Canadian political life. I'm
4 not sure of the years, but it certainly wasn't around
5 many, many years ago when my husband was first elected.

6 49252 I personally think that the cooling
7 off period is a very good idea for all kinds of
8 reasons, both for former politicians and, interestingly
9 enough, for public servants who worked with them. I'm
10 sorry, I'm talking about the cooling off period for
11 politicians first.

12 49253 A former Minister who has been there
13 for quite a long time can quite easily hound his former
14 bureaucrats. It puts a public servant in a tough
15 place. If you have had a Minister there for a long
16 time and that Minister keeps calling you after that
17 Minister has left or been defeated, nobody wants to be
18 impolite, but it puts them in a tough place.

19 49254 So I think the cooling off period is
20 a good and wise move.

21 49255 A former Prime Minister for example
22 would be unlikely to call a public servant himself, but
23 nothing prevents him from hiring former staff who have
24 their own connections. So therefore this taking a
25 break is good.

1 49256 How long that should be for, you
2 know, we have gone between -- I think we are between
3 one and five years on different -- depending on
4 different levels of public accountability.

5 49257 I think there really should be a
6 difference for someone who may have been elected for
7 two years compared to someone who has been elected for
8 20 years and there really isn't -- Craig, I know this
9 is in your graphs, there really is a difference between
10 an MP and a Minister, although one of the papers noted
11 that someone who has been a long serving Minister may
12 have developed extensive networks. I don't know how
13 you quantify all that.

14 49258 We need to make a distinction
15 between knowledge of government and knowledge from
16 government sources. That was sort of tweaked out in
17 some of the papers.

18 49259 For example, I don't think anyone has
19 trouble with the idea that a former politician should
20 teach or lecture in an educational institution. That
21 one would be an okay one and that would be knowledge
22 of government.

23 49260 Knowledge from government, from the
24 inner workings of government, looks pretty well taken
25 care of certainly as we look at the private sector

1 because the rule that a former Minister should not sit
2 on a corporate board with which she may have had
3 dealings is a good rule. That makes sense. It makes
4 sense in all the different sectors.

5 49261 But if my understanding is correct,
6 that Minister may still sit on other boards. So you
7 are just trying to take out the piece of the
8 information that is not public knowledge that she
9 may know.

10 49262 So overall I actually think that we
11 are coming to something here, I just am concerned that
12 the post-employment rules and guidelines are never
13 explained to anyone as they enter public life. I have
14 made that point before.

15 49263 But let me talk to you just for a
16 moment about political life. It is tough. When you
17 run for public office you pretty much put everything on
18 the line, your reputation, your family, your personal
19 time, sometimes your finances.

20 49264 You get a good pension, yes, if you
21 have paid into it, after seven years. Some people that
22 are not there for seven years don't have any kind of
23 pension, unless they have it from another source.

24 49265 People, as Mr. Clark said earlier,
25 run for all kinds of reasons. They run because they

1 strongly believe in national values or policies, or
2 because they want to change the world -- and yes, there
3 is still idealism -- or because they are genuinely
4 angry about a single issue, or just because they love
5 this country.

6 49266 The job has no security whatsoever,
7 unless you have what we say in political parlance as a
8 safe seat, and even then there can be changes.

9 49267 And unless you are the leader. As a
10 candidate, whether you are an MP or a Minister, you are
11 totally dependent on others. You have little control
12 of your life and you are under constant scrutiny and,
13 as we have heard today, heightened scrutiny.

14 49268 You often transition away from
15 this life, as I said to Mr. Mitchell, not by choice
16 but by defeat.

17 49269 So while we need to put rules around
18 this transition time, and it is important for
19 transparency reasons, I don't think they should be
20 hugely onerous because we need the knowledge that those
21 people have gained in the House of Commons.

22 49270 MR. WOLSON: Mr. Clark, to
23 respond, please...?

24 49271 THE RIGHT HON. JOE CLARK: I'm glad
25 that Ms Collenette raised the question of people with

1 shorter rather than longer service because I think the
2 situations are quite different and I think in fact --
3 not to plead the case of people for whom there may not
4 be much sympathy -- the readjustment to private life
5 for people who have been relatively briefly in public
6 life, that readjusting can be very difficult. In fact,
7 what one might see objectively as the credential of
8 having served as a Minister of the Crown or in some
9 other prominent position is not always seen as a
10 credential. Sometimes, to the contrary.

11 49272 I think that in that case one should
12 not impose -- one should not make the same assumptions
13 about the extent of the problem that might be caused by
14 someone whose service was relatively brief with those
15 who were longer in office.

16 49273 I also agree with the cooling off
17 period. I think it's very important.

18 49274 I make the point that the cooling off
19 period is also taken account of in the U.K. system.

20 49275 I don't pretend to be entirely
21 captivated by the U.K. system because I don't know much
22 about it, but I am anxiously looking for an alternative
23 to what we have now and I note that in the judgments
24 that are offered by members of that Advisory Committee
25 there is quite consistently a specific recommendation

1 on the public record that someone who is approved to go
2 to a certain position, that that approval carries with
3 it a condition of what we would now call cooling off.

4 49276 I come back to a point Mr. Cappe had
5 made earlier about the risk of causing people who would
6 normally be concerned about these conflict and other
7 issues to farm them out to an officer if we have an
8 officer. That's one problem with the officer.

9 49277 The other problem with the officer
10 theoretically is the challenge of maintaining as we go
11 forward in time the high quality of appointment that we
12 might make at the very beginning. I think when an
13 office is created freshly we can attract excellent
14 people, but no one would pretend that an office of a
15 Commissioner is the first destination of a high flyer
16 in the public service. They are not going to want to
17 go there, they are going to want to go somewhere else.
18 Depending on how those people are appointed the
19 standards may not be as high as the importance of the
20 office requires.

21 49278 I want to make it clear that I'm
22 speaking here theoretically. The people I know who are
23 in those functions now are people for whom I have the
24 highest of regard.

25 49279 Finally, I want to come back to a

1 point that I think has been touched upon by everybody
2 here, but Ms Collette raised it very early when she
3 talked about the need for routine discussion of some of
4 these issues.

5 49280 I think there is not much
6 understanding of how government actually operates and I
7 think that for example if all you see is the rules and
8 the organization charts and the textbooks, you have no
9 idea what is really going on.

10 49281 If, consequently, we were relying
11 upon a public opinion as the basis for regimes and that
12 public opinion is formed by people who have no real
13 understanding of how the system works, that is a
14 significant problem. And not all experts, if I may say
15 so as delicately as possible, are as well informed
16 about what is really going on, what really happens
17 around a Cabinet table or in discussions among public
18 servants or in discussions between public servants and
19 elected officials.

