THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Statutory Review of the *Conflict of Interest Act*

NATIONAL ADMINISTRATIVE LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Administrative Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

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I. INTRODUCTION

The Administrative Law Section of the Canadian Bar Association (CBA Section) welcomes the opportunity to assist Parliament in its statutory review of the *Conflict of Interest Act*.[1] In 2006, the CBA provided extensive comments on Bill C-2 – the *Federal Accountability Act*[2] – including comments on the proposed *Conflict of Interest Act*.

The CBA Section possesses specialized legal expertise on how the Act affects the administration of justice and the rule of law. To develop this submission, the CBA Section has drawn on several of its members who have particular expertise working with and providing advice under the Act.

The importance of high standards of government ethics is beyond dispute. As the Supreme Court of Canada has observed, "Protecting the integrity of government is crucial to the proper functioning of a democratic system."[3]

The Act only applies to holders and former holders of federal public office. It governs approximately 3000 public office holders, including Cabinet Ministers, Parliamentary Secretaries, employees in Ministers' offices, most appointees[4] of the Cabinet (including Deputy Ministers), and appointees of Ministers whose appointments are approved by the Cabinet. It also governs former occupants of these offices.

Of these public office holders, roughly 1100 are "reporting public office holders." Reporting public office holders are subject to greater disclosure obligations and more severe restraints on

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1 S.C. 2006, c. 9, s. 2.

2 *Federal Accountability Act*, S.C. 2006, c. 9.

3 *R.* v. *Hinchey*, [1996] 3 S.C.R. 1128, *per* L'Heureux-Dubé J., at para. 15.

4 Cabinet appointees not subject to the *Conflict of Interest Act* are: (i) lieutenant governors of the provinces; (ii) officers and staff members of the Senate, House of Commons and Library of Parliament; (iii) ambassadors and heads of mission who are employees in the public service; (iv) judges; (v) military judges; and (vi) RCMP officers excluding the RCMP Commissioner.

their activities. Cabinet Ministers, Parliamentary Secretaries, Deputy Ministers and employees in Ministers' offices are included among reporting public office holders.

Under the Act, all public office holders are required to avoid conflicts of interest, to recuse themselves from decisions and discussions that create a conflict of interest, and to abide by other, specified ethical rules. Reporting public office holders are subject to additional obligations and restrictions, including: public disclosure of gifts received, reporting assets and debts to the Commissioner, a ban on owning publicly-traded securities, prohibition against holding outside employment or positions, and constraints on activities in the first year[5] after leaving office.

All public office holders hold privileged positions that allow them, as the Tait Task Force observed, "Every day, in myriad ways …[to] make decisions and take actions that affect the lives and interests of Canadians."[6]

Individuals covered by the Act fill a wide range of federal offices. Some wield authority. Others exercise influence. A shared attribute is that they all hold the public trust.

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

In this context, public office holders assume office fully cognizant of the public trust they are accepting and of the need to maintain that public trust. They know that maintenance of trust has both a substantive and an optical component. As the Supreme Court of Canada observed more than one-quarter century ago, "A job in the public service has two dimensions, one relating to the employee's tasks and how he or she performs them, the other relating to the perception of a job held by the public."[7]

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5 In the case of former Cabinet Ministers, the constraints last for two years.

6 Canadian Centre for Management Development, Task Force on Public Service Values and Ethics. (1996). *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*, at 4.

7 Fraser v. *P.S.S.R.B.*, [1985] 2 S.C.R. 455, at para. 38.

Consequently, public office holders' integrity must both exist and be perceived to exist. As the Supreme Court observed in a government fraud case:

> … preserving the appearance of integrity, and the fact that the government is fairly dispensing justice, are, in this context, as important as the fact that the government possesses actual integrity and dispenses actual justice. … [I]t is not necessary for a corrupt practice to take place in order for the appearance of integrity to be harmed. Protecting these appearances is more than a trivial concern. This section [*Criminal Code*, para. Section 121(1)(c)] recognizes that the democratic process can be harmed just as easily by the appearance of impropriety as with actual impropriety itself. [emphasis in original][8]

Canadians — through passage of the Act by their representatives in Parliament — determined that to preserve the principles of democracy, the rule of law, government transparency and accountability, and confidence in the integrity of government decision-making:

- public office holders should be subject to rules and compliance measures,and
- a subset of public office holders (known as reporting public office holders) should be subject to further obligations, including disclosure of financial holdings, divestment of assets whose value is sensitive to government policy, and temporary restrictions on the use of their connections upon leaving office.

