

Public Policy Issues and the Oliphant Commission

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Public Policy Issues and the Oliphant Commission

Independent Research Studies

Prepared for

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

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Cat. no.: CP32-92/1-2010E-PDF
ISBN 978-1-100-15637-8

Library and Archives Canada Cataloguing in Publication

Public policy issues and the Oliphant Commission : independent research studies / prepared for Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney ; Craig Forcese, director of research.

Issued also in French under title: Les questions de politiques publiques et la Commission Oliphant.
Available also on the Internet.
ISBN 978-1-100-15637-8
Cat. no.: CP32-92/1-2010E-PDF

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Foreword

Although my Terms of Reference are primarily directed toward a fact-finding mission, certain of the questions I was asked to answer require a public policy perspective. The policy issues pertain to the question of the ethical regimes governing former and current holders of high office in Canada and the adequacy of the current ethical regime. In addition, I was asked to consider how Mr. Schreiber's correspondence addressed to the prime minister was handled by the Privy Council Office and whether different procedures ought to have been adopted.

To assist me in the policy aspects of the Commission's work, I appointed Professor Craig Forcese of the Faculty of Law, University of Ottawa, as research director for the Commission. Professor Forcese worked with me and Commission counsel in establishing the Policy Review and played a key role in this part of the Inquiry's work.

Professor Forcese presents in this volume the independent studies undertaken to provide an academic and international perspective to the ethical issues involved, as well as the research into the handling of correspondence in the current electronic era. The studies were produced quite independently of me and were drafted and revised before the fact-finding portion of the Inquiry was completed. They were finalized after the hearings in the Policy Review. The studies make an important contribution to the literature on the subjects and were of great assistance to the work of the Commission.

I extend my personal thanks to Professor Forcese and the authors of the studies included in this volume.

Jeffrey J. Oliphant
Commissioner

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

Introduction

CRAIG FORCESE

The Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney was appointed to inquire into specific matters of public concern. As such, it included both a thorough fact-finding operation and specific public policy mandates. Its public policy mandate was relatively narrow. Question 14 of the Commission’s Terms of Reference asks:

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

And Questions 15 through 17 of the Commission’s Terms of Reference read:

15. What steps were taken in processing Mr. Schreiber’s correspondence to Prime Minister Harper of March 29, 2007?
16. Why was the correspondence not passed on to Prime Minister Harper?
17. Should the Privy Council Office have adopted any different procedures in this case?

Question 17 is a policy question, albeit one closely tied to the factual matters raised in Questions 15 and 16.

Of the two matters – the “ethics mandate” and the “correspondence mandate” – the ethics mandate was the broader one. Its precise contours are described in greater detail in Chapter 11 of the Commissioner’s Report. Government ethics is a topic with a rich academic literature, one that is consistently in the public eye. The correspondence mandate, in contrast, was comparatively narrow. We quickly learned that there was almost no published academic literature on government correspondence-handling practices and no scholar for whom the topic was a specialty.

In this brief introduction to the Commission’s independent research studies, I describe the process the Commission followed in pursuing its two public policy mandates. I also briefly introduce the content of the expert studies published in this volume.

PROCESS

In pursuing these policy mandates, the Commissioner had two objectives: to elicit public input and to seek the guidance of experts. To accomplish these goals, we followed the process described in “Policy Review (Part II)” at the end of Chapter 2

of the Commission's Report. Here I provide pertinent details.

First, in December 2008 we prepared and published a public consultation paper inviting public submissions on both of the public policy issues. The public consultation paper, however, sparked scant response and, by the March 2009 deadline, the Commission had received only a single substantive submission.

Second, the Commission also retained two experts to assist in assessing Canada's federal ethics rules and guidelines – Dr. Lori Turnbull, a political scientist at Dalhousie University, Halifax, and an expert in ethics codes of conduct; and Dr. Gregory J. Levine, a lawyer and ethics specialist in London, Ontario. We also retained political scientist Dr. Paul G. Thomas from the University of Manitoba to assist in assessing the Privy Council Office's correspondence practices, with an eye to comparative experience in other jurisdictions.

Each of these individuals was retained following a comprehensive literature review that I completed with the able assistance of Elizabeth Montpetit, a law student who served as my research assistant. Given the modest scope of the Commission's public policy mandate, we considered two experts on the ethics question and one on the correspondence question to be an appropriate number. In relation to the ethics question, we chose to include both a political scientist and a lawyer to ensure different professional perspectives.

All three experts prepared draft research studies, which were posted on the Commission's website in April 2009. They were also supplied to the "phase II parties" – persons who had sought and been granted standing for the policy phase of the Commission's work.

These phase II parties were determined in January 2009, following standing hearings at which prospective parties appeared. In the end, party standing was granted to the Government of Canada, Mr. Schreiber, and the organization Democracy Watch. (Mr. Mulroney did not apply for standing in the policy phase.) Parties were invited to make written submissions responding to the draft expert studies. The Government of Canada and Democracy Watch both did so. The Prime Minister's Office and Dr. Tom Flanagan, a political scientist at the University of Calgary, made separate submissions in relation to Dr. Thomas's study. All these responses were archived on the Commission's website.

Subsequently, the Commission convened an Expert Policy Forum, held in Ottawa in June and July 2009. The agenda for that forum, including a list of the participants, is found as Appendices 19 and 20 of the Commission's Report. At the June forum, four panels of experts were asked to address a series of questions pertaining to the Commission's public policy mandates, with most of the attention directed to the ethics issue. These experts included Dr. Turnbull and Dr. Levine who presented their draft studies, responded to questions, and participated as discussants in most of the panels that followed. Dr. Thomas – who in addition to writing the expert study on the

correspondence mandate is also an expert in government ethics – participated in this process as well.

A second panel of academic experts – Dr. Ian Greene from York University, Dr. Lorne Sossin, at the time from the University of Toronto, and Professor Kathleen Clark from Washington University in St. Louis, Missouri – offered their views on the matters before the Commission and in the draft expert studies, serving as a peer-review panel for these documents. These individuals were invited to appear because of their publications in the area of political ethics and conflicts of interest. Again, the Commission endeavoured to include both legal academics and social scientists on this panel. Two of the participants – Dr. Sossin and Professor Clark – are law school professors, and Dr. Greene is a political scientist. Professor Clark, the American law professor, was invited to offer a comparative law perspective on the Commission's discussions.

The forum also heard from four ethics commissioners: Mary Dawson, the federal conflict of interest and ethics commissioner; Paul D.K. Fraser, the BC conflict of interest commissioner; Lynn Morrison, the Ontario acting integrity commissioner; and Karen E. Shepherd, then the interim federal commissioner of lobbying. These individuals described their own mandates and provided practical insight into their various operations.

Finally, the Commission invited input from a panel of noted former public officials who were able to contribute practical insight into the intersection between ethics rules and the realities of public life: former prime minister the Right Honourable Joe Clark; Mel Cappe, president, Institute for Research on Public Policy; Professor Penny Collenette, University of Ottawa; and David Mitchell, president, Public Policy Forum. These individuals, invited because of their particular expertise and experience in the public sector, assembled as a single panel to allow discussion on a wide range of topics, including service as a prime minister of Canada, leadership roles in public policy and academic think-tanks, senior public service appointments, positions in the offices of past prime ministers, and membership in provincial legislature.

In late July 2009 a final session was convened with Sue Gray, the head of propriety and ethics in the UK Cabinet Office, and, for the second time, Mary Dawson, the federal conflict of interest and ethics commissioner. Ms. Gray and Ms. Dawson addressed matters that had arisen in the earlier forum sessions – specifically, the system governing employment of former UK public office holders, and the role of education and training in promoting ethics.

The forum was intentionally informal, in the sense that the event was conducted as a policy conference rather than a quasi-judicial hearing. Experts presented rather than swore their testimony, and discussion was held around a table, not examined in front of a dais. These discussions included the experts, the Commissioner, Commission counsel, the research director, and the parties.

After the forum, Drs. Turnbull, Levine, and Thomas finalized their expert studies, and these documents were then supplied to the parties. These parties were asked to submit final submissions on the matters raised in public policy mandates. Only Democracy Watch did so.

CONTENT

The final versions of the three expert studies are published in this volume. I believe they represent important contributions to the literature and are deserving of close reading by students and practitioners in the area of Canadian governance.

The Turnbull and Levine studies both deal with government ethics – and specifically the question of limitations on post–public service employment. Dr. Turnbull, who has recently completed a doctoral thesis on the topic,¹ includes two especially useful features in her study: a discussion of comparative experience with post-employment ethics rules, and a theoretical and purposive framework to assist in understanding these rules. Dr. Levine’s study focuses almost exclusively on the Canadian legal framework for these rules, a topic on which he has rich expertise as the author of one of the few legal treatises on government ethics in Canada.²

On balance, Dr. Levine is most sympathetic to the need for meaningful post-employment rules codified as law. Although generally satisfied with the overall thrust of the current federal standards, he proposes a series of reforms designed to enhance their coherence and effectiveness. Dr. Turnbull, in contrast, is more skeptical of legalized ethics rules, querying their effectiveness and even positing that they can prove counterproductive. This difference in perspective often divides political scientists and lawyers: the former are generally more indifferent to rules, focusing on political culture, while the latter are preoccupied with codified standards. The question of rules and culture also arose in the Expert Policy Forum. There, most participants suggested that the divide between political culture and rules was a false dichotomy: a strong political culture does not preclude rules (and indeed may be enhanced by them), and rules depend in large measure on values to be effective.

Dr. Thomas’s study – on the handling of government correspondence – was the most difficult one to prepare. Dr. Thomas could rely on no real secondary literature, so he was obliged to conduct interviews and informal discussions to generate the information contained in his study. In the end, his focus goes beyond a simple examination of correspondence-handling practices to situate this process within the broader context of government accountability. More specifically, he examines correspondence handling as part of the general patterns and practices of information management and flow within,

1 Lori Turnbull, “Chasing a Phantom? A Comparative Analysis of Codes of Ethical Conduct for Legislators” (PhD dissertation, Dalhousie University, 2005).

2 Gregory Levine, *The Law of Government Ethics: Federal, Ontario and British Columbia* (Aurora, Ont.: Canada Law Book, 2007).

from, and to government and government officials. Interestingly, between the first and the final draft, this study generated the most feedback from various government bodies, much more so than the other expert studies. Dr. Thomas is cautious with regard to the significance of his findings, noting that they are “necessarily exploratory.” Nevertheless, this exploratory study reaches farther than the public literature to date. As such, it is an important contribution to that literature.

As research director, it is my hope that the studies contained in this volume will prove as useful to the broader public as I believe they have been to the Commissioner. I owe personal thanks to the three expert authors, to all the participants in the Expert Policy Forum, and to Elizabeth Montpetit. I owe a deep debt of gratitude to the administrative staff at the Commission and to the editorial team, all of whom performed to the highest standards. I also extend thanks to the Commission counsel for their dedicated involvement in all aspects of the public policy review – I couldn’t have asked for a better and more collegial group of individuals. Finally, we have all been privileged to work for a superb and dedicated Commissioner: a task that could at times have been arduous for me was always a pleasure because of Commissioner Oliphant’s unflagging support and enthusiasm.

Regulations on Post–Public Employment: A Comparative Analysis

Lori Turnbull

Introduction

The period of time before and after an individual leaves public office to move to the private sector can present unexpected opportunities for conflicts of interest to occur. Before such a switch takes place, a public office holder may be considering prospects for future employment with a private entity. Officials who find themselves in this situation are both trustees of the public interest and private citizens in pursuit of personal interests. It is conceivable that their concern for their own well-being could compromise their ability to exercise impartial judgment on behalf of the public interest. For instance, would they feel pressured to favour a private entity with which they are seeking employment down the road? Even if the public office holder's impartiality is not affected, the perception that it *could* be may have implications for public trust in the integrity of government actors and institutions. Once a public office holder leaves the public sector, ethical issues of a different sort arise. For instance, is it acceptable for former public office holders to lobby former colleagues on behalf of a private corporation, when their previous position would have made them privy to information that would give their client an unfair edge over competitors? Increasingly, governments have taken to adopting codified conflict of interest rules in an attempt to regulate this

This study was completed in July 2009.

transition period and to clarify how to navigate it in an ethical way. Before leaving their positions, public office holders in Canada are expected to observe restrictions on their behaviour as private citizens in order to preserve their capacity to protect the public interest. Some governments, including those of Canada and the United States, have developed comprehensive, detailed ethics laws that seem to be trying to anticipate and prohibit every type of misconduct imaginable, while countries such as Australia have adopted codes of conduct that enumerate only the most flagrant and objectionable of ethical transgressions.

B.A. Rosenson explains that, “by reducing the potential influence of private economic concerns on legislators’ decisions, conflict of interest laws should also promote accountability and public trust in government.”¹ In other words, we ought to trust politicians and public officials because there are rules in place to prevent them from abusing our trust. However, he goes on to acknowledge a common refrain among scholars of political ethics that “ethics laws actually decrease public trust by generating a sense that all lawmakers are fundamentally untrustworthy and strongly motivated by the pursuit of private gain from public office.”² Oonagh Gay, author of a comparative study of the ethics rules in place in the United Kingdom, Australia, and Canada, asserts that, despite the proliferation of parliamentary ethics regimes in the past four decades, “public trust had not increased.”³ Keeping in mind that ethics regulations carry costs as well as benefits and that they do not guarantee improved public trust, it is vital that governments resist the temptation to over-regulate in response to alleged misconduct. It has been well documented that reforms to ethics rules tend to come at the heels of political scandals.⁴ The logic is clear: governments want to assure the public that they are “tough” on ethics and that they will repair the possible loopholes that might have given way to previous improprieties. The underlying message is that ethics regulations, if properly crafted, can remedy the problem of ethical misconduct in government by explaining the difference between right and wrong and by deterring wrongdoing via threat of punishment for non-compliance. Ethics rules do not purport to persuade the public that public office holders are inherently or voluntarily “ethical.” To reiterate Rosenson’s point, ethics regimes do not explicitly refute the idea that many public office holders, if left to their own devices, would engage in misconduct, out of either ignorance or deliberate intent. Public trust in government is based, therefore, on our confidence in the ethics regime’s capacity to deter and punish corruption. This theme is addressed at greater length later in the paper.

1 B.A. Rosenson, “The Costs and Benefits of Ethics Laws,” in Denis Saint-Martin and Fred Thompson (eds.), *Public Ethics and Governance: Standards and Practices in Comparative Perspective. Research in Public Policy Analysis and Management Volume 14* (Oxford, UK: JAI Press, 2006), 137.

2 Ibid.

3 Oonagh Gay, “Comparing Systems of Ethics Regulation,” in Saint-Martin and Thompson (eds.), *Public Ethics and Governance: Standards and Practices in Comparative Perspective*, 93.

4 G. Calvin Mackenzie with Michael Hafken, *Scandal Proof: Do Ethics Laws Make Government Ethical?* (Washington, DC: Brookings Institution Press, 2002).

The alleged business and financial dealings at issue before this Commission occurred at a time when Canada's political ethics regime was not nearly as developed as it is now. In the years that have passed since Prime Minister Brian Mulroney left office, the Canadian government has established a code of ethics for members of parliament and a Conflict of Interest and Ethics Commissioner (referred to below as the ethics commissioner) to interpret the rules and investigate alleged non-compliance. Parliament passed the *Conflict of Interest Act* in 2006 to clarify standards of ethical conduct for public office holders, including ministers and their appointees. Finally, the *Lobbying Act* has been amended and the Office of the Commissioner of Lobbying in Canada has been established to interpret and enforce the legislation.

The primary objective of this study is to assess the Canadian ethics regime in terms of its ability to detect, deter, and address non-compliance, with particular attention to the post-public employment rules. It is a point worth emphasizing that no matter how comprehensive a code of conduct is, it will never inoculate a system from either the perception or the reality of ethical misconduct. Behaviour that is forbidden still occurs and, even if it does not, some people will remain skeptical. This is to say that, even if the alleged events that gave rise to this Commission are enumerated as offences under the current ethics rules, this is not a guarantee that similar offences will not happen in the future or that they will be detected. Ethics laws can and do set standards and clarify expectations but they cannot guarantee compliance.

This study has four major sections. The first considers the consequences and implications, both positive and negative, of regulatory ethics. As mentioned previously, a common response to an ethical breach, especially a high-profile one, has been to make existing ethics rules stricter, more comprehensive, and/or more punitive. This course of action can place a heavier burden on reporting public office holders, while possibly giving the impression that the government places a high priority on ethics and that it will not tolerate impropriety. It is entirely appropriate to take stock of Canada's post-public employment regulations in light of the alleged Mulroney-Schreiber relationship, but it is important to maintain a "measured" approach when considering changes to the ethics regime. Canada's is already rated as one of the more heavily regulated in the world and, as is explained in the first section of this study, over-regulation can have a negative effect on recruitment and retention.

The second section outlines the themes and issues raised by the alleged business relationship to which the Commission must respond. If the post-public employment regulations that apply today had existed in 1993, the individuals involved would have had a number of responsibilities under the *Conflict of Interest Act*, the *Lobbying Act*, and the Conflict of Interest Code for Members of the House of Commons.

The third section consists of a comparative analysis of the post-public employment ethics rules in place in Canada, the United States, the United Kingdom, and Australia

to determine whether better practices exist elsewhere. There are obvious similarities between the Canadian and U.S. post–public employment regulations; both countries have passed legislation that explicitly forbids former public office holders from exerting undue influence on former colleagues and from “side-switching,”⁵ among other things. By comparison, the procedure in the United Kingdom is far less formulaic. All former ministers are required to consult a committee on offers of employment for the first two years after leaving public office. There is no conflict of interest legislation or specific prohibitions, which means that much is left up to the committee’s discretion. However, guidelines to assist the committee’s deliberations stress the need to avoid the *appearance* of impropriety. None of the other regimes places quite the same degree of emphasis on appearance. Australia’s post–public employment ethics regulations are the least onerous; the code of conduct prohibits side-switching for the first 18 months after a minister leaves office.

The fourth and final section of the study offers conclusions and recommendations on the basis of the comparative analysis. The four countries under consideration in this study can be grouped into two smaller categories according to their approaches to conflict of interest management. Canada and the United States have developed legislative ethics regimes consisting of statutory obligations and penalties, while Australia and the United Kingdom have relied on non-statutory codes of conduct, or “soft law,” to encourage compliance with ethical standards. Internationally, Canada is considered one of the more highly regulated systems in terms of lobbying activities. The post-employment restrictions set out in the *Conflict of Interest Act* and the *Lobbying Act* are comprehensive by international standards, and failure to abide by the restrictions on post–public employment lobbying could lead to serious punishment. It is my view that heavier regulations would not increase the ability of current ethics legislation to meet its objectives. We do not have enough evidence to suggest that broader or more punitive laws would have a stronger deterrent effect, nor is there any reason to believe that they would be more effective in enhancing public trust in the integrity of political actors and institutions. The alternative to Canada’s current legislative ethics regime is to return to a true “soft law” approach that ultimately relies on voluntary compliance, but a step in that direction is unlikely. It would be interpreted as a sign of regression by critics and members of the attentive public who pressure governments to be “tough” on political misconduct.

A Cautionary Note on “Best Practices”

Prior to embarking on a comparative analysis of ethics rules that relate to the post–public employment period specifically, it is useful to consider the purpose and utility of codified ethics regulations in general and their capacity to meet their goals. One

5 This is a term often used to describe the actions taken by individuals who, after leaving public office, work against state interests on matters on which they had worked on behalf of the state while in public office.

of the objectives of this study is to determine whether the current ethics regime is comprehensive and would “cover” the allegations in question. It is important to consider that enumerating an action or omission on a list of “thou shalt nots” is not a guarantee that the rules will be complied with or that violations will be detected or punished, nor does it mean that public trust in politicians’ integrity will improve even if the compliance rate is high. Ethics codes have limitations as well as costs of their own. Despite these, the past few decades have seen the creation and expansion of written ethics rules for elected and public officials in many countries. Governments have modified their approaches to conflict of interest management in response to both external and internal pressure. The Organisation for Economic Co-operation and Development (OECD) has identified and encouraged “good practice” in conflict of interest policy. Its 2003 *Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service* has had a significant effect on several member countries’ ethics regimes, including their mechanisms for managing public office holders’ re-entry into the private world following public employment. The document encourages member countries to revisit their conflict of interest policies to ensure adequate attention to such principles as the public interest, transparency, scrutiny, and individual responsibility.⁶ There are a variety of institutional tools available for conflict of interest management, including recusal, divestment, blind trusts, disclosure, internal audit, and external review. Many countries rely on some mixture of these, but only some of them apply to former public office holders in the post–public employment period.

In this section, I consider the following criticisms of codified ethics regulations: (i) that they are reactionary and poorly designed; (ii) that they do not help to enhance public trust; (iii) that they undermine politicians’ ability to demonstrate their moral fibre; (iv) that they are ineffective at detecting and deterring corruption; and (v) that they may have negative effects on recruitment and retention.

ETHICS CODES ARE REACTIONARY AND POORLY DESIGNED

Governments are encouraged to maintain ethics rules that meet the international standards and expectations identified by the OECD; pressure to do so is greatest when suspicions of misconduct arise. Political scandals give opposition parties and the attentive public reason to criticize the government for inadequate ethics rules and to demand reforms. Understandably, governments may be tempted to respond to ethical scandals and their political consequences by making the rules more comprehensive, more onerous, or more punitive; however, if this response is done hastily, it may not produce the best policy. The fact that the rules have been broken does not necessarily mean

⁶ Organisation for Economic Co-operation and Development, *Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service* (June 2003), 4–6, available online at <http://www.oecd.org/dataoecd/17/23/33967052.pdf>

that they are deficient. Rosenson points out a related criticism of ethics regulations: if they are enacted quickly in response to a scandal and are considered “poorly designed,” they often lack the support of legislators, which could affect the latter’s willingness to comply.⁷ Nevertheless, it seems that no Canadian government in recent history has rejected legislative ethics. Michael Atkinson and Gerald Bierling explain that the evolution of Canada’s ethics regime has continued over the years “irrespective of the party in power ... [N]o political party in Canada has seriously proposed dismantling the current ethics regime in favour of a return to politics as practiced before 1960.”⁸

ETHICS CODES DO NOT ENHANCE PUBLIC TRUST

The scholarship suggests that ethics codes, although they differ in scope, breadth, and phrasing, have several general objectives in common. Dennis Thompson explains that ethics rules usually “proscribe only a small area of conduct.”⁹ By drawing distinct parameters around what constitutes appropriate behaviour in public life, ethics rules can help to clarify expectations and to create a convergence of standards among those to whom the rules apply.¹⁰ In addition to these, ethics rules have more subtle, political purposes as well. When a government constructs a complex “ethics infrastructure” consisting of rules, penalties, and administration, it serves as tangible evidence of its commitment to clean governance. Alan Rosenthal sees this as an attempt to appease the media, the opposition, and the public in the short term and as an investment in public trust in the long term.¹¹ This strategy assumes that misconduct among public and elected officials contributes to a decline in public trust and that ethics rules can help to solve this problem.

Although the bulk of ethics rules are directed at sitting elected and public officials, there is some evidence to suggest that the public is attentive to the conduct of former public office holders, which means that impropriety on their part might contribute to public perceptions about corruption in government. The Independent Commission Against Corruption (ICAC) in New South Wales released a discussion paper in 1997 entitled “Managing Post Separation Employment” after having received public complaints about the conduct of former public office holders.¹² Complainants were concerned about side-switching. For instance, the ICAC received complaints directed at a former premier who had accepted elite-level positions on boards of corporations with

7 Rosenson, “Costs and Benefits of Ethics Laws,” 139.

8 Michael M. Atkinson and Gerald Bierling, “Politicians, the Public and Political Ethics: Worlds Apart” (2005) 38(4) *Canadian Journal of Political Science* 1003 at 1006.

9 Dennis Thompson, *Political Ethics and Public Office* (Cambridge, Mass.: Harvard University Press, 1987), 97.

10 Ibid.

11 Alan Rosenthal, “The Effects of Legislative Ethics Law,” in Saint-Martin and Thompson (eds.), *Public Ethics and Governance: Standards and Practices in Comparative Perspective*, 166.

12 New South Wales, Independent Commission Against Corruption (ICAC), “Managing Post Separation Employment – Discussion Paper” (April 1997), 5, available online at http://www.icac.nsw.gov.au/files/pdf/pub2_25cp1.pdf

which the government had been dealing. There were complaints when former public office holders took new jobs that were linked to their previous public positions and when it appeared that access to government information or personnel might be used to exert undue influence on former colleagues. The ICAC reported a sense of public concern when former public office holders extract private gain, such as employment, because of their “inside knowledge of government information, programs or plans.”¹³ After accumulating a list of complaints, the ICAC urged the New South Wales government to create a regulatory regime for the post-employment period. When the discussion paper was released in 1997, only a few public office holders faced restrictions on the sorts of positions they could accept after leaving public office.

The proliferation of ethics regulations continues even though there is much doubt among scholars of political ethics that ethics codes meet their objectives. First, as Rosenthal explains, the long-range goal of an ethics regime is to restore public trust.¹⁴ Although there is evidence of public support for conflict of interest and ethics regulations both in Canada and elsewhere,¹⁵ there is no guarantee that an ethics regime helps to prevent public suspicions of impropriety. Some ethics codes articulate clearly the government’s desire to affect public attitudes, but others are more discrete. Section 3 of the *Conflict of Interest Act 2006* identifies the following purposes:

- (a) to establish “clear conflict of interest and post-employment rules”;
- (b) to minimize the possibility for conflicts to arise between “the private interests and public duties of public office holders” and to see that such conflicts are resolved in favour of the public interest;
- (c) to provide the ethics commissioner with the power to “determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred”;
- (d) to “encourage experienced and competent persons to seek and accept public office”; and
- (e) to “facilitate interchange between the private and public sector.”

These goals are clear and reasonable. There is no explicit mention of a desire to boost public trust in government but, as Rosenthal explains, this would be a logical outcome if the legislation were successful at meeting its stated objectives. Conceivably, rules that are clearly designed to favour the public interest and that are supported by penalties to deter misconduct could alleviate public suspicions about corruption. The idea is that the public can trust the ethics regime to keep government “clean,”

13 Ibid., 6.

14 Rosenthal, “Effects of Legislative Ethics Law,” 168.

15 In 2002, Prime Minister Jean Chrétien introduced plans for an ethics regime that would include new conflict of interest rules and an independent officer of Parliament to enforce them. An Ekos Research Associates survey revealed that 50 percent of respondents, once they were told about the proposal, thought it was a good idea. For more information, please see Ekos Research Associates, “Trust and the Monarchy: An Examination of the Shifting Public Attitudes Toward Government and Institutions” (May 30, 2002), available online at http://www.canadian-republic.ca/pdf_files/Ekos%20Monarchy%2005-31-02.pdf

even if some individuals within it have less than noble intentions. However, we lack the empirical evidence to support this conclusion. Rosenthal claims that there is “little reason to believe that the public’s confidence changes as a result of changes in ethics law,” which suggests that striving to make ethics rules as comprehensive as possible will not necessarily affect public attitudes toward public office holders.¹⁶

Rosenthal argues that the other purposes of ethics law are to “placate the media, defend against partisan attack ... and move on to other lawmaking business.”¹⁷ In his view, the strategy works for a time but, after a while, the media “continue to dig” despite the depth and scope of ethics regulations. The media’s willingness to keep political ethics on the agenda depends on their own needs, not the state of ethics law; in other words, an ethics regime is not a remedy for political scandal, for which the occurrence of actual misconduct is not a prerequisite. Rosenthal contends that media “coverage can be just as intense (and unfair) when there is more law as when there is less.”¹⁸ Despite this reality, Denis Saint-Martin predicts that ethics reforms will continue owing to the political difficulty associated with changing course.¹⁹

ETHICS CODES UNDERMINE POLITICIANS’ ATTEMPTS TO DEMONSTRATE MORAL FIBRE

Mackenzie, Rosenthal, and others have argued that regulatory ethics encourages a minimalist interpretation of what it means to be “ethical” in public life. It does so by encouraging basic compliance with the rules rather than by cultivating a “culture of integrity” as is discussed by Kenneth Kernaghan.²⁰ Rosenthal explains that public office holders, either current or former, who are accused of impropriety can use ethics law as a shield; even if an action or omission offends commonly held notions of propriety, the accused can claim innocence if it is not explicitly prohibited.²¹ Presumably, this type of behaviour would only add to public frustration and distrust. Atkinson and Bierling expand on this theme by identifying two approaches to ethics in politics and government. According to the first, to be ethical in public life is simply to follow the rules laid out in the applicable code of conduct. In the second, ethics is understood not as a procedural exercise but as one that involves the voluntary, thoughtful selection of the “morally correct course” by a trustee of the public interest.²² Voters have an interest in knowing whether their representatives have the capacity for integrity. As ethics

16 Rosenthal, “Effects of Legislative Ethics Law,” 168.

17 Ibid., 166.

18 Ibid., 167.

19 Denis Saint-Martin, “Path Dependence and Self-Reinforcing Processes in the Regulation of Ethics in Politics: Toward a Framework for Comparative Analysis,” in Saint-Martin and Thompson (eds.), *Public Ethics and Governance: Standards and Practices in Comparative Perspective*, 5–27.

20 Kenneth Kernaghan, “Rules Are Not Enough: Ethics, Politics and Public Service in Ontario,” in John Langford and Allan Tupper (eds.), *Corruption, Character and Conduct: Essays on Canadian Government Ethics* (Toronto: Oxford University Press, 1993).

21 Rosenthal, “Effects of Legislative Ethics Law,” 169–71.

22 Atkinson and Bierling, “Politicians, the Public and Political Ethics: Worlds Apart,” 1007.

becomes more and more codified, opportunities for discretion are squeezed out. It is no surprise then that scholars doubt the ability of regulatory ethics to enhance public trust if it is the case that these rules reduce the number of opportunities for elected and public officials to demonstrate their moral character. Nevertheless, one could argue that, given the ambiguity of codified ethics rules in Canada and elsewhere, much is left up to the judgment of public office holders. It is difficult to know with certainty whether and to what extent ethics regimes affect public trust given the number of other factors in the equation.

ETHICS CODES ARE INEFFECTIVE AT DETECTING AND DETERRING MISCONDUCT

The capacity of ethics rules to detect and/or deter misconduct is another unknown variable. There is skepticism about this as well. Governments do not cite this goal explicitly as a reason for creating or changing regulations, as it may be interpreted as an acknowledgement that corruption has occurred under their watch. Surely, arguments for expanding or strengthening ethics laws would be stronger if backed by evidence that they reduce corruption demonstrably. Somewhat paradoxically, regulatory ethics might have increased the number of reported incidents of corruption over the years, at least in some jurisdictions, by pushing the boundaries of the definition of corruption so that it includes a longer list of actions and omissions. Mackenzie's research on U.S. federal public office holders charged with public corruption shows that, although there were 480 indictments and convictions in 1999, there were only nine in 1970.²³ There are a number of possible valid explanations for this variance, one of which is that the sheer number of activities that constitute breaches of ethics law has increased. Things that used to be acceptable are now against the rules. Even if public office holders' behaviour and attitudes have not changed, the standards used to judge them have. Therefore, keeping a tally of accusations and convictions of corruption from one year to the next is not enough to know whether intentional abuse of office is becoming more of a cause for concern.

As is the case with any law aimed at prohibiting a type of behaviour, it is very difficult to know how much of it is being deterred. If the frequency of the prohibited action seems to have decreased after a new law has been established, it could be an indication of a deterrent effect or it could be evidence that perpetrators have found ways to achieve their ends without being caught. Arguably, ethics rules have a better chance of deterring misconduct if the likelihood of detection and the cost of getting caught outweigh the benefits of committing the deed in question. The creation of ethics officers and committees to monitor and enforce ethics laws could increase the likelihood of detection. A possible side effect of this, of course, is that, if more episodes

23 Mackenzie with Hafken, *Scandal Proof: Do Ethics Laws Make Government Ethical?* 103–04.

of misconduct are detected, it gives the appearance that corruption is becoming more frequent, which is not necessarily the case.

In addition to ethics officers, there has been a proliferation of civil society groups dedicated to keeping a watchful eye on governments and exposing abuses of office. Democracy Watch is an example of such an organization in Canada. The punishments for ethical breaches vary by jurisdiction and according to the perceived severity of the deed. Some breaches of ethics law are punishable by serious fines and possible imprisonment but, for most, the punishment is political rather than legal.

The detection, deterrence, and punishment of misconduct by former public office holders is especially tricky, given that they are “private” citizens who are not subject to the same degree of scrutiny as they once were and are no longer vulnerable to political punishments like removal from cabinet. For instance, Canadian public office holders are required to file comprehensive disclosure forms that document their financial interests. They are obliged to report changes in their status to the ethics commissioner in a timely fashion. However, once they leave public office for the private sector, they are not required to communicate with the ethics commissioner unless they engage in lobbying as per the terms of the *Conflict of Interest Act*. If a former public office holder accepts a position with a firm with which he or she had significant dealings during his or her last year of public office – a breach of the *Conflict of Interest Act* – it may very well go undetected. The ethics commissioner is forced to rely on current public office holders and private firms to report misconduct among former public office holders.

ETHICS REGULATION MAY UNDERMINE RECRUITMENT AND RETENTION

OECD publications that deal with conflict of interest management acknowledge the need for a balanced approach between the public interest and the private interests of public and elected officials. Regulations that are too strict or invasive could have negative effects of their own. For instance, there is some evidence to suggest that ethics rules deter some people from continuing in public office or from running in the first place.²⁴ Rosenson found that disclosure laws in place for state legislative primaries had the effect of reducing the number of candidates. Disclosure laws invade privacy by forcing public office holders to open up their own private lives – and in many cases, those of their spouses and dependent children – to public inspection and judgment. Rosenson fears that these laws may discourage wealthy and also highly qualified persons from contesting public office.²⁵ Their unrealized contribution must be recognized as a casualty of strict disclosure laws. None of this implies that disclosure laws ought to be discarded, but we must be cognizant of their costs.

24 Frank Anechiarico and James B. Jacobs, *The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective* (Chicago: University of Chicago Press, 1996).

25 Rosenson, “The Costs and Benefits of Ethics Laws,” 142–44.

When it comes to post–public employment rules in particular, the ICAC acknowledges that people moving from public office to the private sector should not be “unduly restricted in their choice of employment.”²⁶ This is especially true in jurisdictions where government downsizing and outsourcing have made public office more of a short-term than a long-term career choice. Elected office is by definition a limited-term position. Faced with the possibility of defeat at the polls, elected officials ought not to be severely limited when deciding what to do after leaving office. Finally, as the skill sets required for public and private sector work align themselves more closely, the flow of traffic between the two worlds is likely to increase.²⁷ Post–public employment restrictions should not be so onerous as to discourage qualified people from offering themselves for public service.

The preceding paragraphs are meant as a cautionary note about the costs and limitations of regulatory ethics. There is no guarantee that prohibiting an action will deter public office holders from committing it if it is their intent to do so. In 2004, after studying the incidence of corruption at the state level between 1993 and 2002, the Corporate Crime Reporter made the following assessment: “Our review of public corruption convictions in the states indicates that there is apparently little correlation between strong laws and integrity – if a public official wants to violate his or her trust, the laws don’t stand in the way.”²⁸

The Alleged Business Relationship Between the Right Honourable Brian Mulroney and Karlheinz Schreiber

The alleged business relationship between former prime minister Brian Mulroney and lobbyist Karlheinz Schreiber is the primary subject of this Commission. Although its mandate goes beyond the details of the alleged relationship to include a systemic review of the ethics regulations for the post–public employment period, it is important to understand the particulars of this specific case. It provides an opportunity to test the current ethics regime to see if it is equipped to respond to allegations of ethical misconduct involving the political executive. Throughout the duration of the alleged relationship, Mr. Mulroney wore three different hats: those of prime minister, member of parliament, and former public office holder. Each of these roles entails specific responsibilities under the current ethics regime. The events and actions that comprised the alleged business relationship between Mr. Mulroney and Mr. Schreiber, if they arose today, *could* raise questions under the *Conflict of Interest Act*, the *Lobbying Act*, and the Conflict of Interest Code for

26 ICAC, “Managing Post Separation Employment – Discussion Paper,” 5.

27 Ibid.

28 Corporate Crime Reporter, *Public Corruption in the United States* (Washington, DC, January 2004), 9, available online at <http://www.corporatecrimereporter.com/corruptreport.pdf>

Members of the House of Commons. The fact that two of these, the *Conflict of Interest Act* and the code for MPs, require interpretation by the Conflict of Interest and Ethics Commissioner means that we cannot predict with certainty if and how the ethics regime would respond to a specific set of allegations. This is especially true given that the *Conflict of Interest Act* is relatively new and untested.

At the time of writing, the ethics commissioner has yet to investigate a complaint involving the post–public employment regulations in the legislation. Therefore, we have no precedent to refer to in an attempt to draw conclusions about how the rules may be interpreted. In both the *Conflict of Interest Act* and the code of conduct for MPs, a number of clauses contain words and phrases that require interpretation. For instance, section 33 of the *Conflict of Interest Act* prohibits a former public office holder from taking “improper advantage of his or her previous public office.”²⁹ It is not immediately clear what constitutes an offence under this section, as there is no definition of “improper advantage” in the legislation. This is to say that the written rules are only one component of the ethics regime; the ethics commissioner’s approach is an important factor as well.

THE *CONFLICT OF INTEREST ACT*

The *Conflict of Interest Act* applies to both current and former public office holders. If the current rules were in effect during the period in which the alleged business dealings between Mr. Mulroney and Mr. Schreiber occurred, the former prime minister would have had a number of obligations relating to several sections of this legislation. Section 24 of the legislation stipulates that sitting public office holders, including cabinet ministers, are required to report any serious offers of outside employment to the ethics commissioner within seven days of receiving them. It is alleged that Karlheinz Schreiber met with Prime Minister Brian Mulroney on June 23, 1993, at which time they entered into an agreement regarding a consulting retainer for Mr. Mulroney. The term “employment” is not defined in the *Conflict of Interest Act*, but it is possible that an ethics commissioner could decide that a consulting retainer qualifies as employment. Mr. Mulroney was still the prime minister at the time, which means that, if today’s rules had applied, it is likely that he would have been expected to report the offer and its acceptance to the ethics commissioner. However, it is possible that other restrictions on post–public employment in both the *Conflict of Interest Act* and the *Lobbying Act* would have prohibited Mr. Mulroney from accepting Mr. Schreiber’s offer of a contractual arrangement.