20 49282 I couldn't codify it today, but I
21 think that those of us who have been privileged to be
22 in that circumstance know that there is more to it than
23 appears and if we are going to have rules that are
24 established to deal with that behaviour, we have to
25 understand what that behaviour really is.

1 49283 And how do you do that? One way
2 certainly is to have some more regular processes of
3 discussion of some of these issues. I'm not sure what
4 form they could take, but that is certainly not beyond
5 imagination and there would undoubtedly be precedence
6 for it.

7 49284 Thank you.

8 49285 MR. WOLSON: Mr. Cappe, please...?

9 49286 MR. CAPPE: Commissioner, I want to
10 make a point about age and duration.

11 49287 This may be related to my grey beard,
12 but I recall that Mr. Clark was very young when he
13 became Prime Minister and whatever rules or guidelines
14 you put in place have to be able to deal with people
15 who are going to come in in their youth and enter
16 public life, be it in the public service or in
17 political life, and you don't want to disadvantage them
18 for the rest of their career. I just think we have to
19 recognize that we want to attract young people to enter
20 public life.

21 49288 The second thing is this question of
22 duration. Mr. Clark earlier made reference to his
23 tenure, but I point to Jean Chrétien as a former Prime
24 Minister who ended up starting his career in the
25 Pearson government and spending 40 years in public

1 life. You need to have rules that will be adaptable
2 for young people to enter and go on to other things and
3 for young people to enter and stay in public life.

4 49289 That is not an easy circle to square
5 I'm afraid.

6 49290 MR. WOLSON: Mr. Commissioner, we
7 have been at it now for about an hour and 45 minutes,
8 although it seems like we just started because the
9 commentary is so engaging, but perhaps we would
10 break now.

11 49291 There are two areas we have yet to
12 discuss and then of course we can have questions from
13 those around the table.

14 49292 I know that there are some time
15 constraints that we have this morning in terms of
16 trying to finish a little bit before noon if possible.
17 So if we took 10 minutes now...?

18 49293 COMMISSIONER OLIPHANT: All right,
19 that's fine. We will break for 10 minutes.

20 49294 I think there is coffee and juice and
21 water perhaps outside the doorway leading into this
22 room. So please avail yourselves of that.

23 49295 Thank you.

24 --- Upon recessing at 10:43 a.m. / Suspension à 10 h 43

25 --- Upon resuming at 10:57 a.m. / Reprise à 10 h 57

1 49296 MR. WOLSON: Mr. Commissioner, if we
2 are ready to go...?

3 49297 As I said, we have two more areas to
4 cover and then some questions and some of my colleagues
5 may wish to make some closing remarks.

6 49298 To Mr. Clark, should ethics rules be
7 concerned with the activities of former officeholders
8 at the international level after they have left office?

9 49299 THE RIGHT HON. JOE CLARK: My view is
10 that it would be very difficult to make that work, to
11 make it enforceable. There are some obligations now in
12 existing law, as I understand it, which affect of the
13 activities that might be carried on internationally,
14 but there is an issue on the one hand of our imposing
15 our jurisdiction on that of other countries.

16 49300 There is the question of how one
17 keeps track of this, what sense of obligation there is.
18 If one is worried about developing a plethora of rules
19 this is a venture that could lead to rules leading
20 almost everywhere. That's one point.

21 49301 Second, I suspect that this idea is
22 gaining some momentum because of the U.S. experience,
23 particularly the new rules that have just been
24 announced by the new President of the United States.

25 49302 How do I say this in a way that

1 doesn't offend Canadian dignity?

2 49303 We are not as important a country as
3 the United States is, consequently people who may be
4 interested in influencing the decisions of the U.S.
5 system, one should not assume that they would also
6 naturally and equally be interested in affecting ours.
7 So if the worry is to protect the Canadian interest
8 against these kinds of improper approaches by
9 international entities, I think that the occurrence of
10 this is much less likely, much less high than it is in
11 the U.S.

12 49304 There are other reasons why we should
13 not automatically adopt U.S. practices in issues of
14 this kind, but I think in this case the simple
15 difference in the impact of what we do internationally
16 is a factor.

17 49305 May I speak now about the inhibition
18 that an extended regime of international rules might
19 have upon Canadians whose experience would actually be
20 valuable to others?

21 49306 If I began by saying we are not as
22 powerful as the United States I want also to say that
23 there are very many instances in which the judgment and
24 the experience -- the experience of people who have
25 served in Canadian public life, either as appointed or

1 elected public servants, can be very helpful
2 internationally.

3 49307 It's not by accident that we are one
4 of the world's leading multilateralists, we always have
5 been. We are better at, more experienced at making
6 international systems work. A lot of Canadians are
7 involved one way or another in the formal multilateral
8 system or an informal organizations.

9 49308 I have worked to some degree with an
10 organization called NDI which supervises elections and
11 does other things around the world. It's a U.S.-based
12 organization. It is chock full of Canadians. So is
13 the Carter Center, so is the Centre for Humanitarian
14 Dialogue, on and on and on.

15 49309 It may well be that there would be no
16 impact upon the phenomenon, but if we decide that this
17 is a field where rules are needed, that raises a
18 question on the part of others as to why, what is there
19 about Canadian experience that requires those rules,
20 and it also could set off a new rigmarole of
21 regulations that could make it difficult for that kind
22 of service to be undertaken.

23 49310 So I think the advantages -- I think
24 the possibility of actually doing something is limited.
25 I think the need for it is quite small and I think

1 there is a risk of inhibiting very valuable Canadian
2 activity internationally.

3 49311 MR. WOLSON: Mr. Cappe, to
4 respond, please...?

5 49312 MR. CAPPE: I agree totally. I
6 think that using acquaintances, contacts and experience
7 is a valuable contribution of former public
8 officeholders and you want to build on that support and
9 on that experience.

10 49313 If you look at some of the
11 examples -- I remember bumping into Mr. Clark in
12 Washington after he was Prime Minister and after he had
13 left Canadian politics at one point and you were doing
14 work on Cyprus, if I recall.

15 49314 THE RIGHT HON. JOE CLARK: Yes.

16 49315 MR. CAPPE: That is very valuable.
17 Valuable to Canada, but also valuable to the world.

18 49316 I have written down a list of
19 examples of former Canadian politicians who have done
20 this abroad or continue to do this abroad.

21 49317 You could look at Tony Blair and
22 what he is doing in the Middle East. You don't want
23 to say he shouldn't use his contacts for that, you do
24 want to use them.

