

Ending Unethical Actions and Decisions by Everyone in Federal Politics by Strengthening the *Conflict of Interest Act*, MP and Senate Ethics Codes, Related Laws and Codes, and Enforcement

**Submission to the Standing Committee on Access to Information, Privacy and Ethics
by Democracy Watch and the Government Ethics Coalition
(February 5, 2013)**

I. Summary of Needed Changes to the *Conflict of Interest Act*, *MPs Code* and *Senators Code*

Overall, the 30 changes set out below are needed because of many loopholes and flaws in the ethics rules for federal Cabinet ministers, their staff and advisers, Cabinet appointees and senior government officials, and MPs and senators (whose staff and advisers are not covered by any of the rules) – and an additional 14 changes are needed to related laws and codes.

The ethics rules federal politicians have imposed on public servants do not contain most of these loopholes and flaws, and are much stronger than the rules federal politicians have imposed on themselves. And the un-enforced, and unenforceable, principles set out in the ethics rules for politicians are also much stronger – one of the main things needed is to make the principles into enforceable rules.

The federal Ethics Commissioner has acknowledged just how bad the *Conflict of Interest Act* (the “*Act*”) is by recommending 75 changes to the *Act* in her submission to the Committee. In the list of changes below, if a recommendation by the Ethics Commissioner is not specifically mentioned, then Democracy Watch and the Government Ethics Coalition endorse the Ethics Commissioner’s recommendation.

However, the Ethics Commissioner’s recommendations ignore the biggest loopholes in the *Act* and ethics codes for MPs and senators, and she also recommends weakening the *Act* in some cases (which, as you will see below, we strongly and explicitly oppose).

Currently, because of these huge loopholes, the *Act* and codes do not apply to 99% of the decisions and actions of the people covered by the *Act* and codes – that’s how much of a bad joke the federal ethics enforcement system is, and until these loopholes are closed it will remain a bad joke.

As well, the Ethics Commissioner is a major part of the problem with ethics enforcement – since 2007 she has rejected at least 80 complaints filed with her without issuing a public ruling (it could be more as she did not disclose the total number of complaints she received in 2008-2009 nor in 2010-2011). In other words, she may have covered up some dangerously undemocratic ethics violations.

And there is good reason to suspect that the Ethics Commissioner may have covered up some cases, as she has repeatedly interpreted and applied the *Act* and codes in very narrow,

bizarre, legally incorrect ways since 2007, and by doing so she has let dozens of Cabinet ministers and MPs off the hook for clear violations of the *Act*.

As a result, many of the Ethics Commissioner's recommended changes to the *Act* do not actually need to be made – all that is needed is for her to reverse her bizarre rulings, and start enforcing the *Act* and codes properly and legally correctly, and in the spirit of the main purposes of the *Act* and codes which are to prevent conflicts of interest from arising, and to prohibit anyone from making a decision or undertaking an action if they are in the conflict of interest.

However, because of the many loopholes and flaws in federal ethics rules, and because the federal Conservatives have ignored the recommendations of the Oliphant Commission, and the past recommendations of the Ethics Commissioner, and because the Ethics Commissioner shows no signs that she will reverse any of her bizarre rulings, the following 30 changes to the *Conflict of Interest Act*, *MPs Code*, and *Senators Code* are needed, along with 14 changes to related laws, to actually clean up federal politics, finally, more than 145 years after Canada became a country (**NOTE:** You can see details about all of these changes by viewing Democracy Watch's initial June 2009 submission to the Oliphant Commission at:

<http://democracywatch.ca/wp-content/uploads/OliphantCommInitialSubmssnJune2009.pdf> and

Democracy Watch's final July 2009 submission to the Oliphant Commission at:

<http://democracywatch.ca/wp-content/uploads/OliphantCommFnISubmssnJul09.pdf>).

I(a) Changes to the Ethics Rules that Apply While on the Job

NEEDED CHANGE #1 – Change definitions to ensure the *Conflict of Interest Act* (the “*Act*”) applies to every Cabinet appointee (as even the Ethics Commissioner has partially recommended, rec. #2-9 and 2-10 in her submission to the Committee) and all ministerial staff and advisers (full-time or part-time, employees or contractors, paid or volunteer, however they are hired or appointed, as even the Ethics Commissioner has recommended, rec. 2-4 and 2-5 in her submission (NOTE: these changes are needed only because the Ethics Commissioner has interpreted the *Act* in extremely narrow, technical ways, and also failed to conduct audits of ministers' offices to ensure that all staff and advisers are registered as public office holders under the *Act* – both of which are two examples among many of her very negligently weak enforcement record since 2007)).