In a sworn affidavit filed in November 2007, Mr. Schreiber alleged that he hired Mr. Mulroney to support his “efforts in obtaining approval of the establishment of

²⁹ *Conflict of Interest Act*, SC 2006, c. 9, s. 2.

a light armoured vehicle facility in either Nova Scotia or Quebec.”³⁰ The post–public employment regulations place limitations on the types of support that a former public office holder can legitimately provide in a case like this. Section 35(2) of the *Conflict of Interest Act* states that former public office holders are not to “make representations” on behalf of any person or entity to any “department, organization, board, commission or tribunal with which he or she had direct and significant official dealings” during the last year of their public employment.³¹ The restriction applies to former ministers for two years. Presumably, this clause would prohibit a former prime minister from making representations to *any* department, as a prime minister would have “direct and significant dealings” with each and every one during his or her time in office. If the alleged business relationship between Mr. Mulroney and Mr. Schreiber occurred today, this clause would have forbidden Mr. Mulroney from approaching former colleagues on Mr. Schreiber’s behalf, but it would not have ruled out Mr. Mulroney’s working for Mr. Schreiber as long as he did not make direct contact with public office holders in relation to Mr. Schreiber’s file. The *Lobbying Act* applies a similar restriction but extends the cooling-off period to five years. The *Conflict of Interest Act* also prohibits former cabinet ministers from making representations to any sitting ministers who had been part of the ministry at the same time as the former public office holder.³² If this rule had existed in 1993, it would have applied to Mr. Mulroney from June 25 of that year, after he resigned as prime minister, until June 1995.

Section 35(1) of the *Conflict of Interest Act* prohibits a former public office holder from entering into a contract with or accepting a position or appointment from any private entity with which he or she had “direct and significant official dealings” during his or her last year of public employment. This clause would prohibit a former prime minister from entering into such an arrangement with any private entity with whom he or she worked in his or her capacity as a public official, whether it involved making direct representations to public office holders or not. Whether the clause would apply to a situation like the alleged Mulroney-Schreiber relationship would depend on whether the public office holder had had “direct and significant official dealings” with the private entity during the year before he or she resigned. The facts on this are not clear in this case and, at any rate, it would be up to the ethics commissioner to decide whether the threshold for “direct and significant dealings” had been met. In his reports, Independent Advisor David Johnston summarized the 25-year history between the two men. It has been alleged that they were connected through Air Canada’s relationship with Airbus. As Johnston points out, though, this Commission’s report is concerned only with the circumstances and allegations surrounding Mr. Schreiber’s payment to

30 David Johnston, *Report of the Independent Advisor into the Allegations Respecting Financial Dealings Between Mr. Karlheinz Schreiber and the Right Honourable Brian Mulroney* (2008), 1, available online at <http://www.pco-bcp.gc.ca/docs/information/publications/ria-rci/complete-complet-eng.pdf>

31 *Conflict of Interest Act*.

32 *Ibid.*, s. 35(3).

Mr. Mulroney in 1993. Mr. Schreiber has maintained that, in exchange for this money, Mr. Mulroney was expected to “help to promote a light armoured vehicle plant, known as the Bear Head project, for Mr. Schreiber’s client, Thyssen AG.”³³ Mr. Schreiber was the director of BMI, which controlled Bear Head Industries – a lobbying firm created to pressure Ottawa for support on the Bear Head Project. The federal government confirmed its support for the project in September 1988, but withdrew it in the early 1990s as a result of public opposition and internal review.

The date on which the project was cancelled is relevant. According to today’s rules, if the file had been open during Prime Minister Mulroney’s last year of office and if he had had “direct and significant official dealings” with Mr. Schreiber as an “entity” as understood by the *Conflict of Interest Act*, then he would not be permitted to work or act for him in any capacity for two years post–public employment. One could argue that because a prime minister has the authority to affect any file and has dealings with every department, if this rule were to be applied to the alleged relationship in question, the clause ought to be interpreted broadly to prohibit a prime minister in Mr. Mulroney’s position from working or acting for someone in Mr. Schreiber’s circumstance. At any rate, the previously mentioned clause banning former ministers from making representations to former ministerial colleagues would have prohibited a former prime minister in Mr. Mulroney’s position from *contacting* ministers directly to encourage support for the project.

Section 34(1) of the *Conflict of Interest Act* prohibits “side-switching.” It states that former public office holders shall not

act for or on behalf of any person or organization in connection with any specific proceeding, transaction, negotiation or case to which the Crown is a party and with respect to which the former public office holder had acted for, or provided advice to, the Crown.

Again, the applicability of this clause depends on how the ethics commissioner interprets it, but its wording suggests that if a minister was at all active on a file, even in an advisory role, he or she would be forbidden from acting against state interests on that file upon entering the private sector. The ethics commissioner is granted the authority under the legislation to investigate suspected non-compliance. If the ethics commissioner received a request to investigate an alleged breach of this clause, his or her investigation would undoubtedly include an attempt to determine the degree of the minister’s involvement on the file in question.

Subsection (2) of the same clause explains that former public office holders are not to give advice to a private client that is based on information obtained in their former role and to which the general public is not privy. This means that even after leaving

33 Brodie Fenlon and Rheal Séguin, “Mulroney had nothing to do with Airbus: Schreiber,” *Globe and Mail*, December 4, 2007, available online at <http://www.theglobeandmail.com/news/national/article801985.ecc>

public office, public office holders are required to maintain some loyalty to the state. Sensitive information is not for former public office holders to use to confer an unfair advantage on a particular private firm over its competitors. It may be difficult to detect infringements of this clause, but nevertheless the rule is meant to discourage former public office holders from abusing the privileges of public office once they enter the private world.

THE CONFLICT OF INTEREST CODE FOR MEMBERS OF THE HOUSE OF COMMONS

On June 24, 1993, Brian Mulroney resigned as prime minister and was succeeded by Kim Campbell, but he remained the member of parliament for Charlevoix until September 8 of that year. Under the current rules, the Conflict of Interest Code for Members of the House of Commons would have applied while Mr. Mulroney was prime minister and after he resigned from the executive until Parliament was dissolved in September. Section 7 of the code explains that, unless an MP is a minister of the Crown or parliamentary secretary and so long as other provisions of the code are observed, he or she is entitled to engage in outside employment or carry on a business. However, section 21 of the code requires MPs to file disclosure forms with the ethics commissioner that give an overview of the private interests of both the MP and the dependent family. A summary of these forms is made available for public inspection. MPs are required to report income greater than \$1,000 that was earned during the 12-month period prior to filing the report, as well as all income over \$1,000 expected in the year to come.³⁴ This means that, if these rules applied during the period between June 25 and September 8, 1993, Mr. Mulroney would have been required to disclose all income received in the previous year and expected in the upcoming one and to reveal its source(s). (There are disclosure requirements in the *Conflict of Interest Act* as well that require current ministers to disclose their assets, liabilities, and income, among other things. Even if they had been applicable during the alleged Mulroney-Schreiber relationship, they would not have applied after Mr. Mulroney resigned from executive office.)

With respect to the code of conduct for parliamentarians, a fact worth considering is that MPs fill out their first disclosure forms within 60 days of being elected and, unless their circumstances change, updates are on an annual basis. They have a full 60 days to report material changes to disclosure forms. This means that, if an MP were to acquire a private interest that conflicted with the requirements of the code, the ethics commissioner might not know about it for two months.

³⁴ Canada, Parliament, *Conflict of Interest Code for Members of the House of Commons* (2004), Standing Orders of the House of Commons, Appendix, s. 21(1)(b), available online at <http://www.parl.gc.ca/information/about/process/house/standingorders/appa1-e.htm>

SUMMARY

The preceding section explains how the current ethics regime might have responded to the allegations with respect to the business relationship between Karlheinz Schreiber and the Right Honourable Brian Mulroney. One of the questions referred to this Commission is the following: “Are there ethical rules or guidelines which currently would have covered these business and financial dealings?” The Canadian government’s ethical guidelines for the post–public employment period are comprehensive by international standards and *could have* covered the alleged events. The *Conflict of Interest Act* would have required Mr. Mulroney to report the offer of a consulting retainer from Mr. Schreiber that is said to have been made on June 23, 1993. As well, the disclosure requirements in the Conflict of Interest Code for Members of the House of Commons would have conferred an obligation to report all three payments that are alleged to have come from Mr. Schreiber. Even though two of them are said to have come after Mr. Mulroney resigned as an MP, the disclosure rules for MPs require that they report all income over \$1,000 that they expect to receive in the upcoming year. Both the *Conflict of Interest Act* and the *Lobbying Act* impose a cooling-off period during which former public office holders must refrain from lobbying former colleagues in public office. The *Conflict of Interest Act* forbids former public office holders from working in any capacity with private firms with which they were involved “directly and significantly” during their last year of public office; this ban applies to cabinet ministers during the first two years following the termination of their public employment.

The main reason for concluding that the current ethics regime *could* cover the alleged events and circumstances is that some of the clauses in the *Conflict of Interest Act* are worded in ways that make them subject to interpretation by the ethics commissioner. The ethics commissioner has a significant degree of discretion in determining what constitutes a breach of the legislation. For instance, it is up to the ethics commissioner to decide whether a public office holder’s official dealings with a private firm qualify as “direct and significant” or whether a former public office holder has taken “improper advantage” of his or her previous public office. The ethics commissioner’s approach is an unknown variable, especially since, at the time of writing, there has not been a single investigation involving the post–public employment regulations in place at the federal level.

In the following section, I compare Canada’s post–public employment rules to those in place in the United States, the United Kingdom, and Australia. I make some reference to the ethics regimes in place in the Canadian provinces as well. There is evidence of policy convergence in the field of ethics regulation among federal and provincial governments in Canada. Although they have developed at different paces, provincial ethics regimes are similar to the federal one in terms of the content of ethics codes and the mechanisms for their enforcement.

A COMPARATIVE ASSESSMENT OF POST-PUBLIC EMPLOYMENT REGULATIONS

The comparative analysis is divided into two main sections. The first deals with post-public employment restrictions in Canada, the United States, the United Kingdom, and Australia. I identify the four main types of behaviours that are prohibited in post-public employment regulations and compare the ethics regimes in terms of whether and how they regulate each one. The second section focuses on the mechanisms in place in each of the regimes to administer these rules and to encourage compliance. I have organized the comparative analysis section of the study according to themes instead of dealing with each country individually. This is to prevent repetition and to allow the reader to compare the components of the regimes more easily.

WHAT BEHAVIOURS AND CIRCUMSTANCES DO POST-PUBLIC EMPLOYMENT RULES REGULATE?

In his book *Conflict of Interest in American Public Life*, Andrew Stark explains that post-public employment rules are designed to prohibit four types of behaviour: influence, ingratiation, profiteering, and side-switching.³⁵ In this context, the *influence* being targeted is that which former public office holders would be able to exert over former colleagues on behalf of a private client once the office holder enters the private sector. Attempts at *ingratiation* start before an individual leaves public office; these could involve favouring a private entity in the hope that such special treatment would be rewarded in the future, perhaps with an offer of employment. To *profiteer* is to gain personally or privately from one's experience in public office. *Side-switching* is to act *against* state interests once out of office on an issue on which the office holder acted *for* state interests while in public office. In this section, I explain these concepts more fully while reviewing the four ethics regimes to demonstrate how each one attempts to regulate these behaviours. I also discuss briefly U.S. President Barack Obama's January 2009 regulations and give a short explanation of U.S. regulations regarding foreign entities.

Influence

Rules against *influence* seem to assume that former public office holders may be able to exert special pressure on former colleagues when representing a private client, which would confer upon this entity an unfair advantage over competitors. By extension, these rules assume that the judgment of the current public office holders could be impaired by their vulnerability to lobbying from a former colleague, which *could* mean that the public interest is compromised in order to accommodate the requests of the former colleague. The possibility for impaired judgment on the part of current public

35 Andrew Stark, *Conflict of Interest in American Public Life* (Cambridge, Mass.: Harvard University Press, 2000), 96–104.

office holders is the perceived threat to the public interest. Rules against influence seek to remove the possibility for impaired judgment by shielding public office holders from the ethical dilemma of how to maintain neutrality when pressured by a former colleague. The public is to take comfort in the assurance that public office holders will not have to face a situation like this; therefore, their capacity to distinguish right from wrong on their own is inconsequential.

Most ethics codes prohibit influence by requiring that former public office holders abstain from making representations to former colleagues for a time, but they differ in the length of the prescribed cooling-off period. Canada's *Conflict of Interest Act* forbids former public office holders from making representations "for or on behalf of any person or entity to any department, organization, board, commission or tribunal 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."³⁶ For most former public office holders this rule applies for one year after leaving public office, but former ministers of the Crown and ministers of state must observe it for two years. A number of provinces in Canada have codes of ethical conduct that prohibit former ministers and senior officials from making representations to former colleagues, with cooling-off periods ranging from six months in Prince Edward Island to two years in British Columbia. The federal *Conflict of Interest Act* states that former ministers are not to make representations to any current ministers who were part of the ministry at the same time as the former public office holder. The assumption is that the association between ministerial colleagues in the latter instance and between departmental colleagues in the former gives the recently retired minister an enhanced capacity to influence the other person's decisions.

In Canada, the *Lobbying Act* is part of the regulatory ethics regime that relates to influence. It requires that designated former public office holders refrain from becoming lobbyists for a period of five years post-public employment. To "lobby" is, in exchange for payment, to arrange a meeting between a public office holder and another person, or to communicate with a public office holder in respect of initiatives including statutes, regulations, government policies and programs, grants, contributions, or "other financial benefit by or on behalf of her Majesty in right of Canada."³⁷ Therefore, to qualify as a lobbyist, one must be receiving payment of some kind. This is one of several incongruities worth noting between the *Conflict of Interest Act* and the *Lobbying Act*. The *Conflict of Interest Act* prohibits former public office holders from making representations to former departmental colleagues on behalf of private clients whether for payment or not. Therefore, the *Conflict of Interest Act* addresses a loophole that might have been left open by the *Lobbying Act*. A second difference between the two statutes is that the *Lobbying Act* prohibits designated former public office holders from

36 *Conflict of Interest Act*, s. 35(2).

37 *Lobbying Act*, RSC 1985, c. 44 (4th Supp.), s. 5(1)(a)(v).

lobbying *any* current public office holders regardless of what department or agency they are associated with. The *Conflict of Interest Act* prohibits former public office holders from making representations to former colleagues with whom they had “direct and significant official dealings” during their last year of office.³⁸

Thirdly, the *Lobbying Act* prohibits designated former public office holders from *making contact* with current public office holders on behalf of private, paying clients, whether to set up a meeting or to do the lobbying themselves. There is nothing in the statute that prevents former public office holders from accepting a position or appointment with such a private firm; the only thing the former office holder cannot do is actively lobby current public office holders until the five-year cooling-off period is up. The *Conflict of Interest Act* is more demanding; it prohibits former public office holders from accepting an appointment, a contract, or any sort of employment with a private firm with whom they dealt during the last year of their public employment. However, as mentioned above, the relationship would have had to involve “direct and significant official dealings” in order to invoke the *Conflict of Interest Act*. For the purposes of the legislation and its enforcement, it is up to the ethics commissioner to interpret what this means, but this does not prevent the media and attentive public from drawing their own conclusions on what is appropriate.

In the United States, former officers, employees, and elected officials in both the legislative and executive branches are prohibited by law from influencing former colleagues. Former senior officers and employees of the executive branch are prohibited by 18 USC 207 (c) from communicating with or appearing before personnel from their former department, on behalf of someone else, with intent to influence them.³⁹ This rule now applies for two years post–public employment, thanks to changes under the *Honest Leadership and Open Government Act* that took effect in 2007 and new rules introduced by President Barack Obama’s administration in January 2009. Also as a result of President Obama’s recent changes, executive branch appointees who leave the government to become lobbyists are prohibited from lobbying “any covered executive branch official or non career Senior Executive Service appointee for the remainder of the Administration.”⁴⁰

Senators are required to wait for two years after leaving public office before communicating with or appearing before any member, officer, or employee of either house of Congress, or any employee of a legislative office, on behalf of another person with intent to influence them in their official duties. Members and officers of the House of Representatives must observe the same restrictions but only for one year.⁴¹

38 *Conflict of Interest Act*, s. 35(1).

39 *United States Code* 18 USC s. 207.

40 U.S., White House, *Executive Order – Ethics Commitments by Executive Branch Personnel* (January 21, 2009), s. 5, available online at http://whitehouse.gov/the_press_office/ExecutiveOrder-EthicsCommitments/

41 *Honest Leadership and Open Government Act*, Pub. L. No. 110-81, 121 Stat. 735 (2007).

U.S. legislators are subject to these rules presumably to prevent the possibility that the judgment of sitting legislators could be impaired by pressure from former colleagues. As Moncrief and Thompson explain, the U.S. Congress is a “lawmaking” chamber as opposed to a “confidence” chamber, which gives its individual members considerably more freedom and autonomy.⁴² Their voting behaviour is not bound by party discipline in the same way that Canadian MPs’ is, and they have the power to introduce spending measures, including contracts and grants. These factors make sitting members of Congress the targets of outside influence from pressure groups, constituents, and lobbyists. Former members must observe a cooling-off period upon leaving public office before making representations to former colleagues on the assumption that their familiarity with sitting members would enable them to wield undue influence.

In comparison, Canadian members of parliament who are not part of the ministry are not required to observe restrictions on their employment opportunities after they leave public office. Canadian MPs have less power and autonomy compared with their U.S. counterparts and therefore are less likely to be the targets of undue influence; thus restrictions on post-public employment seem unnecessary.

Ministers in the United Kingdom who are considering their options for post-public employment are expected to seek the advice of the Advisory Committee on Business Appointments before accepting any offers. This is not a statutory obligation, but it is enumerated in the Ministerial Code, a publication of the Cabinet Office.⁴³ Despite its lack of statutory authority, it is reported that the requirement to seek committee approval for post-public employment is “widely and willingly” respected.⁴⁴ The committee is an independent, non-departmental public body that consists of seven members appointed by the prime minister.

The only restriction relating specifically to the types of employment that a former minister can accept that is mentioned in the code is to seek the committee’s input. Each case is decided individually and according to its own circumstances. As former ministers consult the committee on employment prospects, the committee’s responses to their requests are made public. However, the public list is limited to those cases in which the committee’s response was positive and the job was taken. The list is updated monthly.

There are no explicit rules in the Ministerial Code prohibiting influence, ingratiation, profiteering, or side-switching as there are in Canada and the United States. However, committee members are expected to observe official guidelines

42 Gary Moncrief and Joel Thompson, “Contrasting the American and Canadian Subnational Legislatures” (1990) 13(3) *Canadian Parliamentary Review* 15.

43 UK, Cabinet Office, *Ministerial Code: A Code of Ethics and Procedural Guidance for Ministers* (July 2007), s. 7.25, available online at http://www.cabinetoffice.gov.uk/propriety_and_ethics/ministers/ministerial_code.aspx

44 Gareth Griffith, *The Regulation of Lobbying* (New South Wales: Parliamentary Library Research Service, June 2008), 24.

that explicitly discourage profiteering and the appearance of ingratiation. These are discussed in the applicable sections below. At this point, I draw attention to the fact that the committee's guidelines are focused on the *appearance* of impropriety as much as on its actual occurrence. For instance, committee members are asked to consider whether the acceptance of an appointment would "give rise to public concern of a degree or character to justify advising the former minister that there should be a delay ... in taking up the appointment, or that the appointment is unsuitable?"⁴⁵ The introductory clauses acknowledge that, although it is important and "in the public interest" for former ministers to explore private opportunities after leaving public office, their pursuits must not cause "any suspicion of impropriety." Former ministers are required to seek committee advice on appointments for the first two years after leaving public office. Committee members are permitted to contact an applicant's former department to determine whether it has had any sort of relationship with the private entity that would make the appointment a source of suspicion.

The guidelines do not make mention of the behaviours that constitute "influence." Their priorities are the appearance of ingratiation, which would involve offers of employment that could compromise a minister's judgment before he or she left office, and the improper use of information. There is no explicit concern with the possibility that current ministers' judgment could be impaired by lobbying from former colleagues. The guidelines are concerned primarily with forbidding ministers from working for companies with which they might have had contact while in public office. The guidelines state that former ministers will be expected to wait three months before entering the private sector, but otherwise there is no cooling-off period. Therefore, former ministers may not have to wait long before they are in a position to lobby former colleagues on behalf of a private entity. However, committee members have demonstrated sensitivity to the possibility of undue influence and have taken it upon themselves to discourage former ministers from lobbying former colleagues. After leaving public office in June 2007, for instance, former prime minister Tony Blair sought the committee's advice on several opportunities for post-public employment. One of them was with JPMorgan Chase and Co., with whom Blair was invited to work as a senior adviser and consultant. The committee advised that Blair take the position "forthwith," but qualified its approval by stating that, "for 12 months after leaving office, he should not be personally involved in lobbying UK Government Ministers or officials on behalf of his new employer or its clients."⁴⁶ In its Ninth Report, published in 2008, the committee acknowledged a recommendation that the parliamentary

45 UK, Advisory Committee on Business Appointments, *Guidelines on the Acceptance of Appointments or Employment outside Government by Former Ministers of the Crown* (December 2008), s. 5(iii), available online at <http://www.acoba.gov.uk/media/acoba/assets/guidelines.pdf>

46 UK, Advisory Committee on Business Appointments, *Ninth Report 2006–2008*, "Annex B – Advice Given on Appointments Taken up by Former Ministers: 1 April 2006 – 31 March 2008," 18, available online at <http://www.acoba.gov.uk>

Public Administration Select Committee had made to government regarding lobbying – specifically, that “it [was] inappropriate for former Crown servants to move almost directly to positions in which they may lobby former Ministers or colleagues.”⁴⁷ The government responded by echoing the concern, while insisting that the decision to restrict the lobbying activity of a former public office holder must be made “on the merits of individual cases.”⁴⁸

There are no lobbyist regulations for multi-client public affairs companies as there are in Canada and the United States, but at the time of writing the Public Administration Select Committee is conducting an inquiry into the subject. It is possible then that former public office holders could face codified restrictions on their lobbying activities at some point in the near future, especially if the committee looks to its North American counterparts for guidance.

Ingratiation

The behaviours that result in *ingratiation* begin before a public official enters the private realm. Specifically, a public office holder could show favouritism toward a private entity in the hope of being rewarded privately later. Canada’s *Conflict of Interest Act* aims to address this in three ways. The first is by forbidding a former public office holder from accepting a contract of service, an appointment to a board of directors, or an offer of employment from “an entity with which he had direct or significant dealings during the period of one year immediately before his or her last day in office.”⁴⁹ The meaning of “significant dealings” depends on how the Conflict of Interest and Ethics Commissioner interprets it. The second is by requiring that public office holders report to the ethics commissioner all “firm” offers of employment within seven days of receiving them. Accepted offers must be reported also to the prime minister or the appropriate minister. This will allow the ethics commissioner to flag possibilities for ingratiation before the public office holder leaves office. The third is listed in section 10 of the legislation, which prohibits public office holders from allowing “plans for, or offers of, outside employment” to influence them in the performance of their official duties.⁵⁰ The point of prohibiting ingratiation is to remove the possibility that public office holders, while employed as trustees of the public interest, will be affected by offers for future employment. The fear is that their judgment could be impaired by such prospects, as their private interests could run counter to the public interest.

There are rules against ingratiation in some provinces as well. In Alberta, the

47 UK, HC, Public Administration Select Committee, “The Business Appointment Rules,” para. 20, HC 651 – Sixth Report of Session 2006–07, available online at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmpublicadm/cmpublicadm.htm>

48 UK, HC, “The Business Appointment Rules: Government Response to the Committee’s Sixth Report of Session 2006–07,” 2, HC 1087 – Third Special Report of Session 2006–07, 2, available online at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmpublicadm/651/651.02.htm>

49 *Conflict of Interest Act*, s. 35(1).

50 *Ibid.*, s. 10.

Conflicts of Interest Act prohibits former ministers from accepting employment from persons or entities with which they had had significant dealings during their final year as members of the executive branch. This restriction applies for one year after leaving public office.⁵¹

Ingratiation is a crime in the United States. U.S. law prohibits current officers and employees of the executive branch from participating in government decisions that could affect the interests of outside organizations with which they are seeking employment.⁵² U.S. public officials are permitted (and expected) to recuse themselves from government decisions and transactions so that they are free to seek outside employment. As long as they are not on both sides of the fence, which could impair their judgment as public officials, they are within the parameters of the rule. The Office of Government Ethics, the agency responsible for preventing and resolving conflicts of interest in the U.S. executive branch, offers some clarification as to what activities constitute “seeking employment”:

- the employee is engaged in actual negotiations for employment
- a potential employer has contacted the employee about possible employment and the employee makes a response other than rejection, and
- the employee has contacted a prospective employer about possible employment (unless the sole purpose of the contact is to request a job application or if the person contacted is affected by the performance of the employee’s duties only as part of an industry).⁵³

As mentioned previously, the Ministerial Code in effect in the United Kingdom requires that former ministers seek the advice of the Advisory Committee on Business Appointments before accepting offers of employment in the first two years after leaving public office. The guidelines that steer committee decisions encourage members to consider whether an appointment could give the appearance of ingratiation. Specifically, they are to think about whether the individual had, as a minister, been in a position that could “lay him or her open to the suggestion that the appointment was in some way a reward for past favours.”⁵⁴

Profiteering

Profiteering occurs when former public office holders reap personal or private benefits or profits from their work in the public domain, whether influence or ingratiation has occurred.⁵⁵ Andrew Stark explains that profiteering could include such things as drawing on knowledge, skills, or status acquired as a result of one’s former public

51 *Conflicts of Interest Act*, RSA 2000, c. C-23, s. 31.

52 18 USC s. 208.

53 U.S., Office of Government Ethics, “Seeking Other Employment,” available online at http://www.oge.gov/common_ethics_issues/seeking_other_emp.aspx

54 UK, *Guidelines on the Acceptance of Appointments or Employment Outside Government by Former Ministers*, s. 5(i).

55 Stark, *Conflict of Interest in American Public Life*, 96.

position to gain financially in the private sector.⁵⁶ Prohibitions on profiteering exist despite the fact that even if a former public office holder reaps private benefits from previous experience in office, there is no risk of impaired judgment on the part of current public office holders.⁵⁷ As Stark explains,

Pure private gain from public office takes place in a realm beyond even the twilight zone of quid pro quo, where the official is neither capable of affecting the interests concerned nor beholden to them, and where the official's in-role judgment is thus in no way compromised. Though private gain from public office comes within the colloquial embrace of conflict of interest problems, it in fact involves no conflict of interest.⁵⁸

Even if profiteering does not carry a risk of impaired judgment on the part of current public office holders, it makes sense to employ prohibitions against profiteering to discourage people from seeking public office if even part of their justification for doing so is for the purpose of private gain later.⁵⁹ Another reason for restricting former public office holders' use of the knowledge and information that is accumulated in the public sector is to protect the interests of the state. Public officials are privy to sensitive information while serving as trustees of the public interest. This information is not theirs to publish in a memoir or leak in an interview once out of office; they are expected to maintain some degree of loyalty to the state.

The post-employment section of Canada's *Conflict of Interest Act* begins with what could be considered a general prohibition against profiteering: "no former public office holder shall act in such a manner as to take improper advantage of his or her previous public office."⁶⁰ The definition of "improper advantage" is not clear and would be subject to the ethics commissioner's interpretation. Australia's "Standards of Ministerial Ethics" requires that former ministers "not take personal advantage of information to which they have had access as a Minister, where that information is not generally available to the public."⁶¹

The Ministerial Code introduced by UK Prime Minister Gordon Brown in 2007 contains specific restrictions on former ministers who wish to publish memoirs on the basis of their time in public office. The code forbids British ministers from writing and/or publishing books on their ministerial experiences while in office and from entering into any sort of agreement for the future publication of their memoirs. Once they have left public office, former ministers are required to forward copies of draft manuscripts to the

56 Ibid., 97.

57 Andrew Stark, "Beyond Quid Pro Quo: What's Wrong with Private Gain from Public Office?" (1997) 91(1) *American Political Science Review* 108.

58 Ibid., 119.

59 Ibid., 114.

60 *Conflict of Interest Act*, s. 33.

61 Australian Government, "Standards of Ministerial Ethics" (December 2007), s. 2.19, available online at http://www.dpmc.gov.au/guidelines/docs/ministerial_ethics.pdf

cabinet secretary and are expected to observe the principles articulated in the Radcliffe Report of 1976. The Report of the Committee of Privy Counsellors on Ministerial Memoirs, under Lord Radcliffe's leadership, recommended that former ministers be "free" to publish memoirs that document their own work, but that information relating to national security and international relations be left out. Also, the committee recommended that former ministers not publish material that fits any of the following descriptions: "information about the opinions or attitudes of colleagues regarding any Government business; advice tendered to Ministers in confidence by individual officials; and personnel matters."⁶² The committee recommended that former ministers refrain from publishing material that could fall into one of these categories for a 15-year post-public employment period. Members' preference was to rely on voluntary compliance with these guidelines rather than to impose statutory obligations.

Switching Sides

Canada's *Conflict of Interest Act* prohibits former public office holders from acting "for or on behalf of any person or organization in connection with any specific proceeding, transaction, negotiation or case to which the Crown is party and with respect to which the former public office holder had acted for, or provided advice to, the Crown."⁶³ The subsection that follows prohibits former public office holders from sharing information with private clients that they obtained while in public office and that is not in the public domain.⁶⁴ These rules have no expiry date, and therefore former public office holders will never have permission to "switch sides" on a matter in which they were directly involved on the government's behalf. As Stark points out, to work for a private client *against* the state is interpreted as disloyalty to the public interest. This action qualifies as the ultimate ethical transgression for a public official, as it has the potential to breach the rules against influence, ingratiation, and profiteering simultaneously.

Most codes of ethical conduct for public office holders at the provincial level in Canada prohibit side-switching. For example, the *Members and Public Employees Disclosure Act* in place in Nova Scotia requires that, for six months post-public employment, members shall not

act for or on behalf of any person or entity in connection with any specific proceeding, transaction, negotiation or case to which a department is party, if the former member or public employee acted for or advised the department in connection therewith while holding such office or employment and if the matter might result in the conferring on a person of a benefit of a purely commercial or private nature or of any other nature on a person or class of persons that is other than the general public or a broad class.⁶⁵

62 UK, HC, "Ministerial Memoirs (Radcliffe Report)," Hansard, Written Answers (Commons), January 22, 1976, Series 5 vol. 903, cc521-3W.

63 *Conflict of Interest Act*, s. 34(1).

64 *Ibid.*, s. 34(2).

65 *Members and Public Employees Disclosure Act*, SNS 1991, c. 4, s. 24.

Nova Scotia's post-public employment rules are unique in that they apply to all former members of the legislature. In most parliamentary systems, these restrictions apply only to former members, employees, and appointees of the executive branch.

In the United States, 18 USC 207(a) prohibits former officers and employees of the executive branch from communicating with or appearing before "any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia" on behalf of anyone else on any matter that meets the following conditions:

- "the United States or the District of Columbia is a party or has a direct and substantial interest"
- "the person participated personally and substantially as an officer or employee"
- "involved a specific party or specific parties at the time of such participation."

This is the equivalent of the Canadian rule against side-switching mentioned previously.

Australia's Standards of Ministerial Ethics forbids ministers from lobbying, advocating, or having business meetings with members of the government, parliament, public servants, and defence force personnel on any matter in which they had "official dealings" during their last 18 months in public office.⁶⁶ This rule is also enumerated in the Lobbying Code of Conduct. The cooling-off period lasts for a year and a half, but Canada's restriction on such matters lasts for life. Former public office holders are *never* permitted to switch sides by acting for a private entity on a matter in which Canada is a party on which they had acted for or advised the Crown while in public office. Former ministers in Australia would be permitted to begin lobbying former colleagues immediately, as long as their efforts related only to matters in which they were not involved as public officials. From this perspective, Canada's post-employment regulations are more demanding.

A Note on President Barack Obama's 2009 Regulations

In January 2009, U.S. President Barack Obama introduced new rules in an attempt to stop the "revolving door" between the private sector and the executive branch. Although some of the changes focus on the post-public employment period, others deal with the converse situation – the period during which an individual moves from the private sector into public office. It is worthwhile to consider these reforms alongside the post-public employment regulations because they both attempt to eliminate opportunities for impaired judgment on the part of public officials in the performance of their official duties. It is now forbidden for new executive branch appointees to participate in matters involving their former employers or clients for the first two years

⁶⁶ Australian Government, "Standards of Ministerial Ethics" (December 2007), s. 2.19.

of their governmental appointments. This rule seeks to eliminate the possibility that new public officials would be influenced by relationships with former employers, as preferential treatment could compromise their roles as trustees of the public interest. Former lobbyists entering government are prohibited from participating in specific matters – and on any general issues – with respect to which they had lobbied the government during the two years prior to their public appointment.⁶⁷

Restrictions Relating to Foreign Entities

The post–public employment restrictions for employees who held senior positions in the United States extend to their interactions with foreign entities for the year immediately following their public employment. Specifically, these officials are prohibited from representing, aiding, and/or providing advice to foreign entities with intent to influence the official decisions of U.S. officials or employees. The category of “foreign entity” includes foreign governments as well as political parties.⁶⁸ In Canada, there are no post–public employment restrictions on former public office holders that relate specifically and explicitly to their interactions with foreign entities. That said, the post–public employment rules in the *Conflict of Interest Act* that prohibit influence, ingratiation, profiteering, and side-switching could be interpreted to include relationships with both foreign and domestic entities. The U.S. restrictions on relations with foreign entities could be read as a prohibition against influence and side-switching. Not only would former public office holders be prohibited from making representations to former colleagues on behalf of a private entity, but they would also be forbidden from providing advice “behind closed doors” that is meant to assist the foreign entity in influencing the decisions of U.S. officials.

HOW ARE POST–PUBLIC EMPLOYMENT RULES APPLIED AND ENFORCED?

A significant challenge facing post–public employment ethics regimes is the difficulty associated with detecting non-compliance once former public office holders enter the private world. The ethics regimes in place in Canada at both the federal and provincial levels rely on current public office holders and the attentive public to come forward with suspected violations. If a former public office holder breaks regulations relating to influence and side-switching by making representations to former colleagues prior to the expiry of the cooling-off period, it is up to current officials and parliamentarians to inform the authorities. The *Lobbying Act* requires active lobbyists to register and relies on other lobbyists in the industry, members of the public, or parliamentarians to report suspicions of non-compliance. It has been suggested in the past that Canada adopt a system of dual reporting, in which both the lobbyist and the public office

⁶⁷ White House, *Executive Commitments* (2009).

⁶⁸ 18 USC s. 207(f).

holder would be obliged to report communication from the lobbyist, but this system has never been implemented.

The Office of the Conflict of Interest and Ethics Commissioner is responsible for advising current and former public office holders on how to navigate the transition between the public and private spheres. If any member of the Senate or House of Commons has reason to believe that a current or former public office holder has violated the *Conflict of Interest Act*, he or she is entitled to ask the ethics commissioner to conduct an investigation. The commissioner is authorized to examine matters on “his or her own initiative” as well. Upon concluding an investigation, the ethics commissioner must file a report with the prime minister that lays out the facts related to the allegation as well as the commissioner’s analysis and conclusions. Concurrently, the ethics commissioner is to forward the report to the current or former public office holder who is the subject of the complaint and make it available to the public.

The legislation is clear on the parameters of the ethics commissioner’s power; he or she is authorized to draw conclusions based on the findings of his or her investigations, but in most cases the commissioner cannot enforce punishment. Violations of sections 22–27 of the legislation relating to disclosure may be subject to administrative fines not exceeding \$500. The ethics commissioner determines whether to apply such a penalty; the office’s website explains that monetary penalties are “set with a view to encouraging compliance rather than punishment.” The only post–public employment requirement that falls within this category and that could be subject to monetary penalty is the obligation to report a serious offer of employment to the ethics commissioner within seven days of receiving it. Aside from being subject to monetary penalties, the other punishment that a public office holder could face for failing to comply with the post–public employment rules in the *Conflict of Interest Act* is a form of blacklisting. According to section 41 of the legislation, the ethics commissioner can order current public office holders to avoid official dealings with former public office holders who have been found to be in violation of the rules.

If the ethics commissioner reports that any section of the code has been violated, it is up to the prime minister to decide whether and how to respond with anything further than monetary penalties (if applicable). Section 47 states that the findings and conclusions of the ethics commissioner’s reports “may not be altered by anyone but ... [are] not determinative of the measures to be taken as a result of the report.”⁶⁹ In other words, a conclusion by the ethics commissioner that non-compliance has occurred does not guarantee that any tangible punishment will follow. It is the prime minister’s decision either to apply a sanction or to give the public office holder a “pass.” Forms of punishment may include dismissal from cabinet or caucus. The fact that the report is put on the public record means that a prime minister would be under some pressure to reprimand a public office holder who did not fulfill the requirements of ethics rules.

69 *Conflict of Interest Act*, s. 47.

The sanctions for violations of the *Lobbying Act* are quite severe. Section 10.11 of the legislation stipulates that designated former public office holders may not engage in lobbying activity during the five years immediately following the day on which they resigned from public office. Non-compliance with this rule is considered an offence that is punishable by a fine not exceeding \$50,000. If an individual acting as a lobbyist fails to file a return or knowingly includes false or misleading information in documents submitted to the commissioner, that individual could be punished on summary conviction with a fine not exceeding \$50,000 and/or six months of imprisonment.⁷⁰ The Office of the Commissioner of Lobbying in Canada enforces the legislation by assisting lobbyists in the registration process and by analyzing and verifying the information provided on disclosure forms. The office monitors media content in search of articles relating to lobbying or alleged lobbying. If it appears that unregistered lobbying could be taking place, the office sends advisory letters to the appropriate individuals and/or organizations to explain their responsibilities. As an additional measure to encourage compliance, the office educates public office holders about lobbyists' responsibilities under the legislation in the hope that they encourage the lobbyists with whom they work to comply with the legislation. The office has the authority to investigate alleged breaches of the rules.⁷¹ As of March 2008, 10 investigations had been initiated and four had been completed.⁷²

In the United States, violations of 18 USC 207 and 208, which stipulate restrictions on influence, side-switching, and ingratiation, are punishable by fine and/or imprisonment. In Canada, the post-employment restriction on lobbying former officials that applies to designated former public office holders carries the possibility of legal sanctions under the *Lobbying Act*. However, the rules against influence and profiteering enumerated in the *Conflict of Interest Act* do not carry an automatic sanction, other than the possibility of "blacklisting" under section 41. Because there is no "penalties regime" in the legislation, aside from the administrative monetary penalties that apply only to violations of the disclosure requirements, the *Conflict of Interest Act* could be described as de facto "soft law" even though it is a statute.

The post-public employment regimes in the United Kingdom and Australia do not impose legal restrictions on former public office holders. The rules are enshrined in codes of conduct as opposed to legislation, which means that there are no legal punishments for non-compliance. In the United Kingdom, there is an Independent Advisor on Ministers' Interests whose responsibilities are to advise ministers on how to avoid conflicts of interests and to investigate allegations of non-compliance with the Ministerial Code. However, the advisor can launch an investigation only at the prime

70 *Lobbying Act*, s. 14.

