

The Evolution of the Office of Ethics Commissioner in Canada

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In 1988, the Ontario legislature created Canada's first independent office of ethics commissioner for the provincial legislature. By 2005, all of the provinces and territories, as well as the Senate and House of Commons, had independent ethics commissioners (see Figure 1).¹ These officials have a dual role: to educate elected members about the ethics rules they need to follow (primarily rules designed to prevent conflicts of interest), and to inquire into allegations of breach of the ethics rules.

There has been a good deal of controversy about whether this innovation is successful, or whether the institution of ethics commissioner is simply expensive window-dressing. Comparing media stories about conflicts of interest before and after the appointment of an independent ethics commissioner provides an indication of the effectiveness of this office. This evidence indicates that there has been a dramatic decline of conflict of interest stories in most jurisdictions following the establishment of the office of independent ethics commissioner.

The paper will begin by tracking the stories behind the establishment of the offices of ethics commissioner for elected legislators in the provinces, territories and the federal Parliament.² The paper will then analyse the impact of the office of ethics commissioner on the coverage of conflict of interest stories in leading Canadian newspapers.

Provincial and Territorial Ethics Commissioners

Ontario

Significant improvements in the ethics rules for elected officials in Canada have rarely come about except as a reaction to a scandal. Ontario pioneered the office of ethics commissioner in 1988 in reaction to conflict of interest scandals that came to light during the previous two years. At that time, there was no provincial legislation prohibiting

¹ In 2002, Quebec went part way toward the establishment of the office of an independent ethics commissioner by creating the office of a "jurisconsult," available to advise on compliance with the conflict of interest rules. This solution proved less than adequate, and in May of 2009, legislation was tabled to create the office of an ethics commissioner along the lines of the ethics commissioners in the other provinces. Rhéal Séguin, "Quebec unveils new code of ethics," *The Globe and Mail*, May 15/09, A6.

² Much of the information presented in this part of the paper is a re-write of Chapter 6 of Ian Greene and David Shugarman, *Honest Politics: Seeking Integrity in Canadian Public Life* (Toronto: Lorimer, 1997). Prof. Shugarman and I have recently agreed with Lorimer to prepare a second edition of the book by the fall of 2010, and this re-write is a first draft of parts of the second edition.

conflicts of interest for members of the legislature, but the premier's office had issued conflict of interest guidelines that required all members of the cabinet, their spouses and minor children to disclose publicly their non-personal assets, and to avoid conflicts of interest by withdrawing from decision-making in situations when the decision might result in a personal benefit for the minister or his/her family. As well, ministers were required to sell or put into trust all shares in public companies. Further, ministers and their spouses were prohibited from entering into contracts with the government.

Figure 1
Dates of Establishment of Offices of
Independent Ethics Commissioners in Canada

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|--------------------|---|
| ■ 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); 2009 (ethics commissioner) |
| ■ House of Commons | 2004 |
| ■ Senate | 2005 |

In 1986, accusations that a company associated with the husband of Management Board Chair Eleanor Caplan had benefitted from provincial government financing led to an investigation by the legislature's Standing Committee on Public Accounts. The Committee concluded that although there was no evidence of wrongdoing, the premier's guidelines had been breached. The Committee recommended that the guidelines should be replaced by legislation, and that an independent advisor be made available to members of the legislature to assist them in complying with the legislation.³

³ Ontario, Standing Committee on Public Accounts, Report on the Allegation of Conflict of Interest Concerning Elinor Caplan, MPP. September 1986.

While the Caplan situation was being investigated, it came to light that Premier Peterson's Minister of Northern Development and Mines had not publicly disclosed all of his holdings in forestry companies. Another committee of the legislature investigated, and found that Fontaine had failed to comply with the guidelines. Premier Peterson was criticized for failing to ensure that his ministers complied with the guidelines.

The René Fontaine affair created more unsavory publicity for the government just a few weeks after the Caplan investigation began. Fontaine, who was Peterson's Minister of Northern Development and Mines, was accused by the opposition of failing to disclose all of his holdings in forest companies, as the Premier's guidelines required. This matter was investigated by the Standing Committee on the Legislative Assembly, which reported around the same time of the release of the Caplan report. The Committee concluded that Fontaine had breached the Premier's guidelines "in three major respects [by neglecting to disclose all his holdings in three forest companies] and in many minor respects" by failing to withdraw from potential conflict of interest situations regarding government decisions about his companies.⁴ The Premier was also blamed for failing to ensure that his Ministers complied with the guidelines.

