Public Law in Canada 2022: *Lobbying & Ethics Investigations*

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Contents

Introduction

Canadian governments at all levels have instituted a complex regime of rules to govern the lobbying of government representatives. They have also instituted "ethics" rules to regulate potential conflicts between government representatives' private interests and the public interests they are required to safeguard.

These rules share a common goal: to protect the integrity and transparency of the political process and encourage public confidence in our parliamentary system. They differ, however, in focus.

Lobbying rules impose obligations on individuals and organizations who interact with government representatives, and to a lesser extent, on the government officials themselves. Ethics rules impose obligations on the government representatives themselves, to prevent the improper use of their public position.

These rules are complex and vary by jurisdiction. They are enforced through administrative bodies that operate at the federal, provincial, and municipal levels. Breach of the rules creates a risk of exposure to investigation and sanction, including, in some cases, criminal sanction.

This guide will outline lobbying and ethics rules in Canada, both at the provincial and federal levels, and provide an overview of how investigations of potential lobbying and ethics violations work.

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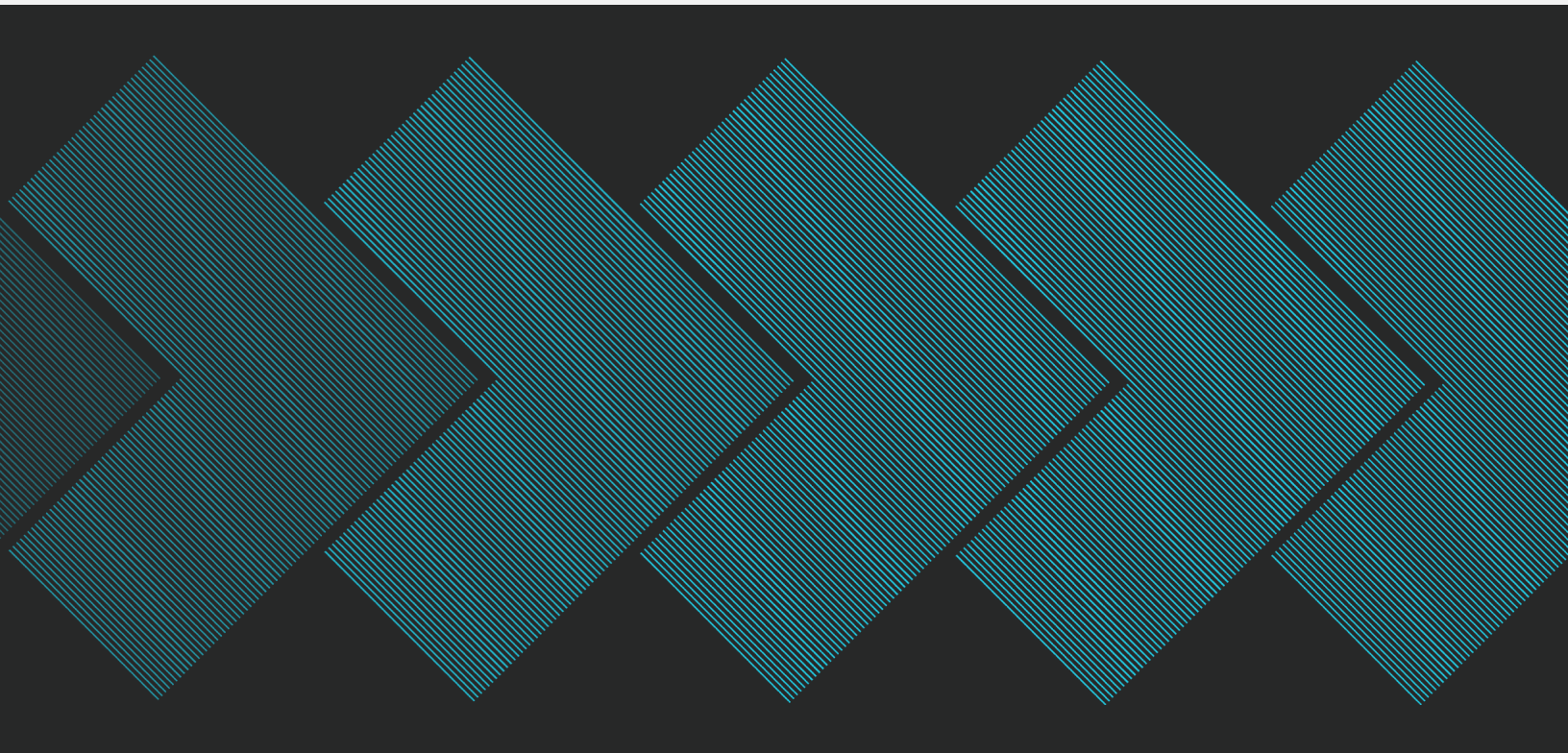
Lobbying in Canada

In this section, we will outline the basic principles of what constitutes lobbying under Canadian law, and explain what requirements are imposed on individuals engaged in lobbying by federal, provincial and municipal governments. In addition, we will discuss the institutions responsible for monitoring potential breaches of lobbying legislation, and provide an overview of those institutions' investigation and enforcement processes.



What is Lobbying?

As the Federal Court of Canada has noted, "lobbying" is a term that does not lend itself to an easy definition. The word "lobbying" is often thought to encompass any attempt by a private individual or group to influence policy decisions by government officials. The underlying concern motivating the regulation of lobbying is that by accessing political and government figures, representatives of companies, industry or other advocacy groups will guide government policy, legislation and decision-making to favour the interests of the groups they represent instead of the public interest.

In Canada, however, the legal definition of lobbying is narrower than the public might expect. Canadian lobbying rules are generally directed only at certain activities of individuals who are paid to communicate with government representatives about issues ranging from draft legislation, to the awarding of government contracts, to arranging meetings between public officials and private entities.