71 *Ibid.*, s. 10.4.

72 Office of the Commissioner of Lobbying in Canada, Key Events and Evolution of the Act, "Key Events in the History of the Canadian Lobbyists Registration Regime," available online at <http://www.ocl-cal.gc.ca>

minister's request and is not authorized to apply a penalty even if he or she finds that a breach has occurred. It is the prerogative of the prime minister to determine how to respond to non-compliance. The fact that the prime minister determines whether alleged misconduct is investigated and punished means that ministerial ethics is a political rather than a legal matter. The prime minister is accountable to the House of Commons for the behaviour of ministers and appointees. If he or she were to choose not to punish a minister after the advisor found that minister to be in breach of the Ministerial Code, the prime minister would have to answer to the House.

In 2005, former British home secretary David Blunkett was accused of breaching the Ministerial Code by failing to consult the Advisory Committee on Business Appointments (ACBA) about a position of employment that he accepted only shortly after resigning from cabinet. His earnings with the Organisation for Research and Technology became a matter of public record in April of that year with the release of Parliament's Register of Members' Interests. He was still an MP and therefore was required to disclose outside earnings. Prime Minister Tony Blair's official response was that, because Blunkett's behaviour did not "stop him [from] doing his job" as a member of parliament, there would be no sanction.⁷³ It is unknown whether Blunkett's failure to consult the committee would have been detected had it not been for the fact that he was still an MP and therefore required to register his private interests.

The "Implementation" section of Australia's Standards of Ministerial Ethics states that it is up to the prime minister to decide whether a minister who is under investigation for alleged "illegal or improper conduct" ought to resign. Ministers charged with criminal offences will be required to resign automatically, as will those who the prime minister feels have committed a prima facie breach of the ministerial standards. In the event that a minister, including the prime minister, is accused of a breach under the ministerial standards, "the Prime Minister may refer the matter to an appropriate independent authority for investigation and/or advice."⁷⁴ If the common punishment for failure to comply with ethics rules is a demand for resignation from cabinet, it is not clear how a former minister would be punished for non-compliance. It would seem that the purpose of the post-public employment restrictions in this case is to clarify expectations and to encourage "good behaviour" rather than to deter or punish questionable conduct.

73 "Blunkett accused of third breach of job code," *Independent*, November 1, 2005, available online at <http://www.independent.co.uk>

74 Australian Government, "Standards of Ministerial Ethics," s. 7.13.

CONCLUSIONS AND RECOMMENDATIONS

In a report written for the OECD on public integrity and post-public employment, Kenneth Kernaghan argues that the deterrent effect of legislation is stronger than that of codes of conduct or “soft laws.” He goes as far as to say that “codes are likely to be especially ineffective in regulating the post-employment activities of *former* officials.” Laws are designed to “prevent and punish wrongdoing” but “codes (and value statements) are often designed to foster ‘right doing’ through the use of aspirational and inspirational language and gently worded admonitions.”⁷⁵ In other words, they can clarify goals and expectations but cannot enforce them. Although Kernaghan is more optimistic about the deterrent effects of laws than of codes, he is hesitant to rely on either as remedies for post-public employment issues. In his view, there is not enough evidence on the effectiveness of existing ethics regimes to be confident of their capacity to deter misconduct in the post-public employment period.⁷⁶

Kernaghan’s reservations about the deterrent effect of codes of conduct ought not to be interpreted as a reason to reject them entirely. The deterrence of wrongdoing is only one of the objectives of ethics regimes. Ethics regulations, whether statutory or not, can assist both current and former public office holders by clarifying expectations. There is evidence to suggest that the “soft law” approach used in the United Kingdom has been effective in helping former ministers to navigate the post-public employment period. The Ministerial Code requires ministers to consult an advisory committee on employment activities in the first two years after leaving public office. There is no legal sanction for failure to comply with this rule, but, as mentioned previously, the Advisory Committee on Business Appointments has reported that the system is complied with “widely and willingly.”⁷⁷ This does not mean that it is deterring non-compliance, as it may be that those who co-operate would do so regardless of whether a penalties regime existed or not.

This study has discussed two main approaches to ethics regulation: the “soft law” approach, which relies on codes of conduct to encourage ethical behaviour, and the “hard law” approach, which uses legislation to discourage and penalize misconduct. In both Canada and the United States, former public office holders are subject to legal restrictions on their post-public employment activities while their colleagues in the United Kingdom and Australia refer to non-statutory codes of conduct to help them to navigate this period. The legislative approach has the advantage of clarity. Ethics laws prohibit specific actions, omissions, and circumstances such as conflicts of interest and the improper use of information, but it is impossible to create an exhaustive list of

75 Kenneth Kernaghan, “Public Integrity and Post-Public Employment: Issues, Remedies and Benchmarks,” Organisation for Economic Co-operation and Development, GOV/PGC/ETH (2007) 3 (May 2007). Prepared for an Expert Group Meeting on Conflict of Interest: Ensuring Accountability and Transparency in the Public Service, June 6–7, 2007, 15.

76 Ibid., 14–16.

77 UK, Advisory Committee on Business Appointments, Third Report 1999–2000, para. 22.

all types of political misconduct. Many codes of conduct prohibit specific behaviours as well, but in addition they often contain “value statements”⁷⁸ that are open to interpretation by a committee or commissioner. The ambiguity of the phrasing in these clauses can make codes of conduct more malleable than legislation. Thus, codes of conduct can “cover” a wider variety of transgressions than laws as long as they are interpreted broadly; laws can prohibit only that which is specifically enumerated as an offence. As Kernaghan points out, however, soft law puts less emphasis on deterrent and punishment than hard law does; punishments for breaches of codes of conduct, where they exist at all, are political rather than legal. Codes of conduct are able to cast a wider net with which to catch various types of misconduct, but compliance is ultimately voluntary. Laws take a narrower approach but have the capacity to deter and punish non-compliance via legal sanction. Again, as Kernaghan reminds us, evidence of the deterrent effect of either soft or hard ethics law is lacking.

Let us revisit the approach used in the United Kingdom as an example of soft law. There are no hard rules restricting the types of employment that ministers can accept in the post–public employment phase. However, the Ministerial Code confers a duty to consult the Advisory Committee on Business Appointments on all employment prospects during the first two years after leaving public office. The guidelines that this committee relies on in its deliberations emphasize the importance of avoiding the perception or appearance of wrongdoing. As a result, the committee’s decision in any particular case depends not simply on whether there is a breach of law, but whether a former minister’s actions are likely to arouse public suspicion. In the event that a former prime minister was considering employment with a well-known lobbyist who had attempted to influence the decisions of his or her government in the past, it is very likely that the committee members would discourage him or her from going forward regardless of whether any specific rule would be broken. This approach offers transparency, openness, and flexibility, but some may see it as too intrusive and as a breach of former ministers’ privacy. An ethics regime has to strike a comfortable balance between the public interest and the public office holders’ personal well-being; the “comfort zone” depends on a regime’s institutional history and cultural expectations.

Prior to the enactment of the *Conflict of Interest Act* in 2006, Canada relied on codes of ethical conduct to manage conflicts of interest in the post–public employment phase. It is unlikely that Canada will return to soft law, given the steady progression toward a legislative ethics regime. A return to a code of conduct may be interpreted as a sign that a government is going “soft” on ethics. However, because the punishment for breaching the post–public employment rules relating to ingratiation and profiteering is political rather than legal, these clauses could be described as a form of soft law. The clauses that prohibit former public office holders from lobbying former colleagues are repeated in the *Lobbying Act*, which contains a more severe penalties regime.

⁷⁸ Kernaghan, “Public Integrity and Post-Public Employment,” 15.

The ethics regime in Canada would not be improved by creating a longer list of prohibited activities; it is already among the most regulatory of OECD countries. As mentioned previously, if the allegations relating to the business relationship between Karlheinz Schreiber and the Right Honourable Brian Mulroney were to come forward now, the current ethics regime could cover it. This is not to say in any certain terms that the alleged events would qualify as breaches of ethics rules, but rather that Mr. Mulroney would have a number of responsibilities relating to them. Specifically, he would be obliged to report any serious offers of employment, to disclose the alleged payments, to avoid lobbying former colleagues for a five-year period, and to refrain from working for a private entity with which he had “direct and significant dealings” as a public official during his last year of office.

I conclude with a reminder of the inherent limitations of ethics regimes. First, the existence of the rules does not guarantee compliance with them. Second, non-compliance with the rules will not necessarily be detected or punished. Third, even the most comprehensive ethics regime will not necessarily enhance public trust in the integrity of political actors and institutions. For these reasons, over-regulation ought to be resisted.

Employment and Post-Employment Restrictions on Prime Ministers and Members of Parliament in Canada

Gregory J. Levine

Introduction

Order in Council 2008-1092 has established a commission of inquiry into certain aspects of the business dealings between former prime minister Brian Mulroney and businessman Karlheinz Schreiber. The Terms of Reference for the Inquiry outline 17 questions concerning the alleged dealings of these two men as well as the regulatory regime and the guidelines for ministers and parliamentarians that may have related to or governed matters such as conflict of interest, outside employment, and post-employment restrictions.

The focus of this study is Question 14:

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

This study was completed in July 2009.

The question presupposes that the nature of the agreement between Mr. Mulroney and Mr. Schreiber is known and understood. At the time of preparing this study, this supposition is not the case. For purposes of discussion, therefore, and for consideration of ethical issues related to a prime minister and a parliamentarian making business agreements while in office, this study assumes that an agreement was made, that the agreement was a retainer of some sort, and that it was related to work which was to be conducted by the former prime minister and parliamentarian. This study also assumes that the work itself would be legitimate in the normal course of business – that is, that the work per se would be legal in Canada and elsewhere.

Analytical Framework: Method and Data

In order to answer Question 14 in the Terms of Reference, several further questions appear to be relevant. In addition, current statutes, regulations and guidelines, and the relevant case law must also be consulted.

FURTHER QUESTIONS

To help explore Question 14, it is instructive to pose further questions. The six questions that follow seem particularly pertinent:

- 1 Can a retainer agreement involving private business be made by a prime minister with a third party while that prime minister is in office? Does it matter if the agreement is made at the end or toward the end of the term of office of the prime minister?
- 2 Can a retainer agreement be made by a member of parliament who was prime minister, where the prime minister has resigned from that position but retains his seat in the Commons? Does it matter if the agreement is made toward the end of his or her term of office?
- 3 Does it matter if the retainer is for work to be performed after the prime minister leaves office? Does the length of time after the prime minister leaves office matter? Are these answers different for a member of parliament who has been prime minister?
- 4 Does the type of work (the subject matter) of the agreement matter? Is one kind of work acceptable but not another?
- 5 A retainer agreement in legal work usually implies that money is paid for future work. Does it matter if no money was paid for the retainer until the prime minister left office? Does the length of time after the prime minister left office matter?
- 6 Does it matter if the retainer was for work with a foreign entity or government rather than for work directed at the Canadian government? If not, is this a gap in the current legislation which should be filled? If so, should the legislation be amended in some way?

These questions follow various scenarios and hypotheses based on the status of someone who is a minister of the Crown – indeed, the first minister – and who then becomes an “ordinary” member of parliament. They are intended to delve into the appropriateness of seeking “outside” work while in office, the timing of looking for such work, the timing of the work itself, the subject matter of the work, the receipt of money for a retainer, the timing of the receipt of retainer money, and, finally, the entities that are involved in the work.

The questions are an attempt to probe whether private interests may compromise the public interest. This question, in turn, is determined by reviewing the various scenarios in light of current law, regulation, policy, and practice.

INFORMATION

The focus of this study is on the current law, regulation, and policy that would govern elected parliamentarians who seek, and engage in, employment outside their work as parliamentarians and/or ministers. The main focus is on the *Conflict of Interest Act*, which was enacted as part of the *Federal Accountability Act* and is now in force.¹ Other legislation, including the *Parliament of Canada Act* and the *Lobbying Act*, are also consulted, as are the corruption sections of the *Criminal Code*.²

The Conflict of Interest Code for Members of the House of Commons, a standing order of the House, is a pivotal document because it provides ethics rules for members of the House of Commons.³ The former Conflict of Interest and Post-Employment Code for Public Office Holders, which has had several iterations through many federal administrations, is also very important. The 1985 edition of that Code is critical because it provides a baseline of ethics rules by which comparisons can be drawn with contemporary rules.

Other codes and legislation, such as Ontario’s *Members Integrity Act*, Ontario’s *Public Service for Ontario Act*, and British Columbia’s *Members’ Conflict of Interest Act*, also provide useful comparisons to assess and understand the contemporary ethics regimes at the federal level.⁴ Similarly, the federal Values and Ethics Code for the Public Service, apparently under revision, also provides a useful interpretive backdrop.⁵ Interpretive bulletins from various Canadian jurisdictions concerning employment issues related to public officials have also been consulted for this study.

1 *Conflict of Interest Act*, SC 2006, c. 9, s. 2, as am. by SC 2006, c. 9, ss. 35–37.

2 *Criminal Code*, RSC 1985, c. C-46, ss. 118–26; *Lobbying Act*, RSC 1985, c. 44 (4th Supp.), *Parliament of Canada Act*, RSC 1985, c. P-1.

3 Standing Orders of the House of Commons, Appendix, online: <http://www.parl.gc.ca/information/about/process/house/standingorders/appa1-e.htm>

4 *Members Integrity Act*, SO 1994, c. 38, as am. by *Public Service for Ontario Act*, SO 2006, c. 35, Schedule A; *Members’ Conflict of Interest Act*, RSBC 1996, c. 287; see also *Conflict of Interest Rules for Public Servants (Ministry) and Former Public Servants (Ministry)*, O. Reg. 381/07.

5 Treasury Board of Canada Secretariat, *Values and Ethics Code for the Public Service* (Ottawa: Minister of Public Works and Government Services, 2003).

In addition, the common law related to employment contracts is relevant. Case law respecting post-employment restraints is instructive and, although it is not the focus here, it too has been consulted.

METHOD

Although this study uses concepts from ethics, political science, public administration, and law, its method is traditional legal analysis. Statutory interpretation, contract interpretation, and case law analysis are the basis of the analysis.

The study begins with an appreciation of the 1985 Conflict of Interest and Post-Employment Code for Public Office Holders. In particular, the sections dealing with “outside” employment are considered. A discussion of contemporary law follows.

Analysis and Discussion

Each of the six questions listed above will be answered in turn. However, it is instructive first to consider the purpose of “outside” employment restrictions in a general way. It is also useful to outline the framework within which the legislation has been enacted, and in which the common law of contract has dealt with this issue.

THE PURPOSE OF RESTRAINING OUTSIDE EMPLOYMENT AND IMPOSING RESTRICTIONS ON POST-EMPLOYMENT ACTIVITY

Restraints on outside activities and employment and on post-employment activity form part of many contemporary public sector ethics codes. They reflect the move toward rules intended to promote integrity in government. Such restrictions have their origins, first, in public law attempts to limit conflicting interests and to promote integrity, and, second, in private sector contracts directed at preventing competition and attempting to restrain trade in certain contexts. Although the first set of origins is of paramount concern here, the second set, along with case law in the area, is instructive and will be considered briefly.

Integrity and Employment Restraints

Integrity in government, and ethical conduct based on it, are critical for maintaining democratic government, which is founded on ideals of mutual respect and equity.⁶ Integrity is about probity and propriety – “the importance of accountability to, responsibility in relation to[,] and respect for others amidst changing and difficult circumstances.”⁷

6 I. Greene and D. Shugarman, *Honest Politics: Seeking Integrity in Canadian Political Life* (Toronto: James Lorimer, 1997), chap. 1.

7 G. Levine, *The Law of Government Ethics: Federal, Ontario and British Columbia* (Aurora: Canada Law Book, 2007), 13 (see chapter 2 generally, also).

Integrity in government is about uprightness in government operations and fair dealing. It is, as the Supreme Court of Canada has indicated, about being free from “under the table” dealing and from securing personal advantage or gain.⁸

To this end – to protect the public interest in government – various laws and codes have been enacted and promulgated. The *Criminal Code* makes various forms of public corruption illegal – such as bribery, selling offices, and frauds on the government.⁹ Governments at all levels in Canada have also been concerned with behaviour that is not conducive to the public weal and which may be seen as proto-corruption and certainly misbehaviour, though not corruption in the criminal sense. To this end, statutes, codes, and bylaws have been enacted or adopted. These instruments typically contain guidance respecting conflict of interest as well as prohibitions against misuse of government property, inappropriate influence and use of office, and inappropriate receipt of gifts. Among these prohibitions, various types of outside employment and post-employment restrictions are often included.

Where outside activity and/or employment restrictions are found, they should always be viewed in context. A detailed analysis of the restrictions within current legislation and the 1985 Conflict of Interest and Post-Employment Codes for Public Office Holders is set out later in this study. For now, however, it is important to note that the context within which these restrictions were created was an attempt to prevent situations where public office could be used for private advantage. Moreover, they were intended to prevent public office holders from using information and advantage gained while they were in office to the detriment of the public good. In this latter respect, there are echoes of the common law of contract and its restraint of trade doctrine.

Contract and Employment / Post-Employment Restrictions

Employers often attempt to limit by contract what outside employment activities their employees may undertake. Covenants restricting activities typically relate to the post-employment period, but they have been used for current employees as well. They are intended to prevent direct competition with the employer.¹⁰ With respect to the post-employment period, typical concerns relate to the possibility of employees working for competitor employers, setting up their own competing businesses, revealing confidential information, or soliciting their former employer’s clients or employees.¹¹ For both current employees and the formerly employed, there is concern about competition, misuse of trade secrets, and loss of goodwill,

8 For example, see *R. v. Hinchey*, [1996] 3 SCR 1128, para. 16 in particular.

9 *Criminal Code*, RSC 1985, c. C-46, ss. 118–26.

10 H. O’Reilly and P.A.N. Gupta, “The Annotated Executive Employment Agreement,” in *The Annotated Employment Contract, 2004* (Toronto: Law Society of Upper Canada, 2004), tab 1, 23, s. 11.

11 S. Kollmorgen and S. John, “Post-Employment Restraints” (May 2002), on-line: www.findlaw.com.au/article/4874.htm. See also R. Price, *Employment Law in Principle* (Pymont, NSW: Thomson, 2007), 20.

which may ensue from outside activity or post-employment activity.¹²

These concerns are not dissimilar to public sector concerns about misuse of office. They reflect a concern for misuse of something that belongs to another. In the private sector, the business is concerned about itself, whereas in the public sector, restrictions are intended to protect the public interest in a larger sense.

Canadian courts have been cautious about enforcing restrictive covenants that amount to restraint of trade. They will protect such restrictions only where a proprietary interest is involved and where the covenant is reasonable in terms of the activities it covers and its duration, geographical breadth, and overall fairness.¹³ Moreover, it is well understood that a covenant of this nature must cause minimal harm to the employee to whom it applies.¹⁴ General clauses that restrict activity, regardless of the reasons, for a period of time will not be upheld.¹⁵

The nature of the concerns expressed in restrictive covenants relating to private sector employment is instructive, as is the caution exhibited by the courts in interpreting such covenants. With respect to the former, the concerns are broadly similar to those in the public sector, while the latter provides a window onto the way to approach public sector restrictions that may limit an individual's ability to gain a livelihood. Given their reluctance about inappropriately restraining trade, the courts may well tread cautiously with respect to restrictions on a public sector official or worker who leaves the public sector, notwithstanding that public duty and protecting the public interest are usually understood differently from private duty and protecting private interest. Against this, one could argue that the difference between public and private sector employment is sufficiently acute that both outside employment and post-employment activities of public sector employees ought to be subject to more severe restrictions. Public employment and public sector activities are public trusts in a way in which private sector activity is not. As Madam Justice Claire L'Heureux-Dubé stated in the Supreme Court of Canada decision in *Hinchey*:

In my view, given the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe.¹⁶

It is arguable, though, that the post-employment situation may be different from the current employment and outside activity situation. It is true that, either way, there is a public trust, but it is also true that to unduly restrict people who have left the public service would not only be unfair to them but could reasonably

12 S.R. Ball, *Canadian Employment Law* (Aurora, Ont.: Canada Law Book, 2008), chap. 7, s. 7:10; see also G. England, *Individual Employment Law* (Toronto: Irwin Law, 2008), 51–57.

13 Ball, *Canadian Employment Law*, s. 7:10; England, *Individual Employment Law*, 52.

14 England, *Individual Employment Law*, 53.

15 S.R. Ball, "Case Comment: *Jostens Canada Ltd. v. Zbieranek*" (1993) 42 *Canadian Cases on Employment Law* 271 at 273.

16 *R. v. Hinchey*, [1996] 3 SCR 1128, para 18.

be seen to constitute an inappropriate restraint of trade, just as in the private sector. Nonetheless, some restriction seems appropriate given the importance of information to which public officials, especially senior public officials, have access.

LEGISLATION AND POLICIES DEALING WITH THE EMPLOYMENT AND POST-EMPLOYMENT ACTIVITIES OF ELECTED PUBLIC OFFICIALS

The Commission's policy consultation document has outlined the key legislation at play in the Inquiry.¹⁷ Nevertheless, it is useful to outline some of the legislation and specific sections relevant to the questions posed in this study.

The Criminal Code

As the questions have been posed and the assumptions made thus far, the matters being discussed here are not criminal in nature. The *Criminal Code* does serve, however, as a useful interpretive backdrop. The corruption sections represent the most egregious attacks on governmental integrity which the law prohibits and punishes. For example, section 121 deals with frauds on the government. It states in part:

Every one commits an offence who

- (a) directly or indirectly
 - (i) gives, offers, or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or
 - (ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person, a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with
 - (iii) the transaction of business with or any matter of business relating to the government ...

whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be;

...

- (c) being an official or employee of the government, directly or indirectly demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind for themselves or another person, unless they have the consent in writing of the head of the branch of government that employs them or of which they are an official;
- (d) having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with
 - (i) anything mentioned in subparagraph (a)(iii) or (iv); ...

17 Oliphant Commission, "Part II – Policy Review: Public Consultation Paper" (December 15, 2008), online: www.oliphantcommission.ca

- (f) having made a tender to obtain a contract with the government,
 - (i) directly or indirectly gives or offers, or agrees to give or offer, to another person who has made a tender, to a member of that person’s family or to another person for the benefit of that person, a reward, advantage or benefit of any kind as consideration for the withdrawal of the tender of that person, or
 - (ii) directly or indirectly demands, accepts or offers or agrees to accept from another person who has made a tender a reward, advantage or benefit of any kind for themselves or another person as consideration for the withdrawal of their own tender.

This section clearly deals with financial and business matters and with dealing gone awry – that is, dealings that are dishonest and corrupt. To date, no one has suggested any such dealings in the matters at issue in the Commission of Inquiry, and they are not the focus here.

However, the assault on integrity of government posed by corrupt acts is only partially dealt with by the *Criminal Code*. Lesser dealings may also taint government, and it is the recognition of this fact that has led to a series of federal reports and policies, and finally to the *Federal Accountability Act*, which included the *Conflict of Interest Act* noted above.

The Conflict of Interest and Post-Employment Code for Public Office Holders, 1985

There have been several iterations of the federal Conflict of Interest and Post-Employment Code, notably in 1985, 1994, and 2006. For purposes of this study, however, it is the 1985 Code that provides an important baseline for the analysis: this version would have been in force in 1993, at the time of the alleged agreement between the parties in this Inquiry.

In order to provide some insight into whether current ethics regimes provide anything new, it is important to consider briefly what system was “in force” at the time. The legal status of the Code, known as the Conflict of Interest Code, and its successors has been ambiguous, although some of its sections have been referred to in court cases and have formed elements of contractual disputes related to senior public servants.¹⁸ It is fair to say that it was a standard, or set of standards, by which the actions of ministers and other public office holders could be assessed.

The 1985 Code applied to “public office holders,” which included ministers of the Crown.¹⁹ It contained sections labelled, respectively, Object, Application, and Principles. The object of the Code was to establish clear rules of conduct respecting conflict of interest and post-employment practices and to minimize the possibility

18 C. Forcese and A. Freeman, *The Laws of Government* (Toronto: Irwin Law, 2005), 445–49.

19 Conflict of Interest and Post-Employment Code for Public Office Holders (Ottawa: Government of Canada, 1985) [1985 Code], s. 2(2)(a).

of conflicts between the private interests and public duties of public officers.²⁰ Interestingly, this minimization of conflict was to be done in the context of “facilitating interchange between the public and private sector.”²¹ There was, from the beginning, an understanding that private interests would always be at play and, in some sense, had to be tolerated or even encouraged and legitimized. Facilitating interchange between the private and public sectors would mean that accommodations such as blind trusts and blind management agreements would have to be made and that they would recognize that private sector actors would come into government and likely return to the private sector. This approach carries through to the current legislation, as will be seen below. What was unacceptable, or more accurately what was to be minimized, was the clash of private interests with public duties.

In the application section, the Code is seen as providing “general and specific direction to assist public office holders in the furtherance” of the Code’s principles.²² The Code was not definitive, however, as public office holders were held responsible to “take such *additional* action as may be necessary to prevent real, potential or apparent conflicts of interest.”²³ Guidance was provided, but public office holders were expected to go beyond this guidance to assess the situations in which they found themselves and consider whether their actions might not only be real conflicts of interest but also (or instead) apparent or potential conflicts of interest.²⁴

The principles section contains many exhortations and prohibitions. Among the most general affirmative requirements are the following:

- (a) public office holders shall perform their official duties and arrange their private affairs in such a manner that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced;
- (b) public office holders have an obligation to act in a manner that will bear the closest public scrutiny, *an obligation that is not fully discharged by simply acting within the law* [.]²⁵ [Emphasis added.]

The Code also contains general prohibitions against misuse of information obtained in the course of official work and against misuse of government property.²⁶ Some of the specific prohibitions that may relate to business and financial dealings are as follows:

20 Ibid., s. 4(c) and (d).

21 Ibid., s. 4(a).

22 Ibid., s. 5(1).

23 Ibid., s. 5(2).

24 The terms “apparent conflict of interest” and “potential conflict of interest” were not defined in the Code. Potential conflict of interest may be seen as the moment when a person realizes that he or she has an interest in a matter at hand, and apparent conflict of interest as the time when a generally well-informed person could reasonably conclude that an official’s ability to perform a public duty was affected by his or her private interest. For a discussion of these issues, see Levine, *The Law of Government Ethics*, 8–12; see also *Members’ Conflict of Interest Act*, RSBC 1996, c. 287, s. 2(2).

25 The 1985 Code, s. 7(a) and (b).

26 Ibid., s. 7(g) and (h).

(c) public office holders shall not have private interests, other than those permitted pursuant to this Code, that would be *affected particularly or significantly by government actions in which they participate*;

...

(e) public office holders, shall not solicit or accept transfers of economic benefit, other than incidental gifts, customary hospitality, or other benefits of nominal value, *unless the transfer is pursuant to an enforceable contract or property right of the public office holder*;

(f) public office holders shall not step out of their official roles *to assist private entities or persons in their dealings with the government where this would result in preferential treatment to any person*;

...

(i) public office holders shall not act after they leave public office in such a manner as to take *improper advantage* of their previous office[.]²⁷ [Emphasis added.]

The Code divided public office holders into two categories, “A” and “B.” It required all office holders to sign a document saying they had read and understood the Code and, as a condition of holding office, they would observe the Code.²⁸ Category A public office holders included ministers of the Crown.²⁹

For Category A public office holders, methods of compliance – including avoidance, confidential reporting, public declaration, and divestment – were outlined.³⁰ The Code also listed assets that were for the official’s private use and those that were exempt from compliance.³¹ These officials were required to produce summary statements that provided public evidence of compliance.³² They were also to divest “controlled assets.”³³

For Category A public office holders, there were a number of additional prohibitions. Except for their official duties, they were not to do the following:

- (c) *engage in the practice of a business or profession*;
- (d) actively manage or operate a business or commercial activity;
- (e) retain or accept directorships or offices in financial or commercial corporations;
- (f) hold office in a union or professional association;
- (g) *serve as a paid consultant*[.] [Emphasis added.]³⁴

Other outside activities were permissible, but they could not be inconsistent with official duties.³⁵ Moreover, they were reportable, and one senses that they were seen

27 Ibid., s. 7(c), (e), (f), (i).

28 Ibid., s. 8(1).

29 Ibid., s. 14(a).

30 Ibid., ss. 16 and 21.

31 Ibid., s. 19.

32 Ibid., s. 22.

33 Ibid., ss. 26 and 27. These assets included publicly traded securities, self-administered RRSPs and commodities, and futures and foreign currencies held or traded for speculative purposes. Interestingly, they did not include – and, logically, could not include – prospective business arrangements.

34 Ibid., s. 29.

35 Ibid., s. 28.

to be things such as involvement with non-commercial activities.³⁶

Category A public office holders were also to avoid preferential treatment. Further, they were to avoid the appearance of it:

- (2) A Category A public office holder shall take care to avoid being placed or the appearance of being placed under an obligation to any person or organization that might profit from special consideration on the part of the office holder.³⁷

Hence there were a number of principles and prohibitions in place which could be seen to be relevant to the formation of business agreements by public office holders.

The *Conflict of Interest Act*

The sections above considered what was in place. What follows is a discussion of key provisions of the current legislation and codes, beginning with the *Conflict of Interest Act*.

The federal *Conflict of Interest Act*³⁸ codifies much of what the various iterations of the Conflict of Interest and Post-Employment Code for Public Office Holders contained and, in addition, includes definitions that empower the new Conflict of Interest and Ethics Commissioner and clarify elements of the previous rules. Because the Act is a statute of Parliament, its legal status is much clearer than that of the Codes. As such, it is law, and not “merely” policy or convention.

The *Conflict of Interest Act* has very similar purposes to the Objects section of the Code. The multifaceted purpose is stated as follows:

The purpose of this Act is to

- (a) establish clear conflict of interest and post-employment rules for public office holders;
- (b) minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise;
- (c) provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred;
- (d) encourage experienced and competent persons to seek and accept public office; and
- (e) facilitate interchange between the private and public sector.³⁹

The one principal difference between the purposes of the Act and the Code is the mandate given to the Conflict of Interest and Ethics Commissioner. Although this position is a new mechanism for compliance with respect to ethics rules for

36 Ibid., ss. 30, 31, and 32.

37 Ibid., s. 36(2).

38 *Conflict of Interest Act [CIA]*, SC 2006, c. 9, s. 2.

39 Ibid., s. 3.

public office holders, it is not an alteration of the rules per se. The goal of facilitating interchange between the private and the public sector has been retained.

The *Conflict of Interest Act* applies to public office holders and, as with the Code, these officers include ministers of the Crown.⁴⁰ The Act attempts to provide further clarifications to concepts such as “private interest.”⁴¹ It also establishes different types of public office holders, among which are “public office holders” and “reporting public office holders.” The latter group includes ministers of the Crown.⁴²

Part 1 of this new Act creates a series of ethics rules dealing with conflict of interest, and it sets out both obligations and prohibitions, just as the Code did. Matters such as preferential treatment, insider information, and influence of office are included, as they were in the Code. The Act contains a general prohibition against public office holders being in conflicts of interest and provides a definition of this term:

s. 4. Conflict of interest

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.

s. 5. General duty

Every public office holder shall arrange his or her private affairs in a manner that will prevent the public office holder from being in a conflict of interest.

s. 6(1). Decision-making

No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest.

This definition of conflict of interest reflects the typical notion of public sector conflict – that is, where a private interest clashes with a public duty.

The sections on preferential treatment and influence are of particular relevance to Part II (Policy Review) of the Commission’s mandate. They are as follows:

s. 7. Preferential treatment

No public office holder shall, in the exercise of an official power, duty or function, give *preferential treatment* to any person or organization based on the identity of the person or organization that represents the first-mentioned person or organization.

⁴⁰ Ibid., s. 2(1).

⁴¹ Ibid., s. 2(1): “Private interest” is defined negatively as not including matters of general application or matters that affect a public office holder as one of a broad class of people. The idea of “private” interest is important because, while not precisely defined, it is clearly more than financial interest. When dealing with conflict of interest, the common law focused on pecuniary or financial interest. The use of the term “private interest” in federal legislation and other legislation across the country is an explicit recognition that interests beyond finances may influence decision makers.

⁴² Ibid., s. 2(1).

s. 9. Influence

No public office holder *shall use his or her position* as a public office holder to seek to influence a decision of another person so as *to further the public office holder's private interests* or those of the public office holder's relatives or friends or to improperly further another person's private interests. [Emphasis added.]

Offers of outside employment are also dealt with.

s. 10. Offers of outside employment

No public office holder shall allow himself or herself to be influenced in the exercise of an official power, duty or function by plans for, or offers of, outside employment.

Section 10 is interesting because it anticipates that offers of outside employment will be made, and it legitimizes them in keeping with one of the Act's purposes. So long as an offer does not interfere with an official's duties, the public office holder will not violate the Act.

Part 1 of the Act also contains several rules about contracting. For example, it prohibits ministers of the Crown from being parties to contracts involving public sector entities.⁴³

The Act contains the same prohibitions as did the Code with respect to outside activities. Subsection 15(1) says:

No reporting public office holder shall, except as required in the exercise of his or her official powers, duties and functions,

- (a) *engage in employment or the practice of a profession;*
- (b) manage or operate a business or commercial activity;
- (c) continue as, or become, a director or officer in a corporation or an organization;
- (d) hold office in a union or professional association;
- (e) *serve as a paid consultant;* or
- (f) be an active partner in a partnership. [Emphasis added.]

Note that this section applies to *reporting* public office holders (including ministers).

Just as with Category A public office holders under the Code, reporting public office holders under the Act are required to divest "controlled assets." These assets are defined in a similar way:

"[C]ontrolled assets" means assets whose value could be directly or indirectly affected by government decisions or policy including, but not limited to, the following:

- (a) publicly traded securities of corporations and foreign governments, whether held individually or in an investment portfolio account such as, but not limited to, stocks, bonds, stock market indices, trust units, closed-end mutual funds, commercial papers and medium-term notes;
- (b) self-administered registered retirement savings plans, self-administered registered education savings plans and registered retirement income funds composed of at least one asset that would be considered controlled if held

⁴³ Ibid., s. 13. See s. 14 as well.

- outside the plan or fund;
- (c) commodities, futures and foreign currencies held or traded for speculative purposes; and
- (d) stock options, warrants, rights and similar instruments.⁴⁴

The inclusion of stock options and the other items is a further refinement of the earlier Code.

Part 2 of the Act is about compliance measures. Reporting public office holders are to prepare a confidential report on assets for the Conflict of Interest and Ethics Commissioner which is to be provided within 60 days of assuming office.⁴⁵ Interestingly, all reporting public office holders “shall disclose in writing to the Commissioner within seven days all firm offers of outside employment.”⁴⁶ In addition, where employment is accepted, this fact must be disclosed within seven days.⁴⁷

Employment in this context should be viewed broadly, and not merely as working for wages as a salaried employee of someone or some entity. Depending on the context, “employ” can mean a common dictionary meaning, such as to use the services of someone in some business.⁴⁸ It would seem almost pointless in the context of an ethics code or ethics law to prohibit or inhibit only those employment relations defined narrowly as waged positions and to allow individuals to take other forms of paid work such as consulting or professional work. The potential for conflict of interest and conflict of duty is surely just as great with the latter type of work.

Part 2 of the Act also contains other important reporting requirements. It requires reporting public office holders to report recusal respecting matters on which they have not participated in decision making; to make a public declaration of all their assets; to state what liabilities they have; and to declare what gifts they have received and what travel they have undertaken. A central feature of this Act is to use reporting both as a form of monitoring and as a way to achieve better public monitoring.

Part 3 of the Act deals with post-employment obligations. The central prohibition remains the same as it was in the Code:

No former public office holder shall act in such a manner as to take *improper advantage* of his or her previous public office.⁴⁹ [Emphasis added.]

The Act contains a number of prohibitions which apply only to reporting public office holders. They include prohibitions on contracting, on representation generally, and on representations by former ministers:

44 Ibid., s. 20.

45 Ibid., s. 22.

46 Ibid., s. 24(1).

47 Ibid., s. 24(2).

48 See discussion of the term “employ” in *Words & Phrases: Judicially Defined in Canadian Courts and Tribunals / Termes et locutions définies par les tribunaux canadiens* (Scarborough, Ont.: Carswell, 2008 supplement) and in particular the discussion of *Cormier v. Alberta (Human Rights Commission)*, (1984) 14 DLR (4th) 55 (Alta. QB).

49 *CLA*, s. 33.

35(1) Prohibition on contracting

No former reporting public office holder shall enter into a contract of service with, accept an appointment to a board of directors of, or accept an offer of employment with, an entity 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.

35(2) Prohibition on representations

No former reporting public office holder shall make representations whether for remuneration or not, for or on behalf of any other person or entity to any department, organization, board, commission or tribunal 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.

35(3) Prohibition on former ministers

No former reporting public office holder who was a minister of the Crown or minister of state shall make representations to a current minister of the Crown or minister of state who was a minister of the Crown or a minister of state at the same time as the former reporting public office holder.

These prohibitions apply for a period of one year after leaving office for reporting public office holders generally, and for two years for former ministers.⁵⁰

It is also noteworthy that former reporting public office holders who lobby and, in doing so, arrange meetings with ministers are to report that activity to the Conflict of Interest and Ethics Commissioner (hereafter, ethics commissioner).⁵¹

Unlike the Code, much of the Act deals with enforcement issues and with monitoring and enforcement by the new ethics commissioner. These aspects of the new Act need not be summarized here, but they make a critical difference. Although the rules have been enhanced in the new Act, the creation of the position of ethics commissioner, with advisory, monitoring, reporting, and administrative order powers, provides a break with past systems. The new system has the force of law and some means of enforcement. It represents a transition in part from a values-based approach to a more coercive approach.⁵²

The Conflict of Interest Code for Members of the House of Commons

The Conflict of Interest Code for Members of the House of Commons is a Standing Order of the House of Commons. It applies to all members of the House, including ministers, who are also covered by the *Conflict of Interest Act*.⁵³ The legal status of the Code has been seen to be non-justiciable and not law in the same sense as the

50 Ibid., s. 36. Note that these periods may be waived or themselves limited on application to the Conflict of Interest and Ethics Commissioner; see s. 39.

51 Ibid., s. 37.

52 See, for example, T. Cooper, "Big Questions in Administrative Ethics: A Need for Collaborative Focused Effort" (2004) 64:4 *Public Administration Review* 395, which outlines the classic Friedrich Finer debate as well as more recent concerns in administrative ethics.

53 Conflict of Interest Code for Members of the House of Commons [Members Code], s. 4.

*Conflict of Interest Act.*⁵⁴

The Members Code establishes rules respecting conflict of interest and disclosure of assets and liabilities. With respect to conflict of interest, it contains prohibitions on the misuse of information and on inappropriate use of influence.

