THE CONFLICT OF INTEREST AND POST EMPLOYMENT CODE: CANADA’S PRINCIPLES-BASED APPROACH

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This paper provides a background on the experiences on managing conflicts of interest in Canada. The study was prepared by the Public Policy Forum in Canada.

For further information, please contact Janos BERTOK,
Tel. 33-1 45 24 93 57; E-mail janos.bertok@oecd.org
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Introduction

1. In recent decades, public trust in government has declined steadily throughout the developed world. In Canada, polling research indicates that this decline is a complex phenomenon involving economic, social and political behaviour, as well as increased scrutiny by the media into government affairs. While declining trust is a challenge for governments in and of itself, more troublesome is the fact that it undermines the legitimacy of government and reflects how existing structures have not fully adapted and responded to the changing needs and interests of citizens.

2. The issue of conflict of interest is a significant factor in this situation. As governments strive toward greater transparency and accountability to the public, it is becoming increasingly important to ensure that politicians and public servants do not conduct their affairs in such a way that they receive or give to others inappropriate benefits that result from their position of power and influence.

3. This document provides an overview of how the Government of Canada, through the office of its Ethics Counsellor and the Conflict of Interest and Post-Employment Code for Public Office Holders (the Code), deals with issues relating to conflict of interest and ethics. Central to this are the philosophy and principles that underpin the current conflict of interest framework in Canada, and these, along with the challenges and opportunities associated with the framework, are discussed in detail in the pages that follow.

Context and History

4. Confidence in government is rooted in trust. In turn, it has been said that trust is fostered in government when it meets the public’s expectations for fair and effective public service through ethical and transparent activities.1 This section provides an historical overview of conflict of interest guidelines – and their implementation – in Canada, and demonstrates how the development of a patchwork of guidelines and initiatives over the course of more than two decades culminated in the creation of the Office of the Ethics Counsellor.

5. Throughout the developing world, trust in government has declined steadily over the last several decades. In Canada, research has demonstrated that only one-fifth to one-third of the public trusted the federal government to “do what is right” in the last decade, marking the lowest point since the end of the Second World War, and down from 80% in the 1960s.2 Although these statistics reflect a troubling trend,

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they do not illustrate the true nature of the problem: declining trust is the culmination of a number of forces at work in public opinion. According to a recent American study, these forces include a belief that politicians are corrupt and in politics only for personal gain, a sense that government operations are frivolous and ineffective, as well as a concern that government is not in touch with – or doesn’t care about – the citizens themselves.3

6. Of particular significance among these challenges is the issue of conflict of interest. Specifically, there is concern among the public that an increasingly intimate relationship between government and industry interests due to new public management styles, including privatisation and other forms of alternate service delivery, might result in new openings for corruption and influence peddling.4 Some challenges associated with issues such as intersectoral partnerships and other forms of new public management are discussed in Section 6 of the present report, Challenges and Opportunities.

7. The Canadian Government began to address the issue of conflict of interest in 1973, when then Prime Minister Pierre Trudeau introduced “Conflict of Interest Guidelines for Ministers” to the House of Commons. These were matched with guidelines for public service employees and Governor in Council appointees. From the beginning, therefore, the Canadian approach has been to implement guidelines rather than legislation; Trudeau’s belief was that a strict legal framework would have meant that the Prime Minister would be responsible for imposing employment conditions on public officials.5 The Office of the Assistant Deputy Registrar General was created to provide advice to public officials to help them avoid conflicts of interest, but was not given powers to investigate transgressions or impose sanctions.

8. In the years that followed, a patchwork system of guidelines was implemented that gradually broadened the scope of the conflict of interest framework. In 1978, post-employment guidelines were implemented to ensure that former public officials could not take unfair advantage of their previous positions. In 1979, when the Conservatives took power from the Liberals under Joe Clark, a new set of guidelines was implemented that brought the wives and dependent children of ministers within the fold of the conflict of interest system. The Clark Government was short-lived, and so his revisions, deemed unfair by some in the House of Commons, were removed from the guidelines when the Liberals swept back into power in 1980.

9. The most significant federal government initiative on conflict of interest was the Sharp-Starr task force, whose report, entitled Ethical Conduct in the Public Sector, criticised the collage of guidelines that had been created in the 1970s as ineffective.6 The report recommended that a single code of ethics be implemented, and that an office be created to administer and enforce it. The report was tabled shortly before a general election was called, but in spite of the fact that John Turner’s Liberal Government was defeated, the new Prime Minister, Brian Mulroney, initiated a programme to examine conflict of interest issues. The new study group’s report directly resulted in the creation in 1985 of the first Conflict of Interest and Post-Employment Code for Public Office Holders, to be administered by the Deputy Registrar General.

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6. Task Force on Conflict of Interest, Ethical Conduct in the Public Sector (Ottawa, 1984).
10. In spite of the efforts of successive federal governments to address conflict of interest, a number of major scandals came to light during the period of development of the conflict of interest guidelines. An inquiry into one of these, involving allegations that the Minister of Regional Industrial Expansion had used his ministerial authority in financial dealings related to a private company with which he held interests, brought to light that the existing framework did not adequately prevent conflicts of interest from taking place. Ontario Supreme Court Chief Justice Parker, who presided over the case, recommended that a Conflict of Interest Office be created that would have the ability to undertake investigations and make rulings on conflict of interest allegations. In 1988, the Mulroney Government addressed these recommendations in a Conflict of Interest Act, and by proposing that a commission be created to administer and enforce the act. Shortly thereafter, however, a general election was called and the act was set aside; bad timing, therefore, prevented yet again the creation of a more comprehensive conflict of interest system.

11. In the five years that followed, small measures were implemented to help deal with declining public trust in government, by addressing the issue of conflict of interest. Foremost among these was the creation of the Lobbyists Registration Act (LRA), which would help to improve transparency by making public the names of all those who lobbied the government on behalf of private interests. The conflict of interest system remained a patchwork of guidelines, however, overseen by the Assistant Deputy Registrar General, whose authority was limited by the complicated nature of the framework and by the lack of power to enforce or implement the guidelines effectively.