In response, Premier Peterson commissioned former Lieutenant Governor John Black Aird to review the extent to which members of the cabinet complied with the guidelines, and to recommend improvements. Aird found that 15 cabinet members, including the Premier, had breached the guidelines in minor ways because the guidelines were unclear. He endorsed the recommendation of the Standing Committee on Public Accounts that the guidelines should be replaced by legislation, and that an independent advisor should be appointed called an ethics commissioner.

Aird was of the view that in some ways, the premier's guidelines had been too strict by requiring cabinet members to divest themselves of all holdings in public companies. Instead, he recommended legislation that would require full public disclosure of the non-personal assets of ministers and their spouses, and recusal from decision-making in potential conflict of interest situations.⁵ He recommended that the ethics commissioner should have the powers of a commissioner under the Public Inquiries Act, and should be an independent officer of the legislature. The commissioner would have a dual role: to advise cabinet ministers on their obligations under the legislation, and to investigate allegations that the legislated rules may have been violated. The Peterson government implemented the Aird recommendations in 1987 legislation, but the legislation was drafted more broadly than that recommended by Aird in that it applied not only to cabinet members, but to all members of the legislature.⁶ The legislation also required

⁴ Ontario, Standing Committee on Legislative Assembly, Report on Allegation of Conflict of Interest Concerning Rene Fontaine, MPP. September 1986, 28-29.

⁵ John Black Aird, *The Aird Report*. Toronto: Premier's Office, 1986. Mimeo., 38, 51

⁶ However, there are stricter rules for cabinet ministers and parliamentary assistants, given that their responsibilities could more frequently lead to potential conflict of interest situations than MPPs who are not in cabinet.

the ethics commissioner to publish annual reports. Aird himself was appointed as the interim ethics commissioner, and in 1988 former Chief Justice Gregory Evans was selected by the legislature as the first tenured ethics commissioner in Canada.⁷ In Ontario the ethics commissioner is appointed through a vote of the legislature for five-year renewable terms.

The legislation prohibits cabinet ministers and other MPPs from using their public office to further their private interests or to benefit the private interests of others. Members must meet with the commissioner within three months of being elected and an annual basis after that to discuss compliance with the legislation.

It appears that MPPs find the services of the ethics commissioner useful. The Annual Reports summarize the inquiries received by the commissioner and his responses. Between 1988 and 1996, the commissioner received 740 inquiries from MPPs, including cabinet ministers. Most of these inquiries concerned situations in which a member was uncertain about whether a particular situation might be a potential conflict of interest. On average, the commissioner found that about a quarter of the inquiries described a potential conflict of interest situation.⁸ Given that members made an inquiry because they were uncertain about whether a particular situation might result in a conflict of interest, it is safe to conclude that the inquiry mechanism likely prevented MPPs from ending up in a substantial number of real conflict of interest situations.

British Columbia:

British Columbia was the second province to create an independent ethics commissioner after Bill Vander Zalm's Social Credit government was challenged by seven conflict of interest scandals involving cabinet ministers in the late 1980s. The most serious of these implicated the Premier himself. In September of 1990, the B.C. legislature speedily enacted the *Members' Conflict of Interest Act* in reaction to the scandals. The B.C. legislation was copied, in most respects, from the Ontario legislation. The Hon. E.N. (Ted) Hughes became the Interim Commissioner in October 1990 because the legislation required an extensive search process for Commissioner. Hughes was confirmed by a vote of the legislature for a five-year term as the first permanent commissioner beginning in May, 1991.

While serving as Acting Commissioner, Hughes was challenged by the Vander Zalm episode. In 1984, Vander Zalm and his wife, Lillian, had bought a property in a suburb of Vancouver which they developed into a theme park called Fantasy Garden World. After Vander Zalm re-entered politics in 1986, Lillian Vander Zalm took over the management of Fantasy Garden. After 1986, the theme park began to lose money, and

⁷ The official title was "Conflict of Interest Commissioner;" in 1994 the title was changed to "Integrity Commissioner."