NEEDED CHANGE #2 – Extend the requirements to disclose outside activities (and changes in those activities), recusals, and the receipt of gifts and other advantages, to all public office holders covered by the *Act* (as the Ethics Commissioner has recommended, rec. #1-1 and #4-22 to 4-27 of her submission).

NEEDED CHANGE #3 – Extend the *Conflict of Interest Code for Members of the House of Commons* (the “*MPs Code*”) and the *Conflict of Interest Code for Senators* (the “*Senators Code*”) to cover all of their staff and advisers (full-time or part-time, employees or contractors, paid or volunteer, however they are hired or appointed). The rules should apply to staff on a sliding scale based on the decision-making power of the MP or senator who employs them, and their responsibilities concerning policy-making (ie. opposition party leaders and their staff should face the most strict and strong restrictions, followed by opposition critics, chairs of committees, members of committees and members who do not sit on any committee). The names of the codes should also be changed to reflect that staff of MPs and senators are covered by the codes.

NEEDED CHANGE #4 – Add an enforceable general rule to the *Act*, *MPs Code* and *Senators Code* requiring everyone to act with integrity and ethically (as federal public servants are already required to do under the *Values and Ethics Code of the Public Service* (the “*Public Service Code*”), and as is already set out as an unenforceable principle in the *Accountability Guide* and *MPs Code* and *Senators Code*), as an anti-avoidance measure so that everyone can be found guilty of violating the *Act* or codes even if they exploit a technical loophole.

NEEDED CHANGE #5 – Add an enforceable rule to the *Act*, *MPs Code* and *Senators Code* requiring everyone to tell the truth when on the job (as public servants are already required to do under the *Public Service Code*, and as is already set out as an unenforceable principle in the *Accountability Guide* and *MPs Code*).

NEEDED CHANGE #6 – Add an enforceable rule to the *Act*, *MPs Code* and *Senators Code* prohibiting everyone from being in an apparent or foreseeable potential conflict of interest (as all federal public servants are already prohibited under the federal Conflict of Interest and Post-Employment Policy (the “*Public Service Conflict Code*), and as currently set out as an unenforceable principle in Annex A. of the *Accountability Guide*, and in the *MPs Code*, and *Senators Code*, and as the Oliphant Commission recommended, and as prohibited for politicians in the B.C. *Members Conflict of Interest Act* and as prohibited for senior public servants under the *Yukon Public Service Act*).

NEEDED CHANGE #7 – Delete the huge “general application” and “broad class of persons” loopholes in the definition of “private interest” in section 2 of the *Act* and subsection 3(2) of the *MPs Code* and subsection 11(1) of the *Senators Code* (NOTE: this change and the change set out above are needed because these loopholes mean that currently the *Act* and *MPs Code* and *Senators Code* do not apply to 99% of the decisions and actions of federal Cabinet ministers, their staff, Cabinet appointees, senior government officials, MPs and senators; this change and the change above are needed to make it clear that everyone will be prohibited (finally, after 145 years since the country was created) from taking part in decisions or discussions of matters when they, their family members or friends have a direct or indirect personal interest (financial or otherwise) in the matter, or when they have an opportunity to improperly further anyone’s or any entity’s private interests, whether the decision is about something specific (like a merger, license approval or contract) or is about something that applies generally (like a law, regulation, tax, policy or guideline).

NEEDED CHANGE #8 – Strengthen the rules in the *Act*, *MPs Code* and *Senators Code* to require disclosure of assets worth more than \$1,000 (the current \$10,000 threshold is much too high as it facilitates the hiding of very significant, influential gifts – \$1,000 is a more consistent threshold because it aligns with the maximum donation allowed under the *Canada Elections Act*). Also strengthen the rules to require divestment of the currently exempt assets of, under section 20 of the *Act*, “(g) registered retirement savings plans and registered education savings plans that are not self-administered or self-directed” (if the assets in the RRSP or RESP are investments in companies) and “(h) investments in open-ended mutual funds” (divestment of these types of investments must be required because they can be in companies that very likely are regulated by the federal government), and to require divestment under section 17 of the *Act* whether controlled assets are held directly or indirectly (as the Ethics Commissioner recommended in rec. 3-12 of her submission – NOTE: this second change is only needed

because the Ethics Commissioner is too narrowly, and legally incorrectly, interpreting the definition of “controlled assets” in section 20 of the *Act*). Finally, do not weaken the divestment rules as the Ethics Commissioner recommends (in rec. 3-11, 4-3, 4-18, 4-19 of her submission).