12. In response to the continued decline in public trust in government, and using the experience gained over successive initiatives during the previous two decades in the area of conflict of interest, the newly elected Liberal Government of Prime Minister Jean Chrétien created the Office of the Ethics Counsellor in June 1994. The Ethics Counsellor, who was given all of the responsibilities previously held by the Assistant Deputy Registrar General, was appointed as part of an effort to promote public trust. During the same period, the LRA was strengthened and placed under the responsibility of the Office of the Ethics Counsellor, thus improving the transparency of legitimate lobbying, and the Conflict of Interest Code for public officials was clarified. In addition, Parliament was asked to develop a comprehensive code of conduct for members of Parliament and Senators. The Ethics Counsellor’s main responsibilities involved the two areas that had produced a number of scandals in previous years: conflict of interest and lobbying. Seven key responsibilities were identified, including:

- to investigate on behalf of the Prime Minister allegations against minister and senior officials involving conflict of interest or lobbying;
- to administer the Conflict of Interest and Post-Employment Code for public office holders;
- to oversee the LRA;
- to consult lobbyists and undertake an initiative to develop a code of conduct for their industry;
- to offer guidance to lobbyists and their clients;
- to investigate complaints about lobbying activities; and
- to report annually to Parliament on matters related to lobbying.

13. In the six years following the creation of the Office of the Ethics Counsellor, the office has implemented a number of smaller-scale measures to promote openness and transparency, including the use of an Internet Website as a public clearing house for information on lobbyists, conflict of interest issues, and

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7. See Lecomte, pp. 4-7 for an overview of a number of scandals that took place during the period 1976-1986.
and positions on high-profile cases. Thus, while there remains a patchwork of guidelines and regulations to oversee conflict of interest and ethics guidelines in the federal government, over a quarter century of efforts and studies appear to have produced a system that provides a solid set of ethics guidelines for public office holders.

**The Principles-Based Philosophy**

14. The Canadian government’s approach toward conflict of interest guidelines has always been to promote integrity rather than to enforce compliance. Whereas the latter involves a series of laws – “thou shalt nots” – within which public office holders may operate, the former path is based on the more positive assumption that public office holders essentially want to act in an ethical and honest manner. This section discusses this principles-based approach, and the ideas that underpin it.

15. The Canadian public service began to emphasise the importance of values and principles in the 1990s. This occurred as the federal government endeavoured to cut costs and focus on core programmes through a re-evaluation of every aspect of its operations, which resulted in part in a 20% reduction in the ranks of the public service between 1994 and 1998. The work undertaken at mid-decade by the Task Force on Public Service Values and Ethics helped to lay the groundwork for a new mindset in the public service, in which traditional values like merit, excellence and objectivity were complemented with new values such as quality, innovation and resourcefulness. In essence, this new, more comprehensive set of values and principles was developed to meet growing public demands on public service employees for service excellence, in the face of limited resources and greater financial austerity and probity. Rather than create rules and regulations, therefore, the federal government provided principles as guidance to public servants in their professional conduct and private interests.

16. Conflict of interest guidelines in the federal government were developed, and are implemented, using the same approach. The Conflict of Interest and Post Employment Code for Public Office Holders (the “Code”) applies to a defined cadre of officials, including Cabinet Ministers, Secretaries of State, Parliamentary Secretaries, Ministerial Staff and Governor in Council Appointees. The main thrust of the Code is to proactively help these individuals ensure that any of their private interests do not threaten to put them in a situation of conflict of interest. According to the Ethics Counsellor, all of those situations that are clearly illegal are dealt with under the Criminal Code, and it is really the “grey areas” that require guidance. By providing them with the guidance to “see and address problems,” based on the assumption that they will want to do what is right, it is expected that those who must work under the Code will address potential conflicts of interest before they become actual conflicts.

17. Under the Code, public office holders are instructed to act according to 10 key principles:

- **Honesty**: to act with honesty and to uphold the highest ethical standards;
- **Public Scrutiny**: to perform duties and arrange private affairs in a manner that will bear public scrutiny;

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8. Unless otherwise stated, and for the purposes of this study, the term “public office holders” refers to those covered by the Code, including Cabinet Ministers, Secretaries of State, Parliamentary Secretaries, Ministerial Staff and Governor in Council Appointees.

• **Decision-Making**: to make decisions in the public interest and with regard to the merits of each case;

• **Private Interests**: to avoid having private interests that would be affected by government actions in which they participate;

• **Public Interest**: to arrange private affairs in a way that will prevent real, potential or apparent conflicts of interest;

• **Gifts and Benefits**: to avoid soliciting or accepting transfers of economic benefit unless the transfer is pursuant to an enforceable contract or property right;

• **Preferential Treatment**: to avoid using their official roles to assist private entities or persons in their dealings with the government, where this would result in preferential treatment;

• **Insider Information**: to avoid taking advantage of, or benefiting from, information that is obtained in the course of official duties;

• **Government Property**: to avoid using, or allowing the use of, government property for anything other than officially approved activities; and,

• **Post-Employment**: to avoid, after leaving public office, acting in such a manner as to take improper advantage of their previous office.

18. These principles have been translated into practical guidelines for public office holders. The Code stipulates that a confidential disclosure to the Ethics Counsellor must be made on the following five types of items:

• **Assets**: Assets include residences, recreational properties, farms, household goods, personal goods, among others.

• **Investments**: These consist of fixed value guaranteed bonds and securities, retirement savings plans, mutual funds, etc.

• **Debts**: Any debts must be disclosed to the Ethics Counsellor, including debts to lending institutions as well as to individuals.

• **Activities**: Activities range from the practice of a profession to the operation of a business, as well as director positions in commercial operations and memberships in professional associations.