At the same time, the Act strikes a balance between the need for clear rules to avoid and resolve conflicts of interest and the need to encourage good people to accept public office. The "purpose" provision of the Act, section 3, makes clear the need for this balance.

We support the Act's objectives of preventing public office holders from obtaining personal benefit from their positions, protecting the integrity of public offices and maintaining public confidence that they are being operated for the public good. We also support many of the 75 recommendations recently offered by the Conflict of Interest and Ethics Commissioner, Mary Dawson.[9] Below, the CBA Section also identifies and recommends other amendments which would uphold integrity in public office and improve the administration of justice.

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8 *R.* v. *Hinchey*, note 3, at para. 17.

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

II. RESPECTING THE LAW WHEN IT SETS DEADLINES FOR STATUTORY REVIEWS

Parliament commonly includes in significant legislation a provision like section 67 of the Act:

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

These statutory review provisions are more than administrative or housekeeping matters. They are an integral part of the balance and compromise in the legislative process. They signify that Parliament has enacted significant legislative change on the condition that a formal mechanism is available to examine the first years of experience under the new law's operation.

Unfortunately, many statutory reviews are not launched by the prescribed deadline. The review of this Act was required within five years after subsection 67(1) came into force – by July 2, 2012. However, the House of Commons did not assign the Standing Committee on Access to Information, Privacy and Ethics to conduct this review until December 10, 2012. The delay is not the responsibility of the Standing Committee, as it is unable to review an Act until mandated by the House.

The tardiness of this review is not unique. The House of Commons frequently misses deadlines for commencing statutory reviews. For example, the first review of the *Lobbying Act* was to commence by June 20, 2010,[10] but it was not until September 28, 2011, that the House designated a committee to conduct the review. After the deadline passed, the House sat for 106 consecutive sitting days without considering the statutory obligation to launch the review.

One of the CBA's primary objects is to promote the rule of law and improvement of the administration of justice. It is deeply troubled by the repeated disregard of deadlines

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[10] A review must be undertaken every five years after section 14.1 came into force. Section 14.1 was enacted by S.C. 2003, c. 10, which was proclaimed in force effective June 20, 2005 (SI/2005-0049).

established by statute. The circumstances are all the more serious because these statutory reviews were mandated by Parliament to provide a formal outlet for stakeholders and other citizens to comment on their experience with the operation of legislation that might have been controversial, or passed quickly, or embedded in omnibus bills. Unfortunately, Canadians possess no remedy short of censure at the polls when Parliament declines to abide by its own deadlines. Given the importance of statutory reviews, some solution must be identified.

We recommend that the *Parliament of Canada Act* be amended to mandate that the Speaker of the House assign the appropriate committee for a statutory review under any Act, if none has been assigned by the deadline.

RECOMMENDATION

1. **That the *Parliament of Canada Act* should be amended to provide that, if a statutory review (under any Act of Parliament) has not been undertaken by the deadline because neither the House of Commons nor the Senate has designated or established a committee for that purpose, the Speaker of the House shall, within 30 calendar days, whether or not the House is sitting, establish or designate the committee, and the Speaker's action shall be deemed to be that of the House.**

III. IMPORTANCE OF BALANCE

The rule of law is best served by legal standards that are clear, consistent and fairly and transparently enforced. At the same time, clear and consistent standards allow discretion in administration and enforcement, provided the discretion is exercised in a reasonable, fair and transparent manner that does not undermine the purposes of the Act.

Sections 38 and 39 of the Act give the Commissioner limited discretion to relieve against the strict application of post-service restrictions, in appropriate circumstances. Parliament should consider giving the Commissioner wider discretion to reduce or waive the application of any of the rules of the Act, subject to the following criteria:

- The public office holder would have to apply for the waiver or exemption. The Commissioner would be unable to grant one on her own initiative.
- The application would be prospective only. A waiver or exemption could not be sought for activity that already has occurred, though it could be sought for continuing activity.

