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Backgrounder on the changes needed to ensure ethical decision-making in the federal government

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Summary: The System is the Scandal

Secret, unethical lobbying, excessive government secrecy, unethical big money influence campaigns, and unethical decision-making and spending are all legal in federal politics.

Canadians are more likely to get caught parking their car illegally than politicians are likely to get caught violating key ethics rules.

And the penalties for illegal parking are higher than the penalties for serious ethics violations by federal politicians and top government officials.

This system is the scandal, and it is not surprising that it encourages dishonest, unethical, secretive, wasteful and unrepresentative actions by federal politicians and government officials.

This dangerously undemocratic and corrupt system must finally be cleaned up by closing all the loopholes, increasing transparency, making political ethics rules, enforcement and penalties much stronger, as detailed in the six sections below:

1. Stop big money in federal politics that unethically influences decisions

In 2019, changes made by Bill C-76 made it much easier for wealthy interest groups to support parties and candidates by more than doubling the amount of money they could spend during election campaigns, and setting a meaninglessly high limit of $1.5 million for pre-election spending by these groups, while leaving a much too high donation limit of $1,625 per person to each party that doesn't stop big money donations it just hides them (Click here for details about how the current donation limit is a façade).

Stopping big money in politics is key because the favours organizations and their lobbyists can do for parties and candidates by funneling and bundling donations unethically influence the decisions of Cabinet ministers. Clinical testing by

psychologists has shown that even small gifts and favours have influence and are the best way to influence someone's decisions.

"The only way to stop the unethical influence of big money in politics is to stop big money donations and loans, as Quebec has, and to ban gifts, including sponsored travel, and restrict and require disclosure of all favours including volunteer help on campaigns," said Duff Conacher, Co-founder of Democracy Watch.

Click here to see the 11 key changes needed to stop big money in federal politics, and see more details here.

2. Stop secret, unethical lobbying that influences decisions

In 2012, the House Ethics Committee unanimously recommended some key changes to the *Lobbying Act* (no changes were made) but not all the changes needed to close all the loopholes and require that all lobbying be registered and disclosed and in compliance with the *Lobbyists' Code of Conduct* (as the Aga Khan's unethical lobbying of Prime Minister Trudeau showed clearly). The *Lobbying Act* was supposed to be reviewed by the Ethics Committee in 2017, but the Committee and Parliament have negligently failed to undertake the review.

One of the key changes is to require all politicians, their staff, appointees, and government officials and employees to register in the Registry of Lobbyists every communication with anyone communicating with them in respect of any decision. The only exception to this disclosure requirement should be if someone sends an email letter through a lobby group's website (as the group would be required to register that mass letter-writing campaign action in its lobbying registration in the Registry).

"Stopping secret lobbying is key because it is a recipe for corruption and waste of the public's money, in part because lobbyists who are not required to register their lobbying are not covered by the lobbyists' ethics code and so are allowed to develop close relationships with politicians and officials they are lobbying, including campaigning or doing favours for them," said Conacher. *"Secret, unethical lobbying loopholes in the federal "Some Lobbying Act" are exploited regularly in Ottawa to hide and rig deals between politicians and wealthy, connected businesses and organizations that rip off and harm Canadians, their communities and the environment."*

See more details here.

3. Stop excessive government secrecy

"Government and its information should be open by default. We will update the Access to Information Act to meet this standard…We will ensure that Access to Information applies to the Prime Minister's and Ministers' Offices…"
Liberal Party 2015 election platform (p. 24)

"…transparent government is good government… For me, open government is effective government… As the saying goes, sunshine is the world's best disinfectant."
("Fair and Open Government" chapter of the 2015 Liberal platform (pp. 3-4)

Secret lobbying is just one part of excessive federal government secrecy. Like the Harper Conservatives did, the Trudeau Liberals have broken almost all their 2015 open government election promises, including applying the *Access to Information Act* (*ATI Act*) to ministers' offices, and making federal government information open by default.

Police investigations and measures and actions to protect national security should remain secret while they are underway. And no one should have access to the private information about individuals, and the actually proprietary information about businesses and other organizations, that is collected by the federal government. And every MP and Cabinet minister should be allowed to keep secret the part of their communications that involves their political party's strategy and tactics, and they and all government employees should also be allowed to keep secret their daily communications about personal matters with their immediate family.

However, there is no good reason to keep secret any other information collected by, or generated by, anyone in federal politics. It should all be disclosed proactively into a searchable database as it is generated, so that anyone and everyone can easily track the entire communication record of any government decision during the decision-making process.