NEEDED CHANGE #9 – Expand the definition of “private interest” in the *Act* and *MPs Code* and *Senators Code* to include political interests (such as fundraising and campaign activities – NOTE: this change would not be necessary except that the Ethics Commissioner bizarrely ruled in the Lisa Raitt and Rick Dykstra cases that a Cabinet minister’s and MP’s interests in keeping their job and being re-elected are not part of their private interests, a ruling that is not only legally incorrect, but also defies common sense).

NEEDED CHANGE #10 – Add to the *Act*, *MPs Code* and *Senators Code* all seven of the Best Practices listed under “Annex B: Fundraising and Dealing with Lobbyists” of the *Accountability Guide*, and require everyone covered by the *Act* and the codes to comply with those rules (even the Ethics Commissioner recommends that the fundraising restriction rule in section 16 of the *Act* be made stronger, rec. #3-10 of her submission -- NOTE: this change would not be necessary except that the Ethics Commissioner bizarrely ruled in the Lisa Raitt and Rick Dykstra cases that lobbyists helping their riding association raise money does not create a conflict of interest, a ruling that is not only legally incorrect, but also defies common sense).

NEEDED CHANGE #11 – Expand the definition of “conflict of interest” in the *Act* and *MPs Code* and *Senators Code* to include a prohibition on anyone from acting when they could further the interest of any type of “entity” (as public servants are prohibited from doing under the *Public Service Conflict Code*, and as even the Ethics Commissioner has recommended (rec. #2-4 and #3-2 to 3-4 in her submission -- NOTE: this change would not be necessary except that the Ethics Commissioner bizarrely ruled in the government cheques/Conservative party logo case that the legal definition of “person” does not include “entities” such as political parties (even though the *Canada Elections Act* defines political parties and other entities as persons, as does almost every other law in Canada)).

NEEDED CHANGE #12 – Expand the definition of “preferential treatment” in section 7 of the *Act* by deleting the words “based on the identity of the person or organization that represents the first-mentioned person or organization” (as the Ethics Commissioner recommends, rec. 3-2 of her submission)

NEEDED CHANGE #13 – Re-word subsection 11(2) of the *Act* and subsection 14(2) of the *MPs Code* and subsection 17(2) of the *Senators Code* to make it completely clear that gifts even from relatives, friends and others (hospitality and benefits) are prohibited if the gifts might reasonably be seen to have been given to influence the public office holder in the exercise of an official power, duty or function, and lower the disclosure threshold for gifts to \$30 (as the Ethics Commissioner recommends – rec. 4.8, 4-13 and 4-14 in her submission).

NEEDED CHANGE #14 – Delete section 15 of the *MPs Code* and section 18 of the *Senators Code* because they allow acceptance of the gift of “sponsored travel” (and because essentially all other gifts are currently prohibited, and public servants are also prohibited from accepting the gift of travel), and also change the *MPs Code* to delete the measure added in 2009 that exempts “volunteer service” from the definition of “benefit” because these two measures allow lobbyists

to gain undue and unethical influence over MPs by giving sponsored travel or by volunteering for them, and allows that to happen without the MP being in violation of the *MPs Code*.

NEEDED CHANGE #15 – Add a measure to the *Act* and the *MPs Code* to clearly prohibit accepting any benefit or advantage (including any position, job, appointment or financial benefit) in return for switching parties, or giving up one’s seat in the House of Commons or nomination as a candidate in an election.

NEEDED CHANGE #16 – Add a rule to the *Act* and *MPs Code* and *Senators Code* prohibiting the use of any government property for anything other than officially approved activities, especially not for any political activities, and to prohibit such political activities at a government place of work (as public servants are prohibited from doing under the *Public Service Conflict Code*, and as an un-enforced rule in Annex A of the *Accountability Guide* already prohibits).

NEEDED CHANGE #17 – Require current Cabinet ministers and senior government officials to confirm with the Ethics Commissioner that former public office holders they deal with are complying with ethics rules (as the Oliphant Commission recommended).

NEEDED CHANGE #18 – Require all federal politicians and their staff to participate in ethics training conducted by the Ethics Commissioner (as recommended by the Oliphant Commission, and as recommended by the Ethics Commissioner – rec. 6-1 of her submission), and also require all advisers, Cabinet appointees, and senior government officials covered by the *Act* to do this.