In federal and provincial legislation, the government official being lobbied is described as a "public office holder". This term is defined very broadly. It includes the public figures you might expect, such as members of Parliament and their staff, and most government employees and civil servants. However, it also includes government appointees (excluding judges, justices of the peace, and the Lieutenant Governors of each province), any officers or employees of any federal board, commission or tribunal and certain provincial Crown corporations, and members of the Canadian Armed Forces, Royal Canadian Mounted Police, and certain provincial police services.

At the federal level, the term "designated public office holder" is used to specify a specific class of senior public office holders, such as members of Parliament and senior executive public officer holders. These officials are considered sufficiently senior in terms of their involvement in high-level decision-making that lobbying them requires additional, special obligations for the lobbyist in question. The designation also creates special obligations for the designated public office holder, including the obligation to refrain from lobbying for five years after they leave their role, which is commonly referred to as a "cooling-off period".

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In recent years, the courts have considered the role of designated public office holders during this cooling-off period and what exactly they can and cannot do during that time. This includes the Court of Appeal's decision in the case of *R v Carson*. Mr. Carson was a former advisor to Prime Minister Stephen Harper. In the two years following his departure from the Prime Minister's Office, Mr. Carson engaged in discussions with representatives of Industry Canada on behalf of the Alberta-based Canada School of Energy and Environment ("CSEE") regarding possible changes to a $15 million grant agreement with the CSEE. Following an investigation, Mr. Carson was charged and convicted of three violations of the federal *Lobbying Act*.

These convictions were upheld by the Court of Appeal, which confirmed two important principles:

- Whether the communication at issue was instigated by the former designated public officer holder is irrelevant: "a person may carry on a communication whether the person is the instigator of the conversation or the recipient of it" and that "any contrary conclusion would very seriously undermine the efficacy of the *Lobbying Act*."
- The perspective of the current public office holders (here, at Industry Canada) as to whether they thought they were being lobbied is also irrelevant. The Court held that there was no reason for the officials in question to be permitted to offer their opinions on this issue.

Who is a lobbyist?

An individual must be paid for their lobbying to be a "lobbyist". Volunteers are not captured by the definition of lobbying and are therefore not subject to the requirements imposed by lobbying legislation.

There are two principal categories of lobbyists for the purposes of Canadian lobbying legislation, whether at the federal, provincial, or municipal levels: consultant lobbyists and in-house lobbyists:

- **Consultant lobbyists** – individuals who operate either on their own or as part of a firm and offer their services to clients on a case-by-case basis. Consultant lobbyists may be retained by a client on a long-term basis to communicate with public office holders about an issue of interest to a client, or on a short-term contract to deal with a discrete issue or situation.
- **In-house lobbyists** – generally employees of a company, partnership, individual or other entity who "undertake to communicate with public office holders" on behalf of the employer as part of their everyday duties. Much like in-house lawyers, these lobbyists only have one client – their employer – and generally only lobby public office holders on issues that affect their employer.

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Recent court cases have clarified that the term "consultant lobbyist" can also include officers, directors, and members of the organization's board of directors in certain cases, where those individuals are paid as part of their role but are not employees of the organization (and therefore could not be "in-house lobbyists").

The courts have also clarified that the term "undertakes" does not require that there be an actual written undertaking or agreement setting out the consultant's tasks, which can "be inferred from words, actions and the responsibilities 'undertaken' or acted upon by an individual."

Lobbying Rules and Regulations

What rules govern lobbying at the federal level?

Lobbying of federal public office holders, such as MPs, ministers of the Crown, and public servants, is governed by the *Lobbying Act* and its regulations. The federal Act is administered by the Office of the Commissioner of Lobbying of Canada, whose responsibilities include ensuring compliance with, and developing and implementing educational programs to foster public awareness of, the requirements of the *Lobbying Act*, particularly on the part of lobbyists, their clients, and public office holders.

The federal lobbying scheme also includes the Lobbyists' Code of Conduct, which sets out the general principles and rules for lobbyists' conduct of their affairs. Canadian courts have recognized that the Code is not an enactment of Parliament, nor is it a statutory instrument. However, even if a lobbyist's conduct does not meet the strict requirements to justify criminal sanction under the *Lobbying Act*, a breach of their obligations of the Code may still be investigated and reported to both Houses of Parliament, ensuring that any potential misconduct is brought to light and subject to parliamentary – and therefore public – scrutiny.

Interestingly, the *Lobbying Act* does not prescribe any penalty for a breach of the Code, and does not provide what, if anything, Parliament is entitled to do in response to a report indicating that such a breach has occurred.

What rules govern lobbying at the provincial level?

Each Canadian province has its own rules in place governing the lobbying of provincial public office holders; such as members of provincial legislatures and ministers in provincial governments. For example:

- In Ontario, the *Lobbyists Registration Act* and its regulations are administered by the Office of the Integrity Commissioner of Ontario.
- In Québec, the *Lobbying Transparency and Ethics Act* is administered by the Commissaire au Lobbyisme du Québec.
- In British Columbia, the *Lobbyists Transparency Act* is administered by the Office of the Registrar of Lobbyists; and
- In Nova Scotia, the *Lobbyists Registration Act* is administered by the Registrar of Lobbyists.

Each province's legislation has its own particular rules, though broadly speaking they follow the same format set out in the federal legislation and as described later in this document: they require registration and disclosure on a regular basis by lobbyists of their interactions with public office holders.

What rules govern lobbying at the municipal level?

There are lobbying registration rules at the municipal level in many cities across Canada. Unfortunately, these municipal rules are not collected in an easily accessible place and can only be found by accessing and reviewing municipal by-laws. These by-laws can often be found on a municipality's website, though not all municipalities keep up-to-date electronic copies of their by-laws available on their websites. Most municipalities allow citizens to access the by-laws in person at their Town Hall or other local municipal office.