The general prohibition concerning members' furthering their own interests is as follows:

When performing parliamentary duties and functions, a Member shall not act in any way to further his or her private interests or those of a member of the Member's family, or to improperly further another person's or entity's private interests.⁵⁵

This prohibition provides a general backdrop of concern – namely, that private interest should not prevail over public duty.

The section on influence is as follows:

A Member shall not use his or her position as a Member to influence a decision of another person so as to further the Member's private interests or those of a member of his or her family, or to improperly further another person's or entity's private interests.⁵⁶

This prohibition too is general, although it is intended to protect the integrity of office of members of parliament and to safeguard the public interest.

Members are required to disclose conflicts, and they are not to participate in debates or to vote on matters when they have such conflicts.⁵⁷ This part of the Code adopts the classic common law position respecting how to deal with conflicts of interest – disclose, withdraw, and do not participate or vote.

Other prohibitions deal with gifts and permissions and with cautions respecting sponsored travel. In relation to the subject of this study, the most important prohibition perhaps is the partial one that concerns contracting with the government. Subsection 16(1) of the Code states:

16(1) A Member shall not knowingly be a party, directly or through a subcontract, to a contract with the Government of Canada or any federal agency or body under which the Member receives a benefit *unless the Commissioner is of the opinion that the contract is unlikely to affect the Member's obligations under this Code.* [Emphasis added.]

54 Forcese and Freeman, *The Laws of Government*, 444. The Code is seen as part of the procedures of the House and subject to parliamentary rules and privilege. It could be argued, however, that because an inquiry system is embedded in the Code, it may attract fairness obligations in the conduct of the inquiry. In turn, these obligations may be justiciable, even though the ethics commissioner himself (or herself) does not exercise a statutory power of decision (he or she reports opinions and makes recommendations under this Code). It is interesting and significant that the federal Parliament has seen fit not to codify rules for members of the House and the Senate within statutory law. This decision stands in marked contrast to the approach taken in the provinces, where there is statutory codification.

55 Members Code, s. 8.

56 *Ibid.*, s. 9.

57 *Ibid.*, ss. 12 and 13.

Contracting is not impossible, then, but it requires approval. Similarly, members may hold securities with corporations that deal with the Government of Canada unless the ethics commissioner is “of the opinion that the size of the holdings is so significant that it is likely to affect the Member’s obligations under this Code.”⁵⁸ Business dealings and holdings are not as restricted under the Members Code as they are in the *Conflict of Interest Act*.

As noted above, disclosure statements are required of each member. They must be made within 60 days of entering the House.⁵⁹ A public summary statement, based on their disclosure statements, is then prepared.

The Members Code is neither as stringent nor as wide ranging as the *Conflict of Interest Act*. A crucial area of difference is the absence of post-employment restrictions in the Members Code. Such an absence is logical, in the sense that members are permitted to engage in outside activities while they are members, so it would appear inappropriate to have heavier restrictions after they have left office. In addition, members do not hold executive or administrative positions in the same sense that ministers and other public office holders do, so they are not seen to have the same post-employment clout or influence and should not be subject to the same level of restriction. In a sense, the *Lobbying Act* restrictions discussed below signal this kind of difference. It would be possible to argue, however, that many members, particularly on the government side, may have behind-the-scenes influence that bears scrutiny in the post-employment period.

The *Lobbying Act*

The federal *Lobbying Act*, formerly the *Lobbyists Registration Act*, sets rules for conduct of lobbyists. It also requires them to register and to file returns on their activities.⁶⁰ It requires filing both from individuals who lobby on behalf of others and from those who are employed in house by businesses and other organizations.⁶¹

The Act contains a prohibition on lobbying for a five-year period for designated public office holders. Section 10.11 states in part:

- 10.11(1) No individual shall, during a period of five years after the day on which the individual ceases to be a designated public office holder,
- (a) carry on any of the activities referred to in paragraph 5(1)(a) or (b) in the circumstances referred to in subsection 5(1);
 - (b) if the individual is employed by an organization, carry on any of the activities referred to in paragraph 7(1)(a) on behalf of that organization; and
 - (c) if the individual is employed by a corporation, carry on any of the activities referred to in paragraph 7(1)(a) on behalf of that corporation if carrying on those activities would constitute a significant part of the individual’s work on its behalf.

58 Ibid., s. 17(1).

59 Ibid., s. 20.

60 *Lobbying Act*, RSC 1985, c. 44 (4th Supp.).

61 Ibid., ss. 5 and 7.

Designated public office holders include ministers, but not MPs, who are public officer holders under the Act but are not “designated.”⁶² The Commissioner of Lobbying may exempt someone from the five-year limitation period.⁶³ The absence of a restriction respecting members of parliament per se, as opposed to ministers, reflects the lower restrictions on MPs generally. It is interesting, however, that parliamentary secretaries are not expressly included in the definition of designated public office holder, yet such individuals could be very influential. Similarly, long-serving members of House or Senate committees could be, and could be seen to be, very influential beyond Parliament and in the executive. To exclude members without any consideration of their potential influence seems problematic.

The Parliament of Canada Act

The *Parliament of Canada Act* governs the House and the Senate.⁶⁴ One of its rules is germane to the subject of this study. Section 41 of the Act states in part:

- 1 No member of the House of Commons shall receive or agree to receive any compensation, directly or indirectly, for services rendered or to be rendered to any person, either by the member or another person,
 - (a) in relation to any bill, proceeding, contract, claim, controversy, charge, accusation, arrest or other matter before the Senate or the House of Commons or a committee of either House; or
 - (b) for the purpose of influencing or attempting to influence any member of either House.

Although it is not stated as such, this rule is a restriction on MPs lobbying each other as paid lobbyists.

Comment

This summary reveals that a number of provisions exist in Acts and Codes which could apply to situations in which ministers (and prime ministers) or members of parliament make business arrangements. It also shows that there is a great deal of ambiguity. Terms such as “improper advantage” require further interpretation, and sections such as those dealing with employment restrictions invite comparisons with other similar laws and policies. Such interpretation and comparison are best done in the context of exploring the questions outlined above.

THE QUESTIONS: ANSWERS AND INTERPRETATIONS

Mr. Schreiber and Mr. Mulroney allegedly entered into an agreement. Not much is known about the agreement, but it is alleged to have been a retainer of some sort.

62 Ibid., s. 2(1).

63 Ibid., s. 10.11(3).

64 *Parliament of Canada Act*, RSC 1985, c. P-1.

Because retainer agreements usually involve an upfront payment before services are rendered, it is instructive to consider what a retainer is before providing some answers to the questions. It is understood, though, that the exact nature of the agreement is a key element of this Inquiry. It is also understood that there may have been no formality or even much structure to the agreement, whatever it was, between the parties involved in this Inquiry. Nonetheless, the idea of a retainer or an agreement requiring payment upfront provides a potentially useful construct for analyzing the obligations of a former public office holder and former member of parliament respecting outside employment, future employment, and future lobbying. The retainer construct provides a vehicle for understanding the obligations stemming from payment in advance.

It may be that the agreement between the parties was so loose that the money amounted to a gift or was a symbol of a vague promise or statement with no real obligations attached to it. Here, it is assumed that the payments are not gifts and that they relate to the retention of a former public office holder and a former member of parliament to do some work related to something in which the party paying the retainer had an interest or was seeking to obtain an interest.

Retainers have been defined in many ways. A retainer can mean a fee paid in advance to obtain someone's services, a fee paid to engage a professional, or a sum of money paid in advance to secure the services of a professional.⁶⁵ For professionals, especially lawyers, the term retainer may mean the act of employing a counsel, the document by which a lawyer's employment is secured, or the amount of money deposited to secure a lawyer's services.⁶⁶ In some contexts it can mean simply a sign-up fee,⁶⁷ and in other contexts it means a security against work done and a guarantee of payment. The latter is usually the case in legal contexts, where a lawyer takes an amount of money from the client at the beginning of their relationship, places it in a trust account, and then draws on it once services have been performed. It appears in the present case that the retainer was both a preliminary agreement, the exact nature of which is unknown at this time and is the subject of the Inquiry, and an amount of money paid at least somewhat upfront (three payments) which was to be for services performed and for expenses.

The implications of a retainer that constitutes a sign-up fee alone may be somewhat different from those in which money is intended to be applied to the project. A sign-up fee retains someone in the sense that he or she may be on call for a certain period, and the fee is paid whether any work is done or not. It is lost to the person who pays if no work is done in that period. A typical retainer in legal circles involves paying money up front which will be applied to work later on. If the work is not done, or only some

65 See YourDictionary.com; *Collins Essential English Dictionary*, 2nd ed. (New York: HarperCollins, 2006); *The American Heritage Dictionary of the English Language*, 4th ed. (New York: Houghton Mifflin, 2000); and *The Oxford Paperback Dictionary*, 4th ed. (Oxford: Oxford University Press, 1994).

66 Law Society of Upper Canada, *Establishing the Retainer* (Toronto, 2008), 3, citing Thomas Baldwin, "Solicitors Retainer," 1998, online: http://rc.lsuc.on.ca/pdf/pmg/advisory_estretainer.pdf

67 This appears to be happening, for example, in various arrangements being made to hire integrity commissioners in Ontario municipalities.

work is done, the payment, or part of it, will be returned. Typically, more work is done and further payments are required, but return of funds is possible. This latter form of retainer will be the focus of the discussion below.

Retainer Agreements Made by a Prime Minister

Question 1 pertains to whether a prime minister could make a retainer agreement and whether the timing of such an agreement matters:

Can a retainer agreement involving private business be made by a prime minister with a third party while that prime minister is in office? Does it matter if the agreement is made at the end or toward the end of the term of office of the prime minister?

Assuming, as this study has throughout, that the deal per se was not illegal in a general sense, the legislation and policy that would currently govern Question 1 are the *Conflict of Interest Act* and the Conflict of Interest Code for Members of the House of Commons [Members Code]. The previous policy that would have relevance to Question 1 was the Conflict of Interest and Post-Employment Code for Public Office Holders [1985 Code].

Application

There is no question that the Members Code applies to the prime minister as a member of the House of Commons. That would be true today, and it would have been true in the past had the Code been in effect.

The *Conflict of Interest Act* applies to ministers of the Crown, as noted previously. Although the former Code was structured such that it could be argued that the intent was for prime ministers to have accountability of their ministers to themselves, the current Act is structured such that accountability is to Parliament through the Conflict of Interest and Ethics Commissioner, and the prime minister is no less accountable than other ministers of the Crown.

Private Business, Offers, and the Prime Minister

Much of this question ultimately hinges on what the agreement actually required. If it did not require any work related to the Government of Canada or the official duties of the prime minister, many concerns and questions simply evaporate because of the wording of the Act and the Members Code. Moreover, we should bear in mind that one of the purposes of the *Conflict of Interest Act* (s. 3) and the 1985 Conflict of Interest Code was to facilitate interchange between the private and the public sectors.

Turning to the Act first, there are, as noted above, some general cautions and prohibitions. Sections 4 and 5 contain these general statements:

s. 4. Conflict of interest

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.

s. 5. General duty

Every public office holder shall arrange his or her private affairs in a manner that will prevent the public office holder from being in a conflict of interest.

Section 4 hinges on whether an official duty or function was to be performed *and* there is an opportunity to further private interests. Interestingly, unlike in some Canadian legislation⁶⁸ (and in the former Conflict of Interest Code), there is no prohibition concerning the appearance of conflict of interest. There must be an actual conflict of interest,⁶⁹ and having business dealings per se does not put a public office holder into an automatic position of conflict of interest. Having such dealings does not necessarily create an appearance of conflict, though the ambit of the appearance concept is decidedly wider.

Appearance of conflict of interest is an important concept deriving, as it does, from the law related to reasonable apprehension of bias. Governmental processes should be fair and be seen to be fair, and actions of government officials should be seen to be above reproach. Being involved in situations where a reasonably well-informed person could reasonably believe that an official was in conflict could bring governmental action into disrepute. This formulation of apparent conflicts is used in the *Members' Conflict of Interest Act*⁷⁰ of British Columbia, and it has been analyzed and used in a number of BC Commissioners' reports. It is an important concept and tool. While naysayers claim that it is unfair to castigate those who are not in any actual conflict, and that no one should be condemned for appearance only,⁷¹ appearances are important. In those situations where the actions of senior officials or ministers may seem untoward because of potential or perceived conflicts, it is appropriate to expand the regulatory framework to include apparent conflict of interest.

Other prohibitions concerning decision making, preferential treatment, and

68 See section 2(2) of British Columbia, *Members' Conflict of Interest Act*, RSBC 1996, c. 287.

69 The phrase "provides an opportunity" cannot be reasonably interpreted as including an "apparent conflict of interest." For this section to include apparent conflicts of interest it would have to have included wording such as "or that a reasonable person could reasonably believe that the public office holder was in a conflict of interest." This section, as it now is, clearly refers to an actual or real conflict of interest. Moreover, s. 6(1), which refers to a public office holder knowing or having ought to have reasonably known, and s. 11, which refers to gifts being given which "might reasonably seem to be given to influence," are not about apparent conflict of interest. The former is about the awareness of a public office holder's own conflict of interest, not about an outside, reasonable person's perception of a conflict of interest. The latter is about the effect of gift giving and ingratiation, and not about apparent conflict of interest per se.

70 British Columbia, *Members' Conflict of Interest Act*, RSBC 1996, c. 287.

71 See, for example, P. Morgan and G. Reynolds, *The Appearance of Impropriety: How the Ethics Wars Have Undermined American Government, Business and Society* (Toronto: Free Press, 2002).

influence of office apply only if, on the facts, it can be shown that some preference was indeed created. Again there is no prohibition concerning appearances in sections 7 and 9 of the *Conflict of Interest Act*.

The section on offers of outside employment is interesting because it clearly anticipates that public office holders per se will receive such offers. Section 10 states:

No public office holder shall allow himself or herself to be influenced in the exercise of an official power, duty or function by plans for, or offers of, outside employment.

What this section pointedly does not say is “hear no offers” or “accept no offers.” Indeed, it anticipates that there will be offers, and it anticipates moves between the public and the private sectors and public business dealings with respect to the private sector.⁷² The federal Public Service’s Values and Ethics Code also anticipates that employees will get offers, and, in cases where they could place the public service in a position of real, apparent, or potential conflict of interest, it requires that firm offers be disclosed. It also requires that acceptance of such offers be disclosed immediately. It, like the *Conflict of Interest Act*, provides little guidance on what happens on acceptance. Because public servants, unlike reporting public office holders, can engage in outside work, though, it likely means that they will have to practise avoidance with respect to conflicts of interest rather than resign. Reporting public office holders, as discussed below, are prohibited from engaging in outside work (with limited exceptions). For such public office holders not only to accept an offer but also to take up the work, they would have to resign or be in violation of the *Conflict of Interest Act*.

The prime minister is a reporting public office holder (and, in the relevant time period, was a Category A public office holder under the 1985 Code). For reporting public office holders, there are critical restrictions, as set out below.

Section 15 of the Act clearly restricts outside activities. It states in part:

No reporting public office holder shall, except as required in the exercise of his or her official powers, duties and functions,

(a) engage in employment or the practice of a profession ...

...

(e) serve as a paid consultant ...

Under current law, the prime minister simply could not, for example, practise law or engage in any kind of representation for hire (as employment or as a paid consultant) outside his or her official duties. Outside activity is clearly restricted.

Section 15 does not deal with future employment or retainer agreements that pertain to future work. Section 10 allows for such offers and the accepting of them, and it does not impose different rules for reporting public office holders. It could be argued that the acceptance of a retainer, even one merely entertaining the possibility of future work, is engaging in the practice of a profession. It is harder to argue that such an agreement

72 Canada Public Service Agency, Values and Ethics Code, 30–31.

is actual employment or serving as a paid consultant. Moreover, this interpretation of “engaging” or “serving” would vitiate those provisions of the Act which allow offers *and* acceptances of offers, and so it is likely stretching the intent of section 15.

The timing of the retainer would be irrelevant if it involved actual paid work while in office. Whether at the beginning or the end of the prime minister’s time in office, he or she would be in violation of the statute. The converse also appears pertinent. If a retainer is made which contemplates future work, it will not be caught by the Act unless it is of such a nature as to be considered engaging in employment or paid work in and of itself. Again, whether these arrangements happen early or late in the term of office does not matter. Further discussion on timing appears in the answers to questions below.

Private business dealing per se – that is, engaging in outside work – is prohibited in the current Act (as it was for Category A public office holders under the 1985 Code). This prohibition relates to outside activity while the individual is a public office holder. It is *not* about post-employment future work, which is explored further below.

Offers are contemplated for all public office holders. Reporting public office holders must disclose both offers of employment and acceptance of such offers. Subsection 24(1) of the Act states:

A reporting public office holder shall disclose in writing to the Commissioner within seven days all firm offers of outside employment.

Neither the term *firm* nor *offer* is defined. It is fair to argue that the offer of a retainer as discussed above is an offer of employment in the common and general senses of both offer and employment (or, minimally, engagement for the purpose of doing paid work). As discussed above in the section “The *Conflict of Interest Act*,” employment should be seen broadly and would include independent contractors. To restrict the meaning to waged or salaried employment would virtually exempt a lot of activity which public office holders might be expected to become engaged in (paid work without an employee/employer wage-based relationship). Subsection 24(2) of the Act states in part:

A reporting public office holder who accepts an offer of outside employment shall within seven days disclose his or her acceptance of the offer in writing to the Commissioner as well as to the following persons:

(a) in the case of a minister of the Crown or minister of state, to the Prime Minister[.]

It is interesting that a minister is to report offers to the prime minister – a relationship that draws a distinction between the ministers and the prime minister. However, as a minister of the Crown, the prime minister must still disclose to the Conflict of Interest and Ethics Commissioner. This new obligation was not in place in 1985.⁷³ The effect of the obligation remains oblique because it is not clear what is to be done with the information. Nonetheless, it is a requirement, and a prime minister receiving an offer or firming up a

73 The 1985 Code did require disclosure of outside activities, but it was anticipated that such activities would not be employment per se.

retainer would be obliged to report this information to the ethics commissioner.

In sum, with respect to outside activity by a sitting prime minister, there are clear and express prohibitions in current legislation against contracting directly with the government and acting for, or as a party to, such a contract. Future employment issues are dealt with below in the section “Forming a Contract for Work to Be Done After Leaving Office.”

Members of the House and Retainer Agreements

Question 2 pertains to members of the House or, rather, when a prime minister becomes a “common” member again:

Can a retainer agreement be made by a member of parliament who was prime minister, where the prime minister has resigned from that position but retains his seat in the Commons? Does it matter if it is toward the end of his or her term of office?

Application of the Members Code

The Conflict of Interest Code for Members of the House of Commons (Members Code) applies to ministers (see above). It would apply to a prime minister both in that position and as a member of parliament who was formerly prime minister.

Private Business, Offers, and MPs

The Members Code is based on principles designed to protect the public interest and to promote the integrity of the parliamentary process. Nowhere in the purpose statement or the principles section is there reference to facilitating interchange between the private and the public sectors as there is in the *Conflict of Interest Act*, or as there was in the 1985 Conflict of Interest Code.

One of the principles highlights the need to avoid both real and apparent conflicts of interest. Subsection 2(d) states:

2. Given that service in Parliament is a public trust, the House of Commons recognizes and declares that Members are expected
- ...
- (d) to arrange their private affairs so that foreseeable real or apparent conflicts of interest may be prevented from arising, but if such a conflict does arise, to resolve it in a way that protects the public interest[.]

As a result, more regard is given to appearance of conflicts of interest in the Code than in the Act.

The Members Code contains general prohibitions, although far fewer than in the Act. As noted previously, this Code contains a general prohibition on furthering private interests at the expense of public duties. Section 8 states:

When performing parliamentary duties and functions, a Member shall not act in any way to further his or her private interests or those of a member of the Member’s family,

or to improperly further another person's or entity's private interests.⁷⁴

Furthering the interests of members is also defined in the Code. Among various things, it includes pursuing outside employment and receiving payment for outside employment. Section 3 states in part:

- (2) Subject to subsection (3) [which contains exceptions of no relevance to this report], a Member is considered to further a person's private interests, including his or her own private interests, when the Member's actions result, directly or indirectly, in any of the following
- ...
- (d) an increase in the person's income from a source referred to in subsection 21(2) [note that s. 21(2) refers to employment income, income from a profession, and income from a contractual arrangement][.]

If members entered into retainers of the sort discussed above and were remunerated either through the retainers themselves or subject to them, they would be considered to be furthering their private interests. Therefore, they would have an obligation to ensure that their private interests did not interfere with or clash with their official duties.

As noted in the general section on the Members Code above, where members have a conflict, they are obliged to disclose it and not participate in debates or vote on a matter related to that interest. Depending on the nature of the retainer, they might have to disclose the interest and refrain from involvement in the matter were it before the House.

In general, members of the House are not precluded from practising a profession or being employed outside the House. Section 7 of the Members Code states:

- 7. Nothing in this Code prevents Members who are not ministers of the Crown or parliamentary secretaries from any of the following, as long as they are able to fulfill their obligations under this Code:
 - (a) engaging in employment or in the practice of a profession;
 - (b) carrying on a business;
 - (c) being a director or officer in a corporation, association, trade union or non-profit organization; and
 - (d) being a partner in a partnership.⁷⁵

Inasmuch as these outside activities are allowed, there would be little problem in a member accepting a retainer to perform a service.

74 This is a fairly stringent standard, in the sense that members are prohibited from acting "in any way" to further their interests.

75 Section 5 of the Conflict of Interest Code for Senators contains the same formulation, and the Code contains similar injunctions about furthering private interests. It is clearly acceptable among Canadian parliamentarians generally that members of parliament may partake of and maintain outside activities that are remunerative. The Canada Public Service Agency's Values and Ethics Code similarly allows outside employment, though it casts prohibition in terms of the likelihood of any conflict of interest arising. It states: "Public servants may engage in employment outside the Public Service and take part in outside activities unless the employment or activities are likely to give rise to a conflict of interest or in any way undermine the neutrality of the Public Service" (p. 74). None of these statements provides a precise explanation of what will trigger the prohibition on outside employment or activity. There must be sufficient flexibility to allow individual assessment in each case.

There is no restriction under the Members Code which says that a former minister or prime minister may not have the same privileges and incur the same obligations as members who have never been ministers of the Crown. This Members Code also does not speak to the issue of timing – the Code applies whether members are beginning MPs or members nearing the end of their terms. It also does not apply restrictions on former ministers. The later restrictions are found in the *Conflict of Interest Act* and are discussed below.

Retainer for Work After Leaving Office

Question 3 deals with the relevance, or not, of making an agreement for work after leaving office:

Does it matter if the retainer is for work to be performed after the prime minister leaves office? Does the length of time after the prime minister leaves office matter? Are these answers different for a member of parliament who has been prime minister?

There are two aspects at least to this question. One is whether the contract and/or retainer formation matters in terms of ethics violations if the work is to be performed later; the other is whether there are limitations on the sort of work a former public office holder can undertake after leaving office.

Forming a Contract While in Office

Whether it matters that a retainer is for work to be performed later may depend on the nature of the retainer and how formal it is. It is one thing for someone to say, “Look me up – I may have some work for you after you leave office,” and quite another for a specific arrangement to be made to carry out some defined work, albeit at a later time.

Where the work has been defined and an arrangement made, the rules of the *Conflict of Interest Act* and the Members Code dealing with outside employment and activities would still seem to apply. The very act of forming the contract might be seen as outside activity, although, as noted above, it is not without ambiguity. On balance, though, given that the rules allow offers and acceptances of offers, the formation of a contract is acceptable, as discussed previously, so long as no work is done under the contract until the public employment has ended.

Section 15 of the *Conflict of Interest Act* indicates that reporting public office holders are not to engage in certain activities that constitute outside employment. Still, as noted above, the Act contemplates that they may receive offers of employment. Logically, then, even though it is not stated expressly, it is reasonable to expect that, if a person accepts the offer, he or she must cease to be a reporting public office holder at the time the new work is actually started. It is important to note that engagement in a profession or a commercial or business activity is not the same as having controlled assets. A reporting public office holder can deal with controlled assets by putting them

in a blind trust (s. 27(1)), but this concept has no meaning in the context of direct employment – which is prohibited by section 15(1). While reporting public office holders may get offers of employment, if they accept and the employment is to begin during their time of tenure, they must surely resign from their positions as reporting public office holders. All of this may imply, with respect to timing, that a reporting public office holder is able to accept offers of outside work nearing the end of the term of office so long as the work is to begin after the office holder leaves office. This interpretation is not explicitly stated, but it is a logical conclusion of the interplay of rules related to offer, acceptance, and outside employment which are in the legislation. While there is a logic here, there is also considerable ambiguity, and the nexus of offer, acceptance, and no outside work for reporting public office holders should be expressly clarified in the legislation (see the section “Amending the *Conflict of Interest Act*” below).

Forming a Contract for Work to Be Done After Leaving Office

Doing work after leaving office or even planning to do such work raises questions about post-employment obligations. As noted earlier, having some restrictions on post-employment activity serves interests in both the private and the public sectors. Both the *Conflict of Interest Act* and the *Lobbying Act* deal with these obligations.

Post-Employment Restrictions and the Conflict of Interest Act

The most general prohibition related to the post-employment of former public office holders is in section 33, which states:

No former public office holder shall act in such a manner as to take improper advantage of his or her previous public office.

Depending on the nature of the work which the retainer required, the former public office holder might be placed in a position of taking improper advantage.

The term “improper advantage” is not defined in the statute. Variants of it occur in case law in various areas of law and in statute law and regulation.⁷⁶ The term “improper” from a common-sense point of view means unseemly, indecent, unsuitable, and ill adapted.⁷⁷ “Improper” may also denote abuse, as in “abuse of process,” and connote unfairness. “Improper influence” may amount to prejudicing decisions and unfairly influencing outcomes.⁷⁸ “Advantage” may be seen as bettering position, superiority, or favourable circumstance.⁷⁹

76 Sections 15 and 17 of Quebec’s Regulation respecting the Ethics and Professional Conduct of Public Office Holders, RQ, c. M-30, r. 0.1, for example, uses the term “undue advantage.” See also cases such as *Turner-Lienaux v. Campbell*, [2004] 3 CPC (6th) 289 NSCA, where the court found that a lawyer had used his position to “improper advantage” by acting in a high-handed manner and being deceptively manipulative.

77 See the reference in Carswell’s *Words & Phrases* to the *Shorter Oxford English Dictionary*.

78 Carswell’s *Words & Phrases*. See the reference to the case *Lakeshore Workmen’s Council v. Lakeshore Mines Ltd.* (1943), [1944] 1 DLR 53 at 56.

79 Carswell’s *Words & Phrases*. See the reference to the *Concise Oxford Dictionary* in the case *R v. Marsh* (1975), 31 CRNS 232 at 237 (Ont. Co. Ct.).

Former public office holders have the advantage of having worked with the methods of government, knowing key personnel in areas that may be of interest to clients, having developed working relationships with other officers, and being familiar with precise information related to certain issues. Moreover, as a federal Interpretation Bulletin related to lobbying has indicated, former Cabinet ministers, even one who had been out of office for some time, might command attention simply by virtue of their previous position.⁸⁰ This knowledge, person, and position is advantageous vis-à-vis other officials. To misuse it, to use it other than in the promotion of the public good within the public service, could be seen to be taking improper advantage. Conceptually, this misuse is akin to exercising improper influence and, similarly, it is about manipulation and the abuse of power through a kind of misappropriation of knowledge and/or relationships that were meant to be used in the service of the public. If public office holders form retainers on this basis, they might be seen as taking improper advantage and, thereby, violating part of the *Conflict of Interest Act*.

Is there a “proper” advantage to be had, or is there something of which proper advantage can be taken? The phrasing implies that there is, and it is the flip side of what has been said above. Former office holders surely should be able to take advantage of the broad skills and experience they have gained. Taking advantage of particular knowledge related to particular matters and taking advantage of relationships could lead not only to violations of the Act but also to corruption and criminal offences. But using knowledge and experience broadly and in general is surely permissible.

The *Conflict of Interest Act* contains specific prohibitions about misusing information, about representing someone with respect to matters with which the office holder dealt while in office, and about contracting. Sections 34 and 35 state:

34(1) Previously acting for Crown

No former public office holder shall act for or on behalf of any person or organization in connection with any specific proceeding, transaction, negotiation or case to which the Crown is a party and with respect to which the former public office holder had acted for, or provided advice to, the Crown.

34(2) Improper information

No former public office holder shall give advice to his or her client, business associate or employer using information that was obtained in his or her capacity as a public office holder and is not available to the public.

Rules for Former Reporting Public Office Holders

35(1) Prohibition on contracting

No former reporting public office holder shall enter into a contract of service with, accept an appointment to a board of directors of, or accept an offer of employment

80 See Interpretation Bulletin, *Disclosure of Previous Public Offices* (Ottawa: Office of the Commissioner of Lobbying of Canada, website, 2009); see, in particular, the section entitled “Considerations,” online: <http://www.ocl-cal.gc.ca/eic/site/lobbyist-lobbyiste1.nsf/eng/nx00110.html>

with, an entity 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.

35(2) Prohibition on representations

No former reporting public office holder shall make representations whether for remuneration or not, for or on behalf of any other person or entity to any department, organization, board, commission or tribunal 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.

35(3) Prohibition on former ministers

No former reporting public office holder who was a minister of the Crown or minister of state shall make representations to a current minister of the Crown or minister of state who was a minister of the Crown or a minister of state at the same time as the former reporting public office holder.

There are many restrictions here: not contracting respecting service in areas where former reporting public office holders had direct and significant dealings, not making representations where they had direct and significant dealings, and not making representations to a minister who was a minister at the same time as the reporting public office holders.⁸¹ Provincial legislation has similar if not as exhaustive restrictions. Section 17 of Ontario's *Members Integrity Act*⁸² is interesting because it not only restricts former members but puts an onus on the Executive Council not to award contracts or take representations from former members. This restriction allows for more complete monitoring and for a system of broader control of potential misuse of office than the federal system does.⁸³ Section 32 of Alberta's *Conflicts of Interest Act*⁸⁴ makes it a breach of that legislation for a minister to knowingly award a contract to a former minister who is in breach of the post-employment restrictions. Such systems make it clear that the Executive Council or current ministers individually have responsibility as well, and the onus is not simply put on former ministers to act responsibly.

The obverse of direct and significant dealings is indirect and inconsequential

81 It should be noted that the term "contract of service" is used in labour and employment law to refer to waged or salaried employment as opposed to independent contractor work (referred to as "contract for services"). It may be that s. 35 (1) is intended to refer only to waged work and not independent contractor work. However, it is respectfully submitted that a wider reading of s. 35(1) is appropriate, given that the intent of these sections of the legislation as embodied by s. 33 is to prevent former public office holders from taking improper advantage of their former positions and, more positively, to protect the public interest by restricting the ambit of activities of former public office holders. Although this section is about employment, it is also and more fundamentally about ethics in government and protecting the integrity of government. For this reason, a wider reading of the terms of s. 35 seems prudent and appropriate.

82 SO 1994, c. 38. Apparently, thus far in the operation of this statute and of the Integrity Commissioner's Office, there have been no complaints alleging failure to fulfill the duties of s. 17. Nonetheless, it is a potentially useful tool in encouraging ministers and ministries to take on responsibility to avoid contracting with former members of the Executive Council.

83 See also section 8 of British Columbia's *Members' Conflict of Interest Act*, RSBC 1996, c. 287.

84 RSA 2000, c. C-23.

dealings, and, presumably, if that was the level of contact, it is permissible. Ministerial non-involvement is of obvious importance here, and if the task, the goal, of the retainer is to contact those whom the minister knew and worked with, then there is a serious problem. The problems may be more complex and wide ranging in some circumstances, where the minister was the prime minister, and less so in others. For example, the prime minister would have had a level of inside information available to few others in government, so the potential for misuse of information is likely higher. However, because other ministers and their officials and administrators do most of the actual operational work of government, it is not as likely that the prime minister will have had direct dealings with many government officials. The prime minister will have had significant dealings with many, but direct dealings with few. The issue of representations and appointments may be an important gap in the legislation because the influence of a prime minister and former prime minister will likely be considerable. In this case, then, the test “significant and direct” may be too narrow; “significant or direct” might be more appropriate.

Finally, there are time limits on the federal restrictions. With respect to public office holders, the time limit is two years after their last day of office. Ministerial staff can seek a waiver of this time limit, but not ministers. A former prime minister would have a two-year cooling-off period.

Post-Employment Restrictions and the Lobbying Act

As discussed in the general legislation and policy section on the *Lobbying Act*, there are limits to lobbying by “designated public office holders.” These public office holders include ministers of the Crown (*Lobbying Act*, s. 2(1)(a)).

The prohibition on lobbying is as follows:

10.11(1) No individual shall, during a period of five years after the day on which the individual ceases to be a designated public office holder,

- (a) carry on any of the activities referred to in paragraph 5(1)(a) or (b) in the circumstances referred to in subsection 5(1);
- (b) if the individual is employed by an organization, carry on any of the activities referred to in paragraph 7(1)(a) on behalf of that organization; and
- (c) if the individual is employed by a corporation, carry on any of the activities referred to in paragraph 7(1)(a) on behalf of that corporation if carrying on those activities would constitute a significant part of the individual’s work on its behalf.

In the case at hand, section 10.11(1)(a) seems most relevant. The lobbying activity outlined in section 5 is as follows:

5(1) An individual shall file with the Commissioner, in the prescribed form and manner, a return setting out the information referred to in subsection (2), if the individual, for payment, on behalf of any person or organization (in this section referred to as the “client”), undertakes to

- (a) communicate with a public office holder in respect of
 - (i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons,
 - (ii) the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament,
 - (iii) the making or amendment of any regulation as defined in subsection 2(1) of the Statutory Instruments Act,
 - (iv) the development or amendment of any policy or program of the Government of Canada,
 - (v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada, or
 - (vi) the awarding of any contract by or on behalf of Her Majesty in right of Canada; or
- (b) arrange a meeting between a public office holder and any other person.

If a retainer was formed for lobbying in general and for any of the lobbying purposes above, then the five-year restriction will apply. There are exceptions in section 10.11, but none of them apply to someone who was a minister for a significant period.

Violating this prohibition is a serious offence and carries a fine of up to \$50,000 (s. 14(2)).

Subject Matter of the Retainer

Question 4 relates to whether the subject matter of the retainer itself matters with respect to the rules and prohibitions:

Does the type of work (the subject matter) of the agreement matter? Is one kind of work acceptable but not another?

Subject Matter

The subject matter respecting issues of a retainer in the lobbying context is outlined above in the section “Forming a Contract for Work to Be Done After Leaving Office.” If a former designated public office holder is lobbying on a given set of issues – for example, lobbying with respect to contracting – then he or she is in violation of section 10.11 and is committing an offence.

Type of Work

The type of work to be done in a retainer does matter in a general sense. As noted above, there are clear prohibitions on some kind of work for reporting public office holders (see the section “Private Business, Offers, and the Prime Minister”) and for former reporting public office holders (see the section “Retainer for Work After Leaving Office”). Reporting public office holders when in office cannot engage in employment or practise a profession, for example. Former reporting public office holders are prohibited from representation work and contracting work in certain contexts, as described above.

Type of work is less of an issue for members of parliament per se, who may engage in business and professions provided the work does not interfere with their official duties and they declare conflicts when appropriate (see the above section “Members of the House and Retainer Agreements”). They cannot directly contract with the Government of Canada without obtaining an opinion from the Conflict of Interest and Ethics Commissioner that this work is unlikely to affect their official duties.⁸⁵ Members are also prohibited from receiving compensation for services rendered to any person respecting bills, contracts, and other matters before the House or Senate.⁸⁶

Retainer Payment After the Individual Has Left Office

Question 5 relates to the time when a retainer payment is actually taken:

A retainer agreement in legal work usually implies that money is paid for future work. Does it matter if no money was paid for the retainer until the prime minister left office? Does the length of time after the prime minister left office matter?

Retainer Paid When the Prime Minister Left Office

The nature of retainers was explored at the beginning of the above section “Retainer Agreements Made by a Prime Minister.” On one level it could be argued that there is no retainer if no payment has been made – at best there was an agreement to agree before the retainer was formed. It is arguable that it does matter a great deal if the prime minister accepted no money before leaving office because no agreement, while in office, had been made. The formality or informality of the retainer is irrelevant here. What is critical is whether any agreement that attracts contractual obligations or statutory and common law obligations related to employment was created.

As noted previously, lawyers and other professionals often demand retainers in the form of money before doing any work. If that was the situation in the present case, then the working relationship between the prime minister and the businessman would not have begun until after the prime minister left office, but he would have formed a contractual arrangement of some sort, and elements of the *Conflict of Interest Act* relating to outside employment might apply, as discussed above. In the situation where no payment is made, in the absence of any other consideration supporting the existence of a contract, no retainer agreement and no contract of any sort are formed, and the rule respecting contracting in the *Conflict of Interest Act* would not apply. As the Act permits receiving and accepting offers, the mere seeking of business is not likely to be prohibited under the Act and should not likely be interpreted as engaging in employment under section 15.

Moreover, if the former prime minister did accept the retainer when he was

85 Interestingly, the Conflict of Interest and Ethics Commissioner has received few requests from members for advice in respect to outside activities and contracts. See Conflict of Interest and Ethics Commissioner, *Annual Report, 2007–2008*.

86 *Parliament of Canada Act*, RSC 1985, c. P-1, s. 41(1).

simply a member of parliament, then the Members Code applies. It permits business relationships so long as they do not interfere with official duties.

Does the Length of Time After Leaving Office Matter?

The length of time after leaving office matters with respect to the subject matter and lobbying or contracting with government and the like, as noted above. The *Lobbying Act*, for example, prohibits lobbying by public office holders such as a former prime minister for a five-year period. By way of example, and as noted previously, there are also prohibitions on contracting with government by former ministers. Some activities are clearly prohibited for certain time periods for former ministers. These prohibitions are not about payment or contract formation per se; rather, they are about restricted or prohibited activities occurring within a designated “cooling-off” period.

Contacting Foreign Entities

Question 6 deals with whether it matters if the retainer pertained to work concerning foreign entities or governments:

Does it matter if the retainer was for work with a foreign entity or government rather than for work directed at the Canadian government? If not, is this a gap in the legislation which should be filled? If so, should the legislation be amended in some way?

The legislation and policies do not really deal with foreign-directed activities. Their focus is on behaviour within the Canadian government and Parliament and toward the Canadian government and Parliament.

Rules such as the rule against taking “improper advantage” of one’s position may come into play. For example, if a prime minister had developed close relationships with foreign leaders and members of their governments, and then flaunted or misused that relationship, the rule might come into play. Clearly it would not be in the Canadian government’s interest for a former minister or prime minister to damage government relationships while taking advantage of his or her former position. Beyond this general understanding, however, this rule in this context is highly ambiguous.

