



HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

STATUTORY REVIEW OF THE *CONFLICT OF INTEREST ACT*

Report of the Standing Committee on Access to Information, Privacy and Ethics

**Pat Martin, M.P.
Chair**

FEBRUARY 2014

41st PARLIAMENT, SECOND SESSION

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THE STANDING COMMITTEE ON ACCESS TO INFORMATION, PRIVACY AND ETHICS

has the honour to present its

FIRST REPORT

Pursuant to the Order of Reference of Monday, October 21, 2013, section 67 of the *Conflict of Interest Act*, and the motion adopted by the Committee on Thursday, November 7, 2013, the Committee resumed the statutory review of the *Conflict of Interest Act*:

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STATUTORY REVIEW OF THE CONFLICT OF INTEREST ACT

INTRODUCTION

In 2004, the House of Commons established the Standing Committee on Access to Information, Privacy and Ethics (the Committee) and its mandate.¹ The Committee's mandate is to study matters related to reports of the Office of the Information Commissioner of Canada, the Office of the Privacy Commissioner of Canada, the Office of the Commissioner of Lobbying of Canada and the Office of the Conflict of Interest and Ethics Commissioner, pursuant to the *Conflict of Interest Act*.²

It was under this last responsibility that in December 2012, the House of Commons tasked the Committee with conducting the statutory review of the *Conflict of Interest Act*. As part of its review, which took place from January to June 2013, the Committee heard evidence from stakeholders, including public servants, subject matter experts, university professors, interest groups, and the Commissioner of Lobbying. The Committee also heard from the Conflict of Interest and Ethics Commissioner, who spoke at the start and the very end of the review.

This report is the end result of this statutory review and outlines the Committee's recommendations.

BACKGROUND: THE FEDERAL CONFLICT OF INTEREST ACT

A. History of the *Conflict of Interest Act*

In 2006, Parliament passed the *Federal Accountability Act*,³ which fundamentally altered the conflict of interest legislative framework.⁴ First, the *Federal Accountability Act* enacted the *Conflict of Interest Act*, which replaced the *Conflict of Interest and Post-Employment Code for Public Office Holders*⁵ by incorporating its provisions. Often referred to as the "Prime Minister's Code," this code was introduced by the government in 1985 and applied to Cabinet ministers, parliamentary secretaries and other senior public office holders. From 1994 to 2004, the code was administered by the Office of the Ethics

1 Parliament of Canada, House of Commons, House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI), ETHI Committee Home, [Mandate](#).

2 [Conflict of Interest Act](#), S.C. 2006, c. 9, s. 2.

3 [Federal Accountability Act](#), S.C. 2006, c. 9.

4 Michel Bédard, Kristen Douglas and Élise Hurtubise-Loranger, [Conflict of Interest at the Federal Level: Legislative Framework and Oversight](#), Publication No. 2010-92-E, Ottawa, Parliamentary Information and Research Service, Library of Parliament, 24 November 2010.

5 Government of Canada, [Conflict of Interest and Post-Employment Code for Public Office Holders](#), 2006.

Counsellor. In 2004, this office was replaced through an amendment to the *Parliament of Canada Act*⁶ establishing the Office of the Ethics Commissioner.

Second, the *Federal Accountability Act* made amendments to the *Parliament of Canada Act* to replace the Office of the Ethics Commissioner with the Office of the Conflict of Interest and Ethics Commissioner. By an Order in Council, the provisions of the *Federal Accountability Act* pertaining to the Commissioner and the *Conflict of interest Act* came into force on 9 July 2007, and Mary Dawson was appointed to this position on the same date.

The *Conflict of Interest Act* provides a statutory regime of rules and obligations applying to public office holders and former public office holders. The Act applies to ministers, ministers of State, parliamentary secretaries, ministerial staff, ministerial advisors, as well as certain Government in Council appointees and ministerial appointees. There are approximately 3,000 public office holders subject to the Act.⁷

B. Conflict of Interest and Ethics Commissioner

The Conflict of Interest and Ethics Commissioner, Mary Dawson, is an independent Officer of Parliament who administers the *Conflict of Interest Act* for public office holders and the *Conflict of Interest Code for Members of the House of Commons*, adopted in 2004 by the House of Commons, for members of Parliament.⁸ These two regimes seek to prevent conflicts between the public duties and private interests of elected and appointed officials.

The Office of the Conflict of Interest and Ethics Commissioner administers these two regimes by:

- providing confidential advice to public office holders and elected members of Parliament about how to comply with the Act and the Code;
- reviewing the confidential reports from public office holders on matters such as their assets, liabilities and activities;
- making information available;
- investigating possible contraventions; and
- reporting to Parliament.

6 [Parliament of Canada Act](#), R.S.C. 1985, c. P-1.

7 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, 30 January 2013, p. 1.

8 Office of the Conflict of Interest and Ethics Commissioner, [Who We Are](#).

The Commissioner is also mandated to provide confidential advice to the prime minister about conflict of interest and ethics issues.⁹ The Commissioner must also submit annual reports on the administration of the Act and of the Code. The House of Commons Standing Committee on Access to Information, Privacy and Ethics considers the report on the Act, while the report on the Code is considered by the House of Commons Standing Committee on Procedure and House Affairs.

STATUTORY REVIEW OF THE *CONFLICT OF INTEREST ACT*

Section 67 of the *Conflict of Interest Act* provides for the following:

- 1) Within five years after this section comes into force, a comprehensive review of the provisions and operation of this Act shall be undertaken by such committee of the Senate, of the House of Commons or of both Houses of Parliament as may be designated or established by the Senate or the House of Commons, or by both Houses of Parliament, as the case may be, for that purpose.
- 2) The committee referred to in subsection (1) shall, within a year after a review is undertaken pursuant to that subsection or within such further time as may be authorized by the Senate, the House of Commons or both Houses of Parliament, as the case may be, submit a report on the review to Parliament, including a statement of any changes that the committee recommends.

On 10 December 2012, the House of Commons ordered that the Committee be the committee designated for the purposes of section 67 of the Act.¹⁰ The following day, the Committee agreed to conduct a review of the Act. During this review, which took place from January to June 2013, the Committee heard evidence from various stakeholders and considered a number of recommendations to amend the *Conflict of Interest Act*. In preparing this report, the Committee considered all the recommendations and observations made by witnesses or submitted during the review.

WITNESS OBSERVATIONS AND RECOMMENDATIONS

The Conflict of Interest and Ethics Commissioner, Mary Dawson, has been the official responsible for administering the *Conflict of Interest Act* since it came into force in 2007. In her submission to the Committee, *The Conflict of Interest Act: Five-Year Review*,¹¹ the Commissioner made recommendations to amend the Act. According to Commissioner Dawson, her recommendations will “help to clarify the rules, ensure

9 Office of the Conflict of Interest and Ethics Commissioner, [What We Do](#).

10 House of Commons, [Debates](#), 1st Session, 41st Parliament, 10 December 2012.

11 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, 30 January 2013.

transparency and fairness and, above all, strengthen the means by which the Act's objectives might be achieved."¹²

The Commissioner's submission contains 75 recommendations, inserted in chapters that follow the structure of the Act: definitional issues, rules of conduct, compliance measures, post-employment, and administration and enforcement.¹³ According to the Commissioner, some recommendations "are quite broad in scope, some target specific provisions of the Act, and others are largely technical in nature."¹⁴ The Commissioner identified the following general themes as priorities:¹⁵

- increasing transparency around gifts and other advantages;
- strengthening the Act's post-employment provisions;
- narrowing the overly broad prohibition on engaging in outside activities;
- narrowing the overly broad prohibition on holding controlled assets;
- introducing some disclosure and reporting obligations for non-reporting public office holders;
- addressing misinformation relating to investigative work;
- adding administrative monetary penalties for breaches of the Act's substantive provisions;
- harmonizing the Act and the Code.

During her appearance before the Committee on 11 February 2013, the Commissioner presented her submission reflecting the last five years she spent administering the Act as being "comprehensive and quite detailed."¹⁶ She said that the recommendations in her submission are based on a thorough analysis of the Act and its administration. She added, however, that, "I do not mean to suggest by the number of

12 Office of the Conflict of Interest and Ethics Commissioner, [Commissioner Dawson recommends changes to Conflict of Interest Act](#), News Release, Ottawa, 11 February 2013.

13 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, 30 January 2013. The Commissioner's recommendations are found at pages 75 and following of the submission.

14 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, 30 January 2013, p. i.

15 Ibid.

16 House of Commons, Standing Committee on Access to Information, Privacy and Ethics (ETHI), [Evidence](#), 1st Session, 41st Parliament, 11 February 2013, 1530 (Mary Dawson, Conflict of Interest and Ethics Commissioner).

recommendations I have made that the regime is not at its core functioning relatively well.”¹⁷

The following observations and recommendations are taken from the evidence heard and submissions received by the Committee during its review of the Act. They are presented under the major themes identified as priorities by the Commissioner.¹⁸

A. Increasing transparency around gifts and other advantages

There continues to be some confusion surrounding the rules for the acceptance of gifts and other advantages by public office holders. For example, there is a misconception that a gift’s value determines its acceptability; in fact, an acceptability test applies to all gifts and other advantages that may be offered to public office holders.¹⁹ The Commissioner attributes this confusion to the way the Act is structured and to the fact that a number of provisions deal with gifts: section 11, section 23 (disclosure of gifts to the Office of the Commissioner), and subsection 25(5) (public declaration of gifts).²⁰

During his appearance before the Committee on behalf of Democracy Watch and the Government Ethics Coalition, Duff Conacher supported this idea by recommending that the gift rules be strengthened in order “to make it clear that all gifts, if they create the appearance of a conflict of interest, must be refused.”²¹

1. Acceptance of inappropriate gifts or other advantages (s. 11)

As currently written, section 11 of the Act states that “no public office holder or member of his or her family shall accept any gift or other advantage, including from a trust, that might reasonably be seen to have been given to influence the public office holder in the exercise of an official power, duty or function.” In order to simplify the rules concerning

17 Ibid.

18 The full list of the Commissioner’s recommendations can be found at pages 75 and following of her Office’s submission, Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, 30 January 2013. The recommendations submitted by the Canadian Bar Association can be accessed at pages 19 and following of their submission: Canadian Bar Association, [Statutory Review of the Conflict of Interest Act](#), February 2013. Finally, the recommendations of the group Democracy Watch can be accessed here: Democracy Watch, [“House Committees must recommend that federal Conflict of Interest Act and MP and Senate ethics codes and enforcement be changed in 30 key ways to finally make corruption in federal politics illegal”](#), 6 February 2013.

19 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, 30 January 2013, p. i.

20 Ibid., p. 25.

21 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 February 2013, 1540 (Duff Conacher, Democracy Watch and Government Ethics Coalition). Recommendation 13 from Democracy Watch is to the same effect (submission, p. 5).

gifts, the Commissioner recommends that section 11 include references to the other provisions relating to gifts (s. 23 and subs. 25(5)).²²

The Commissioner told the Committee that under the acceptability test, public office holders are prohibited from accepting any gifts that may reasonably be seen to have been given to influence them.²³

In the Commissioner's submission, she recommends simplifying matters while leaving the acceptability test unchanged. As is currently the case, "public office holders would still not be able to accept a gift or other advantage if it could reasonably be seen to have been given to influence them."²⁴ This recommendation would assist public office holders in understanding the extent of the rules relating to gifts. According to the Commissioner's submission, "the rules in section 23 and subsection 25(5) should, however, continue to refer to the disclosure and reporting obligations for gifts along with the other disclosure and reporting requirements."²⁵

2. Requirement to disclose gifts that exceed \$200 in value (s. 23)

As the second part of the rules concerning gifts, section 23 sets \$200 as the threshold for disclosing gifts or other advantages accepted by public office holders over a 12-month period. The Commissioner recommends lowering this threshold to a minimal amount (such as \$30, individually or cumulatively).²⁶

In her submission, the Commissioner explains that this recommendation would result in more communication between public office holders and her Office about gifts and would increase the overall transparency of what gifts are received by public office holders.²⁷

The Commissioner also recommends amending section 23 of the Act so that it applies to all public office holders, not just reporting public office holders.²⁸

22 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, Recommendation 3-6, p. 26.

23 ETHI, [Evidence](#), 1st Session, 41st Parliament, 11 February 2013, 1530 (Mary Dawson, Conflict of Interest and Ethics Commissioner).

24 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, p. 25.

25 Ibid.

26 Ibid., Recommendation 4-8, p. 39.

27 Ibid., p. 25.

28 Ibid., Recommendation 4-26, p. 48. Recommendation 12 in the submission from the Canadian Bar Association is similar to the one from the Commissioner: Canadian Bar Association, [Statutory Review of the Conflict of Interest Act](#), February 2013, p. 14.

A number of witnesses and stakeholders addressed the Commissioner's recommendation to lower the threshold for disclosing gifts or other advantages and the \$30 amount she recommended. For example, one recommendation in the submission from Democracy Watch was similar to that of the Commissioner.²⁹ The submission from the Canadian Bar Association (CBA) also recommended reducing the threshold for publicly disclosing any single gift or advantage to a lower amount than what it presently is.³⁰

During her second appearance before the Committee concerning the review of the Act, when Commissioner Dawson was asked to comment on the observations and recommendations of other witnesses with respect to gifts, she noted that the suggested \$30 amount seemed to have become the focus of attention and had distracted from the main issue.³¹

Expressing a different view, Professor Lorne Sossin of York University's Osgoode Hall Law School told the Committee, "I'm comfortable with a fairly healthy *de minimis* line because I don't think the public is concerned about the nickel-and-dime stuff."³² He went on to say the following:

For administrative convenience I can see you need a number and obviously we can't have everything resting on broad discretion. But I'd be fine with \$200, \$300, or \$400. Eyebrows will be raised at some level, and that's the level at which I would put this. I don't think that \$50 is in any reasonable person's view the kind of gift that is going to get a public official to act contrary to the public interest. That kind of benefit just doesn't ring true to me.³³

Lynn Morrison, Ontario's Integrity Commissioner, told the Committee about her experience regarding gifts. She said that there is also some confusion regarding Ontario's gift rules, which state that a gift valued at \$200 must be reported. She also said that several members have the misconception that as long as a gift is under \$200, it can be accepted; instead, the acceptability test consists of determining whether accepting the gift is appropriate. With respect to the recommendation to lower the threshold to \$30, Ms. Morrison said that the proposal could end up making members a little more cognizant

29 Democracy Watch, [*Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement, Submission to the Standing Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition*](#), 5 February 2013, Recommendation 13, p. 5.

30 Canadian Bar Association, [*Statutory Review of the Conflict of Interest Act*](#), February 2013, p. 14.

31 ETHI, [*Evidence*](#), 1st Session, 41st Parliament, 18 March 2013, 1630 (Mary Dawson, Conflict of Interest and Ethics Commissioner).

32 ETHI, [*Evidence*](#), 1st Session, 41st Parliament, 13 February 2013, 1700 (Lorne Sossin, Osgoode Hall Law School, York University).

33 Ibid.

of what is appropriate and what is not, given the media attention a potential breach could draw.³⁴

Paul D.K. Fraser, British Columbia's Conflict of Interest Commissioner, also shared his experience administering gift rules. He expressed concern that if the limit were lowered to \$30, many members would not bother reporting gifts because the amount of paperwork involved would not be proportional to the small amount in question. Based on his experience, the proposed threshold is not high enough; a more realistic and appropriate threshold would be \$200 or \$250, which would make compliance more likely.³⁵

University of Ottawa law professor Adam Dodek expressed that, in his opinion, too much time was being spent talking about the rules surrounding gifts when, according to his observations, it is not a major problem.³⁶ Prof. Dodek did not support the recommendation regarding the \$30 threshold because he does not believe in "further bureaucratizing the Act and bureaucratizing the work of public office holders so that you have to file disclosures on every ball cap that you get."³⁷

3. Public declaration of gifts and other advantages (subs. 25(5))

Under section 25 of the Act, reporting public office holders are required to make certain public declarations. These declarations must be made within 30 to 120 days, depending on the type of declaration required. Subsection 25(5) states that reporting public office holders who accept a single gift or other advantage that has a value of \$200 or more shall make a public declaration within 30 days.

