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Resisting Obsolescence: A Comprehensive Study of Canada's Conflict of Interest and Ethics Commissioner and the Office's Efforts to Innovate While Strategically Asserting Greater Independence

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**Resisting Obsolescence:
A Comprehensive Study of Canada's Conflict of Interest and Ethics
Commissioner and the Office's Efforts to Innovate while Strategically
Asserting Greater Independence**

IAN STEDMAN

A DISSERTATION SUBMITTED TO
THE FACULTY OF GRADUATE STUDIES IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS
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Abstract

In 2017, Justin Trudeau became the first Prime Minister to be found in violation of Canada's parliamentary ethics laws. This incident alone demonstrated the need for a comprehensive study of the Canadian parliamentary ethics regime. The Conflict of Interest and Ethics Commissioner (COIEC) who administers this regime is broadly recognized as belonging in a category of parliamentary institutions called agents of parliament. The COIEC is the only one of nine such agents who denies that it should be categorized as an agent. Instead, the COIEC argues it is an Officer of the House of Commons – a category that is heretofore unrecognized. Given the heightened interest in public sector ethics that has emerged, this dissertation analyzes what this Canadian institution is, how it works, where it belongs, what its limitations are and why.

This is a unique institution whose design sets it apart from the recognized agents of parliament. The COIEC is responsible for two mandates: one (the *Act*) is legislative and the other (the *Code*) is a non-legislative mandate. Work under the *Code* is explicitly protected by parliamentary privilege, which shields it from judicial scrutiny. This allows the COIEC to exercise a level of independence from government and Parliament that is otherwise unprecedented among agents. I argue that the COIEC cannot be properly characterized as either an agent or an officer of either Parliament or the House of Commons as a result, and that this institutional design has allowed the COIEC to intentionally blend the administration of the two regimes.

This blending of regimes has contributed to a strong assertion of operational independence that has been exacerbated by Parliament's reluctance to engage with the Office in good faith in relation to the many recommendations its commissioners have made towards the improvement of both the *Act* and Code. I explain the implications this has for the COIEC's constitutional legitimacy and offer recommendations for how the mandates might be reformed and more thoughtfully delegated by Parliament.

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I also owe incredible gratitude to my wife's parents, Hoa and Minh. Returning to graduate school would not have been possible without the sacrifices they have made for us. I hope one day that I will be able to earn the same love and respect from my children and their partners as my in-laws have earned from me.

Ontario's Integrity Commissioner Lynn Morrison (then my boss) introduced me to Professor Ian Greene back in 2013, when I first told her that I wanted to pursue a graduate degree in law. We met for the first time at a Second Cup near Yonge and Bloor and Professor Greene encouraged me to apply to both the University of Toronto (where I later obtained my LLM) and Osgoode Hall Law School. Although he was already officially retired when I received my acceptance to Osgoode (while nearing completion of my LLM), Professor Greene still agreed to co-supervise my PhD with Professor Liora Salter. I could not have been luckier. Professor Greene is the foremost scholar in political ethics and has treated me like a son. A better mentor does not exist. Professor Salter was also amazing because she pushed me. She accepted no excuses and helped me to realize very early on what I was capable of. Both

supervisors helped me to keep everything in perspective – which I have learned is no small feat during graduate studies.

When Professor Salter retired, I was very fortunate to have then Dean, now Justice Lorne Sossin step in as my supervisor (Professor Greene stayed on as a member of my committee). Nobody wants to let the Dean down, so I hung a picture of Justice Sossin on my wall at home (where I hoped my diploma might eventually go) in order to remind myself to get to work. It has been ever-humbling to look up at his picture on a daily basis. Thank you, Justice Sossin, for the support and guidance that you have given me.

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1. Introduction

The regulation of political ethics has never been as heavily scrutinized as it is today. The ethical conduct of public officials has always been a matter of public interest, but we are now at a moment in our history where the consensus that has been reached on the meaning and scope of political ethics is under siege. There are many things that have brought about this development, including changes in what information governments share with the public, how they communicate, how the public consumes that information and, most importantly, the questionable behavior of individuals who have occupied the highest public offices in the United States and in Canada.

On November 8, 2016, Donald J. Trump became the 45th President of the United States of America. Prior to occupying the political position that is widely regarded as being the most important one in the world, Donald J. Trump was a business person. His 98-page financial disclosure statements covering January 2016 through April 15, 2017, and released on June 16, 2017, disclosed that he was worth over \$1 billion dollars.¹ Prior disclosures also revealed that he has served as a director for over 500 limited liability corporations, although he resigned from many of those positions upon entering public office.²

¹ United States, Office of Government Ethics, *Donald Trump annual Disclosure Form 2017*, (14 June 2017), online: <[https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/12DAC79CC95F849085258142002703CA/\\$FILE/Trump,%20Donald%20J.%20%20final278.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/12DAC79CC95F849085258142002703CA/$FILE/Trump,%20Donald%20J.%20%20final278.pdf)>.

² Jill Disis, Drew Griffin, Curt Devine & Scott Bronstein, “Trump Organization documents say he has resigned from more than 400 businesses”, *CNN Money Online* (23 January 2017), online: <<https://money.cnn.com/2017/01/23/news/donald-trump-resigns-business/index.html>>; Donald Trump, Confirmation of Resignation from Business

As an individual with vast business assets, it was obvious before he won the Presidency that Mr. Trump would have to work hard to avoid conflicts of interest while in office. The public dialogue was so attuned to this potential problem that a major source of controversy during the presidential campaign was the fact that Mr. Trump had not voluntarily released his tax returns to the public (a customary practice for Presidential candidates) so that the public and the press could get a good sense of the candidate's potential conflicts of interest. The concern seemed to be that Mr. Trump's business empire was so vast that it would in fact prohibit him from being able to serve purely in the public interest if he were to be elected President. If that were in fact the case, then an argument could be made that the public should have the right to know more about Mr. Trump's assets before they decide whether to vote for him as a Presidential candidate.

Even if they refuse to disclose their tax returns during their campaign for office, every sitting President is expected to place their conflict-generating assets in a blind trust upon taking office.³ This trust must be managed by an arm's length, third party individual, with the public office holder being given no information and having no control over the trust assets while in office. Presumably on the advice of his lawyers, Donald J. Trump decided that he would instead put his assets into a revocable trust to be administered in part by his

Entities (19 January 2017), online:
<<https://assets.documentcloud.org/documents/3404759/DJT-Resignation-Signature-Page-With-Exhibit-a.pdf>>.

³ *Ethics in Government Act of 1978*, 5 USC app §102(f) (which states that assets can be placed in a blind trust to avoid conflicts and that one of the requirements of a blind trust is that there can be no conditions placed on the independent judgment of the trustee to dispose of any assets in the corpus of the trust).

eldest son, Donald Trump Junior.⁴ Many observers felt that this decision left something to be desired, but what made and makes President Trump's business holdings so unique is that a number of them are real property assets that are branded with his last name. If you place a large office building into a blind trust and have no control or access to the asset, then presumably that asset could be sold without you ever knowing. This is not the case with an asset like an office building that has your last name on it however. It is much easier to keep track of that asset without having to do much digging.

Since taking office, President Trump has openly used government transportation, as he must, to regularly visit and hold official meetings at properties held in his revocable trust. Each visit brings the media with it and often includes meetings with foreign dignitaries and their entourages. In fact, many lobbyists and foreign government officials have come to recognize that one way to curry favour with America's 45th President is to frequent his real estate properties.⁵ It has also been uncovered that US Air Force air crews stopping at Prestwick Airport in Scotland for refuelling also stayed at President Trump's expensive Turnberry Resort on several occasions while he has been in office.⁶

⁴ Donald Trump, "Trump International Hotel Liquor License Filings With Trust Info" (27 January 2017), online: <<https://www.documentcloud.org/documents/3442581-Trump-International-Hotel-Liquor-License-Filings>>.

⁵ Jonathan O'Connell, David A Fahrenthold & Mike DeBonis, "T-Mobile executives seeking merger approval booked more than 52 nights at Trump's D.C. hotel – more than previously known", *The Washington Post* (6 February 2019), online: <https://wapo.st/2MRcyrp?tid=ss_tw&utm_term=.48ae2e3df92e>.

⁶ Ryan Browne, "US AirForce review finds crews stayed at Trump hotel 6% of the time", *CNN.com* (12 September 2019), online: <<https://www.cnn.com/2019/09/12/politics/trump-organization-hotel-air-force/index.html>>.

Seeing the President spend so much time at his self-branded properties while he also occupies the most important political position in the world makes it seem like there are few to no meaningful conflict of interest or anti-corruption laws that apply to prevent him from using his public office to further his own private interests. That this is possible in the United States of America, an arguably advanced democracy that is not ignorant to the problems that conflict of interest and public sector corruption can give rise to,⁷ means that perhaps the rest of the world ought to start paying attention to these issues within their own borders as well.

In fact, Canada's 23rd Prime Minister Justin Trudeau found himself in hot water on multiple occasions during his first term in office - although not because of his business holdings. Prime Minister Trudeau made mistakes with respect to how he handled a family vacation,⁸ neglected to report sunglasses that he received as a gift⁹ and attempted to influence his Attorney-General to interfere in a criminal case for political reasons.¹⁰ There

⁷ See e.g. the infamous Watergate affair.

⁸ Canada, Office of the Conflict of Interest and Ethics Commissioner, *The Trudeau Report made under the Conflict of Interest Act and the Conflict of Interest Code for Members of the House of Commons* (20 December 2017), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/The%20Trudeau%20Report.pdf>> (Commissioner: Mary Dawson) [*Trudeau Report*].

⁹ Canada, Office of the Conflict of Interest and Ethics Commissioner, *Public Notice of Administrative Monetary Penalty Issued Under the Authority of the Conflict of Interest Act, Re: The Right Honourable Justin Trudeau* (June 2018), online: <<http://prciec-rpccie.parl.gc.ca/EN/PublicRegistries/Pages/Declaration.aspx?DeclarationID=728a6ef2-3573-e811-99fe-000e1e07bde8>>.

¹⁰ Canada, Office of the Conflict of Interest and Ethics Commissioner, *Trudeau II Report made under the Conflict of Interest Act* (14 August 2019), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/Trudeau%20II%20Report.pdf>> (Commissioner: Mario Dion) [*Trudeau II Report*].

is no evidence to date that suggests Prime Minister Trudeau is outright corrupt.¹¹ If anything, the evidence simply suggests that he can be careless about parliamentary ethics rules. Regardless, the best time to improve public sector ethics and anti-corruption laws is clearly when the people in power are honourable, so that a country can protect itself from the prospect of a dishonourable person intentionally taking advantage of their position as a public official by advancing their own personal interests. Wholesale improvements to Canada's rules have rarely taken place however, unless a promise to do so was part of a candidate's election campaign platform.¹²

Given that Prime Minister Trudeau was the first Canadian Prime Minister to be found in violation of parliamentary ethics laws, this dissertation reflects the need and anticipates the appetite for a comprehensive study of Canada's parliamentary conflict of interest and ethics regime. The official who administers this regime is broadly recognized in the literature as belonging in a category of parliamentary institutions called 'agents of parliament'. Despite many of them having rather high public profiles, there have been no comprehensive studies of any of these agents to date. Interestingly, the Conflict of Interest and Ethics Commissioner (COIEC) is the only one in a group of nine such agents who vehemently denies that the commissioner's office should be categorized as an agent of parliament. Instead, the two individuals who have served in the position have argued that the COIEC is an officer of the

¹¹ By corrupt here, I mean intentionally acting dishonestly by using his public office for personal gain.

