

## The Harper Impact on the Federal Ethics Regime

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In 2004, the Paul Martin government spearheaded legislation that established an overall ethics regime for Parliament. The new system included a process for creating a code of conduct for MPs and a more stringent code of conduct for cabinet ministers; the appointment of an independent<sup>1</sup> Ethics Commissioner for the House of Commons, cabinet and order-in-council appointments; the appointment of an independent Ethics Officer for the Senate; and a process for the Senate to follow to create a code of conduct for the Upper House. This Parliamentary ethics reform was late in coming. The provinces began to establish similar ethics regimes beginning with Ontario in 1988<sup>2</sup> (see Appendix I for a complete list).

There were some major hurdles for the Martin government to overcome to enact the ethics legislation, as there are for any significant change. One especially difficult challenge faced by the Liberal government was to convince the Senate – even a Senate with a Liberal majority -- that having ethics rules and an independent commissioner would be useful for preventing conflicts of interest and enhancing the public image of the Upper House. As a reaction to the scandals faced by the Chrétien government during its last years in office, the Chrétien cabinet had introduced legislation that would have created one code of conduct for the Senate and the House of Commons, and one ethics commissioner to advise MPs, Senators and public office holders and to adjudicate allegations of breach of the Code.<sup>3</sup> During the Senate's consideration of this bill, the Senate concluded that it required its own Ethics Officer and its own conflict of interest code, and so the Chrétien proposal died in the Upper House. The Martin government re-introduced amended ethics legislation that empowered the Senate to choose its own Ethics Officer and to develop its own code of conduct, and this time the legislation passed. Dr. Bernard Shapiro became Canada's first Ethics Commissioner in 2004, and the Senate chose Mr. Jean Fournier to become its first Ethics Officer in 2005.

The legislation creating the position of Ethics Commissioner required the Prime Minister to “consult” with the Leader of every recognized party prior to the appointment, and this Prime Minister Martin did in a cursory way shortly before Shapiro's appointment was announced. It was clear that Opposition Leader Stephen Harper was not pleased with the extent of the consultation. When Shapiro's lack of extensive experience with government ethics regimes led to media criticism of the appointment, the Conservatives were not disposed to disagree. Harper became more critical of Shapiro as time went on,

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<sup>1</sup> The Ethics Commissioner can only be removed for cause after a resolution in the House of Commons, and so has this degree of independence. The Commissioner administers two codes – one for the House of Commons, and one for public office holders. There are some restrictions on the ability of the Commissioner to act independently of the Prime Minister regarding the latter role, a situation that has been only partly addressed by the Federal Accountability Act.

<sup>2</sup> For a description of the establishment of independent ethics commissioners in the provinces up to 1997, see Ian Greene and David Shugarman, *Honest Politics: Seeking Integrity in Canadian Public Life* (Toronto: Lorimer, 1997).

<sup>3</sup> See "The Chrétien Ethics Legacy," Special edition of *Review of Constitutional Studies*, 2004.

to the point where after becoming Prime Minister, he was reportedly reluctant to cooperate with Shapiro in his first investigation of an alleged breach of ethics rules -- .<sup>4</sup>

Only a few months after the Conservative Party took power in 2006, the Harper government introduced the Federal Accountability Act in order to fulfill its election promise to create higher standards of ethics and accountability in government, and as a reaction to some of the recommendations of the Gomery report.<sup>5</sup> The legislation as originally introduced would have abolished the offices of the Ethics Commissioner and the Senate Ethics Officer, and replaced them both with a new parliamentary Conflict of Interest and Ethics Commissioner. As would be predicted, the Senate objected to the merger of the offices, and in the end the government relented, and being in a minority situation, had to allow the Senate to retain its separate Ethics Officer in order to get the legislation through Parliament.

This paper argues that the attempt to abolish both of the Martin-era ethics commissioners and replace them with a single commissioner was more of an attempt by the Harper government to settle scores with the former Martin government than an attempt to institute a carefully thought-out ethics regime. However, both government supporters and members of the opposition have been guilty of trying to use the new ethics regime as a weapon in the blood sport of politics rather than as a tool to enhance their credibility and trust with voters, and thus they have missed an important opportunity promote the legitimacy of the Canadian political system through the Parliamentary ethics regime. An independent officer of Parliament ought to be respected by both sides of the House; instead, the Harper government has promoted the undermining of the legitimacy of the office of the Ethics Commissioner, leading to the resignation of Dr. Shapiro in March of 2007.<sup>6</sup> Although the creation of independent ethics commissioners is an important step forward in advancing ethical standards in Canadian politics, it is possible that because of the vitriolic atmosphere in Parliament in the current era, no one holding the position of Conflict of Interest and Ethics Commissioner in the foreseeable future will be able to garner the respect needed to make the system work effectively.

This paper also argues that the benefits of the separate ethics system for the Senate outweigh its deficiencies. Ethics rules only work if there is broad participation in their drafting, and because the Senate has its own Code and its own independent commissioner, the rules have more credibility in the Senate than might otherwise be the case. In addition, because the Senate has its own ethics commissioner, the commissioner is more likely to be successful in his educational role than would be the case if just one commissioner was in place for both the Senate and House of Commons.

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<sup>4</sup> Les Whittington, "Federal ethics czar resigns; Shapiro clashed with Harper over probe into Emerson's switch to Conservatives." *Toronto Star*, Mar 30, 2007, A6.

<sup>5</sup> Ian Greene and David Shugarman, "Commission of Inquiry into the Sponsorship Program and Advertising Activities, phase I Report and Phase II Report." 49 (2) *Canadian Public Administration* (Summer 2006), 220-232.

<sup>6</sup> Robert F. Benson, the Deputy Ethics Commissioner under Shapiro, was appointed as Interim Ethics Commissioner on April 2, 2007. However, he left the position at the end of April for a position in the United Nations related to ethics. The Acting Deputy Commissioner is currently filling in.