25 49318 Kim Campbell, in the Club of Madrid

1 of former leaders; James Stewart went to the ILO; John
2 Williams set up an international Organization of
3 Parliamentarians Against Corruption while he was an MP.
4 So I don't think you want to inhibit this at all.

5 49319 But I think you do want to have
6 openness and transparency and you want to make sure
7 that insofar as people are using those contacts and
8 acquaintances and experience they are not disclosing
9 government secrets that they may have learned in
10 their previous capacity -- but they take oaths to
11 that effect -- and they do not want to be at odds
12 with Canadian foreign policy in their international
13 activities and there has to be a way of squaring
14 that circle.

15 49320 Typically people will consult with
16 the Ministry of Foreign Affairs. Bob Rae, when he was
17 the Chairman of the Forum of Federations was doing work
18 in Sri Lanka and we saw recently he was refused
19 admission, but that was all good activity, helping
20 Canada. And as long as you stay in touch with the
21 Foreign Ministry, and the Foreign Minister presumably,
22 to make sure that you are not at odds with Canadian
23 Foreign Policy, then I think you are fine.

24 --- Pause

25 49321 MR. WOLSON: Mr. Commissioner, a last

1 question -- and it's an open question for the
2 panellists -- dealing with any recommendations that
3 they would have to design a more effective and
4 appropriate correspondence handling in relation to
5 correspondence directed at a Prime Minister and, more
6 specifically, do you have any thoughts on how one
7 designs a system that determines what information
8 can and should be conveyed to a Prime Minister.

9 49322 It would be a logical place to start
10 with Mr. Clark, if you would.

11 49323 THE RIGHT HON. JOE CLARK: Well, I
12 don't really -- here is what I would say about that. I
13 would say two things.

14 49324 First, the systems I followed were
15 not perfect. In at least one case notoriously not
16 perfect. An important letter was lost and no one
17 understands yet quite why that happened.

18 49325 I frankly have to speak here more
19 of my ministerial experience than of my Prime
20 Minister experience because I did not occupy myself a
21 lot with the correspondence arrangements in my office
22 as Prime Minister.

23 49326 My rule as a Minister was that if
24 there was bad news I wanted to know it and I wanted
25 to know it early. I didn't want to discover it in

1 the House of Commons or in a morning newspaper. That
2 was communicated to my staff. And if the bad news or
3 the troubling news came by way of mail, my
4 understanding was -- I think my staff's understanding
5 was that my public servants, if it came to them, my
6 political staff if it came to them, would get the basic
7 information to me very quickly. That worked quite well
8 in my experience.

9 49327 My last experience at then External
10 Affairs was now two decades ago, but I don't think the
11 place has become that much more complex that a system
12 of that kind, of cooperation between able political
13 staff and able public service staff, wouldn't work as
14 well now as it did then and, frankly, I see no reason
15 why a system of that kind could not work in the Prime
16 Minister's office.

17 49328 I think it depends upon sending a
18 signal that says, for all sorts of reasons, if there is
19 bad news, if there is something troubling, it has to
20 follow an internal channel quickly through to the Prime
21 Minister so that the office, the country are not
22 surprised by something of which there may well have
23 been forewarning.

24 49329 MR. WOLSON: Mel, if you
25 would, please...?

1 49330 MR. CAPPE: Thanks.

2 49331 I was interviewed by Paul Thomas and
3 his paper deals with a lot of these issues. I commend
4 the Commission for having undertaken a bit of research
5 because it is an area that very few people have ever
6 looked at.

7 49332 I'm glad to hear Mr. Clark say that
8 he didn't pay much attention to this. I have to
9 admit that I didn't pay much attention to it when I
10 was Clerk.

11 49333 Having said that, I did want to make
12 sure that the system worked and therefore we had spent
13 a fair bit of time on managing efficiency and seeing
14 that the paper flowed properly. I did raise with the
15 Prime Minister's Chief of Staff from time to time
16 whether he was satisfied that they were getting the
17 material they needed.

18 49334 Two little points on this.

19 49335 One is that I think -- and I have
20 said this to Mr. Thomas, Professor Thomas and it's
21 reflected in his paper I suppose -- I think it is
22 appropriate to insulate Ministers or the Prime Minister
23 from some kinds of material.

24 49336 The public deserves an accusé de
25 réception when they send a letter. They should have an

1 acknowledgment at least that their letter has been seen
2 and that it will be seen by the appropriate person, but
3 I don't think it's necessarily the case that you want
4 to bring every bit of information to the Prime Minister
5 or a Minister and you need therefore to bring judgment
6 again to that: Is this something that the Minister or
7 the Prime Minister should be aware of?

8 49337 In some cases, if for instance if you
9 are dealing with the Minister of Responsible for the
10 Canada Revenue Agency and there is a letter which deals
11 with a particular case that is being litigated in the
12 courts on taxation, it might be highly appropriate not
13 to bring it to the Minister's attention, and it might
14 be appropriate where there is a dispute on a contract
15 to insulate a Minister or the Prime Minister from the
16 correspondence on this, but to make sure that the
17 appropriate person gets it.

18 49338 So I think there is an issue here of
19 finding this balance of getting the information to the
20 person who needs it at the right time, but also
21 recognizing that it is compromising to bring every bit
22 of information to a Minister's attention or a Prime
23 Minister and sometimes it's better that they not
24 have seen it.

25 49339 The second point I would make, and

1 this is now -- I can show you the scars, Commissioner,
2 from a court case where the issue of the PMO and the
3 PCO has actually been litigated by the Information
4 Commissioner. I won't try to interpret the Federal
5 Court of Appeal's judgment in this, which happened
6 about three weeks ago, it's a case left over from my
7 time as Clerk.

8 49340 But basically it found that there
9 were separate offices and that the Prime Minister was
10 not a public office holder in the meaning of the
11 Access to Information Act. And the division we made in
12 PCO on the computers -- the partitioning of the
13 computers that were done -- to have the PMO have
14 different access than PCO to documentation was
15 appropriate and that there is an issue here of managing
16 three different types of communication.

17 49341 So when they Privy Counsel Office was
18 managing the information flow -- and Professor Thomas
19 says, you know, every day three bags of mail are
20 brought to that office -- it was divided into those
21 kinds of correspondence that were clearly political,
22 clearly party.

23 49342 I mean remember, the Prime
24 Minister -- let's keep this focused on the Prime
25 Minister. The Prime Minister is the Member of

1 Parliament from a riding, also the Leader of the Party,
2 and also carrying out government responsibilities as
3 Prime Minister. So a judgment has to be made which
4 category does this letter fit into. Is it the letter
5 to the MP? Is it the letter to the Leader of the
6 Party? Or is it a letter to the Prime Minister
7 ex officio?