- The Commissioner could grant the waiver or exemption only if satisfied that to do so would be all of the following: reasonable; fair (both to the affected individual and to other public office holders); in the public interest; likely to maintain public confidence in the integrity of federal public office; consistent with previous guidance given by the Commissioner; and consistent with the purposes of the Act.
- The waiver or exemption would last for such duration, and be subject to such conditions, as the Commissioner felt were required by the public interest.
- The Commissioner would make public the waiver or exemption and the reasons.

RECOMMENDATION

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

IV. NO FEDERAL OFFICIAL SHOULD BE EXCLUDED FROM THE DEFINITION OF "PUBLIC OFFICE HOLDER"

Currently, the Act applies only to appointees whose appointments are made directly by the Cabinet or by Ministers and then approved by Cabinet. Consequently, the Act does not cover an individual whose appointment is approved by the federal Cabinet but who was not appointed by a minister. Officials excluded from the Act are the Governor and Deputy Governor of the Bank of Canada,[11] directors of national museums[12] and the CEO of the Canadian Centre on Substance Abuse.[13] It is unclear why an office as important as the Governor of the Bank of Canada would be excluded from the Act.

11 Under subsection 6(1) of the *Bank of Canada Act*, the Governor and Deputy Governor are appointed by the directors with the approval of the federal Cabinet.

12 Under subsection 23(1) of the *Museum Act*, the Director of each museum is appointed by the museum's board with the approval of the federal Cabinet.

13 Under section 17 of the *Canadian Centre on Substance Abuse Act*, the Chief Executive Officer is appointed by the board subject to the approval of the federal Cabinet.

The Commissioner has recommended broadening the Act's scope to cover any individual whose appointment is approved by the federal Cabinet.[14] We agree. These individuals should be both "public office holders" and "reporting public office holders" under the Act.

RECOMMENDATION

3. **Consistent with Recommendation 2-10 of the Commissioner, the definitions of "public office holder" and "reporting public office holder" should be amended to include any individual (e.g., Governor of the Bank of Canada) who is appointed to an office with the approval of the Governor in Council.**

At the same time, the CBA Section supports the technical change proposed by the Commissioner to exclude interns and summer students with terms less than six months from the definition of "reporting public office holders."[15] However, these students and interns would still be public office holders under the Act. They would also be "designated public office holders" under the *Lobbying Act*, meaning that they are subject to the five-year post-service lobbying ban.

RECOMMENDATION

4. **As proposed in Recommendation 2-11 of the Commissioner, interns and summer students with terms less than six months should be excluded from the definition of "reporting public office holder."**

V. RESTRICTIONS ON EMPLOYMENT AND PROFESSIONAL AFFILIATION OF REPORTING PUBLIC OFFICE HOLDERS

The CBA first addressed the issue of restrictions on employment and professional affiliation when the *Federal Accountability Act* was introduced in 2006.

At the time, the CBA observed that, in a world of complex policy problems in an equally complex regulatory regime, many offices are best filled by experienced professionals, actively engaged in their professions. Even when the duties of the office do not require a professional license, active participation and currency in a chosen profession can and usually will enhance the skill, knowledge and experience of an office holder.

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14 Commissioner's submission to the Standing Committee, note 9, recommendation 2-10.

15 Commissioner's submission to the Standing Committee, note 9, recommendation 2-11.

The CBA expressed particular concern about paragraphs (a) and (d) of subsection 15(1) of the Act. These state that no reporting public office holder shall, except as required in the exercise of his or her official powers, duties and functions, engage in the practice of a profession or hold office in a union or professional association. The impact of paragraph (d) is mitigated by subsection 15(3), which provides that a reporting public office holder may continue as, or become, a director or officer in a non-commercial organization only if the Commissioner is of the opinion that it is not incompatible with his or her public duties as a public office holder.

As a result, in 2006, the CBA recommended two amendments to section 15. First, it recommended that section 15 be amended to confirm that nothing in the section prohibits or restricts a reporting public office holder from licensure as an active practitioner with any regulatory body governing his or her profession. Second, it recommended that paragraph 15(1)(d), relating to holding office in professional associations and unions, be removed pending further study.