The paper will begin by examining the establishment of the office of the Ethics Commissioner, and then will review the major inquiries conducted by Dr. Shapiro prior to his resignation. It will then proceed to review the separate ethics regime for the Senate.

### **Canada's First Ethics Commissioner**

Bernard Shapiro had had a distinguished career both in the academic world and in the public service prior to his appointment as Canada's first Ethics Commissioner in 2004. He earned his doctoral degree at Harvard University in 1967, and became a professor and then Associate Dean at the University of Boston. In 1976 he then became Dean of Education, and later Vice-President Academic at the University of Western Ontario. From 1980 to 1986, he was Director of the Ontario Institute for Studies in Education. From 1986 to 1992, he served as Deputy Minister for three Ontario government ministries: Education, Skills Development, and Colleges and Universities; as well, he was Deputy Secretary to the Cabinet, and Deputy Minister and Secretary to the Management Board.<sup>7</sup> He was a Professor at the University of Toronto for two years prior to becoming Principal and Vice-Chancellor of McGill University, a post he held from 1994 to 2002.<sup>8</sup> He has received honorary degrees from eleven universities around the world.<sup>9</sup>

He was viewed as a Liberal Party sympathizer, partly because of his Deputy Minister experience with the Peterson government in Ontario, but he was also seen as an advocate of higher ethical standards in government. He was surprised when Prime Minister Martin asked him whether he would consider becoming the first Ethics Commissioner, and he accepted because he could contribute to the Canadian political system by helping to raise the level of respect that Canadians have for their elected politicians.<sup>10</sup> In interviews that he gave after his appointment, he admitted that he knew only a little about the ethics regimes that had been developing in the provinces prior to his appointment.

Shapiro was faced with a Herculean task as the first ethics commissioner. Ethics commissioners in the Canadian provinces are expected to meet with all elected legislators, and in particular with cabinet ministers, to explain the rules, review personal disclosure statements, and decide on items that were required to be publicly disclosed. Shapiro was not only faced with setting up the bureaucracy for the new office of the ethics commissioner, but also with deciding how to advise three times as many elected members as any provincial ethics commissioner would have to advise.<sup>11</sup> In addition,

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<sup>7</sup> The Liberals formed the Ontario government from 1985 to 1990, and the NDP was in government from 1990 to 1995.

<sup>8</sup> His twin brother, Harold, is President Emeritus of Princeton University.

<sup>9</sup> Paul Axelrod, Ed. *Essays in Honour of Bernard Shapiro*. Montreal: McGill-Queens, 2004.

<sup>10</sup> McLaughlin College Public Policy Lecture, March 24, 2005, York University, Toronto, Ontario.

<sup>11</sup> There are two kinds of advising conducted by ethics commissioners. There is the advice tendered as soon as possible after election, and general advising as called on by elected members. In Ontario, the Integrity Commissioner receives about 400 to 500 inquiries per year. Because the House of Commons has three times as many members, it would be expected that the Ethics Commissioner would receive in the neighborhood of 1200 to 1500 inquiries annually.

Shapiro's office had jurisdiction over 1,250 full-time order-in-council appointments and 2,200 part-time appointments<sup>12</sup> – a responsibility not allocated to the provincial ethics commissioners.

In addition to their advisory and educative roles, Ethics commissioners also investigate allegations of breach of the ethics rules. To make Shapiro's challenges even more daunting, several of the allegations that Shapiro was called on to investigate in the early days of his office were extremely complex. To complicate matters, his wife, Phyllis, passed away in November of 2004 after a brief battle with cancer.

### **Inquiries conducted by Bernard Shapiro**

During his two years in office, Shapiro conducted one inquiry under the Prime Minister's Conflict of Interest and Post-Employment Code for Public Office Holders – regarding Citizenship and Immigration Minister Judy Sgro – and seven inquiries under the Conflict of Interest Code for Members of the House of Commons.<sup>13</sup> The results of these inquiries will be presented in order of requests made to the Commissioner for an inquiry.

The Sgro Inquiry: In November of 2004, Dr. Shapiro received a request from Diane Ablonczy, the Conservative Member for Calgary-Nose Hill, to conduct an inquiry regarding allegations that Judy Sgro, the Liberal Minister of Citizenship and Immigration, had used her public office to assist Alina Balaican to obtain a temporary work permit so that she would not have to leave the country. In addition to volunteering in Ms. Sgro's campaign office, Ms. Balaican worked as an exotic dancer, and had been in Canada on a temporary work visa (which was running out during the 2004 election campaign) to work in strip clubs. As well, Ms. Ablonczy alleged that Ms. Sgro's campaign office had assisted Mr. Harjit Singh, who was dodging a deportation order, and had regularly delivered pizza to the campaign office. Third, Ms. Ablonczy alleged that Song Dae Ri, a North Korean defector, had been active in Ms. Sgro's campaign office, hoping to use the connection to seek landed immigrant status. In December, Ms. Ablonczy made further allegations in a letter to Dr. Shapiro's office, most notably that Ms. Sgro offered "special access" to the owners of two or more strip clubs to consult with her Chief of Staff, Ihor Wons, with the hope that he would assist them in bringing additional strippers to Canada.<sup>14</sup> In January of 2005, Ms. Sgro resigned as Minister, pending the outcome of Dr. Shapiro's inquiry.

Dr. Shapiro's report on the Sgro inquiry, issued in June of 2005, indicated that because the office of the Ethics Commissioner was still in the process of being established, it

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<sup>12</sup> Office of the Ethics Commissioner, Annual Report of the Ethics Commissioner for Year Ending March 31, 2005 (Ottawa: Office of the Ethics Commissioner, June 30, 2005), 6.

<sup>13</sup> In addition to these inquiries, up to March 31, 2006, the Commissioner rejected seven requests for inquiries because he determined that they were outside his jurisdiction, and/or there were not reasonable grounds to conduct an inquiry. *Annual Report of the Ethics Commissioner on activities in relation to Members of the House of Commons for the Fiscal Year Ending March 31, 2006* (Ottawa: Office of the Ethics Commissioner, 2006), 8.