By way of example, the City of Toronto has implemented its own lobbying registry through the Lobbying By-law, which is enforced by the Toronto Lobbyist Registrar. The Toronto system functions much like the Ontario and federal lobbying systems – requiring individuals to register as lobbyists and then subsequently provide regular filings to the Registrar listing their lobbying interactions with public office holders. Halifax, on the other hand, does not have lobbying rules or a municipal lobbying registry, leaving the lobbying of municipal office holders essentially unrestricted.

The Foundational Requirement: Registration, Registration!

What do lobbyists have to register, and when?

While the rules differ between each level of government, lobbying legislation generally imposes two foundational requirements on lobbyists:

- That they register the substance and subject of their lobbying with the applicable federal, provincial, or municipal body within a specified time; and
- That they keep that registration up to date with any new information.

Consultant lobbyists are individually required to file an initial report setting out their name and information, the name and information of their client, the name and information of any public office holder they intend to communicate with, as well as particulars identifying the subject matter that they intend to communicate about with that public office holder. After the initial report, the lobbyist must update their registration where any of the information has changed (e.g., a new or different government organization is being lobbied) or where the lobbying has come to an end.

When it comes to designated public office holders, federal legislation imposes additional obligations. Consultant lobbyists are also required to file a monthly report describing every communication they had with designated public officer holders during the preceding month, as well as the subject matter of those communications.

Whereas consultant lobbyists are responsible for their own registrations, the lobbying performed on behalf of an organization by its in-house lobbyists must be registered by a designated "senior officer" in that organization. These returns are required to disclose a broad range of information, including about the senior officer, the organization and its sources of funding, the in-house lobbyist (and any previous employment by a public office holder or public body), the subject matter and goal of their lobbying, and which public officer holders they intend to lobby and how.

At the federal level, this senior officer is also required to file a monthly report describing every communication their in-house lobbyists had with designated public officer holders during the preceding month, in the same manner as a consultant lobbyist.

Are there any exceptions?

There are several exceptions under the different legislative schemes, where lobbyists need not register their interactions with public office holders. These include where the lobbyist's submissions are made publicly as a witness before a parliamentary committee.

Conversely, there are certain situations where a lobbyist might not expect that they are required to register, but where registration may in fact be required. This includes certain cases of "grass-roots communications", where lobbyists encourage members of the public to communicate with federal public office holders on registrable topics – even if the lobbyist does not communicate directly with the public office holders in question.

The rules and exceptions governing in-house lobbyists are just as, if not more, complex as those governing consultants, with the federal, provincial, and municipal legislation and regulations setting out the responsibilities of senior officers in the lobbyist's organization, as well as additional registration requirements based on the amount of time collectively spent lobbying by that organization's employees and by different classes of employees.

This includes what is commonly referred to as the "20 percent threshold". This rule applies only to in-house lobbyists, and provides that where the time spent or anticipated to be spent lobbying by all employees meets or exceeds the threshold of 20 percent of one employee's duties, then that organization must register that lobbying.

While the 20 percent figure is not set out in the federal *Lobbying Act*, it is result of the Commissioner's official interpretation of the term "significant part of duties" in s. 7(1)(b) of that legislation. Similar thresholds appear in provincial legislation across the country, setting the threshold anywhere from a certain percentage to a certain total number of hours of lobbying by an organization's employees.

Investigations of Lobbying Rule Breaches

Federal, provincial, and municipal lobbying legislation contain provisions establishing offices to monitor, investigate and sanction individuals who breach the registration requirements and lobbying prohibitions set out by each level of government. These offices are led by individual officials, typically titled Commissioner or Registrar, whose role is to lead the office in enforcing the applicable lobbying legislation. These officials are typically lawyers, who may or may not have prior experience working in government or Parliament.

Lobbying investigations may be conducted where the relevant Commissioner has reason to believe that there has been non-compliance with lobbying rules. The Commissioner's belief can arise out of ordinary compliance reviews, or where a complaint has been filed by a member of the public or a public servant.

Before starting a lobbying investigation, the Commissioner will determine whether the matter falls within their jurisdiction and whether an investigation is necessary. To do so, the Commissioner will review the facts underlying the potential non-compliance and consider whether it might be appropriately dealt with by another level of government or under another piece of legislation. If the Commissioner concludes that the matter falls within their jurisdiction, an investigation will be commenced and notice will be provided to the target of the investigation setting out their alleged non-compliance and giving them an opportunity to respond regarding the allegation and any penalty that may be imposed.

The Federal Court of Appeal has clarified that the *Lobbying Act* does not create a right for a member of the public to have a complaint investigated, because the Act does not require that the Commissioner take into account information received from the public – or in fact, mention the public at all. In other words, where the Commissioner has determined that a complaint does not warrant investigation, it is fully within their discretion to close the file. On this basis, the Court concluded that a decision by the Commissioner not to investigate a complaint brought by a member of the public is not a decision or order subject to judicial review.

What are the investigator's powers during an investigation?

The federal and provincial lobbying Commissioners are empowered to, and regularly do, summon, and enforce the attendance of witnesses, compel the production of documents, and receive witnesses' sworn oral or written evidence. In-person hearings are not held as part of these investigations, which are conducted in private and are subject to strict confidentiality protections.

Once the Commissioner's office has completed the collection of testimony and documents, they will review all the evidence and come to a determination on compliance. Under the federal legislation, any evidence given by a person in the investigation, and evidence of the existence of the investigation, is inadmissible against the person in a court or in any other proceeding other than in a prosecution for perjury in respect of a statement made to the Commissioner. No such protection exists under Ontario's lobbying legislation, though it does exist under the *Lobbyists Transparency Act* in British Columbia.