⁸ Legislative Assembly of Ontario, Office of the Integrity Commissioner, Annual Reports, 1988-1996.

by 1989 the Vander Zalms were looking for potential purchasers for the property. In September 1990, the property was sold to Tan Yu, a wealthy Taiwanese businessman. Prior to the sale, Tan Yu had been entertained in the Premier's Office and the Lieutenant-Governor's residence. The opposition accused Vander Zalm of violating his own conflict of interest guidelines, which were proclaimed by the premier in 1987, by mixing business and politics. In February of 1991, both the Premier and the Leader of the Opposition requested Ted Hughes to investigate the matter. Hughes agreed, although he emphasized that he was not accepting the assignment pursuant to his role as Interim Commissioner of Conflict of Interest, because all of the events which he was to inquire into had occurred prior to the passage of the new conflict of interest legislation.

In April, Hughes issued his report. The report concluded that the Premier had committed several obvious violations of the 1987 conflict of the interest code. First, he had arranged for Tan Yu get special treatment to encourage him to buy Fantasy Gardens. Tan Yu was introduced to cabinet ministers, who were instructed to help Tan Yu with his plans for investments in British Columbia. In addition, Tan Yu wished to buy some Petro Canada property adjacent to Fantasy Garden, as a condition of purchase. Vander Zalm used his political connections to arrange the sale. Following Vander Zalm's interventions with Petro Canada, the Premier met Tan Yu, and Tan Yu gave him \$20,000 in cash.

Vander Zalm had not mentioned this financial transaction during his examination under oath, but later confirmed the transaction. No receipts were ever issued. Hughes was never able to ascertain the exact purpose of this mysterious transaction, although it appears that it may have been an acknowledgement of the Premier's promise to assist with the purchase of the Petro Canada property. Hughes found that Vander Zalm breached the Guidelines by accepting \$20,000 in cash from Tan Yu. According to Hughes, "...reasonably well-informed persons could properly conclude that the Premier's ability to exercise his duties and responsibilities objectively in the future might appear to be compromised given the bizarre circumstances in which the money was given to the premier and the lack of any reasonable explanation."⁹

Vander Zalm resigned as Premier following the issuing of the Hughes report. The once-mighty Social Credit Party was soundly defeated in the 1991 B.C. election, and has since disappeared from the B.C. political scene.

Hughes completed his term as conflict of interest commissioner in 1996, and in his final Annual Report he reflected on the past and future of the ethics commissioner's role. He felt that through having an independent ethics commissioner meet annually with MLAs and at least once with spouses to discuss the ethics rules, conflicts of interest caused

⁹ The Hon. E.N. Hughes, QC, Report on the Sale of Fantasy Garden World Inc. Victoria: Office of the Conflict of Interest Commissioner, April 1991. Mimdo, 57.

by a lack of understanding of the ethics rules could be successfully prevented, as the 1991-96 period in British Columbia politics demonstrated.¹⁰

Alberta:

Alberta enacted its conflict of interest legislation in 1991, following allegations of conflict of interest against Premier Don Getty and another Alberta cabinet minister, and the subsequent recommendations of an independent review panel that reported in 1990. However, an Ethics Commissioner was not appointed until 1992, and the Act did not come into full operation until March 1993. Robert Clark, a cabinet minister in the Social Credit governments of Ernest Manning and Harry Strom in the 1960s, was appointed by the Legislature as the first Ethics Commissioner. He was selected from nearly three hundred applicants for the job by an all-party legislative committee. The role of the Commissioner and the legislation are similar to the situation in British Columbia.

Mr. Clark has described his role as "90% priest and 10% policeman."¹¹ As with the other ethics commissioners, most of Clark's time is taken up by meeting members and advising them about how to comply with the legislation, and by giving opinions about what members think might constitute potential conflict of interest situations.