One concern was that the joint prohibitions against engaging in employment or the practice of a profession and holding office in a professional association would require members of professional associations, including engineers, doctors, lawyers, and accountants, to cease practice while holding public office unless the practice of that profession is required in the exercise of official powers, duties and functions. Depending on the professional association and jurisdiction, failure to engage in active practice could result in the loss of professional licensing. For lawyers, for example, several law societies have established guidelines on how long and in what circumstances a lawyer can retain non-practising status and return to practice without fulfilling educational and other licensing requirements. As a result, public office holders could lose substantial employment opportunities in their profession if they hold public office for any length of time.

As well, the extent to which reporting public officers would be able to participate in professional associations, other than licensing regimes, was not known. For example, the CBA consists of national and provincial branches, with subgroups for specialized areas of the law. It appeared that reporting public office holders could not hold office in the CBA or any of its constituent groups. As a result, lawyers with particular interests and specialized skill and knowledge would have to choose either to refrain from participating as officers in the activities of the CBA or to refrain from holding public office. It was thought that similar problems could occur in other

professional associations. Public office holders would be prohibited from full participation in professional associations that could enhance their knowledge of specialized areas. Professional associations would be prohibited from fully accessing skill and knowledge in the possession of public office holders to advance the public interest.

While the CBA's expression of concern did not result in amendment of Bill C-2 in 2006, the Act was subsequently amended to address the issue. The *Keeping Canada's Economy and Jobs Growing Act*,[16] enacted in the current Session of Parliament, has introduced a new subsection 15(1.1):

> (1.1) Despite paragraph (1)(a), for the purpose of maintaining his or her employment opportunities or ability to practice his or her profession on leaving public office, a reporting public office holder may engage in employment or the practice of a profession in order to retain any licensing or professional qualifications or standards of technical proficiency necessary for that purpose if
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> (a) the reporting public office holder does not receive any remuneration; and
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> (b) the Commissioner is of the opinion that it is not incompatible with the reporting public office holder's duties as a public office holder.[17]

This addresses the concern about paragraph 15(1) (a) that the CBA first identified in 2006.

The CBA's concern about paragraph 15(1)(d) would be satisfactorily addressed by the adoption of Recommendation 3-8 of the Commissioner. This recommendation would give the Commissioner wide discretion to permit a reporting public office holder to engage in outside activities where this would not be incompatible with the reporting public office holder's public duties or obligations.

RECOMMENDATION:

5. **As proposed in Recommendation 3-8 of the Commissioner, section 15 of the Act should be amended to give the Commissioner the authority to permit a reporting public office holder to engage in outside activities prohibited by subsection 15(1) where this would not be incompatible with the reporting public office holder's public duties or obligations as a public office holder.**

16 S.C. 2011, c. 24.

17 *Ibid.,* s. 168.

VI. RULES FOR POLITICAL FUNDRAISING BY MINISTERS AND PARLIAMENTARY SECRETARIES

The Act contains no specific regulation of political fundraising by Ministers and Parliamentary Secretaries. The only restriction (applicable to all public office holders) is that an office holder cannot solicit funds if the solicitation would place the office holder in a conflict of interest.

It is obvious that fundraising can give rise to conflict of interest issues, especially when the targets of fundraising are stakeholders of the department for which the fundraising Minister or Parliamentary Secretary is responsible, or when the funds are solicited from lobbyists who are lobbying the Minister, Parliamentary Secretary, or department.

To address these issues, guidelines for political fundraising by Ministers and Parliamentary Secretaries were established by the Prime Minister in 2010. They appear in *Accountable Government* (Annex B).[18] The Commissioner mentions the guidelines in her submission to the Committee.

The Commissioner recommends that the Act be amended to impose more stringent rules on fundraising by Ministers and Parliamentary Secretaries, though she does not specify what this might entail.[19] The obvious answer is to rely on the fundraising rules in Annex B of *Accountable Government*.

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

RECOMMENDATION:

6. **Further to Recommendation 3-10 of the Commissioner, the Act should be amended to incorporate the political fundraising rules in Annex B of *Accountable Government*, "Fundraising and Dealing with Lobbyists: Best Practices for Ministers, Ministers of State and Parliamentary Secretaries."**

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18 Canada, Privy Council Office. (2011). *Accountable Government: A Guide for Ministers and Ministers of State*, Annex B, pp. 25-27.