Because the public is paying the salary of everyone in federal politics, and all the costs of running the government, and because disclosure is needed to ensure open, democratic debate and accountability, the public has a right to know all the information and recommendations its public servants present to Cabinet ministers on every issue, problem, policy or spending initiative, so that a fully informed public debate can occur before Cabinet makes its final decision. Closing the much-abused "advice to Cabinet" loophole in the *ATI Act*, and requiring proactive disclosure of that advice, will make it easier for public servants to speak truth to power. The current secretive system makes it easy for Cabinet ministers to hide the truth and threaten public servants who challenge dishonest, corrupt or wasteful decisions by ministers.

"The many loopholes in the federal 'Guide to Keeping Information Secret Act' must be closed to end the culture of excessive secrecy that often hides wrongdoing and wrongdoers in the federal government," said Conacher.

See more details here.

4. Stop unethical decision-making directly

Usually, ethics laws prohibit Cabinet ministers and top government officials from having the direct conflict of interest of owning a business or investments in businesses, as Canada's federal ethics law does. However, Ethics Commissioner Mary Dawson interpreted the law in a legally incorrect way to create a loophole, and has allowed Cabinet ministers to own investments and other assets indirectly.

The Federal Court of Appeal questioned the correctness of Ethics Commissioner Dawson's decision, but ultimately allowed it due to a technicality.

Canada's federal ethics law, the *Conflict of Interest Act* (clause 20(h)) also allows ministers and top officials to own mutual fund investments without even disclosing them publicly, and to put other assets and investments in a so-called "blind trust." These investments should be prohibited, and (as the Parker Commission recommended in 1987 and the Starr-Sharp Report recommended in 1984) blind trusts should be abolished because ministers and officials can easily know what they own, especially since they choose their own trustee.

The only way to prevent these conflicts is to require Cabinet ministers and top government officials to sell all their investments in businesses (as the Parker Commission also recommended in 1987 – Chapter 27, pp. 343-361 (especially 360-361)). They can take the money from selling them and buy term deposits or government bonds that pay a set interest rate until they leave office.

They are already paid a salary in the top five per cent – they don't need to make more money while in office, especially by making decisions that help themselves instead of helping as many Canadians as possible.

If a minister or top official owns some asset or investment which is not possible to sell, they should be required to disclose it publicly (as the Parker Commission also recommended).

What about businesses or investments owned by the relatives or friends of Cabinet ministers and top officials? Canada's federal ethics law requires their spouses and dependent children to disclose their investments only to the Ethics Commissioner – they are not required to sell anything. Spouses should be required to disclose their investments publicly (as the Parker Commission also recommended in 1987 – Chapter 27, pp. 343-361 (especially 360-361)), as should all children whether or not they live at home.

To avoid disrupting the lives of other relatives and friends of a person who enters politics or government, another approach is usually used to prevent conflicts with their interests. The minister or official is prohibited from taking part in discussions or

decisions that affect their own interests, and the interests of their relatives or friends, directly or indirectly.

However, like political ethics laws across Canada, the federal ethics law (*Conflict of Interest Act*), and the MPs' ethics code and Senate ethics code, don't do this. They all have a huge loophole that actually allows ministers and top officials, and all politicians and their staff, to participate in and make all decisions that apply generally (which almost all their decisions do), even if they have a direct financial conflict of interest.

Yes, that's right, the most powerful people in politics in Canada are allowed to profit from their decisions.

"The federal ethics law should be called the 'Almost Impossible to be in a Conflict of Interest Act' because it has a huge loophole which means it doesn't apply to 99 percent of the decisions and actions of Cabinet ministers, their staff and appointees, and allows them to profit from their decisions, as do the codes for MPs and senators," said Duff Conacher, Co-founder of Democracy Watch.

In 2018, Ethics Commissioner Mario Dion exploited the huge loophole in the federal *Conflict of Interest Act* to let Finance Minister Bill Morneau off the hook even though he introduced Bill C-27 which would have changed pension laws in ways that would have increased profits for his family's company, Morneau Shepell Inc., and for himself as a shareholder in the company.

Former Ethics Commissioner Dawson exploited this same loophole to allow Nigel Wright, then-Chief of Staff for Prime Minister Harper, to take part in discussions and decisions in which he had a financial interest.

The loophole in the *Act* (in the definition of "private interest" in subsection 2(1) of the *Act*), which also exists in the MPs' ethics code and the Senate ethics code, allows all federal Cabinet ministers, their staff and appointees, to participate in decisions even when they have a direct interest in the outcome, as long as the decision applies generally.