It is interesting that the prohibitions in the *Conflict of Interest Act* regarding contracting and representation with respect to boards, agencies, departments, and the like do not specify that these bodies must be Canadian. However, that is likely the intent of the sections that appear to be geared to preventing misuse of office and undue influence in arenas in which the former reporting public office holder had some sway.

Inasmuch as there may be concern with damaging Canadian relations and interactions with foreign entities and governments, amendment of the current legislation would be appropriate.

Summary

The key legislative sections, exclusive of the definition and interpretative sections, canvassed in relation to these six questions are outlined in Table 1.

TABLE 1: THE KEY LEGISLATION RELATING TO THE SIX QUESTIONS POSED IN THIS STUDY

SITUATION	LEGISLATION
Prime Minister in office	<i>Conflict of Interest Act</i> , ss. 4, 5, 10, 15, 24
Member of parliament in office	Conflict of Interest Code for Members, s. 2(a), ss. 7, 8
Post-employment	<i>Conflict of Interest Act</i> , ss. 33, 34, 35; <i>Lobbying Act</i> , ss. 5(1), 10.11(1)

There are important distinctions in obligations between the responsibilities of ministers (and the prime minister) and members of parliament. As a minister of the Crown, a prime minister is subject to the *Conflict of Interest Act* and is a reporting public office holder under that statute. As such, by virtue of section 15 of the *Conflict of Interest Act*, with two exceptions (working for a Crown corporation and engaging in philanthropic work), the prime minister is prohibited from engaging in various employment activities such as practising a profession or being a paid consultant.

Reporting public office holders are not prohibited from accepting offers of employment (and by implication from accepting retainers for future work). If an employment contract or retainer is not for future work, though, and is to begin immediately, the reporting public office holder cannot continue as a reporting public office holder (unless he or she repudiates the contract, which would negate the whole point of accepting the offer). As stated previously, this work is not analogous to controlled assets, which can be divested through a blind trust. Reporting public office holders cannot simply rearrange their business in the case of outside employment. If the work entails lobbying government, such former officers would also, under the *Lobbying Act*, be prohibited from lobbying government for five years. If the work entails contracting with the government or making representation to it, where the former minister had official dealings with the government, there are prohibitions in place today, some of which are time limited and others more enduring.

Members of the House of Commons are freer than public office holders, especially reporting public office holders, to engage in outside activity and to accept outside remuneration. They are under fewer restrictions both in and out of office. While in office, they must not further their own private interests at the expense of performing their public duties, and their private interests must not supersede their official duties. The principles in their Code are broader as there is express concern with apparent conflict of interest.

Strengthening the Current Legislation

As has been highlighted throughout this study, certain absences and ambiguities in the current legislative regime could be tightened or eliminated. To explore this suggestion further, it is instructive to consider some of the differences between the original Conflict of Interest and Post-Employment Code for Public Office Holders and the current legislation and then to suggest some specific enhancements to the latter.

TRANSFORMATION OF THE CONFLICT OF INTEREST AND POST-EMPLOYMENT CODE TO THE *CONFLICT OF INTEREST ACT*

There are considerable differences between the 1985 Code and the current *Conflict of Interest Act*. The creation of a statutory Code with an independent Conflict of Interest and Ethics Commissioner who oversees and monitors the Code and reports to Parliament is a very important and interesting change. The creation of administrative monetary penalties creates a preliminary order power for the ethics commissioner, and that in turn may lead to further transformation of the ethics system.⁸⁷ At present these penalties relate to disclosure requirements. Though significant, that authority is clearly restricted. The ethics commissioner does not have the power to make orders respecting major prohibitions and ethics rules embedded within the statute. Nevertheless, as the first order power of its kind in a model for a Canadian ethics commissioner, it is important and it may lead to broader order powers. For the purposes of this study, the key positive changes between the Code and the Act are the enhanced prohibitions around contracting. There are now more expressly prohibited actions respecting contracting than there were previously.⁸⁸

One rule that appeared in the 1985 Code and is somewhat reflected in the principles in the Members Code, but which has not found its way into the current Act, is the rule concerned with apparent conflict of interest. Subsection 5(2) of the 1985 Code said:

Conforming to this Code does not absolve individual public office holders of the responsibility to take such additional action as may be necessary to prevent real, potential or apparent conflicts of interest.

The principles of the Members Code refer to apparent conflicts, but this idea is not in the current *Conflict of Interest Act*. Although apparent conflict of interest may not always be easy to ascertain, it is a worthwhile concept. Despite the Federal

87 Note, however, that the ethics commissioner has downplayed this aspect of the new legislation in a question and answer session given after a speech to the Canadian Centre for Ethics and Corporate Policy, Toronto, May 2008. Link to speech can be found online: http://www.ethicscentre.ca/EN/events/past_events.cfm?tmp=1¤tPage=2.

88 See, for example, sections 13 and 14 of the *Conflict of Interest Act*.

Court's 2004 decision in *Stevens v. Canada*,⁸⁹ the idea of apparent conflict of interest was credibly explored and outlined in the Parker Commission Report.⁹⁰ Mr. Justice Parker indicated that a real conflict was indicated when a public office holder had a private interest of which he or she was aware and which had a nexus with his or her public duties that was sufficient to influence the exercise (performance) of those duties. He defined an apparent conflict of interest as something that could be seen when "a reasonably well-informed person could reasonably conclude as a result of the surrounding circumstances that the public official must have known about his or her private interest."⁹¹ More recently, the Bellamy Inquiry respecting Toronto Computer Leasing has affirmed the utility of the idea of apparent conflict of interest.⁹² For Madam Justice Bellamy, an "apparent conflict of interest exists when someone could reasonably conclude that a conflict of interest exists."⁹³ The idea is known to law and arises from the idea of reasonable apprehension of bias – that is, a reasonable apprehension that reasonably well-informed persons could have a bias.⁹⁴ Such a concept may be pertinent in a case such as the present one where appearances of official action may have mattered and, indeed, may continue to matter. Interestingly, the 1985 Code dealt with this possibility while the current legislation does not.

Integrity in government is crucial. Both actual integrity and the appearance of integrity must be manifest in the workings of government for public trust to be fostered and maintained.⁹⁵ If an official appears to be biased or in conflict, that image compromises his or her impartiality and integrity. In the *Hinchey* case,⁹⁶ while discussing

89 [2005] 2 FCR 629. In this case the Federal Court found that the Parker Commission, which looked into allegations of conflict of interest concerning the Hon. Sinclair Stevens, had exceeded its jurisdiction by defining the concepts of real and apparent conflict of interest. The mandate of the commission had been to find whether the former minister had been in violation of the conflict of interest sections of the Conflict of Interest and Post-Employment Code for Public Office Holders (1985). The commission, the court held, ought not to have interjected its own definitions of real and apparent conflicts. The oddity of this finding, it is respectfully submitted, is that, as the court notes, the Code did not define the terms, yet the commission's mandate was to determine whether there were conflicts! Some understanding of the terms was necessary, or the commission could not have done its work. The court's judgment is based on the understanding that the former minister could not have known a standard devised by a commission investigating his behaviour some time after his actions occurred. What is troubling about the decision is that it does not acknowledge the lineage of the concepts of conflict of interest in administrative and other areas of law. The Parker Commission drew on well-understood concepts involving natural justice and reasonable apprehension of bias. The government did not appeal the Federal Court decision. In a sense, though, from a conceptual point of view, the state of the *Stevens* case in itself does not matter. The idea of apparent conflict of interest has taken hold and, although by no means universally accepted, has come into statute and policy over the years.

90 Canada, Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair Stevens, *Report* (Ottawa: Ministry of Supply and Services, 1987) (Commissioner W.D. Parker).

91 *Ibid.*, p. 32.

92 Toronto Computer Leasing Inquiry / Toronto External Contracts Inquiry, *Report, Volume 2: Good Government* (Toronto: City of Toronto, 2005) (Commissioner Denise E. Bellamy).

93 *Ibid.*, p. 39.

94 Levine, *The Law of Government Ethics*, 11.

95 See, for example, M. Young, *Conflict of Interest Codes for Parliamentarians: A Long Road* (Ottawa: Parliamentary Library, Law and Government Division, 2006).

96 *R. v. Hinchey*, [1996] 3 SCR 1128, para. 16.

the purpose of section 121 of the *Criminal Code*, Madam Justice L’Heureux-Dubé indicated that the section was “not merely to preserve the integrity of government but to preserve the appearance of integrity as well.” She cited the *Greenwood* case⁹⁷ and approvingly quoted Mr. Justice Doherty when he said that “[t]he government’s business must be free of any suggestion of ‘under the table’ rewards.”⁹⁸ Where there is potential for appearances to harm government, surely they must be taken into account. In this sense the current *Conflict of Interest Act* is deficient.

AMENDING THE *CONFLICT OF INTEREST ACT*

There are conceptual and practical amendments that could enhance the *Conflict of Interest* legislation.

Apparent Conflict of Interest

The Act should include a specific statement about apparent conflict of interest. This term could be defined as it is, for instance, in British Columbia’s *Members’ Conflict of Interest Act*.⁹⁹ Subsection 2(2) of that Act states:

- (2) For the purposes of this Act, a member has an apparent conflict of interest if there is a reasonable perception, which a reasonably well informed person could properly have, that the member’s ability to exercise an official power or perform an official duty or function must have been affected by his or her private interest[.]

In the BC formulation, where there is apparent conflict of interest in a matter, members of the Legislative Assembly violate the statute only where they act on the matter. MLAs do not violate the statute merely by being in a situation where they have an apparent conflict. Former commissioner Oliver stated it this way:

For an apparent conflict of interest, the question is whether the member exercised a power or performed an official duty or function when there was a reasonable perception, which a reasonably well informed person could properly have, that the member’s ability to exercise a power, duty or function must have been affected by his private interest. The potential for an appearance of conflict arises whenever there is a reasonable perception that a member is in a position to further his or her private interest through the exercise of an official power, duty or function, i.e. that he or she has the “ability” to do so. However, there is only a violation of the Act if the member actually exercises an official power or performs an official duty or function when he or

97 *R. v. Greenwood* (1991), 5 OR (3rd) 71 (Ont. CA).

98 *R. v. Hinchey*, [1996] 3 SCR 1128, para. 16. For a fuller discussion and citation of the *Hinchey* decision, see Levine, *The Law of Government Ethics*, 13.

99 RSBC 1996, c. 287.

she appears to be in a position to further his or her private interest.¹⁰⁰

A formulation of the apparent conflict of interest test in British Columbia should be adopted in the federal legislation. The BC legislation stands almost alone at the provincial level in including a standard dealing with apparent conflict of interest for members of the legislature.¹⁰¹ It is a workable standard and has stood the test of time.

Appearances do matter. Public trust can be enhanced or destroyed by actions that appear unseemly or dishonest even where they may not be. Society cannot rely absolutely on appearances, and ought not to, because appearances can be tragically unfair and also plain wrong. However, a case can be made for an objective standard and for rules that deal with apparent conflict of interest in the current Act.¹⁰²

Monitoring Contracting by Former Reporting Office Holders

Contracting obligations and monitoring, whether former ministers are involved in contracts or not, should not be left solely to the Conflict of Interest and Ethics Commissioner. As discussed above in the section “Forming a Contract for Work to Be Done After Leaving Office,” provincial legislation often indicates that the Executive Council or the minister(s) awarding a contract have a responsibility to ensure that former ministers are not contracting with government. This is important because it indicates a collective responsibility of government to monitor itself. A similar requirement should be placed on either the Privy Council Office or Cabinet itself.

Offer, Acceptance, and Employment

The nexus of the offer, acceptance, and outside employment sections in the Act should be made crystal clear. It has been argued above that, in terms of the purposes of the Act, reporting public office holders can, logically and consistently, have offers of employment and accept employment. They cannot, however, continue to work as a reporting public office holder if they move beyond offer and acceptance and actually begin the new work (unless it is as a reporting public office holder in another job or it fits the two exceptions set out above in the section “Forming a Contract While in Office”). This type of restriction is obviously consistent with the purpose of the statute. The offer and acceptance sections of the Act should refer back to section 15,

100 *Opinion of the Conflict of Interest Commissioner, pursuant to s. 19(3) of the Members’ Conflict of Interest Act, in the Matter of a Request by the Executive Council and an Inquiry pursuant to s. 21 of the Members’ Conflict of Interest Act into Whether the Honourable H. Glen Clark has been in Breach of Any of the Sections of the Members’ Conflict of Interest Act in Connection with the Approval-in-Principle of a Gaming License for the North Burnaby Inn / 545736 B.C. Ltd* (Victoria: Office of the Conflict of Interest Commissioner, 2001) (Commissioner H.A.D. Oliver), 53.

101 The standard is included in the Members Code and in the federal Values and Ethics Code. It was also suggested in the Bellamy Inquiry Report as a standard to be used for Toronto, and it has found its way into the *Public Service of Ontario Act*, SO 2006, c. 35, sch. A, s. 119 (a section dealing with referrals). Recent trends suggest it is an important standard.

102 As discussed in footnote 69 above, no amount of mental gymnastics can fairly allow for the current Act to be interpreted to include apparent conflict of interest.

the outside employment section, and make it clear that reporting public office holders cannot hold down two jobs at once.¹⁰³

Retainer

Retainers or other contractual arrangements that demand upfront payment as part of the offer and acceptance should be prohibited for public office holders. This restriction would prevent the unseemly spectacle of officials bargaining while in office for payments to be applied to later work. It would also help alleviate any concern about bias in favour of the new “boss” while the official is still obliged to be acting in the public interest.

Ambiguities

Ambiguities in terms such as “improper advantage” and “significant dealings” should be ironed out. The concerns need to be more clearly specified through interpretive sections. For significant dealings, interpretive work such as Alberta’s Ethics Bulletin entitled *Post Employment* should be consulted.¹⁰⁴ Although it would be impossible to have an exhaustive list of such dealings, it makes sense to itemize examples as the bulletin does and to include them in the legislation. For example, the bulletin indicates that “significant official dealing” includes ministerial direction of a matter irrespective of whether the minister has had personal contact with the personnel who carry out his or her directions. It also indicates that constant and routine contact could indicate significant dealing between an agency and a person or a department and an agency. It indicates that regular input into the policy process of a department or agency would be seen as significant dealing, as would the preparation and presentation of matters for Cabinet consideration. All these indicators are useful, and it would be helpful for the federal regime to adopt this kind of thinking. At a minimum, it ought to work out its own definitions, and it should separate the concepts of significant dealing and direct dealing.

Clarification of the term “improper advantage” – which would outline the misuse of prior knowledge, contacts, and position – would be helpful. Gaining access to channels of power on the basis of current or previous position in order to further private interests, and using influence that was to be applied only in the public interest, are examples of taking an improper advantage. The term has certain ambiguities, and clarification through definitions would be helpful.¹⁰⁵

103 It should be noted that some jurisdictions go further than merely dealing with offers and cover negotiating prior to receipt of offers. Moreover, it has been suggested that even seeking outside employment should be covered. It is worth considering such rules, but for now clarification of what is in place seems the most urgent concern.

104 Office of the Ethics Commissioner, *Ethics Bulletins – Issue 5: Post Employment* (Edmonton: Office of the Ethics Commissioner, January 1997), online: <http://www.ethicscommissioner.ab.ca/Ethics%20Bulletins.htm>

105 It has been suggested that s. 33 of the *Conflict of Interest Act* is actually a form of residual clause and that taking improper advantage is covered specifically in other sections such as s. 34. If this is the case, surely these points should be clarified.

AMENDING THE MEMBERS CODE

Three major issues are important with respect to the Code. One relates to status, and the others to conceptual and substantive rules issues – apparent conflict of interest and post-employment restrictions.

Status

The Code is ostensibly non-justiciable. The time has come for Parliament to legislate its code. All the provinces have established such codes within their members' conflict of interest or integrity statutes. The legislatures retain the decision-making power as to what is to happen to those who violate the rules, but the rules have the force of law. It is past time for Parliament to enact rules at the federal level.¹⁰⁶

Apparent Conflict of Interest

With respect to apparent conflict of interest, the Members Code sees its avoidance as a matter of principle – a view that is important and even impressive. What is needed is to clearly articulate the “appearance” standard throughout the rules in the Code. A standard analogous to the BC standard discussed above in the section “Amending the *Conflict of Interest Act*” should be adopted.

Post-Employment Restrictions

For the most part, it seems appropriate that the Members Code does not contain post-employment restrictions for most members of parliament. Consideration should be given to having some form of post-employment restriction for members of parliament who are not covered by the *Conflict of Interest Act* as former ministers or advisers but who have influential positions and are not expressly included in the *Conflict of Interest Act*. Heads of committees, for example, might be subject to some form of post-employment restriction.¹⁰⁷

106 The legislative codification of ethics codes in the federal system has often been characterized as an attack on both the Westminster model and parliamentary privilege. The Westminster model of responsibility of the prime minister for his ministers is not negated by having a legislated code nor is it by having an officer of parliament who makes findings and recommendations respecting ethics matters. Privilege is not particularly affected by this system either. The provinces all have legislated codes, and none have suffered a parliamentary or democratic deficit because of it. The advantage of legislation is that it is arrived at by a known, established, and relatively open process, whereas having rules adopted by resolution (and custom) can result in rule changes in covert committee settings which are entirely inappropriate for this kind of system.

107 Parliamentarians who hold positions of influence may be better able to use that position to their advantage in the outside employment context. Committee heads at least have the potential to gain more knowledge and contacts than other members of parliament by virtue of their position. It is interesting that the Privy Council Office guide, “Accountable Government – A Guide for Ministers and Ministers of State – 2008, III – Ministerial Relations with Parliament, III.1 – Ministerial House Duties,” calls on ministers to establish good relations with committee heads because committees form an important part of the legislative and policy process.

CULTURE AND ENFORCEMENT ISSUES

This study focuses on integrity rules as they were and as they might be. In the absence of meaningful culture change and enforcement mechanisms, the rules, no matter how clear, may go unheeded. Rules alone are insufficient. Although the focus of this study is on interpreting and enhancing the rules, it is worthwhile to mention briefly issues of acculturation and enforcement that would make the rules meaningful.

Culture

Values must be more than “ethical art”: a nicely framed code of conduct hanging on the wall. The ethical dimensions of each decision must be taken into account, and must be seen to be taken into account. They should animate everyday decisions by everyone at all levels of activity. What makes an ethical culture strong is acceptance by individuals through involving them in the process of articulating those values. As an oft-quoted saying attributed to Confucius puts it: “Tell me and I forget; show me and I remember; involve me and I understand.”¹⁰⁸

The inculcation of values and ethics is an ongoing process. Involvement in ongoing dialogue concerning the values and ethics in the *Conflict of Interest Act* and the Members Code, training in them, and experience in using them are all imperative if there is to be genuine adherence to them. The Act and the Code ought not to be for show but, rather, to genuinely inform public office holders and influence members’ actions.

Enforcement

As the current legislation stands, the Conflict of Interest and Ethics Commissioner can levy some administrative monetary policies. Beyond this role, the office is a form of specialty ombudsman which investigates and reports on potential breaches of the Act and the Code. This latter aspect is appropriate at this juncture. The specialty ombudsman model has worked very well at the provincial level, and it should be given a chance to blossom at the federal level. The provincial models have, for years, been far superior to the federal regimes in place. However, the process should be subject to review and, in time, if it is not working at the federal level, Parliament should consider having an ethics commissioner with a wider array of direct sanction powers.

108 Bellamy Inquiry, *Report, Volume 2: Good Government*, 25.

Conclusion

The questions raised in this study are difficult to answer in the absence of specific facts about the nature of the particular retainer between the parties named in this Inquiry and the work it would have entailed.

The overview of the current (and past) ethics framework reveals ambiguities and generalities that it would be helpful to correct in amendments to statute and policy. However, this sort of legislation and policy must, to some extent, be sufficiently open ended to allow for changing conceptions of problems as well as to cover a range of ethics problems without trying to delineate every possibility – which itself would be impossible.

In respect to the six further questions posed above, it is relatively clear under current law that reporting public office holders could not engage in outside employment such as consulting and professional practice (and, by implication, lobbying the Canadian government). Such office holders could accept offers of outside employment, but, once undertaking that work, they would surely have to cease to be office holders, as discussed above. Reporting public office holders would, under the lobbying legislation, be restricted from lobbying the Canadian government. Members of parliament would be freer to engage in outside employment but would have to be cautious about such work interfering with their particular official duties (here, as elsewhere, the facts matter – what were/are the duties and what was the precise employment?). Finally, members of parliament would have to be more cognizant of apparent conflict of interest than would public office holders.

Who Is Getting the Message? Communications at the Centre of Government

Paul G. Thomas

Introduction

Every day in 2005, the year leading up to the November 29, 2005, federal general election call, approximately three bulging bags of letters addressed to Prime Minister Martin were received in the Executive Correspondence Section of the Privy Council Office, which exists at the centre of government. In addition, the prime minister's email was flooded with close to three thousand messages daily, including weekends. In total, close to two million communications were directed to the prime minister during 2005. The topics were wide ranging and shifting, but generally they did not reflect issues that were grabbing the media headlines at the time.¹

This study is concerned with the processing, assessment, and responses to communications involving the centre of government, particularly the prime minister and the influential central agencies that support that office.

Every organization takes in, generates, and uses information. All organizations

This study was completed in August 2009. The author would like to thank the 12 current or former public officials in Canada and abroad for agreeing to anonymous interviews and for sharing their insights into communications processes at the centre of government. In addition, Rebecca Jensen's capable supporting research was much appreciated. Professor Craig Forcese, director of research for the Commission's Policy Review, provided helpful advice and support. The author alone is responsible for the interpretation of the findings.

1 Dean Beeby, "Prime Minister's Mailbag Provides a Glimpse of What's on the Minds of Voters," Canadian Press, January 15, 2006.

transmit information internally to their members, as well as externally to outsiders. Communication has become crucial in the overlapping and intersecting worlds of politics, governing, and management within the public sector. Both the internal and external communications environments of governments and the public services that support them have become more complicated, unpredictable, and difficult to manage.

Unfortunately, most of the scholarly research on communications focuses on private businesses rather than on public organizations. There are, however, distinctive issues and challenges involved with communication in the public sector, and these issues are discussed more fully later in this study. The quality of the communications and information management practices within government has consequences for performance and productivity, the fulfillment of legal obligations, the responsiveness and accountability of public officials (both elected and appointed) to legislatures and citizens, and the development of reliable, enduring, and useful historical records of past actions and their consequences.

The crucial importance of communication, and the highly varied and dynamic nature of communications functions at different levels in the public sector, means, ideally, that this area should be approached in a strategic, anticipatory, planned, and coordinated manner. To state that this objective is difficult to accomplish in practice qualifies as a gigantic understatement. Planning for, structuring, conducting, and coordinating communications in a wide range of specialized and complicated policy environments, across numerous departments and agencies, in an era of evolving digital technologies, at a time when there is growing insistence on greater transparency, proactive disclosure, and accountability, and when public trust and confidence in governments is low, all combine to give rise to a challenging new era in public sector communications.

This study focuses on the somewhat narrow but important issue of how sensitive communications are handled at the heart of executive government in and around the prime minister. In the 1920s and 1930s, Prime Minister Mackenzie King was able to dictate responses to a significant portion of his personal correspondence. Today, were it not for the existence of designated organizations, established procedures, new technologies, and the assistance of administrative staff, a prime minister would rapidly drown in the deluge of communications directed to him and his office.² Messages to and from the prime minister take many forms: old-fashioned letters, telephone calls, faxes, emails, write-in campaigns, website entries, BlackBerry communication, and face-to-face communications in formal meetings and informal conversations. Most contacts receive a response from staff on behalf of the prime minister. The small portion of mail responded to directly by the prime minister is usually signed by a machine that insiders call “the arm.”

2 The male pronoun is used throughout this study for ease of reading. It should be taken to mean male and female individuals.

There is an ongoing two-way communication flow both inside and outside government. Over the past three or four decades, the volume, speed, non-stop intensity, and complexity of communications activities surrounding the prime minister and his office have increased enormously. A specialized and more professionalized apparatus has developed to serve, support, and protect the prime minister, who is the single most powerful figure in government, is at the centre of a communications maelstrom, and is the person who speaks most authoritatively internally and externally on the intentions and actions of government. The desire of governments to manage agendas and to stay on message has led to a centralization of communication activity in and around the prime minister.

In today's information-, technology-, and media-rich environments, unaided prime ministers could not possibly cope with the voluminous and swirling communications expectations and demands that come with the office. But centralization, specialization, and the reliance on new communications technologies lead legitimately to a number of concerns. The most prominent of these issues is the potential for a blurring of the line between communication for partisan political purposes and more objective communication for the purposes of public administration.

This broad issue relates to the more specific concerns of this study; namely, what are the structures, procedures, and criteria for receiving, assessing, filtering, and responding to communications of all kinds that arrive non-stop at the centre of government. Presumably there are matters that the prime minister must know, matters that he should know, matters that he would prefer to know, matters that he need not know, and perhaps even matters that, for a variety of reasons, he should not know about.

This issue raises the question of who at the centre of government are the gatekeepers on communications with the prime minister, whose time, attention, energy, and reputation have to be protected. Which offices and individuals play that role? Are the gatekeepers both political staff and career public servants? How is it decided between these two groups which type of information will reach the prime minister personally? Does support and protection of the prime minister ever extend to withholding or obscuring information to allow him to deny knowledge when an issue becomes public and controversial? In what circumstances and for what reasons would either political staff or public servants arrange for this condition of "plausible deniability" to be created, and how would it be arranged? What are the dangers and costs of plausible deniability? Can rules, structures, and procedures be put in place to prevent or limit such actions so that legality, ethics, transparency, and accountability are upheld? Are there working models of such preventive measures in other countries?

In addressing these questions, this study is necessarily exploratory. Not much has been written in the academic literature, in government reports, or in the "grey" zone of online commentary about central communications policies, structures, and processes within government. Therefore, in addition to reliance on the usual types of

research sources, the study involved a small number of semi-structured, qualitative, off-the-record interviews with past and present political staff and public servants with first-hand experience and knowledge of the world of communications at the centre of government. Interviews were conducted with eight former or present public officials at the national level in Canada and four at the provincial level, and with four officials from governments outside of Canada. Given the exploratory nature of the study, no claim can be made that the analysis to follow is either complete or completely accurate, but hopefully it provides a sound foundation from which the Commission can prescribe appropriate arrangements for handling correspondence and other types of communications targeted at the prime minister.

The analysis is presented in a number of sections. A description of the communications environments outside and inside of government appears next. The key concepts and issues that guide the study are also discussed briefly. A description and discussion of the communications apparatus that exists at the centre of the Government of Canada constitutes the body of the study. A further section includes some comparisons to other jurisdictions – those at the provincial level in Canada, as well as a small number of other countries. The concluding section draws together the main themes of the analysis and offers some general observations on the soundness of existing communications arrangements and possible reforms.

If there is an integrating theme to the overall study, it is that communications in the public sector generally must be approached on a strategic, but contingent, basis.³ In other words, there is no one best way to plan and manage the huge volume and immensely diverse types of communications that take place both inside and externally by governments. Each communication situation needs to be analyzed and approached according to the nature of the subject matter, the purposes of communicating (to inform, to direct, to consult, to persuade, and so forth), the intended target for the communication (for example, external or internal audiences), the most appropriate medium to be used (written, telephone, fax, email, face-to-face), and the degree of sensitivity and risks associated with unintended disclosure. The need to be strategic, careful, and results-oriented in the performance of the communications function has become more critical because the external and internal environments of governments have become more complicated, challenging, and risky.

3 James L. Garnett, *Communicating for Results in Government: A Strategic Approach for Public Managers* (San Francisco: Jossey-Bass, 1992).

The Communications Environments of Government

Both the external and the internal communications environments of governments are becoming more complicated, turbulent, intense, unpredictable, and risky.⁴ An understanding of the context in which these communications take place is necessary to interpret recent trends and developments at the centre of government. In the space available, it is possible to describe the external and internal environments in only a series of brief points.

The following are some notable features, beginning with the swirling forces and intensifying pressures that impinge on governments from the outside:

- The multi-dimensional process of globalization has meant an increased pace of change, a growing interdependence among countries, a blurring of the traditional line between domestic and external affairs, and the movement of ideas and issues across national boundaries with greater frequency and speed owing to the information and communications revolution.
- Whereas the sweeping and impersonal forces of globalization are leading to dispersed power-sharing and collaboration, the governing process itself is becoming more centralized, controlled, and personalized through the growth in prime ministerial power and a greater influence for central agencies that serve the prime minister and the cabinet.
- As part of the preoccupation with managing the agenda of government and pushing its policies into the bureaucracy, the prime minister and other ministers created larger political staffs and strengthened the status of the principal secretary or chief of staff in the office of the prime minister.
- Policy-making and the management of government now take place in a 24/7 media environment in which competitive media enterprises, with a voracious requirement for stories, have become more adversarial, aggressive, and negative in their coverage of public affair.
- The adoption of access-to-information laws and the insistence on greater transparency and disclosure have made for more of a fishbowl atmosphere within government.
- A whistle-blower protection law has been adopted to encourage employees to come forward with “good faith” disclosures of serious wrongdoing and to provide them with protection against retaliation.
- The number of external monitoring bodies, mainly in the form of independent agencies serving Parliament, has led to more public reports on financial mismanagement (Office of the Auditor General), lack of fairness (various ombudsmen and the language commissioner), abuses of authority (the public

⁴ Doris A. Graber, *The Power of Communication: Managing Information in Public Organizations* (Washington DC: CQ Press, 2003); Doris A. Graber, *Public Sector Communication: How Organizations Manage Information* (Washington DC: CQ Press, 1992).

sector integrity commissioner), and the ethics of public office holders (the conflict of interest and ethics commissioner).

- According to informed observers, the activities and culture of parliament and its committees have become more adversarial, negative, and theatrical, leading governments to adopt defensive strategies and tactics.
- Prime ministers and other ministers are less willing to accept the traditional requirement that only responsible ministers take the credit or blame for the actions and inactions of government. Instead, it has become more common when serious problems arise to blame, and even to name, public servants who were traditionally anonymous.
- The multitude of communications channels arising from digital technologies creates a tsunami of non-stop messaging.
- A political culture in which Canadians are less deferential to public sector elites (especially politicians, but also public servants), plus a generalized lack of trust and confidence in “government” as an institution, leads to a suspicious and unreceptive communications environment.
- As a result of bitter partisanship and aggressive media, a culture of scandal has developed in political life. What were once seen as run-of-the-mill problems in government have been elevated to the status of indications of rampant corruption or widespread abuses of authority.⁵

Under these challenging conditions, political life resembles a permanent election in which campaigning and governing have become almost indistinguishable. Governing becomes a non-stop process of campaign-type actions designed to gain and retain public approval and support. This is done through the use of an array of refined technologies of “political management.” The aim is to avoid surprises, blowups, and controversies so that the appearance can be maintained that governments are acting on the basis of a consensus, are productive, and are adhering to high legal and ethical standards. The techniques of political management include polling; focus groups; communications strategies, including “spin”; targeted messaging; “opposition research” to gather ammunition against political opponents and critics; symbolic gestures; information control, including defensive strategies to limit the impacts of access-to-information laws; and strategies to preempt criticism by advance consultation and pretesting of ideas and contemplated actions with the groups and organizations most directly affected.

Political management activities are conducted mainly out of ministerial offices by ministerial staff. However, in the overlapping and intersecting worlds of politics and administration in government, it is increasingly expected that the public service at the senior levels will be more involved than in the past with the design and execution

5 Donald J. Savoie, *Court Government and the Collapse of Accountability in Canada and the United Kingdom* (Toronto: University of Toronto Press, 2008); Paul G. Thomas, “The Swirling Meanings and Practices of Accountability in Canadian Government,” in David Siegel and Ken Rasmussen (eds.), *Professionalism and Public Service: Essays in Honour of Kenneth Kernaghan* (Toronto: University of Toronto Press, 2008), 34–62.

of strategies of agenda management. A sign of this trend is the fact that senior public servants are increasingly being “put out front” to explain and even defend government thinking and to negotiate with outside interests.

In communications terms, the notion of separate outside and inside environments is becoming more artificial. The political, parliamentary, pressure group, and media processes serve to make government highly porous to outside influences and create a requirement for ministers and public servants to lead and manage from the “outside in” rather than following the historical pattern, which was more “inside-out.” Ministers and public servants spend an increasing amount of time gathering intelligence about developments outside of government and managing ongoing external relationships with groups within the various policy fields. The result is that communications networks in these fields span organizational boundaries, raising issues of information sharing, confidentiality, risk management, and accountability when government is only one, and not always the lead, actor on an initiative that becomes troubled and controversial.

Political and administrative cultures in government overlap.⁶ Ministers want error-free government with no high-profile mistakes. They don’t like surprises. To avoid negative stories and damage to their reputations, they want government communications specialists to practise, as much as possible, “information control” and “news management.”

Studies suggest that the cultures and climates of organizations are powerfully shaped by the top leaders.⁷ In government departments and agencies, leadership is dual – shared between ministers and senior public servants, especially deputy ministers. Historically, the interface between politics and administration was seen to involve a delicate balance and some trade-offs. On the one hand, the public service was expected to demonstrate loyalty to the government of the day, responsiveness to its agenda, and neutral, professional competence to advise ministers and to carry out their policies. On the other hand, ministers were expected to recognize the value of an impartial, professional public service to the goal of quality government. They were prepared to grant public servants a measure of independence to provide “free and frank” advice and be insulated against undue political interference in the sound management of departments and programs. By being somewhat independent, professional, neutral, discreet, and relatively anonymous, public servants could serve successive governments of different partisan persuasions equally well. There would be no need for a wholesale turnover in the upper ranks of the public service when a new party came into office.

6 O.P. Dwivedi and James Iain Gow, *From Bureaucracy to Public Management: The Administrative Culture of the Government of Canada* (Peterborough, Ont.: Broadview Press, 1999).

7 E.H. Schein, *Organizational Culture and Leadership*, 3rd ed. (San Francisco: Jossey-Bass, 2004); David G. Carnevale, *Trustworthy Government: Leadership and Management Strategies for Building Trust and High Performance* (San Francisco: Jossey-Bass, 1995).

According to a number of informed commentators, trust relationships between ministers and the upper echelons of the public service are not as strong as they used to be, and need to be, for the constructive partnership at both the centre of government and within individual departments to work effectively.⁸ Evidence on this point is sketchy and somewhat impressionistic. Critics point to the expansion of the role of political staffs as a sign that governments do not fully trust the willingness or the capacity of the bureaucracy to implement new policy directions.⁹ At the political level, there is a concern to ensure that the public service will deliver budgetary restraint when it is required and will practise sound financial and program management to guarantee value for money in government spending. Recent scandals, like the so-called “billion dollar boondoggle” in the grants and contributions program at Human Resources Development Canada in 2004, and a few years later the so-called sponsorship scandal of advertising contracts being given to firms in Quebec that were connected to the governing Liberal Party without competitive tendering and documented evidence that the work was actually done, have led to charges of illegal, unethical, incompetent, and unaccountable behaviour within the bureaucracy.¹⁰

Anxious to respond to public outrage and no longer willing to put deep trust in the professionalism and the integrity of the public service, first the Liberal governments of Prime Ministers Chrétien and Martin and subsequently the Conservative Party of Canada government of Prime Minister Harper brought in new laws, regulations, auditing procedures, monitoring bodies, public-reporting requirements, codes of conduct, values and ethics programs, and a whistle-blowing law. The fullest expression of this philosophy of “trust less and regulate more” was the *Federal Accountability Act* (FAA) put forward by the Harper government and passed by Parliament in December 2006.

The new “accountability industry” that has recently emerged in Ottawa sends a very clear message to the public service: do not screw up, and be prepared to pay a serious price when abuses or blunders are uncovered. The FAA adopted the “accounting officer” model for deputy ministers, which makes them directly and personally answerable before the Public Accounts and other committees of Parliament for the prudent financial management of their departments. This innovation was adopted without any formal modification to the constitutional conventions of ministerial responsibility. The resulting ambiguity about where ministerial responsibility ends and

8 Paul G. Thomas, “Trust, Leadership and Accountability in Canada’s Public Sector,” in O.P. Dwivedi, Tim Mau, and Byron Sheldrick (eds.), *The Evolving Physiology of Government: Canadian Public Administration in Transition* (Ottawa: University of Ottawa Press, 2009), 215–48.

9 Liane E. Benoit, “Ministerial Staff: The Life and Times of Parliament’s Statutory Orphans,” in Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability, Research Studies, vol. 1: Parliament, Ministers and Deputy Ministers* (Ottawa: PWGSC, 2006).

10 David A. Good, *The Politics of Public Management: The HRDC Audit of Grants and Contributions* (Toronto: University of Toronto Press, 2003); Canada, *Commission of Inquiry into the Sponsorship Program and Advertising Activities*, Volumes 1–3 (Ottawa: PWGSC, 2006).

administrative accountability begins has no doubt led to concern within the public service that blame shifting will occur when something goes wrong and that individual public servants will be named and blamed in the parliamentary process and in the media.¹¹

A psychological climate of fear and a risk-averse culture could be the result.¹² Public servants could become reluctant to “speak truth to power,” especially those senior officials who owe their appointment to the prime minister. Put somewhat dramatically, the clerk of the privy council and the roster of deputy ministerial level appointees could begin to see themselves less as semi-independent professional partners with political leaders engaged in the co-production of “good government,” and more as “fixers” who help their political masters manage agendas and fix political problems – including communications activities intended to present the government’s performance in the best possible light. As the next section suggests, structures and procedures to guide communications flows internally and externally both reflect and shape the cultures and climates of organizational life.

The Interface Between Structures and Communications

All organizations face difficult problems in designing structures and procedures that assist in determining what messages must go to the top (to keep executives informed), and what messages can be handled at the lower level (to protect executives from overload).¹³ Structure refers to the distribution of authority and the defined roles of employees. The prescribed patterns of relationships define who is expected to communicate with whom, and about what topics. In addition to the formal structure, informal networks of interaction exist among employees. The formal and informal structures are usually, but not always, complementary. Networks can exist on a number of bases, including structure, function, shared interests, power rivalries, and friendships. Such informal networks both shape and reflect the cultures (values, beliefs, norms of behaviour) and the climates (the social psychology of interpersonal relationships) within organizations. Studies have found physical proximity and the layouts of organizational space to have a significant impact on communications patterns.¹⁴

11 C.E.S. Franks, “The Unfortunate Experience of the Duelling Protocols: A Chapter in the Continuing Quest for Responsible Government in Canada,” in O.P. Dwivedi, T. Mau, and B. Sheldrick (eds.), *The Evolving Physiology of Government: Canadian Public Administration in Transition* (Ottawa: University of Ottawa Press, 2009), 118–50.

12 Katherine Baird and Ian Greene, *Canada’s Public Service in the 21st Century: Destination: Excellence* (Ottawa: Public Policy Forum, 2008).

13 Doris A. Graber, *Public Sector Communication*, chap. 7.

14 *Ibid.*, 90–93.