• **Gifts and Benefits**: Gifts valued at $200 or more must be disclosed to the Ethics Counsellor, other than gifts or hospitalities received from a family member or personal friend.

19. Following such disclosure, the Ethics Counsellor will guide public office holders in question as to which steps to take in order to avoid conflict of interest situations. These are outlined below.

(i) **Assets and Investments**: Public office holders must **declare publicly** any interests in businesses that do not contract with the government, as well as on any interests in real properties or commercial farming operations. Public office holders must **divest by sale or into blind trust** any publicly traded securities of corporations and foreign governments, self-administered Registered Retirement Savings Plans composed of publicly traded securities, as well as commodities, futures and foreign currency investments. Public office holders must **divest by sale or blind management agreement** any ownership interests in corporations having dealings with the government.
(ii) **Prohibited Activities:** Prohibited activities include the practice of a profession, the operation of a business or commercial activity, a directorship or office in a commercial or financial corporation, an office in a union or professional association, or a position as a paid consultant. Public office holders must **resign and make a public declaration** of such in order to avoid conflicts of interest.

(iii) **Permissible Activities:** Public officials are permitted to hold memberships, directorships or offices in organisations which are charitable, non-commercial or philanthropic in nature. Public office holders must seek the **approval of the Ethics Counsellor** and make a **public declaration** of any activities deemed permissible by the Ethics Counsellor.

(iv) **Gifts, Hospitalities and Other Benefits:** Public office holders must **decline any gifts and benefits which might influence their judgement**, or impact on performance of duties. On the one hand, if the gift or hospitality received is valued at less than $200, and is deemed not to impact on or influence their performance of duties, then no public disclosure is required. On the other hand, gifts or benefits valued at over $200 that arise out of their official duties, and are within the normal standards of protocol, must be disclosed publicly.

(v) **Post-Employment:** Public office holders must abide by a number of **regulations following their departure from public office.** At no time are they permitted to “switch sides,” to act on behalf of a person or other entity or association, in any ongoing proceeding or negotiation to which the government is a party and where the former office holder advised or acted on behalf of the government. In addition, public office holders are prohibited from using insider information to their benefit or to another organisation’s benefit following the end of their tenure. For non-ministers, there is a one-year limitation on accepting employment or directorships with organisations with which they had direct dealings during their tenure, as well as on making representations back to government. This limitation is extended to two years for ministers. The Prime Minister has the authority, when it is deemed necessary, to reduce the period of limitation from the amount set out under the Code. Decisions to do so depend on the circumstances of the termination of the public office holder’s position, the desirability of a rapid transfer from government to another sector, the level of authority possessed by the public office holder, and the impact that this will have on their affairs following their departure.

20. In the mid-1990s, a case involving a serving Cabinet Minister highlighted the need to address the issue of ministerial dealings with quasi-judicial institutions, and so another principle was added to the slate. In Canada, quasi-judicial institutions range from the review boards that administer appeals on issues such as immigration, veterans’ affairs and pensions, to licensing boards and other related agencies. In order to prevent these boards from being swayed by their “ministerial aura,” it was decided that ministers could not intervene with federal quasi-judicial institutions on any matter, unless required by law. This principle helps to reinforce a fundamental convention of Cabinet that states that a minister must not intervene with the affairs of another minister’s department, unless they have the blessing and support of the other minister to do so.

Conflict of Interest Framework

21. Because Canada’s conflict of interest guidelines are principles-based, rather than rules-based, responsibility for implementing them is shared among a number of parties. This section briefly reviews the roles and responsibilities of each of the parties, and discusses how the principles-based approach is implemented.

22. There are three main areas of responsibility under Canada’s conflict of interest guidelines, covering a number of different parties. First, the responsibility to oversee the guidelines and their implementation falls to the Ethics Counsellor. Second, responsibility to follow the guidelines and promote integrity under them falls to all those who are covered by them. Third, and most importantly, the responsibility for ensuring that public office holders remain free of conflict of interest is the obligation of the Prime Minister as a steward of good government. Each of these areas of responsibility, and the different parties involved, is outlined below.

*Overseeing and Implementing Guidelines: The Ethics Counsellor*

23. The first category of responsibility is that of overseeing and implementing conflict of interest guidelines, which rests solely with the Ethics Counsellor. In addition to overseeing the LRA, the Ethics Counsellor must also provide advice to public office holders under the Code. As he noted in an address to the Australian Senate in 1999, his role does not replace that of the police and the justice system when public office holders are involved in suspected breaches of the Criminal Code. Rather, his area of chief concern is the “grey areas of potential or real conflict of interest… issues that may seem broadly wrong in the eyes of citizens, without ever actually being illegal.”

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24. This being said, the responsibility as an adviser on conflicts of interest translates into two slightly different roles, depending on the situation.

- **Advice to Public Office Holders:** The Ethics Counsellor helps guide public office holders, and recently departed public office holders, through situations that may place them in conflict of interest. As a start, public office holders are given a copy of the guidelines upon assuming office, as well as a step-by-step guidebook on disclosures and responsibilities under the Code. Throughout their tenure, as well as during the limitation period that follows their departure, the Ethics Counsellor is available to provide public office holders with guidance should their situations change, or should they feel that they have fallen into a potential area of conflict of interest.

- **Advice to Prime Minister as Head of Government:** The Ethics Counsellor reports to the Prime Minister on issues relating to actual, potential or perceived conflict of interest among current and former public office holders. It is important to note that the Ethics Counsellor does not make “judgements” on individual “cases,” but rather provides an informed opinion, based on an investigation of a given situation, and on the guidelines laid out by the Code. The Ethics Counsellor also reports directly to the Prime Minister on all other matters relating to the functions of the Office of the Ethics Counsellor, rather than to Parliament or to a parliamentary committee.