<sup>14</sup> Bernard J. Shapiro, Ethics Commissioner, *The Sgro Inquiry: Many Shades of Grey* (Ottawa: Office of the Ethics Commissioner, June, 2005, Appendix II and Appendix III.

lacked adequate resources to investigate the complex allegations of Ms. Ablonczy. Shapiro contracted with David Scott and Lisa Micucci, lawyers with the firm Borden Ladner Gervais, to investigate the facts. As well, he contracted with Robert Marleau of RDM Consulting to advise as to which allegations were within the proper jurisdiction of the Ethics Commissioner.<sup>15</sup> Borden Ladner Gervais interviewed under oath forty people.

In his report on the inquiry, Dr. Shapiro concluded that Ms. Sgro took no action with regard to the attempts of Harjit Singh and Song Dae Ri to obtain her assistance in obtaining immigration status in Canada. Ms. Sgro did grant a Temporary Residence Permit to Alina Balaican “on grounds well within the Minister’s legislative discretion and entirely consistent with the Minister’s ongoing criteria as reflected in her previous discretionary decisions.”<sup>16</sup> Shapiro also concluded that Sgro did not know that Balaican had been volunteering in her campaign office, but “members of her staff certainly did know [and therefore] her staff placed her in a conflict of interest both by allowing Ms Balaican to serve as a volunteer in the first instance and then by not fully and explicitly informing the Minister when the case was brought to her for a decision.” In addition, Shapiro found that similar conflicts of interest existed “not to donors or individuals listed as volunteers directly but to the relatives and associates of those who were assisting the re-election campaign. This was in clear violation of Principle 7 of the Conflict of Interest Code for Public Office Holders....”<sup>17</sup> With regard to sanctions, Shapiro observed that “The Minister has already resigned, and without comment on that decision, I have no further recommendation to make.”<sup>18</sup>

The Sgro affair was prominent in the media in late 2004 and the first half of 2005 for a number of reasons. Harjit Singh claimed that he had provided Sgro’s campaign office with free pizza in exchange for a permit to stay in Canada, and that Sgro had reneged on the deal. He attempted unsuccessfully to sue her, and was deported from Canada in February of 2005. In May, he withdrew his allegations and apologized to Sgro. The length of time that it took for Shapiro’s office to investigate and report was criticized, as well as the cost of the inquiry. Democracy Watch claimed that the fact that Shapiro provided Sgro with “confidential advice” in the midst of his inquiry – advice that was subsequently made public by Sgro – caused Shapiro to appear biased. In addition, Democracy Watch claimed that the main law firm hired by Shapiro had strong Liberal Party connections. It pointed out that David Scott of Borden Ladner Gervais, “... was then, and remains, counsel for former Prime Minister Jean Chrétien in his participation before the Sponsorship Inquiry. One of Judy Sgro's former Liberal Cabinet colleagues is a member of BLG and was hired in February 2005, during the investigation period. Further, BLG donated almost three times as much to the federal Liberal Party and party

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<sup>15</sup> The total additional cost for the inquiry, above and beyond the resources of the Office, was \$170,747, including \$120,500 for Borden Ladner Gervais for fact-finding, \$5,040 to RDM Consulting, and \$37,285 to three additional legal firms (including \$11,660 to Borden Ladner Gervais) for legal interpretations. The Sgro Inquiry, Appendix VI.

<sup>16</sup> The Sgro Inquiry, 22.

<sup>17</sup> Ibid., 23.

<sup>18</sup> Ibid., 24.

candidates between 2000 and 2003 than to all other federal political parties combined.”<sup>19</sup> As well, Shapiro’s report was criticized in the media for its ambiguity regarding the seriousness of the breach of the Code by Ms. Sgro.

The Grewal Inquiry: Joe Volpe, the new Liberal Minister of Citizenship and Immigration and the successor to Judy Sgro, in April of 2005 requested Dr. Shapiro to investigate allegations that Conservative MP Gurmant Grewal had requested personal bonds from some of those seeking his support on immigration matters. Dr. Shapiro issued his report on the matter in June of 2005, concluding that Mr. Grewal “has not fully complied with an obligation under the Code, but ... that his actions were an error in judgment made in good faith. It is my recommendation that given that his intentions, however misguided, were reasonable and that the practice has now ceased, no sanction be imposed.”<sup>20</sup> What the investigation showed was that Mr. Grewal had developed his own procedure for handling the numerous requests that he received, as an MP, for assistance from his constituents and others in obtaining visitor visas. Grewal decided that those wanting to receive his assistance had to pledge to post a bond,<sup>21</sup> which would be forfeited if the visitor did not return to his or her home country by the date of the expiry of the visitor visa. No money actually exchanged hands, and no fee was charged for the service, although several of those posting bonds were worried about how their financial situation would be affected if their visitor did not return as promised. Grewal was open about this procedure (the forms his office used to process applications are included in the Report), and had even introduced private member’s legislation to make a similar process universal.<sup>22</sup> The essential problem, of course, was that the process that Grewal had developed was outside the law. In addition, it was not clear what would happen to funds that might be obtained from a forfeited bond.

The Obhrai Inquiry: In May of 2005, Citizenship and Immigration Minister Joe Volpe sent another request to Dr. Shapiro to investigate what he considered to be another alleged violation of the Code, this time by Conservative Mr. Deepak Obhrai. Mr. Volpe alleged that Mr. Obhrai may have “i) entered into agreements in which he had been remunerated for assisting his sister-in-law and her family to immigrate to Canada; ii) had subsequently coerced his sister-in-law’s husband to return to India; and iii) had accepted gifts in return for assisting other persons with immigration matters.”<sup>23</sup> The allegations were supported by two affidavits that had been signed by Mr. Anand in India. Mr. Volpe forwarded the affidavits to the RCMP at the same time that he forwarded them to Dr. Shapiro. This inquiry took nearly two years to complete, as it was suspended during the time of an RCMP criminal investigation that took place between October of 2005, and

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<sup>19</sup> Letter sent by Duff Conacher, Coordinator, on behalf of the Board of Directors of Democracy Watch, to Dr. Bernard Shapiro, June 29, 2005.