In the vast literature on organizational design, numerous theories and models have been advanced, along with many controversies, about the best structures to support the communications function. Again, most of this literature focuses on private firms rather than public organizations of various kinds.¹⁵ At the risk of oversimplifying and ignoring important disagreements, a number of points relevant to the central concerns of this study have been identified.

The first relates to the design of the communications function. Two issues must be addressed: *who* will be the main gatekeepers in the communications process? And *how* will those decision-makers or advisers be guided, in terms of rules and criteria, to handle the communications flow? In government, political leaders have a big stake in the *who* and *how* questions because their reputations, and even their jobs, can depend on how the communications functions are performed. When it comes to politically sensitive communications, political leaders are unlikely to place unconditional faith in the professionalism and neutral competence of career public servants. They will want communications specialists who are politically attuned, identify with their political and policy goals, are close at hand, and are personally loyal. The division of labour between political and professional communicators within the Government of Canada is discussed later.

There are voluminous manuals within government that seek to ensure integrity, consistency, and high professional standards in all types of administrative communications. The personnel who perform the communications functions across government are a diverse group with different kinds of educational backgrounds and occupational experience. It is probably accurate to state that the communications community in government is neither well developed nor fully professionalized. For example, the communications community does not seem to have the cohesion and status of other professional groups such as auditors and lawyers. A final, somewhat impressionistic, observation is that in both the policy and the administrative processes of government, communications considerations still tend to be an afterthought once decisions have been made. This is the case despite official rhetoric to the effect that communications specialists and communications considerations should be involved in the processes from the outset.

In comparison to communications activities in private firms, those within government are performed amidst a web of laws, rules, procedures, and guidelines. This area is discussed more fully later in the study. Information processing, storage, and retrieval have become major concerns in an age of overabundant messages, most of them now in an electronic format. Someone has to decide what is stored and how it will be retrieved. Records management and archival services are needed to support organizational memory and productivity, to meet legal liability requirements, to comply with access-to-information laws, to support parliamentary and other processes

¹⁵ Ibid., chap. 1.

of accountability, and to enable historical research. To save physical filing space, many organizations previously discarded paper documentation involving intermediate steps and considerations which provided the basis for actions that later turned out to be controversial. In today's digital era, electronic space is virtually limitless and inexpensive; but old habits die hard, deletion of information can be instantaneous and inadvertent, and the disclosure of inside information is more likely and risky.

Training and guidelines can be provided for communication in "normal" and "crisis" situations. For example, it can be indicated that a supervisor be consulted when potential risk and controversy are involved. Most communications situations will be straightforward. In more sensitive, high-risk circumstances, however, leaders are required, sometimes on the advice of communications specialists, to make subjective judgments based on less-than-perfect information.

Hierarchy and specialization in large and complicated information-processing organizations like the public service can create problems and barriers to the smooth flow of communication. Only a few of these difficulties can be discussed in a study of this length. In hierarchical organizations, employees show a reluctance to communicate upward, especially beyond the level of their immediate supervisor. There could be a number of reasons for this tendency. Individuals may be intimidated by hierarchy. Even when leaders commit themselves to openness, there is a reluctance to bypass the chain of command. Pessimism that ideas and concerns will be "lost in the pipeline" to the top, or will become "sanitized" on grounds of "bureaucratic" and "political" safety, can inhibit frank and full communication. It has been observed that within organizations, "good news is shouted and bad news is whispered."¹⁶

If there are not safe communications channels based on a climate of trust, an employee will fear gaining a reputation as a troublemaker, becoming stigmatized and isolated, or even facing subtle and not-so-subtle forms of reprisal for being the bearer of bad news. In other governmental systems with a longer history of legal protection of whistle-blowers than Canada's (Australia, New Zealand, the United Kingdom, and the United States, for example), the evidence is that only a tiny minority of public servants are prepared to assume the professional and personal risks of coming forward to disclose serious wrongdoing.¹⁷ When they do, it is almost impossible to protect them against the more indirect and longer-term forms of reprisal. Most case studies of actual whistle-blowers paint a bleak picture of serious damage to their professional careers and often to their personal lives. It is noteworthy, however, that some surveys of employees suggest that pessimism that nothing will be done to fix a wrongdoing is a more important reason for not coming forward than is the fear of retaliation.

Laws, rules, procedures, and accountability mechanisms of all kinds have far

16 Ibid., 95–96.

17 Paul G. Thomas, "Debating a Whistleblower Protection Act for Employees of the Government of Canada" (summer 2005) 48(2) *Canadian Public Administration* 147–84.

less influence on behaviour than do cultures of integrity and fairness, which to a significant extent reflect the character and behaviours of leaders within organizations. In government, both politicians and public servants shape the cultural foundations of public organizations. High-profile political scandals spill over into the public service, taking a toll on public service loyalty, pride, motivation, and commitment, especially if public servants are scapegoated for problems that are political in origin. Over time, controversies can coarsen the public service culture by making it less public spirited and altruistic and more defensive and self-interested. Recognizing that their influence and advancement are tied to the politics of governing, senior public servants may become “promiscuous” in terms of their willingness to “flirt” with the shifting contours of power at the centre of government.

This point leads into the concern that politicians, their advisers, and/or public servants may engage in the activity of plausible deniability in order to protect the reputation and political standing of the prime minister, individual ministers, and the government as a whole.

Communications and Plausible Deniability

“Plausible deniability” is a phrase used to describe situations in which higher-level public officials, usually elected politicians and their political staff but also public servants, seek to avoid blame and accountability for illegal, unethical, ill-conceived, or unpopular actions by denying prior knowledge, involvement, or approval.¹⁸ The concept has been around for a long time, but the precise phrase “plausible denial” was first used publicly by Allen Dulles, director of the Central Intelligence Agency in the United States (1953–61). It became more widely used as a result of the investigations of intelligence agencies by the U.S. Senate Select Committee on Intelligence (the Church Committee, named after its chair, Senator Frank Church), which uncovered plots to assassinate foreign leaders including Cuba’s Fidel Castro. The committee noted that the concept of plausible denial had been designed originally to protect from disclosure the activities of the U.S. government when personnel worked overseas. It had been expanded, however, to protect the president and senior administration officials against any backlash when secret intelligence and covert military operations were uncovered. Even though the president favoured the actions taking place, he was not to be involved in decision making; that way, should disclosure occur, he could honestly deny knowledge.¹⁹

Critics suggest that use of the practice of plausible deniability has extended beyond

18 Richard J. Ellis, *Presidential Lightning Rods: The Politics of Blame Avoidance* (Lawrence: University Press of Kansas, 1994); John Poindexter and David Boren, “Plausible Deniability,” in William L. Richter and Frances Burke (eds.), *Combating Corruption, Encouraging Ethics: A Practical Guide to Management Ethics*, 2nd ed. (Lanham: Rowan & Littlefield, 2007), 114–16.

19 Kathleen Hall Jamieson, *Dirty Politics: Deception, Distraction and Democracy* (Oxford: Oxford University Press, 1993), 84.

spying and covert military operations and into other sensitive policy areas.²⁰ A number of factors have encouraged this trend: the strong emphasis within governments on agenda management; the requirement to deal with more aggressive and instantaneous media; the development of a more specialized and more professional communications capacity within government in order to put a positive spin on events; the need to deal with the impacts of access-to-information laws; and a concern to avoid scandals and generally to be seen as governing in a legal, effective, and ethical manner. Although the phrase “plausible deniability” has become an entry in the lexicon of public life, it has not been the subject of much academic or governmental study.

It is possible to think of a number of circumstances and reasons that could give rise to a condition of plausible deniability. Either by design or inadvertently, the authority structures of direction and control, the reporting requirements for lower-level employees, and the routines of communication may mean that sensitive information does not reach the top of the organization either because of breakdowns caused by hierarchy (as discussed above) or because employees do not want to cause trouble. Rivalries among ministers and their departments, and even between divisions within a particular department, can lead to information hoarding or the provision of less-than-complete information. The crux of the problem with large, specialized information-gathering organizations like departments is that structures, processes, and guidelines are not often designed to channel information both vertically and horizontally to the appropriate locations without overloading the leadership with too much information and advice.

As indicated above, culture and climate can both reflect and reinforce the impacts of hierarchy. Creating psychologically safe places for honest and frank dialogues is difficult when there is a lack of external trust and confidence, when ministers mistrust the bureaucracy, when there are legal requirements for openness and disclosure, when there are numerous oversight bodies, and when a parliamentary culture of blaming leads to an insistence by ministers on “error free” government. A fearful and defensive climate may encourage people to cover up mistakes and manipulate information to avoid negative consequences.²¹

Leaders play a big part in shaping the culture and climate of organizations, and they can communicate directly and indirectly whether they do or do not want to be informed about certain types of matters. There is the condition of “willful blindness,” in which leaders deliberately do not ask about a situation so that they will not be implicated should there be a disclosure of a serious problem.²² In the overlapping worlds of ministers, political staff, and public servants, who said what to whom can become a confused and blurred affair. For example, are ministers deemed to be informed if advice is provided by public servants to the political staff serving the prime minister or other ministers? Can staffers, including

20 Richard Mulgan, “Truth in Government and the Politicization of Public Service Advice” (2007) 85(3) *Public Administration* 569–86.

21 Gilbert Fairholm, *Leadership and the Culture of Trust* (Westport, Conn.: Praeger, 1994), chap. 4.

22 David Luban, “Contrived Ignorance” (1998–99) 87 *Georgetown Law Journal* 957–80.

media advisers to ministers, give directions to public servants about what their “political bosses” want to know, about how issues will be framed, and about how situations will be described? As discussed below, over the past decade political staff have exercised growing influence. The issue of whether they can be seen as simply extensions of the minister, and therefore falling within the scope of ministerial responsibility for accountability purposes, is discussed later.

In thinking about the potential for a condition of plausible deniability, we should not underestimate the importance of incompetence, mistakes, and accidents. The knowledge and experience of the people acting as gatekeepers of access to ministers can be a factor. For example, if more junior exempt staff do not fully understand the constitutional foundations of the political system, lack deep knowledge of the machinery of government, lack intimate knowledge of the values and ethical norms of the public sector, and do not have the training or experience to judge the importance and sensitivity of communications, they may not deal with matters appropriately. Strategic, fast-paced, and highly pressurized locations like the Prime Minister’s Office or the Privy Council Office are not good locations for on-the-job training when there is so much pressure to avoid public mistakes. Life in such locations is frenetic. Issues come and go daily, ministers make demands, the information available to guide decisions is incomplete, and communication takes place with great speed. There are corridor conversations, meetings interrupted by telephone calls and BlackBerry messages, constantly changing priorities, and long hours, yet little time is available to pause and reflect on the right course of action. There is also little time to compile notes and to maintain records. As a result, reconstructing events before a parliamentary committee or a commission of inquiry becomes difficult and problematic.

Technology, which supposedly enables more instantaneous and accurate information and leaves an electronic trail of records, can also create problems of missing data. For example, in the White House of President George W. Bush, millions of emails disappeared, including many dealing with allegations of torture at Abu Ghraib detention centre.²³ Officially, the disappearance was blamed on software problems in the White House’s email system; but critics in congressional committees were suspicious and determined to find the smoking gun that proved the president had condoned the use of extreme measures like electronic shocks and waterboarding to gather counterterrorism information. More information may be captured by today’s digital technologies than in previous eras of manual record-keeping, but it is also possible to eliminate whole files instantaneously, either accidentally or deliberately, with the simple push of the delete button on a computer. A backup file may exist on the hard drive or with the central server, but retrieving the information can be time-consuming and expensive, involving the use of specialists.

23 Citizens for Responsibility and Ethics in Washington, “Without a Trace: The Missing White House Emails and the Violations of the Presidential Records Act” (April 12, 2007), at www.citizensforethics.org (downloaded on 1/18/2008).

In some cases, withholding information can be justified. For example, to uphold the rule of law and to avoid any appearance of bias, the principle of no political interference in the administration of justice has long been accepted. At the same time, the minister of justice is responsible for policy and the overall performance of the justice system. This situation leads to the question of what responsible ministers need to know in order to answer questions and to be held accountable. The issue arose in a very practical and high-profile manner in January 1997, when a former chief of staff to Prime Minister Mulroney engaged in a debate through the media with the then clerk of the privy council about whether Prime Minister Chrétien should have been told about an RCMP investigation that reached into Mr. Mulroney's Office. The former chief of staff, who had advised the clerk of the investigation while serving as a deputy minister in the Chrétien government, took the view that the prime minister was entitled to know of the existence of the investigation, whereas the clerk of the privy council denied, in a written statement, that she had been told about the investigation and argued that, in any case, the long-standing principle and practice was to withhold such information so as to avoid any real or perceived political interference. The clerk to the executive council in British Columbia wrote a letter to newspapers across the country declaring support for the position of his federal counterpart.²⁴

The tactic of plausible deniability is seldom completely successful. Either the denials made are not plausible, or the officials making the denials are not credible or trusted. In the current culture of widespread suspicion, both the media and citizens are not inclined to give government elites the benefit of the doubt when there are accusations of serious wrongdoing. When plausible deniability fails – as it often does – the reputations of the officials involved are tarnished and the entire governmental system is discredited further in the eyes of the citizens it serves. Simply as a practice, plausible deniability may cause serious damage to the political system. It creates potential for the abuse of authority, and it allows subordinates to act as if they have the support of the person in charge. Within government, it can create misunderstanding, mistrust, and a lack of mutual respect between ministers and public servants. Secrecy and a lack of documentation weaken both internal and external accountability. In the United States, Congress sought to put an end to plausible denial by passing laws and creating oversight bodies to deal with espionage and covert military operations. However, even as powerful a legislature as Congress could not stop the practice completely.²⁵ The vagueness of the laws it passed created a number of escape hatches for the executive. Also, when Congress insisted on being informed, there was a serious risk of secret information being inadvertently or deliberately leaked.

24 Joan Bryden and Stephen Bindman, "PM's Aide Had Early Warning" *Calgary Herald*, January 9, 1997, A3; Stephen Bindman and Joan Bryden, "Airbus Affair Apologies to Schreiber, Moores: Top Bureaucrat Denies Knowing About Probe," *Ottawa Citizen*, January 10, 1997, A3; Doug McArthur, "Bourgon Upheld Traditional Practices," *Globe and Mail*, January 15, 1997, A15.

25 Kathleen Hall Jamieson, *Dirty Politics*, 80–85; Douglas Walton, "Plausible Deniability and Evasion of Burden of Proof," *Argumentation* 10 (1996), 47–58.

Ultimately, the greatest protection against the use of secrecy and denial in order to avoid blame and accountability is the integrity of leaders and cultures within organizations based on a strong foundation of values and ethics.

The Constitutional and Institutional Context

The communications processes at the centre of government cannot be understood apart from the wider context. The changing economic, societal, technological, and political environment has been described briefly. Here, a brief discussion covers the key constitutional and institutional features of the political system that shape communications processes.

The two most important constitutional and institutional features of Canada's political system are cabinet-parliamentary government and federalism. A great deal has been written on both topics. For the purposes of this study, it is sufficient to say that, inherent in the theory and practice of cabinet-parliamentary government, especially under contemporary conditions, there is a strong measure of centralization of power and secrecy. Cabinet confidentiality and cabinet solidarity are well-established constitutional conventions that make the cabinet one of the best-informed parts of government, but also one of the least transparent.²⁶ Federalism, in contrast, may be seen to disperse power because it involves shared authority, power, resources, risks, and accountability, including within the domain of conducting international relations on some subjects. Confidentiality is seen as essential to both intergovernmental and international relations, and both areas of activities are therefore subject to a harm's test exemption under the *Access to Information Act* (ATIA), meaning that documents in those fields are afforded extra protection against disclosure, if necessary.

As the leader of the governing party and the head of government, a prime minister operates in a number of overlapping and intersecting worlds: the external world of interdependence with other governments and non-governmental institutions and actors; the world of his party and competition with other parties in Parliament and during elections; the media world of shifting issues and pressures for instantaneous responses; and the day-to-day world of running government. The discussion that follows focuses mainly on this last world, but it needs to be recognized that today the prime minister has far less control over the issues that arrive on the governmental agenda than in earlier decades, and that the required response times have been shortened dramatically.

The size of cabinet, its internal structure, and the dynamics of power within it can vary depending on the issues dominating the agenda of government at the time, on the leadership style and capabilities of the prime minister, and on his standing with the party and the public. The prevailing interpretation of cabinet government in Canada

26 See the discussion in Craig Forcese and Aaron Freeman, *The Laws of Government: The Legal Foundations of Canadian Democracy* (Toronto: Irwin Law, 2005), chap. 9; Nicholas d'Ombraïn, "Cabinet Secrecy (The Essence of the Cabinet Secrecy Convention)" (fall 2004) 47(3) *Canadian Public Administration* 332–59.

portrays the prime minister as dominant. According to Professor Donald J. Savoie, effective power now rests with the prime minister and a select group of “courtiers” who support him.²⁷ Under this system of court government, cabinet has become mainly a “focus group” to test the risks and acceptability of the policy ideas and proposed actions of the prime minister. Prime ministerial power is seen to rest on a number of pillars: position as leader of the governing party; authority as leader of the government and chair of the cabinet; support of powerful central agencies; role representing the national government in federal-provincial and international arenas; and role as the principal communicator who defends government policies, actions, and inactions before Parliament, the media, pressure groups, and the public. According to Savoie, a prime minister can launch an initiative at any time and will decide whether or not to respect the cabinet decision-making processes. In contrast other ministers may take initiatives, but they must work through the cabinet process, including, ideally, gaining the approval of the central agencies that support the prime minister and cabinet.

This is not the place to engage in a debate over the sources and limits of prime ministerial power.²⁸ As noted, the prime minister cannot completely control the issues that arrive on the governmental agenda – and there are always surprises that require immediate responses. It is true that, inside government, the prime minister is very influential in deciding how issues will be defined and determining the responses to be taken. However, time is a major practical constraint on the exercise of prime ministerial power. Prime ministerial life is crowded, frenetic, fragmented, episodic, pressured, and stressful. The prime minister cannot arrange to be involved in every important meeting, read every important piece of communication, and participate in every conversation. Delegation to ministers, political staff, and public servants is unavoidable. Practising leadership and management by exception is essential. Simply because prime ministers can take the initiative does not free them from others in terms of achieving their goals.

Power is relational and fluid, not static. Not all ministers can be taken for granted. Regional ministers can, for example, be powerful figures in their own right within cabinet, the parliamentary caucus, the party at large, and in parts of the country that the governing party depends on to gain re-election. Of course, prime ministers have important prerogatives, but they will not want to rely on authority all the time to achieve their goals. To stay on top, prime ministers need to spend their “political capital” on issues that matter most to them and to avoid controversies that damage cabinet and

27 Donald J. Savoie has developed and refined this thesis in a series of three books: *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999); *Breaking the Bargain: Public Servants, Ministers and Parliament* (Toronto: University of Toronto Press, 2003); and *Court Government and the Collapse of Accountability in Canada and the United Kingdom* (Toronto: University of Toronto Press, 2008).

28 See Paul G. Thomas, “Governing from the Centre: Reconceptualizing the Role of the PM and Cabinet” (Dec. 2003–Jan. 2004) *Policy Options* 79–85; Graham White, *Cabinets and First Ministers* (Vancouver: UBC Press, 2005), chap. 3.

caucus solidarity, their reputation, and the political standing of their government. The more issues that prime ministers touch, the greater their influence but also the greater the risk to the position if an issue blows up. In summary, the popular slogan of prime ministerial rule exaggerates the capacity and the power of the prime minister to control government on all issues at all times.

The prime minister needs staff support to perform effectively as party leader and political head of government. An important distinction for this study is between staff serving the prime minister alone and those serving the prime minister and cabinet and supporting the processes of collective cabinet decision-making. The first group is found in the Prime Minister's Office (PMO), and the second group is found in the Privy Council Office (PCO). The difference between the two offices described succinctly almost four decades ago and still relevant today is as follows: the PMO is partisan, politically active, and operationally sensitive whereas the PCO is non-partisan, operationally active, and politically sensitive.²⁹ Both offices are at the hub of communications, including correspondence, related to the role of the prime minister. Each will be described briefly.

The Prime Minister's Office (PMO)

The PMO is the place where partisan political concerns and the processes of governing meet most directly.³⁰ The institutional interests of the PMO are identical to those of the prime minister. The people who work in the PMO are described in the terminology of the Government of Canada as "exempt staff." This label reflects the fact that they are appointed and serve at the pleasure of the prime minister. Unlike for career public servants the recruitment, appointment, compensation, promotion, and termination of PMO employees are not subject to the rules of the Public Service Commission, which oversees the operation of the merit system for the regular public service. Exempt staff serving the prime minister might be described as "public servants" in the broadest sense of that term because they do play a legitimate role in the policy process, they are paid from money approved by Parliament, and administrative support of various kinds is supplied to them by other parts of government. However, in contemporary debates over the alleged concentration of power in the hands of the prime minister, employees of the PMO are typically referred to as "political staff" or "prime ministerial advisers," labels that, in the current cynical era, have less positive connotations than the title of public servant.

The PMO plans and organizes the public life of the prime minister, including

29 Gordon Robertson, "The Changing Role of the Privy Council Office" (winter 1971) 14(4) *Canadian Public Administration* 487–508, at 506.

30 On the evolution of the PMO see Marc Lalonde, "The Changing Role of the Prime Minister's Office" (winter 1971) 14(4) *Canadian Public Administration* 509–37; Thomas S. Axworthy, "Of Secretaries to Princes" (summer 1988) 31(2) *Canadian Public Administration* 247–64; Donald J. Savoie, *Governing from the Centre*; Graham White, *Cabinets and First Ministers*, chap. 3.

schedule, links to the party apparatus, preparations for Parliament, especially Question Period, interactions with the media, and those parts of his correspondence that are “political” in nature. More on this last function is said later. The PMO also advises on major policy issues and priorities and on the several thousand appointments made by cabinet on the recommendation of the prime minister. The PMO generally serves as a listening post and gatekeeper, determining which “political” matters will be brought to the attention of the prime minister and ensuring that the prime minister’s political and policy directions for government are translated into action by the permanent bureaucracy.

Although there can be tensions between political advisers and non-partisan public servants, it is generally accepted that both kinds of advice are required and valuable. Both political staff in the PMO and public servants in the PCO recognize that political and administrative considerations are often intertwined and can never be completely disentangled. This awareness leads to the further recognition by both groups that they must understand the other’s role and avoid working in isolation from each other. The closeness or distance of the PMO-PCO relationship depends greatly on how the leadership of the two offices understand, relate to, and trust each other.

At various times since its emergence as a power centre in the late 1960s under Prime Minister Trudeau, the role of the PMO has shifted from a strong “policy advisory” role, to more of a “switchboard” function directing activity and communications, to more of a role of “strategic management” directing the implementation of the key priorities of the prime minister.³¹ Even though they are controversial, exempt political staff members play a legitimate and crucial role. They can provide valuable insights, which can improve policy formulation by adding a political dimension. They can protect public servants by carrying out work that may raise doubts about public service neutrality. They are indispensable in managing the demands on the time and the attention of prime ministers and ministers. They are here to stay and, regardless of their decisions and actions, they are likely to remain the targets of criticism.

The following discussion of the role of the PMO staff in the communications and correspondence processes at the centre of government is not focused in depth on a particular PMO at a given point in time; instead, a more general analysis of the institution is presented. It is important to remember that the role of the PMO can vary somewhat, depending on such factors as the leadership philosophy and style of the prime minister; the issues before the government during a particular period of time; and the wider political context, such as whether there is a majority or minority government in office and whether an election is imminent. To help develop a composite picture of the communications environment in the PMO, interviews were conducted with former political staff who served three different prime ministers.

The person presiding over the PMO has at times been called the principal secretary

31 Thomas S. Axworthy, “Of Secretaries to Princes.”

and more recently the chief of staff. In the current PMO serving Prime Minister Harper, a chief of staff is in overall charge, but there is also a principal secretary; this was also the case in the previous PMO serving Prime Minister Martin. Whatever the title, the top position in the PMO is crucial because that individual works more closely than anyone else with the prime minister. There are both advisory and managerial dimensions to the top job. The chief of staff / principal secretary advises on politics, policy, and management; promotes and protects the interests of the prime minister across a wide range of issues; and negotiates with other powerful actors to move the prime minister's agenda forward. As manager, the head of the PMO, with the approval of the prime minister, organizes the office, selects staff, and protects the time and attention of the prime minister by controlling the flow of people, paper, and information. In this last role, the head of the PMO must ensure that all relevant information is received and that all relevant viewpoints are represented. The job of ensuring that the prime minister is adequately informed is shared with the clerk of the privy council, who normally has equal access to the prime minister for this purpose. A close working relationship based on trust between the principal secretary and the clerk is necessary to ensure that the prime minister has the full intelligence and range of perspectives needed to do his job well.

The size of the PMO has fluctuated over the years since the late 1960s, from a low of approximately 70 staff to a high of approximately 120 staff. In 2008–09, approximately 80 people work in the PMO. Probably half these people perform administrative support and secretarial services, including the handling of “political” correspondence, which is passed forward from the PCO. Beneath the chief of staff / principal secretary, there is a deputy chief of staff and a number of director positions covering such areas as priorities and planning, strategy, policy, issues management, communication, touring, and personnel. There are also two press secretaries and a number of advisers/assistants.

The budget for the PMO is integrated with the budget of the PCO, so it is difficult to identify the cost of the political support to the prime minister. A PCO breakdown of its costs for 2006–07 identified financial and administrative support to the PMO and the offices of other portfolio ministers as \$27 million.³² As a central agency serving the prime minister, the PMO is large compared with similar offices in other cabinet-parliamentary systems. It has been described as “the largest concentration of highly paid partisan political advice found in any one place in Ottawa.”³³ Unlike in Australia and the United Kingdom, where prime ministers rely on permanent public servants in their immediate offices, this occurrence is rare in Canada. “Career officials” working in a prime minister's office, writes Donald J. Savoie, “are much more likely than politically appointed officials to view issues in terms of the government rather than in the interests of the prime minister.”³⁴ Criticism of the PMO is strongest when the office is seen as

32 Canada, *Departmental Performance Report*, Privy Council Office and Public Appointments Commission Secretariat, 2006–2007, 9.

33 Donald J. Savoie, *Governing from the Centre*, 101.

34 Ibid.

more pervasive and controlling in its approach to pushing the prime minister's agenda forward. Clearly, a PMO of 80 people, perhaps half of them in administrative roles, is no match in terms of policy expertise for line departments. The PMO does not administer programs directly, so it has to rely on others to implement its ideas.

As a former principal secretary to Prime Minister Trudeau wrote, the PMO is “not the White House North.” It is an important power centre, he went on to write, “but it has predominant sway on very few matters, perhaps only the leader's schedule and appointments.”³⁵ This is probably an unduly modest assessment, but it is a useful counterweight to the popular image of the PMO as a secretive, controlling, all-powerful centre of decision making.

The Privy Council Office (PCO)

The PCO is the prime minister's department and the cabinet secretariat. It is headed by the clerk of the privy council and secretary to the cabinet. The employees of the PCO are career public servants, not politically aligned advisers. As a rule, employees are recruited from line departments, bring their expertise from earlier positions into the PCO, and leave the office after several years to enrich the knowledge of central processes and perspective within other departments and agencies. By design, the PCO is a relatively small organization with a staff of 937 people in 2007–08.³⁶ This number has to be put in perspective by examining the range of responsibilities and functions of the PCO and its necessary reliance on the expertise and activities of other federal departments and agencies to fulfill its mandate.

Stated briefly and with great oversimplification, the mandate of the PCO is to provide advice and support to the prime minister; to support the collective decision-making processes within cabinet and its committees; to ensure coherence and coordination in the development and implementation of policy; and to promote an efficient and effective public service, which is crucial to the achievement of good government. This last responsibility includes ensuring that the principles and practices of a responsible cabinet-parliamentary government and an impartial and professional public service are upheld. The clerk of the privy council and secretary to the cabinet has the personal responsibility to advise the prime minister on the exercise of his constitutional responsibilities.

The position of clerk of the privy council and secretary to the cabinet (henceforth referred to simply as the clerk), which has existed since 1867, was largely clerical in content prior to 1940 (when the second part of the title was added) and has expanded in scope and influence during the postwar period.³⁷ In 1992 the clerk was made head

35 Thomas S. Axworthy, “Of Secretaries to Princes,” 249.

36 Canada, Privy Council Office, 2007–2008 *Report on Plans and Priorities*, 3.

37 S.L. Sutherland, “The Role of the Clerk of the Privy Council,” in Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability, Research Studies, vol. 3: Linkages: Responsibilities and Accountabilities* (Ottawa: PWGSC, 2006).

of the public service on a statutory basis, a position that involves the duty to uphold the traditions, values, and expertise of the public service. In 1993 the PCO was given responsibility for federal-provincial relations, and the clerk plays a key role in the conduct of an extensive array of important and politically sensitive federal-provincial relations. In summary, the position of clerk now encompasses three broad, interrelated, and demanding roles: deputy minister to the prime minister, secretary to the cabinet, and head of the public service.

The manner in which clerks perform these roles depends on the expectations and demands of the prime minister, the issues that dominate the agenda over a given period, their own definition of the role, and their leadership capabilities. According to a background research study prepared for the Gomery Commission, the greatest single change over the past 30 years has been the expectation that the clerk will serve as a mediator and problem solver on behalf of the prime minister.³⁸ How large this role becomes depends in part on the quality of the leadership and personnel in the PMO. It also depends on the trust levels among the prime minister, his chief of staff, and the clerk. Normally, the clerk meets each morning with the prime minister and his chief of staff, although such meetings happen less frequently when the interpersonal relationships are more distant. If the clerk and the PCO are successful at problem-solving on key priorities of the government, then reliance on the PCO increases. This relationship leads in turn to a concern that the clerk and the PCO are being politicized and will be tempted to put the short-term political needs of the prime minister ahead of broader government goals and public service traditions.

The structure and operations of the PCO flow directly from the central role of the office in organizing and coordinating support to the prime minister and the cabinet. Inevitably, its structures and procedures are fluid, reflecting such factors as the leadership styles of prime ministers, new cabinet structures (which are a prerogative of the prime minister), shifting policy agendas, and the thinking of the clerk. Shifting structures and titles make it difficult and hazardous to generalize about internal arrangements of the PCO over time. For example, during the period of the Chrétien government from 1993 to 2003, the main working units of the PCO were called secretariats, each of which was headed by an assistant secretary to the cabinet. Under Prime Minister Harper, the present PCO structure (March 2009) involves deputy ministers for intergovernmental affairs and for the Afghanistan Task Force, a senior adviser with unspecified duties, six deputy secretaries, a foreign and defence policy adviser, a national security adviser, and an assistant deputy minister for corporate services – all reporting directly to the clerk. Below the deputy secretaries, and reporting to them, are 12 assistant secretaries.

The PCO is the organization most responsible for the quality and completeness of the information and advice that flow to the prime minister and cabinet. The titles and locations of the communications unit within the PCO have varied somewhat

38 Ibid., 64–77.

over time. At present (March 2009), the key communications functions fall within the portfolio of the assistant deputy minister in charge of the Communications and Consultation Secretariat. This division includes the Corporate Services Branch. The branch deals with information services, IT support, access to information and privacy, planning, human resources, and general administration. Each of these six functional areas within Corporate Services has a director. Within the branch, the Executive Correspondence Services (ECS) handles mail and email addressed to the prime minister. (This function is discussed below.) However, to convey the full picture of the PCO as a relatively small, flat organization in which there is a confusing swirl of many kinds of communication, several other positions need to be identified. Listed on the September 2008 organizational chart are the positions of assistant secretary to the cabinet, communications and consultation; a director for cabinet papers systems; and a director for cabinet confidences. In terms of providing services to Canadians online, in 2006 the key contacts in the PCO were the assistant deputy minister for corporate services and the senior research adviser for communications and consultations. This expansion is another indication of how communications are central to a successful PCO operation.

Correspondence Services in the PCO

There is a division of labour in terms of the handling of incoming correspondence of all kinds directed to the prime minister. The lead role in terms of handling most postal mail, emails, faxes, and telephone calls resides in the PCO and more specifically with the Executive Correspondence Services. Consistent with the definition of the PCO as non-partisan and operational, the ECS does not deal with postal mail or email that is political and personal in content. More is said below about how these categories are defined in practice. Political and personal items of mail are forwarded to the PMO, where they are handled by staff in the prime minister's correspondence unit. Although the mailing address is the same for the PCO's and the PMO's correspondence units, the units are actually housed in two different buildings. Face-to-face contact between the managers of the two units takes place occasionally, but direct contact between front-line employees is rare. Manuals, guidelines, criteria, and well-established procedures regulate the flow of documents between the two locations. The following analysis of the intersection of "politics" and "administration" in the handling of correspondence relies in terms of factual information on a comprehensive report (18 pages and eight appendices) filed with the Commission by the PCO and a shorter report (five pages) filed by the PMO. Selective highlights of these documents will be reported here in order to provide some factual basis for the assessment of the reliability of the correspondence-handling system.

The PCO Executive Correspondence Services consists of two units. The Executive Correspondence Unit (ECU) provides support to the prime minister, while the Departmental Correspondence Unit (DCU) provides support to those ministers whose “home” department is the PCO. At present (June 2009), these ministers are the minister of intergovernmental affairs, the leader of the Government in the House of Commons, and the Minister of State (Democratic Reform). The ECU and its procedures are of primary interest to this study. However, it needs to be recognized that correspondence addressed to the prime minister arrives in locations other than the ECU; the expectation is that messages and attached documents will be forwarded to the PCO in order to ensure that items do not slip between the bureaucratic cracks and that responses across government are consistent and “safe.”

The volume and diversity of incoming communications to the prime minister have generally increased over the past decade. Technology is part of the explanation for more complex correspondence challenges. The availability of email to reach the prime minister began in November 1997. The prime minister’s web page went up in 1995 and has long included an invitation to provide a written or email comment to the prime minister. The prime minister’s website includes links to the social networking sites of Facebook, Twitter, Flickr, and You Tube, where one finds a prime ministerial presence and comment sections. Although technology has increased overall volume, the actual levels of incoming communications fluctuate on the basis of the shifting agenda of issues and the prominence of the prime minister, including his popularity or unpopularity.

Table 1 at the end of this study provides a summary of communications-related activities as presented by the PCO in its departmental performance report for 2006–07.³⁹ Over the preceding five years the volume of communications of all kinds ranged from a high of approximately 2.15 million contacts of all kinds to a low of approximately 1.2 million contacts. After first being established in November 1997, the email address for the prime minister has become by far the most popular communications channel, with just over one million incoming emails in 2006–07 and just over 80,000 outgoing email replies in the same year. It is interesting that old-fashioned “snail mail” still accounted for more than 600,000 contacts in 2006–07 and over one million in the preceding year. The variance between messages received and replies sent reflects mainly the fact that write-in campaigns, petitions, thank you letters, and other correspondence do not require a response.

The ECU has a staff complement of 35 positions and a budget of \$1,954,667 for the fiscal year 2008–09 to deal with the prime minister’s correspondence needs.⁴⁰

39 Canada, *Departmental Performance Report*, Privy Council Office and Public Appointments Commission Secretariat, 2006–2007, 31.

40 Privy Council Office, Report on the Privy Council Office’s Executive Correspondence Procedures and the Handling of Letters from Karlheinz Schreiber to Prime Minister Harper, June 2006 to September 2007, submitted to the Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney, January 30, 2009.

Figure 1 at the end of this study presents the organizational chart of the ECU. The manager of the ECS reports to the director of corporate information services within the PCO, who in turn reports to the assistant deputy minister of the Corporate Services Branch. As is discussed below, the clerk of the privy council and secretary to the cabinet does not regularly deal with correspondence matters. Occasionally, the manager of the ECS may contact the correspondence coordinator in the clerk's office to determine if a letter should be routed to that location to be treated as a priority matter. The ECS does not have direct contact with the clerk.

To an outsider, the correspondence operations of the ECU appear to be highly systematic, refined, and professional. Manuals, guidelines, criteria, established procedures, and state-of-the-art information and records management systems are used to receive, sort, analyze, store, track, and respond to communications of all kinds. Incoming postal mail addressed to the prime minister is scanned for security reasons before it is sent to the ECU. The ECU uses WebCIMS, the Correspondence and Issues Management System, to perform the following functions: scan incoming correspondence, record relevant details, assign to appropriate personnel, track progress, and generate analysis of correspondence-related issues. WebCIMS appears to be state-of-the-art software, which is ISO certified and counts among its users more than 15 departments and agencies of the Government of Canada as well as several federal departments in the Government of the United States. It is “capability maturity” Level 3, which means that it has systems management processes built in for cross-checking and improvement. In its 2006–07 performance report, the PCO declared that it “continued to strengthen [correspondence] management practices by optimizing technology to deal with the increasing volume of correspondence while maintaining established service standards.”⁴¹

The procedures for handling postal mail are slightly different from those for email. ECU correspondence analysts (classified at the AS-01 level, which is the lowest classification in the administrative support category) sort letters into six categories: political and personal mail, priority mail (from VIPs), general mail, requests for special messages from the prime minister (for example, conference program greetings), requests for acknowledgements of special occasions (for example, birthdays and wedding anniversaries), and write-in campaigns on specific issues (for example, petitions and postcards). In the case of emails, after duplicates and junk mail have been deleted, the balance is processed by ECU clerks. For regular mail and emails that fall into the “general” category, an electronic library of standardized responses is available (it includes referrals to another department, when appropriate). Of greatest interest to this study are the procedures for handling priority and political or personal mail.

41 Canada, *Departmental Performance Report*, Privy Council Office and Appointments Commission Secretariat, 2006–2007, 31.

Letters and emails from prominent individuals such as heads of state, premiers, and ministers are treated as priority mail. These pieces are given a tracking number and forwarded for routing to the ECU English or French senior editor. The editor first decides whether an item is truly a priority or should be downgraded to general (with a longer reply deadline) and then directs the item to the appropriate location for a response. Correspondence from other governments and cabinet ministers is normally assigned to the clerk's office for reply. Priority mail and emails from other individuals, such as heads of non-governmental organizations (churches, national business associations, and trade unions, for example) are replied to by ECU writers based on their respective portfolios and working under the supervision of a senior editor.

Political or personal mail deals with the prime minister's role as a member of parliament, with his constituency, with party-related political matters (such as party organization and the parliamentary caucus), and with the private life and personal interests of the prime minister. What constitutes politically sensitive communications is somewhat open to interpretation, but usually the judgment is relatively straightforward. Employees of the ECU have detailed guidelines for processing messages from different categories of respondents and for the precise assignment of responsibility for replies. The procedures for handling various types of communications have been refined over time. The public servants who work in the ECU are generally experienced, and new employees receive training. If there is any doubt about the sensitivity and risks attached to a particular piece of correspondence, employees are encouraged to consult their superiors. Once political and personal mail is forwarded to the correspondence unit in the PMO, it is no longer tracked by the ECU; therefore, the ECU does not know whether a response has been issued or the nature of any response sent by the PMO.