During three full years of operation in Alberta, the Commissioner received 86 requests to investigate allegations of conflict of interest, and found that nine were worthy of investigation. In these nine investigations, he found only two breaches of the Act – one very minor. The second of these involved Premier Ralph Klein, whose wife had been given shares of an Alberta company, Multi-Corp, that the premier had helped to promote, along with other Alberta companies, in Hong Kong. At the end of 1993, Mrs. Klein was given 10,000 shares in the company, and told that when she sold them, she would need to pay the company only \$1 per share plus interest. Although this transaction should have been reported to the Ethics Commissioner, it was not. When the opposition became aware of the situation and asked the Ethics Commissioner to report in 1995, the Commissioner took the blame for the lapse, stating that it was his fault for not asking whether Mrs. Klein had paid for the Multi-Corp shares.¹² In the end, Mrs. Klein sold the shares, paid \$1 plus interest to Multi-Corp, and donated the \$51,000 in profit to charity.

It is clear that the Alberta's office of the ethics commissioner has been successful in helping to educate elected members about conflicts of interest and how to avoid them,

¹⁰ British Columbia, Legislative Assembly, Annual Report of the Conflict of Interest Commissioner, 1996.

¹¹ *Canadian Parliamentary Review*, Winter 1995-96, 29.

¹² Robert Clark, *Report of Investigation into Allegations Relating to The Honourable Ralph Klein, Premier*. November 1995. Mimeo.

and with the exception of the Klein case, has settled a number of issues that might otherwise have continued to fester.

Newfoundland and Saskatchewan:

Newfoundland and Saskatchewan established independent ethics commissioners in 1993 and 1994 respectively. In Saskatchewan, in the late 1980s and early 1990s, it was revealed that every one of the 38 Conservative MLAs approved the diversion of 25% of their communications allowances to numbered companies. A number of them received illegal payments from these companies. Several MLAs were convicted of fraud.¹³ As a result, the Conservative Party was destroyed in the 1991 election. The Saskatchewan legislation was partly in response to this scandal.

In both Saskatchewan and Newfoundland, the ethics legislation and the role of the Commissioner is similar to that in the provinces described above, except that in Saskatchewan the Commissioner may not provide an opinion about an alleged breach of the Act except by resolution of the legislature. In contrast, in Newfoundland investigations can result from requests from Members of the House of Assembly or members of the public, and the Commissioner himself may initiate an inquiry. In Saskatchewan, Derrill McLeod, a lawyer in private practice, served as the first part-time Commissioner, while in Newfoundland the Chief Electoral Officer, Wayne Mitchell, also served as the Commissioner of Members' Interests. This role has since been transferred to the Newfoundland Commissioner for Legislative Standards.¹⁴

In the early years of the Newfoundland Commissioner, the most interesting of the inquiries he had conducted was the result of a probe from the Leader of the Opposition as to whether Premier Clyde Wells and another minister were in a conflict of interest situation because they had participated in a cabinet decision to sell Newfoundland and Labrador Hydro Corporation to Fortis Inc., a company in which they had financial interests. Mr. Mitchell's investigation showed that both ministers had at one time owned shares in Fortis, but had placed them in a blind trust acceptable to the Commissioner, and neither was aware of whether the Fortis shares had been sold by the Trustee and different shares purchased, or whether the Fortis shares had been retained.¹⁵

Nova Scotia and New Brunswick: Designated Judges:

¹³ Honest Politics, 1-2, and Brian Bergman, "Saskatchewan Tories in Fraud Scandal," *Macleans*, Nov. 18, 1996.

¹⁴ <http://www.legislativestandardscomm.gov.nl.ca/role.htm>

¹⁵ Newfoundland and Labrador, House of Assembly, Report of the Conflict of Interest Commissioner, 1994.

The conflict of interest legislation in Nova Scotia and New Brunswick, dating from the early 1990s, originally empowered the cabinet, in consultation with the Chief Justice of the province's superior court, to designate a judge to act as the Conflict of Interest Commissioner. In 2000, however, New Brunswick changed its procedures to mirror other provinces with independent ethics commissioners appointed by the legislature. In Nova Scotia, Members of the House of Assembly must complete and file with the Commissioner disclosure forms for themselves, their spouse and their dependent children annually, or within 90 days if there are significant changes. This information is available to the public. The Commissioner is empowered to respond to members' written queries. As well, the Commissioner will investigate alleged violations of the legislation if someone states under oath that they have reasonable and probable grounds to believe that a violation has occurred, and can produce sufficient evidence. As a result of an inquiry, the Commissioner has the power to levy a fine, or to order financial gains that have occurred as a result of a conflict of interest to be returned. The Commissioner may also refer the matter to the province's Supreme Court, and in this circumstance the Supreme Court has the power to declare a Member's seat vacant.