Regarding this declaration, which is the third and final rule concerning gifts, the Commissioner recommended amending subsection 25(5) to reduce the threshold of \$200 if a lower amount is established pursuant to the preceding recommendation.³⁸ In its submission, the CBA supported this recommendation made by the Commissioner.³⁹

The Commissioner also recommended amending subsection 25(5) of the Act to apply to all public office holders (not just reporting public office holders), where the gifts or

34 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 March 2013, 1630 (Lynn Morrison, Integrity Commissioner of Ontario).

35 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 March 2013, 1635 (Paul D.K. Fraser, British Columbia Conflict of Interest Commissioner).

36 ETHI, [Evidence](#), 1st Session, 41st Parliament, 18 March 2013, 1610 (Adam Dodek, University of Ottawa).

37 Ibid.

38 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, Recommendation 4-13, p. 41.

39 Canadian Bar Association, [Statutory Review of the Conflict of Interest Act](#), February 2013, Recommendation 14, p. 15.

other advantages relate to their duties as public office holders.⁴⁰ Here again, in its submission the CBA supported the Commissioner's recommendation.⁴¹ In the CBA's view,

Whatever amount is chosen should strike a balance between the importance of transparency and the need not to burden reporting public office holders and the Commissioner's office with reporting that does not materially improve accountability. Further, the amount chosen should take into account the high cost of living (and therefore the cost of offering routine hospitality such as a restaurant lunch) in most Canadian cities.⁴²

In light of the above observations and recommendations with respect to gifts and other advantages offered to public office holders, the Committee the confusion regarding the applicable rules as well as the need for clarification.

B. Strengthening the Act's post-employment provisions

1. General observations

The *Conflict of Interest Act's* post-employment rules for public office holders apply indefinitely and prohibit public office holders from enjoying an undue benefit from their previous position. For most reporting public office holders, rules regarding contracts apply for one year, and in the case of former ministers, two years. However, the Act does not specify how post-employment rules are to be implemented, nor does it specify the mechanism for making the required declarations to the Commissioner.

During her second appearance before the Committee regarding the review of the Act, the Commissioner explained that her recommendations seek to rectify certain deficiencies in the Act by reminding former reporting public office holders of their post-employment obligations so as to avoid the situation where one week after the end of their mandate, they no longer have obligations to report any possible employment or other relevant offers.⁴³

In her submission, the Commissioner recommended that the Act be amended to require former reporting public office holders to report any firm offers of a contract of

40 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, p. 51.

41 Canadian Bar Association, [Statutory Review of the Conflict of Interest Act](#), February 2013, Recommendation 12, p. 14.

42 Ibid., p. 16.

43 ETHI, [Evidence](#), 1st Session, 41st Parliament, 18 March 2013, 1715 (Mary Dawson, Conflict of Interest and Ethics Commissioner).

service, an appointment to a board of directors, a partnership relationship or offer of employment during their cooling-off period, within seven days of the offer.⁴⁴

She also recommended amending the Act to require former reporting public office holders to report on

their duties and responsibilities in relation to their new contracts of service, appointments to a board of directors, partnership relationships or employment during their cooling-off period, including a description of their duties and responsibilities and information on any measures taken to ensure compliance with the Act.⁴⁵

The Commissioner recommended that a reporting deadline of 30 days from the start date of a former reporting public office holder also be required.⁴⁶

In her submission, the Commissioner justified the above two recommendations by stating that in most cases, former reporting public office holders do not maintain contact with her Office during their cooling-off period, making it difficult to monitor their activities.⁴⁷

Democracy Watch recommended a more fundamental change, requiring everyone covered by the Act to report to the Commissioner about their work activities after they leave office. Furthermore, they recommended requiring the Commissioner to approve any such work activity and to publicly disclose approvals of work activity and any changes to the approval as conditions change, as well as making it a punishable offence to fail to disclose such post-employment work activity.⁴⁸

During his appearance before the Committee, Prof. Sossin argued that an ongoing monitoring, advising and reporting function for former public office holders is not clearly set out in the Act.⁴⁹ He did say that he much prefers “principled discretion, with an ongoing office holder, commissioner, or other person able to have that jurisdiction, to a series of bright lines that are set out in the act and about which there’s no further commentary or guidance.”⁵⁰

44 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, Recommendation 5-6, p. 57.

45 Ibid., Recommendation 5-7, p. 57.

46 Ibid.

47 Ibid., p. 56–57.

48 Democracy Watch, [Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition, 5 February 2013, Recommendation 21, p. 5–6.

49 ETHI, [Evidence](#), 1st Session, 41st Parliament, 13 February 2013, 1715 (Lorne Sossin, Osgoode Hall Law School, York University).

50 Ibid.

Similarly, during his appearance before the Committee, Prof. Yves Boisvert of the École nationale d'administration publique pointed to the post-employment issue as a weak spot in managing conflict of interest with respect to public office holders. He shared views similar to those of Prof. Sossin, stating that those in charge of managing post-employment issues should be provided with significant means to oversee post-employment. He believes that the Act and the budgets allocated to the Commissioner do not provide sufficient leeway for managing post-employment cases.⁵¹

Prof. Boisvert recommended that those in charge of managing post-employment issues be given the opportunity and the necessary resources to oversee the activities of former public office holders for about a year or two, depending on the type of public office. This follow-up would make it possible to hold public office holders accountable during that period. He recommended that every two or three months, for example, former public office holders be required to submit a post-employment report. He also raised the possibility of imposing sanctions in cases of non-compliance with post-employment requirements.⁵²

2. Prohibition on contracting with former reporting public office holders (s. 35)

Section 35 of the Act prohibits former reporting public office holders from

- entering into a contract of service with,
- being appointed to a board of directors of, or
- accepting employment from a company with which he or she had direct and significant official dealings during the period of one year immediately before his or her last day in office.

This prohibition extends to any representations, for or on behalf of any other person or entity, made by former office holders. Former ministers are not permitted to make representations to former colleagues still in Cabinet.

In her submission, the Commissioner recommended that the prohibition in subsection 35(1), which prohibits former reporting public office holders from entering into service contracts with, being appointed to a board of directors of, or accepting employment from a company with which he or she had direct and significant official dealings during the period of one year immediately before his or her last day in office, be expanded to include

51 ETHI, [Evidence](#), 1st Session, 41st Parliament, 25 February 2013, 1540 (Yves Boisvert, École nationale d'administration publique).

52 Ibid.

direct and significant official dealings that a reporting public office holder had during his or her last year in office, not only “with” entities, but also “in relation to” entities.⁵³

The Commissioner also recommended amending subsection 35(1) so that the prohibition would include “partnership relationships as well as contracts of service, appointments to boards of directors and employment.”⁵⁴ She also recommended amending subsections 35(1) and (2) to prohibit former reporting public office holders from participating indirectly in any of the activities in which these provisions prohibit them from participating directly.⁵⁵

In its submission, Democracy Watch recommended extending the prohibition under section 35 of the Act to prohibit any public office holder from taking employment with outside entities or representing them after leaving office, or from becoming a registered lobbyist after leaving office.⁵⁶ This would cover “all politicians, political staff people and advisers (full-time or part-time), Cabinet appointees or government officials (including part-time and temporary ‘exchange program’ participants).”⁵⁷

The report by the Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney (the Oliphant Commission), released 31 May 2010, included recommendations concerning the Act. In its report, the Oliphant Commission recommended that the Conflict of Interest and Ethics Commissioner issue an interpretive bulletin providing guidance on the meaning of “direct and significant official dealings” used in section 35 of the Act to clarify what constitutes legitimate post-employment activities for former public office holders.⁵⁸

In her submission, the Commissioner explained that her Office is often consulted on how to apply these words to particular situations. She noted that she has issued an interpretation bulletin in relation to the terms “direct”, “significant” and “official” explaining

53 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, Recommendation 5-1, p. 53.

54 Ibid., Recommendation 5-2, p. 53.

55 Ibid., Recommendation 5-3, p. 54.

56 Democracy Watch, [Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition, 5 February 2013, Recommendation 19, p. 5.

57 Ibid.

58 Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney, Final Report, [Volume 3: Policy and Consolidated Findings and Recommendations](#), 31 May 2010, Recommendation 10, p. 539.

the application of these terms to individual situations. She believes that these terms are clear and do not need to be defined in the Act.⁵⁹

In its report, the Oliphant Commission also recommended amending the Act to bar a current public office holder from awarding or approving a contract with, or granting a benefit to, a person who, in the course of seeking that contract or benefit, appears to be in violation of his or her post-employment obligations under the Act, without first obtaining advice from the Commissioner that the former public office holder is in compliance with the Act. The Oliphant Commission's recommendation states that the Act should specify that the Commissioner has not only the power, but also the duty, to give this advice.⁶⁰

During his appearance before the Committee, Professor Ian Greene, McLaughlin College, York University, supported this recommendation by the Oliphant Commission:

One thing that was recommended by Oliphant is that if people violated the rules and were no longer public office holders, then current MPs and cabinet ministers should not be allowed to arrange for contracts with them. So they're blacklisted, and they have to check with the commissioner to find out who is blacklisted.

I think that makes a lot of sense. It would be an incentive not to do that once you're no longer a public office holder, not to get on that list, and an incentive for the current MPs to find out who these people are.⁶¹

Similarly, Democracy Watch recommended requiring current Cabinet ministers and senior government officials to confirm with the Commissioner that the former public office holders that they deal with are complying with the Act.⁶²

The Oliphant Commission went even further in its recommendations regarding post-employment requirements by connecting them to all federal contracts. Its report recommended requiring all federal contracts to include a provision rendering it a breach of contract to rely (or, in the course of obtaining the contract, to have relied) on the services of a former public office holder acting in contravention of post-employment restrictions.⁶³

59 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, p. 53.

60 Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney, Final Report, [Volume 3: Policy and Consolidated Findings and Recommendations](#), 31 May 2010, Recommendation 11, p. 542.

61 ETHI, [Evidence](#), 1st Session, 41st Parliament, 4 February 2013, 1625 (Ian Greene, McLaughlin College, York University).

62 Democracy Watch, [Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition, 5 February 2013, Recommendation 17, p. 5.

63 Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney, Final Report, [Volume 3: Policy and Consolidated Findings and Recommendations](#), 31 May 2010, Recommendation 12, p. 544.

Likewise, Democracy Watch's submission included a recommendation to "make it a violation of a contract with the federal government if a former public office holder (of any kind) wins the contract while in violation of ethics rules."⁶⁴

3. Cooling-off period (s. 36)

Referring to the post-employment prohibitions under section 35, the Act in section 36 provides a cooling-off period of two years for former ministers and one year for all other reporting public office holders. The Commissioner did not make any recommendations regarding this section.

However, in its report the Oliphant Commission included a detailed recommendation calling on the prime minister to amend *Accountable Government: A Guide for Ministers and Secretaries of State* to include additional requirements for reporting public office holders and the Commissioner to communicate with each other about the reporting public office holder's employment during the cooling-off period.⁶⁵

64 Democracy Watch, [Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement, Submission to the Standing Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition](#), 5 February 2013, Recommendation 22, p. 6.

65 Note that the latest edition of the guide is called [Accountable Government: A Guide for Ministers and Ministers of State \(2011\)](#). Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney, Final Report, [Volume 3: Policy and Consolidated Findings and Recommendations](#), 31 May 2010, Recommendation 16, p. 554–555. Recommendation 16 reads as follows:

- a) As a first priority, the prime minister should amend *Accountable Government: A Guide for Ministers and Secretaries of State* to include the following directives to reporting public office holders, as defined under the *Conflict of Interest Act*:
 - Reporting public office holders shall disclose to the Conflict of Interest and Ethics Commissioner (ethics commissioner) the nature of any post-office employment (as defined in Recommendation 5) prior to taking up that employment.
 - Before commencing the employment, reporting and former reporting public office holders must receive advice from the ethics commissioner on the compatibility of the position with their post-employment obligations. In deciding whether and under what circumstances to take up this employment, they are expected to abide by the ethics commissioner's advice.
 - The reporting public office holder must make the ethics commissioner's advice public prior to taking up the employment, and should ask the ethics commissioner to include the advice in the public registry created by the Act.
 - These obligations on current and former reporting public office holders to disclose the employment, obtain advice, disclose the advice, and abide by this advice shall exist throughout the cooling-off periods set out in section 36 of the *Conflict of Interest Act* and shall be triggered for each new employment.
- b) It is further recommended that the Conflict of Interest and Ethics Commissioner take such steps as are necessary to receive the disclosures and provide the advice described above.
- c) The above changes should be codified in the *Conflict of Interest Act* as early as practicable. At that time, two additional changes should be made to the Act:

The Oliphant Commission also recommended amending the Act to provide for new offences in the event that former public office holders fail to comply with the new disclosure requirements.⁶⁶

During his appearance before the Committee, Prof. Greene addressed the Oliphant Commission's recommendations, saying that the Commission had determined that the offence should be a non-criminal one because the prosecution would be more straightforward.⁶⁷

In terms of setting the term of the post-employment cooling-off period provided by section 36 of the Act, Dr. Lori Turnbull, Dalhousie University, pointed out the need to strike a balance:

On the one hand, you want to make sure the person who is coming out of a ministerial role or from a minister's office is not so heavily penalized, or that the cooling-off periods are so onerous that the person wishes to have never been there in the first place. On the other hand, you have to make sure there's a long enough cooling-off period.⁶⁸

On the same topic, Jim Patrick of the Government Relations Institute of Canada (GRIC) spoke about the importance of maintaining a certain degree of flexibility in administering the Act in order to "tailor the cooling-off period to how long someone has been in the job and what the nature of their job actually was."⁶⁹

The Committee notes the various observations and recommendations received concerning the post-employment period and acknowledges the importance of this part of the Act. The Committee takes note of the Commissioner's recommendations for new disclosure requirements for former public officer holders and understands the need to maintain a balance in the Act with respect to the rules surrounding the cooling-off period.

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- The Conflict of Interest and Ethics Commissioner should be permitted to disclose publicly the advice given to the current or former reporting public office holder, if that person takes up the employment in question.
 - The Act should specifically permit current or former public office holders to request that the ethics commissioner reconsider prior advice given to take into account new facts or developments that the current or former public office holder believes should be before him or her.

66 Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney, Final Report, [Volume 3: Policy and Consolidated Findings and Recommendations](#), 31 May 2010, Recommendation 17, p. 555.

67 ETHI, [Evidence](#), 1st Session, 41st Parliament, 4 February 2013, 1600 (Ian Greene, McLaughlin College, York University).

68 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 February 2013, 1605 (Lori Turnbull, Dalhousie University).

69 ETHI, [Evidence](#), 1st Session, 41st Parliament, 4 March 2013, 1555 (Jim Patrick, Government Relations Institute of Canada).

C. Narrowing the “overly broad” prohibition on engaging in outside activities

Section 15 prohibits reporting public office holders from engaging in a range of activities outside their official duties and responsibilities. The prohibition does not depend on whether the activity places the office holder in a conflict of interest or whether it is incompatible with the office holder’s official duties. Subsection 15(4) states that this prohibition does not apply to the political activities of a reporting public office holder.