¹² See e.g. "Accountability Act signed into law" CBC News (12 December 2016), online: < <https://www.cbc.ca/news/canada/accountability-act-signed-into-law-1.596815>> (where it is noted that the Conservative government's recently passed *Federal Accountability Act* was a key campaign plank during Prime Minister Stephen Harper's election campaign).

House of Commons – a categorization which is heretofore unrecognized in the literature and has certainly not been studied. Given the heightened interest in public sector ethics that has emerged in recent years, it is worth exploring what this Canadian institution is, how it works, where it belongs, what its limitations are and why.

In this dissertation I explain the political, structural and legal history of the governance of parliamentary ethics in Canada. I draw attention to the developments and tensions that have led us to the unique parliamentary ethics regime we now have in Canada and argue that the COIEC cannot be properly characterized as either an agent or an officer of either Parliament or the House of Commons. The COIEC is responsible for two mandates: one (the *Conflict of Interest Act*¹³) is legislative and the other (the Conflict of Interest Code for Members of the House of Commons¹⁴) is a mandate that exists by virtue of authority vested in the COIEC under the Standing Orders of the House of Commons. The COIEC itself is created under the *Parliament of Canada Act*,¹⁵ which specifically sets out that only the commissioner's work under the Code is protected by parliamentary privilege, whereas certain aspects of the administration of the *Act* can, in contrast, be subject to judicial review.

The COIEC is the only institution that has been generally categorized as an agent of parliament while also being given the explicit protection of parliamentary privilege that is typically reserved for officers of parliament. It is accordingly an example of a unique

¹³ *Conflict of Interest Act*, SC 2006, c 9, s 2 [*Act*].

¹⁴ Canada, House of Commons, *Standing Orders of the House of Commons, Appendix 1: Conflict of Interest Code for Members of the House of Commons* (consolidated version at 29 November 2018) [*Code*].

¹⁵ *Parliament of Canada Act*, RSC 1985, c P-1 [*PC Act*].

institution whose design sets it apart from others and allows its commissioner¹⁶ to exercise a level of independence from government and Parliament that is otherwise unprecedented for agents. I argue not only that this institutional design is uncharacterizable under the current nomenclature that is available in the literature, but that this confusion has allowed the office's commissioners significant flexibility with respect to how they choose to operationalize the office's mandates. Specifically, the office's commissioners have leveraged its unique institutional design by intentionally blending the administration of the two regimes it is responsible for (thus serving to shield some of its work under the *Act* from judicial scrutiny) and have begun to interpret their role through a philosophical lens that reflects a commitment to being directly accountable to the public as well as to Parliament. This evolving approach is noteworthy because the *Act* and Code have been specifically drafted to ensure that the commissioner acts as an advisor to and delegate of the PM and the House of Commons. While there is some expectation of transparency in its operations,¹⁷ relatively little emphasis is placed on public engagement or accountability to the public. This new approach to accountability has important implications for the COIEC's effectiveness as a parliamentary body, particularly because it represents an attempt to inform and influence the office's stakeholders through communication channels that were given very little emphasis in its formal mandates.

¹⁶ Two individuals have served as the Conflict of Interest and Ethics Commissioner to date. I will occasionally refer to them as "the office's commissioners" throughout this study.

¹⁷ For example, the Commissioner is expected to make certain documents available to the public, including annual reports and investigation reports. This will be discussed further in chapter 6.

This strong assertion of its independence has been exacerbated, and perhaps inspired in part, by Parliament's reluctance to fully engage with the office in good faith in relation to the many recommendations its two commissioners have made towards the improvement of both the *Act* and Code. Understanding the history of the *Act* and Code will help us to gain insight into the reasons for this reluctance. Whereas the commissioners have made recommendations that have been primarily focused on their desire to drive strong ethical governance in the public sector, the political, structural and legal histories of parliamentary ethics in Canada seem to have had a chilling effect on Parliament's willingness to take progressive action with respect to the *Act* and Code.

As noted above, the office's two commissioners have adopted philosophical approaches to their work that support their efforts to strongly assert the office's independence. These decisions have important implications for the office's constitutional legitimacy that have yet to be identified in the literature. I identify these implications and explain again how they are informed by the political, structural and legal histories of parliamentary ethics in Canada. My goal is to provide a thoughtful critique of the current regimes that contributes to the literature by drawing attention to ways in which the effectiveness of the office is being undercut and why. I offer recommendations for how the COIEC's mandates might be reformed to reflect the fact that the public has come to expect that thoughtful and meaningful accountability from public institutions will involve placing greater emphasis on transparency in their operations.

In order to defend this argument, I begin in chapter 2 by briefly explaining Canada's history as a parliamentary democracy that exists under the model of the United Kingdom's Constitutional Monarchy. Necessary as a foundational starting point, this background helps us understand where the privileges and rights of Parliament originate from. The principle of responsible government is explained, and context is provided to make clear the difference between Parliament and government, the relationship between the two and, most importantly, the role that Parliament plays in overseeing government and holding it to account. As government has grown in its breadth and complexity, Parliament has creatively developed institutions to help it fulfil some of its oversight responsibilities. The emergence of these institutions is both historically and politically significant. The goal of this chapter is to explain the roles that those agents have come to occupy and situate them as being ad hoc oversight mechanisms that have been created to improve and strengthen Parliament's ability to uphold the broad principle of responsible government. They have generally emerged in response to political pressure on governing parties to improve public sector governance. I also make an important distinction between agents of parliament and officers of parliament that serves to clarify the language I use throughout this study.

Chapter three addresses the criticism made by some commentators that agents of parliament have no legitimate constitutional basis for their existence and quite simply represent an erosion of parliamentary power. This is an important discussion that I will return to later in order to better understand the implications of delegating a mandate to the COIEC that is properly one of the privileges and rights of Parliament, and also to understand the implications of how the COIEC's accountability relationships are evolving. Despite the

questions surrounding their legitimacy however, agents of parliament have also been touted as important to parliamentary democracy because they are independent oversight bodies that play a role in enhancing public trust in government. The rest of this chapter therefore offers context from the literature about what is fundamentally necessary for the process of establishing an independent agent of parliament. I describe how mandates are set, the rules surrounding appointment and removal from office of an appointee, how budgets are determined and modified and how agents are held accountable. This provides a general comparative background within which we will be able to contextualize the emergence and evolution of Canada's modern parliamentary ethics regime.

Chapter four builds from the literature review and explains how agents of parliament generally operationalize their independence through their work. The purpose of this largely descriptive work is to again provide the comparative context that I appeal to in my chapter six analysis of the COIEC's formal structure and operations. Having this background allows me to identify the ways in which the institutional design of the COIEC closely mirrors that of the other agents of parliament. Chapter six will build from these similarities in order to clearly demonstrate the structural and legal characteristics of the COIEC that make it unique.

With the understanding that neither of the office's two commissioners have characterized their role as being that of an agent of parliament, this dissertation next moves into a more detailed study of the office itself. Chapter five provides an historical overview of the law, politics and structure of parliamentary ethics rules in Canada that will help us understand why and how these regimes have evolved. The COIEC is Canada's fourth

iteration of its parliamentary ethics oversight office, with the design of each successive iteration placing greater emphasis on structural and operational independence. I explain the political and legal tensions that have served to inspire the emergence of the COIEC in its current form and draw attention to the landscape of complementary ethical and legal regimes in which it is situated. Despite the primacy of the COIEC, it is only one of many regimes that have clear influence over public sector ethics. This is important because it helps us understand why parliamentarians may lack the political will to make progressive changes to the *Act* and Code.

Chapter six offers a comprehensive analysis of the COIEC's structure and ongoing operations. As the only parliamentary body in the class of agents that has been explicitly given the powerful protection of parliamentary privilege over some of its operations, it is crucial to understand how this rare delegation of independence is being operationalized. I look at what the office's responsibilities are and how they are managed, who its stakeholders are, who its influential relationships are with and how the COIEC is held accountable. Most importantly however, this chapter explains that the COIEC is not in fact akin to an agent of parliament and that the parliamentary privilege bestowed upon it under the *Parliament of Canada Act* in relation to one part of its mandate (i.e. the Code) can be used by a commissioner (whether intentionally or not) to shield the office from scrutiny in relation to its work under the other half of its mandate (i.e. the *Act*).

Chapter seven explains that despite being delegated one of its mandates by the House of Commons and the other by Parliament more broadly, the office's two commissioners have

been unable to convince parliamentarians to work towards adequately modernizing those mandates. Having been asked to make recommendations on several occasions for how the regimes could be improved, the office's commissioners have been left noticeably disappointed by the response to their recommendations. This disappointment has also been mirrored in the academic literature, in traditional and social media and by civil society organizations. Parliamentarians have yet to demonstrate a real commitment to improving the mandates that they have delegated to the COIEC. This reluctance could simply be due to their busy schedules, but I argue that the slow evolution of these two regimes is a function of the Prime Minister's reluctance to lose control over the *Act* by opening it up to input from the Senate in order to pass amendments, and an interest in self-preservation for members of House of Commons that disincentivizes amending the Code absent political pressure to do so.

In chapter eight I demonstrate that the obvious frustration experienced by the office's two commissioners has compelled them to make decisions that demonstrate a resistance to Parliament's indifference. Ethics commissioners are expected to be interested in strong ethical governance, but the historical, political and structural limitations weighing on the *Act* and the Code serve to incentivize complacency from members of parliament. Instead of simply being content with an out-dated status quo, the office's two commissioners have chosen to leverage the office's unique status as the only 'agent' to be protected by parliamentary privilege in order to assert a level of operational independence that may help to drive progress for these regimes. This strong operational approach to emphasizing the COIEC's independence has been complemented by (current) Commissioner Dion expressly

re-framing both the public and the media as among the office's key stakeholders, while investing more resources into public outreach and education. This re-framing appears to be an attempt not only to get Parliament's attention, but also to interpret the COIEC's mandates as authorizing the commissioner to prioritize the public interest much more broadly than appears to have been intended by Parliament. Because the COIEC is similar to courts in terms of its expected independence, it is possible that the mandate drift is a natural response to the challenges that have arisen in its relationship with Parliament. Regardless, it is very much an intentional rather than an unconscious shift. I explain the implications of these changes for the legitimacy of the COIEC's role within Canada's parliamentary democracy and offer possibilities for reform.