<sup>20</sup> Bernard J. Shapiro, *The Grewal Inquiry* (Ottawa: Office of the Ethics Commissioner, June 22, 2005), 6.

<sup>21</sup> The pledges were for \$1,000 to \$250,000, with \$50,000 the “typical amount” pledged. *The Grewal Inquiry*, 4.

<sup>22</sup> Bill C-283, which received first reading on November 15, 2004.

<sup>23</sup> Bernard J. Shapiro, *The Obhrai Inquiry* (Ottawa: Office of the Ethics Commissioner, March 30, 2007), 3.

January of 2007. The final report was issued on the day of Dr. Shapiro's resignation – March 30, 2007.

Like the Sgro inquiry, the Obhrai inquiry proved to be unusually complex. It turned out that Mr. Obhrai, the MP for Calgary East, had assisted his sister-in-law, Mrs. Laxmi Anand, and her husband, Mr. Aman Anand, in obtaining permission to move to Canada with their two sons in 2003. In 2004, the family split up, with Mr. Anand returning to India with one of their sons. Mr. Anand's relationship with Mr. Obhrai had become strained, and Mr. Anand wanted his wife and his other son to return to India, while Mrs. Anand preferred to stay in Canada. Mr. Anand alleged that he had paid Mr. Obhrai for immigration assistance – an allegation denied by Mr. Obhrai – but he “appeared willing to retract all the allegations in exchange for the return of his wife and youngest child to India.”<sup>24</sup>

Dr. Shapiro's office arranged to have an interview conducted with Mr. Anand in India. Dr. Shapiro's conclusion after studying the results of the interview was that Anand proved to be a “contradictory and unreliable” witness.<sup>25</sup> As well, it was discovered that the person who had claimed to have notarized the affidavits signed by Mr. Anand in India was not on the registry of notaries. On the other hand, Mr. Obhrai and Mrs. Anand stopped cooperating with the Commissioner's office once it had been decided that the Office would hire a lawyer to interview Mr. Anand in India.

On September 15, 2005, Dr. Shapiro gave an interview to the Ottawa Citizen, and when questioned about the Obhrai inquiry, was quoted as saying, “I have some material that suggests something inappropriate was happening. If true, it seemed worth looking into. If untrue, it will turn out not to be.” Mr. Obhrai considered that these remarks constituted a breach of the privacy stipulations in the Conflict of Interest Code for Members of the House of Commons, and he therefore brought his complaint to the Standing Committee on Procedure and House Affairs. He also complained that Shapiro had not given him formal notice that he had initiated a formal inquiry. The Committee met in October and November, and heard both from Mr. Obhrai and Dr. Shapiro. The committee concluded “that the Ethics Commissioner was in contempt of the House of Commons. In the circumstances, however, it does not recommend any sanctions or penalty.”<sup>26</sup> With regard to formal notice, Dr. Shapiro maintained that he had been in discussion with Mr. Obhrai two days after Mr. Volpe sent the allegations to Dr. Shapiro, and that Obhrai was fully aware of the nature of the allegations. Mr. Obhrai claims, however, that he was not aware that Dr. Shapiro had decided to conduct a formal inquiry, rather than a preliminary inquiry. With regard to the interview with the Ottawa Citizen, Dr. Shapiro admitted, in his March 30 report, that “In hindsight, however, I understand that my comments were somewhat ambiguous and open to misinterpretation. In the future, therefore, I will limit

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<sup>24</sup> Ibid, 4.

<sup>25</sup> Ibid, 6.

<sup>26</sup> Standing Committee on Procedure and House Affairs, 51<sup>st</sup> Report, November, 2005, chaired by Don Boudria. Although a Liberal, Boudria had been consistently opposed to the idea of creating an independent ethics commissioner for the Parliament.

my media comments in relation to any inquiry to a simple and clear confirmation that an inquiry is proceeding and nothing else.”<sup>27</sup>

The Grewal-Dosanjh Report: An NDP MP for a New Brunswick riding, Yvon Godin, requested Dr. Shapiro to conduct an inquiry surrounding the circumstances around the surreptitious audio taping of conversations with Ujjal Dosanjh, Minister of Health in the Paul Martin government, and Tim Murphy, Chief of Staff to Martin.

The situation in question occurred during the raucous days leading up to the non-confidence vote on the Liberal government’s budget on May 19, 2005. The Liberals were expected to lose the vote unless one or two Conservatives or independents voted with the government. Vancouver Conservative MP Gurmant Grewal had been in contact with leading members of the Liberal party – Ujjal Dosanjh and Tim Murphy – with a suggestion that perhaps he and his wife (also a Conservative MP in Vancouver) might join the Liberals. Mr. Grewal recorded some of these conversations. What was not clear was whether Mr. Grewal may have been offering to switch sides in return for a personal or family benefit (for example, a United Nations position or a Senate appointment for he and/or his wife), or whether he was attempting to prove that leading Liberals were willing to bribe members of the opposition to switch sides in return for a public office favour.

Mr. Godin’s request asked Dr. Shapiro to investigate whether Mr. Grewal “sought inducements from Minister Dosanjh and/or Mr. Tim Murphy; or Minister Dosanjh or Mr. Murphy offered inducements to Mr. Grewal to change his vote(s) on matter before the House of Commons of Canada; [whether] Mr. Grewal surreptitiously audio taped conversations with Minister Dosanjh and/or others; and [whether] Mr. Grewal attempted to entrap Minister Dosanjh into improper conduct.”

Again, this was an extremely complex case. The Conservative Party had already released edited versions of the recording made by Mr. Grewal, claiming that this was proof that the Liberals were willing to bribe opposition members to cross the floor. On May 18, Conservative MP Belinda Stronach crossed the floor to join the Liberals, citing a disaffection with Conservative policies, and particularly with the leadership style of Stephen Harper. She was immediately given a position in the Liberal cabinet as Minister of Human Resources and Skills Development. Her defection was essential to the Liberal government’s survival in the May 19 vote of non-confidence.