25. During situations of perceived or alleged conflict of interest, the Ethics Counsellor’s staff considers the evidence vis-à-vis the Code, and provides recommendations to the Prime Minister on whether or not conflict of interest has taken place. At this point, the Ethics Counsellor assumes a more reactive role, developing a position on a particular case and an action plan or set of recommendations on how to remove a public official from a situation of conflict of interest. It is important to note that the Ethics Counsellor does not act as a judge in this situation, but rather as a key advisor to the Prime Minister. The responsibilities of the Prime Minister are discussed in greater detail later in this section, but it suffices to say that the Prime Minister, not the Ethics Counsellor, makes the ultimate decision on whether or not a reprimand is in order.

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11. See Wilson, “Ethics and Government.”
26. In an effort to increase transparency in the area of ethics, and to help bolster trust in government and public servants, the current Ethics Counsellor has committed to making the work of his office on conflict of interest issues as public as possible. This means that public disclosures by public office holders, as well as documents related to perceived or alleged conflicts of interest, are available both in hard copy from the Office of the Ethics Counsellor and via the Internet.

27. The Ethics Counsellor also oversees the LRA, under which lobbyists dealing with the federal government must disclose information about their lobbying activities and the clients they represent. The LRA is based on four basic principles:

- free and open access to government is an important matter of public interest;
- lobbying public office holders is a legitimate activity;
- it is desirable that public office holders and the general public be able to know who is attempting to influence government;
- the system for the registration of paid lobbyists should not impede free and open access to government.

28. The current LRA dates to 1995, when the existing legislation was amended as part of the more general effort to promote public trust in government that led to the creation of the Office of Ethics Counsellor the previous year. The LRA also contains a Lobbyists Code of Conduct, which mirrors to a certain extent the principles-based approach of the Conflict of Interest and Post Employment Code for Public Office Holders. Under the LRA and Code of Conduct, however, the Ethics Counsellor tables reports in Parliament when, based on reasonable grounds, he or she believes that rules have been breached. This aspect of the LRA is the only area in which the Ethics Counsellor acts more as a parliamentary commissioner than as a counsellor.

29. The Act is slated for parliamentary review in 2001, and a recent Public Policy Forum study on government-industry relations demonstrates that there remain considerable tensions between the federal government and the private sector. It was noted in the study, for instance, that government representatives tend to prefer to deal with business associations. For some in government, it seems, the efforts under the LRA to improve transparency have yet to achieve success, since they still often find it difficult to identify the client for whom an individual lobbyist is working.

Following Guidelines and Promoting Integrity: Public Office Holders

30. The second area of responsibility is that of following the conflict of interest guidelines and of promoting integrity. This responsibility is shared among all current and former public office holders who fall under the Code, and is central to the conflict of interest framework. As previously noted, the Canadian approach has been to assume that public office holders want to “do good,” and desire at all times to act ethically in every aspect of their responsibilities. Under the Canadian system, public office holders have three main responsibilities:

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• **Declaration:** Public office holders are responsible for reporting honestly and clearly to the Ethics Counsellor on all holdings, assets, and interests, as outlined in the conflict of interest guidelines. This responsibility applies to them throughout the duration of their tenure of public office, and until the end of their period of limitation following their departure.

• **Monitoring:** Public office holders are responsible for ensuring that they do not enter into conflict of interest situations and, should they find themselves unable to avoid such situations, to remove themselves from them based on the guidance they receive for doing so from the Ethics Counsellor.

• **Decision Making:** Public office holders are responsible for making decisions relating to their interests. Since the Ethics Counsellor can only advise them on their decisions, it is ultimately the public office holders themselves who are accountable to the Prime Minister, or in the case of the Prime Minister to Parliament, for their actions and decisions.

*Accounting for Government Actions*

31. The third, and perhaps most important, area of responsibility involves accounting for the actions of the government. As stated earlier in this section, the Ethics Counsellor reports to the Prime Minister, as head of government, on issues relating to actual, potential or perceived conflict of interest among current and former public office holders. According to the Office of the Ethics Counsellor, the existing reporting relationship has been developed based on two principles. First, the fact that the Prime Minister is accountable for the actions of his or her ministers and government means that the Prime Minister’s action on advice offered by the Ethics Counsellor – or the lack thereof – will ultimately be put before the scrutiny of Parliament and the voting public. Second, the fact that the Ethics Counsellor works in “grey areas” rather than within a strict legal or accountability framework, means that the main focus of his or her advice is on the appearance of conflict. That is to say that the Ethics Counsellor focuses on areas that are, so to speak, “beyond what the law requires,” and require the Prime Minister to decide whether a given situation requires action.  

*In Practical Terms: The Conflict of Interest Life Cycle*

32. As noted in the previous section, the Conflict of Interest framework in the federal government of Canada involves a shared set of values, principles and responsibilities. These translate into a life cycle of actions that public office holders must undertake during their tenure. This section documents these in practical terms through a case study of a fictional Cabinet Minister.  

33. There are three phases in the conflict of interest regulations life cycle within the Code. First, there is an initial compliance phase that takes place before office is assumed, and an adjustment sub-phase during which the public office holder undertakes compliance measures. The second phase is the actual tenure of the position, which requires annual review of compliance. The third phase is the post-employment phase. The life cycle is roughly depicted in the following diagram:

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15. Much of this section has been based on Office of the Ethics Counsellor, “Implementing the Conflict of Interest Code: The Case of Jane Doe” (Ottawa: Minister of Public Works and Government Services Canada, 1996).
The processes and measures relating to each of these three phases are documented in this section. The most intensive phase is the Phase I, or the compliance phase, during which the public office holder makes adjustments to personal holdings and interests in order to comply with the conflict of interest guidelines. Phases II and III, however, or the tenure/annual review and post-employment phases, are just as important since they ensure that compliance is not simply a nominal gesture at the time of appointment, but rather is reviewed and reinforced over the entire duration of a public office holder’s tenure.
Phase I – Adjustment and Compliance