Chapter nine draws the dissertation together through a comprehensive summary of the important arguments I have made throughout.

2. Accountability in Canada's Parliamentary Government

2.1 Introduction

In this chapter I explore Canada's history as a parliamentary democracy that exists under England's Constitutional Monarchy. Having this early background allows us to understand where the privileges and rights of Parliament originate from and why the principle of responsible government is so important. I explain and contextualize the difference between Parliament and government, the relationship between the two and, most importantly, the role that Parliament plays in overseeing government and holding it to account. As government has grown in its breadth and complexity, Parliament has creatively developed institutions to help it fulfil some of its oversight responsibilities. An important goal of this chapter is to situate those agents of parliament as being ad hoc oversight mechanisms that have been created to improve and strengthen Parliament's ability to uphold the broad principle of responsible government. Finally, I make an important distinction between 'agents of parliament' and 'officers of parliament' to clarify the language used throughout this dissertation.

2.2 Constitutional Monarchy

To begin to understand Canada's parliamentary ethics laws it is important to first gain some familiarity with Canada's constitutional structure. This will allow us to trace the emergence of these laws and to situate them within the proper historical, structural and legal contexts.

The Parliament of the United Kingdom created and patriated Canada when it enacted the *British North America Act* in 1867. The *British North America Act* became known as the *Constitution Act, 1867*.¹⁸ The Constitution is “a comprehensive set of rules and principles” that provides “an exhaustive legal framework for our system of government.”¹⁹ The written Constitution is based on the British constitutional model and outlines many of the rules and principles that dictate how Canada’s system of government operates, although some important usages, practices, customs and conventions remain unwritten.²⁰ As a result of its historical and ongoing connection to the United Kingdom, Canada is considered to be a constitutional monarchy. The Queen or King of the U.K., as applicable, remain as Canada’s head of state, but the Constitution itself sets out that Canada’s system of political governance is democratic in nature and consists of more than simply a Monarch who governs. There are three branches of government between which certain powers of governance are divided: the legislative, the executive and the judiciary.²¹ I will briefly describe these branches to provide background for the analysis that will follow.

The first branch of the Canadian system of parliamentary democratic government is the legislative branch. This branch consists of the Queen (as represented by the Governor General), the Senate and the House of Commons, who all work together to make laws for

¹⁸ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act 1867*].

¹⁹ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 32 [*Secession*].

²⁰ Peter Russell has argued, among others, that Canada should write down these customs, uses and conventions, as the UK and New Zealand have in their cabinet manuals. See Peter H Russell, “The Need for Agreement on Fundamental Conventions of Parliamentary Democracy” (2010) 27:1 NJCL 205 at 205.

²¹ See *Constitution Act 1867*, *supra* note 18.

the country. The House of Commons, also called the ‘lower house’, is composed of individuals who are voted for during elections by the Canadian citizenry and who therefore become responsible for representing particular, geographically defined, electoral districts. Members of Canada’s House of Commons are also called Members of Parliament (MPs) and there were 338 seats for these members in 2018.²² Seats in the House of Commons are expected to be distributed between the provinces and territories in roughly the same proportion as the population is distributed.

The elections process has evolved over time so that there are now groups of candidates who have formed political parties, thus allowing them to espouse similar ideas and to act in concert with one another. People who seek to become members of parliament typically associate themselves with political parties, of which Canada has five that are well-recognized.²³ The political parties each choose a person who will be their leader. After an election has taken place, it is convention that the Governor General (who is the Queen’s delegate in Canada and who therefore acts on behalf of the Monarch) determines which party leader he or she believes is likely to receive the support and confidence of a majority of the

²² The number of MPs corresponds to the number of electoral districts that exist within the country. Some electoral districts may be without representation at times, which accordingly means that some seats may be vacant on occasion. The number of seats has also changed over time.

²³ These are the Liberal Party, the Conservative or Progressive Conservative party, the New Democratic Party, the Bloc Québécois and the Green Party. Other parties also exist, but their members have never held seats in the House of Commons. That being said, some MPs have been kicked out of parties while still holding their seat in the House of Commons. In such cases, those members sit as independents. A person may be voted in as an independent as well, although that is quite rare in modern times. Being affiliated with a party is generally understood to be necessary in order to maximize influence in the legislative decision-making process. Political parties do not have formal status under the Constitution.

members of the House of Commons. That party leader is then given an opportunity to earn that support, typically by tabling and passing their first budget of the session. If they are successful at earning the confidence of the House, the Governor General will then appoint that party as the governing party.²⁴ The title of Prime Minister does not appear in the *Constitution Act, 1867*, but is based on the conventions historically adopted by the Parliament of the United Kingdom. Usually the results of an election make it clear who the Prime Minister should be, but it is also possible that the parties whose members did not win the most seats can form a coalition, nominate a leader, pass a confidence vote and then ask the Governor General to appoint their chosen leader as the Prime Minister. The political party that the Prime Minister belongs to then forms government.

The first job for the Prime Minister is to nominate a circle of close advisors to become ministers of the Crown. The members of this ‘Cabinet’ are all officially sworn in and appointed to their positions by the Governor General on the advice of the Prime Minister. Members of that same political party who are not sworn into Cabinet are called ‘backbenchers’.²⁵ The *Constitution Act, 1867*, ascribes executive power to the Queen, or, as the case is in Canada, her representative the Governor General. Although the Governor General is therefore technically responsible for governing Canada on behalf of the Monarch, the *Constitution Act, 1867*, further stipulates that the Governor General has access to a Privy Council, who can “aid and advise in the Government of Canada.”²⁶ The Privy Council is

²⁴ Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press Canada, 1991) at 20 [Heard].

²⁵ All members have seats in Parliament. Ministers sit near the front, and non-ministers sit behind them, nearer to the back. Hence the term ‘backbenchers’.

²⁶ *Constitution Act, 1867, supra* note 18.

actually a group of more than a hundred persons, including all current and former Cabinet ministers and certain other notable Canadians who are “...charged with the responsibility for advising the governor general as to the exercise of the powers of the Crown.”²⁷ The Privy Council does not meet in actual practice however, and has no active role or function in governing Canada. Instead, the Cabinet that was appointed by the Governor General upon recommendation from the Prime Minister, is technically a committee of the Privy Council and exercises the powers of the Privy Council on a day to day basis.²⁸

Given the above, the Prime Minister and cabinet work together to effectively instruct the Governor General about matters of governance. For example, the summoning and dissolution of the Legislature and the drafting of a writ to start an election campaign.²⁹ Legally speaking, the Governor General has no obligation to accept the advice of the Prime Minister and cabinet. It is incredibly rare, however, to see a Governor General reject such advice, as constitutional convention has evolved to guard against this.³⁰ The Governor General can nonetheless respond to advice by offering advice, encouragement and/or warning in return. According to Andrew Heard, “[e]ither the Prime Minister personally, or

²⁷ Patrick J Monahan, *Constitution Law*, 3rd ed (Toronto, ON: Irwin Law Inc, 2006) at 62 [Monahan].

²⁸ *Ibid* at 64.

²⁹ There are many other interesting things I could note about the role of the Governor General, but they simply lie outside the focus of this dissertation. See *Heard, supra* note 24 at 16-47 (for a good discussion of the Governor General’s powers).

³⁰ The Governor General does have some reserve powers that permit him or her to exercise a measure of personal discretion over some matters, rather than having to strictly follow the advice of the Prime Minister. These powers can only be exercised in very exceptional circumstances (see e.g. *Monahan, supra* note 27 at 73 (for a discussion of the King-Byng Incident and the Governor General’s refusal to dissolve Parliament and call an election at Prime Minister Mackenzie King’s request)).

the Cabinet collectively, makes the decisions relevant to the exercise of almost all [sic] of the governors' legal powers."³¹

The second branch of government is the executive branch. The executive is comprised of the Monarch, the Privy Council (which consists of the Prime Minister and the members of his or her Cabinet) and the departments of government.³² The executive branch of government works to create policies and procedures to put new laws into action. Those policies and procedures are administered by the departments that the members of the privy council manage in their roles as ministers of the Crown. Although members of the privy council are nearly always members of parliament, the roles and duties of the executive branch of government are separate from those of Parliament. The executive branch is responsible for governing according to the laws of the country, whereas the rest of Parliament is there to scrutinize those governance decisions and to hold the executive accountable for its actions.

Returning to the legislative branch, the party or parties whose leader(s) are not chosen to govern take on the role of being the opposition. If we understand that the executive branch's responsibility is to implement the laws of the country, then the opposition's responsibility is to hold it to account³³ for the way that it chooses to implement those laws.

³¹ Heard, *supra* note 24 at 18.

³² Canada, Library of Parliament, "Guide to the Canadian House of Commons (Ottawa: 2016), online: <<https://lop.parl.ca/About/Parliament/GuideToHoC/index-e.htm>>.

³³ "Holding to account" is primarily done by opposition members asking questions of the government during question period so that its decisions must be explained in a public forum. The opposition must be well-informed in order to be able to ask important questions. As will be made clear throughout this dissertation, Agents of Parliament play

They do this by participating in question period, but also by playing an important role in the multi-partisan parliamentary committees that help to hold the executive to account. As Andrew Potter has explained, “[t]he essence of parliamentary democracy is the accountability of the government to an elected legislature.”³⁴ The opposition fulfills this role primarily by asking questions of the Prime Minister and Cabinet during question period to seek justification for policy decisions. The opposition also debates and votes on bills³⁵ when they are tabled in Parliament. Technically, it is every MP’s job, including the government backbenchers, to represent the will of their constituents and to hold the government to account. In John Stuart Mill’s words, “...the proper office of a representative assembly is to watch and control government.”³⁶ Practically speaking however, it is the opposition parties that do all the heavy lifting in the House of Commons. These relationships of accountability between the executive and legislative branches, as well as with the voting public, are foundational within Canada’s system of constitutional democratic government.

an important role in ensuring that opposition members have sufficient information and analysis about government policies. A further discussion about accountability is taken up below in chapter 3.6.

³⁴ Andrew Potter, “Political Ethics and Responsible Government” in Denis Saint-Martin & Fred Thompson, eds, *Research in Public Policy Analysis and Management, Volume 14: Public Ethics and Governance: Standards and Practices in Comparative Perspective* (UK: Emerald Group Publishing Limited, 2006) 71 at 77 [Potter].

³⁵ A ‘bill’ is the name given to a proposed law. How and by whom bills can be and are tabled is not important for the purposes of this dissertation.

³⁶ Paul G Thomas, “The Emerging World of Accountability and Ethics: Parliamentary Scrutiny and Redress of Grievances” (Luncheon Address to the Canadian Study of Parliament Conference delivered at Winnipeg, Manitoba, 9 December 2006) citing John Stuart Mill, *Considerations on Representative Government (1861)*, online: <http://cspg-gcep.ca/pdf/2006_Conference_Dr._Paul_Thomas_speech-e.pdf> [Luncheon speech].