8 49343 We had a system which tended to work.
9 I'm not sure that it was flawless, but it basically
10 saw that the political letters and the constituency
11 letters went in a different direction than the
12 government letters.

13 49344 MR. WOLSON: Ms Collette...?

14 49345 PROF. COLLENETTE: Like Mr. Cappe I
15 thought that Paul Thomas' paper was extraordinary and,
16 like Mr. Cappe, I too was interviewed for that. I
17 think he talked to everybody in Ottawa. He did a great
18 job of an issue that has just never had the proper
19 attention than it should have had.

20 49346 I spoke to a Prime Minister's Chief
21 of staff yesterday and I said "What about
22 correspondence?" And he said "Oh, I don't know. The
23 letters just came to me. I haven't a clue how they
24 got there." So this is obviously something that really
25 needs to be looked at.

1 49347 But I'm not sure that Professor
2 Thomas, for all his interviews, caught one part of this
3 and Mr. Cappe has just referred to it inadvertently.

4 49348 A letter can get to a Prime Minister
5 in all sorts of different ways and by many different
6 routes and they don't have to be stamped or filed or
7 checked in with anybody.

8 49349 Let me give you three examples.

9 49350 Mr. Cappe just referred to a Prime
10 Minister also being a Member of Parliament. He is in
11 his riding, she's in her riding. Do you know how many
12 people are coming up to you putting papers in front of
13 you, you know, giving you little notes?

14 49351 Take a second example, the Prime
15 Minister is in caucus, that's where it really happens,
16 the notes go to the Prime Minister. Does the Prime
17 Minister put the note in his or her pocket or purse or
18 give it to an assistant or what do they do?

19 49352 The third example is Question Period.
20 That's a big one. Anybody who wants to get to the
21 Prime Minister with a note, a letter, whatever, goes
22 then because it's a great opportunity. There is no
23 security around.

24 49353 So I think that, you know, all the
25 designs and the tracking in the world are terrific, but

1 you have to remember that a Prime Minister is person
2 who is going to be able to get informal notes or formal
3 letters any way that the human mind can think of it.
4 So that has to be taken into consideration.

5 49354 Lastly, on the point of -- and I
6 would agree with Mr. Cappe -- I am a little nervous
7 to say this, but on the point of sometimes you don't
8 tell everything to a Prime Minister. I would agree
9 with him.

10 49355 I will give you an example.

11 49356 I was a former Director of
12 Appointments. That is the person who advises the Prime
13 Minister on all the appointments, all the Commissions,
14 whatever. It's a job from hell. You can't go anywhere
15 in the country because everybody, you know, wants to
16 talk to you.

17 --- Laughter / Rires

18 49357 PROF. COLLENETTE: I actually became
19 antisocial during those four years.

20 49358 But I would know for example that
21 Mr. "X" desperately wanted to be Ambassador to Spain
22 let's say, and I would know that he was trying to get
23 to the Prime Minister, using every single route and
24 gate, and I wouldn't want the Prime Minister to even go
25 there because there might be security reasons, or

1 because the prime minister has already indicated to me
2 that that person is not going to be appointed.

3 49359 So sometimes, if a letter came in
4 through the PCO/PMO channels and I knew that it was
5 someone the prime minister did not want to hear from,
6 and was not going to appoint, and it was going to be my
7 job to tell that person that he or she was not going to
8 be appointed, then I wouldn't tell the prime minister
9 that there was one more attempt of this person trying
10 to get an appointment.

11 49360 That is sort of a concrete example.

12 49361 MR. WOLSON: Mr. Commissioner, while
13 I like Spain, I am not Mr. X.

14 --- Laughter / Rires

15 49362 MR. WOLSON: Nor did I seek Ms
16 Collenette out during those years.

17 49363 David Mitchell, please.

18 49364 MR. MITCHELL: Mr. Chairman, as an
19 historian, I have spent my fair share of time in
20 archives, here in Ottawa, looking at the papers of
21 prime ministers from earlier eras, and one can't help
22 but be struck when one spends any amount of time doing
23 research in the papers of Prime Ministers Macdonald,
24 Laurier and King at the sheer volume of correspondence,
25 and much of it, I should tell you, from those earlier

1 eras, deals with requests for patronage appointments.

2 49365 The volume is staggering. In fact,
3 one gets the impression that prime ministers from
4 earlier times spent most of their day dictating
5 responses to letters from constituents, yes, from
6 members of their party, to be sure, and occasionally
7 dealing with the governance of the country.

8 49366 Times have changed, I am sure, in the
9 sense that prime ministers are today insulated from
10 some of what their predecessors in earlier times had to
11 endure.

12 49367 But the staggering volume of mail --
13 and we have seen measurements of that, and the
14 Commission has received data in Paul Thomas' paper --
15 suggests that there is room for human error.

16 49368 One can only wonder if any system
17 could be devised, if there is a best practice anywhere
18 in the world that would prevent errors from occurring
19 in the flow of paper and correspondence to a government
20 leader.

21 49369 I think that Ms Collenette pointed
22 out very well how some of the capacity for error can
23 include through informal channels, not mail coming in
24 through Canada Post.

25 49370 But there is some reference in the

1 background materials that the Commission has received
2 to the doctrine of plausible deniability that we have
3 not talked about today.

4 49371 I agree with Mr. Cappe that there
5 could be, and should be perhaps, instances where not
6 every piece of correspondence or information is brought
7 to the attention of the leader of the government, but
8 what about the doctrine that comes from the United
9 States, I believe, of plausible deniability? Should
10 that be considered a factor in practice, or policy,
11 informal or otherwise, in the running of a prime
12 minister's office?

13 49372 We haven't talked about that today.
14 I don't think it has been advocated, and yet, as a
15 practice, it certainly has been a factor in governments
16 elsewhere, and perhaps in our own country.

17 49373 Any system that is designed to be
18 effective and appropriate, I would recommend, has to
19 deal with this issue of whether or not senior staff,
20 especially political staff, might utilize such a
21 doctrine.

22 49374 I don't have a solution to this, I
23 simply flag it as something that needs to be
24 considered.

25 49375 MR. WOLSON: Mr. Clark, please.

1 49376 THE RIGHT HON. JOE CLARK: There is
2 no question that prime ministers have to be protected
3 from the waves of correspondence that come to them.

4 49377 I think the important question here
5 is: What happens to a piece of correspondence that
6 should be in the system at an authoritative level?

7 49378 It seems to me that there are two
8 questions -- I am coming to plausible deniability.

9 49379 It seems to me that there are two
10 questions. One, if the matter is important enough that
11 it should be in the system, it has to get in the
12 system.