The "designated judge" in Nova Scotia and at first in New Brunswick acted as an independent ethics commissioner. However, because the administration of the conflict of interest legislation is just one small part of the duties of the designated judges, they have not adopted the kind of proactive approach to educational activities regarding ethical politics as do the commissioners who are not sitting judges. Indeed, because of the principle of judicial independence, the judges must remain more aloof from the Members than the independent ethics commissioners in the other provinces. As well, the designated judges do not produce annual reports, which are important educative tools as well as accountability mechanisms. Therefore, although the "designated judge" system is cost effective (the federal government pays the salaries of provincial superior court judges) and the judges provide an assurance of impartiality, this approach is not as strong on educating elected members as it should be.

Other Provincial and Territorial Jurisdictions

The example of the jurisdictions mentioned above in establishing independent conflict of interest or integrity commissioners mentioned was followed by the Northwest Territories (1998), Prince Edward Island (1999), Nunavut (2000), and by Manitoba and Yukon (2002). The federal Parliament was the last to adopt this innovation.

Federal Parliament:

Since the early 1970s, there has been an official who was available to offer advice to Members of Parliament about ethics rules, but until 2004, the federal Parliament did not have an independent ethics commissioner.

The first federal ethics counselor was known as the Assistant Deputy Registrar General (ADRG). This position was created by the Lester Pearson government in 1974 to process the disclosures of assets of cabinet ministers which were required by Pearson's 1973 conflict of interest guidelines. The ADRG reported through the Minister of Consumer and Commercial Relations to the Prime Minister. The ADRG's role in terms of advising ministers about how to avoid conflict of interest situations was similar to that of the independent provincial ethics commissioners. Lacking the high profile of an independent commissioner, the ADRG could not be expected to have the same kind of clout in advising compliance. For example, Sinclair Stevens, a cabinet minister in the Mulroney government, claimed that he was far too busy to consult with the ADRG, and that oversight might have been a factor in his subsequent ethics difficulties. It is doubtful whether a cabinet minister would succeed in avoiding a meeting with a truly independent ethics commissioner, as Stevens avoided meeting the ADRG in 1984 and 1986.

Because of numerous allegations of conflict of interest against members of the Mulroney cabinet, including Mulroney himself, the Mulroney government introduced conflict of interest legislation for cabinet ministers and MPs in 1988 and again in 1990. This legislation would have created a three-person ethics commission. There were two reasons for the three-person commission. First, the legislation would have covered not only cabinet ministers and MPs, but also Senators and senior public servants. Second, reasonable persons can sometimes have different ideas about what constitutes a conflict of interest, and it was considered that in this regard three heads are superior to one. The Mulroney legislation died on the order paper, as the Mulroney Conservatives were never very serious about enacting conflict of interest legislation.

One of the central issues in the 1993 election was ethical politics, and the Chrétien Liberals promised to ensure ethical government. As a result, the Chrétien government promised the establishment of an independent ethics counselor with a mandate at least to oversee the legislation regulating the activities of lobbyists. After the Liberals won the election, in 1993 the ADRG's position was given a higher profile in two respects. The title was changed to "Ethics Counselor" and made to report directly to the Prime Minister rather than through another minister. The Ethics Counselor was given jurisdiction over ensuring compliance with the Lobbyists Registration Act as well as the Prime Minister's conflict of interest guidelines.

In 2004, after revelations that eventually led to the "sponsorship scandal," 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 independent¹⁶ Ethics Commissioner for the House of Commons, cabinet and order-in-

¹⁶ The Ethics Commissioner could 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 were some restrictions on the ability of the Commissioner to act

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 compared with the provinces and territories.

There were some major hurdles for the Martin government to overcome to enact the ethics legislation. 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.¹⁷ 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 2005.¹⁸

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 is likely that then 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, 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.¹⁹ 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

independently of the Prime Minister regarding the latter role, a situation that has been only partly addressed by the Federal Accountability Act.

¹⁷ See "The Chrétien Ethics Legacy," Special edition of *Review of Constitutional Studies*, 2004.