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Canada (Attorney General) v Democracy Watch, 2020 FCA 69 at para 41

What are the potential outcomes of an investigation?

Contraventions of the federal *Lobbying Act* are offences punishable by fines and, in some cases, imprisonment. If the federal Commissioner comes to believe that a criminal offence may have been committed, the Commissioner will suspend their investigation and advise a peace officer to investigate the alleged offence. The lobbying investigation will then only resume once the criminal investigation has been completed or withdrawn. At the conclusion of the lobbying investigation, the Commissioner is required to submit a report to both the Speaker of the House of Commons and the Speaker of the Senate.

If an individual is convicted of an offence under the *Lobbying Act*, the Commissioner has the discretion, if they are satisfied that it is necessary in the public interest and taking into account the gravity of the offence, to prohibit that individual from lobbying for up to two years.

Similarly, in Ontario, if a lobbyist is found to have breached provincial lobbying legislation, the penalty can include a prohibition from lobbying for up to two years. The penalty can also include a public report setting out the name of the lobbyist, a description of their non-compliance, and any other information necessary to explain the finding.

Findings of non-compliance by provincial or federal lobbying oversight bodies are subject to judicial review by courts of competent jurisdiction (federally, the Federal Court of Canada, and provincially, the superior courts of each province).

In certain provinces, such as Ontario and British Columbia, decisions of the Office of the Integrity Commissioner (in Ontario) or the Registrar for Lobbyists (in British Columbia) are subject to the right to request reconsideration by the Commissioner, which remedy must generally be exhausted before judicial review of the decision is pursued. However, there is no such right at the federal level.

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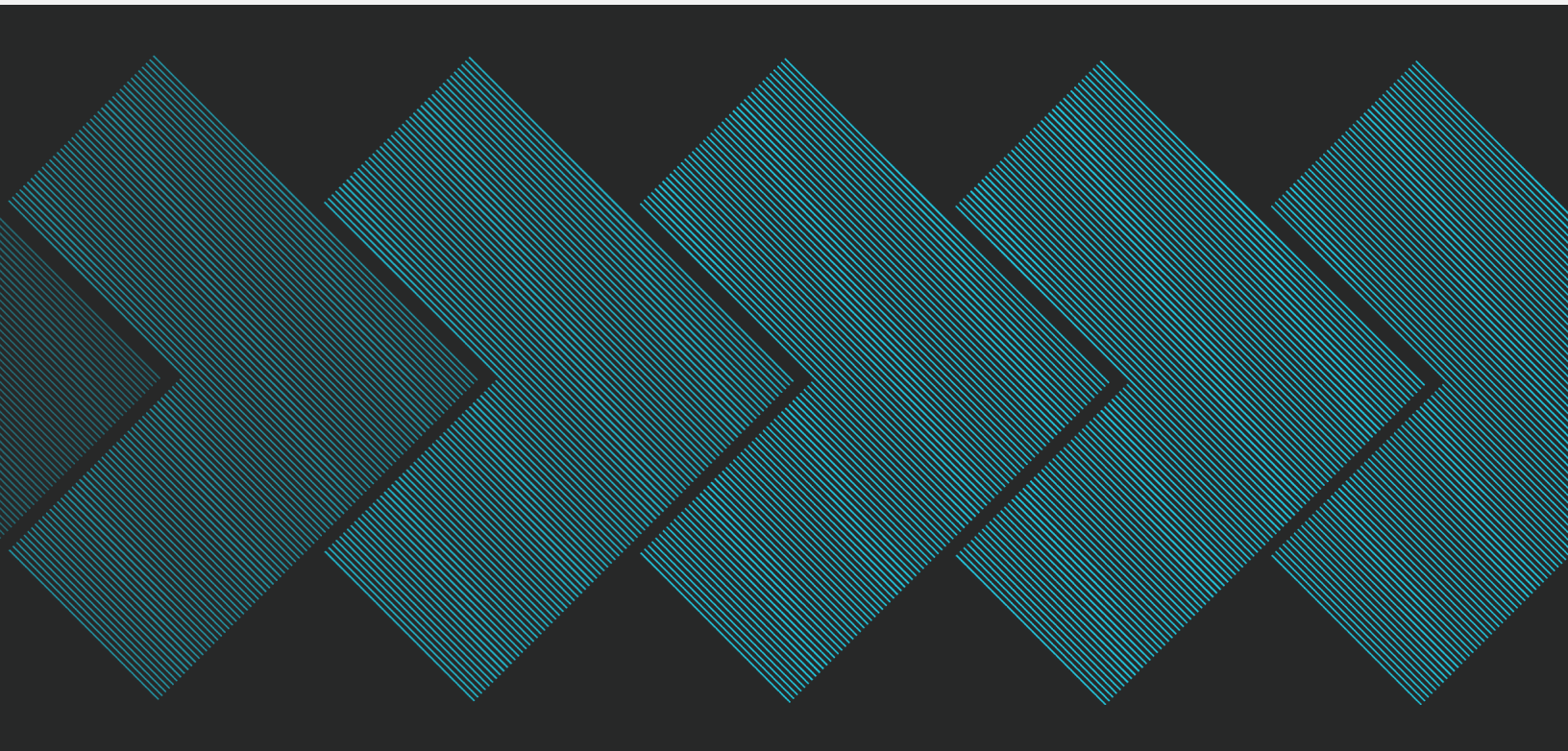
11

Ethics Investigations in Canada

In this section, we will outline the basic principles underlying "ethics" legislation in Canada, including how Canadian federal and provincial governments approach conflicts of interest. We also discuss the institutions responsible for monitoring potential breaches of ethics legislation, and provide an overview of those institutions' investigation and enforcement processes.