In her submission, the Commissioner explained that

Aside from the limited exceptions covered in subsections 15(1.1), (2) and (3), the Commissioner is given no discretion to waive the prohibition against engaging in outside activities in cases that may cause hardship or unnecessary interference with the personal life of a reporting public office holder where there is no incompatibility with his or her official duties.⁷⁰

The Commissioner concluded that “an appropriate consideration might be whether the outside activity is compatible with the public duties of the reporting public office holder. It is significant that this is the test that the Commissioner must apply to decide whether to grant one of the exceptions under subsections 15(1.1), (2) or (3).”⁷¹ Consequently, the Commissioner recommended the following:

That the Commissioner be given the authority to permit reporting public office holders to engage in outside activities prohibited by subsection 15(1) where this would not be incompatible with the reporting public office holder’s public duties or obligations as a public office holder.⁷²

The Commissioner added that this recommendation “would make subsections 15(1.1), (2) and (3) essentially redundant. If this approach were taken, all outside activities authorized by the Commissioner should continue to be publicly declared under subsection 25(4).”⁷³ In its submission, the CBA supported the Commissioner’s recommendation.⁷⁴ The CBA noted the following regarding the adoption and application of section 15 of the Act:

One concern was that the joint prohibitions against engaging in employment or the practice of a profession and holding office in a professional association would require members of professional associations ... to cease practice while holding public office unless the practice of that profession is required in the exercise of official powers, duties and functions. Depending on the professional association and jurisdiction, failure to

70 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, p. 28.

71 Ibid.

72 Ibid., Recommendation 3-8.

73 Ibid.

74 Canadian Bar Association, [Statutory Review of the Conflict of Interest Act](#), February 2013, Recommendation 5, p. 9.

engage in active practice could result in the loss of professional licensing. ... As a result, public office holders could lose substantial employment opportunities in their profession if they hold public office for any length of time.⁷⁵

Democracy Watch recommended adding a rule to the Act as well as to the respective codes applying to MPs and Senators prohibiting “the use of any government property for anything other than officially approved activities, especially not for any political activities, and to prohibit such political activities at a government place of work.”⁷⁶

The Committee notes the various observations and recommendations concerning the prohibition on reporting public office holders engaging in a range of activities outside their official duties and responsibilities, and also acknowledges that the prohibition needs to be enforced in a way that is fair for the individuals concerned. The Committee understands that this is the rationale behind the Commissioner’s recommendation calling for discretionary authority to waive the prohibition.

D. Narrowing the “overly broad” prohibition on holding controlled assets

1. Divestiture of controlled assets (s. 17)

Section 17 of the Act prohibits reporting public office holders, “unless otherwise provided in Part 2,” from holding controlled assets as defined in that Part, which pertains to compliance measures.

In her submission, the Commissioner stated that

This section prohibits reporting public office holders from holding controlled assets, regardless of whether a conflict of interest exists. I believe that the requirement that all reporting public office holders divest themselves of controlled assets without reference to a conflict of interest test goes beyond what is necessary to accomplish the purposes of the Act.⁷⁷

Consequently, the Commissioner recommended that section 17 of the Act be amended to prohibit reporting public office holders who have a significant amount of decision-making power or access to privileged information from holding controlled assets, and to prohibit all other reporting public office holders from holding controlled assets where to do so would place them in a conflict of interest.⁷⁸

75 Ibid., p. 8.

76 Democracy Watch, [*Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement, Submission to the Standing Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition*](#), 5 February 2013, Recommendation 16, p. 5.

77 Office of the Conflict of Interest and Ethics Commissioner, [*The Conflict of Interest Act: Five-Year Review*](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, p. 31.

78 Ibid., Recommendation 3-11, p. 32.

The Commissioner also recommended more stringent requirements for ministers, ministers of state, parliamentary secretaries and certain senior reporting public office holders such as chiefs of staff and deputy ministers, as they may be more capable of furthering their own private interests or those of friends or relatives.⁷⁹

The CBA posited that the Commissioner's recommendation would reduce, from 1,100 to as few as 140, the number of officials subject to automatic divestment. It noted that automatic divestment of controlled assets, could, in a few cases, to be an excessive precaution against conflicts of interest.⁸⁰

One example might be appointees to agencies or boards with narrow mandates that do not affect a broad cross section of the private sector (for example, the Immigration and Refugee Board of Canada). Summer students and interns who work in Ministers' offices might be another example.⁸¹

On the other hand, the CBA stated that automatic divestment of controlled assets should be required of all other employees in ministers' offices.⁸²

Under the current law, no Minister's employee may own a controlled asset. The status quo is preferable to the Commissioner's proposal to replace automatic divestment with declarations of conflict and divestments on a case-by-case basis. The sheer volume of lobbying of Ministers' offices makes the suggestion impractical.⁸³

During his appearance on behalf of the CBA, Guy Giorno told the Committee how the CBA and the Commissioner differ with respect to automatic divestment and divestment on a case-by-case basis. In his view,

[the Commissioner's] thinking is that in many cases it's enough to divest on a case-by-case basis. You're a public office holder; something comes before you; you own those securities; you report to the commissioner; she tells you what to do, and you either sell it or put it in a blind trust.

We don't quarrel with case-by-case divestment as a mechanism, but it's our belief that in the case of certain public office holders, they're coming into contact with decisions or issues that relate to publicly controlled assets. Routine, frequent case-by-case divestment doesn't make sense. It's simply not practical.⁸⁴

79 Ibid., p. 31.

80 Canadian Bar Association, [Statutory Review of the Conflict of Interest Act](#), February 2013, p. 11.

81 Ibid.

82 Ibid.

83 Ibid.

84 ETHI, [Evidence](#), 1st Session, 41st Parliament, 25 February 2013, 1610 (Guy Giorno, Canadian Bar Association).

Democracy Watch also opposed the Commissioner's recommendation, recommending that the government "not weaken the divestment rules as the Ethics Commissioner recommends."⁸⁵

In its submission, the CBA detailed its position on the divestiture of controlled assets. First, it recommended that some reporting public office holders, such as appointees to agencies with narrow focus or influence, be subject to case-by-case, not automatic, divestment of controlled assets.⁸⁶

The CBA then recommended that, contrary to the Commissioner's recommendation, employees of ministers' offices (except summer students and interns) and reporting public office holders who are appointees to agencies and bodies with broad mandates that affect multiple sectors of the economy, continue to be subject to automatic divestment of controlled assets.⁸⁷ It also recommended that ministers, deputy ministers and parliamentary secretaries continue to be subject to automatic divestment of controlled assets.⁸⁸

During his appearance on behalf of the CBA, Mr. Giorno told the Committee that the CBA's recommendations would maintain the clarity found in the Act and would keep almost all of the cases requiring automatic divestments, except in narrow circumstances which would be clearly defined:

Interns or students in ministers' offices, again is a clearly defined class. Then we would allow the commissioner to exempt public appointees, that is, Governor in Council appointees, where the nature of their mandate is so narrow—it doesn't apply to multiple sectors of the economy; it applies very narrowly and there's not likely to be an issue related to the decisions affecting the value of assets. The example we use is the Immigration and Refugee Board.⁸⁹

With respect to another issue related to the divestiture of controlled assets, the Commissioner recommended that section 17 be amended to apply to cases where controlled assets are held indirectly as well as directly.⁹⁰ Regarding this recommendation,

85 Democracy Watch, [*Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement. Submission to the Standing Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition*](#), 5 February 2013, p. 4.

86 Canadian Bar Association, [*Statutory Review of the Conflict of Interest Act*](#), February 2013, Recommendation 7, p. 12.

87 Ibid., Recommendations 8 and 9, p. 12.

88 Ibid., Recommendation 10, p. 13.

89 ETHI, [*Evidence*](#), 1st Session, 41st Parliament, 25 February 2013, 1550 (Guy Giorno, Canadian Bar Association).

90 Office of the Conflict of Interest and Ethics Commissioner, [*The Conflict of Interest Act: Five-Year Review*](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, Recommendation 3-12, p. 32.

the Commissioner explained that there is one way in which the prohibition in section 17 is too narrow:

There have been instances where a reporting public office holder does not hold controlled assets directly, but holds them indirectly through a holding company or other similar mechanisms. Those instances should be included as well.⁹¹

During her appearance before the Committee, the Commissioner argued that the requirement to divest of controlled assets is unnecessarily broad with regard to certain reporting public office holders.

Basically what I'm proposing is that for these people who are not in the designated groups, and I'm a little bit flexible on what the designated group would be too—I've suggested deputies, parliamentary secretaries, deputy ministers, chiefs of staff, but that's to consider. Aside from those people who have lots of access to information and decision-making powers, it's really quite onerous for some people, to no avail, to have them have to put all their holdings into trust or to sell them. I'm just suggesting that it doesn't need to be that wide a rule.⁹²

Along the lines of what the Commissioner had to say, Democracy Watch recommended strengthening the rules to require the divestiture of assets controlled either directly or indirectly.⁹³

2. Definitions specific to compliance measures (s. 20)

a. "Controlled assets"

Section 20 of the Act defines controlled assets as "assets whose value could be directly or indirectly affected by government decisions or policy." The definition includes examples, although it is not exhaustive.

In her submission, the Commissioner recommended the following:

That the definition of "controlled assets" in section 20 be limited to publicly traded securities traded on a stock exchange or over-the-counter, including such assets within self-administered registered accounts, and to commodities, futures and currencies that are traded on a commodities exchange.⁹⁴

91 Ibid., p. 33.

92 ETHI, [Evidence](#), 1st Session, 41st Parliament, 11 February 2013, 1630 (Mary Dawson, Conflict of Interest and Ethics Commissioner).

93 Democracy Watch, [Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement. Submission to the Standing Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition](#), 5 February 2013, Recommendation 8, p. 3.

94 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, Recommendation 4-3, p. 35.

The Commissioner maintained that the definition of “controlled assets” is overly broad.⁹⁵ According to her interpretation, since all the items included in the definition of “controlled assets” are financial instruments, the divestment provisions currently include only investments that are publicly traded on a stock exchange or over-the-counter, and situations where commodities, futures and currencies are traded on a commodities exchange.⁹⁶

Accordingly, stock options, warrants and rights have been considered to be controlled assets only where they are publicly traded or linked to publicly traded securities. Publicly traded securities held in registered accounts, plans or funds that are self-administered are also considered to be controlled assets.

I recommend that the wording of the definition of “controlled assets” be adjusted to reflect this approach.⁹⁷

Contrary to the Commissioner’s recommendation, Democracy Watch recommended that the government “not weaken the divestment rules as the Ethics Commissioner recommends.”⁹⁸

One of the CBA’s recommendations also countered the Commissioner’s recommendation:

Contrary to Recommendation 4-3 of the Commissioner, the definition of “controlled assets” should not be limited to publicly traded securities.⁹⁹

In its submission, the CBA explained its opposition to the Commissioner’s recommendation, and provided this rationale for its own recommendation:

The Commissioner’s amendment would mean that even the most senior reporting public office holders, such as Ministers and Deputy Ministers, could retain shares in privately-held companies. While most private companies are owned by single shareholders, 13 of the 100 largest privately-held companies in Canada are held widely, or held by large groups of individuals.

95 Ibid., p. 34.

96 Ibid.

97 Ibid.

98 Democracy Watch, [*Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement, Submission to the Standing Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition*](#), 5 February 2013, Recommendation 8, p. 4.

99 Canadian Bar Association, [*Statutory Review of the Conflict of Interest Act*](#), February 2013, Recommendation 11, p. 13.

Because shares in private companies can be owned by groups of individuals, or be widely held, there is no principled reason to exempt them from automatic divestment.¹⁰⁰

While the discussion was not conclusive, the Committee takes note of the need to reflect on the definition of controlled assets and the way such assets are handled within the Act.

b. “Exempt assets”

Under section 20 of the Act, “exempt assets” means “assets and interests in assets for the private use of public office holders and the members of their family and assets that are not of a commercial character.” Examples of these kinds of assets are then presented in the definition [paragraphs (a) to (q)].

In her submission, the Commissioner recommended:

That the definition of “exempt assets” in the English version of section 20 be amended to include the words “but not limited to” to make it clear that the list of examples is not exhaustive.¹⁰¹

The Commissioner also recommended that paragraphs (n) and (o) of the definition of “exempt assets” be amended “to exempt all moneys, whatever the amount, owed by relatives, whether or not under a mortgage or hypothec.”¹⁰²

Regarding this definition, Democracy Watch recommended the following:

Also strengthen the rules to require divestment of the currently exempt assets of, under section 20 of the Act, “(g) registered retirement savings plans and registered education savings plans that are not self-administered or self-directed” (if the assets in the RRSP or RESP are investments in companies) and “(h) investments in open-ended mutual funds.”¹⁰³

The Committee takes note of the observations and recommendations that suggest the need to evaluate the definition of exempt assets in light of the entire divestment rules within the Act.

100 Ibid., p. 13.

101 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, Recommendation 4-1, p. 34.

102 Ibid., Recommendation 4-2, p. 34.

103 Democracy Watch, [Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics by [Democracy Watch and the Government Ethics Coalition](#), 5 February 2013, Recommendation 8, p. 4.

3. Divestment (s. 27)

Section 27 of the Act sets out the divestment requirements for reporting public office holders who have controlled assets. Within 120 days following their appointment, public office holders are to divest of their controlled assets by either selling them in an arm's length transaction or placing them in a blind trust. As for ministers and parliamentary secretaries, the Commissioner may grant an exception if she deems the assets to be of minimal value (not specified).

The Commissioner's recommendation pertaining to section 27 contains two elements:

- That subsection 27(1) be amended to apply only to those reporting public office holders with a significant amount of decision-making power or access to privileged information, such as ministers, ministers of state, parliamentary secretaries, chiefs of staff and deputy ministers; and
- That section 27 be amended to require that the controlled assets of all other reporting public office holders be subject to a conflict of interest test. Where there is a conflict of interest, these reporting public office holders would be required to sell those controlled assets in an arm's length transaction.¹⁰⁴

If this recommendation were to be accepted, the Commissioner added that "subsection 27(10), which sets out a minimal value exception, would become largely irrelevant and could be repealed."¹⁰⁵

Contrary to the Commissioner's recommendations, Democracy Watch recommended that the government "not weaken the divestment rules as the Ethics Commissioner recommends."¹⁰⁶

The Committee notes the various observations and recommendations concerning divestment, as well as the wide divergence of opinion on the matter. The Committee notes that the issue is highly complex and understands the importance of administering the Act in a flexible yet predictable manner in order to achieve the Act's objectives.

104 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, Recommendation 4-18, p. 44.

105 Ibid., Recommendation 4-19, p. 44.

106 Democracy Watch, [Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics by [Democracy Watch and the Government Ethics Coalition](#), 5 February 2013, Recommendation 8, p. 4.

E. Introducing some disclosure and reporting obligations for non-reporting public office holders

The Act sets out two classes of public office holders – reporting public office holders, and others that the Commissioner refers to as “non-reporting public office holders.”¹⁰⁷ Reporting public office holders have additional obligations with respect to reporting, disclosure and public declaration, and their activities are subject to greater restrictions. Of the approximately 3,000 public office holders, about 1,100 are reporting public office holders.¹⁰⁸

The Commissioner does not believe that there are “sufficient mechanisms to address possible conflict of interest situations in relation to non-reporting public office holders. [...] They do not have the same level of contact with my Office as reporting public office holders largely because they do not have any disclosure obligations. I am therefore recommending that some disclosure and public reporting requirements be established for non-reporting public office holders.”¹⁰⁹

Consequently, of the Commissioner’s 75 recommendations, the very first one calls for the Act to be “amended to establish certain disclosure and public reporting requirements for non-reporting public office holders in relation to outside activities, recusals and gifts or other advantages.”¹¹⁰

Democracy Watch urged the government to “extend the requirements to disclose outside activities (and changes in those activities), recusals, and the receipt of gifts and other advantages, to all public office holders covered by the Act.”¹¹¹

In its submission, the CBA stated that a shared attribute of all public office holders is that they all hold the public trust. In addition, public office holders choose to undertake their responsibilities:

[A]ll have volunteered for public service. While public office holders carry burdens and face unique challenges, the role is forced on no one. Public office in Canada is not filled by conscription. Whether by seeking election, or by accepting appointment or employment, each public office holder has freely chosen this responsibility.¹¹²

107 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, 30 January 2013, p. 3.