35. Prior to assuming a new position, public office holders must, in effect, expose their interests, holdings, and other declarable assets to the Ethics Counsellor. This permits the Ethics Counsellor to study their situation, and to develop a personalised report that will explain what they must do in order to prevent conflict of interest situations from occurring. Below is an explanation of each of the actions, reports and declarations that take place during this phase:

- **Introductory Letter**: Upon appointment, public office holders will receive a letter explaining the role of the Ethics Counsellor, as well as the public office holder’s responsibilities under the conflict of interest guidelines. This letter presents the different disclosures and public statements that will need to be made. Included, therefore, are the following documents for completion by the public office holder:
  - **Certification Document**: This document will allow the public office holder to declare that he or she will observe the Code.
  - **Personal Information Statement**: The public office holder will complete this document, identifying all exempt and declarable assets, liabilities, and interests, based on the principles outlined in the Code.
  - **Introductory Meeting**: The Ethics Counsellor will meet with public office holders upon their appointment, to explain the requirements under the Code, as well as the resources available to them during their tenure.
  - **Confidential Report**: Once the public office holder completes the required documentation, the Office of the Ethics Counsellor will examine the case and provide a confidential report explaining any compliance measures that they must take involving the assets, liabilities and interests declared in the Personal Information Statement. It will also provide guidance on any public declarations that they must make, as well as any divestments or agreements that they will need to enter into in order to avoid conflict of interest situations.

36. Once the confidential report has been received by the public office holder, any measures set out in the report must be acted upon. The Ethics Counsellor will provide them with any assistance or documentation that they may require to meet the stipulations of the Code. Documents and compliance measures include:

- **Public Declaration of Declarable Assets**: Public office holders will declare all publicly declarable assets, as defined by the Code, using this document.
- **Public Declaration of Outside Activities**: This document allows public office holders to declare any activities in which they are involved, including memberships on boards and organisations, positions in private companies, and other appointments.
- **Blind Trust Agreements**: The Ethics Counsellor will assist public office holders in placing interests into blind trust agreements, and documentation attesting to such actions will be completed by the public office holder and kept by the Ethics Counsellor.

37. Once the public office holder has complied with the measures set out in the confidential report, the Ethics Counsellor will review all of the documentation involved to ensure that no more steps are necessary, and will acknowledge receipt of this documentation in the form of a Summary Statement. This statement notes all documentation received from the public office holder, and any compliance measures that have taken place. Once the summary statement is signed and returned by the public office holder, the
Ethics Counsellor will advise the Prime Minister in writing that the public office holder has made the necessary arrangements to comply with the Code.

**Phase II – Tenure of Office and Annual Review**

38. During a public office holder’s tenure, annual reviews are undertaken to ensure that the official in question remains in compliance with the Code. Following their appointment to public office, the Ethics Counsellor advises them in writing that they will remain subject to the Code throughout their tenure, and of their responsibilities under the Code. In addition, a summary of their *Personal Information Statement* is sent to them, which they must review and sign once a year. In the meantime, should there be any change to their situation, they are required to note it in their Personal Information Statement, and bring it to the attention of the Office of the Ethics Counsellor. All public office holders are reminded every year on or around the anniversary of their appointment that they must review their Personal Information Statement.

**Phase III – Post-Employment**

39. As noted earlier in this report, public office holders are subject to the Code for one year following their departure from public office. In the case of Cabinet Ministers and Secretaries of State, this period is extended to two years. The Ethics Counsellor will advise them in writing of their post-employment responsibilities under the Code immediately following the termination of their appointment. In addition, the Office of the Ethics Counsellor will offer assistance, should it be required, in ensuring that they meet the requirements of the Code following their departure. This also applies to dismantling blind trust and other divestment arrangements. In cases in which the Prime Minister decides that the period of limitation should be reduced, it is the Prime Minister’s responsibility to communicate that fact in writing to the former public office holder in question.

**Challenges and Opportunities**

40. Although it would be difficult to determine the overall impact of the Ethics Counsellor on government, the fact that no public office holders covered by the Code have been found to be in conflict of interest since the post was created in 1994 is testament to some degree of success. According to the Office of the Ethics Counsellor, this is due primarily to the fact that public office holders recognise that acting with integrity will help to “ensure their long-term political health,” and have therefore taken full advantage of the guidance and expertise offered by the Ethics Counsellor, avoiding potential “hot spots.” By contrast, however, others point to this fact as evidence of the fact that the Code may not broad enough in scope to deal with the conflict of interest issue, and that some potential conflicts of interest may have simply been “under the radar” and therefore unnoticed by the Ethics Counsellor. At the time of writing, a number of opposition-led initiatives were underway in the House of Commons, including a vote – which was defeated – on whether the Ethics Counsellor should report directly to Parliament.⁶

41. Beyond this, however, there remain a number of challenges that threaten to undermine the Canadian system, particularly in times of increased media scrutiny. During the 2000 federal election campaign, for example, Prime Minister Jean Chrétien’s discussions with the head of a federal Crown corporation, on the details of a federal loan for one of his constituents, were decried by the opposition as a conflict of interest and abuse of power. Although the Ethics Counsellor determined that the Prime Minister had not contravened any of the guidelines, political opponents and the media called for a number of

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changes to be made to address the perception that the existing reporting relationship between the Ethics Counsellor and the Prime Minister may actually offset his effectiveness. Two opposition party political leaders even resorted to lodging formal requests with the Royal Canadian Mounted Police (RCMP) to review the case to determine if criminal charges could be laid. The RCMP have since determined that there are no grounds for a criminal investigation.

42. The sections that follow discuss a number of the challenges facing Canada’s conflict of interest guidelines, and touches on several important positioning opportunities that would help to improve the responsiveness of the existing system to the changing realities of Canadian Government, and would help to sustain it over the long term.