I(b) Changes to the Ethics Rules That Apply After Leaving the Job

NEEDED CHANGE #19 – Extend the prohibition on taking employment of any kind with outside entities and representing them after leaving office (as the Ethics Commissioner recommends – rec. 51. to 5.3), and on becoming a registered lobbyist after leaving office, to cover all politicians, political staff people and advisers (full-time or part-time), Cabinet appointees or government officials (including part-time and temporary “exchange program” participants), and make the prohibition a sliding scale of one year to five years (increasing in length as the decision-making power and potential conflicts of the person increase) to ensure everyone must take a cooling-off period when they leave office.

NEEDED CHANGE #20 – Expand the definition of "firm offer of employment" in subsection 24(1) of the *Act* to include any type of offer so that all employment offers extended to anyone covered by the *Act* are required to be disclosed to the Ethics Commissioner, and require MPs to disclose income received in their last two months in office to the Ethics Commissioner to ensure they are not in a conflict of interest (both as recommended by the Oliphant Commission, and as the Ethics Commissioner recommends – rec. 4-9 in her submission), and add a similar rule requiring disclosure of offers of employment to the *MPs Code* and *Senators Code*.

NEEDED CHANGE #21 – Require everyone covered by the *Act* to report to the Ethics Commissioner about their work activities after they leave office (as recommended by the Ethics Commissioner – rec. 4-21, 5-6, 5-7 and 6-12 of her submission), and require the Ethics Commissioner to approve any such work activity, and to disclose publicly approvals of work activity and any changes to the approval as conditions change, and make it a punishable offence

to fail to disclose such post-employment work activity, with an appeal through a fair and transparent process (all as recommended by the Oliphant Commission), and enact the same requirements for everyone covered by the *MPs Code* and the *Senators Code* and the *Public Service Codes*, to ensure everyone is complying with their cooling off period prohibitions.

NEEDED CHANGE #22 – Make it a violation of a contract with the federal government if a former public office holder (of any kind) wins the contract while in violation of ethics rules (as recommended by the Oliphant Commission).

I(c) Changes to the Ethics Enforcement System

NEEDED CHANGE #23 – Require the Ethics Commissioner to issue a public ruling for every complaint filed by anyone (whether filed by an MP, senator or anyone else), and to issue a public ruling for every situation in which the Ethics Commissioner decides to self-initiate an investigation, examination or inquiry – and do not increase the secrecy or allow the Ethics Commissioner’s to in any way avoid disclosure of her rulings (as the Ethics Commissioner recommends – rec. 6-2 to 6-5, and 6-8 of her submission).

NEEDED CHANGE #24 – Require the Ethics Commissioner to conduct random, unannounced, regular audits of the activities of everyone covered by the *Act* and *MPs Code*, and require the Senate Ethics Officer to do the same for everyone covered by the *Senators Code*.

NEEDED CHANGE #25 – Do not, as the Ethics Commissioner recommends (in rec. 4-5 and 4-11 of her submission) make the illegal “conflict of interest screens” that the Ethics Commissioner has created legal under the *Act*. Such screens are clearly illegal under the *Act*, and the Ethics Commissioner’s use of them hides the number of times those covered by the *Act* recuse themselves from decision-making processes, and this information is very important to ensure these people are complying with the *Act*.

NEEDED CHANGE #26 – Add measures that set out significant, mandatory minimum fines for violations of the *Act* (as the Ethics Commissioner recommends -- rec. 6-13 and 6-14, and as several provincial ethics laws have), and for violations of the *MPs Code* and *Senators Code*, and for violations of the key new ethics rules mentioned in the above recommendations, and make the mandatory minimum penalty the loss of office and a prohibition against running for office or being appointed to any office for several years (as under the *Municipal Act* in Ontario), and other penalties equal to the maximum penalties for violating the *Lobbying Act* (ie. fine of \$50,000 and a jail term of six months on summary conviction, and a fine of \$200,000 and a jail term two years if convicted by indictment).

NEEDED CHANGE #27 – Require the Ethics Commissioner to define the many vague words and phrases in the *Act*, and also disclose publicly summaries of the currently secret advice and rulings she gives, and has given in the past, to people covered by the *Act* (both as recommended by the Oliphant Commission -- without naming the public office holder in the summary), and require the Ethics Commissioner to do the same with the rules and the secret advice and rulings she has given (past, present and future) under the *MPs Code* (as the Senate Ethics Officer does with the rules and rulings under the *Senators Code*).