108 Ibid.

109 Ibid.

110 Ibid., Recommendation 1-1, p. 4.

111 Democracy Watch, [Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition, 5 February 2013, Recommendation 2, p. 2.

112 Canadian Bar Association, [Statutory Review of the Conflict of Interest Act](#), February 2013, p. 1-2.

The Committee notes the desire expressed by certain witnesses, including the Commissioner, to see additional disclosure and public reporting obligations imposed on (non-reporting) public office holders.

F. Addressing misinformation relating to investigative work

Under section 44, a member of the Senate or House of Commons who has reasonable grounds to believe that a public office holder or former public office holder has contravened the Act may request that the Commissioner conduct an examination, which the Commissioner must do if the request is made in a way that meets minimal requirements. However, under subsection 44(3), the Commissioner may decline to examine the matter if it is believed that the request is frivolous or vexatious or is made in bad faith. The Commissioner is required to conduct an examination of the matter if it is not frivolous or vexatious or is made in bad faith, although she may, under certain circumstances, discontinue the examination. Then, regardless of the Commissioner's decision, she must provide the prime minister with a report setting out the facts in question as well as the Commissioner's analysis and conclusions.

Gregory Levine, a lawyer, ethics consultant and social scientist, told the Committee that the statutory provisions allowing refusal of an investigation for matters that are trivial or vexatious or frivolous are useful.¹¹³

In her submission, the Commissioner recommended that the Act be amended "to provide for a process that would allow for the Commissioner to undertake a preliminary review of a request for an examination, including any response from the subject of the request, before the Commissioner determines whether an examination is warranted."¹¹⁴

As she explained:

Unlike the Members' Code, the Act does not provide for a preliminary period during which the Commissioner may consider the matter and seek preliminary information before making a decision as to whether an examination is warranted.¹¹⁵

With respect to these requests for an examination, the Commissioner also made the following two recommendations. First:

That the Commissioner be expressly permitted to comment publicly to correct misinformation, or to explain his or her reasons for not pursuing a matter that has been

113 ETHI, [Evidence](#), 1st Session, 41st Parliament, 4 February 2013, 1620 (Gregory J. Levine, as an individual).

114 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, Recommendation 6-2, p. 62.

115 *Ibid.*, p. 62.

raised in the public domain, where doing so is in the public interest or serves to clarify the mandate of the Office.¹¹⁶

And second:

That the Act be amended to require that a Senator or Member of the House of Commons requesting an examination refrain from commenting publicly on the request until the Commissioner has confirmed that he or she has received the request and has notified the person who is the subject of that request.¹¹⁷

Subsection 44(9) of the Act prohibits the Commissioner from including confidential information in her report. As well, subsection 48(5), addressed below, requires the Commissioner and her staff to respect confidentiality unless the disclosure is essential for the purposes of carrying out certain responsibilities, including establishing the grounds for the conclusions in the report provided for in section 44, or the information is disclosed in the course of a prosecution.

In her submission, the Commissioner explained that with respect to public comment, she applies subsection 27(5.1) of the *Conflict of Interest Code for Members of the House of Commons*.¹¹⁸

The Commissioner therefore has adopted the practice of refraining from making any public comments about an ongoing examination under the Act other than to confirm or deny that an examination has been commenced.¹¹⁹ The Commissioner pointed out the challenges that arise when a senator or member makes public statements about an examination that he or she has requested, or when other allegations are made in the public domain, and these statements include misinformation.¹²⁰ According to the Commissioner, she should have an opportunity to correct the public record in cases where she does not conduct an examination or issue a report, and she should also have an opportunity to explain her reasons for not pursuing a matter raised in the public domain where no examination is launched.¹²¹ In her view,

116 Ibid., Recommendation 6-3, p. 64.

117 Ibid., Recommendation 6-4, p. 64.

118 Ibid., p. 63. Under subsection 27(5.1) of the *Conflict of Interest Code for Members of the House of Commons*:

Other than to confirm that a request for an inquiry has been received, or that a preliminary review or inquiry has commenced, or been completed, the Commissioner shall make no public comments relating to any preliminary review or inquiry.

119 Ibid., p. 63.

120 Ibid.

121 Ibid.

If I do not comment publicly in relation to misinformation, this could have an unfair deleterious effect on the reputation of the person who was the subject of a request or the person who requested it and my Office.¹²²

Subsection 44(5) of the Act prohibits parliamentarians from disclosing information they have brought to the attention of the Commissioner for examination. They are not to disclose it to anyone until the Commissioner has issued a report in respect of the information.

On behalf of the CBA, Mr. Giorno said that this confidentiality requirement for members is “one of the unenforceable 25 provisions. Our recommendation to make that provision enforceable would go one way toward dealing with that.”¹²³

In response to Commissioner Dawson’s recommendation that members requesting an examination be prohibited from speaking publicly before she has had an opportunity to inform the individual subject to the complaint, Ms. Morrison referred to her experience in Ontario, saying that she believes that “it is important for a commissioner to have the discretion to correct misinformation.”¹²⁴

Regarding this issue, Prof. Sossin posited that

The goal is how to make sure we’re going to get efficient, effective investigation, with efficient transparency to enhance public confidence and to avoid that kind of potential unfairness. If this just becomes another vehicle through which to express partisanship, then I think we’ve clearly lost an opportunity for accountability, which is what the public wants.¹²⁵

The Committee notes the various observations and recommendations concerning the disclosure of misinformation in connection with requests by parliamentarians for examinations and believes that, in the interest of fairness, the interests of individuals subject to examinations should be considered to the same extent as those of the parliamentarians requesting them.

122 Ibid.

123 ETHI, [Evidence](#), 1st Session, 41st Parliament, 25 February 2013, 1615 (Guy Giorno, Canadian Bar Association).

124 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 March 2013, 1605 (Lynn Morrison, Integrity Commissioner of Ontario).

125 ETHI, [Evidence](#), 1st Session, 41st Parliament, 13 February 2013, 1645 (Lorne Sossin, Osgoode Hall Law School, York University).

G. Adding administrative monetary penalties for breaches of the Act's substantive provisions

1. Administrative monetary penalties (s. 52)

Under section 52 of the Act, if the Commissioner believes on reasonable grounds that a public office holder has contravened one of the 11 provisions outlined in this section, she may impose a penalty not exceeding \$500.

As the CBA stated in its submission, “administrative monetary penalties may be imposed only for breach of the sections of the Act dealing with financial holdings.”¹²⁶

With respect to section 52, the Commissioner recommended amending it “to provide that a failure to meet the deadline for completing an annual review be subject to an administrative monetary penalty.”¹²⁷

In her submission, the Commissioner explained that this recommendation relates to Recommendation 4-20, which recommends that section 28 of the Act be amended to establish a deadline for the completion of the annual review process. She posited that failure to meet this new obligation should be subject to an administrative monetary penalty.¹²⁸

The Commissioner also recommended amending the Act “to extend the administrative monetary penalty regime to apply during post-employment to cover failures to meet reporting deadlines.”¹²⁹ In her view, section 52 should be amended “to provide for penalties for substantive contraventions of the Act where an examination is not warranted because it is clear that a contravention has occurred.”¹³⁰ In her submission, the Commissioner gave examples of instances where penalties could be applied, including gifts, prohibited activities, holding controlled assets and failures to recuse.¹³¹ She added that penalties relating to gifts and failures to recuse should apply to non-reporting public office holders as well as reporting public office holders.¹³²

126 Canadian Bar Association, [Statutory Review of the Conflict of Interest Act](#), February 2013, p. 15.

127 Office of the Conflict of Interest and Ethics Commissioner, [The Conflict of Interest Act: Five-Year Review](#), Submission to the Standing Committee on Access to Information, Privacy and Ethics, Recommendation 6-11, p. 69.

128 Ibid., p. 69.

129 Ibid., Recommendation 6-12, p. 69.

130 Ibid., Recommendation 6-13, p. 70.

131 Ibid., p. 70.

132 Ibid.

The Commissioner also recommended considering whether it would be desirable to impose a penalty where an examination results in the finding of a contravention.¹³³

Regarding the Commissioner's recommendations, the CBA recommended amending section 52 of the Act "to give the Commissioner the authority to impose an administrative monetary penalty for any contravention of the Act."¹³⁴ The CBA also recommended amending section 52 to increase the maximum administrative monetary penalty to \$25,000 per contravention.¹³⁵

The CBA's submission noted that the administrative monetary penalties which the Commissioner should be given authority to impose for all contraventions of the Act, should be sufficiently significant:

[They] should be significant enough to have specific and general deterrent effect. Currently the maximum administrative monetary penalty is \$500. By comparison, under the *Lobbyists Registration Act* (British Columbia) and the *Lobbyists Act* (Alberta), the maximum administrative monetary penalty is \$25,000.¹³⁶

During his appearance on behalf of the CBA, Mr. Giorno told the Committee that

if public office holders are troubled by the idea of \$25,000, the alternative is to do what happens to ordinary folk; that is, they're charged, brought before a court, and fined or sent to prison. That's how the rule of law applies to everyone else in the country.¹³⁷

Democracy Watch instead recommended adding mandatory minimum fines:

Add measures that set out significant, mandatory minimum fines for violations of the Act, and for violations of the MPs Code and Senators Code, and for violations of the key new ethics rules mentioned in [Democracy Watch's] recommendations, and make the mandatory minimum penalty the loss of office and a prohibition against running for office or being appointed to any office for several years (as under the *Municipal Act* in Ontario), and other penalties equal to the maximum penalties for violating the *Lobbying Act*.¹³⁸

133 Ibid., Recommendation 6-14, p. 70.

134 Canadian Bar Association, [Statutory Review of the Conflict of Interest Act](#), February 2013, Recommendation 15, p. 16.

135 Ibid., Recommendation 16, p. 16.

136 Canadian Bar Association, [Statutory Review of the Conflict of Interest Act](#), February 2013, p. 16.

137 ETHI, [Evidence](#), 1st Session, 41st Parliament, 25 February 2013, 1605 (Guy Giorno, Canadian Bar Association).

138 Democracy Watch, [Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement, Submission to the Standing Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition](#), 5 February 2013, Recommendation 26, p. 6.

When afforded the opportunity to elaborate on her views during her second appearance before the Committee as part of the review of the Act, the Commissioner stated:

I'm much less turned on by penalties than I am by public reporting. I think I've said that before. I think what's important is the public report and the light being shed on whatever has been done wrong.

I think there is a place for administrative monetary penalties in the case of people who simply don't get their reports in on time, and it would be another mechanism to deal with contraventions where it wasn't worthwhile doing a full investigation. If somebody admitted they'd done something wrong, it would be an easy way to deal with it expeditiously.¹³⁹

2. Strengthening enforcement and penalty provisions

Several witnesses spoke about the limited enforcement options available under the Act, noting that the Act lacks teeth. Their recommendations ranged from adding stiffer monetary penalties to an array of possible sanctions. Witnesses also stated that any quasi-judicial or penalty-based system must ensure procedural fairness.

With respect to the most serious violations, Mr. Levine recommended sanctions beyond the existing limited monetary penalties.¹⁴⁰ "There could be fines," he suggested, "but I think if you leave the fines the way they are, it's not going to amount to much."¹⁴¹

Mr. Levine supported his recommendation by the fact that

In general, there are limited consequences for breaching the rules in the act. It does contain administrative monetary penalties. It also contains order powers for the commission to enforce compliance, but it does not have any specified penalties for failure to meet the key substantive rules.¹⁴²

Mr. Levine pointed out that since these rules apply to public office holders, sanctions could range from apologies to dismissal. According to him, such penalties should be up to the prime minister, not the ethics commissioner.¹⁴³ In his view,

139 ETHI, [Evidence](#), 1st Session, 41st Parliament, 18 March 2013, 1655 (Mary Dawson, Conflict of Interest and Ethics Commissioner).

140 ETHI, [Evidence](#), 1st Session, 41st Parliament, 4 February 2013, 1550 (Gregory J. Levine, As an Individual).

141 Ibid., 1615.

142 Ibid., 1550.

143 Ibid.

If you leave it at administrative monetary penalties, that trivializes the offence: “Okay, I’ll pay \$500. But I’ll influence this action over here, so who cares? It’s just the cost of doing business.” That really trivializes the act, so I don’t think you should do that.¹⁴⁴

During his appearance, Mr. Conacher recommended that the Ethics Commissioner be required to do audits and, when she finds a violation, to impose a mandatory minimum penalty.¹⁴⁵ He pointed out that

Mandatory minimum sentences are applicable for ethics violations, and they should match the penalties for lobbying violations, which are \$50,000 to \$200,000 fines.¹⁴⁶

He said that “[i]n the past 20 years, about 50 cabinet ministers have violated federal ethics rules, and only two have been penalized in any way: they were kicked out of cabinet. That’s not a great enforcement record.”¹⁴⁷

According to Prof. Sossin, “the value-based approach—of saying the remedies necessary to ensure public confidence ought to be the remedies the commissioner has at her disposal—is going to fulfil the objects of the statute much better than an attempt to itemize with exact precision the nature of which penalty ought to attach to which kind of conduct.”¹⁴⁸

In its submission, the CBA recommended considering amending the Act to give the Commissioner

wider discretion to relieve against a rule or standard in the Act, on such conditions and for such duration as the Commissioner determines, provided that to provide the relief would be reasonable, fair, in the public interest, likely to maintain public confidence in the integrity of federal public office, consistent with any previous guidance given by the Commissioner, and consistent with the purposes of the Act.¹⁴⁹

The CBA also recommended a set of criteria that the Commissioner would have to consider when exercising discretion to waive the application of any rule of the Act.¹⁵⁰ According to the CBA, “[i]ack of enforcement under the current statutory scheme bodes poorly for the rule of law.”¹⁵¹ In its submission, the CBA added that the rules of conduct

144 Ibid., 1555.

145 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 February 2013, 1540 (Duff Conacher, Democracy Watch and Government Ethics Coalition).

146 Ibid.

147 Ibid., 1535.

148 ETHI, [Evidence](#), 1st Session, 41st Parliament, 13 February 2013, 1635 (Lorne Sossin, Osgoode Hall Law School, York University).

149 Canadian Bar Association, [Statutory Review of the Conflict of Interest Act](#), February 2013, Recommendation 2, p. 6.

150 Ibid., p. 5.

151 Ibid., p. 15.

established by the Act must be seen to be actually enforced; otherwise the law is liable to fall into disrepute.¹⁵² According to the CBA,

It might be argued that non-compliance with the Act is best dealt with as a political matter, and is not suited to the imposition of monetary penalties. On the contrary, once Parliament has decided to make laws proscribing or mandating certain conduct, fairness demands that its laws be enforced without favour to any particular group. It is neither just nor compatible with the rule of law that federal legislation of general application is enforced by prosecution and penalty, while contravention of a statute applying to government officials remains unenforceable.¹⁵³

During his appearance before the Committee on behalf of the CBA, Mr. Giorno suggested that the most significant shortcoming of the Act was that it lacks teeth.¹⁵⁴

The act contains 44 rules, 19 positive obligations or duties, and 25 prohibitions. The prohibitions and one-third of the duties are unenforceable. No one can be charged for breaching a prohibition under this act. No one who defies a prohibition will pay a fine. Other than being named in a report to Parliament, there is no sanction for violating any of the 25 prohibitions or for breaching one-third of the duties under this act.