19 Commissioner's submission to the Standing Committee, note 9, recommendation 3-10.

VII. AUTOMATIC DIVESTMENT OF CONTROLLED ASSETS IS NECESSARY AND APPROPRIATE

Currently, reporting office holders are not permitted to hold "assets whose value could be directly or indirectly affected by government decisions or policy."[20] Holdings whose value can be affected by government policy, known as "controlled assets," must be sold or placed in a blind trust. Divestment of controlled assets is one area where the Commissioner proposes to relax protection against conflicts of interest.

The Commissioner recommends that automatic divestment of controlled assets apply only to reporting public office holders "who have a significant amount of decision-making power or access to privileged information, such as ministers, ministers of state, parliamentary secretaries, chiefs of staff and deputy ministers."[21] She recommends that other reporting officers be forced to sell (or place in a blind trust) controlled assets only if those assets would place them in a conflict of interest.

The Commissioner's recommendation would reduce from 1100 to as few as 140 the number of officials subject to automatic divestment.

In a few cases, automatic divestment of controlled assets may be an excessive precaution against conflict of interest. One example might be appointees to agencies or boards with narrow mandates that do not affect a broad cross section of the private sector (for example, the Immigration and Refugee Board of Canada). Summer students and interns who work in Ministers' offices might be another example.

On the other hand, automatic divestment of controlled assets should be required of all other employees in Ministers' offices. While the Commissioner suggests that only chiefs of staff should be required to divest automatically, other employees in Ministers' offices, such as policy advisors, directors and deputy chiefs of staff, routinely have access to confidential information and are able to influence government decisions.

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20 *Conflict of Interest Act*, section 20, definition of "controlled assets," and section 27.

21 Commissioner's submission to the Standing Committee, note 9, recommendation 3-11.

Each year, monthly communication reports filed under the *Lobbying Act* reveal thousands of contacts between lobbyists and Ministerial aides. Much of this lobbying relates to decisions that could affect the value of publicly-traded stocks and other controlled assets. Under the current law, no Minister's employee may own a controlled asset. The *status quo* is preferable to the Commissioner's proposal to replace automatic divestment with declarations of conflict and divestments on a case-by-case basis.[22] The sheer volume of lobbying of Ministers' offices makes the suggestion impractical.

Further, divestment of controlled assets should continue to be automatic for appointees to agencies and bodies with broad mandates that affect multiple sectors of the economy (*e.g.*, Canada Industrial Relations Board and, the Canadian Radio-television Telecommunications Commission). The nature and scope of these offices would make case-by-case declarations and divestments of controlled assets impractical.

Finally, the CBA Section agrees with the Commissioner that Ministers, Deputy Ministers and Parliamentary Secretaries should remain subject to the automatic divestment of controlled assets.

RECOMMENDATION

7. **Some reporting public office holders, *e.g.*, appointees to agencies with narrow focus or influence, should be subject to case-by-case divestment of controlled assets and not automatic divestment of controlled assets.**
8. **Contrary to the Commissioner's recommendation 3-11, employees of Ministers' offices (except summer students and interns) should continue to be subject to automatic divestment of controlled assets.**
9. **Contrary to the Commissioner's recommendation 3-11, reporting office holders who are appointees to agencies and bodies with broad mandates that affect multiple sectors of the economy (*e.g.*, Canada Industrial Relations Board and the Canadian Radio-television Telecommunications Commission) should continue to be subject to automatic divestment of controlled assets.**

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22 Under her proposal, Ministers' chiefs of staff would remain subject to automatic divestment of all their controlled assets.

10. Ministers, Deputy Ministers and Parliamentary Secretaries should continue to be subject to automatic divestment of controlled assets.

VIII. DO NOT WATER DOWN DEFINITION OF "CONTROLLED ASSETS"

Another proposed weakening of the Act, in the Commissioner's recommendation 4-3, is to restrict the "controlled assets" definition to publicly-traded securities.[23] This recommendation reflects the Commissioner's existing practice, which is not to force divestment of shares in private companies. Ownership in private companies must, however, be publicly declared.[24]

The Commissioner's amendment would mean that even the most senior reporting public office holders, such as Ministers and Deputy Ministers, could retain shares in privately-held companies. While most private companies are owned by single shareholders, 13 of the 100 largest privately-held companies in Canada are held widely, or held by large groups of individuals.[25]

Because shares in private companies can be owned by groups of individuals, or be widely held, there is no principled reason to exempt them from automatic divestment. The CBA Section recommends that ownership of interests in private companies not be removed from the definition of "controlled assets."