Once the lower house votes to pass a bill, the bill then proceeds to the Senate.³⁷ The Senate is also called the ‘upper house’ of Parliament and there are 105 Senators. These individuals are not elected by the public but are instead appointed by the Governor General upon recommendations received from the Prime Minister. As explained in the *Reference Re Senate Reform*:

The contrast between election for members of the House of Commons and executive appointment for Senators is not an accident of history. The framers of the *Constitution Act, 1867* deliberately chose executive appointment of Senators in order to allow the Senate to play the specific role of a complementary legislative body of “sober second thought.”³⁸

The Senate’s primary responsibility is to study and debate bills that pass through the House and either send them back to the lower chamber with feedback for its consideration, or pass/approve them. If a bill passes through both chambers, it will then be given royal assent by the Governor General as a matter of convention.³⁹ It is important to note here that until very recently every individual appointed to the Senate was affiliated with a political party. This does not mean that those individuals did not merit their appointment, but it does mean that the appointment process was not officially or explicitly driven by merit-based decision-making. Prime Minister Justin Trudeau decided during his first term in office that he would

³⁷ The Senate can also initiate new bills. Also, majority governments will sometimes introduce a bill in the Senate first before it goes to the lower House for debate.

³⁸ *Reference re Senate Reform*, 2014 SCC 32 at para 56.

³⁹ See Canada, Library of Parliament, “Constitutional Conventions”, by Élise Hurtubise-Loranger (11 July 2006), online:

<<https://lop.parl.ca/content/lop/TeachersInstitute/ConstitutionalConventions.pdf>> (in which Hurtubise-Loranger explains that the Governor General cannot refuse to give Royal Assent to a bill that has passed through both houses, except if the Prime Minister advises that Assent should be withheld).

make Senate appointments explicitly merit-based instead and in 2019 the Independent Senators Group has more members than the Liberal or Conservative caucuses.⁴⁰

As noted above, holding the government to account is most commonly an undertaking that takes place in Parliament during question period. As will be addressed throughout this dissertation however, there are many other important and impactful ways that the executive branch is held to account. One of the most important ways is by the third branch of government: the judiciary. The *Constitution Act* provides for the establishment of a judiciary⁴¹ and convention dictates that it shall be professional and independent as it presides over the courts of law and the administration of justice.⁴² The judiciary is independent of the executive and legislative branches of government and is responsible for, among other things, interpreting the laws that are passed by Parliament to determine whether actors (both public and/or private) are complying with those laws.

Finally, Canada's federalist system of government means that the power to govern in relation to particular subject matters is divided between the federal and provincial/territorial levels of government. Although the provinces and territories do not have upper houses of Parliament (i.e. a Senate), they do have agents and officers of parliament that are created under and otherwise subject to the same accountability structures as are agents and officers at the federal level. This is important to draw attention to because

⁴⁰ See Canada, Parliament of Canada, "Senate – Standings in the Senate" (accessed 16 September 2019, online: <<https://sencanada.ca/en/senators/#senate-standings-table>>.

⁴¹ *Constitution Act 1867*, *supra* note 18 at VII.

⁴² Stephen Brooks, *Canadian Democracy: An Introduction*, 4th ed (Toronto: Oxford University Press, 2004) at 135.

it allows us to understand that the basic accountability structures that emerge from the *Constitution Act* in relation to Canada's democratic system of parliamentary government exist at more than one level of government. The experiences of the provinces and territories will help to inform our analysis in later chapters. I will also return below to a discussion of the role of each of the branches of government in the context of the federal parliamentary ethics regime.

2.3 Responsible Government

Although the executive branch acts independently from the legislative and judicial branches, there must be a way to hold it continuously accountable for its actions. This fundamental requirement exists within our system of parliamentary democracy and is expressed as the principle of responsible government. There are two requirements of responsible government: 1) that ministers be "...collectively responsible for the policies and conduct of the government and individually responsible for the policies and administration of their departments,"⁴³ and 2) that Cabinet as a whole bear a collective responsibility for the actions of government.⁴⁴ These requirements can be otherwise understood as the principles of individual (ministerial) and collective responsibility. Because formal constitutional theory makes Parliament the primary agency of accountability within the Canadian political

⁴³ Paul G Thomas, "The Lambert Report: Parliament and accountability" (1979) 22:4 Can Pub Admin 557 at 559 [*Lambert*].

⁴⁴ *Heard*, *supra* note 24 at 50-51.

system,⁴⁵ it is of course through Parliament that government must be held accountable and responsible to the public.⁴⁶

The principle of ministerial responsibility is operationalized through a recognition that: “first, questions concerning a department may be directed in the legislature to the minister; second, the minister carries a culpability for wrongful actions and will have to correct the wrong and/or depending on the circumstances, suffer the penalty of loss of office.”⁴⁷ With respect to issues that may arise relating to the non-partisan public service, convention dictates that it is the minister who is to be held responsible. This guarantees the anonymity of civil servants in parliamentary debates. This emphasis on anonymity ensures that civil servants “have the freedom to offer advice to the minister without fear of public recrimination.”⁴⁸

The principle of collective responsibility, on the other hand, dictates that Cabinet is responsible to the monarch, to itself, and to elected parliamentarians. Crucial to this responsibility is that Cabinet must have both solidarity and confidentiality. Cabinet solidarity means that the members of Cabinet must be seen to publicly and unanimously support the policies that they, as Cabinet, have decided upon. They must present a united front to the electorate. Ministers who break this commitment to solidarity risk being removed from their

⁴⁵ Paul G Thomas, “The Past Present and Future of Officers of Parliament” (2003) 46:3 Can Pub Admin 287 at 289 [PP&F].

⁴⁶ Megan Michelle Furi, *Officers of Parliament: A study in Government Adaptation* (MA Thesis, University of Saskatchewan 2002), online: <<https://harvest.usask.ca/handle/10388/etd-11062008-130840>> at 3 [Furi MA].

⁴⁷ *Heard*, *supra* note 24 at 52.

⁴⁸ *Ibid* at 59.

ministerial posts by the Prime Minister. Cabinet confidentiality is closely tied to solidarity and requires that Cabinet discussions and documents remain confidential. This protects Cabinet members who disagree on a position taken by Cabinet from being subject to criticism from the public, but also ensures that national/state secrets remain secret.

These principles of responsibility are extremely important given the ways in which governments spend money. The Canadian system is “based on the acceptance of the principles of legislative supremacy and executive responsibility.”⁴⁹ All spending must originate with the Crown and then be voted on by Parliament.⁵⁰ Government must ask for funds, and it must also disclose its use of resources.⁵¹ I will return below to a discussion about how government gets approval from Parliament to spend money, but it is important to note here that Parliament’s role in both spending decisions and accountability discussions serve as an important point of departure for any understanding of the Conflict of Interest and Ethics Commissioner.

One of the most important ways in which accountability to Parliament is determined is through the confidence convention. This convention ensures that the prime minister and government remain in office only as long as they have the confidence of a majority of the

⁴⁹ Herbert Balls, “The watchdog of Parliament: the centenary of the legislative audit” (1978) 21:4 Can Pub Admin 564 at 587 [*Balls*].

⁵⁰ Paul G Thomas, “Understanding and Debating the Role of Agents of Parliament” (A research paper prepared for the Public Policy Forum, 2017), online: <<https://www.researchgate.net/publication/328345770>> at 8 [*Thomas PPF*].

⁵¹ S L Sutherland, “The Office of the Auditor General of Canada: Government in Exile?” (2002) School of Policy Studies, Queen’s University, Working Paper 31 at 5.

MPs in the House of Commons.⁵² Confidence is determined based on the outcome of particular votes within Parliament, though not every government bill or motion is, or needs to be, considered a matter of confidence.⁵³ Andrew Heard writes that there are three categories of confidence votes:

- (1) those that are designated as such in advance by the prime minister;
- (2) those that would approve crucial government policy; and
- (3) motions by the Opposition that are worded to express a clear lack of confidence.⁵⁴

If a government loses the confidence of Parliament, then it must either resign or advise the Governor General to call an election.⁵⁵ This convention is a key accountability measure in Canada's parliamentary democracy and can even be used to remove a government for matters related solely to its ethical conduct. The principle of responsible government provides a base upon which concerns about ethical conduct can find support. As Paul Thomas notes "[a] government that has confidence in its measures and actions should welcome parliamentary scrutiny, not resist it."⁵⁶

2.4 Parliamentary Oversight

Another way of saying that government is responsible to Parliament is to say that Parliament has a responsibility to watch and control the government. This was historically a somewhat manageable task, especially in Canada's early years. As the federal bureaucracy

⁵² Peter Aucoin, Mark D Jarvis & Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery Publications Limited, 2011) at 42.

⁵³ *Ibid* at 87.

⁵⁴ *Ibid* at 87 (describing *Heard*, *supra* note 24 at 69-70).

⁵⁵ *Heard*, *supra* note 24 at 69.

⁵⁶ *PP&F*, *supra* note 45 at 311.

has grown however, and as government ministries, departments and agencies have multiplied, it has become increasingly difficult for Parliament to adequately carry out its watch and control duties. As noted above, there were merely 338 MPs in 2018. By contrast, there were over 200 agencies and departments⁵⁷ and the federal public service employed 273,571 individuals in 2018.⁵⁸ The size of the government over which Parliament must keep its watchful eyes trained is quite remarkable. On top of this, it can be the case that the majority of MPs (as they were in 2018) are members of the governing party, which means that the bulk of the oversight and scrutiny of a huge government operation must come from fewer than half the sitting MPs.⁵⁹ Interestingly, “[t]heory suggests that Parliament controls the executive, but in practice the reverse seems to be true.”⁶⁰ In Paul Thomas’ opinion, because of the vast and shifting scope of modern governments, watching and controlling have become impossible tasks for Parliaments to perform comprehensively on their own.⁶¹

Parliament has therefore been required to think creatively and to enlist the help of others to even begin to fulfil its duties. This has meant leveraging the help of individuals and groups outside of Parliament, but also thinking creatively about how Parliament can

⁵⁷ Government of Canada, “Departments and Agencies” (2018), online: <<https://www.canada.ca/en/government/dept.html>>.

⁵⁸ Government of Canada, “Population of the federal public service” (2018), online: <<https://www.canada.ca/en/treasury-board-secretariat/services/innovation/human-resources-statistics/population-federal-public-service.html>>.

⁵⁹ This is of course only the case if we do not consider government MPs as having to exercise oversight and scrutiny roles.

⁶⁰ *PP&F*, *supra* note 45 at 289. See also Donald V Smiley, *The Federal Condition in Canada* (Toronto: McGraw-Hill Ryerson Inc, 1987) at 87 (for a discussion of the ways that power is centred in the first ministers and their key advisors, both in and out of cabinet).