According to Mr. Giorno, the current regime does not respect the rule of law and results in unfairness and inequality under the law.¹⁵⁵

Laws are drafted by civil servants and passed by politicians. When civil servants draft and politicians pass laws on ordinary citizens, those laws include penalties. When civil servants drafted and politicians passed the prohibitions in this law, which applies to senior civil servants and politicians and to political aides and political appointees, penalties were absent.¹⁵⁶

Mr. Giorno added that, based on his experience in Canadian law, Parliament has three sets of options in enforcing this type of legislation:

There's an administrative monetary penalty regime [...] it's newer but it's increasingly common in Canadian jurisdictions for this sort of infraction.

There's the standard offence and penalty prohibition, which provides for either a fine or a jail term. That requires charges by the police, prosecution, and fining or imposition of sentence by a judge.

152 Ibid.

153 Ibid., p. 17.

154 ETHI, [Evidence](#), 1st Session, 41st Parliament, 25 February 2013, 1530 (Guy Giorno, Canadian Bar Association).

155 Ibid.

156 Ibid.

The third sanction we see in some legislation, including some provincial legislation of this nature – very famously, the case involving the mayor of the City of Toronto – is legislation that provides the penalty of vacating a seat.¹⁵⁷

However, Prof. Dodek took a different view from the CBA and Mr. Giorno, recommending instead that the Act be amended to repeal the provisions related to administrative monetary penalties.¹⁵⁸ He maintained that the strongest sanctions the Commissioner has at her disposal are her moral authority and the power of condemnation.¹⁵⁹ He therefore recommended amending the Act to increase the powers of the Commissioner in two specific ways. First, the Commissioner should be given the power to issue a formal reprimand against a public office holder for violation of any provision in the Act.¹⁶⁰ Second, the Commissioner should be given the power to “send a copy of any decision regarding a public office holder to the minister responsible, or, in the case of a minister or a parliamentary secretary, to send a copy of any decision to the Prime Minister, and require a response from the minister or the Prime Minister as to how they propose to deal with the violation within a set period of time.”¹⁶¹

According to Prof. Dodek:

If the goal of the *Conflict of Interest Act* [...] is to foster accountability for the exercise of public power and to create an ethical environment in public office holders so that the public increases its confidence in public officials, then I think there are other ways you can do this that are more cooperative and are more positive than necessarily levying very large fines for non-compliance.¹⁶²

Ms. Turnbull questioned the concept of enforceability and accountability of the Act in the context of administrative penalties, noting:

If you’re charging someone \$200 or \$500 because they weren’t complying with the [Act], does that mean that the [Act] is enforced? Well, no. It just means that there’s a \$200 cost associated with not disclosing. I don’t think I would jump to enforceability just because there are monetary penalties in place.¹⁶³

In response, Commissioner Dawson noted that it was a matter for Parliament to decide whether in fact the regime she administers lends itself to significant penalties “or whether that should be left to the government or somebody else to impose or to have

157 Ibid., 1645.

158 ETHI, [Evidence](#), 1st Session, 41st Parliament, 18 March 2013, 1555 (Adam Dodek, University of Ottawa).

159 Ibid.

160 Ibid.

161 Ibid.

162 Ibid., 1535.

163 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 February 2013, 1605 (Lori Turnbull, Dalhousie University).

the results.”¹⁶⁴ In her second appearance before the Committee, Commissioner Dawson weighed in on the nature of the penalties in question:

The other issue is that it would become a different system, I think, if there were serious big penalties. It would become a criminal offence probably, and there’s a question as to whether that belongs in the type of office that I now have.

In the context of the act that I’m now administering, I don’t think penalties are necessary with the contraventions.¹⁶⁵

For his part, Joe Wild, a representative of the Privy Council Office, testified that the administrative monetary penalty regime is set up to ensure that public office holders disclose and file their public declarations on time, not to punish the actual substantive breaches of the Act.¹⁶⁶ According to him, the Act is intended to work as a name-and-shame kind of regime as the greatest threat to an offender is reputational damage.¹⁶⁷ He also pointed out the role of the Prime Minister and his “political accountability for the conduct of the ministry as well as those appointees for whom he is responsible.”¹⁶⁸

Mr. Fraser shared his experience with the Committee regarding the administrative penalty regime in place in British Columbia:

Insofar as punishment is concerned, the commissioner, after making his determination, can make recommendations to the legislature of British Columbia for penalty. The commissioner cannot impose a fine or impose any other penalty himself. Only the legislature can do that, and the legislature can choose to ignore what the commissioner’s recommendations are. If, however, the commissioner’s recommendations are accepted, then there is the imposition of sanctions. The legislature cannot impose any punishment that has not been recommended by the commissioner, so it must choose an either/or kind of situation.¹⁶⁹

The Committee notes the various observations and recommendations that were made regarding the Act’s limited enforcement options and the possibility of providing harsher penalties to give the Act more teeth. The Committee believes it is important to look at the various options that have been proposed to ensure the Act is enforced while at the same time recognizing the importance of ensuring procedural fairness should the Act be amended to provide for more significant penalties.

164 ETHI, [Evidence](#), 1st Session, 41st Parliament, 11 February 2013, 1600 (Mary Dawson, Conflict of Interest and Ethics Commissioner).

165 ETHI, [Evidence](#), 1st Session, 41st Parliament, 18 March 2013, 1655 (Mary Dawson, Conflict of Interest and Ethics Commissioner).

166 ETHI, [Evidence](#), 1st Session, 41st Parliament, 13 February 2013, 1550 (Joe Wild, Privy Council Office).

167 Ibid.

168 Ibid.

169 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 March 2013, 1620 (Paul D.K. Fraser, Conflict of Interest Commissioner of British Columbia).

H. Harmonizing the Act and the Code

In her submission, the Commissioner recommended that the government take steps to “harmonize the *Conflict of Interest Act* and the *Conflict of Interest Code for Members of the House of Commons* to provide consistency in their language and processes, where appropriate.”¹⁷⁰

According to the Commissioner, “the existence of two very similar but distinct regimes has created some confusion generally and the differences between the two regimes can result in a lack of clarity specifically for those individuals subject to both.”¹⁷¹

The only reason Ms. Turnbull could posit for the merger proposed by Commissioner Dawson is to once and for all reconcile the conflict when one person wears two hats.¹⁷² According to Ms. Turnbull:

If we were to do that, it would only be worth it if we had an actual conversation about what that means, not just to consolidate the rules, but to actually figure out the complexity of being both a minister and an MP at the same time, and how you can ethically act on behalf of your constituents as an MP when you also have the responsibilities and the power and authority that comes with being a minister.¹⁷³

On behalf of the Privy Council Office, Mr. Wild pointed out to the Committee that:

To combine [the *Member’s Code* and the Act] into a single act would just raise the question of how to structure the process of reviewing that act, and how to make amendments to it, given that you would have split policy responsibilities. Part of the act would be under the policy jurisdiction of the executive branch – the government and my office – and the other part would be under the legislative branch and whatever House committee is used to review the rules for members of Parliament.¹⁷⁴

Regarding Commissioner Dawson’s recommendation to harmonize the Act and the Code, Ms. Morrison, based on her experience in Ontario, argued that it made sense and would make the rules for elected officials clearer.¹⁷⁵

As Integrity Commissioner, I have several mandates with intersecting areas of jurisdiction, with parties who interact with one another, such as elected officials and lobbyists. Having clear definitions, identical or at least similar language between

170 Office of the Conflict of Interest and Ethics Commissioner, “[The Conflict of Interest Act: Five-Year Review](#),” submission to the Standing Senate Committee on Access to Information, Privacy and Ethics, Recommendation 1-2, 30 January 2013, p. 5.

171 Ibid., p. 5.

172 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 February 2013, 1610 (Lori Turnbull, Dalhousie University).

173 Ibid.

174 ETHI, [Evidence](#), 1st Session, 41st Parliament, 13 February 2013, 1610 (Joe Wild, Privy Council Office).

175 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 March 2013, 1610 (Lynn Morrison, Integrity Commissioner of Ontario).

legislation, makes my job a lot easier. The instances where the language diverges only lead to confusion among those who are affected by the laws and rules.¹⁷⁶

The Committee notes the Commissioner's recommendation to harmonize the Act and the Code while emphasizing the importance of keeping in mind that the two regimes are distinct, one under the legislative branch and the other under the executive branch, in any harmonization effort.

I. Other possible amendments

Apart from the key themes identified by the Commissioner in her submission, the Committee believes it is also important to look at the following other possible amendments to the *Conflict of Interest Act*, which were debated during its statutory review.

1. Definitions and purpose of the Act (ss. 1 to 3)

a. Definitions (s. 2)

(i) "Apparent conflict of interest"

The expression "apparent conflict of interest" is not currently defined under the Act. The Oliphant Commission's report contains a recommendation concerning apparent conflicts of interest:

The definition of "conflict of interest" in the Act should be revised to include "apparent conflicts of interest," understood to exist if there is a reasonable perception, which a reasonably well-informed person could properly have, that a public office holder's ability to exercise an official power or perform an official duty or function will be, or must have been, affected by his or her private interest or that of a relative or friend.¹⁷⁷

In its submission, Democracy Watch echoed the Oliphant Commission's recommendation, in turn making the recommendation to "[a]dd an enforceable rule to the Act, *MPs Code* and *Senators Code* prohibiting everyone from being in an apparent or foreseeable potential conflict of interest."¹⁷⁸

In referring to the recommendation of the Oliphant Commission, Prof. Greene gave the example of British Columbia, whose conflict of interest legislation includes apparent

176 Ibid.

177 Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings between Karlheinz Schreiber and the Right Honourable Brian Mulroney, Report, [Volume 3: Policy and Consolidated Findings and Recommendations](#), 31 May 2010, Recommendation 6, p. 577.

178 Democracy Watch, [Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement, submission to the Standing Senate Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition](#), 5 February 2013, Recommendation 6, p. 3.

conflicts of interest.¹⁷⁹ He said that “[i]t simply ensures that the legislation goes a little bit further to require members to observe the highest standards.”¹⁸⁰

In his testimony before the Committee, Mr. Levine agreed:

The recommendation of the Oliphant commission that “apparent” conflict of interest be adopted and placed in the act I think is very important. I understand that there has been an argument which suggests that because perceptual language occurs in other parts of the *Conflict of Interest Act*, you need not define apparent conflict of interest. That’s not correct, I respectfully submit.¹⁸¹

Asked to explain “apparent” conflict, Prof. Greene defined it as apparent to the reasonable person informed of all the relevant facts.¹⁸² According to him, this legal concept “means that people, under the act, need to take additional precautions to ensure that the reasonable person doesn’t perceive them to be in a conflict of interest situation.”¹⁸³ Prof. Greene explained how the provision in British Columbia works:

The [B.C.] commissioner is there to advise how to avoid apparent conflicts of interest. If you get into an apparent conflict of interest, obviously the penalty wouldn’t be as great as it would be for a real conflict of interest. It is good to have that extra level. It gives the whole system more credibility.¹⁸⁴

According to Prof. Greene, including “apparent” in the definition itself would make it clearer than it would be if implied elsewhere. Members would be less likely to accidentally breach the rules if it is clarified in the definition.¹⁸⁵

Mr. Conacher argued before the Committee that a rule on apparent conflicts of interest already exists for all public servants, except the most senior people, who are covered by the Act:

This rule is in place for B.C. politicians in their act. It’s also, again, set out in the principles in the accountability guide for ministers, in the Members’ code, and in the Senators’ code. Just make it enforceable. There has to be an apparent conflict of interest standard in force.¹⁸⁶

179 ETHI, [Evidence](#), 1st Session, 41st Parliament, 4 February 2013, 1535 (Ian Greene, McLaughlin College, York University).

180 Ibid.

181 Ibid., 1545 (Gregory J. Levine, as an individual).

182 Ibid., 1605 (Ian Greene, McLaughlin College, York University).

183 Ibid.

184 Ibid.

185 Ibid., 1610.

186 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 February 2013, 1540 (Duff Conacher, Democracy Watch and the Government Ethics Coalition).

Raising the same issue in the negative, Ms. Turnbull did not see “why you wouldn’t put the appearance standard in. I don’t see the downside to doing it.”¹⁸⁷

Mr. Conacher argued the importance of having a definition of “apparent conflict of interest”:

If you have an apparent conflict of interest standard, you must either have a regulation that says what it means, or she has to issue an interpretation bulletin, or no one should go forward. It wouldn’t be fair to have an appearance standard or a potential conflict of interest standard without defining what it means, because so many situations are there.¹⁸⁸

According to Prof. Sossin, actual conflicts of interest are remarkably difficult to establish in many cases, whereas the perception is often much clearer.¹⁸⁹ In his opinion:

Increasingly, what people are concerned with is not entering into a course of action that’s going to give rise, in a reasonable observer, to the perception of a conflict. That’s certainly a legal standard well known in administrative law around decision-making. Increasingly, [...] the tendency is to embrace that idea of perception being as potentially damaging as the actual conflict.¹⁹⁰

Prof. Sossin noted that considerable jurisprudence on this point exists through administrative law’s “reasonable apprehension of bias” test, which is used by decision makers, regulators and quasi-judicial and policy-based entities.¹⁹¹ According to him, the jurisprudence provides enough of a basis to say when, in the eyes of a reasonable person, there is the perception of a lack of impartiality:

That’s what I think the conflict of interest provisions are getting at, where there is a possibility that a private interest has undermined public confidence in the exercise of public authority. For the same reason, in that legal standard we don’t say you have to prove bias. We say it would be too onerous, too unpredictable to actually prove what’s in the heart and mind of a person. So the reasonable apprehension, the mix of that objective standard, has to be a reasonable observer’s view, not a partisan observer’s view. This is a check on its being abused.

W. Scott Thurlow of the Government Relations Institute of Canada (GRIC) noted that his organization believes that, for public office holders, the Act arguably sets the criteria and meaning for a “real” conflict of interest only.¹⁹²

187 Ibid., 1650 (Lori Turnbull, Dalhousie University).

188 Ibid., 1700 (Duff Conacher, Democracy Watch and the Government Ethics Coalition).

189 ETHI, [Evidence](#), 1st Session, 41st Parliament, 13 February 2013, 1630 (Lorne Sossin, Osgoode Hall Law School, York University).

190 Ibid.

191 Ibid., 1650.

192 ETHI, [Evidence](#), 1st Session, 41st Parliament, 4 March 2013, 1530 (W. Scott Thurlow, Government Relations Institute of Canada).

I say “arguably” because the committee has heard evidence that the test for apparent conflict of interest is implicit in the act. The Lobbyists’ Code of Conduct, on the other hand, explicitly targets both real and apparent conflicts, creating a situation where the ethical bar could be seen as higher for lobbyists than for public office holders and a situation where lobbyists can be guilty of placing a public office holder in a conflict of interest that the public office holders were never actually in.¹⁹³

This situation has led him to believe that it is important to add a definition of “apparent conflict of interest” to the Act because the more specificity given to officers of Parliament and judges in interpreting the Act, the better.¹⁹⁴

According to Mr. Fraser, the public is invested in apparent conflicts of interest. If there is a suspicion or if there is a taint of a conflict of interest, then that should be enough for an investigation.¹⁹⁵ In referring to British Columbia’s legislation, Mr. Fraser underscored the importance of ensuring that the definition of an apparent conflict of interest be very objective.¹⁹⁶ He explained that, given how broadly the wording of the definition is cast, a mere perception is not going to be nearly enough to conclude that there is a conflict of interest, but the fact that there is an appearance of a conflict of interest is enough to bring it before his office.¹⁹⁷ Mr. Fraser added that, for this kind of legislation to work, the public needs to be invested in it. That investment would be more secure if there were an apparent conflict of interest provision right in the Act.¹⁹⁸

According to Prof. Dodek, one of the purposes of the Act is to ensure public confidence in ethical government and in the fair exercise of public power.¹⁹⁹ He maintained that, if the standard is only a real conflict of interest, it will not create enough public confidence.²⁰⁰ He posited that a rule of perceived conflict of interest, or apparent conflict of interest, is needed to protect public confidence in government.²⁰¹

However, Commissioner Dawson sounded a word of caution on this issue. According to the Commissioner, “You can’t just stick words into an act because somebody

193 Ibid.

194 Ibid., 1555.

195 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 March 2013, 1640 (Paul D.K. Fraser, Conflict of Interest Commissioner of British Columbia).