Between August and November, Shapiro’s office “made numerous attempts” to schedule an interview with Stephen Harper, but were “informed Mr. Harper’s schedule did not permit an interview.”<sup>28</sup> Shapiro concluded from the evidence that Paul Martin had been clear that the Grewals were welcome to cross the floor, but that no deals could be struck and no promises given. He was critical of Dosanjh and Murphy for continuing discussions with Grewal even though it was clear from Martin that no “deal” could be struck. He was much more critical of Mr. Grewal: either he had tried to entrap leading

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<sup>27</sup> Ibid, 6.

<sup>28</sup> Bernard J. Shapiro, *The Grewal-Dosanjh Inquiry* (Ottawa: Office of the Ethics Commissioner, January, 2006), 6.

members of the Liberal party by getting them to agree to a “deal” in which he and his wife would cross the floor in return for a public office benefit, or he was attempting to secure benefits for himself and his wife in return for crossing the floor.<sup>29</sup> Grewall did not run in the 2006 election. His wife was re-elected as a Conservative MP.

The Smith Report: In October of 2005, Liberal MP David Smith requested Dr. Shapiro to investigate allegations about whether he had complied with the Code, and to provide a confidential opinion. In November, Conservative MP Pierre Poilievre sent a request to Dr. Shapiro to investigate similar allegations. Dr. Shapiro reported in December that Mr. Smith and his family had complied fully with the provisions of the Code. The allegations against Mr. Smith by Mr. Poilievre may have resulted from some confusion about when he relinquished his duties with a corporation, and when the provisions of the Code took effect.

The Gallant Inquiry: In February of 2006 (shortly after the Conservative government took office), Liberal MP Mauril Belanger requested an inquiry into whether Conservative MP Cheryl Gallant had “inappropriately retained and used personal information provided to her by two constituents.”<sup>30</sup> The “personal information” in question was information pertaining to passport applications for the two constituents, which it was alleged was used to produce Christmas cards sent to them. The investigation concluded that there was no breach of privacy.

The Harper-Emerson Inquiry: On March 2, of 2006, three members of the House of Commons<sup>31</sup> requested an inquiry into whether Liberal MP David Emerson’s crossing of the floor to join the Conservative Cabinet following the 2006 election, and prior to the opening of Parliament, constituted a breach of the Code in that he may have been induced to cross the floor by the offer of a cabinet appointment. The Martin government had been defeated in a non-confidence vote on November 28, 2005, and the 38<sup>th</sup> Parliament was dissolved on November 29, 2005. The 39<sup>th</sup> Parliament did not meet until April 3, 2006. However, the names of the newly-elected MPs were published in the Canada Gazette on February 6, and Shapiro determined that those whose names were published on February 6 had a right to request an inquiry. Nevertheless, to remove any doubt, Shapiro used provisions of the Code to “self-initiate” a preliminary inquiry. He had little choice: polls indicated that the great majority of Canadians were angry with Emerson’s defection so soon after the January 23 election and prior to the recall of Parliament, and passionate demonstrations were organized to protest against Emerson’s move by constituents in Vancouver-Kingsway, Emerson’s constituency. On the other hand, Stephen Harper, who had been Prime Minister since February 6, and who was likely still quite angry over

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<sup>29</sup> Ibid., 7.

<sup>30</sup> Bernard J. Shapiro, *The Gallant Inquiry* (Ottawa: Office of the Ethics Commissioner, April, 2006, 1.

<sup>31</sup> The inquiry was requested by Liberal MP Byron Wilfert, Liberal MP Wayne Easter, and NDP MP Peter Julian.

the defection of Belinda Stronach the previous year, was in no mood to cooperate with an inquiry.<sup>32</sup>

When Shapiro announced on March 2 that he would initiate a preliminary inquiry into the situation, Mr. Harper's communications director, Sandra Buckler, announced that Mr. Harper was "loath to co-operate" with Shapiro. Harper telephoned Shapiro about the inquiry on March 2, and later that day Harper told reporters "that he had indicated to Mr. Shapiro that he has no jurisdiction because it is a prime minister's right to appoint cabinet ministers." Two days later, Buckler attacked Shapiro's credibility, referring to him as a "Liberal appointee. We're not going to co-operate," she said. "This is a partisan attack."<sup>33</sup> She also referred to the censure of Dr. Shapiro by the House of Commons Standing Committee on Procedure and House Affairs the previous November. However, MP Ed Broadbent and other members of the opposition then stated that if Harper refused to cooperate, he could be in contempt of Parliament, and the NDP caucus considered introducing a motion of contempt when the new Parliament convened.<sup>34</sup> Broadbent had been critical of what he considered to be "numerous poor decisions" made by Shapiro since becoming Ethics Commissioner. Harper had even indicated to Broadbent that he intended to find a way to fire Shapiro, and asked Broadbent if he would consider being nominated to the post of Ethics Commissioner. Broadbent refused. He observed that Shapiro's mistakes 2004 don't "justify Harper's snub." Referring to Harper's apparent refusal to cooperate with Shapiro on March 2, Broadbent said, "That's a serious situation – a commissioner has very high status in the parliamentary system. Slipping into highly partisan language can totally undermine the office."<sup>35</sup>

Shapiro released his report on the Emerson situation on March 20.<sup>36</sup> He made no mention of Harper's public testiness on and after March 2, but merely indicated that he had spoken with the Prime Minister on March 2, and that both Harper and Emerson had responded in writing to the allegations on March 6. Shapiro concluded that Stephen Harper had contacted Mr. Emerson to ask him to cross the floor, and to offer him a cabinet position. Mr. Emerson decided to accept the offer as "a way to better serve his city, his province and his country."<sup>37</sup> Shapiro concluded that there was no evidence of breach of the Code as it was currently written, and so he exonerated Emerson and Harper and did not move into a full inquiry. However, Shapiro noted that this particular crossing of the floor was unusual in that it occurred immediately after an election, and prior to the convening of Parliament. As well, he expressed "disquiet" because of the "large gap between the values underlying the Preamble to the Members' Code and the detailed

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<sup>32</sup> Some members of the Conservative Party were critical that Shapiro had not investigated the floor crossing of Belinda Stronach. However, there is no evidence that anyone requested Shapiro to investigate.