⁶¹ *Luncheon Speech*, *supra* note 36 at 4.

meaningfully enhance its own oversight capabilities. Obvious examples of non-parliamentary actors that play a role in holding government accountable are the media (both traditional and non-), civil society groups and members of the public who litigate or otherwise challenge government decision-making through courts and administrative tribunals. Academics, private sector organizations, and international interest groups also play a role in scrutinizing the operations of the Canadian government. I will provide a more robust analysis of the role of these different groups in chapters 5 and 7.

To enhance their own capacity for oversight, parliamentarians have ensured that they have funding for office staff, including researchers and political advisors, and they have also created a variety of parliamentary standing committees. These committees are assigned specific mandates related to Parliament's watching and controlling responsibilities and are comprised of elected members from each of the political parties. Examples of standing committees include: International Trade, Finance, Justice and Human Rights, Health, Public Accounts, and Access to Information, Privacy and Ethics.⁶² To supplement these committees, parliamentarians have also created various standalone officers of parliament.⁶³ These officers have been delegated the power to perform certain aspects of Parliament's oversight and regulatory functions at an arm's length from government actors who are traditionally subject to parliamentary scrutiny.⁶⁴

⁶² Parliament of Canada, House of Commons, "List of Committees" (42nd Parl, 1st Sess), online: <<https://www.ourcommons.ca/Committees/en/List#collapse-JUST>>.

⁶³ The conceptual and linguistic confusion that exists in relation to officers and agents of parliament will be addressed below, in chapter 2.6.

⁶⁴ Jamie Baxter, "From Integrity Agency to Accountability Network: The Political Economy of Public Sector Oversight in Canada" (2015) 46:2 *Ott Law Rev* 231 at 236 [*Baxter*].

Megan Furi argues that officers of parliament have become a crucial aspect of responsible government.⁶⁵ These officers are effectively mechanisms to help make responsible government work when particular parliamentary oversight responsibilities have become unwieldy. Interestingly, they have been created as a matter of convention within Canada’s model of parliamentary democracy and are not specifically mentioned in the written Constitution. Although they emerge in a rather ad hoc manner and as a result of political decision-making aimed at improving public sector governance, officers have unfortunately also not been the subject of sufficient academic study and scrutiny to date. It is worth noting that there has also been an evolution in the terminology used to describe officers of parliament. In fact, the word ‘officer’ is no longer used in the same way that it once was and there is a distinction that must be made between officers and agents of parliament. This linguistic and conceptual confusion will be further addressed in section 2.6, where I clarify that I will be using the expression “agents of parliament” throughout.

2.5 Agents of Parliament

According to a 2018 Public Policy Forum report, there are nine agents of parliament in Canada: the Auditor General, the Chief Electoral Officer, the Commissioner of Official Languages, the Information Commissioner, the Privacy Commissioner, the Conflict of Interest and Ethics Commissioner, the Commissioner of Lobbying, the Public Sector Integrity Commissioner, and the Parliamentary Budget Officer. Although the Parliamentary Budget Officer did not officially become an agent until 2017, the number of agents has

⁶⁵ *Furi MA, supra* note 46 at 64.

grabbed the attention of people like Paul Thomas. Thomas commented in 2003 that “things may not have gone as far in most provincial capitals, but I would recommend that you stay tuned because coming soon to a government near you will be an ever expanding watching and controlling apparatus.”⁶⁶ In fact, the Public Policy Forum reports that the overall number of agents at the federal, provincial and territorial levels of government is 88.⁶⁷ Agents have also been adopted by Parliaments all across the Westminster system, including UK and Australia. It is accordingly very clear that watching (i.e. surveillance) and controlling (i.e. regulation) have become significant growth industries within the public sector.⁶⁸

The watching and controlling responsibilities of Parliament have arguably become so unwieldy not only because the task is too large, but also because of there is a need “to respond to a public mood of cynicism, mistrust and disillusionment with the political process.”⁶⁹ This progressive increase in the number of agents of parliament seems reasonable because, as Tolga Yalkin and Patrick Baud observe, “...even when parliamentarians have access to government information, it is often so complex and voluminous that it requires a specialist to interpret.”⁷⁰ Furthermore, there is no guarantee that there will be MPs elected to Parliament who have sufficient subject matter expertise to allow them to understand and interpret complex information about government policies and programs. Even if they could

⁶⁶ *Luncheon Speech*, *supra* note 36 at 8.

⁶⁷ Public Policy Forum, *Independent and Accountable: Modernizing the Role of Agents of Parliament and Legislatures* (Ottawa: April 2018), online: <<https://ppforum.ca/publications/independent-accountable/>> at 3 (see chart on pages 31-32) [*PPF Report*].

⁶⁸ *Luncheon Speech*, *supra* note 36 at 8.

⁶⁹ *Ibid* at 1.

⁷⁰ Tolga R Yalkin & Patrick F Baud, “Ontario’s New Financial Accountability Officer: An Evaluation” (2014) 8 JPPL 529 at 529.

do so, “their analysis would be perceived as intrinsically partisan and, thus, serve less value in clarifying the public debate.”⁷¹ Agents help by being able to expose a lack of integrity and performance problems in government while also being able to offer advice about how to fix those problems.⁷² It has been argued that their ability to assist Parliament in these ways makes them integral parts of our accountability infrastructure.⁷³

The first agent in Canada was the Auditor General, which was established August 1, 1878⁷⁴ by Alexander Mackenzie’s Liberal government in the wake of the Pacific Scandal.⁷⁵ The offices of the Auditor and Deputy Minister of Finance had been combined at that time, but the auditor, John Langton, was being overburdened with work. This caused Mr. Langton to have to devote too much of his time to dealing with daily administrative problems that would arise. To provide the auditor with greater independence from the ministry and to free up more of his time, a new bill was introduced to separate the offices of Auditor and Deputy Minister of Finance by establishing the Audit Office as an agent of the Legislature.⁷⁶

⁷¹ *Ibid* at 530-531.

⁷² *Thomas PPF*, *supra* note 50.

⁷³ *Luncheon Speech*, *supra* note 36 at 4.

⁷⁴ See e.g. *Balls*, *supra* note 49.

⁷⁵ Jeffrey Graham Bell, “Agents of Parliament: The Emergence of a New Branch and Constitutional Consequences for Canada” (2006) Institute on Governance, online: <https://iog.ca/docs/2005_December_alfhales.pdf> at 7 [*Bell Emergence*].

⁷⁶ Herbert R Balls, “John Langton and the Canadian Audit Office” (1940) 21:2 *Can Hist Rev* 150 at 174-5.

Offices of this nature continued to emerge progressively⁷⁷ over time, until things changed in the wake of the 1995 Quebec sovereignty referendum. The Canadian government had established a fund in 1994 to help promote Canada by advertising the Canadian government at events anywhere in the country.⁷⁸ The management of this program worsened progressively between 1995-2002, with access to information requests revealing that money was being spent on projects for which little to no work was completed. The program was suspended in 2002, but it wasn't until 2004 that Prime Minister Paul Martin established a commission of inquiry to investigate what had gone wrong. The details of the results of the investigation are not important for the purposes of this dissertation, but it is important to note that the Auditor General reported about the scandal in a 2003-2004 report. Justice Gomery then released his public inquiry report in 2006.

The sponsorship scandal cost the Liberals the election in 2006 and gave Stephen Harper and the Conservative party plenty of political ammunition. One of the promises made by the Conservatives was that they would pass comprehensive accountability legislation to create three new officers of parliament and that they would make

⁷⁷ See Ann M Ann Chaplin, *Officers of Parliament: Accountability, Virtue and the Constitution* (LLM Thesis, University of Ottawa, 2009), online: <<http://dx.doi.org/10.20381/ruor-12552>> at 100 [*Chaplin LLM*] (The order of their first appointment is described by Ann Chaplin as: The Auditor General of Canada (1878), The Chief Electoral Officer (1920), The Commissioner of Official Languages (1970), The Information Commissioner (1982), The Privacy Commissioner (1982)).

⁷⁸ Ian Greene & Robert Shepherd, "Case Studies: Conflicts of Interest and Entitlement" in Ian Greene & David Shugarman, eds, *Honest Politics Now: What Ethical Conduct Means in Canadian Public* (Toronto: James Lorimer & Company Ltd, 2017) at 101 [*HP Now*].

improvements to the officers that already existed. The theory behind the proposed *Federal Accountability Act* was that the way to “improve the capacity of Parliament to hold government to account was primarily to strengthen the capacities of parliamentary agents, the press, and the public.”⁷⁹ I will return below to the specifics of the legislation that was later passed by the majority Conservative government.

The creation of these offices in the wake of government scandals strongly suggests that their purpose is, at least in part, to help mitigate eroding public trust and confidence in government.⁸⁰ The fact that the first office was a financial accountability office further reflects this idea that people want assurance the public’s resources have not been mis-managed.⁸¹ Significantly, everyone involved seems to want this assurance “from an individual who is not involved in the management or of those programs, but who is knowledgeable, independent, and objective.”⁸²

Ann Chaplin argues that it is possible to discern four themes about why these offices are being created: probity, transparency, justice and integrity.⁸³ She argues that the fact that parliamentarians have chosen to operationalize these themes in this particular way indicates that ordinary government institutions were insufficient to protect these values.⁸⁴ A former

⁷⁹ Peter Aucoin, “Improving Government Accountability” (2006) 29:3 Can Parl Rev 20 at 21 [*Aucoin*].

⁸⁰ *Thomas PPF*, *supra* note 50 at 11.

⁸¹ Ross A Denham, “The Canadian Auditors General – What is their role?” (1974) 17:2 Can Pub Admin 259 at 260-261 [*Denham*].

⁸² *Ibid.*

⁸³ Ann Chaplin, “The Constitutional Legitimacy of Officers of Parliament” (2011) 29:1 NJCL 71 at 77 [*Constitutional Legitimacy*].

⁸⁴ *Ibid* at 80.

Commissioner of Official Languages agreed with this assessment when he reflectively commented about his role in a speech to Statistics Canada executives that: “I think of us as guardians of values.”⁸⁵

Despite the growth, proliferation and considerable positive response to agents of parliament, some commentators have also expressed reservations about these offices. There are questions about whether the creation of these agents means that elected officials are effectively surrendering their responsibility to probe and dig into the workings of government by dumping it into the laps of agents.⁸⁶ Ann Chaplin writes that the piecemeal nature of the development of these offices also raises some concerns:

...officers of Parliament did not come about through an effort to identify the whole mandate of holding government to account and divide it up into eight pieces. The creation of each office responded to a perceived need, focused in a particular subject-area, which was assumed to require an officer with a particular set of functions and powers.⁸⁷

They arise from increasing concerns over political legitimacy and seem to reflect the fact that there is a lower degree of confidence in the ability of elected legislatures to provide the political legitimacy and political accountability that is required for the exercise of governmental power.⁸⁸ Although there are important differences between them in mandate, capacity, tools, governance, etc., some commentators have expressed doubt about the overall

⁸⁵ Graham Fraser, “Agents of Parliament and the Machinery of Government” (Notes for an address to Statistics Canada’s executive conference, delivered in Ottawa, 7 October 2013), online: <<https://www.clo-ocol.gc.ca/en/news/speeches/2013/2013-10-07>> [*Fraser Speech*].