13 49380 Does it have to go to the prime
14 minister? Maybe not, in some circumstances, but I
15 would think that the limit of those circumstances
16 should be fairly carefully drawn.

17 49381 Plausible deniability may well be
18 important, for example, with regard to some security
19 matters, and there may be other issues. Certainly
20 where there are matters before a tribunal or something,
21 where clear confidentiality is involved, that need not
22 be brought to the attention of a prime minister.

23 49382 But that is not really the difficult
24 issue. The issue here is about something that may be a
25 threat to the country or a problem for the country, and

1 how do you deal with that.

2 49383 Someone in the system has to know,
3 and if there is to be plausible deniability, that
4 should be for systemic reasons, the health of the
5 system, rather than for the protection of the
6 particular office holder, it seems to me.

7 49384 MR. WOLSON: Mr. Cappe, please.

8 49385 MR. CAPPE: I apologize for not being
9 explicit enough. I thought that I was defending
10 plausible deniability, but I didn't use those terms.

11 49386 So, David, thank you.

12 49387 I think that it can be a good thing.
13 I agree with Mr. Clark that you have to specify the
14 criteria you are going to use ex ante, not ex post, and
15 not based on just the circumstances, to say that this
16 is a defensible use of plausible deniability.

17 49388 And, typically, they are process
18 related. Where you have established an existing
19 process, or you have delegated authority to someone
20 else, or it is not yet before the appropriate
21 decision-maker, then you want to insulate the system
22 from lobbying pressure influence, and I think the
23 example -- you could come up with a long list of
24 examples, but I thought that the examples I was using
25 before of a tax case, litigation, regulatory approval,

1 or contracts, would be areas where you would want to
2 ensure that when the prime minister, at one of those
3 events that Ms Collenette was describing, is accosted
4 by someone, the prime minister can say: We have an
5 established process for this, and I am not about to
6 make a decision at this cocktail party to agree to this
7 contract.

8 49389 I used to have a lot of people come
9 up to me and say: Oh, the prime minister has agreed to
10 this, that or the other thing.

11 49390 We used to have a little line, which
12 was that they must have whispered in his right ear,
13 which was deaf in Prime Minister Chrétien.

14 49391 The prime minister doesn't have to be
15 able to say no, he or she just has to be able to say:
16 I am not making that decision. There is a process for
17 that. And, by the way, I didn't see your letter. That
18 went into the established process.

19 49392 If you think about appeals from the
20 CRTC to cabinet, you don't want a prime minister to be
21 off there seeing, in an undisciplined fashion, some
22 kinds of argument that may ultimately be going to
23 cabinet and should be arrayed as part of a cabinet
24 document, which will ultimately lead to a decision by
25 the cabinet.

1 49393 MR. WOLSON: We are at a stage now,
2 Mr. Commissioner, where we will open up the forum for
3 questions, and I think, first, we will call on Mr.
4 Craig Forcece.

5 49394 MR. FORCESE: Thanks very much, I
6 just have one question, and this is directed, at least
7 initially, to Mr. Mitchell.

8 49395 You raised concerns about the Federal
9 Accountability Act as codifying a risk-adverse culture.
10 What facet of the Federal Accountability Act are you
11 referring to?

12 49396 It is a large document, and it has
13 many attributes. Is there one particular aspect that
14 you view as being particularly prejudicial in this
15 respect?

16 49397 MR. MITCHELL: Mr. Chairman, there is
17 not a single part of that very significant and large
18 piece of legislation that I would point to, but I would
19 point out that it is the public service accountability
20 act in this case. It is not a political accountability
21 act, because its focus is on the public service, the
22 federal public service in particular, not on elected
23 representatives.

24 49398 If one believes, as I do, that our
25 public servants, especially our public service leaders,

1 should have the opportunity to have relationships, not
2 only within government but outside government, in order
3 to serve the communities that government seeks to
4 serve, this legislation, in my view, inhibits those
5 kinds of relationships, inhibits interaction with
6 people outside government, whatever sector they might
7 come from, and it discourages the taking of intelligent
8 risks, as we were discussing earlier, on a number of
9 fronts.

10 49399 This is, again, a large piece of
11 legislation that could be analyzed and dissected in
12 detail, and there has been literature analyzing it,
13 including some excellent work by Professor Paul Thomas,
14 who has done some work for this Commission.

15 49400 That piece of legislation, I think,
16 is an example of what not to do in terms of regulating
17 behaviour. It institutionalizes distrust. It assumes
18 that all public servants are potentially capable of
19 malfeasance of one kind or another, and seeks to tar
20 all of the public service with a brush that may have
21 resulted from an overreaction to one specific incident
22 that occurred that did involve a small number of public
23 servants.

24 49401 So I would regard that as an example
25 of what not to do when trying to regulate ethical

1 behaviour.

2 49402 MR. WOLSON: Commission counsel?

3 49403 Mr. Roitenberg...

4 49404 MR. ROITENBERG: This question is,
5 firstly, directed at Mr. Clark.

6 49405 I agree that if we have embarked on a
7 particular course of conduct, we shouldn't continue
8 down that path simply because we have already committed
9 to it, but from a practical perspective, where we have
10 a body of codified rules and regulations on ethical
11 behaviour, how does Parliament, and parliamentarians,
12 or a particular government in power, move away from
13 hard law to a more soft law approach at changing
14 culture, and do so without any political ramification
15 in the eyes of the public?

16 49406 THE RIGHT HON. JOE CLARK: There are
17 always political ramifications, and I think that one
18 has to take account of that.

19 49407 How do you do it practically? There
20 is a fairly standard practice of either formally or
21 informally reviewing processes that are in place. In
22 some cases there is a time period after which there
23 should be a review, in other cases there is simply a
24 view that this is not working, so it is examined, and
25 in the examination, I would imagine, the question would

1 arise as to how practical is it to change this. What
2 program of information would be needed to indicate that
3 this is counterproductive?

4 49408 I think that is quite possible.

5 49409 I was looking for a note that I
6 thought I had made, and I didn't, that would add to my
7 comment.

8 49410 Yes, there is a note here.

9 49411 If this is important enough, then
10 this may be an issue where political leadership is
11 required, where someone is prepared to say, not that we
12 are throwing out the idea of rules at all, but we think
13 that, in part, because these rules were conceived
14 quickly, in part because we have noted that there are
15 some negative consequences to them, we are of the view
16 that there should be a review and a change.

17 49412 That has happened on other public
18 questions. From time to time governments do things
19 that don't work, and I think that part of the
20 obligation of governing is to recognize that and come
21 back to it.

22 49413 I think that becomes easier if there
23 is the kind of process that has been referred to by all
24 of the panellists here of a more regular discussion of
25 some of these issues.