¹⁸ Some of this information in this section was originally gathered for a paper I presented to the CPSA Annual Meeting in 2007: "The Harper Impact on the Federal Ethics Regime."

¹⁹ Les Whittington, "Federal ethics czar resigns; Shapiro clashed with Harper over probe into Emerson's switch to Conservatives." *Toronto Star*, Mar 30, 2007, A6.

reaction to some of the recommendations of the Gomery report.²⁰ 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.

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 to 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 promoted the undermining of the legitimacy of the office of the Ethics Commissioner, leading to the resignation of Dr. Shapiro in March of 2007.²¹ 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 after the election of the minority Harper Conservatives, no one holding the position of Conflict of Interest and Ethics Commissioner during that period would have been able to garner the respect needed to make the system work effectively.

Shapiro was faced with daunting challenges 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.²² In addition,

²⁰ 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.

²¹ 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.

²² 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 appointments²³ – a responsibility not allocated to the provincial ethics commissioners.²⁴

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.²⁵ After carefully reviewing Shapiro's reports on each inquiry, I have concluded first that Shapiro was faced with an unusual number of very complex situations to investigate in a very short period of time. Most provincial and territorial commissioners have been challenged with difficult cases in their time, but there is never more than one very challenging case a year. Shapiro was handed several very complex cases in the same year. Shapiro's reports on each of these allegations, from my perspective, were balanced and fair. In addition, he had 308 MPs to advise, as well as several thousand order-in-council appointments.

Initially in 2006, this legislation was an attempt to force Shapiro out of office by replacing the Senate Ethics Officer and Shapiro's position with a unified Parliamentary ethics officer. My view is that this would not be conducive to the promotion of ethics in government, as the more checks and balances the better. In May 2009, the Harper government has introduced similar legislation to abolish the Senate ethics officer, and replace this position with a unified Parliamentary officer. This move might be considered part of the strategy of the current government to centralize power and eliminate checks and balances.

Mary Dawson was appointed Conflict of Interest and Ethics Commissioner under the Parliament of Canada Act on July 9, 2007. Mrs. Dawson is a career public servant, and well-suited to the position. She is clearly non-partisan, and very competent. Following her appointment, the controversy over the office of the Ethics Commissioner appears to have subsided except for the latest attempt to abolish the separate Senate Ethics Officer position.

²³ 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.

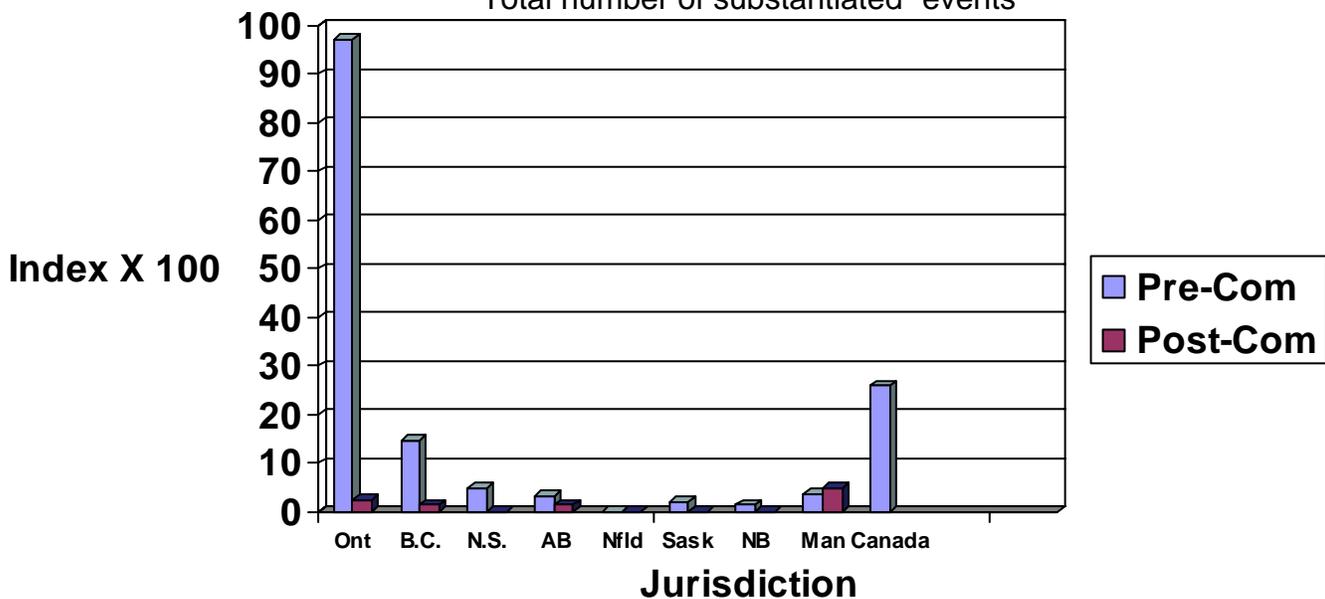
²⁴ Increasingly, however, provincial ethics commissioners are being allocated additional tasks, such as oversight of whistle-blowing legislation, lobbyist registration legislation, and members' expenses review, as is the case now in Ontario.