*The Code of Conduct “Patchwork”*

43. Perhaps the most significant vestige of the era that preceded the creation of the Ethics Counsellor position is the fact that conflict of interest and general conduct guidelines for all public officials are not consolidated in a single code. As illustrated earlier in this report, such codes and guidelines developed gradually over the last three decades, partly due to changing pressures on government to react to various politically charged situations. As it stands, general rules and regulations for public officials can be found in a number of places, including, but not limited to:

- the Criminal Code of Canada;
- the Parliament of Canada Act;
- the Rules of the Senate;
- the Standing Orders of the House of Commons;
- the Conflict of Interest and Post-Employment Code for Public Office Holders.

44. It should be noted that this concern was first raised in the 1984 report of the Task Force on Conflict of Interest, that a code of ethics should be enshrined in legislation to replace the “patchwork” of guidelines and regulations, and to expand regulations to cover all parliamentarians.\(^{17}\) The task force’s report noted that the patchwork of codes, guidelines and regulations translated into extensive inconsistencies in the content and administration of conflict of interest guidelines. The report recognised that, while the existing guidelines are based on sound and reasonable principles:

> The rules, which have evolved gradually over the years to deal with problems as they arose, need to be reformatted to ensure consistency in content and administration and to make them simple, fair, and reasonable as possible.\(^{18}\)

45. The task force recommended that a number of steps be taken to address the situation. These included, for instance, the creation of a Code of Ethical Conduct that was at once short and simple, yet comprehensive, that would be binding upon all public office holders, the development of standard procedures for removing public office holders from conflict of interest situations, and the creation of supplemental codes to deal with the “grey areas” of conflict of interest situations.

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17. Please see Task Force on Conflict of Interest, “Ethical Conduct in the Public Sector” (Ottawa: Minister of Supply and Services Canada, 1984).

Possibly the most critical issue highlighted by the task force’s report, that remains relevant to today’s situation, was also discussed in a chapter of the 1995 report of the Auditor General of Canada. According to the Auditor General, the public’s perception – whether warranted or not – that standards of conduct in government are on the decline, suggests a need for a comprehensive framework to address conflict of interest and standards of conduct issues. One need look no further than the inquiry into the Prime Minister’s constituent affairs that caught the attention of the media during the 2000 election campaign for an example of how such a situation can impact on public perception. This would, stated the Auditor General, “provide some assurance that decisions are made impartially and objectively, and in the public interest.”

The 1996 Second Report of the Special Joint Committee on a Code of Conduct of the Senate and the House of Conduct noted that the existing framework is antiquated and limited in scope, since it deals primarily with specific situations. In addition, it noted that there exist no comprehensive guidelines for backbench and opposition members of Parliament, or for public service employees below the rank of Deputy Minister. The Committee recommended the creation of a Code of Official Conduct that would apply to all public office holders, in response to a perceived need for action on two fronts:

- **Guiding Politicians**: The Committee recognised the need for continued guidance to politicians on conflict of interest and conduct issues, just as the existing conflict of interest guidelines and the Ethics Counselor provide guidance to a select group of public office holders.
- **Broadened Scope**: The Committee noted that broadening the scope of existing conflict of interest and conduct guidelines to accommodate all parliamentarians could help to improve public perception of government.

According to the Special Committee’s report, the proposed Code of Official Conduct would establish a regime that was comprehensive in scope, providing “guidance and assistance to Senators and members of the House of Commons, while assuring the public that allegations [would] be investigated and breaches dealt with. [sic]” Proposed regulations would require, among others, that:

- all parliamentarians make public and confidential disclosures similar to those currently required under the current Conflict of Interest and Post-Employment Code;
- spouses and dependants of parliamentarians disclose confidentially their assets and holdings;
- parliamentarians disclose publicly any information on gifts received that exceed a predetermined value;
- penalties be imposed for abuses of power;
- the existing rules regarding government contracts involving parliamentarians be reviewed;
- a *Jurisconsult* officer be appointed to receive disclosures and other such documents from parliamentarians, and provide advice on the Code of Conduct; and

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20. Please see Special Joint Committee on a Code of Conduct of the Senate and the House of Commons, “Second Report” (Ottawa: March 1996); this was also noted in the 1984 “Ethical Conduct” report, p. 271.

49. Addressing this challenge will require strong will and leadership on the part of parliamentarians and senior departmental officials. As noted in a report by a representative of the Office of the Ethics Counsellor, Canada “lags behind” other countries in rules of conduct for parliamentarians, and this is due mainly to a lack of desire to institute more comprehensive ethics, conduct and conflict of interest guidelines.  

Public Awareness and Trust

50. Another significant challenge facing Canada’s conflict of interest framework is a lack of public awareness and understanding of conflict of interest policies and procedures, the concepts that underpin them, and the role of the Ethics Counsellor.

51. Although no quantitative data are available that accurately pinpoint the level of public understanding, intense media scrutiny of weaknesses or problems tends to promulgate negative public perception. This is best exemplified in research carried out by Transparency International, in its annual Corruption Perception Index (CPI). The CPI reports public perceptions of the degree of corruption in government in different countries, based on surveys undertaken in each country, and then ranks countries on a scale of 0 (indicating highly corrupt) to 10 (indicating highly clean). Historical data show that, while Canada has ranked consistently among the top-10 “cleanest” countries, public perception of corruption has not improved substantially since the creation of the first Conflict of Interest and Post Employment Code in the 1980s, or the creation of the Ethics Counsellor position in 1994. Some thoughts on the similarities between Canada and other “top” TI performers can be found in Section 7 of the present report, “International Context for Ethics.”