Not all letters and emails receive a reply from the prime minister. The PCO has produced a list of 16 reasons why a particular piece of correspondence may be filed without a response. The reasons include the fact that messages may be unclear, irrational, incoherent, nonsensical, or paranoid. The arrival of email has increased the number of such messages. Correspondents writing about a matter before the courts may receive a standard acknowledgement stating the principle of non-intervention in legal matters, or the item may simply be filed. Other categories of incoming correspondence not warranting an official reply are: prolific (more than 10 times annually); religious opinions; illegible; inappropriate language (including profane, racist, slanderous); write-ins; and thank you letters.

Consistent with the earlier description of the ECU as a highly professional operation, it sets benchmarks, or service standards, for each of the stages involved in the handling of correspondence, including deadlines for response times. Meeting service standards is not always possible because of fluctuations in the volume of incoming communications. Regular analysis of volume and content is conducted, and more specialized analysis can be produced if requested.

The Correspondence Unit of the PMO

In contrast to the relatively large, rule-bound, and professionalized correspondence process in the PCO, the structures and processes for handling correspondence in the PMO are smaller in scale, less elaborate, and more flexible. The prime minister's correspondence unit (PMC) employs between six and eight politically appointed individuals, who are relatively young and do not enjoy long-term job security. They are expected to identify with the policy agenda and the re-election goals of the prime minister and the governing party. In addition to letters, emails, and faxes forwarded from the PCO, the PMC receives numerous requests from ministers, parliamentarians, and party officials. Notes and letters can escape the filter of the PCO correspondence-handling process when they are delivered directly to the prime minister. This can happen at the weekly meetings of the caucus of the governing party, which take place on Wednesday mornings when Parliament is sitting. It can happen in the lobby or on the floor of the House of Commons when the prime minister is attending Question Period. It can happen at party functions and public meetings as the prime minister travels across the country. In short, there is no way that the dual-track correspondence system involving the PCO and the PMO can capture and process systematically all communications directed to the prime minister. The PMC handled approximately 30,000 items of correspondence in 2006–07 and 37,000 in 2007–08.⁴²

From time to time specific issues are identified as being of particular interest to the prime minister or his staff, and the PCO is instructed to forward items related to those topics. Those instructions typically come by telephone or email. The PCO's correspondence unit used to prepare a weekly synopsis of the correspondence for the PMO, but this practice was dropped when Paul Martin was prime minister from 2003 to 2006.

Analysts sort letters by subject daily and the correspondence manager reviews the letters to identify those that may be of interest to the prime minister. All letters are entered into the WebCIMS system and then forwarded to the appropriate PMO officer or correspondence writer to prepare a reply.

The highly intense and politically focused culture of the PMO was revealed in a confidential interview with a former political staffer who served Prime Minister Chrétien. The staffer began by noting that, in the fast-paced world of the PMO, it is impossible to separate politics from governing and from communications. The primary responsibility for the “political safety” of the prime minister rests with his political staff. Above all else it is the staff's job to protect him against embarrassments and damage to his reputation; ideally, it is to make him “look good.” Staff members are also acutely

42 Prime Minister's Office, Report on the Prime Minister's Correspondence Unit Procedures and the Handling of Letters from Karlheinz Schreiber to Prime Minister Stephen Harper, June 2006 to September 2007, submitted to the Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney, February 5, 2009, 1.

conscious of the time pressures on their boss. Every letter is seen as important, but only a few actually make it to the prime minister's desk. A signature machine is used to sign most replies sent out by the prime minister. The former staffer observed that when a letter arrived which was "political dynamite," he would refer it to the executive assistant serving the prime minister. Past dealings will condition how correspondence and other contacts are handled. As part of the job of protecting "the boss," political staff may withhold or delay the provision of information, usually presuming that the matter can be handled without involving the prime minister. If the prime minister insists on seeing a piece of correspondence, there is no way that staff would withhold it. There is a cultural norm within the PMO, the former staffer observed, of putting as little as possible in writing.⁴³ He noted that beginning with the uncovering of the audiotapes in the White House that brought down President Nixon, many examples, in different political systems, have come to light of memos and emails causing trouble for political executives. Such instances have led to an oral tradition in high places and to a strong emphasis on the security of communications.

Generalizing about the role of political staff within the PMO is dangerous given the limited and sketchy evidence available. Several valuable books by Professor Donald J. Savoie on prime ministerial power contain assessments of the PMO.⁴⁴ The Gomery Commission (for which Professor Savoie served as research director) published a study on ministerial staff, and a chapter on this subject (Chapter 7, *The Prime Minister, Ministers and Their Exempt Staff*) is found in Phase 2 of the Commission's final report.⁴⁵ These developments represent initial steps toward recognizing the emergence of a new group of players who occupy a "twilight zone" in our constitutional order that officially divides "the universe" into elected, responsible, and accountable ministers and appointed, professional, and impartial public servants who answer primarily to the ministers they support. A regulatory framework governing the behaviours of political staff is gradually taking shape. Such staff is appointed under section 128 of the *Public Service Employment Act*, which came into force in December 2005. There are provisions in the section for the governor-in-council to make regulations respecting such staff. One interpretation of these provisions is that exempt political staff members are "government employees" who are authorized to engage in *political* activity (advancing

43 See also Donald J. Savoie, *Court Government and the Collapse of Accountability in Canada and the United Kingdom*, p. 232, where the informality of "court government" is discussed.

44 See Donald J. Savoie, *Breaking the Bargain: Public Servants, Ministers, and Parliament* (Toronto: University of Toronto Press, 2003), chap. 6.

45 Liane E. Benoit, "Ministerial Staff: The Life and Times of Parliament's Statutory Orphans," in Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability, Research Studies, vol. 1: Parliament, Ministers and Deputy Ministers* (Ottawa: PWGSC, 2006); Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Phase II Report, Restoring Accountability: Recommendations* (Ottawa: PWGSC, 2006); Alex Smith, "Ministerial Staff: Issues of Accountability and Ethics," *Parliamentary Information and Research Service, Library of Parliament*, December 1, 2008.

the agenda of ministers), but not in *partisan* activity (supporting a political party).⁴⁶ Upholding this distinction in practice would be very difficult, especially at the centre of government where, in the highly charged atmosphere of the PMO, political and partisan considerations overlap and can easily be seen as one and the same, especially as political staff work under the pressures of fast-moving events.

Other statutes, such as the *Conflict of Interest Act* and the *Lobbying Act*, recognize full-time political staff as “public office holders” and make them subject to rules, including investigations by an independent Conflict of Interest and Ethics Commissioner and an independent Commissioner of Lobbying. For other statutory purposes, however, ministerial offices and staff do not fall within the scope of the law. As is discussed below, ministers’ offices are not subject to the *Access to Information Act* because they are not listed as public institutions in the Act. Similarly, the *Public Servants Disclosure Protection Act*, which seeks to promote the good faith disclosure of wrongdoing and to protect whistle-blowers against retaliation, does not apply to political staff serving the prime minister and other ministers.

In addition to binding laws and regulations, there are codes and guides that seek to promote responsible behaviour on the part of both public servants and exempt staff. For example, the Privy Council Office has issued a document entitled *Accountable Government: A Guide for Ministers and Ministers of State*, which imposes a duty on exempt staff serving ministers to be aware of public service values and ethics and to assess their own conduct in the light of those parameters. According to the guide, exempt staff are not allowed to exercise decision-making authority in the name of the minister.

There is also a Values and Ethics Code for the Public Service, which has been in operation since September 1, 2003. That code forms part of the conditions of employment in the public service of Canada. A similar Code of Conduct for Exempt Staff (including part-time advisers and consultants) was recommended by the Commission of Inquiry into the Sponsorship Program and Advertising Activities.⁴⁷ It was also recommended that the proposed code should provide the foundation for a training program for all incoming political staff. To date, such a code does not exist in Canada; reliance is still placed on the guide to accountable government mentioned above to describe what constitutes responsible and accountable behaviour by exempt political staff.

Rules help to shape behaviour, but even more important are the embedded values and beliefs that represent the foundations of an organization’s culture. In addition to its role and location in the policy process, the culture of the PMO is shaped mainly by the character, philosophy, and leadership style of the prime minister. Also highly

46 Office of the Prime Minister, Response to Thomas Report, June 11, 2009. Submission to the Oliphant Commission of Inquiry.

47 Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Phase II Report, Restoring Accountability: Recommendations* (Ottawa: PWGSC, 2006), 139.

influential in shaping the culture and interpersonal climate of the PMO are the career backgrounds and leadership styles of the chief of staff / principal secretary and other senior officials. People recruited to these positions usually have advanced educational qualifications and significant accomplishments in fields such as law, business, the public service, and elected public office. They understand the importance of competence and integrity in the performance of the various roles of supporting the prime minister. It is the chief of staff or principal secretary (depending on the preferred terminology at the time) who oversees the operation of the PMO on a daily basis, supervises PMO employees, and is responsible for communicating the importance of competence and integrity in the performance of duties to support the prime minister.

In terms of the focus of this study – the handling of sensitive communications directed to the prime minister – the concern is that political staff are too zealous in their loyalty to the prime minister and too inclined to see governing as a permanent campaign in which protecting “the boss” and the reputation of the government is the number one priority. A former deputy minister interviewed for this study described PMO staff as “political warriors” and “spear-carriers for the prime minister.” This unflattering portrait is probably unfair to most political staff who work at the centre of government and in ministerial offices. It is likely more appropriate to assume that a broad spectrum of people and behaviours is found in these influential roles.

Almost nothing is written about the leadership and staffing of the prime minister’s correspondence unit (PMC) in the PMO. It has been determined from interviews for this study that the head of the PMC is usually a more experienced individual who has worked in government or Parliament for some time. For example, the director of the PMC for Prime Minister Chrétien (1993–2004) had many years of prior experience in managing correspondence. By reputation, she was known to be highly professional in approach and strict with junior staff in terms of adherence to established protocols. The current director of correspondence for Prime Minister Harper’s PMO performed the same job in the office of the leader of the official opposition for nearly a decade. The director oversees the work of the correspondence staff on a daily basis, which is made possible by the relatively small size of the unit. Staff members have titles such as analyst, writer, senior writer, and administrative assistant. The senior writer / editor in the PMO in June 2009 also served as assistant director of the unit. He has a background in community journalism and worked previously in the office of the leader of the official opposition for six years.

The jobs of the analysts – who sort the mail/email – and the writers – who draft responses – are often entry-level positions into the political world of government for individuals who have recently completed post-secondary education. Typically, these analysts and writers have academic backgrounds in fields such as political science, public affairs, journalism, and history. Most have been active in party politics before entering the PMO. To be hired, they have to complete an interview and a writing

test. In the current PMC (2009), many analysts work part time during the school year and full time during the summer months. Writers are full-time employees. In the past, brief training was provided to incoming staff, but it consisted mainly of an orientation to the processing routines for handling correspondence, including the use of the WebCIMS software for tracking correspondence. On-the-job coaching and supervision are provided by the director and the senior writer. The most sensitive incoming correspondence is referred to the unit manager and/or the principal secretary, as appropriate.

Following passage of the federal *Accountability Act* in 2006, which extended conflict of interest rules to exempt staff, PMC staff, during their initial training period, are briefed on those rules by representatives of the independent Office of the Conflict of Interest and Ethics Commissioner. The broader issues of the principles of responsible cabinet-parliamentary government and public sector ethics do not appear to be part of the training, although it was indicated in interviews that PMC staff are expected to familiarize themselves with the parliamentary and policy processes of government.

Interviews conducted for this study suggest that younger staff members see service in the correspondence unit as a privilege – as intoxicating because they are at the centre of the governing process – and as a potential stepping stone to more senior positions either in the PMO or on ministerial staffs. Although records are not kept, turnover in the PMC appears to be fairly high. A new government, of course, brings with it new staff to the PMO at all levels. A senior official in the PMO in June 2009 estimated that the typical period of employment in the PMC is two to three years, with some individuals serving only one year.

Breakdowns in communication leading to a potential condition of plausible deniability can be intentional or unintentional. The communications environment surrounding the prime minister is intense and swirling, involving formal and informal, recorded and unrecorded messages. The days are long (10–16 hours) and full of multiple events. It is not surprising that messages will from time to time become lost or distorted. With approximately 30,000 pieces of correspondence arriving annually in the PMO, including some highly politically sensitive messages, the small staff faces a real challenge in dealing with the workload. Miscommunication can result from a lack of experience, competence, and knowledge of the issues; from the distinctive context of government; and from honest mistakes.

Concerns about potential attempts at creating plausible deniability cannot, however, be completely dismissed. It is significant that the one well-documented Canadian case of attempted plausible deniability involved a chief of staff to the minister of foreign affairs who withheld information about the fast-tracking of a former Iraqi ambassador's entry into Canada in 1991. The so-called Al-Mashat affair led to a parliamentary investigation. The political staffer was fired, senior public servants were severely and openly criticized in a partisan forum, and the whole episode created a chill

in the climate of ministerial-bureaucratic relations. According to Professor Sharon Sutherland, the case broke the convention that ministers would accept responsibility for the actions of their staff.⁴⁸ Where attempts at plausible deniability have arisen in other political systems – such as Australia, the United Kingdom, and the United States, which are examined in appendices to this study – political staffs serving prime ministers, presidents, and other ministers have been at the centre of controversies.

Exempt staff are expected to obey the law and to be persons of integrity. However, their attitude toward government and policy-making is likely to be somewhat different from that of public servants. As Thomas P. d’Aquino, former special assistant to Prime Minister Trudeau (1968–72), wrote in 1973, exempt staff were “much more directly involved in day-to-day politics, vigorously partisan in most instances and well versed in the art of political gamesmanship.”⁴⁹ He quoted from a letter (what according to him amounted to a “code of conduct”) from Prime Minister Lester Pearson in response to a scandal involving political staff: “There is an obligation not simply to observe the law but to act in a manner so scrupulous that it will bear the closest public scrutiny. The conduct of public business must be beyond question in terms of moral standards, objectivity and equality of treatment.”⁵⁰ The letter went on to emphasize that loyalty to the leader can never be an acceptable reason for evading the law or violating the prevailing standards of political propriety. Since the 1960s, when Prime Minister Pearson wrote his letter, the number of political staff serving the prime minister and other ministers has grown, the complexity of their jobs has increased, and the public expectations in terms of the ethical standards to be observed by political leaders and their staffs have risen dramatically. As noted below, other countries have responded to these developments by adopting quasi-legal codes of conduct for political staff. Such codes are meant to cover that grey zone of behaviour which is not illegal but may contravene the ethical standards that should guide the actions of both ministers and the exempt staff who serve them.

Access to Information

The flow of information within government and outward to Canadians is regulated by a number of statutes passed by Parliament and by a series of internal administrative policies and manuals. These legal and quasi-legal instruments play a significant role in shaping cultures and behaviours within government. Experienced public servants are very familiar with the informal, unwritten “rules of the game” for handling and

48 S.L. Sutherland, “The Al-Mashat Affair: Administrative Accountability in Parliamentary Institutions” (winter 1991) 34(4) *Canadian Public Administration* 573–603.

49 Thomas P. d’Aquino, “The Prime Minister’s Office: Catalyst or Cabal? Aspects of the Development of the Office in Canada and Some Thoughts on Its Future.” Paper presented to the Canada–United Kingdom Colloquium on Recent Changes in the Machinery of Government, Montreal, August 19, 1973, available online at <http://www.ceocouncil.ca/en/publications/publications.php>, 22.

50 Ibid.

disclosing information, including internal and external correspondence. This section provides a brief impressionistic exploration of the intersection of laws, rules, procedures, and culture in conditioning the processing of sensitive information. The discussion begins with the *Access to Information Act* (ATIA).

The ATIA came into force on July 1, 1983. Over the ensuing years, a number of studies critical of the Act have been presented by parliamentary committees, successive information commissioners, an administrative task force, and academic commentators. Some changes have been made to the ATIA, most recently in December 2006 with the passage of the *Federal Accountability Act*. The latter Act amended the ATIA, extending its scope to include 70 new organizations and introducing a new “duty to assist” to facilitate citizen use of the access law. One amendment worthy of note in terms of the focus of this study is found in section 67.1.⁵¹ That section makes it an offence to destroy, mutilate, or alter a record, to falsify a record, to conceal a record, or to direct or counsel others to do any of these things with the intent of denying access under the Act.

In terms of the focus of this study on communications and information at the centre of government, a key provision of the ATIA is one that prevents cabinet confidences from being disclosed immediately. Unlike acts in Australia and New Zealand, in which cabinet documents can be reviewed by an information commissioner leading to a recommendation for release, this practice does not happen under the Canadian Act. Cabinet records in this country are held by the PCO for 30 years, after which time they are transferred to Library and Archives Canada. For the first 20 years after their creation, there is a blanket exclusion for cabinet confidences. However, after 20 years, any cabinet document may be requested by the public under the provisions of the ATIA, and many such documents have been released by the PCO. Cabinet documents that are transferred to the archives after 30 years are available for public consultation, subject to the exemptions under the ATIA. The application of these exemptions is subject to review by the information commissioner.

The cabinet confidences exclusion has been the source of considerable controversy, which is too involved to be explored in depth here. Section 69 of the ATIA, reinforced by section 39 of the *Evidence Act*, makes it clear that a written specification from the clerk of the privy council that a particular document involves a cabinet confidence puts it beyond review by either the information commissioner or the courts. The exercise of discretion by the clerk has been limited somewhat by a court ruling that the clerk’s certificate must state that a particular document falls within the meaning of “confidence” under the ATIA and that the considerations governing disclosure versus non-disclosure have been balanced appropriately.⁵²

One access dispute relevant to this study is whether records held in the PMO are

51 Craig Forcese and Aaron Freeman, *The Laws of Government: The Legal Foundations of Canadian Democracy* (Toronto: Irwin Law, 2005), 503.

52 *Ibid.*, 507–12.

covered by the ATIA. The Act gives the public the right to access records controlled by “government institutions.” Since the Act was proclaimed in 1983, every prime minister has taken the position that it does not apply to records held in the PMO and in other ministers’ offices. The argument has been that the PMO and other ministers’ offices are not government institutions, and that both ministers and their exempt staff are not considered to be employees or officers of the institution. The first information commissioner agreed with this interpretation in her 1989 annual report.⁵³ Ten years later, in 1999, the issue arose again when a researcher for an opposition party in the House of Commons was denied access to prime ministerial records, including agenda books that recorded the detailed whereabouts of the prime minister. In accepting a complaint from the researcher, the then information commissioner, John Reid, took the view that records held in ministers’ offices (including the PMO) were, with the exception of personal and political records, subject to review and potential release under ATIA.⁵⁴

Over the past ten years, several court cases were heard on the issue, with one lower court ruling favouring the information commissioner’s position that the agenda books of the prime minister should be made public. However, in June 2008, the Federal Court ruled that the PMO would have to release documents in its possession only if there was “a reasonable expectation” that those documents would be shared with other parts of government that fall under the ATIA.⁵⁵ It rejected the contention of the information commissioner that the documents were held by the PCO, not the PMO, and therefore were within the Act. The court stressed that its interpretation was based on the wording of the existing Act. If Parliament wanted, it could extend coverage to include the PMO by adding it to the list of government institutions that fell under the Act. It was noted that the Conservative Party of Canada government of Prime Minister Harper had not added the PMO when it amended the ATIA in 2006 to include more non-departmental institutions.

An appeal by the information commissioner to the Federal Court of Appeal resulted in a decision on May 27, 2009, in which the June 2008 ruling was upheld. The ATIA, the court wrote, “was drafted on the basis of a well understood convention that the Prime Minister’s office is an institution of government that is separate from the Privy Council Office.”⁵⁶ Whether documents fell under the Act would turn on whether their content related to departmental matters and whether other government institutions could reasonably expect to obtain a copy on request. Over the course of the various court cases, successive governments have invoked other exemptions within the ATIA

53 Canada, Department of Justice, “Strengthening the Access to Information Act: A Discussion of Ideas Intrinsic to the Reform of the *Access to Information Act*,” Ottawa: April 11, 2006, 6–8.

54 Information Commissioner of Canada, *Annual Report: Information Commissioner, 2004–2005* (Ottawa: PWGSC, 2005), “Case 3: The Agendas of the Prime Minister Held in the PMO and PCO,” 42–44.

55 *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2008 FC 766.

56 *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2009 FCA 175, para. 7.

that justify non-disclosure, such as the protection of the privacy of the prime minister, to ensure the safety of the prime minister and to protect cabinet confidences. The issue of whether the ATIA applies to prime ministerial records may end up before the Supreme Court for final resolution.

Both the ATIA and the *Privacy Act* provide protection for personal information, a matter that raises issues of interpretation and application as to when confidentiality will be upheld with respect to correspondence from private parties directed to the prime minister. There does not appear to be much case law on this matter. Under the *Privacy Act*, citizens writing to the prime minister are entitled to a reasonable expectation of privacy in terms of their identity. However, the content of correspondence is subject to the access law, unless one of the exemptions under the ATIA applies.

The intersection of privacy and access laws arose in a 2006 case in which a reporter (Jim Bronskill) complained that his name had been improperly released in an email message prepared by a PCO employee regarding a request made under the ATIA. Revealing the name of someone filing an access request is a violation of the *Privacy Act*. The email from the PCO was written following a multi-department conference call in which an officer with Public Safety Canada discussed the pending release of sensitive information. Bronskill also complained that his identity was the subject of a conference call. Eight departments participated in the call, and the resulting minutes were distributed to 19 people in the PCO and PMO, including the director and deputy director of communications in the PMO. In response to the first complaint, the PCO explained that the names of other reporters included in the minutes were blacked out, but that Jim Bronskill's identity had been revealed by mistake. The Office of the Privacy Commissioner judged Bronskill's first complaint, about the disclosure of his identity in an email, to be well founded, and the PCO apologized for its error.⁵⁷ The second complaint, that his case had been discussed in a conference call, was deemed to be not well founded. In response to the controversy the deputy information commissioner at the time was quoted in the press as saying most public servants were aware that access requests are confidential, but that many ministerial aides probably did not know the law.⁵⁸

Since 1999, the Office of the Information Commissioner has been issuing annual "report cards" on how departments have complied with the letter and spirit of the ATIA. Letter grades are assigned on the basis of the timeliness of the responses to access requests, and the indicator of performance is called "the deemed refusal ratio." The ratio measures how well a particular department completed its processing of requests within the time limit (30 days) allowed under the Act. Anything over a deemed refusal rate of 20 percent earns the institution a red-alert failing grade of F. The PCO has a

57 Office of the Privacy Commissioner of Canada, *Annual Report to Parliament on Privacy Act, 2007–2008* (Ottawa: PWGSC, 2008), 67–68.

58 Elizabeth Thompson, "Shroud of Secrecy Violated in Ottawa," *Gazette* (Montreal), September 20, 2006.

checkered history. When the report cards began in 1999, it received a grade of F, with a 38 percent deemed refusal rate. The following year, the deemed refusal rate dropped to 3.6 percent, and the grade jumped to A. Over subsequent years, with the exception of 2003–04, the PCO scored poorly, falling usually in the F range. A poor report card is always accompanied by recommendations from the information commissioner about how to improve performance. In his 2005–06 report, the information commissioner recommended that the PCO set itself the target of an ideal score of A and a minimum grade of B.⁵⁹ In the PCO’s 2006–07 annual report, the information commissioner criticized the persistence of a “top-heavy approach – virtually unique in government” – which allowed little discretion to the access coordinator and pushed too many decisions about the release of documents to the top of the PCO.⁶⁰

The PCO responded by hiring new staff, restructuring the access-to-information and privacy (ATIP) process, and introducing mandatory training for employees. These changes, along with a new framework of evaluation, resulted in a significant improvement in the performance ranking of the PCO. In February 2009, the information commissioner released a special report on the process for evaluating the performance of institutions. The new assessment framework was based on a broader picture of institutional performance, which took greater account of the context of individual institutions and included such factors as workload, capacity, processes, and leadership. The rating system was changed from letter grades to a star system in which the range is one star to five stars. Based on this new rating system the PCO was given three stars, for which “average” was the adjective to describe its performance.⁶¹ Average means, among other attributes, that there was a 20 percent or lower deemed refusal rate. The information commissioner commended the PCO for bringing its carryover of deemed refusals down from 25.3 percent in 2006–07 to 17.9 percent in 2007–08. The information commissioner also complimented the PCO for the reduced number of time extensions taken, from 49 percent in 2005–06 to 35 percent in 2007–08. For the first time, the information commissioner examined in some depth the role of the PCO in advising other departments on what constitutes a cabinet confidence and committed to the development of a set of measures for this dimension of the performance of the PCO.

The grades assigned to departments generate parliamentary and media attention and put pressure on poor performers to improve. In fairness to the PCO, it must be noted that it is a relatively small organization which is very much caught up in the

59 Information Commissioner of Canada, *Privy Council Office: Status Report on the 2005 Report Card* (Ottawa: PWGSC, 2006), 3.

60 Information Commissioner of Canada, *Annual Report: Information Commissioner, 2006–2007* (Ottawa: PWGSC, 2007), 27.

61 Information Commissioner of Canada, *Report Cards 2007–2008 and Systemic Issues Affecting Access to Information in Canada, A Special Report to Parliament, February 2009*. The discussion of the Privy Council Office appears on pp. 105–17; available online at http://www.infocom.gc.ca/specialreports/2007-2-2008_special_report-e.asp

swirl of daily events within government. The volume (between 600 and 700 requests per year), complexity, and sensitivity of the requests it receives are an important part of the explanation for the backlogs that exist within the PCO in a given year. The fact that the PCO is so strategically located at the nerve centre of government, and so closely attuned to the concerns of the prime minister and other ministers, undoubtedly leads to an understandable measure of caution in handling access requests. In 2008–09, based on information supplied by the Privy Council Office, media requests accounted for 56 percent of the PCO volume, public requests for 17 percent, and business requests for 9 percent. For government as a whole, media requests were only 14 percent of the total volume. This pattern confirms the politically sensitive nature of the operations of the PCO.

Digitization and Records Management

Changing technology, especially the arrival of email, has altered the volume and content of communications reaching government and within government. The impacts of digitization are many and not well analyzed in the available literature, and selective observations related to the themes of this study will have to suffice here. More than 90 percent of the records being created in government are electronic, and increasingly they are transmitted as attachments to emails. It was feared that the introduction of email would limit frank correspondence within government because the messages were not completely secure. However, this fear seems to have been overstated. Email has become so deeply entrenched in daily work life that busy employees do not often make an effort to censor themselves. Moreover, technology has evolved to provide greater security features – such as PIN-to-PIN messaging on BlackBerries, which does not leave a trail on a central server. In his 2007–08 annual report, the information commissioner of Canada described a complaint that BlackBerry messages between PCO officials and another department were not recorded properly. Although the complaint could not be substantiated, the commissioner noted that there was no uniform policy on PIN-to-PIN communications and that each institution was advised by the Treasury Board Secretariat (TBS) to craft its own policy.⁶²

Reliance on email reduces the role of hierarchy in structuring communications as information flows increasingly follow informal network patterns. The style of communication becomes less formal because the official standards and informal conventions regarding email are not as clear, strict, or embedded in the culture of organizations. Because electronic files do not pile up in bulging filing cabinets or in boxes in basements, there is less awareness of the requirements for the capture, management, disposal, and retrieval of e-documents of all kinds.

62 Information Commissioner of Canada, *Annual Report: Information Commissioner, 2007–2008* (Ottawa: PWGSC, 2008), 38–39.

In 2006, Library and Archives Canada circulated a guide on email management to all federal departments and agencies. It noted that email messages, including any electronic attachments created, received, or transmitted in the conduct of government business, are records and must be managed in accordance with such relevant legislation as the *Library and Archives of Canada Act*, the *Access to Information Act*, the *Privacy Act*, and the Treasury Board's policy on the management of information. Emails related to government business must be kept. Transitory emails – as defined by policy – can be deleted after they have served their purpose, but not if they are, at that point in time, the subject of a request under the ATIA. Emails are supposed to be “captured into a recognizable records system,” and are to be “managed efficiently and effectively” on the basis of “corporate policies, guidelines and procedures.”⁶³

Legislation, policies, guidelines, and procedures are required, but ensuring that employees have the awareness, knowledge, skills, and commitment to the sound management of electronic documents is a big challenge. Introducing sound information management practices across government is the responsibility of the Chief Information Officer Branch of the Treasury Board Secretariat. In the fall of 2008, the branch released a document called IMBasics (Information Management Basics), guidelines that sought to provide Government of Canada employees at all levels with a clear picture of their responsibilities for the day-to-day handling of digital records. A training program, which accompanies the document, educates employees on IM, and there is additional training for managers. In an interview with a government technology magazine, the official in charge at the TBS acknowledged that changing people's habits was more difficult than changing hardware, and that across government many departments were still “doing their own thing.”⁶⁴ Achieving consistent, standardized approaches to information management and record keeping is a huge challenge for all governments in terms of meeting rising statutory, legal liability, continuity, and accountability requirements.

To improve its capacity to record and to access inventories of documents of all kinds, the Government of Canada began in the 1990s to implement the Electronic Documents and Record Management System (EDRMS). According to Professor Alasdair Roberts, a leading expert on access laws, EDRMS is meant to give structure to “unstructured data” – that miscellany of documents generated in huge volumes daily within bureaucracies in the form of letters, memoranda, emails, draft reports, presentation files, and so on.⁶⁵ Large databases store these documents. When a new document is added, basic information from the controlled vocabulary that is used to

63 Library and Archives Canada, *Email Management in the Government of Canada* (Ottawa, 2006), available online at <http://www.collectionscanada.gc.ca/government/002/007002-3008-e.html>

64 Chad Vander Veen, “Canada Creates Comprehensive Records Management Strategy” (October 28, 2008), available online at <http://www.govtech.com/gt/418681> (downloaded on 12/10/2008).

65 Alasdair Roberts, *Blacked Out: Government Secrecy in an Information Age* (New York: Cambridge University Press, 2006), pp. 218–27.

classify documents makes it easier to search government databases using Government of Canada search engines. The process of assigning “authorized descriptors” to documents is also called “meta tagging.”

Even though the Government of Canada has been recognized by industry groups as a leader in the field, the promise of the paperless office is a long way off. The current information management system is still in transition. Electronic data exist alongside huge volumes of old-fashioned paper documents such as correspondence, memoranda, and draft reports, which are comparable to those produced decades ago.

Some Comparative Evidence on Government Communications

This section offers a summary of the findings from a selective examination of how communications issues in government have been debated and resolved in three other countries. Appendices A through C provide a brief synopsis of developments in Australia, the United Kingdom, and the United States. Only general trends from those countries are described here, and then just briefly. As in Canada, governments in all three countries are facing more complicated, intense, and negative communications environments.

Trends in Australia, the United Kingdom, and the United States include the following:

- Public mistrust of politicians in terms of their motives, intentions, and behaviours is strong.
- There are low levels of public confidence in the capacity of governments to solve problems, and there is a suspicion of government claims.
- There is increasing public insistence on openness and disclosure.
- The media are increasingly aggressive and adversarial in their coverage.
- Governments have adopted increasingly elaborate approaches and refined technologies to practise agenda management and message discipline.
- Two-way communication between citizens and governments has increased as a result of new information and communications technologies.
- The communications function has increased in importance and is developing as a more professional group within governments.
- There are growing debates over “political” spin displacing the professional provision of objective information.
- In office, politicians have insisted on strengthening their personal advisory and support systems to ensure that their ideas are acted on by bureaucracies and to promote/protect their reputations.
- In all countries, at the centre of government, there is a crucial difference between those organizations serving the prime minister exclusively in his political role (and which are staffed by political loyalists) and other organizations, which serve both the prime minister and the cabinet and uphold the traditions of neutral competence of the public service.

- Allegations of plausible deniability attempts have arisen in all countries, with political staff more often than public servants being blamed for attempted cover-ups.
- There have been debates leading to non-statutory frameworks for regulating the behaviour of political staff, especially their dealings with public servants.
- The changes in information and communications technologies have increased the volume and complexity of external and internal communications, leading to issues of record keeping, access to information, and privacy.
- There have been controversies about advice from public servants that goes missing, about internal emails being deleted, about computer-programming breakdowns leading to the loss of sensitive information, and about a lack of attention and care in record keeping by employees.
- The computer-programming methods for the entry, storage, and retrieval of meta-data are generally the same as those used in the Government of Canada.

This study did not uncover a controversy in the other countries involving allegations of outside mail being withheld from the political head of government.

In summary, a review of experiences in three other countries revealed that similar issues related to the handling of sensitive communications have arisen, but there is not a single straightforward solution.

In addition to reviewing the three countries, the author sought to interview officials in the executive councils of six provincial governments. Officials in four provinces – Manitoba, New Brunswick, Ontario, and Saskatchewan – agreed to participate in semi-structured, not-for-attribution interviews of approximately 45 minutes. The main purpose of the interviews was to gain an understanding of the system for handling sensitive communications directed to the premiers and to see if there are structures or procedures that may improve the arrangements in the Government of Canada.

Because only four provinces agreed to the request for an interview, the findings must be interpreted cautiously. Moreover, not knowing the type of report that might emerge from the study probably inclined respondents to be factual but cautious in their replies about what is a sensitive, largely uncharted territory of government operations. Finally, owing to limited time and a lack of documentation, the researcher was not able to corroborate the descriptions and assessments of the provincial officials who, it must be stressed, were generous with their time and knowledge.

The following observations on provincial practices should be read with the above qualifications in mind. The four provincial systems feature the same overlapping and intersecting worlds and cultures of politics and administration that are found in Ottawa. Public servants in charge of communications units and political staff serving premiers both recognize that they have different, but interdependent, roles to play. Size matters in terms of how these two worlds relate to each other. In Ontario, a relatively large governmental system, the structures, procedures, and administrative documentation related to the communications functions are more extensive and

formal. For correspondence, for example, the protocols are well developed, having been refined over several decades without many changes when governments have changed. In the three smaller provincial governments, the shared world of politics and administration at the centre is less bureaucratized, less regulated, and more informal and face-to-face. All four provinces follow the practice of having public servants in the correspondence unit sort postal mail and email directed to the premier. All have criteria for separating political and personal mail to be answered by political staff. In general terms, the arrangements correspond to those in the Government of Canada. The interviews did not disclose any structural or procedural arrangements that are distinctive and would represent an improvement to the system of the Government of Canada.

Conclusion

Communication is central to politics, governing, public policy, and public management. If a prime minister does not integrate communications considerations into his political leadership, into the policy process in all its stages, and into governing, he risks failure of his electoral, policy, and governing goals. When political life resembles a permanent election contest, campaigning and governing become almost indistinguishable. The term “spin” has moved beyond its origins as a description of election tactics and into an all-encompassing word for all communication from government. Putting a favourable spin on information and events and seeking to shape public opinion to gain support has become a preoccupation at the political centre of government, and this concern tends to spill over into the administrative culture of the senior ranks of the public service.

Media coverage of politics and governing has become more constant, instantaneous, and adversarial. This approach is partly a tool by media outlets to ensure a viable position in more competitive media marketplaces. It is also a reaction to attempts by governments to control information and to proactively manage the news. The media focus on the blunders, abuses, and unavoidable errors feeds a negative stereotype of politicians and governments as untrustworthy and incompetent. The media bias toward suspicion and negativity in covering government, combined with the greater transparency arising from access-to-information laws, creates a fear of mistakes within government and the adoption of preventive and defensive strategies to avoid negative news coverage.

Most citizens, most of the time, are spectators to the political and governing processes. Their impressions and beliefs about both processes are mainly based on the stories and images presented in the media, especially on television. In general, the public’s level of attention to and engagement with public affairs has declined in recent decades. Canadians are better educated than in the past, and they have access to

many more sources of information and opinion about public issues. Opinion surveys reveal, however, that within Canadian society there are very low levels of what social scientists call “civic literacy.” Put less politely, this means that there is a great deal of public ignorance about the basic features of the political system, about the machinery of government, and about the issues facing governments at any point in time. These same citizens are less deferential toward government elites; they want to be consulted; they want channels of communication with which they are comfortable and which they find convenient; and they insist on more transparent, responsive, and accountable government. Managing multiple channels of interaction with citizens (including mail, email, telephone, in person, and online consultations) for many different purposes (such as informing, listening, persuading, serving, and engaging) is proving to be a major challenge for governments and public services.

Electronic government (e-government) refers generally to the use of information and communications technologies in government settings. E-government is neither a homogenous nor a static phenomenon. As a general trend, governments have introduced more technological and organizational sophistication and complexity into their e-government initiatives. The Government of Canada has been recognized by industry associations as a leader among governments in terms of its plans and accomplishments in the field. Government On-Line (GOL) and Service Canada represent two major efforts by the government to provide information, access, and services to Canadians on a more integrated basis. E-government initiatives, however, have been launched in the context of a web of laws and rules designed to protect a range of values, such as the public’s right to know, privacy, security, legal liability, accountability, and records management.

The process of two-way correspondence between citizens and their governments cannot be fully or realistically understood without an awareness of the wider and dynamic context in which it takes place. The greatest impact of new information and communications technologies has been to increase the volume of incoming communications with government, and email has been the source of most of this increase. It is easier for Canadians to write the prime minister by email than by old-fashioned mail, and the message arrives immediately rather than days later. Within government, one impact of email has been to allow for more information sharing, including on a more horizontal basis across divisions within organizations and across organizations. The volume and speed of email transmission lead to information overload and less attention paid to the requirements for record keeping.

This study examined the political, legal, structural, and cultural factors that affect communications at the centre of government. Its integrating theme is that communications in the public sector should be approached on a strategic, but contingent, basis. Strategies must be appropriate to the external and internal communications environments of particular governments. Although there are lessons to be learned

from other jurisdictions, there are risks associated with borrowing communications structures and procedures that appear to work in other governments under different conditions. Avoiding so-called “best practice” elsewhere and adopting “smart practice” means developing and refining communications arrangements to fit the context, scale, capability, and culture of a particular political and governmental system. Over time, the Government of Canada has refined its communications structures, policies, and practices. The result is a systematic, professional, and evolving approach. No structural, procedural, or technological features identified in the comparative analysis of other jurisdictions stand out as so superior as to warrant a strong recommendation for their adoption by the Government of Canada.