RECOMMENDATION

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

IX. GREATER TRANSPARENCY FOR GIFTS

Currently, reporting public office holders are required to report to the Commissioner any gifts, from a single source, other than family and friends, with a cumulative value of $200 in a 12-month period. Reporting public office holders must also disclose to the public any single gift or

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23 Commissioner's submission to the Standing Committee, note 9, recommendation 4-3.

24 *Conflict of Interest Act*, subsection 25(2).

25 *Report on Business Magazine*. (2012, June 28). "2012 Rankings of Canada's 350 biggest private companies." Online: http://www.theglobeandmail.com/report-on-business/rob-magazine/top-1000/2012-rankings-of-canadas-350-biggest-private-companies/article4372009/ Largest companies are as determined by revenues. The figure 13 includes companies described as "widely held" or owned by dealers, employees, policyholders or unit-holders, or families.

advantage of $200 value. Public office holders who are not reporting public office holders are not required to report to the Commissioner or to disclose gifts publicly.

The CBA Section endorses the recommendation to extend the reporting and disclosure obligations to all public office holders.[26]

The Commissioner noted that the current $200 threshold, for reporting and disclosure, is often confused as the standard of an acceptable gift or benefit. In her words, "Public office holders often erroneously believe that gifts or other advantages valued at less than $200 are automatically acceptable. This is not the case." [27]

We agree that a lower threshold for reporting and disclosure would simplify the gift rules and increase transparency.[28] The Commissioner has proposed that both thresholds be reduced to $30.[29] The CBA Section agrees that the $200 threshold should be reduced, but does not take a position on whether $30, or some other amount, would be the appropriate reduced threshold.

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

RECOMMENDATION:

12. **As proposed in Recommendations 4-26 and 4-27 of the Commissioner, all public office holders should be required to inform the Commissioner and to publicly disclose gifts of threshold value or higher.**
13. **Consistent with Recommendation 4-8 of the Commissioner, the threshold for publicly disclosing any single gift or advantage should be reduced from $200 to a lower amount.**

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26 Commissioner's submission to the Standing Committee, note 9, recommendations 4-26, 4-27.

27 Commissioner's submission to the Standing Committee, note 9, at 23.

28 Commissioner's submission to the Standing Committee, note 9, at 24.

29 Commissioner's submission to the Standing Committee, note 9, recommendations 4-8, 4-13.

14. Consistent with Recommendation 4-13 of the Commissioner, the threshold for informing the Commissioner about gifts from any one source other than relatives and friends in a 12-month period should be reduced from $200 to a lower amount.

X. CONSEQUENCES OF CONTRAVENTION

The CBA Section supports the Commissioner's recommendation that she be given additional authority to impose administrative monetary penalties for contraventions of the Act.

Sections 53 through 58 of the Act set out a transparent, principled and fair procedure for determining whether administrative monetary penalties should be imposed. The process includes notice and a right to be heard. However, administrative monetary penalties may be imposed only for breach of the sections of the Act dealing with financial holdings: subsections 22(1), (2) and (5); section 23; subsections 24(1) and (2); subsections 25(1) to (6); subsections 26(1) and (2); and subsection 27(7).

Other than these few sections, no other provision of the Act is currently enforceable. Section 63 provides that a contravention of the Act is not an offence and cannot be prosecuted. The Commissioner may report to Parliament that a contravention has occurred, but the report would be the only sanction imposed on the wrongdoer. While these reports to Parliament might offer both specific and general deterrence to public office holders as a group, there are no practical consequences apart from the potential reputational damage.

Lack of enforcement under the current statutory scheme bodes poorly for the rule of law. If the law establishes rules of conduct, then those rules must enforceable, they must be enforced, and they must be seen to be enforced. Otherwise, the law is liable to fall into disrepute.

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

The CBA Section believes that the Commissioner should be given authority to impose administrative monetary penalties for all contraventions of the Act. Those administrative monetary penalties should be significant enough to have specific and general deterrent effect. Currently the maximum administrative monetary penalty is $500. By comparison, under the *Lobbyists Registration Act* (British Columbia)[30] and the *Lobbyists Act* (Alberta),[31] the maximum administrative monetary penalty is $25,000.