<sup>33</sup> Peter O'Neill, "PM might be in contempt on probe, Broadbent says," *The Montreal Gazette*, March 9 2005.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Bernard J. Shapiro, *The Harper-Emerson Inquiry* (Ottawa: Office of the Ethics Commissioner, March 20, 2006), 1.

<sup>37</sup> *Ibid.*, 8. The January 23, 2006 election results for Vancouver-Kingsway, Emerson's riding, showed that Emerson won as a Liberal with 43.5% of the votes cast. Ian Waddell of the NDP was second with 33.5% of the votes, and the Conservative candidate was third with 18.8% of the votes.

conflict of interest rules within the Code itself.” The preamble expects members “to fulfill their public duties with honesty and uphold the highest standards so as to avoid real or apparent conflicts of interests, **and maintain and enhance public confidence and trust in the integrity of each Member and in the House of Commons.**” (emphasis added by Shapiro’s report) He recommended that Parliament consider this issue and find a solution acceptable to the majority of Canadians.

The Vellacott Inquiry: In March of 2006, Liberal MP Borys Wrzesnewskyi requested an inquiry into whether Conservative MP Maurice Vellacott had contravened the Code by accepting financial assistance to travel to Sudan from a group known as the Canadian Friends of Sudan, and not disclosing the financial assistance. Shapiro reported in June that although Vellacott had paid for his own personal travel expenses, he had received funds to cover the travel costs of “the individual who accompanied him during his travels” without whose services he “could not have undertaken the trip.”<sup>38</sup> He had not properly reported these funds. Shapiro concluded that there had been a technical contravention of the Code that “occurred through inadvertence or an error in judgment made in good faith,” and so he did not recommend any sanction.<sup>39</sup>

The letter that Mr. Wrzesnewskyi sent to Dr. Shapiro requesting the inquiry is illustrative of the toxic atmosphere surrounding issues of ethics in politics during the entire period of Dr. Shapiro’s tenure. Following is an excerpt from the letter:

In September 2005, Mr. Vellacott and I, along with several other individuals, took a trip to Sudan to get a first hand look at the very desperate situation that this country finds itself in. In order to take this trip Mr. Vellacott received financial assistance from me and through the Canadian Friends of Sudan. I have enclosed a copy of a handwritten note from Mr. Vellacott to me acknowledging receipt of \$2,000 (U.S.). I personally provided these funds to help defray the cost of his trip as I felt that it was of uttermost importance for as many individuals from all political parties to participate.

My reason for bringing this to your attention is that Mr. Vellacott is claiming that this was a self-financed trip, which is simply not true. You will note from the copy of the transcript of Mr. Vellacott’s press conference that he claims he went at his personal expense. Nowhere in the transcript does he acknowledge that he received any outside financial assistance for this trip.

**Prior to their election, the Conservative government claimed to have brought down the government on issues of honesty and accountability. I believe that they would be ashamed should it be found that a colleague of theirs has made false claims in press releases and false submissions to the Ethics Commissioner.**<sup>40</sup> (emphasis added by the author)

Ethics issues had dominated public debate about federal politics since Andrew McIntosh of the National Post broke the “Shawinigate” story in 1999, and especially since the opening stories leading to the sponsorship scandal in 2000.<sup>41</sup> Not only did the Conservatives try to generate as much political capital as possible from the ethical lapses

<sup>38</sup> Bernard J. Shapiro, *The Vellacott Inquiry* (Ottawa: Office of the Ethics Commissioner, June, 2006), 2.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, 5.

<sup>41</sup> Ian Greene, “The Chrétien Ethics Legacy,” Special edition of *Review of Constitutional Studies*, 2004.

of the government during the late Chrétien period, but this natural political tendency appeared to grow into a palpable hatred of the Liberal government, as if all of their motives and actions must be suspect and ethically challenged. The promotion of ethics and accountability in government became one of the Conservative party's five main platform planks during the 2006 election, just as ethics in government had been one of Jean Chrétien's main platform planks during the 1993 election in the wake of the serious ethical lapses of the Mulroney government. In this atmosphere, it was perhaps natural – if unfortunate -- for the Conservatives to view Dr. Shapiro's appointment as suspect and his inquiries as biased. In politics as in theatre, there are rarely any characters who are totally good or totally evil, in spite of the attempts of their friends or enemies to describe them in such a fashion. Chrétien's belated attempt to create the office of an independent ethics commissioner was a step in the right direction, in spite of the ethical shortcomings of his government. Martin's decision to create the Gomery commission on the sponsorship scandal was a brave move to promote ethics in politics, even though the Commission's findings may have cost the Liberals the 2006 election. Martin's success in creating an ethics regime that included two independent ethics commissioners was another huge step in the right direction, although in hindsight he should have given more thought to the process for choosing the first Ethics Commissioner.

Dr. Shapiro, a brilliant and honest individual whose chief desire in accepting the position of Ethics Commissioner was to serve his country and enhance the credibility of politicians of all stripes, did his best under incredibly strained circumstances. No ethics commissioner in Canada has faced so many complex cases – Sgro, Grewal-Dosanjh, Obhrai, and Emerson-Harper – during his first two years in office, and also during a period when he was setting up an office that covered an unprecedented number of public office holders, and while his spouse was terminally ill. His decisions were balanced, if at times somewhat obscure. The criticisms he faced were often unfair and unstatesmanlike, although he readily admitted mistakes he made that were a result of his lack of experience in the area of ethics and politics.