This loophole must be closed, and the rule must be that the Prime Minister, all federal ministers, their staff and appointees (including all top government officials), all MPs and senators and their staff, are prohibited from taking part in any decision if they have even the appearance of a conflict of interest.

To be clear, the *Conflict of Interest Act*, and MP and senator codes, already prohibit participating in decision-making processes that only specifically affect one or a few people or entities when in the appearance of a conflict of interest, although this could be clarified by specifying that apparent conflicts of interest are covered. The broad, comprehensive language used in the operative provisions of the *COIA* make it clear that it was intended to apply to real and apparent conflicts of interest. As noted above, section 3 of the *COIA* articulates among its purposes prevention and avoidance of "conflicts of interest" generally, without any limiting language that would confine it to

"real" conflicts of interest. This broad language is reinforced by subsection 6(1) of the *COIA* which covers situations in which the public office holder "reasonably should know" that they would be in a conflict of interest.

The Federal Court of Appeal has ruled unanimously that the phrase "a conflict of interest" means a situation in which a public office holder has "competing loyalties" or "a real or seeming incompatibility between one's private interests and one's public or fiduciary duties" that "might reasonably be apprehended to give rise to a danger of actually influencing the exercise of a professional duty" (*Democracy Watch v. Campbell*, [2010] 2 F.C.R. 139, 2009 FCA 79, para. 49, quoting from *Cox v. College of Optometrists of Ontario* (1988), 65 O.R. (2d) 461 (Div. Ct.)). In other words, the phrase "conflict of interest" includes an apparent conflict of interest.

The key change needed is to close the huge loophole that allows ministers, top government officials, MPs and senators, and their staff, to participate in all decisions, including decisions that apply generally, when they have any kind of conflict of interest.

In addition to this huge loophole in the *Conflict of Interest Act*, Federal Ethics Commissioner Mary Dawson made things even worse in 2009 by creating so-called ethics "screens" that hide whether ministers and officials are actually stepping aside when they have a conflict of interest. The federal ethics law requires disclosure every time a minister steps aside. Unfortunately, in a very flawed decision, the Federal Court of Appeal allowed the use of these unethical "smokescreens".

In truly incredible contrast, the rules and code that Cabinet ministers have imposed on lower level federal government employees, who don't have much decision-making power, prohibit them from participating in all decisions if they have even a potential or apparent of a conflict of interest (even if the decision applies generally), and require them to provide honest advice, and they can be suspended or fired for violations.

The Prime Minister has the same rules in his code for ministers and their staff (which has existed in one form or another since 1985). However, those rules are only in the PM's code, not in the federal ethics law, and no prime minister has ever enforced these key rules in their code.

The simple solution is to take the rules in the PM's code (or the government employees' code) and put them into the federal ethics law so that they apply to Cabinet ministers, their staff and appointees, and are enforced by the Ethics Commissioner (and every government across Canada should make the same change to its ethics law).

"As well, a rule requiring honesty should be added to the federal ethics law and codes, to ensure politicians and government officials are penalized if they mislead voters about anything, including their own wrongdoing," said Conacher. See details here.

See more details here.

5. Stop questionable sole-source spending directly

Loopholes also need to be closed that allow federal government institutions to hand out sole-source contracts for very questionable reasons, and they should be required to do a compliance check with the Auditor General and Parliamentary Budget Officer when initiating any significant spending process. See details here.

6. Strengthen enforcement to prevent unethical decision-making

The watchdogs who enforce these rules (ethics, lobbying, information and integrity commissioners, and auditor general and procurement ombudsman) are handpicked by the Cabinet through secretive, biased processes, as the Federal Court of Appeal recently ruled.

As a result, the watchdogs often act like lapdogs, failing to conduct audits to discover wrongdoing (audits which are needed to supplement FINTRAC's anti-bribery inspections (that also need to be strengthened)), and letting many people off the hook with very questionable, secret rulings.

Very unfortunately, the Federal Court of Appeal has ruled that federal ethics and lobbying watchdogs' rulings can't be challenged (To see the ruling, click here).

As well, there are no penalties for politicians who violate key ethics rules, or for politicians government officials who violate key spending rules, other than a public report.

"Canada's key good government watchdogs must be chosen by an independent commission, not by Cabinet ministers and officials they watch over, and they must be required to conduct audits and issue public rulings on every questionable situation, and empowered to impose high fines on violators, with everyone having the right to challenge their rulings in court," said Conacher.

See more details here, and here.

Finally, staff of politicians and parties are not protected by the federal whistleblower protection system, weak as it is. A House Committee unanimously recommended in June 2017 most of the key changes to make the system effective. All of these changes need to be implemented. See more details here.