"Ethics" in the Public Law Context

"Ethics" in the public law context is concerned with addressing actual or perceived conflicts of interest by elected officials and other public office holders.

This goes beyond the "retainers, personal donations, special discounts, miscellaneous outgoings, agents' fees, political contributions and management expenses", aptly described by the fictional public servant Sir Humphrey Appleby in the British television series *Yes Minister* as being typical of political scandal. It captures a broad spectrum of behavior by public officials that may be perceived to be unethical due to actual or perceived conflict. This includes:

- Members of Parliament debating or voting in the House or Senate on issues that could benefit them or their family members personally.
- Ministers of the Crown providing preferential treatment in the exercise of an official power, duty, or function; or
- Public servants using insider information obtained in their official capacity for personal benefit.

This is just a sample of the conduct that is governed by ethics legislation in Canada, and which is routinely investigated by independent Commissioners such as the federal Conflicts of Interest and Ethics Commissioner.

"Ethics in the public law context is concerned with addressing actual or perceived conflicts of interest by elected officials and other public office holders."

Who does ethics legislation govern?

In the federal *Conflict of Interest Act*, the behavior of federal "public office holders" is regulated. "Public office holder" is defined in much the same manner as it is under the *Lobbying Act*, but with certain important exceptions. A "public office holder" in the federal *Conflict of Interest Act* includes:

- Ministers of the Crown and Parliamentary Secretaries.
- Any ministerial adviser or members of a Minister's staff.
- The Chief Electoral Officer.
- Any persons or class of persons designated by the Governor in Council, or any full-time ministerial appointee designated by an appropriate Minister of the Crown; and
- Any individual appointed to an office by the Governor in Council, with the exception of certain individuals listed below.

The following individuals are excluded from the definition of "public office holder" for the purpose of the *Conflict of Interest Act*:

- Lieutenant Governors General of any province.
- All officers and staff of the Senate, House of Commons and Library of Parliament;
- Any heads of mission, including ambassadors, high commissioners, or consul-generals; and certain other diplomatic representatives, of Canada.
- Federally appointed judges and military judges.
- Any Deputy Commissioner of the RCMP; and
- Members of the National Security and Intelligence Committee of Parliamentarians.

While the rules at the provincial level differ from one province to another, they are broadly consistent with the federal Act in substance, though some jurisdictions have separated their legislation governing elected politicians from the legislation governing public servants.

For example, Ontario's *Conflict of Interest Rules* govern "public servants", which includes every person employed under Part III of the *Public Service of Ontario Act*, the Secretary of the Cabinet, every deputy minister, every employee of a public body and every person appointed by the Lieutenant Governor in Council, the Lieutenant Governor, or a minister to a public body. This definition specifically excludes judges and officers of the Legislative Assembly. However, Ontario also has a separate piece of legislation, the *Members' Integrity Act*, 1994, which governs conflicts of interest and ethics issues as they pertain to Members of the Legislative Assembly (commonly known as MPPs).

In contrast, Alberta's *Conflicts of Interest Act* shares many similarities to the federal *Act*, consolidating all ethics rules for public servants, ministers, and elected officials into one piece of legislation.

"While the rules at the provincial level differ from one province to another, they are broadly consistent with the federal Act in substance."

Who is responsible for enforcing this legislation?

The federal *Conflict of Interest Act* is the responsibility of the Conflict of Interest and Ethics Commissioner.

At the provincial level, the responsibility for enforcing ethics legislation is generally designated to the same entity responsible for lobbying legislation, despite the lobbying and ethics rules being found in separate pieces of legislation. For example, in Ontario, the *Conflict of Interest Rules* and the *Members' Integrity Act* are enforced by the Office of the Integrity Commissioner, the same body that enforces the provincial lobbying legislation. Similarly, Alberta's *Conflicts of Interest Act* is administered by the Office of the Ethics Commissioner and Lobbyist Registrar of Alberta.

However, in Nova Scotia, the *Lobbyists' Registration Act* is enforced by the Registrar of Lobbyists, while the *Conflict of Interest Act* is enforced by the Conflict of Interest Commissioner. The same division of responsibility exists in Manitoba, with their *Lobbyists Registration Act* administered by the Office of the Lobbyist Registrar for Manitoba and their *Legislative Assembly and Executive Council Conflict of Interest Act* enforced by the Manitoba Conflict of Interests Commissioner.

Restrictions Imposed by Ethics Legislation

What are the obligations and restrictions of public office holders?

Under the federal legislation, public office holders are subject to two key positive obligations:

- To arrange their private affairs in a manner that will prevent them from being in a conflict of interest; and
- To recuse themselves from any discussion, decision, debate or vote on any matter in respect of which they would be in a conflict of interest.

They are also subject to a number of important restrictions and prohibitions designed to assist them in avoiding any conflicts of interest, including:

- Not to make, or participate in making, any decision related to the exercise of an official power, duty, or function of the public office holder that could put them in a conflict of interest.
- For Ministers of the Crown and Members of Parliament, not to participate in any vote of the House of Commons or Senate that would place them in a conflict of interest.
- Not to give preferential treatment to any person or organization based on the identity of the person or organization that represents the first-mentioned person or organization.
- Not to use non-public information obtained through their position to further their private interests, that of their relatives or friends, or to seek to improperly further another person's private interests.
- Not to use their position to seek to influence the decision of another person so as to further their private interests, that of their relatives or friends, or to seek to improperly further another person's private interests.
- Not to allow themselves to be influenced in the exercise of their official power, duty or function by plans for, or offers of, outside employment.
- Not to accept, or to allow their family members to accept, any gift or other advantage that might reasonably be seen to have been given to influence the public office holder in the exercise of an official power, duty or function, with certain exceptions.
- For Ministers of the Crown, Parliamentary Secretaries and their family, advisors, and staff, not to accept travel on a non-commercial chartered or private aircraft for any purpose unless required in his or her capacity as a public office holder or in exceptional circumstances or with the prior approval of the Commissioner.
- For Ministers of the Crown and Parliamentary Secretaries, not to knowingly be party to a contract with a public sector entity under which he or she receives a benefit, whether personally or through a partnership or corporation in which they have an interest.
- Not to, in the exercise of their official powers, duties and functions, enter into a contract or employment relationship with their family members, subject to certain exceptions.