In terms of the specific concern about the processing of correspondence, there are structures, rules, manuals, and established practices that exist to help staff meet political, legal, and administrative requirements. External messages directed to the prime minister are meant to be channelled through the Executive Correspondence Unit (ECU) housed within the Corporate Services Branch of the Privy Council Office. The manager of this unit and its 35 employees are professional, impartial public servants, most of whom have years of experience in government. There is a well-established system for sorting correspondence of all kinds and logging and tracking it in terms of responses. Incoming correspondence that is “political” is forwarded to the correspondence unit in the Prime Minister’s Office. As suggested in the body of this study, the designation of “political” correspondence is in most instances straightforward – based on the knowledge of ECU employees and past practice in handling different types of correspondence. If there is doubt about a particular communication, or if it is seen to be highly sensitive in political terms, there is a well-established protocol for consulting the manager of the ECU. That individual could in turn seek advice from superiors, and in rare circumstances the clerk of the privy council could be consulted. It cannot be ruled out completely, but it is highly improbable that an employee of the PCO would deliberately seek to protect the prime minister and the government of the day by withholding information so that a condition of plausible deniability involving a controversial event could be created. Of course, bad judgments and breakdowns in communication are possible.

In terms of the information-processing systems for handling postal and email correspondence, the PCO’s system seems to be state of the art and comparable to or better than those in other countries. The high-profile case of millions of emails going missing from the White House in the United States (described earlier) would probably never happen in the Government of Canada. Put simply, the George W. Bush government in Washington sought to sidestep the official record-keeping rules by using a private email service in the Executive Office, and the backup strategy was to rely on Microsoft Outlook database files pulled from each computer, which became unstable because they were too big. Recording, storage, and retrieval of emails in the

Government of Canada need improvement, but huge black holes like those created in Washington are a remote possibility.

Legal, organizational, procedural, and technological means are available to promote the integrity of the information-handling and communications processes within government. The Government of Canada does not generally seem to lag behind other governments in terms of coping with the abundance of information received, generated, processed, used, stored, and recovered in the governing and administrative processes.

Far less is known publicly about the communications processes within the highly political world of the PMO. Going back to the initial expansion of the PMO by Prime Minister Trudeau (1968–79), concern has been expressed that the principal secretary and other political staff will determine what the prime minister hears and sees, and will shield him from certain political pressures and unfavourable news. The potential consequences include blurred responsibility for actions and inactions and a lack of accountability. It is recognized that prime ministers today cannot perform effectively without a personal advisory and administrative support apparatus, including an extensive and sophisticated communications capability. The existence of both a political office and an administrative office serving the prime minister is now well accepted as a legitimate part of government.

As an extension of the prime minister in his political roles as leader of the governing party and leader of the cabinet, the PMO has gradually been recognized in public law and administrative documents. The trend has also been to recognize and regulate the role and conduct of exempt political staff, as for example in the recent *Conflict of Interest* and *Lobbying* acts. There also exists a guide to responsible behaviour for cabinet ministers and there is a code of values and ethics for public servants, adherence to which is a condition of their employment. Political staff members serving the prime minister and other ministers are expected to behave in a manner consistent with the law and with the provisions of several non-legal documents.

To date, governments have not adopted a code of values and ethics for exempt staff and ministerial advisers on contracts. There is, however, a zone of behaviour where the issues are less legal, organizational, and procedural and more ethical and cultural in nature. A capacity for deep understanding and sophisticated reasoning about ethical dilemmas when the facts are in dispute and fundamental values clash cannot be acquired on the basis of a short-term course. Breadth and depth of education and experience, together with encouragement and support for reflection and dialogue, are seen by many experts as requirements for the creation of ethically competent organizations. In Australia, education and training have been introduced for political staff to ensure that they have some understanding of the constitutional principles of cabinet-parliamentary government, that there is greater clarity in the definition of their role in relation to the public service, and that the values and ethical norms which should guide their

behaviour are better understood. Public officials – elected politicians and their personal staff, as well as career public servants – who demonstrate a commitment to high ethical standards will do more to restore public trust and confidence in government as an institution than will more rules and accountability mechanisms.

Appendices

APPENDIX A COMMUNICATIONS ISSUES IN AUSTRALIA

Over the last decade issues of communication within government, allegations of plausible deniability, the role of ministerial advisers, and the need to increase transparency and accountability have been the subjects of parliamentary inquiries and public debates at the national level in Australia.

The precipitating event was the so-called Children Overboard affair (also known, in the words of a subsequent Senate inquiry report, as “a certain maritime incident”), which came to light in October 2001. At the time, the Liberal-National Coalition government of Prime Minister John Howard was about to call an election. Ministers of the government alleged that seafaring asylum-seekers had thrown children overboard in order to gain refuge in Australia. Prime Minister Howard later suggested that the boat had been deliberately sunk, whereas other reports indicated that it had broken apart as a result of the strain of being towed by the navy. In response, Howard maintained he spoke on the basis of the intelligence he was given at the time. Tough talk on illegal immigration was widely seen as one reason that the Howard government was re-elected with an increased majority in the House of Representatives. Of importance for the account to follow, it must be noted that there was not a government majority in the Senate, as is usually the case in Australia’s upper house, which is elected on a proportional representation basis. It was mainly Senate committees that sought to uncover who knew what, when.

A stream of inquiries, reports, media coverage, and books flowed from these initial events. Issues of plausible deniability were widely debated in a select committee of the Senate, which investigated the Children Overboard affair. The report from this committee, which included both a majority finding and a separate opinion from government members,⁶⁶ contained numerous observations and recommendations. In terms of the focus of this study, recommendations were made that the Australian Public Service Commission (APSC) prepare a discussion paper on record keeping, with a view to the development of practical guidelines for public servants; that the APSC include training in the principles and practices of accountability for whole-

66 See *A Certain Maritime Incident*, available online at http://www.aph.gov.au/Senate/committee/maritime_incident_ctte/report/index.htm

of-government operations in the development programs for executives; and that the APSC, in consultation with the Department of Prime Minister and Cabinet (DPMC), prepare guidelines addressing the responsibilities of agency heads in circumstances where a minister fails to act on advice that corrects factual misinformation of public importance.

The Senate inquiry heard a great deal of testimony on the potential for political staff to create confusion and cause problems in the transmission of information and advice to ministers. The 2002 report called for the DPMC to develop a code of conduct (including a statement of values and ethics) for ministerial advisers, as well as mechanisms for handling complaints about breaches of the code. This topic was the subject in 2003 of a second Senate committee,⁶⁷ which criticized the government for its failure to produce a code of conduct; for its refusal to allow ministerial advisers to appear before parliamentary committees; and for the limited training provided to political operatives who occupied strategic locations in the communications systems of government.

Late in 2004, a further development occurred, in which a political staffer who had spoken to Prime Minister Howard about the initial inaccuracies in the Children Overboard statements came forward. A Senate committee held a brief inquiry into his evidence.⁶⁸ This committee also divided along opposition/government lines, with those government members who were in a minority issuing a dissenting report. Several of the observations made in the majority report are relevant to this study:

- It was necessary to establish proper communications protocols between departments and ministerial offices to ensure that both parties understand clearly when formal communications have been transmitted.
- Verbal communications are uniquely vulnerable to confusion, misunderstanding, and ambiguity – and to simply being forgotten or ignored. Therefore, it is recommended that officials maintain records and diaries to record key messages so as to ensure accuracy, accountability, and public confidence.
- Centralization of communications in the prime minister's office or in ministers' offices leads to misinformation remaining inadvertently uncorrected and makes information susceptible to manipulation for political convenience. It also risks the politicization of the public service. Finally it undermines public confidence in the integrity of the information being reported on a controversial event.

67 See Inquiry into Members of Parliament Staff (MOPS), available online at http://www.aph.gov.au/Senate/committee/fapa_ctte/completed_inquiries/2002-04/mops/index.htm

68 See Senate Select Committee on the Scafton Evidence, available online at http://aph.gov.au/Senate/committee/scafton_ctte/index.htm

Not surprisingly, government senators dismissed these statements as politically motivated and inaccurate, an action that illustrates the problem of conducting an objective inquiry in a partisan and parliamentary committee.

After the Labour Government of Prime Minister Kevin Rudd came into office in November 2007, Senator John Faulkner, who had been deeply involved in the earlier Senate inquiries, was appointed cabinet secretary and Special Minister of State. His website⁶⁹ lists a number of initiatives related to transparency and integrity in government, including:

- A code of conduct for ministerial staff (July 2008);
- An annual report on ministerial and parliamentary staff (October 2008);
- A new Lobbying Code of Conduct (May 2008);
- Reforms to the *Freedom of Information Act* (July 2008);
- Strengthening of the whistle-blower protection law;
- Improvements to the donation disclosure and public-funding laws for political parties (May 2008);
- New guidelines for government advertising;
- Abolition of the ministerial committee on government communications (to eliminate political spin), transfer of the management of communications campaigns to departmental secretaries, guidelines for such campaigns, review by the auditor general, and a semi-annual report to parliament on advertising activities.⁷⁰

The *Archives Act* was amended (October 2008) to include a new definition of a record as a document in any form, giving statutory recognition of electronic records and providing strict rules for departments and agencies regarding record keeping, management, and archiving.

The subject of the balance between independence and responsiveness in the relationships of the public service with the government of the day has been the topic of frank discussions in public forums sponsored by the Institute of Public Administration of Australia. Several valuable books on this area have been published:

- Anne Tiernan, *Power Without Responsibility: Ministerial Staffers in Australian Governments from Whitlam to Howard*. Sydney: University of New South Wales, 2007.
- Patrick Weller, *Don't Tell the Prime Minister*. Melbourne: Scribe, 2002.
- Kathy MacDermott, *Whatever Happened to Frank and Fearless? The Impact of New Public Management on the Australian Public Service*. Canberra: Australian National University Press, 2007.

69 See website of Senator the Hon. Joe Ludwig, available online at <http://www.smos.gov.au/>

70 See Senator Faulkner's speech, "Transparency and Accountability: Our Agenda" (October 30, 2008), available online at http://www.smos.gov.au/speeches/2008/sp_20081030.html

APPENDIX B

THE RECENT UK EXPERIENCE WITH GOVERNMENT COMMUNICATIONS

Controversy, inquiries, and reforms related to the centralized communications functions within the Labour government of Prime Minister Tony Blair represented a major issue on the political and media agenda in the United Kingdom over the last decade. In general terms, “politicization” of communications was the concern. The Blair government was notorious for relying on polling and focus group findings to shape and to “sell” its policies. Elaborate efforts at spin were used to enhance the reputation of the prime minister and his government. Special advisers and ministerial staff took over communications functions or sought to direct the professional civil service. Four processes crystallized these concerns and created an agenda for reform. Only the highlights of these processes can be briefly presented here.

The first process involved a standing committee of the House of Commons on *Standards in Public Life*, which embarked on a series of hearings and reports. Its ninth report, in 2003, was entitled “Defining the Boundaries Within the Executive: Ministers, Special Advisers, and the Permanent Civil Service.” It reflected the widely voiced concerns about the Government Information and Communications Service (GICS) and the accountability of staff in the Prime Minister’s Office. In particular, it examined the role and influence of two special advisers: Mr. Charles Powell, chief of staff; and Mr. Alastair Campbell, who as director of communication was seen as the “spinmaster” for the prime minister and the government. The parliamentary committee was most concerned about the “executive powers” granted to the two special advisers to direct civil servants. While recognizing the clear need for personal advisers to the prime minister, the committee detected a shift in practice: from a former role confined to advising the prime minister and articulating his wishes, to actually directing the necessary action to carry out the prime minister’s wishes. The committee called for changes in the *Civil Service Act* to clarify and to regulate the conflict of special advisers, and it recommended that, in the meantime, a code of conduct for the Prime Minister’s Office be adopted.

The second process was the Hutton Inquiry into the circumstances surrounding the death of a government weapons scientist who had committed suicide after being named in July 2003 as the possible source of a BBC story that suggested the Blair government had “sexed up” intelligence on weapons of mass destruction in Iraq. Lord Hutton’s report, released in 2004, found no evidence of tampered evidence or a cover-up, a conclusion that brought widespread criticism that the inquiry had been too ready to accept the evidence of the prime minister and senior officials. Over the course of several weeks of rigorous examination, the internal workings of the Prime Minister’s Office were exposed, especially the work of Mr. Campbell. Mr. Campbell gave testimony

to the inquiry and shortly thereafter resigned from his position. The Hutton Report ran to 750 pages (including 18 appendices, with hundreds of documents, memos, emails, and transcripts of conversations). This was the first public inquiry in the UK to request and publish emails, and the retrieval problems revealed serious weaknesses in terms of policy and practice regarding deletion and storage of electronic records of all kinds. In 2004, the record office of the British Government began to require that all emails, including deleted files, be automatically stored on central computers and be destroyed only centrally.

The third process, a follow-up investigation into the intelligence system, was conducted by a five-member committee that included senior parliamentarians and civil servants with backgrounds in intelligence. This is not the place to examine the issues and detailed recommendations of the second report (called the Butler Report after the committee chair, Lord Butler). However, one finding of direct relevance to this study was the concern about “the informality” of communication at the centre of government, which reduced “the scope for informed collective political judgment.”

The fourth process was the Phillis review of government communication (led by Robert Phillis, the chief executive of the *Guardian* media group), launched in February 2003 when the Blair government accepted the recommendation of the Commons’ Select Committee on Public Administration for a review of the GICS. The interim and final reports of the Phillis Committee emphasized the breakdown of trust among politicians/government, the media, and the public. It focused its attention on the relationships between special media advisers to ministers and the civil servants who made up the GICS. Advisers, noted the report, took the pressure off civil servants to assume an advocacy role to the point that it would compromise their neutrality. Conflicts between political appointees and senior civil servants over where political “spin” ended and objective information provision began were seen as dangerous. The GICS was criticized as a vertical and voluntary network that had neither the authority nor the ability to enforce standards in communication. In response to the Phillis review, the Blair government accepted the recommendation that a senior civil servant should have control over government communications and launched a communications policy community within government that promotes best practices. In July 2008 the House of Lords, through its Communications Committee, launched an inquiry into the impartiality, efficiency, and effectiveness of government communications systems. The first witness, Robert Phillis, told the committee that he was generally positive about the first steps and the longer-term commitment of the government to the implementation of his report.

Another development in the UK context deserves brief mention. It involves the early operation of the 2000 *Freedom of Information Act* (FOIA). In a 2005 ruling, the Information Tribunal, which adjudicates disputes over the release of information, offered an observation on whether information held electronically and then deleted

from the “live” system, but still retained in central data banks or in archival records, was still “held” by government. The tribunal deemed all backup data as archived and retrievable for purposes of the FOIA. Restoring information from recycling bins and computer backup tapes was fairly straightforward, but extracting information from centralized computer systems could be a time-consuming task involving specialist staff and costs that exceeded the ceilings allowed under the FOIA.

APPENDIX C

PRESIDENTIAL COMMUNICATIONS IN THE UNITED STATES

REBECCA JENSEN

Until a generation ago, American presidential papers were considered the private property of the office holder both during and after his tenure. The right of the president to withhold communications while in office has been variously considered by the courts to be a valid exercise of executive privilege, a necessary aspect of the separation of powers, and a matter of security, especially when military and diplomatic issues have been involved. After the president leaves office, presidential correspondence and other papers have, in the past, been destroyed, sealed either indefinitely or for a fixed period, donated, sold, or passed down within the family, in accordance with the former president’s wishes.

Franklin Roosevelt chose to establish a presidential library, which included a large volume of papers from his administration and was built with private funds but thereafter was federally administered. Subsequent presidents adopted this tradition. While facilitating access to, and study of, presidential papers, these libraries did not change the fundamentally discretionary nature of the decision to make public the president’s files and communications.

In the aftermath of the Watergate affair, the investigation of which was hindered by President Nixon’s refusal to provide audiotapes and other relevant material from his office, Congress under President Carter passed the *Presidential Records Act* (PRA) in 1978, which took effect on the first day of the Reagan administration in 1981. The substance of the PRA was to transfer ownership of all presidential communications and materials to the federal government. The job of maintaining the integrity of such papers became the responsibility of the president and applied to all materials sent or received by “the president, his immediate staff, or any unit or person in the executive office of the president whose sole function is to advise and assist the president.” The president may choose to destroy materials only if they are judged by the chief archivist of the U.S. government to have no “historical, evidentiary, administrative, or informational value.” Disagreements between the president and the archivist on this matter are referred to Congress.

Although these communications are considered the property of the government and not the office holder, access to presidential papers remains restricted during the

president's tenure. Under the PRA, the public may access these documents through the *Freedom of Information Act* after five years have elapsed; however, the president or his representatives can prevent access to documents they consider politically sensitive or otherwise private for up to 12 years. After this point, only information whose release would threaten national security or military or diplomatic interests remains inaccessible to the public.

At the end of his second administration, President Reagan issued an executive order that required the chief archivist to notify former presidents before releasing any papers and allowed either the incumbent president or the former president whose papers were involved to exercise executive privilege and refuse their release. This option was first exercised by President George W. Bush shortly after gaining power. He issued his own executive order creating new categories of privilege under which the release of presidential papers could be refused. These categories included legal privilege, for correspondence between the president and legal staff; deliberative process privilege, for documents created during the deliberative process; personal communications privilege; and national security privilege. These privileges were also extended to incumbent and former vice-presidents, and they stipulated that when a dispute existed between an incumbent and former president as to the release of any correspondence, the incumbent's decision would take precedence. A series of challenges from 2002 until 2007 struck down elements of this order, and on January 21, 2009, President Obama revoked it in its entirety, with the exception of the clause applying the same rules to the vice-president as to the president.

Court proceedings punctuated the Clinton and George W. Bush administrations, representing an ongoing struggle among Congress, which sought to increase its oversight; and journalists, historians, and researchers, who argued both for the release of specific documents and for broader access to presidential correspondence in general; and presidents, former and incumbent, who wanted to protect the reputation of their administrations. University of Colorado historian Bruce Montgomery, evaluating the issue from an archivist's perspective, sees the attempts to extend the circumstances in which the release of documents can be blocked, as well as the list of people who may exercise that privilege, as fundamentally incompatible with the accountability crucial to a democratic government, noting that without public records, the actions of the president will remain shrouded in secrecy.

In 1993, a judicial decision mandated that electronic communications and computerized records be treated as all other government records were, whether or not they fell under the aegis of the PRA. Judge Charles Richey stated that, in the absence of rules to the contrary, institutions had a natural tendency to erase records that reflected poorly on their performance, and he specifically rejected the White House's argument that computer messages were not included in the definition of government records. Most recently, President Obama has become the first U.S. commander-in-chief to use

wireless and electronic communications while in office, since Presidents Clinton and George W. Bush chose not to use email. Much discussion of Obama's attachment to his BlackBerry has centred on security concerns, but from an administrative perspective, the importance of preserving presidential communications in all their forms deserves consideration. Since the *Presidential Records Act* includes electronic communications, all those enabled to email Obama directly, for personal or work-related purposes, are being briefed on the appropriate use of this channel, as well as the implications of all correspondence eventually becoming part of the public record.

Accessibility of communications has changed with the proliferation of information technology (IT). Proper encryption can mean that classified communications are more secure than ever before, but flaws in software, transmission, or the use of email can also make such documents more widely available than in the past. Certainly, electronic records can be destroyed more rapidly and inconspicuously than paper records. During the second Clinton administration, a software error led to the failure to record tens of thousands of email messages, which were normally all preserved in a central archive established to facilitate the subpoena of email communications. Investigators gathering evidence for, among other things, proceedings from the Lewinsky affair and Clinton's impeachment trial suspected that staff in the White House obstructed efforts to retrieve these records, and some individuals further suggest that some messages were deliberately destroyed. Although attempts to retrieve missing email were eventually suspended owing to cost and feasibility reasons, it is unclear how many of these documents, if any, were intentionally erased.

Prior to the rise of electronic communications, over-classification became a problematic aspect of records and archives, and it has since worsened. Estimates of the degree of over-classification, when documents are given a classification level incongruent with their content, range from 50 to 90 percent. Clearly, there is a consensus that too many documents are made inaccessible to the public and to government staff below certain levels, and this phenomenon complicates not only access to information but also the evaluation of government, when critical inputs, and sometimes outcomes, of the decision-making process are never revealed. Further, many materials that are rightly considered sensitive lose that sensitivity fairly quickly. Although declassification of documents no longer pertinent to national security took place routinely in the past, this practice is much less common today. Some retired officials have noted that over-classification as well as failure to declassify seem motivated more by a desire to avoid "governmental embarrassment of one sort or another" than by a legitimate concern for security.

A related and even more opaque problem is the growing prevalence of "pseudo-classification." In the heightened security awareness following 9/11, the practice of labelling documents "sensitive but unclassified" (SBU) became common. The *Freedom of Information Act* requests for documents designated SBU draw automatic scrutiny

from Homeland Security officials, who are empowered to deny the request by means of a number of exemptions to the Act. This practice blurs the line between public and classified documents, and it does so in a nebulous and often unmonitored manner. Any employee in the Department of Homeland Security is authorized to designate something as SBU, as is the case in a number of other agencies, and mechanisms of oversight or administrative guidelines as to the proper use of this tool are lacking almost everywhere.

Apart from the physical preservation of communications and the rules about how, when, and by whom they are accessible, the substance of presidential communications deserves scrutiny, as does the subject of who controls them. It is impossible for any president to be apprised of all the information on all the topics of concern to the American people and government. The role of filtering information and directing it to the president in a useful format is fulfilled by the Executive Office of the President (EOP). The manner in which the EOP is staffed and structured can have a dramatic influence on the decisions taken by the president. Many observers note that structuring advisers to the president according to area of expertise can lead to policy that is shaped in isolation, while organizing staff along functional lines can lead to groupthink and false consensus; the challenge in both setting up the EOP and selecting individual staffers is to achieve the right blend of expert knowledge, appreciation of the broader picture, honest criticism, and discussion of alternatives. The chief of staff plays a central role in providing the president with support and in setting the tone for the quantity and nature of raw information that reaches the Oval Office.

Two examples from U.S. foreign policy demonstrate the significance of White House staffing. During President Reagan's first term, he was served by a "troika" of advisers at the highest level: James Baker, Edwin Meese, and Michael Deaver. Each man's intelligence and aptitudes meant that he provided solid analysis and advice, while the rivalry among the three ensured that all policies suggested to the president were well scrutinized. During Reagan's second administration, however, Donald Regan took over as chief of staff, formerly Baker's job, and also assumed the responsibilities of the other two men. With the exception of the National Security Council, which had its own direct pipeline to Reagan, Regan then effectively controlled all access to the president. Political scientist Andrew Rudalevige believes this hierarchy to be in part responsible for the Iran-Contra affair, since major critics of the plan within the administration, such as Caspar Weinberger and George Shultz, no longer had the president's ear. Similarly, he argues that President George W. Bush's troika of Karl Rove, Andrew Card, and Karen Hughes saw their role as advocating for policy, rather than evaluating and critiquing it. Combined with Donald Rumsfeld's ability to circumvent the chief of staff, Rudalevige believes, orienting the president's staff this way led to poor decision making, especially during the prelude to intensified American involvement in Iraq.

Since the flow of information to the president must be balanced, diverse, and yet coordinated, the selection of the chief of staff, who in theory is responsible for monitoring all communications with the president, is of key importance. James Baker, who held that job during Reagan's first term, states that the crucial characteristic of a good chief of staff is to be an "honest broker" who shares a great deal of the president's worldview and agenda but, where he does not, will put the commander-in-chief's wishes first. Maintaining the trust of the cabinet is also an essential function, since the chief of staff often serves as the link between the president and his cabinet. Implicit to all these roles is that the chief of staff works to advance the president's policies both in terms of politics and with respect to the administration and implementation of the president's agenda.

TABLE I: SUMMARY OF CORRESPONDENCE ACTIVITIES

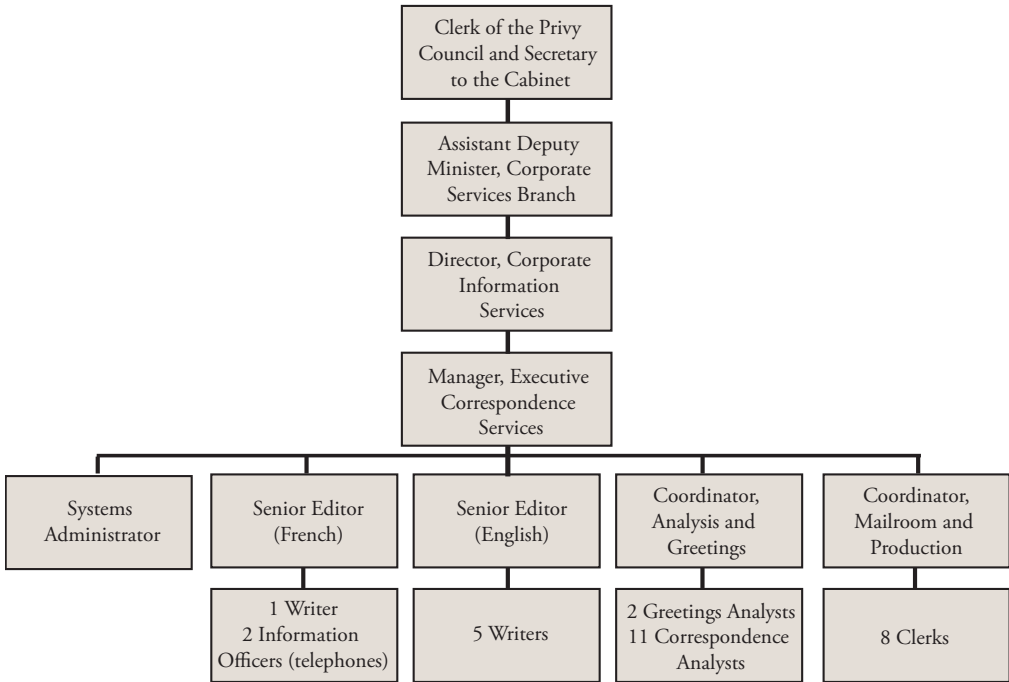
FISCAL YEARS	2006– 2007	2005– 2006	2004– 2005	2003– 2004	2002– 2003
<i>Correspondence Received*</i>					
<i>Prime Minister</i>	1,701,846	2,116,118	1,567,747	1,189,896	1,649,839
Postal mail	611,842	1,064,838	739,512	724,512	1,254,621
Email	1,064,455	1,028,840	807,243	437,551	371,165
Telephone calls	25,549	22,440	20,992	27,695	24,053
<i>President of the Queen's Privy Council for Canada and Minister of Intergovernmental Affairs, and Leader of the Government in the House of Commons</i>	4,503	4,704	12,243	14,065	4,626
<i>Deputy Prime Minister**</i>		28,951	68,084	15,230	19,476
<i>Grand Total</i>	1,706,349	2,149,773	1,648,074	1,219,191	1,673,941

<i>Correspondence Sent*</i>					
<i>Prime Minister</i>	112,079	78,617	104,818	163,435	148,592
Postal replies	31,597	33,558	37,220	107,512	90,871
Email replies	80,482	45,059	67,598	55,923	57,721
<i>President of the Queen's Privy Council for Canada and Minister of Intergovernmental Affairs, and Leader of the Government in the House of Commons</i>	792	310	852	1,940	2,610
<i>Deputy Prime Minister**</i>		2,940	3,204	3,755	1,289
<i>Grand Total</i>	112,871	81,867	108,874	169,130	152,491

* There is a variance between the correspondence received and the correspondence sent because of the nature of the correspondence (for example, petitions, thank you letters, and other messages that do not require a response).

** Correspondence support to the deputy prime minister was discontinued in 2006 because the position of deputy prime minister was discontinued.

FIGURE I: EXECUTIVE CORRESPONDENCE UNIT ORGANIZATION CHART



BIBLIOGRAPHY

- Akkad, Omar E. "Obama Winning Battle to Keep His BlackBerry." *Globe and Mail*, January 20, 2009, A10.
- Andrews, Leighton. "Spin: From Tactic to Tabloid." *Journal of Public Affairs* 6:1 (February 2006) 31–45.
- Axworthy, Thomas S. "Of Secretaries to Princes." *Canadian Public Administration* 31(2) (summer 1988) 247–64.
- Baird, Katherine, and Ian Greene. *Canada's Public Service in the 21st Century: Destination: Excellence*. Ottawa: Public Policy Forum, 2008.
- Beeby, Dean. "Prime Minister's Mailbag Provides a Glimpse of What's on the Minds of Voters." Canadian Press, January 15, 2006.
- Benoit, Liane E. "Ministerial Staff: The Life and Times of Parliament's Statutory Orphans." Commission of Inquiry into the Sponsorship Program and Advertising Activities: *Restoring Accountability: Research Studies Vol. 1 – Parliament, Ministers and Deputy Ministers*. Ottawa: PWGSC, 2006.
- Burch, Martin, and Ian Holliday. "The Prime Minister's and Cabinet Offices: An Executive Office in All but Name." *Parliamentary Affairs* 52(1) (1999) 32–45.
- Canada, Information Commissioner. *Annual Reports, 2000–2008*.
- Privacy Commissioner. *Annual Reports, 2000–2008*.
- Privy Council Office. *Annual Reports, 2000–2008*.
- Cannon, Carl M. "Untruth and Consequences." *The Atlantic* 299(1) (January/February 2007) 56–67.
- Carnevale, David G. *Trustworthy Government: Leadership and Management Strategies for Building Trust and High Performance*. San Francisco: Jossey-Bass, 1995.
- d'Aquino, Thomas P. "The Prime Minister's Office: Catalyst or Cabal? Aspects of the Development of the Office in Canada and Some Thoughts on Its Future." Paper presented to the Canada–United Kingdom Colloquium on Recent Changes in the Machinery of Government." Montreal, August 19, 1973.
- Dutil, Patrice (ed.). *Searching for Leadership: Secretaries to Cabinet in Canada*. Toronto: University of Toronto Press, 2008.
- Dwivedi, O.P., and James Iain Gow. *From Bureaucracy to Public Management: The Administrative Culture of the Government of Canada*. Peterborough, Ont.: Broadview Press, 1999.
- Ebbers, W.E., W.J. Pieterse, and N.H. Noordman. "Electronic Government: Rethinking Channel Management Strategies." *Government Information Quarterly* 25:2 (2008) 181–201.
- Eichbaum, Chris, and Richard Shaw. "Ministerial Advisers and the Politics of Policy-Making: Bureaucratic Permanence and Popular Control." *Australian Journal of Public Administration* 66(4) (2007) 453–67.
- Ellis, Richard J. *Presidential Lightning Rods: The Politics of Blame Avoidance*. Lawrence: Kansas University Press, 1994.
- Fairholm, Gilbert. *Leadership and the Culture of Trust*. Westport, Conn.: Praeger, 1994.

- Ferguson, Sherry Devereaux. "Strategic Planning for Issues Management: The Communicator as Environmental Analyst." *Canadian Journal of Communication* 18(1) (1993) 1–16.
- Forcese, Craig, and Aaron Freeman. *The Laws of Government: The Legal Foundations of Canadian Democracy*. Toronto: Irwin Law, 2005.
- Franks, C.E.S. "The Unfortunate Experience of the Duelling Protocols: A Chapter in the Continuing Quest for Responsible Government in Canada," in O.P. Dwivedi, T. Mau, and B. Sheldrick (eds.), *The Evolving Physiology of Government: Canadian Public Administration in Transition* (Ottawa: University of Ottawa Press, 2009) 118–50.
- Gaber, Ivor. "Too Much of a Good Thing: The 'Problem' of Political Communications in a Mass Media Democracy." *Journal of Public Affairs* 7:3 (August 2007) 219–34.
- Garnett, James L. *Communicating for Results in Government*. San Francisco: Jossey-Bass, 1992.
- Gehring, Edward F. "Missing White House E-Mail: A Whistleblowing Case Study." *Proceedings of the 2002 American Society for Engineering Education Annual Conference and Exposition*, 2002.
- Gelders, Dave, Geert Bouckaert, and Betteke van Ruler. "Communication Management in the Public Sector: Consequences for Public Communication about Policy Intentions." *Government Information Quarterly* 24:2 (2007) 326–37.
- Gil-Garcia, J. Ramon, and Ignacio J. Martinez-Moyano. "Understanding the Evolution of E-Government: The Influence of Systems of Rules on Public Sector Dynamics." *Government Information Quarterly* 24:2 (2007) 266–90.
- Good, David A. *The Politics of Public Management: The HRDC Audit of Grants and Contributions*. Toronto: University of Toronto Press, 2003.
- Graber, Doris A. *The Power of Communication: Managing Information in Public Organizations*. Washington DC: CQ Press, 2003.
- *Public Sector Communications: How Organizations Manage Information*. Washington: CQ Press, 1992.
- Hubbard, Ruth, and Gilles Paquet. *Gomery's Blinders and Canadian Federalism*. Ottawa: University of Ottawa Press, 2007.
- Irvine, W.P., and R.E.B. Simeon. "The Prime Minister's Mailbag." *Canadian Public Administration* 19(2) (summer, 1973) 279–94.
- Jamieson, Kathleen Hall. *Dirty Politics: Deception, Distraction and Democracy*. Oxford: Oxford University Press, 1993.
- Kozolanka, Kirsten. "The Sponsorship Scandal as Communication: The Rise of Politicized and Strategic Communications in the Federal Government." *Canadian Journal of Communication* 31(2) (2006) 343–66.
- Lalonde, Marc. "The Changing Role of the Prime Minister's Office." *Canadian Public Administration* 14(4) (winter 1971) 509–37.
- Luban, David. "Contrived Ignorance." *Georgetown Law Journal* 87 (1998–1999) 957–80.
- MacDermott, Kathy. *Whatever Happened to Frank and Fearless? The Impact of New Public Management on the Australian Public Service*. Canberra: ANU E-Press, 2008.
- Mart, Susan Nevelow. "Documents, Leaks and the Boundaries of Expression: Government

- Whistleblowing in an Over Classified Age." *Documents to the People* 35:2 (2007) 30.
- Meijer, Albert Jacob. "E-mail in Government: Not Post-Bureaucratic but Late Bureaucratic Organizations." *Government Information Quarterly* 25:3 (2008) 429–47.
- Missingham, Roxanne. "Access to Australian Government Information: A Decade of Change 1997–2007." *Government Information Quarterly* 25:1 (2008) 25–37.
- Montgomery, Bruce P. "Presidential Materials: Politics and the Presidential Records Act." *The American Archivist* 66:1 (2003): 102–38.
- Mulgan, Richard. "Truth in Government and the Politicization of Public Service Advice." *Public Administration* 85(3) (2007) 569–86.
- d’Ombrain, Nicholas. "Cabinet Secrecy (The Essence of the Cabinet Secretary Convention)." *Canadian Public Administration* 47(3) (Fall 2004) 332–59.
- Perlman, Ellen. "Delete at Your Own Risk." (January 31, 2008) *Governing.com*: <http://www.governing.com/articles/0801email.htm>
- Phillis, Bob (Chair). *An Independent Review of Government Communications, Presented to the Minister for the Cabinet Office*. London: TSO, January 2004.
- Relyea, Harold C. "Government Secrecy: Policy Depths and Dimensions." *Government Information Quarterly* 20:4 (2003) 395–418.
- Richter, William L., and Frances Burke (eds.). *Combating Corruption, Encouraging Ethics: A Practical Guide to Management Ethics*, 2nd ed. Lanham: Rowan & Littlefield, 2007.
- Roberts, Alasdair. *Blacked Out: Government Secrecy in an Information Age*. New York: Cambridge University Press, 2006.
- Robertson, Gordon. "The Changing Role of the Privy Council Office." *Canadian Public Administration* 14(4) (winter 1971) 487–508.
- Rudalevige, Andrew. "The Structure of Leadership: Presidents, Hierarchies, and Information Flow." *Presidential Studies Quarterly* 35:2 (June 2005) 333–60.
- Savoie, Donald J. *Court Government and the Collapse of Accountability in Canada and the United Kingdom*. Toronto: University of Toronto Press, 2008.
- *Breaking the Bargain: Public Servants, Ministers and Parliament*. Toronto: University of Toronto Press, 2003.
- *Governing from the Centre: The Concentration of Power in Canadian Politics*. Toronto: University of Toronto Press, 1999.
- "The Minister’s Staff: The Need for Reform." *Canadian Public Administration* 26(4) (winter 1983) 509–24.
- Schein, E.H. *Organizational Culture and Leadership*. San Francisco: Jossey-Bass (3rd ed.), 2004.
- Sleeman, Bill. "Recent Literature on Government Information." *Journal of Government Information* 30:1 (2004) 20–41.
- Smith, Alex. "Ministerial Staff: Issues of Accountability and Ethics." *Parliamentary Information and Research Service, Library of Parliament* April 12, 2006.
- Sornes, J.O., L.D. Browning, K.K. Stephens, and A.S. Sartre. "A Reflexive Model of ICT Practices in Organizations." *Informing Science Journal* 8 (2005) 123–42.

- Sutherland, S.L. "The Al-Mashat Affair: Administrative Accountability in Parliamentary Institutions." *Canadian Public Administration* 34(4) (winter 1991) 573–603.
- "The Role of the Clerk of the Privy Council." Commission of Inquiry into the Sponsorship Program and Advertising Activities: *Restoring Accountability: Research Studies Vol. 3 – Linkages: Responsibilities and Accountabilities*. Ottawa: PWGSC, 2006.
- Tant, A. P. "Leaks and the Nature of British Government." *The Political Quarterly* 66(2) (1995) 197–209.
- Thomas, Paul G. "Trust, Leadership, and Accountability in Canada's Public Sector." In O.P. Dwivedi, Tim Mau, and Byron Sheldrick (eds.), *The Evolving Physiology of Government: Canadian Public Administration in Transition*. Ottawa: University of Ottawa Press, 2009, 215–48.
- "The Swirling Meanings and Practices of Accountability in Canadian Government." In David Siegel and K. Rasmussen (eds.), *Professionalism and Public Service: Essays in Honour of Kenneth Kernaghan*. Toronto: University of Toronto Press, 2008, 43–62.
- "Debating a Whistleblower Protection Act for Employees of the Government of Canada." *Canadian Public Administration* 48(2) (summer 2005) 147–84.
- "Governing from the Centre: Reconceptualizing the Role of the PM and the Cabinet." *Policy Options* 25(1) (December 2003–January 2004) 79–85.
- Tiernan, Anne. *Power Without Responsibility: Ministerial Staffers in Australian Governments from Whitlam to Howard*. Sydney: UNSW Press, 2007.
- Walcott, Charles E., Shirley Anne Warshaw, and Stephen J. Wayne. "The Chief of Staff." *Presidential Studies Quarterly* 31:3 (September 2001) 464–89.
- Walton, Douglas. "Plausible Deniability and Evasion of the Burden of Proof." *Argumentation* 10 (1996) 47–58.
- Ward, I.M. "An Australian P.R. State?" *Australian Journal of Communication* 30(1) (2003) 25–42.
- Weller, Patrick. *Don't Tell the Prime Minister*. Melbourne: Scribe Publications, 2003.
- White, Graham. *Cabinets and First Ministers*. Vancouver: UBC Press, 2005.
- Worthy, Benjamin. "The Future of Freedom of Information in the United Kingdom." *The Political Quarterly* 79(1) (January–March 2008) 100–08.
- Zeleny, Jeff. "Obama Keeps His BlackBerry in a Hard Fought E-Victory." *New York Times*, January 23, 2009, A18.

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