### **The Federal Accountability Act and the Harper Governments' Quest to replace Shapiro**

The animosity demonstrated by the new Conservative government in general, and by Stephen Harper in particular, toward Bernard Shapiro is documented above. The problem faced by Harper was that Shapiro had been appointed by Paul Martin (after a brief consultation with Stephen Harper) on May 17, 2004 for a five-year term, and could only be removed “for cause by the Governor in Council on address of the House of Commons.”<sup>42</sup> A majority government might have been able to manufacture cause (although none of Shapiro's shortcomings, in my opinion, came close to constituting a breach of good behaviour). Certainly, a minority government was unlikely to secure Shapiro's removal. Legislation could have been drafted that would have abolished the office of the Ethics Commissioner and replaced it with a new office with more independence and more substantial resources, but that would have been seen as a

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<sup>42</sup>52-53 Elizabeth II, Chapter 7, “An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence,” Assented to 31<sup>st</sup> March, 2004, S. 72.02 (1).

transparent move to get rid of Shapiro, as simply amending the then current legislation would have been the preferred route if the goal was simply to strengthen the office of the ethics commissioner. The solution that the government found was to introduce legislation that would abolish both the office of the Senate Ethics Officer and the Ethics Commissioner, and replace them with a new Conflict of Interest and Ethics Commissioner who would have jurisdiction over both houses. And by the way, the new Commissioner would be required to have a judicial or quasi-judicial background, something that Dr. Shapiro lacked. This was the clever solution adopted by the new government, and the enabling legislation was encased in the omnibus 280-page Federal Accountability Act, Bill C-2. This strategy initially seemed like a winner for the government. The existence of two ethics commissioners for Parliament would seem to most people to be wasteful –pandering to an upper house that many Canadians considered not terribly useful. And it was clear that the most highly-regarded ethics commissioners in the provinces – in Ontario and British Columbia in particular – had been retired judges.

Given the difficulty that the Chrétien and Martin governments had in getting legislation through the Senate to create an independent ethics commissioner’s office unless the Senate had its own separate Ethics Officer, it was clear that the section of the Federal Accountability Act dealing with the Ethics Commissioner’s office would face a serious challenge in the Senate. In the fall of 2006, the Senate Committee on Legal and Constitutional Affairs heard from a number of witnesses in its consideration of Bill C-2, including myself. Following is part of my testimony before the Committee:

The new regime that was put into place a few years ago was a major change and there were a number of bumps along the road.... One of the bumps ... was when the Senate decided that it would cooperate with the new regime only if it could have its own ethics officer and its own rules that were home-grown within the Senate. After some consideration, it seemed to me that [this] was a good idea because ethics regimes do not work [well] from the top down. If it is home-grown and the rules are developed in-house, people buy into it, and it is more likely to be effective. Regardless of which party holds the majority in the Senate, I do not believe any legislation will get through [this] House that abolished the separate ethics officer for the Senate. We must contend with that political reality.

The other reality is that when Paul Martin appointed Dr. Bernard Shapiro as the first Ethics Commissioner, he briefly consulted, as the legislation required him to do, Stephen Harper, then the leader of the opposition. However, it was a pro forma consultation, not a real one, which annoyed Mr. Harper and the relationship between Dr. Shapiro and Mr. Harper started on the wrong foot. That was unfortunate for the creation of a new regime, but we have to anticipate these are the kinds of bumps [naturally encountered] along the road....

The independent ethics regimes have worked well in the provinces because the commissioners spend the majority of their time talking with elected members – in the case of the Senate, it is Mr. Fournier [the Senate Ethics Officer] talking with senators – about the nature of ethics and conflict of interest, to develop a trust relationship to answer questions. My fear is that [a central] conflict of interest commissioner would find it difficult to establish that level of trust [amongst Senators]....

My second concern is the way the new conflict of interest commissioner would be chosen. The appointment of Mr. Shapiro rightfully annoyed Mr. Harper. Why not look to the experience in

British Columbia and Alberta where the legislature has a broad consultative process and asks for people to apply for the [commissioner's job]?

My third concern is that the restrictions on who can be appointed to the position of conflict of interest commissioner unnecessarily restrict the pool of potential candidates.... Having past experience as a judge prepares the commissioner for the proper frame of mind and helps the commissioner to deal with difficult situations dispassionately and sensibly. That does not mean people without that sort of background cannot also be good ethics commissioners....<sup>43</sup>

The Senate proposed numerous amendments to the Federal Accountability Act, most of which were rejected by the House of Commons. However, one Senate amendment that stuck was to retain a separate Ethics Officer for the Senate. Thus, Bill C2 as amended proceeded with the abolition of the office of the Ethics Commissioner, and replaced it with the office of a Conflict of Interest and Ethics Commissioner with practically the same responsibilities as the old Ethics Commissioner.<sup>44</sup> However, the new Conflict of Interest and Ethics Commissioner will be required to be “a former judge, or a member of another board, commission or tribunal who has demonstrated expertise in conflicts of interest, financial arrangements, professional discipline or ethics, or could be a former Senate Ethics Officer or Ethics Commissioner.”<sup>45</sup> As with the previous regime, the governor-in-council must consult with the leader of every party in the House, and the nominee must be approved by resolutions in the House prior to the appointment of the Commissioner by the Cabinet.

### **The Senate Ethics Regime**

In his First Annual Report, Senate Ethics Officer Jean Fournier quoted from the 2004-05 Annual Report of the British Columbia Conflict of Interest Commissioner to illustrate the nature of his own work: “by far the greatest portion of the Commissioner’s time is taken up by informal, confidential meetings with Members....to discuss Members’ problems or potential problems...or to provide assistance to Members in identifying potential future problems not readily observable at first glance with a view to their avoidance.”<sup>46</sup> During

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<sup>43</sup> Hansard, First Session Thirty-ninth Parliament, Senate of Canada, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Chair: The Hon. D.H. Oliver, Monday, September 18, 2006, 7:43 – 7:45.