In addition to the *Conflict of Interest Act*, Members of Parliament (particularly of the House of Commons) are subject to the *Conflict of Interest Code for Members of the House of Commons* which are appended to the Standing Orders of the House, the rules of parliamentary procedure for that body.

The Code repeats and clarifies the application of many of the general prohibitions in the Act to the specific context of a deliberative assembly. This includes, for example, clarifying the meaning of "furthering a person's private interests" in the legislative context and requiring members who have a private interest that might be affected by a matter before the House or a committee thereof to disclose that interest "at the first opportunity" and subsequently in writing to the Clerk of the House. In addition, the Code incorporates many of the restrictions which the Act only imposes on "reporting public office holders", as set out below.

The Code also includes a process by which any member of the House of Commons can request an inquiry into an alleged breach of the Code, which is conducted by the Commissioner and, when completed, is presented to the House by way of report, which may include recommendations that the Commissioner considers appropriate.

The restrictions imposed by provincial ethics legislation are generally similar to those set out in the federal Act. For example, the Ontario *Conflict of Interest Rules* generally prohibits six categories of conduct: taking steps to benefit oneself, one's spouse or one's children, accepting gifts, disclosing confidential information, giving preferential treatment, hiring family members, or engaging in a business or participating in any decision-making which would place oneself in a conflict of interest.

However, certain provincial acts have been criticized as weaker than the federal standard. This includes Manitoba's aforementioned *Legislative Assembly and Executive Council Conflict of Interest Act*, which that province's Conflicts of Interest Commission has criticized because it lacks a mechanism empowering the Commissioner to receive and investigate complaints, instead placing the onus on individual voters to take such complaints to court themselves.

What are the post-employment restrictions of public office holders?

The *Conflict of Interest Act* also imposes a number of post-employment restrictions on public office holders.

Former public office holders are prohibited from acting "in such a manner as to take improper advantage of his or her previous public office", or from acting on behalf of any person or organization in a process or transaction with the Crown with respect to which they had provided advice to the Crown, or give any client, associate or employer advice using non-public information obtained in their capacity as a public office holder.

The "improper advantage" language was introduced by the former federal Conservative government in the *Federal Accountability Act*. This language has been noted by the federal Ethics Commissioner to be "very broad in scope" particularly when contrasted "to some of the other post-employment provisions that deal with specific activities, such as the prohibitions on switching sides and on contracting", and has been applied to include a broad range of conduct that might previously have been considered to fall within a grey area.

In a report issued in May of 2019, the Ethics Commissioner applied this provision of the federal Act in finding that Jim Smolik, the former Assistant Chief Commissioner and Acting Chief Commissioner of the Canadian Grain Commission, contravened his post-employment ethics obligations in relation to activities he carried out on behalf of his new employer, Cargill Limited.

The Commissioner concluded that, within a few weeks after leaving public office, Mr. Smolik engaged in a course of conduct aimed at helping Cargill resolve an issue at its Sarnia terminal, including by exploiting "previously established Commission relationships by obtaining internal Commission notes (...) which he shared with his employer", using "social interactions with Commission staff to facilitate official interactions between himself or Cargill and the Commission" and exploiting "the knowledge and expertise he had acquired as Assistant Chief Commissioner (...) in advising Cargill colleagues on how to navigate Commission processes".

This decision highlights the need for former public office holders to be very cautious about using their specific knowledge of applicable procedures or connections within government bodies to facilitate or benefit their new employer's business.

In Ontario, public office holders are subject to similar post-employment restrictions. The *Conflict of Interest Rules in Ontario*, which includes two separate regulations, the first for public servants (i.e., non-partisan public servants) and the second for staff in ministers' offices (generally considered to be partisan political employees), prevent both of these classes of public office holders from seeking advantages in their interactions with government as a result of their former roles. For example, they are precluded from lobbying.

Under the *Members' Integrity Act*, former members of Ontario's provincial Executive Council (i.e., the provincial cabinet) are prohibited from contracting with the government or making representations on their own or another person's behalf with respect to a contract or benefit, during a twelve-month cooling-off period after they leave office. However, these restrictions do not apply to government backbenchers or opposition members of the provincial Parliament.

In contrast, the New Brunswick Members' *Conflict of Interest Act* is broader, extending the same restrictions to all members of the legislature. This legislation prohibits these members from contracting with or lobbying the government during the twelve-month period after they leave office, along with imposing similar (but less extensive) restrictions on former deputy ministers, heads of crown corporations or executive staff members.

Reporting Public Office Holders

The federal Act also includes a category of individuals subject to particular restrictions: the "reporting public office holder", which is defined as including the following individuals:

- Ministers of the Crown and Parliamentary Secretaries.
- Any ministerial adviser or members of a Minister's staff who works on average 15 hours or more per week.
- The Chief Electoral Officer and Parliamentary Budget Officer.
- Any individual appointed to an office by the Governor in Council, whether part-time (if they receive an annual salary and benefits) or full-time; and
- Any persons or class of persons designated by the Governor in Council, or any full-time ministerial appointee designated by an appropriate Minister of the Crown.