1 49414 One of the things that is most
2 troubling about the impact that David Mitchell has just
3 discussed of the Accountability Act and the public
4 service is how little discussion of it there is in
5 public. There is all sorts of discussion about it in
6 private.

7 49415 For a system that depends upon
8 transparency and public knowledge, that is a very bad
9 situation. What it suggests to me is that there is a
10 real problem compounded -- a real problem, in and of
11 itself, compounded by a reluctance to discuss it.

12 49416 I think this is one of those unusual
13 occasions when there is an opportunity to open that
14 question again, so that discussion involving people who
15 are concerned about it would be encouraged to occur.

16 49417 MR. WOLSON: Mr. Cappe...

17 49418 MR. CAPPE: Very briefly, I agree
18 with that. The statutory review is one way, but,
19 indeed, parliamentary committees will take up these
20 subjects from time to time, and there is a very clear
21 role for the opposition in this.

22 49419 The opposition is in a position --
23 and I don't mean the current opposition, I just mean
24 that oppositions, by their nature, are in the position
25 of saying: Here is a problem. Regulate it and fix it.

1 49420 Oppositions can be in the position of
2 saying: This legislation is a problem. We need to
3 review it and fix it, and accountability will be
4 increased by deregulating, or regulating smarter.

5 49421 And I think that they could never
6 justify, "We are going to have less accountability,"
7 but I think you could say that accountability will be
8 enhanced if we changed the law.

9 49422 MR. WOLSON: Mr. Roitenberg, do you
10 have any further questions?

11 49423 MR. ROITENBERG: No, thank you.

12 49424 COMMISSIONER OLIPHANT: Mr. Wolson, I
13 have a question, if I might, please.

14 49425 I just observed, in terms of
15 statutory review, that the Federal Accountability Act
16 does provide for a review in section 67. It is a
17 five-year review.

18 49426 I have a question for Ms Collenette,
19 and I ask this because she is the person who raised the
20 issue of the importance of a cooling off period.

21 49427 My question is this: If a cooling
22 off period is important, is it appropriate that
23 provision be made in the statute for a waiver of the
24 cooling off period, so that a -- the term that is used
25 is "a former reporting public office holder", who would

1 normally be bound not to engage in certain activities
2 over a period of time, whether that prohibition could
3 be waived.

4 49428 Is that appropriate?

5 49429 PROF. COLLENETTE: I talked about the
6 need for discretion earlier today, and we do need to
7 have discretion in our ethical rules, because, as we
8 have all noted, we can't have one particular formula
9 for every circumstance.

10 49430 I find that one slightly out of line,
11 I suppose, because if we have agreed on a cooling off
12 period for this class of person, it would seem to me
13 that it would have to be a very good exception.

14 49431 And I am not clear -- just help me
15 with this, is it the Lobbying Commissioner or the
16 Ethics Commissioner that grants --

17 49432 COMMISSIONER OLIPHANT: It is the
18 commissioner under the Accountability Act, so it would
19 be Ms Dawson, I assume.

20 49433 PROF. COLLENETTE: I guess the other
21 question that would come to my mind is, are reasons
22 given for the waiver.

23 49434 COMMISSIONER OLIPHANT: Reasons are
24 required to be published under the Act, yes.

25 49435 PROF. COLLENETTE: So it's public.

1 That would certainly help the matter, I think, if there
2 is some extraordinary reason as to why there should be
3 a waiver.

4 49436 THE RIGHT HON. JOE CLARK: I would be
5 more categoric about that. I would think that a waiver
6 with an explanation makes sense.

7 49437 MR. WOLSON: If I could now turn to
8 the parties; Mr. Landry, for the Attorney General of
9 Canada?

10 49438 MR. LANDRY: We don't have any
11 questions, Mr. Wolson.

12 49439 MR. WOLSON: Mr. Auger...

13 49440 MR. AUGER: No questions, thank you.

14 49441 MR. WOLSON: Mr. Conacher, you told
15 me that you had 20 questions, but I know that you are
16 going to modify them, so fire away, sir.

17 49442 MR. CONACHER: Thank you very much,
18 Mr. Wolson.

19 49443 There have been many very general
20 statements using words like "might", "may", "possibly",
21 "could", with regard to rules, and then one very
22 specific statement, which I will follow up with you on,
23 Mr. Mitchell, specifically.

24 49444 My question is to Mr. Cappe, Mr.
25 Clark and Mr. Mitchell, not to Ms Collenette, because I

1 heartily endorse pretty much everything that Ms
2 Collenette has said today.

3 49445 Of the three of you, do any of you
4 have anything that is actually evidence of any rule
5 that actually, to use a few phrases that have been
6 used, goes too far currently, would actually
7 disadvantage anyone for their entire career, that is
8 actually overregulation, that would actually
9 discourage -- any evidence that anyone has actually
10 been discouraged from running for office or entering
11 the public service because of any actual rule?

12 49446 THE RIGHT HON. JOE CLARK: Let me
13 start. Do I have actual evidence of a rule that goes
14 too far? I have evidence that is reliable to me, in
15 terms of conversations I have had with serving public
16 servants, about their behaviour being inhibited by the
17 regime of rules brought in under the Accountability
18 Act.

19 49447 Can I bring this forward in evidence?
20 No, I can't, it is information that was communicated to
21 me quite generally. I would be astonished if my
22 experience was unique.

23 49448 So the capacity to bring this forward
24 in concrete terms -- my inability to bring this forward
25 in concrete terms does not suggest that no problem

1 exists.

2 49449 You used an interesting phrase, you
3 said, "that would disadvantage someone for an entire
4 career".

5 49450 MR. CONACHER: Actually, that was Mr.
6 Cappe's phrase that I was quoting.

7 49451 THE RIGHT HON. JOE CLARK: Well,
8 then, would you put it to me again, Mr. Conacher?

9 49452 MR. CONACHER: Which rule actually
10 exists now that disadvantages anyone for the rest of
11 their career.

12 49453 THE RIGHT HON. JOE CLARK: Again, I
13 am not sure that I could specify a rule, but I can
14 think of cases -- and I am not prepared to specify them
15 here -- of colleagues of mine whose difficulty of
16 re-entry into private life after relatively brief
17 ministerial service made their ability to take up a new
18 career -- delayed their ability to take up a new
19 career.

20 49454 So over their entire career they were
21 probably moving forward more slowly than they would
22 have been.

23 49455 Now, I have to say, Mr. Conacher,
24 that may be a necessary consequence of any set of
25 rules, but it is one that should not be ignored,

1 particularly in the case, as Ms Collenette said
2 earlier, of people who have had relatively short
3 service in the public service.