⁸⁶ *PPF Report*, *supra* note 67 at 9.

⁸⁷ *Constitutional Legitimacy*, *supra* note 83 at 94.

⁸⁸ John D Whyte, “Constitutional Change and Constitutional Durability” (2011) 5 JPPL 419 at 426 [*Whyte*].

potential for agents in general to make a real difference in the long run. Because there are many reasons for public mistrust, agencies like these can arguably only contribute a marginal amount to enhancing public trust.⁸⁹

Finally, it has also been argued that agents are given functions that can go well beyond simply providing support to parliamentarians.⁹⁰ They have become so common that some believe they are beginning to play a role in government policy-making.⁹¹ This is an important topic to which we will return later. Now I will turn instead to taking a closer look at who these agents are and what roles they have come to occupy.

Who are the Agents?

Despite the historic shortage of in-depth and agent-specific studies, some academics have spent time trying to piece together a list of criteria that can be appealed to in order to determine if someone is in fact an agent of parliament. Jeffrey Graham Bell has suggested the following criteria that I believe are instructive and will be reflected in the analysis I offer throughout this study:

- Is there reference in the enabling statute to a commission under the Great Seal affixed to the executive agent?
- Is it required to have the confidence of the chambers i.e. either the House or Senate or both to approve (or nominate and approve) the agency's executive candidate?
- Does the executive candidate have a statutory guarantee of a term at least five years in length?

⁸⁹ *Thomas PPF, supra* note 50 at 11.

⁹⁰ *Chaplin LLM, supra* note 77 at 100.

⁹¹ Gwyneth Bergman & Emmett Macfarlane, "The impact and role of officers of Parliament: Canada's conflict of interest and ethics commissioner" (2018) 61:S1 *Can Pub Admin* 5 at 21 at 6 (for an overview of the literature on this topic) [*Bergman & Macfarlane*].

- Is Cabinet required to have a resolution of the House and/or the Senate to remove a sitting executive agent?
- Is a report submitted, at least annually, to Parliament via the Speakers of one or both Chambers?
- Are the agency's estimates submitted to Parliament by the agency (via the Speaker) –or determined independently in some other fashion –rather than by a government department?
- Are staff, apart from officers named in the legislation, appointed by the agency's executive agent rather than by the government?
- Is the executive agent's salary fixed or pegged to a reference point in statute rather than being left to Cabinet discretion?⁹²

The list of officers who fit these technical indicia is continuing to grow, with the Parliamentary Budget Officer joining the group as recently as late 2017. This continuing growth has started to draw attention away from Parliament's work in holding government to account on big issues, with many observers expecting that it is instead the job of officers of parliament to do the heavy lifting regarding the oversight related to pressing matters of public concern.⁹³ As Peter Aucoin has noted, "...the capacity of Parliament to hold ministers and officials to account is considered almost exclusively in terms of Parliament's agents and not MPs themselves."⁹⁴ Given the incredible growth of interest in these offices and the public trust they seem to be commanding, what follows is an overview of the offices and the nature of their work. This overview will allow us to draw stronger comparative insights regarding appointment processes, mandates and reporting requirements. As will become clear, the office of the COIEC is different from the other agents in several important ways, particularly

⁹² Jeffrey Graham Bell, "Agents of Parliament: A New Branch of Government?" (2006) 29:1 Can Parl Rev 13 at 15 [*Bell*]; See also *Hubertise-Loranger, supra* note 172 at 71 (for a similar, but shorter list).

⁹³ See e.g. *Thomas PPF, supra* note 50 at 1 (Thomas notes that "With increased regularity when controversies arise about the behaviour of public officials, especially when the facts are complicated and cherished democratic principles and values are at stake, the almost automatic demand by the opposition in Parliament and by voices in the media is for an agent of Parliament to investigate").

⁹⁴ *Aucoin, supra* note 79 at 21.

with respect to the unique structural setup of its two mandates and the complicated reporting relationships that accompany them.

(a) Auditor General

Creation

As noted above, the Auditor General of Canada was the country's first agent of parliament. The office was created in 1878 in response to a scandal that involved the Prime Minister and several cabinet members.⁹⁵ The Office has evolved a great deal since its creation and is now governed by the *Auditor General Act*.⁹⁶

Appointment and Term

The Auditor General is a governor-in-council appointment that is made under section 3 of the *Act*. A governor-in-council appointment is one that is made by the Governor General after receiving the advice of his or her Privy Council. The *Act* stipulates that the appointment must be made only “after consultation with the leader of every recognized party in the Senate and House of Commons and approval of the appointment by resolution of the Senate and House of Commons.”⁹⁷ The appointee may only serve one term⁹⁸ of no more than ten years and may be removed mid-term by an order of the Governor in Council if the Senate and House of Commons agree to the removal.⁹⁹

⁹⁵ *Bell Emergence*, *supra* note 75 at 7.

⁹⁶ *Auditor General Act*, RSC 1985, C A-17 [*A-G Act*].

⁹⁷ *Ibid*, s 3(1) (“consultation” is not defined in the legislation, so it is unclear what level of dialogue and consensus is needed in order to meet this requirement). According to the Public Policy Forum, “the consultation usually consists of a phone call to the opposition advising them of a nominee on the eve of the appointment” (see *PPF Report*, *supra* note 67 at 22).

⁹⁸ *Ibid*, s 3(3).

⁹⁹ *Ibid*, s 3(1.1).

Mandate

The Auditor General's mandate is framed very broadly under the *Act*. It stipulates simply that the "Auditor General is the auditor of the accounts of Canada, including those relating to the Consolidated Revenue Fund."¹⁰⁰ To carry out its mandate, the Office conducts "independent audits and studies that provide objective information, advice, and assurance to Parliament, territorial legislatures, boards of crown corporations, government, and Canadians."¹⁰¹ The Auditor General also has other obligations to the President of Treasury Board, the Minister of Finance and under the Financial Administration Act, but they all involve auditing and providing a responsive opinion.¹⁰² To properly conduct its affairs, the office is granted access to all relevant information¹⁰³ and is also entitled to request information, including reports and explanations, from members of the public service.¹⁰⁴

Reporting relationships

There are two major annual reporting requirements for the Office of the Auditor General. First, the Auditor General must submit an annual report to the House of Commons by tabling it with the Speaker, who will then lay it before the House.¹⁰⁵ The legislation does not require that this annual report be tabled in the Senate. Second, the Treasury Board must nominate a "qualified auditor" every year who will audit the Office of the Auditor General

¹⁰⁰ *Ibid*, s 5.

¹⁰¹ Canada, Office of the Auditor General of Canada, "Who We Are: Our Role" (accessed 18 July 2019), online: <http://www.oag-bvg.gc.ca/internet/English/au_fs_e_370.html>.

¹⁰² *Supra*, note 96, s 6.

¹⁰³ There is an exception carved out for information that is expressly shielded from the Auditor by other Acts of Parliament. See *Ibid*, s 13(1).

¹⁰⁴ *Supra*, note 96, s 13(1).

¹⁰⁵ *Ibid*, ss 7(1), 7(3).

by examining receipts and disbursements and then reporting back to the House of Commons.¹⁰⁶ The external auditor's report is to be submitted to the President of the Treasury Board, who will then lay it before the House of Commons.¹⁰⁷

(b) Chief Electoral Officer

Creation

Canada's Chief Electoral Officer (CEO) position was created in 1920 under the *Dominion Elections Act*¹⁰⁸ and is regarded as the first of its kind in the world.¹⁰⁹ The legislation provided that the CEO would be appointed by a resolution of the House of Commons, rather than by the government. The push towards greater independence helped to insulate the CEO from undue political pressure and to eliminate partisanship in the administration of federal elections. Interestingly, the CEO was granted a life appointment under this early version of the legislation.¹¹⁰

¹⁰⁶ *Ibid*, s 21(1).

¹⁰⁷ *Ibid*, s 21(2).

¹⁰⁸ *Dominion Elections Act*, SC 1920, c 46.

¹⁰⁹ Canada, Office of the Chief Electoral Officer of Canada, "A History of the Vote in Canada" 2nd ed (2007), online:<https://www.elections.ca/res/his/History-Eng_Text.pdf> at 71.

¹¹⁰ *Ibid*.

Appointment and Term

Not surprisingly, the lifetime term of appointment set out under the *Dominion Elections Act* has since been changed. The CEO continues to be appointed by a resolution of the House of Commons, but they may only hold office while demonstrating good behaviour and for a maximum term of 10 years, with no possibility of re-appointment.¹¹¹ Furthermore, the CEO can be removed for cause by the Governor General at any time, provided that the House of Commons and Senate approve.¹¹²

Mandate

The office of the Chief Electoral Officer, also known as Elections Canada, was originally only responsible for the administration of general elections and by-elections. The office's mandate has since broadened to include the administration of referenda and other important aspects of our democratic electoral system. Other duties include, but are not limited to:

- Overseeing compliance with political financing laws in the *Canada Elections Act*;
- Maintaining the national register of electors;
- Registering political parties and third parties engaged in electoral advertising and ensuring that they comply with the rules;
- Registering electoral district associations, leadership contestants and nomination contestants of registered parties;
- Administering the laws related to the disclosure of contributions made to candidates, political parties and third parties, etc.;

¹¹¹ *Canada Elections Act*, SC 2000, c 9, s 13(1) [*Elections Act*].

¹¹² *Ibid.*

- Conducting public education campaigns on all matters related to voter and candidate registration, as well as voting;
- Conducting public information campaigns about voting and voter registration; and,
- Supporting the independent Federal electoral boundaries commission.¹¹³

Reporting relationships

The Chief Electoral Officer is an independent, non-partisan agent of parliament who reports to the House of Commons through the Speaker. Reports must be filed following general elections¹¹⁴ as well as by-elections.¹¹⁵

(c) Commissioner of Official Languages

Creation

Canada's Constitution stipulates that the country's records and laws must be produced in both English and French.¹¹⁶ Parliament adopted the *Official Languages Act*¹¹⁷ in 1969, following the Royal Commission on Bilingualism,¹¹⁸ and created the role of the Commissioner of Official Languages. The first commissioner was appointed in 1970.

Appointment and Term

¹¹³ *Electoral Boundaries Readjustment Act*, RSC 1985, c E-3, s 28(1).

¹¹⁴ *Elections Act*, *supra* note 111, s 534.

¹¹⁵ *Ibid*, s 536.

¹¹⁶ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 18(1).

¹¹⁷ *Official Languages Act*, RSC 1985, c 31 (4th Supp) [OLA].

¹¹⁸ Canada, *Report of the Royal Commission on Bilingualism and Multiculturalism* (Ottawa: Queen's Printer, 8 October 1967).