RECOMMENDATION

15. **Further to Recommendations 6-11, 6-12, 6-13 and 6-14 of the Commissioner, section 52 of the Act should be amended to give the Commissioner the authority to impose an administrative monetary penalty for <u>any</u> contravention of the Act.**

16. **Section 52 should be further amended to increase the maximum administrative monetary penalty to $25,000 per contravention.**

Of course, upholding the Act cannot be the sole responsibility of the Commissioner. The government, which appoints and employs public office holders, and Parliament, which holds the government to account, have important roles to play.

One measure of Parliament's commitment to upholding the Act is the response to contraventions. Ignoring a contravention is not consistent with a culture that promotes respect for, and compliance with, the Act.

During the last 12 months, the Commissioner imposed administrative monetary penalties on 17 reporting public office holders for failure to comply with their obligations under the Act. By and large, these contraventions did not receive any attention, either in Parliament or in the news media. Further, the Government of Canada, which appoints or employs the individuals, does not appear to have recognized or acted on the infractions.

Section 19 provides that, "Compliance with this Act is a condition of a person's appointment or employment as a public office holder." It is unclear whether this provision has ever been invoked to protect the public interest against non-compliance.

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30 S.B.C. 2001, c. 42, para.7.2(2)(b).

31 S.A. 2007, c. L-20.5, subs. 18(2).

To address the apparent failure to take contraventions seriously, the Act should be amended to require the government to confront and address each breach. The most effective method would be to give the government a window to reconsider the appointment or employment in light of the contravention. Further, if the government chooses to do nothing in the face of a contravention, it should be required to give reasons.

RECOMMENDATION

17. The Act should be amended to provide as follows:

After the Commissioner's finding of a breach of the Act by a public office holder, the public office holder's employer or appointing authority [*e.g.*, Minister in the case of a Minister's office employee, the Governor in Council in the case of a Governor in Council appointee or appointee approved by the Governor in Council] shall be given 30 days to confirm the employment or appointment, as the case may be, and to publish reasons for the decision. If the employment or appointment is not confirmed within 30 days of the finding of a breach, then the public office holder's office shall be vacated.

XI. HARMONIZATION WITH THE *LOBBYING ACT*

The Commissioner is also responsible for the interpretation and administration of the Act and also the *Conflict of Interest Code for Members of the House of Commons*.[32] The former establishes post-employment restrictions on reporting public officers. The latter places post-service restrictions on MPs. Both outline what office holders can and cannot do after leaving office.

Specifically, the *Conflict of Interest Act* prohibits a former reporting public office holder, for one year after leaving office[33] from making "representations" (whether or not for pay) on behalf of any other person or entity to any federal government department or organization with which the official had direct and significant official dealings during his or her last year in office.

Meanwhile, the *Lobbying Act*[34] places a five-year restriction on lobbying by former designated public office holders. Designated public office holders under the *Lobbying Act* are a subset of

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32 *Conflict of Interest Code for Members of the House of Commons.* See: www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm

33 In the case of a former Minister, the restriction lasts for two years.

34 R.S.C., 1985, c. 44 (4th Supp.)).

public office holders.[35] The category includes senior government officials. In 2010, the definition was expanded by regulation to include MPs and Senators. Designated public office holders are prohibited from lobbying for five years after leaving office. The prohibition is almost absolute: the only gap in the restriction allows former designated public office holders employed[36] by a business corporation[37] to lobby for the employer not more than 20 per cent of their time.

The definitions of "designated public office holder" under the *Lobbying Act* and "reporting public office holder" under the *Conflict of Interest Act* are similar, but not identical. With the passage of time, affected individuals are becoming more familiar with the difference between the definitions. However, some confusion persists.

The CBA Section believes that post-employment restrictions on public office holders should be consistently applied and enforced. To the greatest extent possible post-employment restrictions on public office holders should be interpreted and administered by a single authority.

The CBA Section supports a move to harmonize the restriction on "representations" in the C*onflict of Interest Act* with the post-employment restrictions on registrable lobbying under the *Lobbying Act*.

RECOMMENDATION:

18. Post-employment restrictions on former public office holders should be interpreted and administered by a single authority.

XII. CONCLUSION

The CBA Section trusts these comments and recommendations will assist the Standing Committee in its review of the Act. We would be pleased to respond to questions and provide further information regarding any of the issues raised in this submission.