52. Thus, the federal government has an opportunity, and an obligation, to improve understanding of the existing Code and framework, among both the public and the community of public office holders. Based on the media scrutiny of the Office of the Ethics Counsellor during the 2000 federal election campaign, there are two main areas of misinformation that could potentially impact on public opinion:

- **Counsellor vs. Commissioner:** As previously noted, the role of the Ethics Counsellor is to counsel the Prime Minister on situations and perceptions of conflict of interest, rather than to report such situations to the House. During the most recent election campaign, the media tended to portray the Ethics Counsellor as an ineffectual subordinate of the Prime Minister, ignoring the pretext of the counsellor’s job. In order to understand the actual reporting relationship, we must consider the context provided by the role of the Prime Minister, which, although it is only alluded to in the Constitution and other key documents, many scholars have noted that it has increasingly become the centre of power in government over the last five decades. Within this model, the Prime Minister is perceived – if not actually stated in the

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23. Transparency International’s Website, located at www.transparency.de, provides summaries of each of its Corruption Perception Indices over the last decade.
26. See, for instance, Donald J. Savoie, Governing from the Centre (Toronto: University of Toronto Press, 1999).
Constitution as such – as ultimately responsible in Parliament for the actions of his or her Cabinet Ministers, and so the Ethics Counsellor’s advice is intended to reinforce this accountability. One might say, therefore, that because it is primarily public perception that ascribes to the Prime Minister the ultimate accountability for the performance and actions of government, in the House of Commons and in the glare of the media, then the need for a transparent and responsive process for dealing with conflict of interest and ethical issues is raised.

- **Proactive Guidance vs. Reactive Enforcement:** During the campaign, opposition candidates and the media complained that the primarily advisory role of the Ethics Counsellor makes his position ineffectual.27 While the reporting relationship to the Prime Minister needs to be viewed within its constitutional context, such statements were not balanced with an explanation of the “guidance” role that the Ethics Counsellor plays. Little mention was made by the media, for instance, of the steps that public office holders must take before assuming office, or of the disclosures they must make during and after their tenure. Thus, the role of the Ethics Counsellor in providing proactive guidance rather than as a reactive enforcer of the law remains misunderstood and is frequently misrepresented.

**Constituents and Cabinet Members**

53. A third important challenge facing the existing conflict of interest framework is the fact that the guidelines facing public office holders tend to defy the traditional role of members of Parliament as constituent representatives in the House of Commons. Under Canada’s constitution, Cabinet members do not interfere with the affairs of their Cabinet colleagues’ portfolios or departments without their express permission or unless deemed necessary under the law. In a similar vein, the Conflict of Interest and Post-Employment Code for Public Office Holders forbids Cabinet Ministers from interfering with quasi-judicial and regulatory agencies.

54. In theory, prohibiting Cabinet Ministers from influencing quasi-judicial and regulatory agencies clearly prevents them from entering into a situation in which they appear to use their “ministerial aura” to influence others. In practice, however, this presents a significant challenge in the area of the minister’s constituent affairs. For instance, the rule prevents Cabinet Ministers from representing their constituents’ views in areas of federal regulation. Thus while the rules reduces opportunities for conflict of interest situations to occur, it could also be said that they severely constrain the ability of a minister to represent his or her constituents in government.

**Perceptions of New Public Management**

55. New approaches to public management, particularly in the form of public-private partnerships and alternate forms of service delivery, pose a new kind of challenge to public perceptions of conflict of interest. In a positive vein, non-traditional forms of public management allow for government to employ a more flexible approach to meeting citizens’ needs. Public-private partnerships are also well positioned to leverage the expertise, resources and tools necessary to undertake projects and initiatives of many types. By contrast, however, closer service or contractual relationships between government and the private and third sectors may also contribute to a perception that government officials have “sold out” to corporate interests. As a result, the governance framework of new public management initiatives need to ensure – and demonstrate very clearly – that the public interest is safeguarded on all fronts.

It is important to consider, therefore, the scope of the existing conflict of interest framework as it applies to non-traditional forms of service, and new public management approaches. As noted earlier in this report, Cabinet Ministers, heads of agencies and heads of Crown corporations are covered by the Code, and as such need to make the same disclosures to the Office of the Ethics Counsellor upon appointment, periodically throughout their tenure and following dismissal or resignation. This underscores both a strength and a weakness inherent to the conflict of interest framework currently in place. As noted by d’Ombrain, alternate service delivery initiatives are most effective when they can produce simple and measurable results, and when the need for ministerial control or input is lower than in traditional areas of government service. For example, while service kiosks to dispense licenses for motor vehicles may be a more effective and transparent means of meeting a relatively straightforward client service need, a hypothetical public-private venture for setting annual fishing quotas may pose other problems.

Based on the above example, existing conflict of interest framework can be seen as effective due to the fact that the heads of such initiatives fall under the same conflict of interest responsibilities and guidelines as do Cabinet Ministers. As such, limited areas of responsibility traditionally held by a Cabinet Minister may be delegated to them without excessively exposing the initiative to potential conflicts of interest. In the case of the hypothetical motor vehicle license dispensing kiosk network, the responsibilities of the agency head are the same as a minister may have in overseeing the same initiative, and the client usage and satisfaction statistics are simple to measure and report.

More complex projects and organisations that do not fall under d’Ombrain’s “ideal” vision for new public management initiatives pose significant obstacles to the conflict of interest process and framework. Two significant challenges emerge when the fictional intersectoral fishing quota initiative is examined, clearly illustrating the issues relating to the conflict of interest framework, public perception and confidence, and transparency.

- **Board of Directors:** Many new public management and alternative service delivery initiatives are governed by a board of directors or similar body. Thus, while the conflict of interest regulations clearly stipulate that the heads of such bodies fully disclose their interests as government appointees, the rules are less clear when applied to other board members and employees. Thus, while board members may operate in good faith, the perception that they can potentially “fall through the cracks” of conflict of interest guidelines may leave the organisation exposed to a public already distrustful of government in general.

- **Public and Private Accountability:** A challenge that is increasingly being faced by organisations involved in partnerships with governments is related to the fact that the standards for accountability differ in the public and private sectors. Thus, while transparency in all aspects of government accounting is of the utmost importance to the public interest, non-governmental organisations and private corporations may be reticent toward opening their doors to the same standards. Given that such proprietary knowledge often forms part of a company’s competitive advantage in the marketplace, this concern appears to be well-founded. Thus, new public management initiatives may be headed for an impasse over accounting standards.