The Commissioner of Official Languages is a governor-in-council appointment that is made under section 49 of the *Act*. The *Act* stipulates that the appointment may only be made “after consultation with the leader of every recognized party in the Senate and House of Commons and approval of the appointment by resolution of the Senate and House of Commons”¹¹⁹ and that the two houses must pass resolutions to demonstrate their approval. The appointee may serve unlimited consecutive seven-year terms,¹²⁰ holds office during good behavior and may be removed mid-term by an order of the Governor in Council if the Senate and House of Commons agree to the removal.¹²¹

Mandate

The commissioner is responsible for overseeing the administration and promotion of the *Official Languages Act*. The commissioner:

- Acts as an ombudsman for Canada’s official languages in order protect the language rights of Canadians and to promote bilingualism across the country;
- Ensures the equality of English and French in Parliament, the Government of Canada, the federal administration and the institutions subject to the Act;
- Audits institutional compliance with the Act;
- Creates educational tools and conducts research, studies and public awareness campaigns; and,
- Intervenes before the courts in proceedings related to the status or use of English or French in Canada.

¹¹⁹ *OLA, supra* note 117, s 49(1)-(3).

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

Reporting relationships

The commissioner submits annual and other special reports¹²² to Parliament that address current issues, findings and recommendations.¹²³ These reports are submitted through the Speakers of the two houses¹²⁴ and are reviewed by the Senate and House of Commons Standing Committees on Official Languages.¹²⁵ Interestingly, there are also certain circumstances in which the commissioner can exercise a right to transmit a copy of a report and recommendations to the Governor in Council. The legislation contemplates that this will only take place when adequate and appropriate actions have not followed the initial tabling of a report that contained recommendations for action.¹²⁶

(d) Privacy Commissioner

Creation

The *Privacy Act*¹²⁷ and *Access to Information Act*¹²⁸ were both proclaimed in 1983. As I will explain, the two regimes complement each other very well.

Appointment and Term

The Privacy Commissioner is a governor-in-council appointment that is made under section 53 of the *Act*. The *Act* stipulates that the appointment may only be made “after consultation with the leader of every recognized party in the Senate and House of Commons”

¹²² *Ibid*, s 67(1).

¹²³ *Ibid*, s 66.

¹²⁴ *Ibid*, s 69(1).

¹²⁵ *Ibid*, s 69(2).

¹²⁶ *Ibid*, s 65.

¹²⁷ *Privacy Act*, RSC 1985, c P-21 [*Privacy Act*].

¹²⁸ *Access to Information Act*, RSC 1985, c A-1 [*Access to Info*].

and that the Senate and House must also pass resolutions to demonstrate their approval of the appointment.¹²⁹ The appointee may serve unlimited consecutive seven year terms during good behavior and may be removed by order of the Governor in Council only if the Senate and House of Commons agree to the removal.¹³⁰

Mandate

The Privacy Act governs the personal information handling practices of federal departments and agencies. The duties of the office were also extended in 2001 to include private sector businesses subject to the *Personal Information Protection and Electronic Documents Act*¹³¹ (PIPEDA). PIPEDA is Canada's federal private-sector privacy law. The Privacy Commissioner carries out its mandate to protect and promote privacy rights in various ways, including by:

- Investigating complaints against public and private sector organizations that are subject to the office's legislative mandate and issuing reports with recommendations;
- Auditing and issuing public reports related to the personal information handling practices of federal institutions and private businesses;
- Pursuing legal remedies where necessary;
- Promoting public awareness of privacy issues;
- Providing advice and analysis, including to Parliament, public institutions and private sector organizations. This includes reviewing privacy impact assessments (PIAs) that are completed in relation to government initiatives; and,

¹²⁹ *Privacy Act*, *supra* note 127, s 53(1).

¹³⁰ *Ibid*, s 53(2)-(3).

¹³¹ *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [*PIPEDA*].

- Researching trends, practices and systemic challenges relating to privacy in both the public and private sectors.

Reporting relationships

The commissioner is required to submit an annual report and entitled to submit special reports to Parliament.¹³² These reports must be filed with the Speakers of the Senate and House of Commons, who will then table them in their respective houses. The commissioner must also file an annual report with Parliament relating to their duties under PIPEDA.¹³³

(e) Access to Information Commissioner

Creation

The *Access to Information Act* was passed by the House of Commons in 1982¹³⁴ and the Office of the Information Commissioner was established very soon thereafter, in 1983. Whereas the Privacy Commissioner oversees how information in the possession of particular public and private sector actors is handled, the Information Commissioner oversees the way that the federal government allows people to access the information in its possession including individuals' personal information. The commissioner encourages and assists federal institutions to adopt approaches to information-sharing that meet the objectives of the *Act*, and advocates for greater access to information in Canada.

¹³² *Privacy Act*, *supra* note 127, ss 38 & 39.

¹³³ *PIPEDA*, *supra* note 131, s 25(1).

¹³⁴ Ken Rubin, "Parliamentarians and Canada's Access to Information Act" (1986) 9:1 *Can Parl Rev* 8 at 8.

Appointment and Term

The Information Commissioner is a governor-in-council appointment that is made under section 54 of the *Act*. The *Act* stipulates that the appointment may only be made “after consultation with the leader of every recognized party in the Senate and House of Commons” and that they must also pass resolutions to demonstrate their approval of the appointment.¹³⁵ The appointee may serve unlimited consecutive seven year terms¹³⁶ during good behavior and may be removed by order of the Governor in Council only if the Senate and House of Commons agree.¹³⁷

Mandate

Access to information laws ensure that the public has a right to access certain information that the government has in its possession, including individuals’ personal health information. A citizen will not be given access to personal information about other citizens or anything related to national security and cabinet confidences, but they are generally entitled to information related to government policy-making and the actual administration of government programs.

The Information Commissioner’s role is to encourage and assist federal institutions with adopting policies and practices regarding the handling of information that meet the objectives of the *Act*. The commissioner also advocates for greater access to information on behalf of the public and, when necessary, conducts investigations into complaints that are

¹³⁵ *Privacy Act*, *supra* note 127, s 54(1).

¹³⁶ *Ibid*, s 54(3).

¹³⁷ *Access to Info*, *supra* note 128, s 54(2).

received. For example, the office may investigate how access requests are handled by government institutions, and then work to resolve any disputes. The dispute resolution process is ideally driven by mediation but may also take place through the courts.

Reporting relationships

The commissioner submits annual and other special reports to Parliament to provide it with information about the office's yearly activities and any specific concerns that have arisen.¹³⁸ These reports are submitted to Parliament through the Speakers of the two houses¹³⁹ and are reviewed by Senate and House of Commons' Standing Committees.¹⁴⁰

(f) Commissioner of Lobbying

Creation

The Office of the Commissioner of Lobbying was established under the *Lobbying Act* in 2008.¹⁴¹

Appointment and Term

The Commissioner of Lobbying is a governor-in-council appointment that is made under section 4.1 of the *Act*. The appointment may only be made after consultation with the leader of every recognized party in the Senate and House of Commons and they must pass resolutions to demonstrate their approval of the appointment.¹⁴² The appointee may serve

¹³⁸ *Ibid*, ss 38, 39(1).

¹³⁹ *Ibid*, s 40(1).

¹⁴⁰ *Ibid*, s 40(2).

¹⁴¹ *Lobbying Act*, RSC 1985, c 44 (4th Supp) [*Lobbying Act*].

¹⁴² *Ibid*, s 4.1(1).

unlimited consecutive seven-year terms¹⁴³ during good behavior and may be removed by order of the Governor in Council only if the Senate and House of Commons agree to the removal.¹⁴⁴

Mandate

Lobbyists are generally understood to be individuals who are paid to champion particular causes by communicating with public office holders in an attempt to influence them in the performance of their official duties. Lobbyist registration legislation ensures that these interactions are recorded on a public registry so that lobbying activities are transparent to the public. This registry is administered and enforced by the Commissioner of Lobbying.

The goal of this regime is to leverage transparency in order to encourage public confidence in the integrity of government decision-making.¹⁴⁵ The legislation even allows the commissioner to create a code of conduct for lobbyists to abide by when they engage in lobbying activities.¹⁴⁶ Lobbyist registration laws also prohibit lobbyists from placing elected officials in real or potential conflicts of interest - which arises when an elected official makes or participates in the making of a decision in the execution of his or her official duties while they know, or reasonably ought to know, that there is an opportunity to improperly advance their own or another person's private interest(s).¹⁴⁷ The Commissioner of Lobbying also develops and implements educational programs targeted at lobbyists, public office holders

¹⁴³ *Ibid*, s 4.1(2).

¹⁴⁴ *Ibid*, s 4.1(3).

¹⁴⁵ See e.g. *Ibid* at Preamble.

¹⁴⁶ See e.g. *Ibid*, s 10(2).

¹⁴⁷ A variation of this definition can be found in the parliamentary conflict of interest laws for every Canadian jurisdiction.

and members of the public, and conducts reviews and investigations to ensure that lobbyists are complying with the legislation

Reporting relationships

The commissioner submits annual and other special reports to Parliament to provide information about the office's yearly activities and any specific concerns that have arisen.¹⁴⁸

These reports are submitted to Parliament through the Speakers of the two houses.¹⁴⁹

(g) Public Sector Integrity Commissioner

Creation

The Office of the Public Sector Integrity Commissioner was created in 2007, under the *Public Servants Disclosure Protection Act*.¹⁵⁰

Appointment and Term

The Public Sector Integrity Commissioner is a governor-in-council appointment that is made under section 39 of the *Act*. The appointment may only be made “after consultation with the leader of every recognized party in the Senate and House of Commons” and the Senate and House must also pass resolutions to demonstrate their approval.¹⁵¹ The appointee serves a seven-year term of office during good behavior and may be removed only by an order of the Governor in Council on the advice of the Senate and House of Commons.¹⁵² An

¹⁴⁸ *Lobbying Act*, *supra* note 141, s 11-11.1.

¹⁴⁹ *Ibid*, s 11.1(2).

¹⁵⁰ *Public Servants Disclosure Protection Act*, SC 2005, C 46 [*PSDPA*].

¹⁵¹ *Ibid*, s 39(1).

¹⁵² *Ibid*, s 39(2).

individual who serves a term as commissioner may only be reappointed for one more identical term.¹⁵³

Mandate

The Public Sector Integrity Commissioner is responsible for receiving disclosures of wrongdoing related to the federal public sector. These disclosures can be received from public servants and members of the public, provided they meet the criteria outlined in the *Act*. The commissioner investigates, makes recommendations and prepares reports. He or she is also charged with protecting whistleblowers against reprisal. One excellent example of corruption being exposed by a whistleblower is the sponsorship scandal, which implicated several elected members of Canada's governing party.¹⁵⁴

Reporting relationships

The commissioner reports directly to Parliament on an annual basis¹⁵⁵ and may also file special reports, when a matter is deemed to be urgent or important.¹⁵⁶ As is also the case for the other agents, these reports must be submitted to the Speakers of both the House of Commons and the Senate, who will then place them before their respective houses of Parliament.¹⁵⁷

¹⁵³ *Ibid*, s 39(3).