196 Ibid.

197 Ibid.

198 Ibid., 1645.

199 ETHI, [Evidence](#), 1st Session, 41st Parliament, 18 March 2013, 1625 (Adam Dodek, University of Ottawa).

200 Ibid.

201 Ibid.

else has them in there. You have to look at the provision you're sticking them into and whether it's really necessary."²⁰² She added:

I don't really care if you put an extra provision in there on apparent conflict of interest, because I think it's covered. But it will create some confusion in those sections where the "apparent" is very obviously covered, and it's building on that concept of conflict of interest.

All I'm saying is that if you put in an amendment to add "apparent", you'd better take a look at all the sections it's going to affect and make sure it makes sense.

I don't think it's necessary, but I'm not militant against it.²⁰³

Mr. Fraser said that he agreed with Commissioner Dawson when she said that the Act already contains provisions that implicitly include apparent conflicts of interest.²⁰⁴ However, he noted that, "I do think, though, that for more than public relations purposes, but in order to protect the integrity of our modern legislation, it's better to have it in there."²⁰⁵

(ii) "Conflict of interest"

Currently, there is no definition of "conflict of interest" in the definitions section of the Act. However, section 4 of the Act establishes that:

For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.

In her submission, the Commissioner recommended amending the Act to add a definition of "conflict of interest" in section 2 based on the wording of the current section 4.²⁰⁶

Building on this recommendation, the Commissioner also recommended adding to the Act a new general section 4 that "would prohibit public office holders from exercising

202 ETHI, [Evidence](#), 1st Session, 41st Parliament, 11 February 2013, 1610 (Mary Dawson, Conflict of Interest and Ethics Commissioner).

203 Ibid.. See also: ETHI, [Evidence](#), 1st Session, 41st Parliament, 18 March 2013, 1640 (Mary Dawson, Conflict of Interest and Ethics Commissioner).

204 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 March 2013, 1645 (Paul D.K. Fraser, Conflict of Interest Commissioner of British Columbia).

205 Ibid.

206 Office of the Conflict of Interest and Ethics Commissioner, "[The Conflict of Interest Act: Five-Year Review](#)," submission to the Standing Senate Committee on Access to Information, Privacy and Ethics, 30 January 2013, Recommendation 2-2, p. 8.

an official power, duty or function if they know or reasonably should know that they would be in a conflict of interest.”²⁰⁷

In her submission, the Commissioner explained her reasoning for these recommendations:

The location of section 4, in Part 1, under the heading “Conflict of Interest Rules,” has been the source of some confusion. I have received a number of requests to investigate individuals on the basis of an alleged contravention of section 4 alone. There can be no such contravention because section 4 contains no substantive rule of conduct. [...] For this reason, the content of section 4 would be more appropriately placed in section 2, the definition section.²⁰⁸

Moreover, the Commissioner recommended that the definition of “conflict of interest” be “expanded to cover ‘entities’ as well as ‘persons’ as follows: ‘or to improperly further the private interest of another person or entity’.”²⁰⁹

According to the Commissioner, “[i]ncluding entities would eliminate a loophole that has become evident in applying the Act. The use of the term ‘entity’ in the Act would also serve to harmonize the wording of the Act with similar provisions found in the Members’ Code.”²¹⁰

The Democracy Watch submission contained a similar recommendation to “expand the definition of ‘conflict of interest’ in the Act, the Members’ Code and the Senators’ Code to include a prohibition on anyone from acting when they could further the interest of any type of ‘entity’.”²¹¹

(iii) “Employment”

No definition of “employment” currently exists in the Act. Prof. Greene²¹² and Mr. Levine²¹³ both suggested looking at the Oliphant Commission’s proposed definition of “employment.” The Oliphant Commission recommended the following definition:

207 Ibid., Recommendation 3-1, p. 19.

208 Ibid., p. 8.

209 Ibid., Recommendation 2-3, p. 9.

210 Ibid., p. 9.

211 Democracy Watch, [*Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement, submission to the Standing Senate Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition*](#), 5 February 2013, Recommendation 11, p. 4.

212 ETHI, [*Evidence*](#), 1st Session, 41st Parliament, 4 February 2013, 1535 (Ian Greene, McLaughlin College, York University).

213 Ibid., 1550 (Gregory J. Levine, as an individual).

[E]mployment shall mean, for the purposes of sections 10, 24(1), 24(2), 35(1), and 39(3)(b), any form of outside employment or business relationship involving the provision of services by the public office holder, reporting public office holder, or former reporting public office holder, as the case may be, including, but not limited to, services as an officer, director, employee, agent, lawyer, consultant, contractor, partner, or trustee.²¹⁴

(iv) “Private interest”

Currently, the definition of “private interest” in the Act excludes “an interest in a decision or matter (a) that is of general application; (b) that affects the public office holder as one of a broad class of persons; or (c) that concerns the remuneration or benefits received by virtue of being a public office holder.”

During his appearance before the Committee, Mr. Conacher noted the following:

This loophole which the Ethics Commissioner does not address means that the act doesn’t apply to 99% of what all of you do, which makes it pretty useless. It’s almost impossible to be in a conflict of interest. The finance minister can own \$1 million in shares in every bank and still make the changes to the Bank Act because you cannot be in a conflict of interest when you’re dealing with a matter of general application. If that loophole is not eliminated, it doesn’t really matter what else you do in terms of the conflict of interest rules.²¹⁵

In its submission, Democracy Watch made the following recommendation:

Delete the “general application” and “broad class of persons” loopholes in the definition of “private interest” in section 2 of the Act and subsection 3(2) of the Members’ Code and subsection 11(1) of the Senators’ Code.²¹⁶

Furthermore, another Democracy Watch recommendation proposed to “expand the definition of ‘private interest’ in the Act and the MPs Code and Senators Code to include political interests (such as fundraising and campaign activities).”²¹⁷

In comparing “private interest,” which is found in section 4 of the Act, with “special interest,” Prof. Boisvert argued that:

It should be very clear that special interests go well beyond the direct interest of the public office holder and their family. We see in the legislation that the scope is basically

214 Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings between Karlheinz Schreiber and the Right Honourable Brian Mulroney, Report, [Volume 3: Policy and Consolidated Findings and Recommendations](#), 31 May 2010, Recommendation 5, p. 577.

215 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 February 2013, 1555 (Duff Conacher, Democracy Watch and the Government Ethics Coalition).

216 Democracy Watch, [Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement. submission to the Standing Senate Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition](#), 5 February 2013, Recommendation 7, p. 3.

217 Ibid., Recommendation 9, p. 4.

fairly limited. That gives rise to a considerable problem. Special interests can be completely outside the public office holder's private sphere. This aspect requires some serious thought.²¹⁸

(v) "Public Office Holder"

As previously mentioned, the Act applies only to "public office holders".

With respect to this definition, the Commissioner recommended that "the Act be amended to list the agents of Parliament who are intended to be included in or excluded from the application of the Act."²¹⁹ The Commissioner explained her reasoning as follows:

There is another group of officers, appointed under various other Acts, who are sometimes referred to as officers of Parliament and sometimes as agents of Parliament. The Privy Council Office has traditionally referred to them as agents. This group includes the Auditor General of Canada, the Chief Electoral Officer, the Commissioner of Official Languages, the Information Commissioner, the Privacy Commissioner, the Commissioner of Lobbying and the Public Sector Integrity Commissioner. The precursor codes to the *Conflict of Interest Act* were applied to them. I have therefore continued to apply the Act to them. If it is intended that some or all of them not be covered by the Act, the Act should expressly provide an exception.²²⁰

The Commissioner also recommended that "the definition 'public office holder' be broadened to include all individuals whose appointments are approved by the Governor in Council."²²¹ The Commissioner explained that:

There are a number of individuals, including, for example, some directors of museums and the Governor of the Bank of Canada, whose appointments, as set out in the relevant legislation, only require approval by the Governor in Council. In these instances, the individuals are appointed by their organization. While the Act does not apply to them, in almost all cases individuals falling into this category have agreed to comply voluntarily with its provisions. Their exclusion appears to have been an oversight and they should be expressly made subject to the Act.²²²

This recommendation was supported by the CBA. In its submission, the CBA made the following recommendation:

218 ETHI, [Evidence](#), 1st Session, 41st Parliament, 25 February 2013, 1535 (Yves Boisvert, École nationale d'administration publique).

219 Office of the Conflict of Interest and Ethics Commissioner, "[The Conflict of Interest Act: Five-Year Review](#)," submission to the Standing Senate Committee on Access to Information, Privacy and Ethics, 30 January 2013, Recommendation 2-6, p. 14.

220 Ibid., p. 13.

221 Ibid., Recommendation 2-10, p. 16.

222 Ibid., p. 15–16.

[T]he definitions of “public office holder” and “reporting public office holder” should be amended to include any individual (e.g., Governor of the Bank of Canada) who is appointed to an office with the approval of the Governor in Council.²²³

Similarly, Democracy Watch’s first recommendation is to “[c]hange definitions to ensure the *Conflict of Interest Act* applies to every Cabinet appointee and all ministerial staff and advisers.²²⁴

(vi) “Reporting Public Office Holder”

As previously mentioned, reporting public office holders have more extensive obligations than non-reporting public office holders respecting a number of provisions in the Act. Such provisions relate, for example, to prohibited activities, divestiture, disclosure of gifts, disclosure of offers, and the obligation to make various declarations.

In her submission, the Commissioner noted that “there is no exception from the definition ‘reporting public office holder’ for individuals appointed by Governor in Council in an acting capacity on a temporary basis or for a short term.”²²⁵ The Commissioner explained her method for dealing with these types of cases and her proposed solution:

My Office considers the length of the acting appointment to determine the appropriate measures to be applied in these cases for the individuals to comply with the divestment and other requirements of the Act.

This situation could be addressed directly by excluding individuals appointed in an acting capacity on a temporary basis, or for a term of six months or less from the definition of “reporting public office holder.” If they were excluded in this way, they would continue to meet the definition of “public office holder”.²²⁶

With respect to this definition, the Commissioner also recommended amending the definition of “reporting public office holder” to expressly exclude interns and summer

223 Canadian Bar Association, [Statutory Review of the Conflict of Interest Act](#), February 2013, Recommendation 3, p. 7.

224 Democracy Watch, [Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement, submission to the Standing Senate Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition](#), 5 February 2013, p. 2.

225 Office of the Conflict of Interest and Ethics Commissioner, “[The Conflict of Interest Act: Five-Year Review](#),” submission to the Standing Senate Committee on Access to Information, Privacy and Ethics, 30 January 2013, p. 17. The Commissioner’s Recommendation 2-12 provides that the “definition of ‘reporting public office holder’ expressly exclude individuals appointed by Governor in Council in an acting capacity on a temporary basis for six months or less, or for a term of six months or less. They would continue to meet the definition of ‘public office holder’.”

226 *Ibid.*, p. 17.

students who are ministerial staff and have terms of less than six months.²²⁷ However, they would continue to meet the definition of “public office holder”.²²⁸

According to the Commissioner, the heightened level of obligations that apply to students and interns is unnecessary given the short term of employment and the nature of the work usually performed by these individuals.²²⁹ Furthermore, she argued, with respect to the requirement to complete their initial compliance process within 120 days, their employment does not usually extend much beyond this period.²³⁰

Similarly, the CBA recommended that “interns and summer students with terms less than six months should be excluded from the definition of ‘reporting public office holder’.”²³¹

2. Purpose of the Act (s. 3)

Currently, paragraph 3(a) of the Act establishes that the purpose of the Act is to “establish clear conflict of interest and post-employment rules for public office holders.” Mr. Wild, of the Privy Council Office, explained the substance of this provision:

As is reflected in the purpose clause, the act seeks to provide clear rules for public office holders while ensuring that these rules are not so restrictive or burdensome that they discourage experienced and competent persons from serving in public office or hinder interchange between the private and public sectors.²³²

In her submission, the Commissioner recommended amending paragraph 3(a) to reflect the overarching objective of the Act along the following lines:

3. The purpose of this Act is to:

(a) establish clear conflict of interest and post-employment rules for public office holders in order to maintain and enhance public confidence and trust in the integrity of public office holders as well as confidence in the objectivity and impartiality of the decision-making process in the government.²³³

The Commissioner explained her reasoning for the recommendation as follows:

227 Ibid., Recommendation 2-11, p. 17

228 Ibid.

229 Ibid., p. 17.

230 Ibid.

231 Canadian Bar Association, [Statutory Review of the Conflict of Interest Act](#), February 2013, Recommendation 4, p. 7.

232 ETHI, [Evidence](#), 1st Session, 41st Parliament, 13 February 2013, 1530 (Joe Wild, Privy Council Office).

233 Office of the Conflict of Interest and Ethics Commissioner, “[The Conflict of Interest Act: Five-Year Review](#),” submission to the Standing Senate Committee on Access to Information, Privacy and Ethics, 30 January 2013, Recommendation 2-1, p. 7.

Both the precursor of the Act, the *Conflict of Interest and Post-Employment Code for Public Office Holders (2006)*, and the *Conflict of Interest Code for Members of the House of Commons (Members' Code)* include a statement to the effect that their purpose is to enhance public trust in public office holders and confidence in their objectivity and impartiality. In order to highlight the rationale for the Act, I recommend that a similar statement be included in the Act.²³⁴

In supporting this recommendation, Mr. Levine added during his appearance that it would be useful to have a preamble that clearly states the need for ethical behaviour in government and the aspirations to which the Act applies.²³⁵ According to him:

[t]he act deals with much more than conflict of interest. It's called the Conflict of Interest Act, but it deals with behaviours that are beyond conflict of interest: influence of office, misuse of insider information, inappropriate acceptance of gifts, and so on. Conflict of interest, classically defined, is about an opportunity, a potentiality, that is the opportunity or potential to make a decision in one's public role that will further one's private interests.

The act describes ways of avoiding that and so on, but other things, such as improperly influencing an action, for instance, are well beyond conflict of interest. It's misbehaviour.²³⁶

3. Prohibition on fundraising (s. 16)

Section 16 of the Act officially prohibits public office holders from personally soliciting "funds from any person or organization if it would place the public office holder in a conflict of interest." With respect to this section, the Commissioner explained in her submission that:

All public office holders, including ministers and parliamentary secretaries, may personally solicit funds if the activity does not place them in a conflict of interest. However, the potential for a conflict of interest is higher for a minister or a parliamentary secretary than for other public office holders [...] I note that the guide administered by the Privy Council Office, *Accountable Government: A Guide for Ministers and Ministers of State 2011*, can be helpful for Ministers and Ministers of state with respect to political fundraising, but it does not prohibit them from undertaking this activity.²³⁷

The Commissioner therefore recommended that "a more stringent rule with respect to fundraising than the current one in section 16 be established for ministers and parliamentary secretaries."²³⁸

234 Ibid., p. 7.

235 ETHI, [Evidence](#), 1st Session, 41st Parliament, 4 February 2013, 1545 (Gregory J. Levine, as an individual).

236 Ibid.

237 Office of the Conflict of Interest and Ethics Commissioner, "[The Conflict of Interest Act: Five-Year Review](#)," submission to the Standing Senate Committee on Access to Information, Privacy and Ethics, 30 January 2013, p. 30.