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35 As the term "public office holder" is defined in the *Lobbying Act*.

36 Former designated public office holders who represent business corporations other than by reason of employment (*e.g.*, as independent contractors, as consultants serving fee-paying clients, or as members of boards of directors) remain subject to the absolute five-year ban on lobbying.

37 Former designated public office holders employed by non-profit corporations and unincorporated organizations remain subject to the absolute five-year ban on lobbying.

XIII. SUMMARY OF RECOMMENDATIONS

1. **That the *Parliament of Canada Act* should be amended to provide that, if a statutory review (under any Act of Parliament) has not been undertaken by the deadline because neither the House of Commons nor the Senate has designated or established a committee for that purpose, the Speaker of the House shall, within 30 calendar days, whether or not the House is sitting, establish or designate the committee, and the Speaker's action shall be deemed to be that of the House.**

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

3. **Consistent with Recommendation 2-10 of the Commissioner, the definitions of "public office holder" and "reporting public office holder" should be amended to include any individual (e.g., Governor of the Bank of Canada) who is appointed to an office with the approval of the Governor in Council.**

4. **As proposed in Recommendation 2-11 of the Commissioner, interns and summer students with terms less than six months should be excluded from the definition of "reporting public office holder."**

5. **As proposed in Recommendation 3-8 of the Commissioner, section 15 of the Act should be amended to give the Commissioner the authority to permit a reporting public office holder to engage in outside activities prohibited by subsection 15(1) where this would not be incompatible with the reporting public office holder's public duties or obligations as a public office holder.**

6. **Further to Recommendation 3-10 of the Commissioner, the Act should be amended to incorporate the political fundraising rules in Annex B of *Accountable Government*, "Fundraising and Dealing with Lobbyists: Best Practices for Ministers, Ministers of State and Parliamentary Secretaries."**

7. **Some reporting public office holders, *e.g.*, appointees to agencies with narrow focus or influence, should be subject to case-by-case divestment of controlled assets and not automatic divestment of controlled assets.**

8. **Contrary to the Commissioner's recommendation 3-11, employees of Ministers' offices (except summer students and interns) should continue to be subject to automatic divestment of controlled assets.**

9. **Contrary to the Commissioner's recommendation 3-11, reporting office holders who are appointees to agencies and bodies with broad mandates that affect multiple sectors of the economy (*e.g.*, Canada Industrial Relations Board and Canadian Radio-television Telecommunications Commission) should continue to be subject to automatic divestment of controlled assets.**

10. **Ministers, Deputy Ministers and Parliamentary Secretaries should continue to be subject to automatic divestment of controlled assets.**

11. **Contrary to Recommendation 4-3 of the Commissioner, the definition of "controlled assets" should not be limited to publicly traded securities.**

12. **As proposed in Recommendations 4-26 and 4-27 of the Commissioner, all public office holders should be required to inform the Commissioner and to publicly disclose gifts of threshold value or higher.**

13. **Consistent with Recommendation 4-8 of the Commissioner, the threshold for publicly disclosing any single gift or advantage should be reduced from $200 to a lower amount.**

14. **Consistent with Recommendation 4-13 of the Commissioner, the threshold for informing the Commissioner about gifts from any one source other than relatives and friends in a 12-month period should be reduced from $200 to a lower amount.**

15. **Further to Recommendations 6-11, 6-12, 6-13 and 6-14 of the Commissioner, section 52 of the Act should be amended to give the Commissioner the authority to impose an administrative monetary penalty for <u>any</u> contravention of the Act.**

16. **Section 52 should be further amended to increase the maximum administrative monetary penalty to $25,000 per contravention.**

17. **The Act should be amended to provide as follows:**
After the Commissioner's finding of a breach of the Act by a public office holder, the public office holder's employer or appointing authority [*e.g.*, Minister in the case of a Minister's office employee, the Governor in Council in the case of a Governor in Council appointee or appointee approved by the Governor in Council] shall be given 30 days to confirm the employment or appointment, as the case may be, and to publish reasons for the decision. If the employment or appointment is not confirmed within 30 days of the finding of a breach, then the public office holder's office shall be vacated.

18. **Post-employment restrictions on former public office holders should be interpreted and administered by a single authority.**