Two remedies to address the former challenge are clear on the surface. First, further study needs to be undertaken to broaden the existing Code to account for contributors or employees involved in non-traditional initiatives. Care will need to be exercised, however, to prevent causing unnecessary burdens that will undermine the positive impact that new public management programs can have on government’s responsiveness to its citizens. Second, governments need to be strategic in their selection of new public

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28. d’Ombrain, p. 113.
management programmes, and not become overly ambitious in the scope and measurability of programmes and programme outcomes. Taking this approach, will help ensure that they do not find themselves overly exposed to possibilities of conflict of interest.

60. The challenge relating to standards of accounting is far less clear, and needs to be addressed only after all of the differences in methodology and accountability requirements are identified among and between the public, private and third sectors. As expectations for government transparency and the need for government to employ more streamlined approaches to public management increase, the tensions between the sectors can only be heightened.

**International Ethics and Conflict of Interest Context**

61. It was noted earlier in this report that, by international standards, Canada is a relatively strong performer in the area of public perceptions of corruption, frequently ranking in the “cleanest” six countries of Transparency International’s (TI) Corruption Perception Index. Although it would be impossible to draw direct links between conflict of interest and ethics guidelines in the high-performing countries and public perception in each, there are some discernible trends between that appear to have had a positive impact on public trust and confidence, based on the TI survey outcomes. This section briefly discusses some aspects of the public service ethics environment and framework among three of the top six performing countries of TI’s 1998 survey, including Canada, Finland, Iceland and New Zealand. In particular, this section demonstrates some key differences and similarities between Canada and counterparts in how public service values and ethics are enshrined and implemented as a key step to reinforcing public confidence in government. The focus of the section is on the most prominent aspects of the Canadian conflict of interest and ethics experience detailed in the present case study, including each country’s overall approach and underlying philosophy to conflict of interest and ethics, the prominence of public service values and principles, the means by which the guidelines are enshrined, and the means by which they are implemented and/or enforced.

- **Approach:** There does not appear to be a standard approach among the countries in question in the area of approach or underlying philosophy. While the governments of Canada, Finland, Iceland and New Zealand all recognise that public servants generally approach their work with the public interest at heart, only Canada and New Zealand use this assumption as the foundation for ethics and code of conduct guidelines that promote integrity rather than establish a strict legislative framework.29 Interestingly, the Finnish constitution takes public perception into consideration in determining whether action is necessary, while this has not been factored explicitly into the frameworks of the other countries.30
- **Implementation:** Canada’s Ethics Counsellor is unique among this group of countries. In Finland, the Parliamentary Ombudsman is largely responsible for the implementation of ethical and conflict of interest guidelines. The Ombudsman also has the power to recommend court action against parliamentarians, ministers and their staff, and other public servants.31 In Iceland and New Zealand, similar functions fall under the responsibility of the Office of the

Controller and Auditor General of New Zealand, and the State Audit Office in Iceland. These agencies provide regular reports on government, and operate mainly as a review function for departmental activities.

- **Code:** None of the four countries in question have a centralised code for ethics and conflict of interest that applies to all members of the public service and the political sphere. The framework therefore consists of a combination of guidelines and laws. In Iceland, moreover, ethical and conflict of interest laws are more dispersed than in its “top six” counterparts. It has been stated that this is more a reflection of the fact that ethics have long been an integral element of public management in Iceland.

- **Values and Principles:** All but Iceland have begun to implement explicit public service values and principles statements and initiatives in recent years. As noted earlier in this report, values and principles have become a high priority in Canadian public management. By contrast, the Icelandic experience points to the fact that values and principles have long been seen as central to public management and government, possibly highlighting the existence of an implicit cultural “code” rather than an explicit statutory or other framework.

62. The brief comparison above demonstrates that there is no clear formula for addressing conflict of interest and ethics issues that is appropriate to all countries. For instance, while Canada and New Zealand have both chosen to take a proactive, values-based approach to addressing such challenges, there is no clear counterpart to Canada’s Ethics Counsellor in the New Zealand system. By the same token, the fact that values and principles are not explicitly stated or implemented in a framework in Iceland does not appear to have had – by Transparency International’s standards – a negative impact on public trust and confidence. Clearly, the one conclusion that may be drawn from this comparison is the fact that ethics guidelines, as they relate to conflict of interest rules, regulations and practices, are very much a creature of history and environment, and have tended to be shaped not only through study and analysis of best practices in other jurisdictions, but also using the experiences unique to each country as a guide.

### Conclusion

63. The Canadian Government’s Conflict of Interest and Post-Employment Code for Public Office Holders, and the Office of the Ethics Counsellor, are relatively new initiatives. Thus, their overall impact on government, especially on the level of public trust in government, remains unclear. Media criticism aside, however, the system’s emphasis on promoting integrity rather than on punishing bad behaviour appears to be aligned with the growing emphasis on public service values and principles throughout the federal government.

64. Much remains to be done to help address the key challenges outlined in this report, and to help stem and possibly reverse the declining level of trust in government in Canada. Although conflict of interest is only one facet of declining confidence in government, public awareness and information campaigns, for instance, could help remedy the lack of public understanding that plagues the Office of the Ethics Counsellor. Still greater transparency, through the Internet and official reports, should contribute to public acceptance of the Ethics Counsellor and the framework within which the office operates. Finally, there clearly is a need for a comprehensive code of conduct and conflict of interest regulations, in order to make the framework more responsive to the changing realities of the Canadian public sector and the trust and confidence test of the Canadian public.

32. Please see http://www.oag.govt.nz/ (New Zealand) and http://www.rikisend.althingi.is/ (Iceland) for further information on these agencies.