NEEDED CHANGE #28 – Change section 66 of the *Act* to allow anyone to challenge any decision or ruling by the Ethics Commissioner in court for any error of fact or law, and add a similar measure to the *MPs Code*.

NEEDED CHANGE #29 – Require the public approval (not just consultation, actual public approval) of a majority of party leaders in the House of Commons for the appointment of the Ethics Commissioner.

NEEDED CHANGE #30 – Remove the Senate Ethics Officer from the control of a Senate committee (currently all investigations must be approved by the committee), and add the *MPs Code* and *Senators Code* as new parts of the *Act* enforced by a 3-person Ethics Commission.

II. Summary of Needed Changes to Ethics-Related Laws

II(c) Establish, Finally, the Public Appointments Commission

NEEDED CHANGE #31 – Establish the Public Appointments Commission the Conservatives promised in the 2006 federal election (under the *Salaries Act*) so that the Prime Minister and Cabinet are finally effectively prohibited from appointing friends, cronies and party supporters to more than 3,000 positions without any public or merit-based review.

II(b) Close the Loopholes in the *Lobbying Act*

NEEDED CHANGE #32 – Close loopholes that allow for unregistered, secret lobbying, and require lobbyists to disclose amounts spent on lobbying efforts, and possibly limit spending

NEEDED CHANGE #33 – Clearly prohibit lobbyists from working with political parties, riding associations and candidates, and from becoming Cabinet ministers for a few years after they enter office, and require lobbyists to disclose past work with any government or political party, riding association or candidate

NEEDED CHANGE #34 – Require the Commissioner of Lobbying to conduct regular, random audits and inspections, and require the Commissioner and Director of Public Prosecutions to rule publicly within a reasonable time period on every situation that raises issues of violations, and to disclose the identity of all wrongdoers, and require the Commissioner to impose mandatory minimum penalties for violations of the *Lobbying Act* or the *Lobbyists' Code of Conduct*.

NEEDED CHANGE #35 – Make appointment of Commissioner of Lobbying open, fair and merit-based, and for non-renewable term

NEEDED CHANGE #36 -- Make the *Lobbyists' Code* part of the *Lobbying Act*, and make the Registry of Lobbyists fully searchable by any field

II(c) Close the Loopholes in the *Canada Elections Act*

NEEDED CHANGE #37 – Close the loopholes that allow for secret, unlimited donations and loans to nomination race and non-MP political party leadership race candidates in the *Conflict of Interest Act*, the *Canada Elections Act*, and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.

NEEDED CHANGE #38 – Add to the *Canada Elections Act* donation limits and disclosure requirements for "volunteer labour" donated to parties and candidates during nomination race, election and party leadership campaigns, to close this existing secret donations loophole, and; to require disclosure of the identity of each individual donor's employer (as in the U.S.) and direct organizational affiliations (to help ensure that corporations, unions and other organizations do not illegally funnel donations through their executives or employees).

NEEDED CHANGE #39 – Close the loopholes in the *Canada Elections Act* that allow political parties and riding associations to maintain secret trust funds for defeated or retiring MPs, and any senator or political staff person.

NEEDED CHANGE #40 – Close the loopholes in the *Canada Elections Act* to ban loans to parties, riding associations, nomination race candidates, election candidates and party leadership candidates from corporations, unions and all other types of organizations (as donations have been), and to limit and require disclosure of loans from individuals (as donations are), so that loans cannot be used to influence public officials.

NEEDED CHANGE #41 – Change the *Canada Elections Act* to require, (as political party leadership campaign candidates are required) all candidates, riding associations and parties to disclose publicly all donations, gifts, and the details and status of any loans, during the week before election day, so voters know who is bankrolling campaigns before they vote.

NEEDED CHANGE #42 – Change the *Canada Elections Act* to give the Commissioner of Elections and the Chief Electoral Officer more investigative powers, especially the power to audit annually the finances and assets of political parties, riding associations, and candidates in nomination races and elections, and to require them to conduct annual audits.

II(d) Close the Loopholes in the Whistleblower Law and System

NEEDED CHANGE #43 – Close the loopholes in the *Public Servants Disclosure Protection Act* that undermine protection of public servants who disclose wrongdoing (whistleblowers), and extend that *Act* to cover anyone (including political staff) who blows the whistle on wrongdoing.

NEEDED CHANGE #44 – Require stronger enforcement by the Treasury Board and the Integrity Commissioner (including disclosure of all rulings on whistleblower complaints by every government institution, and by the Commissioner).