These "reporting public officer holders" are subject to further obligations in addition to the obligations imposed on all public office holders. They are prohibited from doing any of the following, except as required in the exercise of their official powers, duties, and functions or where they receive no remuneration and where it has been approved by the Commissioner:

- Engaging in employment or the practice of a profession.
- Managing or operating a business or commercial activity.
- Continuing as, or becoming, a director or officer in a corporation or an organization.
- Holding office in a union or professional association.
- Serving as a paid consultant.
- Being an active partner in a partnership.

"These 'reporting public officer holders' are subject to further obligations in addition to the obligations imposed on all public office holders."

Furthermore, reporting public office holders are required to provide a report to the Commissioner within 60 days of the day on which they assume their role including a description of all of their assets, liabilities, incomes (during the 12 months before and after their appointment), past employment or involvement in businesses, commercial activities, consultancies, partnerships, unions, professional associations, charitable or philanthropic activities, trusteeships, executorships, liquidations or powers of attorney in the two years before their appointment. They are also required to make reasonable efforts to provide all of the same information for each member of their family.

Reporting public office holders also have an ongoing obligation to disclose a variety of other events to the Commissioner, including gifts to them or any member of their family from one source exceeding a total value of $200 within a 12-month period and any firm offers of outside employment and their acceptance of said offers. This also includes a number of obligations requiring the public disclosure of various matters, such as their recusal from any decision, their assets and liabilities and any outside activities, or gifts or travel accepted by them.

What does it mean to divest from controlled assets?

Reporting public office holders have a special obligation to divest themselves from any assets whose value could be directly or indirectly affected by government decisions or policy, such as publicly traded securities, self-administered RRSPs, commodities, futures, currencies, and stock options. These assets must, within 120 days of the office holder's appointment, be sold in an arms-length transaction or placed in a blind trust.

In November 2017, the Ethics Commissioner conducted an examination under the *Conflict of Interest Act* regarding Finance Minister Bill Morneau's sponsorship of Bill C-27, *An Act to amend the Pension Benefits Standards Act*, 1985, while at the same time holding shares in Morneau Shepell Inc., an entity that administers private pension funds.

Minister Morneau initially defended his continued holding of those shares on the basis that the Ethics Commissioner had provided advice to his office that, because he did not personally hold any assets considered to be "controlled assets" under the Act, no divestment of these interests was required though it would be best to put in place a conflict screen to ensure that he would have no participation in any discussion or decision, and no communication with government officials, that would involve the interests of Morneau Shepell. The issue was resolved when the Ethics Commissioner issued a letter concluding that Minister Morneau had not been offside the provisions of the *Conflict of Interest Act*. At that point, Morneau had already announced that he had sold the shares to avoid any perception of conflict.

What are the post-employment restrictions of reporting public office holders?

Much like public office holders, reporting public office holders remain subject to restrictions after their departure from public service. This includes a one year (or two years for former Ministers of the Crown) "cooling-off" period during which they are restricted from, among other things, entering into any contract or accepting any appointment or offer of employment from an entity with which they had "direct and significant dealings" during the year before their last day in office.

The "cooling-off" provisions of the Act were discussed after the resignation of Minister Jane Philpott, the former Minister of Health, Minister of Indigenous Services and President of the Treasury Board, from cabinet in March of 2019. Shortly after former Minister Philpott announced in late 2019 that she intended to begin a new paid role as a special health adviser to the Nishnawbe Aski Nation (with which she had had dealings while a Minister), she made a statement clarifying that her work would be voluntary.

Former reporting public office holders are also required to report any communications they have or meetings they arrange with public office holders (within the meaning of the *Lobbying Act*) to the Ethics Commissioner, and to file a return to that effect, in addition to any reporting requirements imposed by the *Lobbying Act*.

A similar class of office holder exists under Alberta's ethics legislation, which distinguishes between "senior officials" including the chairs and/or chief executive officers of public agencies as well as "designated senior officials" who have additional obligations to those of "reporting public office holders" under the federal Act and as described above.

"Reporting public office holders have a special obligation to divest themselves from any assets whose value could be directly or indirectly affected by government decisions or policy, such as publicly traded securities, self-administered RRSPs, commodities, futures, currencies, and stock options."

Ethics Investigations and Examinations

Federal, provincial, and municipal ethics legislation contain provisions establishing offices to monitor and investigate conflicts of interest and ethics violations by public office holders.

These investigations may be conducted where the relevant Commissioner suspects there has been a possible contravention of the applicable legislation, code, or rules. At the federal level, the Conflict of Interest and Ethics Commissioner may conduct what is referred to as an "examination" under the Act at the request of a member of the Senate or House of Commons or on their own initiative.

The *Conflict of Interest Act* does not create a right for a member of the public to request that an examination be undertaken by the Commissioner. In fact, as the Federal Court of Appeal has confirmed, the only route a member of the public can take if they wish to present information to the Commissioner is by presenting that information to a member of the Senate or the House of Commons – though no obligation is imposed on the member to then provide that information to the Commissioner.

When an examination is conducted on the Commissioner's own initiative, unless the examination is discontinued, the Commissioner is required to provide a report to the Prime Minister setting out the relevant facts as well as the Commissioner's analysis and conclusions in relation to the examination. At the same time that the report is provided to the Prime Minister, a copy of the report is also provided to the public office holder or former public office holder who is the subject of the report and the report is made available to the public.

The rules that govern ethics investigations are generally similar across the provincial legislative schemes. For example, Alberta's ethics legislation provides that that province's Ethics Commissioner can conduct an investigation on its own initiative, or in response to a request made by a member of the public or a request made on resolution of the Legislative Assembly.