238 Ibid., Recommendation 3-10, p. 30.

In her appearance before the Committee, the Commissioner noted that, while she did not put a specific recommendation in for more stringent rules, like those in *Accountable Government: A Guide for Ministers and Ministers of State*, she does not oppose the idea of prohibiting a minister from fundraising.²³⁹ She also raised the possibility of establishing rules on not accepting fundraising from lobbyists or certain kinds of lobbyists in order to broaden the scope of such an initiative.²⁴⁰

Respecting *Accountable Government: A Guide for Ministers and Ministers of State*, Mr. Wild said that the document expresses the Prime Minister's expectations of his ministers.²⁴¹ He added, "It's ultimately the Prime Minister who judges whether or not conduct is sufficient under those parameters for a minister to continue or not in the position they are in."²⁴²

In its submission, the CBA made the following recommendation regarding *Accountable Government: A Guide for Ministers and Ministers of State*:

the Act should be amended to incorporate the political fundraising rules in Annex B of *Accountable Government*, "Fundraising and Dealing with Lobbyists: Best Practices for Ministers, Ministers of State and Parliamentary Secretaries".²⁴³

The CBA explained its recommendation as follows:

The Commissioner recommends that the Act be amended to impose more stringent rules on fundraising by Ministers and Parliamentary Secretaries, though she does not specify what this might entail. The obvious answer is to rely on the fundraising rules in Annex B of *Accountable Government*.

While very detailed, the fundraising rules in *Accountable Government* do not have the force of law. They are guidelines that cannot be legally enforced. The CBA Section recommends strengthening the rules and making them enforceable by including them in the *Conflict of Interest Act*.²⁴⁴

In this respect, Democracy Watch recommended that the government:

239 ETHI, [Evidence](#), 1st Session, 41st Parliament, 11 February 2013, 1610 (Mary Dawson, Conflict of Interest and Ethics Commissioner).

240 Ibid.

241 ETHI, [Evidence](#), 1st Session, 41st Parliament, 13 February 2013, 1600 (Joe Wild, Privy Council Office).

242 Ibid.

243 Canadian Bar Association, [Statutory Review of the Conflict of Interest Act](#), February 2013, Recommendation 6, p. 10.

244 Ibid., p. 10.

Add to the Act, Members' Code and Senators' Code all seven of the Best Practices listed under "Annex B: Fundraising and Dealing with Lobbyists" of the *Accountability Guide*, and require everyone covered by the Act and the codes to comply with those rules.²⁴⁵

In her second appearance before the Committee on the review of the Act, the Commissioner made the following remarks regarding the recommendations of other witnesses concerning section 16:

The act allows all public office holders, including ministers and parliamentary secretaries, to personally solicit funds if the activity does not place them in a conflict of interest. I have noted my concern about the potential for current and future conflicts of interest when ministers and parliamentary secretaries engage in fundraising, and I have recommended stronger rules in this area. It has been suggested that an absolute prohibition might be

245 Democracy Watch, [*Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement, submission to the Standing Senate Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition*](#), Recommendation 10, 5 February 2013, p. 4.

The seven best practices in Annex B of the Accountability Guide are:

1. Ministers, Ministers of State and Parliamentary Secretaries should not seek to have departmental stakeholders included on fundraising or campaign teams or on the boards of electoral district associations.
2. Ministers, Ministers of State and Parliamentary Secretaries should establish and maintain appropriate safeguards to ensure that lists and contact or other identifying information of departmental stakeholders are not provided to those engaged in fundraising activities.
3. Ministers, Ministers of State and Parliamentary Secretaries should ensure that government facilities and equipment, including ministerial or departmental letterhead, are not used for or in connection with fundraising activities.
4. Ministers, Ministers of State and Parliamentary Secretaries should ensure that the solicitation of political contributions on their behalf does not target:
 - (i) departmental stakeholders, or
 - (ii) other lobbyists and employees of lobbying firms.

Note that this is not intended to restrict general fundraising appeals made to a broad group of supporters or potential supporters.

5. Ministers, Ministers of State, Parliamentary Secretaries and their staff should not discuss departmental business at any fundraising event, and should refer any person who wishes to discuss departmental business to make an appointment with the Minister's office or department as appropriate.
6. Ministers, Ministers of State and Parliamentary Secretaries should ensure that fundraising communications issued on their behalf do not suggest any connection between fundraising and official government business.
7. Ministers, Ministers of State, Parliamentary Secretaries and their staff should exercise caution in meeting with consultant lobbyists, and should give particular consideration to whether it is appropriate to meet a consultant lobbyist in the absence of the lobbyist's client.

See: Prime Minister of Canada, [*Accountable Government: A Guide for Ministers and Ministers of State, 2011*](#), p. 26–27.

appropriate for ministers and parliamentary secretaries. I would be comfortable with that. I would not recommend any change to section 16 for other public office holders.²⁴⁶

4. Duty of recusal (s. 21)

According to the Act, section 21 provides that all public office holders must recuse themselves from “any discussion, decision, debate or vote on any matter in respect of which [they] would be in a conflict of interest.” In her submission, the Commissioner recommended amending section 21 to “provide expressly for the establishment of conflict of interest screens by public office holders in consultation with the Commissioner where a conflict of interest could very likely arise.”²⁴⁷

In her submission, the Commissioner explained how she has set up the practice of establishing conflict of interest screens:

Very few recusals have been reported. There are a number of mechanisms in the Act that reduce the need for recusals, such as divestment of assets under section 27 and the prohibitions relating to outside activities in section 15. In addition, my Office has arranged for public office holders to set up conflict of interest screens to avoid situations where a conflict of interest could very likely arise. This is done in collaboration with public office holders under the authority of section 29 [...] I recommend that section 21 be amended to add a subsection that would reflect the practice of establishing conflict of interest screens where a public office holder foresees that future recusals may likely be necessary in order to avoid a conflict of interest.²⁴⁸

Conversely, Democracy Watch proposed the following:

Do not, as the Ethics Commissioner recommends make the illegal “conflict of interest screens” that the Ethics Commissioner has created legal under the Act. Such screens are clearly illegal under the Act, and the Ethics Commissioner’s use of them hides the number of times those covered by the Act recuse themselves from decision-making processes, and this information is very important to ensure these people are complying with the Act.²⁴⁹

In his appearance before the Committee, Mr. Conacher argued that “what [the Ethics Commissioner] is doing with public office holders is saying, ‘Tell me the area in which you’re in a conflict, and then we’ll set up a screen and you will not have to disclose

246 ETHI, [Evidence](#), 1st Session, 41st Parliament, 18 March 2013, 1635 (Mary Dawson, Conflict of Interest and Ethics Commissioner).

247 Office of the Conflict of Interest and Ethics Commissioner, “[The Conflict of Interest Act: Five-Year Review](#),” submission to the Standing Senate Committee on Access to Information, Privacy and Ethics, 30 January 2013, Recommendation 4-5, p. 36.

248 Ibid., p. 35–36.

249 Democracy Watch, [Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the Conflict of Interest Act, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement, submission to the Standing Senate Committee on Access to Information, Privacy and Ethics by Democracy Watch and the Government Ethics Coalition](#), 5 February 2013, Recommendation 25, p. 6.

your recusals for every decision-making process that you recuse yourself from.’ She’s saying the screen means that you don’t have to disclose recusals, but the act says that recusals have to be disclosed. The screen is not anywhere in the act. It’s not legal. I think it’s an illegal scheme that’s hiding recusals.”²⁵⁰

5. Complaints initiated by members of the public

The Act does not currently allow for members of the public to make a request for examination to the Commissioner. Mr Levine recommended amending the Act to add this possibility:

it is important for the public to have a means of seeking redress about the behaviour of public office holders. I don’t know why it wouldn’t be. The public has the greatest interest in what our representatives do and what our public service does. I can’t think of a good reason why the public ought not to be able to. I do understand that people will talk about vexatious complaints and trivial and frivolous complaints. I think you can create a mechanism to deal with those.²⁵¹

Asked to comment on this recommendation during her appearance, the Commissioner told the Committee:

I don’t think it’s necessary. I think if that provision were in the act, probably it would encourage a lot more spurious complaints, just because there are certain people who are sending in complaints to deal with. I wouldn’t recommend it, but again, I think I’m accomplishing it in the way we’re administering the act.²⁵²

The Commissioner assured the Committee that whether or not public complaints were in the Act, she would look into them as carefully, in the same way, as she does now.²⁵³ She added:

I don’t think practically there would be a difference; I just think we’d get more. We’d get more because there would be an encouragement to put more complaints in.

But you know, I wouldn’t be devastated at all if the public complaints went in there. That’s not a problem for me. I think that effectively we’re doing that now because of the self-initiation power, but again, if Parliament felt they wanted to put that in, that’s fine.²⁵⁴

Prof. Sossin adopted a nuanced approach by suggesting the following:

250 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 February 2013, 1555 (Duff Conacher, Democracy Watch and the Government Ethics Coalition).

251 ETHI, [Evidence](#), 1st Session, 41st Parliament, 4 February 2013, 1640 (Gregory J. Levine, as an individual).

252 ETHI, [Evidence](#), 1st Session, 41st Parliament, 11 February 2013, 1610 (Mary Dawson, Conflict of Interest and Ethics Commissioner).

253 Ibid., 1625.

254 ETHI, [Evidence](#), 1st Session, 41st Parliament, 11 February 2013, 1625 (Mary Dawson, Conflict of Interest and Ethics Commissioner).

[...] a model in which there is an opportunity to welcome complaints from others, but also a screening mechanism such that the commissioner can decide which ones are meritorious and not necessarily have to investigate every one, or everyone in the same way, would be a middle ground or a balance.

If you're looking at it from the standpoint of the purposes of the act, I can't think of a principled reason that you wouldn't want to hear concerns from citizens or other interested parties. At the same time, if you opened it up without any constraints, you would undermine those very goals.²⁵⁵

In his appearance, Mr. Fraser explained to the Committee how he handles complaints from the public as the Conflict of Interest Commissioner of British Columbia:

In terms of processing complaints when they do come in, there's a threshold of whether or not there are reasonable and probable grounds to take the matter forward. That's the first filter, if you like.

Many of the complaints from the public don't pass that hurdle, but the vast majority of complaints that I handle are from the public.²⁵⁶

Prof. Dodek agreed with the idea of to give members of the public a right to file a complaint concerning an action done by a public office holder, as long as the Commissioner considers that the complaint meets reasonable criteria.²⁵⁷

Ultimately, we are talking about the public interest and public trust in the government's sense of ethics [...] There has to be a criterion that the complaint must be a reasonable one if the commissioner is to accept a complaint from a citizen.²⁵⁸

The Committee takes note of the observations and recommendations that suggest the need to clarify the mechanism by which the public can initiate a complaint regarding the behaviour of public office holders under the Act, while stressing the importance of allowing the Commissioner to reject complaints based on a reasonableness criterion.

6. Harmonization with the *Lobbying Act*

The *Conflict of Interest Act* and the *Lobbying Act* were both created by the *Federal Accountability Act, 2006*, and overlap in certain instances, resulting in debate as to how to harmonize the two acts.

255 ETHI, [Evidence](#), 1st Session, 41st Parliament, 13 February 2013, 1710 (Lorne Sossin, Osgoode Hall Law School, York University).

256 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 March 2013, 1625 (Paul D.K. Fraser, Conflict of Interest Commissioner of British Columbia).

257 ETHI, [Evidence](#), 1st Session, 41st Parliament, 18 March 2013, 1615 (Adam Dodek, University of Ottawa).

258 Ibid.

In this respect, Mr. Patrick, on behalf of GRIC, proposed the following three recommendations to the Committee:

First, the standard for determining whether a lobbyist has placed a public office holder in a conflict of interest should be the same as the standard for determining whether a public office holder was placed in a conflict of interest by a lobbyist.

Second, the rules on what types of gifts a lobbyist can offer a public office holder should be the same as the rules on what types of gifts a public office holder can accept from a lobbyist.

Third, post-employment restrictions on public office holders should be streamlined. They should be administered and interpreted by a single authority—in our view, the Conflict of Interest and Ethics Commissioner.²⁵⁹

Similarly, the CBA recommended in its submission that post-employment restrictions on former public office holders should be consistently interpreted and administered by a single authority.²⁶⁰

In his appearance, Mr. Conacher made the following suggestion to the Committee:

There should be a sliding scale, applying to everyone and depending upon their power and their potential conflicts, that prohibits lobbying of any kind, whether it's registered lobbying or not, for one to five years after they leave office. It should slide up and down depending upon the power of the person when they leave office.²⁶¹

In response, Commissioner Dawson made the following comments to the Committee:

It has been suggested that the cooling-off period be structured on a sliding scale according to various criteria. I do not see the need for such an amendment. There's already a one-year and two-year distinction, and I also have the discretion to reduce the cooling-off period when it's in the public interest to do so.²⁶²

According to Mr. Patrick, "The standard should be the same under both acts, whether the test is for 'real', 'apparent' or 'potential' conflicts of interest. No one should

259 ETHI, [Evidence](#), 1st Session, 41st Parliament, 4 March 2013, 1530 (Jim Patrick, Government Relations Institute of Canada).

260 Canadian Bar Association, [Statutory Review of the Conflict of Interest Act](#), February 2013, Recommendation 18, p. 18.

261 ETHI, [Evidence](#), 1st Session, 41st Parliament, 6 February 2013, 1540 (Duff Conacher, Democracy Watch and the Government Ethics Coalition). Democracy Watch's Recommendation 19 is similar.

262 ETHI, [Evidence](#), 1st Session, 41st Parliament, 18 March 2013, 1635 (Mary Dawson, Conflict of Interest and Ethics Commissioner)

ever be found to have placed a public office holder in a conflict of interest that the public office holder was never in.”²⁶³

Taking a cautious approach, Mr. Thurlow testified, on behalf of GRIC, that

GRIC takes no position whatsoever at this time on what the definitions under the Lobbying Act should be when it comes to the value and nature of gifts that lobbyists can offer to public office holders. But we strongly recommend that you take the opportunity to ensure that the Conflict of Interest Act reflects the same definitions on the value, and nature, and acceptability of gifts that public office holders can accept from lobbyists, to avoid any confusion and conflict between the two statutes.²⁶⁴

In her appearance before the Committee, the Commissioner of Lobbying, Karen E. Shepherd, pointed out the differences between the *Conflict of Interest Act* and the *Lobbying Act*, particularly with respect to post-employment regimes. Ms. Shepherd explained that the *Lobbying Act* considers certain public servants as designated public office holders, while the *Conflict of Interest Act* does not apply to them.²⁶⁵ She also explained that all members of the House of Commons and Senators are designated public office holders but the *Conflict of Interest Act* does not apply to them unless they are ministers, ministers of state or parliamentary secretaries.²⁶⁶

These differences regarding who is covered by each piece of legislation are a source of confusion for public office holders. This is especially true when it comes to determining which post-employment prohibitions one is subject to.

Under the Conflict of Interest Act, reporting public office holders are subject to a one- or two-year prohibition on certain activities, which may include lobbying activities. The Lobbying Act prohibits designated public office holders from working as lobbyists, except under certain circumstances, for a period of five years. This can be confusing for individuals who are subject to both acts.

It is essential to make it clear to former public office holders that there are two different post-employment regimes, so they do not find themselves in breach of one of them.²⁶⁷

The Committee takes note of the observations and recommendations pertaining to the harmonization of the *Conflict of Interest Act* with the *Lobbying Act* and considers that they should be evaluated in light of the Committee’s recommendations stemming from its statutory review of the *Lobbying Act*.