²⁵ 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.

Impact of the Ethics Commissioner positions

Figure 2 provides an indication of the impact of independent ethics commissioners. With the help of research assistants, newspaper stories in Canada's major dailies about allegations of conflict of interest against cabinet ministers – federal or provincial – were analysed from 1986 to 2004.²⁶ Only conflict of interest events that were eventually substantiated were included in the analysis shown in Figure 2. "Substantiated" means

Figure 2:
Conflict of Interest Events Index
Pre- and Post-Commissioner
Total number of substantiated "events"



²⁶ The source was the Canadian Index, and later the Canadian Newsstand. Prince Edward Island was not included, as PEI newspapers were not included in the indexes. As well, data from Quebec were not included in the above table because the "jurisconsult" did not play the same kind of educative role as the other ethics commissioners. There is no "post commissioner" data for the Canadian Parliament, because there was no independent commissioner until 2004.

either that a conflict of interest commissioner found that there had been a real conflict of interest situation or a violation of the ethics rules, or that prior to the time of an independent commissioner, I judged the conflict of interest allegations to be substantiated, based on the evidence.

I calculated the average number of substantiated conflict of interest events per year (the “index”), and then this multiplied this number by 100 so that the “index” could more easily be shown in graphic format. Figure 2 shows that in every jurisdiction except Manitoba, there was a drop – often quite dramatic -- in the number of substantiated conflict of interest events after the appointment of an independent conflict of interest commissioner. In Manitoba, the numbers were very small, however, because there had been an independent ethics commissioner for only two years of my study.

Conclusion

The concept of independent ethics commissioners who are officers of the legislature or Parliament is a Canadian innovation that is working. Prior to the creation of these positions, conflict of interest and other ethics guidelines were interpreted in a variety of ways by public office holders, and there was no way of determining in an impartial fashion whether the guidelines had been breached other than hearings by legislative committees, or the appointment of a commission of inquiry, such as the Parker commission with regard to allegations against federal cabinet minister Sinclair Stevens in 1986. Independent ethics commissioners provide a quick and credible mechanism for investigating allegations of breaches of the ethics rules. More importantly, however, the role of the commissioners in educating elected members about the content of the rules, and providing them with advice about how to avoid conflicts of interest given their personal business and financial situations, has clearly done a great deal to keep elected politicians out of trouble.

Whenever a jurisdiction creates the office of an independent ethics commissioner – and this is nearly always as a reaction to ethics scandals – there are complaints from members that their behavior is being too tightly monitored. Inevitably, however, most members find the independent commissioners helpful in helping them to decide how to behave in ambiguous situations. As well, sometimes members feel pressured by members of their political party to behave in ways that they are not comfortable with, and the opinion of the ethics commissioner provides the members with ammunition to resist such pressure.²⁷

Now that the initial controversy over the office of the federal Ethics Commissioner has subsided, there is the possibility that federal MPs and cabinet ministers will take full advantage of the office. Having a separate Senate ethics officer is a situation that is working well, and should not be tampered with.

²⁷ See the interviews with former Ontario Integrity Commissioner Gregory Evans, and former British Columbia Conflict of Interest Commissioner Ted Hughes, reported in Chapter 6 of Greene and Shugarman, *Honest Politics*.