Similarly, the Saskatchewan Conflict of Interest Commissioner, who investigates ethics complaints only in respect of members of the Legislative Assembly, may receive a request for an opinion from another member of the Assembly, the Assembly as a whole by way of resolution, or the Premier. This may also include the more formal process of conducting an inquiry, during which the Commissioner may investigate the conduct of members of the public service.

Notably, and as is the case federally but not in Alberta, Saskatchewan's legislation does not provide a right of members of the public to request that the Commissioner conduct an investigation.

"Once the Commissioner's office has completed the collection of testimony and documents, they review the evidence and determine whether or not the public office holder in question complied or failed to comply with the applicable ethics rules."

What are the investigator's powers during an examination?

The federal and provincial Commissioners are empowered to, and regularly do, summon, and enforce the attendance of witnesses, compel the production of documents, and receive witnesses' sworn oral or written evidence. In-person hearings are not held as part of these investigations, which are conducted in private and are subject to strict confidentiality protections.

Once the Commissioner's office has completed the collection of testimony and documents, they review the evidence and determine whether or not the public office holder in question complied or failed to comply with the applicable ethics rules.

In any case where the federal Commissioner believes on reasonable grounds that a public office holder has committed a violation of the Act, the Commissioner has the discretion to issue and serve on that public office holder, a notice of violation which sets out a description of the alleged violation and the proposed penalty, and to provide them the opportunity to make representations to the Commissioner with respect to the alleged violation or proposed penalty.

If the public office holder makes representations to the Commissioner in accordance with the notice of violation, the Commissioner is required to decide on the civil standard of a "balance of probabilities" whether the public office holder committed the violation and, if so, may impose a penalty.

While the investigation process at the provincial level is generally similar, most provincial ethics commissioners do not have the same power as the federal Commissioner to issue notices of violation.

For example, the Ethics Commissioner in British Columbia only has the power to issue reports to the Legislative Assembly. If they make a finding that a member has contravened the *Members' Conflicts of Interest Act*, they can recommend to the Assembly that a penalty be imposed. These recommended penalties may include a fine of up to $5,000 or more severe measures such as a suspension or expulsion of the member from the legislature.

"While the investigation process at the provincial level is generally similar, most provincial ethics commissioners do not have the same power as the federal Commissioner to issue notices of violation."

What are the potential outcomes of an investigation?

Certain contraventions of the federal *Conflict of Interest Act* are offences punishable by administrative monetary penalties not exceeding $500. This includes a failure by a reporting public office holder to disclose their assets and liabilities to the Commissioner, to disclose gifts in excess of $200 received from a single source during a 12-month period and a failure to divest themselves of their controlled assets in accordance with the Act.

While the *Conflict of Interest Act* provides that every order and decision of the Commissioner is "final and shall not be questioned or reviewed in any Court", judicial review is available in certain circumstances, including where the Commissioner has acted without jurisdiction, beyond their jurisdiction or refused to exercise their jurisdiction, failed to observe a principle of natural justice or procedural fairness, or acted or failed to act as a result of fraud or perjured evidence.

In Ontario, public servants who breach a conflict of interest rule under the *Public Service of Ontario Act* may find themselves subject to disciplinary measures, including suspension and dismissal from employment. Members of the provincial legislature who have contravened certain sections of the *Members' Integrity Act* may find themselves subject to strict sanctions, up to and including a suspension of their right to sit and vote in the Assembly or a declaration that their seat is vacant, which would trigger a by-election for their riding.

Conclusion

Governments at all levels take lobbying and ethics requirements very seriously. Anyone working as a lobbyist, whether as a consultant or in-house, is required to carefully abide by their registration and disclosure requirements to avoid a long, difficult, and complex lobbying investigation proceeding.

Similarly, public servants must scrupulously ensure that they follow any restrictions imposed upon them by the applicable ethics legislation, both during and after their employment, to avoid a potentially damaging investigation and report along with potential fines.

If you are a lobbyist or public servant and find yourself the subject of an investigation by a lobbying or ethics oversight body, you should seek legal advice.

Lenczner Slaght represents and assists clients at every level of government in lobbying and ethics related investigations and disputes, including investigations by the federal Office of the Commissioner of Lobbying of Canada and Ontario's Office of the Integrity Commissioner.

Lenczner Slaght's Public Law Practice

Lenczner Slaght's lawyers help clients navigate complex litigation matters involving all levels of government and the public-sector.

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Public Law Practice Areas

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46

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Our lawyers combine a deep knowledge of the workings of government with expertise in a broad range of relevant areas, from the nuances of judicial review applications to constitutional issues and questions under the Charter of Rights and Freedoms. From conducting a successful fraud trial on behalf of a major public sector institution to arguing appeals before the Supreme Court of Canada on constitutional matters, we have the experience and credibility in court to successfully represent clients in public sector disputes.

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Rebecca leads the firm's Public Law Practice Group.

Rebecca is an experienced trial and appellate lawyer. She represents private and public sector clients in public law proceedings, commercial disputes, class actions, and professional liability matters. Rebecca's public law practice includes judicial reviews, public inquiries, integrity investigations, constitutional and regulatory proceedings, and expropriation disputes. She acts for governments, public institutions and senior public officials, as well as individuals and corporations navigating the regulatory landscape or involved in disputes or investigations with public entities.

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Zach is a trial lawyer focusing on complex corporate-commercial litigation and public and administrative law matters. Zach's public law practice includes regularly representing government institutions and private entities in procurement matters, assisting individuals in lobbying investigations by the Integrity Commissioner of Ontario, and advising clients in relation to public inquiries and judicial reviews.

Zach's clients come from a wide range of backgrounds and industries, from individual entrepreneurs to public companies, and government institutions to non-profit human rights organizations. Zach has appeared as counsel at all levels of court in Ontario, as well as before a number of administrative tribunals, including the Human Rights Tribunal of Ontario and the Canadian International Trade Tribunal.

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