263 ETHI, [Evidence](#), 1st Session, 41st Parliament, 4 March 2013, 1535 (Jim Patrick, Government Relations Institute of Canada).

264 Ibid. (W. Scott Thurlow, Government Relations Institute of Canada).

265 ETHI, [Evidence](#), 1st Session, 41st Parliament, 4 March 2013, 1630 (Karen Shepherd, Commissioner of Lobbying of Canada).

266 Ibid.

267 Ibid.

RECOMMENDATIONS OF THE COMMITTEE

In light of all the observations and recommendations made by witnesses and stakeholders during its statutory review, the Committee calls on the government to amend the *Conflict of Interest Act*, and any other necessary Acts of Parliament, in the manner detailed below.

A. Definitions

In order to minimize the need for extensive interpretation of the Act, the Committee recommends:

Recommendation 1

That the definition of “public office holder” be changed to include:

- Members of organizations that collectively bargain with the Government of Canada; and
- Order in Council appointees that are currently overlooked (such as the Governor of the Bank of Canada).

Recommendation 2

That the definition of “reporting public office holder” be amended so that it more closely resembles the definition given to “designated public office holder” in the *Lobbying Act*.

Recommendation 3

Define, in a way that prevents arbitrary or vague rulings, what is meant

- by a public office holder’s “friend”,²⁶⁸ and,
- by a contract or employment “relationship”.²⁶⁹

Recommendation 4

Define what is meant by the term “preferential treatment”, currently found in section 7 of the Act.

268 The term “friend” appears in sections 4, 8, 9, 11(2), 23 and 25(5) of the *Conflict of Interest Act*.

269 The term contract or employment “relationship” appears in sections 14(1) to (4),

Recommendation 5

Clarify what is not to be considered a conflict of interest in terms of the expected duties of public office holders.

B. Prohibited Activities

The Committee recommends that section 15 of the Act be amended as follows:

Recommendation 6

As submitted by the Office of the Conflict of Interest and Ethics Commissioner (Recommendation 3-8), “that the Commissioner be given the authority to permit reporting public office holders to engage in outside activities prohibited by subsection 15(1) where this would not be incompatible with the reporting public office holder’s public duties or obligations as a public office holder.”

Recommendation 7

That an exception be added to section 15 of the Act permitting reporting public office holders to participate in, or volunteer for, charitable organizations and events that would be seen as being compatible with his or her duties as a public office holder.

C. Administration and Enforcement of the Act

The Committee calls on the government to make the amendments below to the *Conflict of Interest Act* in order to enhance fairness and protect the rights of those public office holders who may be the subject of a request before the Conflict of Interest and Ethics Commissioner.

Recommendation 8

That the examination of a complaint remain private until a formal report is made public by the Commissioner, with the exception of the circumstances described in recommendations 12 and 13.

Recommendation 9

That the complaint filing and examination process be standardized. Section 45(1) of the Act should be considered as part of standardizing the complaint filing process.

Recommendation 10

That a section be added to the *Conflict of Interest Act* that specifies the rights of the individual public office holder who is subject to a request.

Recommendation 11

That section 66 be amended so that any order and decision of the Commissioner be subject to judicial review where there is an error in law.

Recommendation 12

That, where the Commissioner determines that a request is frivolous or vexatious or is made in bad faith under section 44(3) of the *Conflict of Interest Act*, the Commissioner be obligated to publicly disclose the identity of the member of the Senate or House of Commons that made the request.

Recommendation 13

That complaints filed by members or senators that the Commissioner does not see fit to investigate be publicly disclosed, along with the complainant's name, by the Commissioner.

D. Consistency of the Act with other related Acts and Codes

The Committee recommends that the government take the actions detailed below in order to ensure there is more consistency between the *Conflict of Interest Act* and other Acts of Parliament, conflict of interest codes and codes of ethics.

Recommendation 14

As submitted by the Office of the Conflict of Interest and Ethics Commissioner (Recommendation 6-5), "that section 68 of the Act be repealed."

Recommendation 15

That the government examine ways to harmonize the *Conflict of Interest Act* and other ethics codes governing public office holders to provide consistency in their language and processes, where appropriate.

Recommendation 16

The Committee reiterates Recommendation 1 from its statutory review of the *Lobbying Act* that "all public servants serving in a Director General's position, or serving in a more senior position than Director General, should now be considered Designated Public Office Holders

and held subject to all applicable laws governing this designation”²⁷⁰ and recommends that the *Conflict of Interest Act* be amended accordingly.

270 ETHI, [Statutory Review of the Lobbying Act: Its First Five Years](#), Third Report, 1st Session, 41st Parliament, May 2012.

APPENDIX A

LIST OF WITNESSES

41st PARLIAMENT, FIRST SESSION

Organizations and Individuals	Date	Meeting
Office of the Conflict of Interest and Ethics Commissioner Nancy Bélanger, General Counsel Mary Dawson, Conflict of Interest and Ethics Commissioner Lyne Robinson-Dalpe, Assistant Commissioner, Advisory and Compliance	2013/01/30	61
As an individual Gregory J. Levine, Lawyer, Ethics Consultant, Social Scientist	2013/02/04	62
York University Ian Greene, University Professor, McLaughlin College		
Dalhousie University Lori Turnbull, Associate Professor	2013/02/06	63
Democracy Watch Duff Conacher, Board Member, Chairperson, Government Ethics Coalition		
Office of the Conflict of Interest and Ethics Commissioner Nancy Bélanger, General Counsel Mary Dawson, Conflict of Interest and Ethics Commissioner Lyne Robinson-Dalpe, Assistant Commissioner, Advisory and Compliance	2013/02/11	64
Privy Council Office Joe Wild, Acting Deputy Secretary to the Cabinet, Legislation and House Planning and Machinery of Government	2013/02/13	65
York University Lorne Sossin, Dean, Osgoode Hall Law School		
Canadian Bar Association Kerri Froc, Staff Lawyer, Law Reform and Equality Guy Giorno, Executive Member	2013/02/25	66
École nationale d'administration publique Yves Boisvert, Professor		

Organizations and Individuals	Date	Meeting
Government Relations Institute of Canada Jim Patrick, President W. Scott Thurlow, Chair, Legislative Affairs Committee	2013/03/04	68
Office of the Commissioner of Lobbying Bruce Bergen, Senior Counsel Karen E. Shepherd, Commissioner of Lobbying		
Office of the Conflict of Interest of British Columbia Paul D.K. Fraser, Commissioner	2013/03/06	69
Office of the Integrity Commissioner of Ontario Lynn Morrison, Integrity Commissioner		
Office of the Conflict of Interest and Ethics Commissioner Nancy Bélanger, General Counsel Mary Dawson, Conflict of Interest and Ethics Commissioner Annie Plouffe, Manager, Advisory and Compliance	2013/03/18	70
University of Ottawa Adam Dodek, Professor, Common Law Section		
Office of the Conflict of Interest and Ethics Commissioner Nancy Bélanger, General Counsel Mary Dawson, Conflict of Interest and Ethics Commissioner Lyne Robinson-Dalpe, Assistant Commissioner, Advisory and Compliance	2013/05/06	78

No witnesses appeared before the Committee during the Second Session of the 41st Parliament

**APPENDIX B
LIST OF BRIEFS
41st PARLIAMENT, FIRST SESSION**

Organizations and Individuals

Canadian Bar Association

Democracy Watch

Green, Ian

Levine, Gregory J.

Office of the Conflict of Interest and Ethics Commissioner

No brief was received during the Second Session of the 41st Parliament

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this report.

A copy of the relevant *Minutes of Proceedings* 41st Parliament, 1st Session ([Meetings Nos. 60, 61, 62, 63, 64, 65, 66, 68, 69, 70, 71, 74, 77, 78, 83 and 85](#)) is tabled.

A copy of the relevant *Minutes of Proceedings* 41st Parliament, 2nd Session ([Meetings Nos. 5, 6, 7 and 8](#)) is tabled.

Respectfully submitted,

Pat Martin, M.P.

Chair

NDP DISSENTING REPORT ON THE STANDING COMMITTEE ON ACCESS TO INFORMATION, PRIVACY AND ETHICS' STATUTORY REVIEW OF THE CONFLICT OF INTEREST ACT

As the Official Opposition, the New Democratic Party is disappointed that the Committee missed an important opportunity to make recommendations that would strengthen Canada's Conflict of Interest Act, and ensure greater accountability for public office holders. As the Conservative government faces serious allegations, including of conflict of interest in the Prime Minister's Office and in the Senate, public confidence in the integrity of Parliament has been shaken, and measures to tighten laws to prevent corruption and penalize rule breakers are needed now more than ever.

Canadians are frustrated as they see increasing bending, breaking, and hiding from the rules in Ottawa. In response to Liberal corruption, the Conservative Party passed the Accountability Act; however, the past seven years of Conservative corruption and entitlement has only expanded and exploited the Acts many exemptions and loopholes. Given the dismal scandal rocking both the Senate and the Prime Minister's Office, Canadians are looking for Parliament to recommit to the principles of Transparency, Accountability and Punishment for those who break these rules.

During the review, the Committee received numerous important recommendations from the Ethics Commissioner and from expert witnesses, yet few of those are reflected in the Committee recommendations. Additionally, serious proposals for increased stringency detailed in the Gomery Commission into the Liberal government's sponsorship scandal, and the Oliphant Commission into former Conservative Prime Minister Brian Mulroney, were not considered. More troubling still is the fact that many of the recommendations made in the Committee's report do not reflect any of the testimony the Committee heard, or any of the briefs received, and we have to question their validity. Notably, the Committee's recommendations 1, 3, 4, 5, 7, 8, 9, 10, 12, 13, and 16 were not reflected in the evidence.

We take considerable exception to the recommendation to extend the conflict of interest act to all members of organizations that collectively bargain with the federal

government. According to the Public Service Labour Relations Board's Report on Plans and Priorities 2013-14, "The PSLRA (Public Service Labour Relations Act) covers over 244,000 federal public service employees and applies to departments named in Schedule I to the Financial Administration Act, the other portions of the core public administration named in Schedule IV and the separate agencies named in Schedule V." All of these employees are members of organizations who collectively bargain with the federal government, and most, if not all are already covered by the Treasury Board of Canada Policy on Conflict of Interest and Post-Employment.ⁱ Not only is the recommendation redundant, it would also be an enormous burden on the office of the Ethics Commissioner to have to administer an additional 244,000 public office holders.

In addition, we are concerned that the Committee's recommendation number 11, which amends the Act to ensure "any order and decision of the commissioner be subject to judicial review where there is an error in law" reflects a lack of understanding of the Act in practice. The majority of the Commissioner's reports on investigations under the current Act are non-binding, and are not able to be judicially reviewed. It is the Prime Minister's responsibility to enforce the Commissioner's recommendations. There is no similar provision in law in Canada.

In their 2006 election platform, the Conservatives promised accountable government. Among key planks of their platform, they promised to:

- Give the Ethics Commissioner the power to fine violators.
- Enshrine the Conflict of Interest Code into law.
- Allow members of the public – not just politicians – to make complaints to the Ethics Commissioner.
- Make part-time or non-remunerated ministerial advisers subject to the Ethics Code.ⁱⁱ

Unfortunately, the Conservatives failed to keep their promises. None of those provisions were included in the Accountability Act, and none of those recommendations were made in this Committee's report. The Official Opposition, however, would make these and further recommendations to amend the Act, as below:

- 1) Give the Commissioner the power to administer financial penalties and other penalties for breaches of the Act where an examination results in the finding of a contravention, including but not limited to :
 - a) Suspension for a specified periodⁱⁱⁱ
 - b) Suspension of Member's right to vote for a specified period^{iv}
 - c) Require Reimbursement of the value of the gift, hospitality or benefit received.
 - d) Impose a fine not exceeding \$ 5000^v
- 2) Enshrine Ministerial accountability guidelines into the Act: Amend section 16 of the Act to include Annex B entitled: "Fundraising and Dealing with Lobbyists: Best Practices for Ministers, Ministers of State and Parliamentary Secretaries", as follows:
 - a) Ministers, Ministers of State and Parliamentary Secretaries should not seek to have departmental stakeholders included on fundraising or campaign teams or on the boards of electoral district associations.
 - b) Ministers, Ministers of State and Parliamentary Secretaries should ensure that government facilities and equipment, including ministerial or departmental letterhead, are not used for or in connection with fundraising activities.
 - c) Ministers, Ministers of State and Parliamentary Secretaries and their staff should not discuss departmental business at any fundraising event, and should refer any person who wishes to discuss departmental business to make an appointment with the Minister's office or department as appropriate.
 - d) Ministers, Ministers of State and Parliamentary Secretaries should ensure that fundraising communications issued on their behalf do not suggest any connection between fundraising and official government business.^{vi}
- 3) Allow members of the public to bring complaints, not just MPs^{vii}
- 4) Extend the definition of "Ministerial staff" to include all work including contract and volunteer work.^{viii}
- 5) Expand the definition of Public Office Holder to include all Governor in Council appointees, including the Governor of the Bank of Canada^{ix}

- 6) Empower the Commissioner to continue investigations that have been referred to the RCMP.
- 7) Reduce the value of a gift that requires disclosure from \$200 to \$100^x
- 8) Maintain automatic divestment rules for reporting public office holders with significant decision making power or access to privileged information, including, but not limited to, Ministers, Ministers of State, Parliamentary Secretaries, Chiefs of Staff, Deputy Ministers, Ministerial staff and employees of Ministers' offices. Maintain automatic divestment for appointees to agencies and bodies with broad mandates. All other appointees should be subject to a case-by-case divestment of controlled assets.^{xi}
- 9) Define and toughen post-employment and secondary employment rules for MPs and Senators
- 10) Include an **apparent** conflict of interest in the definition of a conflict of Interest

New Democrats welcome the opportunity to strengthen the Conflict of Interest Act. We see this as an opportunity to recommit to raising ethical standards in Parliament and closing the loopholes that are currently threatening the spirit of accountability. We urge the government to consider and adopt our recommendations.

ⁱ <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25178§ion=text>

ⁱⁱ Standing Up For Canada, 2006, http://www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative_platform20060113.pdf

ⁱⁱⁱ British Columbia Members Conflict of Interest Act Part 22 (1) (d)

^{iv} Ontario Members Integrity Act, Part 34 (1) (c)

^v British Columbia Members Conflict of Interest Act Part 22 (1) (e)

^{vi} Accountable Government – A Guide for Ministers and Ministers of State – Privy Council 2011 Edition (pp.26-27)

^{vii} British Columbia Members Conflict of Interest Act Part 19 (2)

^{viii} Recommendation 2-4 The 2012-2013 ANNUAL REPORT in respect of the CONFLICT OF INTEREST ACT, June 11, 2013, <http://ciec-ccie.gc.ca/resources/Files/English/Public%20Reports/Annual%20Reports/Public%20Office%20Holders/2012-2013%20Annual%20Report%20Act.pdf>

^{ix} Ibid, Recommendation 2-10

^x Ibid, Amendment on Recommendation 4-8

^{xi} Ibid, Recommendation 3-11

Minority Report

This report is a complete farce. The reader needs only to read the text of the report and see that it does not match any of the recommendations at all. The recommendations outlined in this report are certainly not those of the committee as a whole. The government ignores all of the very credible testimony, which we heard from many sources and all the possible recommendations that were suggested. None of the recommendations contained in this report do justice to the statutory review of the Conflict of Interest Act.

If the reader of this report was interested in making meaningful changes to make the Conflict of Interest Act, then they should go back to the testimony and see recommendations of witnesses. The Conflict of Interest and Ethics Commissioner had almost 100 recommendations, many of which were reasonable suggestions. Democracy Watch, the Canadian Bar Association, and other witnesses also had some very good suggestions but they were completely ignored.

Respectfully submitted,

Scott Andrews
Vice Chair