4 49456 I think there may be a question of
5 onus here. Is the onus upon me to prove that rules
6 don't work, or is the onus upon others to prove that
7 they do work?

8 49457 I have a considered opinion, for what
9 that's worth, that many of these rules do not work. At
10 the very least, I think that should instigate a
11 deliberate examination of the implication of some of
12 the aspects of the accountability rules, and some of
13 the options that might be considered in response to
14 issues that are before the Commission.

15 49458 MR. CONACHER: Thank you.

16 49459 Just before Mr. Cappe and Mr.
17 Mitchell answer, I have to ask again, and emphasize,
18 which rules?

19 49460 MR. CAPPE: Is this evidence that
20 would be admissible in a criminal trial? No. It would
21 be hearsay, because I have talked to other people about
22 it.

23 49461 But I would venture that there is no
24 senior public servant I have spoken to in the last
25 three years who would not say that they have been

1 inhibited in their taking responsible action by the
2 Federal Accountability Act, in some way or another, and
3 the culture of risk-aversion that it creates.

4 49462 I literally can say that just
5 about -- not just about, that everyone I have spoken to
6 at a senior level has conveyed that to me.

7 49463 And I do have examples of politicians
8 who have been disadvantaged for the rest of their
9 career by some of these events, and I am not prepared
10 to talk about them in a public hearing that is about
11 those individuals.

12 49464 MR. MITCHELL: I don't have anything
13 further to add.

14 49465 MR. CONACHER: I would like to note
15 for the record that, actually, the Federal
16 Accountability Act contains no rules that apply to
17 public servants, except a few with regard to hiring,
18 but that is, again, applying to appointees, the
19 at-pleasure people, who are not part of the public
20 service technically, and then whistle-blower protection
21 and the extension of the Access to Information Act.

22 49466 Other than those -- and
23 whistle-blower protection is not a rule, it's a system
24 for protecting whistle-blowers -- the Federal
25 Accountability Act does not include rules for the

1 public service.

2 49467 It includes the enforcement of rules
3 that have never been enforced, and new enforcement
4 mechanisms, most specifically the whistle-blower
5 protection system, but it does not contain any rules.
6 There is not one section in the Act -- and I have gone
7 through it in very great detail.

8 49468 I just wanted to note that for the
9 record.

10 49469 THE RIGHT HON. JOE CLARK: I am not
11 sure what the rules are here; may I ask a question of
12 the questioner?

13 49470 MR. CONACHER: I would welcome it.

14 49471 THE RIGHT HON. JOE CLARK: Both Mr.
15 Cappe and I have, from our different experiences,
16 referred to what is called a chill within the public
17 service. Have you seen no evidence of that? Have you
18 heard of that?

19 49472 Do you think this is not true?

20 49473 If you have heard that there is
21 something of that kind, to what do you attribute it?

22 49474 MR. CONACHER: I have heard lots of
23 statements of "might", "may", "possibly", "could", and
24 lots of amorphous statements about things being
25 discouraged, but almost every example that has been

1 offered has been something that should be discouraged,
2 like political staff getting first dibs on jobs in the
3 public service, like people leaving senior positions
4 and lobbying, the next day, their former colleagues.

5 49475 I think we could all agree that good
6 policy-making is based on actual evidence, and I am
7 just asking you which rules, and presumably, Mr. Clark,
8 when you said that colleagues of yours were delayed,
9 those were colleagues who left office long before the
10 Federal Accountability Act, so they were operating
11 under the 1986 code.

12 49476 And, Mr. Cappe, I don't know which
13 examples they are, but I am just trying to help the
14 Commissioner, who has to make, hopefully, specific
15 recommendations about which rules are the problem.

16 49477 I will turn to another matter --

17 49478 THE RIGHT HON. JOE CLARK: No, no,
18 it's not just rules, it's about a regime, and it is
19 entirely possible, I suppose, that Mr. Cappe and I are
20 entirely wrong in what we believe we have heard from
21 our interactions with people in the federal public
22 service, and I suppose evidence that we are wrong would
23 be if you, who takes an active interest in these
24 things, have heard nothing of this kind.

25 49479 Have you heard nothing of this kind

1 beyond the fairly specific matters with regard to
2 ministerial staff?

3 49480 MR. CAPPE: Could I just add that one
4 of my authorities is, indeed, the current Clerk of the
5 Privy Council, who is at least Clerk for another day or
6 two, when he in his report to the Prime Minister talked
7 about the "web of rules".

8 49481 Now, they may not be statutory
9 obligations, and it may not all be attributable to the
10 statute entitled the Federal Accountability Act, but I
11 come back to Mr. Clark's point at the outset, that
12 there is a culture of risk aversion that is created by
13 that, and I think that that is what we are really
14 attributing this to.

15 49482 MR. CONACHER: Created by what, the
16 web of rules?

17 49483 MR. CAPPE: By the approach to try to
18 regulate behaviour.

19 49484 MR. CONACHER: What I think, I
20 believe, has happened, just to make a general statement
21 before moving to another question, is that there were a
22 lot of rules that weren't very closely followed, and
23 now there is a whistle-blower protection system and a
24 public sector Integrity Officer, and now there is an
25 independent Ethics Commissioner, who is actually taking

1 a generally -- although I have disagreed, as most
2 people know, with some of her rulings -- generally
3 taking a legal-based approach to enforcement, actually
4 looking at what the words in the codes mean and drawing
5 lines based on law, as opposed to politics, or the
6 currency of the day, or the media spotlight.

7 49485 I may be wrong, as well, but I don't
8 think it's the Accountability Act. Yes, there may be a
9 web of rules, and now they are being enforced, and
10 everyone is scared because they weren't enforced before
11 by anyone independent of a deputy minister. The deputy
12 ministers used to enforce them all themselves.

13 49486 So that would create risk aversion,
14 because the rules have never been defined. The lines
15 have never been drawn.

16 49487 And, as Ms Collette highlighted,
17 and others, we need clearly defined rules. Otherwise
18 you are in a "Gotcha" world, no question.

19 49488 I will leave it at that.

20 49489 MR. WOLSON: Mr. Conacher, you will
21 have a chance to deal with that --

22 49490 COMMISSIONER OLIPHANT: Mr. Wolson,
23 is your microphone on?

24 49491 MR. WOLSON: I don't think that the
25 microphone is working, so let me, then, speak in my

1 court voice.

2 49492 You will have a chance perhaps to
3 address the Commissioner, but we have some panellists
4 that have to leave, and I want to provide them with an
5 opportunity to make some closing comments.

6 49493 So rather than getting into
7 submissions, I would ask that you move on to another
8 question, given that we have very little time left in
9 this day.