<sup>44</sup> A major improvement brought about by this legislation is the inclusion of a definition of conflict of interest. The legislation states that “a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person’s private interests.” The Senate amended this section to include a definition of potential and apparent conflicts of interest, as is the case in some provinces, but this amendment was rejected by the House. The new legislation provides greater restrictions on public office holders who are parliamentarians regarding contracting with public sector entities, and Parliament has expanded powers to request the Commissioner to investigate possible contraventions of the Act by public office holders. See legislative summary of Bill C-2 prepared by the Parliamentary Information and Research Service, Law and Government Division, Political and Social Affairs Division, and Economics Division, 21 April 2006, *Revised 18 December 2006*. (<http://www.parl.gc.ca/LEGISINFO>)

<sup>45</sup> This amendment to the original legislation was introduced by an opposition member in order to make it possible for either Bernard Shapiro or Jean Fournier to apply for the new Commissioner’s position.

<sup>46</sup> Office of the Senate Ethics Officer, Annual Report 2005-2006 (Ottawa: Office of the Senate Ethics Officer), 21.

the year, Fournier received more than two hundred requests for assistance in interpreting the Senate Ethics Code. One hundred written opinions were provided, the most complex of which was reproduced in the Report as a guide to other Senators. Fournier worked with Senators to help facilitate their public disclosure statements, and a Senate Public Registry of Senators' disclosure statements was launched. There is no doubt in my mind that by allowing the Senate to retain its own independent Ethics Officer, the ethics regime for the Senate is likely to have more credibility amongst Senators, and will be more successful in preventing real conflicts of interest that would have been the case if the original version of the Federal Accountability Act had become law.

## Conclusion

The new federal ethics regime is an improvement over the pre-2004 system in which the Ethics Counselor was accountable to the Prime Minister. In spite of the public criticism of some parts of the decisions of Bernard Shapiro, his decisions have had more credibility than those of the old Ethics Counselor partly because Shapiro had – until the Federal Accountability Act was introduced – security of tenure. Even after the Federal Accountability Act was introduced, it is unlikely that that situation would have affected the outcome of Shapiro's decisions, as he has too much integrity to be influenced by petty politics. As well, in comparing Shapiro's inquiry decisions to those of the leading provincial ethics commissioners, I consider them thorough and carefully balanced. From time to time, the inquiry processes were somewhat clumsy due to inexperience, but the end results are not bad.

Clearly, the politics behind the request for inquiries was often petty. Conservative Diane Ablonczy no doubt requested an inquiry into the allegations against Judy Sgro in part to further embarrass the Martin government, which was already reeling from the sponsorship scandal. After Sgro resigned, the new Minister of Immigration, Joe Volpe, might well have requested the inquiries into the allegations against Grewal and Obhrai in part to get even with the Conservatives. With the allegations against Grewal and Dosanjh, the NDP was able to cast aspersions on both the Liberals and the Conservatives. The allegations against Smith, Gallant and Vellacott were trivial. The Emerson-Harper situation was clearly not trivial, but the existing Code is ambiguous about the propriety of crossing the floor, and Shapiro's recommendation that Parliament address this issue is timely.

In the early years of the ethics regime in Ontario, Integrity Commissioner Gregory Evans found that he was being requested to investigate a number of allegations that were made simply to embarrass and discredit the government or the opposition. In one of his Annual Reports, Evans recommended that requests for inquiries be screened by the party whips in order to ensure that the requests were in the public interest. He later reported good cooperation from the whips, and so the requests for inquiries that he received were by and large substantive and important ones.<sup>47</sup> The party whips in Ottawa would do well to heed the same advice.

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<sup>47</sup> Ian Greene and David Shugarman, *Honest Politics* (Toronto: Lorimer, 1997).

Dr. Shapiro's annual reports indicate that he was not likely able to meet in person with many MPs or cabinet ministers to explain the Conflict of Interest Code for Members of the House of Commons and to review their personal situations to provide advice on compliance. Advice was tendered primarily through letters of instruction, supplemented by the availability of office staff to answer inquiries. One of the strengths of the provincial ethics regimes is that individual cabinet ministers and members of the legislature are able to meet in person with the ethics commissioner to discuss compliance. These personal meetings mean that the ethics regime is taken more seriously than might otherwise be the case, and that potential problems have a greater chance of being caught before they turn into serious ethics issues. One of the challenges faced by the new Conflict of Interest and Ethics Commissioner will be to decide how to provide effective personal counseling to such a large group of MPs and cabinet ministers, in addition to several thousand other public office holders.

Prime Minister Harper's approach to the federal ethics regime has been anything but helpful and statesmanlike. The attempt to abolish the office of the Senate Ethics Officer as part of a thinly-disguised strategy for ending the tenure of Dr. Shapiro was not well-intentioned. It is fortunate that thanks to the tenacity of Senators on both sides of the floor, and their ability to persuade opposition members in the House, the Senate Ethics Officer was retained. Of course, this major amendment to the Federal Accountability Act means that the replacement of the office of the Ethics Commissioner with the office of the Conflict of Interest and Ethics Commissioner is shown up for what it was really all about – forcing the exit of Bernard Shapiro. If the federal ethics regime is ever to become as successful as its provincial counterparts, it is essential that party leaders put partisan considerations aside around ethics issues in order to ensure the success of the conflict of interest regime. Given a more respectful atmosphere in the House, it might be possible for the Commons to recruit a new Conflict of Interest and Ethics Commissioner who commands the respect of all members.

Appendix I  
Dates of Establishment of Offices of  
Independent Ethics Commissioners in Canada

■ Ontario	1988
■ British Columbia	1990
■ Nova Scotia	1991 (designated judge)
■ Alberta	1992
■ Newfd/Lab	1993
■ Saskatchewan	1994
■ NWT	1998
■ PEI	1999
■ New Brunswick	2000
■ Nunavut	2000
■ Manitoba	2002
■ Yukon	2002
■ Quebec	2002 (jurisconsult)
■ House of Commons	2004
■ Senate	2005