10 49494 MR. CONACHER: Okay. Thank you very
11 much, and I apologize for moving into a debate more
12 than a discussion.

13 49495 Mr. Cappe, you had suggested that we
14 need guidelines as well as rules. We have an
15 Accountability Government Guide now that is enforced by
16 the prime minister, and it essentially takes the
17 principles that used to be -- the 10 principles that
18 were in the code for public office holders and puts
19 them into something enforced by the prime minister.

20 49496 I am wondering, when you say
21 guidelines, are you saying that they should be
22 enforceable?

23 49497 And I will also ask Mr. Clark, as an
24 extension of this question -- in the U.K. system, that
25 committee, when they are making a ruling, it's

1 non-binding. I am not sure whether you knew that.

2 49498 Also, if they say that a person
3 cannot take the position, that is not made public, it
4 is only made public if they can.

5 49499 So if we are talking about
6 guidelines, should they be enforceable, and if they are
7 going to be enforced, however they are enforced, should
8 every ruling be made public?

9 49500 Because, currently, the Ethics
10 Commissioner can make a secret ruling, and the Lobbying
11 Commissioner can make a secret ruling. It's called
12 advice -- confidential advice, but it's not made
13 public.

14 49501 Again, it is all to this theme of the
15 public doesn't learn where the lines are, nor do other
16 officials -- public officials of any kind.

17 49502 If we have guidelines, should they be
18 platitudes or enforceable, and should every ruling be
19 made public, so that everyone knows where the lines
20 are?

21 49503 MR. CAPPE: My view of guidelines is
22 that they are guidelines. They help guide my judgment,
23 but I am still left to make mistakes.

24 49504 So I don't see them as being
25 enforceable.

1 49505 I come back to your point about
2 openness, and I think you can do a lot more in private
3 than you can in public in those circumstances.

4 49506 Up until now I have been arguing for
5 openness and transparency without qualification. I
6 want to put a qualification on it. I think that there
7 is such a thing as too much openness, that it induces
8 modestly perverse behaviour, and it shifts us to an
9 oral -- the point about correspondence, as well -- and
10 this is something that came out in Paul Thomas'
11 paper -- you can move to more of an oral communication,
12 which detracts from the historical record.

13 49507 So I would be cautious about having a
14 lot of private advice being made public.

15 49508 MR. CONACHER: Just before you
16 answer, Mr. Clark --

17 49509 COMMISSIONER OLIPHANT: Excuse me,
18 Mr. Conacher, just for a moment. We are running out of
19 time. I am going to make arrangements -- and our
20 Director of Research, Mr. Forcese, will address the
21 issue -- to give you an opportunity to make a
22 submission to the Commission; but I am interested, Mr.
23 Wolson, in hearing closing remarks by those panellists
24 who wish to make them.

25 49510 I hate to do this, but I am going to

1 cut you off in terms of your questions, because we are
2 going to run out of time if I don't.

3 49511 And, Mr. Forcese, you are aware of a
4 step that the Commission will be taking to permit Mr.
5 Conacher and others to make their views known to the
6 Commission.

7 49512 MR. CONACHER: Thank you very much.

8 49513 MR. WOLSON: Mr. Commissioner, Mr.
9 Mitchell wanted to make some closing comments.

10 49514 MR. MITCHELL: Yes, thank you, Mr.
11 Chair.

12 49515 We have had an interesting discussion
13 this morning about the regulation of ethics, whether or
14 not it is possible to regulate ethical behaviour, and I
15 think there is a consensus, I sense, from most everyone
16 around the table, that some rules -- clear,
17 understandable rules -- are desirable.

18 49516 Essentially, we have various codes,
19 rules, legislation in place today. They can always be
20 refined. They can always be made clearer. Perhaps
21 they could be streamlined.

22 49517 My own view is, I don't believe that
23 we necessarily need to go further, but in fact -- and
24 this is debatable, I suppose, but some believe that we
25 have gone too far in some directions.

1 49518 Leaving that aside, I think that the
2 enforceability of rules that are clearly articulated is
3 crucial.

4 49519 My own view is that, under the
5 current regime of different rules and laws relating to
6 ethical behaviour, we should ensure that individuals
7 who violate or transgress these measures do pay the
8 full price, reputationally and otherwise. I believe
9 that this, in fact, would provide the highest degree of
10 deterrence for others.

11 49520 We have talked a little bit this
12 morning about reputational harm as perhaps the greatest
13 deterrent.

14 49521 There is one other point that I would
15 like to make, and it is something that was raised by Ms
16 Collenette earlier this morning, about education, and I
17 think it's an essential point that needs to be
18 considered.

19 49522 How can we educate ourselves, members
20 of the public service, members of Parliament, the
21 public, about the importance of ethics, the rules that
22 are in place, the need to review them from time to
23 time, and, surely, as times change, they should adapt
24 to changing times.

25 49523 There is a role for education on many

1 levels, within Parliament, within the public service,
2 and amongst the general public, and I think it would be
3 useful, Mr. Chairman, if we tried to turn our
4 attention, in a constructive way, toward the kind of
5 education that is necessary in our communities, in our
6 civil society, to have a higher degree of awareness of
7 the current regime, of rules and regulations relating
8 to ethical behaviour, and for possible reforms of those
9 over the course of time, as well. I think this is
10 essential.

11 49524 MR. WOLSON: All that remains, Mr.
12 Commissioner, is to thank the panellists. I can tell
13 you that over the years I have chaired many panels --
14 some haven't worked well, some worked just fine, and
15 then there are those that are exceptional, like this
16 panel, and that happens because of the hard work and
17 the knowledge and the wonderful presentations of these
18 four panellists.

19 49525 So I would like to thank them. I
20 know their comments will be informative and will assist
21 you in your deliberations.

22 49526 COMMISSIONER OLIPHANT: Thank you,
23 Mr. Wolson.

24 49527 Let me just endorse what Mr. Wolson
25 has said. I know how busy each of you on the panel is,

1 and I really appreciate your taking your time to come.

2 49528 I have been thinking as I have
3 listened to what I have heard this morning, and the
4 suggestion that perhaps we in Canada should consider a
5 system somewhat akin to that in the U.K., where an
6 advisory committee is utilized, that the members of
7 this panel would make a terrific advisory committee in
8 terms of ethics.

9 49529 I listened closely to what you had to
10 say, and I can assure you that I will take all of it
11 into account in the report that I must now write.

12 49530 Thank you, again, on behalf of the
13 Commission.

14 --- Whereupon the hearing concluded at 11:56 a.m. /

15 L'audience se termine à 11 h 56

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Lynda Johansson

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