¹⁵⁴ See *HP Now*, *supra* note 78 at 18 (for an excellent description of the sponsorship scandal).

¹⁵⁵ *PSDPA*, *supra* note 150, s 38(1).

¹⁵⁶ *Ibid*, s 38(3).

¹⁵⁷ *Ibid*, s 38(3.3).

(h) Parliamentary Budget Officer

Creation

The office of the Parliamentary Budget Officer was created in 2006 as part of the *Federal Accountability Act*. Unfortunately, the first Parliamentary Budget Officer (PBO) “was not appointed until March 25, 2008 due to setbacks during the appointment process.”¹⁵⁸

The original reporting structure was such that the PBO reported to the Parliamentary Librarian instead of to Parliament through the Speaker.¹⁵⁹ This reporting structure remained in place until September 2017 when “different understandings over the meaning of “independent” became apparent”¹⁶⁰ and Parliament finally made changes to allow the PBO to officially become an agent of parliament under the *Parliament of Canada Act*.¹⁶¹

Appointment and Term

The PBO’s appointment process is a little different from the other agents of parliament. Although it is a governor-in-council appointment made under the Great Seal with the approval of the Senate and House of Commons, there are further consultations that are required. The Governor in Council must also consult with, though not necessarily receive the approval of, the leader of every recognized party in the House of Commons as well as the members of the Senate who occupy the seats of the Leaders of the government and

¹⁵⁸ Ian Lee, “The Origins of the Parliamentary Budget Officer in Canada” (Spring/Summer 2013) 24:3 Financial Management Institute of Canada E-Journal 23 at 24 [Lee].

¹⁵⁹ Canada, Office of the Parliamentary Budget Officer, *2015-16 Report on the Activities of the Office of the Parliamentary Budget Officer* (23 November 2016) at 12 (PBO: Jean-Denis Fréchette).

¹⁶⁰ Lee, *supra* note 158 at 24.

¹⁶¹ See *PC Act*, *supra* note 15, s 79.1.

official opposition.¹⁶² The PBO is appointed on the condition of good behavior for a term of seven years. They may only be removed mid-term for cause by an order of the Governor in Council on the address of the Senate and House of Commons.¹⁶³ There is also no limit to the number of times that an individual can be reappointed to the positions, as long as they serve no more than fourteen total years in office.¹⁶⁴

Mandate

The PBO provides Parliament with independent analysis of the government's budget, the estimates and any other documents that relate to Canada's finances, including the state of the Country's finances as a whole. The PBO may also provide analysis at the request of committees or specific parliamentarians, to estimate the cost of a proposed matter that is within Parliament's jurisdiction.

The legislative mandate has also been amended so that the PBO now has an obligation to respond to requests received from political parties or individual members of the House of Commons in the months that lead up to a general election. These individuals may ask the PBO to estimate the cost of election campaign proposals that they are considering.¹⁶⁵

Reporting relationships

The PBO is unique among the agents of parliament because it is required to file an annual work plan before the beginning of each fiscal year. This work plan is expected to

¹⁶² *Ibid*, s 79.1(1)(a)-(b).

¹⁶³ *Ibid*, s 79.1(2).

¹⁶⁴ *Ibid*, s 79.1(3).

¹⁶⁵ *Ibid*, s 79.21.

outline matters that the office believes to be of significance for the year ahead, how they will prioritize working on those matters, and what resources will be needed.¹⁶⁶ The PBO is also required to file an annual report at the end of the fiscal year and any other reports prepared throughout the year as they are finalized, as is typical of agents of parliament.¹⁶⁷ The PBO reports directly to the Senate and the House of Commons through their respective Speakers.

(i) Conflict of Interest and Ethics Commissioner

There is some debate as to whether the Conflict of Interest and Ethics Commissioner is in fact an agent of parliament.¹⁶⁸ This debate, along with a comprehensive analysis of the work of the commissioner, will be taken up in chapters five through eight.

2.6 Linguistic and Conceptual Clarification

There is an unfortunate “linguistic and conceptual confusion”¹⁶⁹ around the difference between officers and agents of parliament. It is important to unpack this confusion because agents and officers are different and we must to be clear about what we are talking about. The confusion stems from the historic use of the word ‘officer’ to describe those individuals who have since come to be described as ‘agents’. In fact, the word ‘officer’ is used so widely to describe individuals and offices connected to Parliament that it is almost

¹⁶⁶ *Ibid*, s 79.13(1).

¹⁶⁷ See *Ibid*, ss 79.13(1), 79.2(2), 79.22.

¹⁶⁸ See e.g. Canada, Office of the Conflict of Interest and Ethics Commissioner, *The Relationship Between Parliament and the Agents of Parliament - Seminar Offered by the Canadian Study of Parliament Group* (Ottawa, 31 March 2017), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/The%20Relationship%20Betwe en%20Parliament%20and%20the%20Agents%20of%20Parliament%20Mar%2031%202 017%20EN.pdf>> (Mary Dawson, Commissioner) [*Dawson Relationship*].

¹⁶⁹ *Bell Emergence*, *supra* note 75 at 5.

impossible to argue it is a term of art with any precise meaning. Given that both terms appear in the literature, it is important that I attempt to unpack the differences between them. To do this I must return to focusing on how Canada's Parliament operates.

Recall that the parliamentary branch of government consists in the Governor General as representative of the Monarch, the House of Commons and the Senate. Within Parliament, there are individuals who support parliamentary operations. These individuals are employees of Parliament, not elected officials. They include, among others, the Clerks of both houses, the Parliamentary Librarian, the Sergeant-at-Arms, the Law Clerks and Parliamentary Counsel. In an effort to use precise language, we might say that these actors operate within the Parliamentary bureaucracy and are subject to the authorities of the Speaker, as head of the bureaucracy. These individuals are non-partisan¹⁷⁰ and "assist Parliament in procedural and administrative matters."¹⁷¹ Historically, these officials have been referred to by the Privy Council Office, which is the central body of the federal government, as officers of parliament.¹⁷² That being said, there is no statutory definition for what constitutes a parliamentary officer¹⁷³ and the terms Officer of Parliament or Officer of the House appear

¹⁷⁰ Gary Levy, "A Parliamentary Budget Officer for Canada" (2008) 31:2 Can Parl Rev 39 at 42.

¹⁷¹ Canada, Library of Parliament, *Background Paper: Appointment of Officers of Parliament*, by Andre Barnes & Élise Hurtubise-Loranger, Publication No 2009-21-E (revised 10 September 2015) at 1 [*Barnes & Hurtubise-Loranger*].

¹⁷² Élise Hurtubise-Loranger "Chapter 6: Commonwealth Experience I – Federal Accountability and Beyond in Canada" in Oonagh Gay & Barry K Winetrobe, eds., *Parliament's Watchdogs: At The Crossroads* (UK Study of Parliament Group, 2008) 71 at 71 [*Hurtubise-Loranger*].

¹⁷³ *Supra*, note 171.

very rarely in statute and have never been subject to judicial interpretation.”¹⁷⁴ Interestingly, the Standing Orders for the House of Commons makes reference to the concept of an officer of parliament.¹⁷⁵

Officers of Parliament. Referral of the name of the proposed appointee to committee.

(1) Where the government intends to appoint an Officer of Parliament, the Clerk of the House, the Parliamentary Librarian or the Conflict of Interest and Ethics Commissioner, the name of the proposed appointee shall be deemed referred to the appropriate standing committee, which may consider the appointment during a period of not more than thirty days following the tabling of a document concerning the proposed appointment.¹⁷⁶

This reference in the Standing Orders seems to suggest that the Clerk, the Librarian and the Conflict of Interest and Ethics Commissioner are not officers of parliament. This is rather peculiar given that the Parliament of Canada’s online Glossary of Parliamentary Procedure defines an officer of Parliament as “[a]n officer responsible to one or both Houses of Parliament for the carrying out of duties assigned by statute. Among those included in the designation are... the Conflict of Interest and Ethics Commissioner.”¹⁷⁷ Paul Thomas has picked up on this confusion and has tried to sort through the language. He argues that we can better understand what an officer of parliament is if we accept that there are two types of officers. The first type is meant to be independent of the executive and exists to serve

¹⁷⁴ UK, Library of the House of Commons, *Officers of Parliament – A Comparative Perspective*, (Research paper 03/77 by Oonagh Gay, 20 October 2003) at 7 [Gay].

¹⁷⁵ *Ibid* at 22.

¹⁷⁶ Canada, House of Commons, *Standing Orders of the House of Commons, Committees* (consolidated version as at 29 November 2018), s 111.1(1) [*Standing Orders*].

¹⁷⁷ Canada, House of Commons, “Glossary of Parliamentary Procedure: Officer of Parliament” (accessed 18 July 2019), online: <http://www.ourcommons.ca/About/Glossary/Index-e.html#officer_of_Parliament_e>.

Parliament. The second type is also independent of the executive and intended to serve Parliament, but also functions to protect and serve the public.¹⁷⁸

This way of describing the second type of officer is slowly being accepted by other authors to add precision to the language used and to minimize confusion. We now speak of these officers using the language of ‘agencies’ or ‘agents’. For the purposes of this dissertation, I will adopt this approach and acknowledge that there are two types of officers of parliament. To distinguish between them, I will describe one as being ‘officers of parliament’ who work for and report directly to Parliament through the Speaker as the head of the parliamentary bureaucracy and ‘Agents of Parliament’ who undertake work on behalf of Parliament, but who are independent of Parliament and who simply report back to the house or houses through the Speaker. Agents do not answer to Parliament in any formal manner, whereas officers do. The term “officer of Parliament” will be “reserved for those positions that are purely parliamentary in their focus – such as the clerks of the two houses and the librarian of parliament.”¹⁷⁹ The new and emerging institutions that not only support Parliament but also serve Canadians,¹⁸⁰ will be described as agents or agencies of Parliament.¹⁸¹ With two exceptions, each of these agencies have reporting responsibilities

¹⁷⁸ *PP&F*, *supra* note 45 at 292-3.

¹⁷⁹ *Ibid* at 307.

¹⁸⁰ *Barnes & Hurtubise-Loranger*, *supra* note 171 at 1.

¹⁸¹ *PP&F*, *supra* note 45 at 307.

relating to both houses of Parliament.¹⁸² A brief introduction to each of the agents of parliament¹⁸³ was provided above.

The distinction between officer and agent that I am adopting has been supported by others, including the former Commissioner of Official Languages, Graham Fraser, who noted in a 2013 speech that: "...we have used the term "agents of Parliament" to describe individuals who report to parliamentarians, in order to distinguish us from those who work directly for Parliament, like the Clerk."¹⁸⁴ The distinction has also been adopted in some, but not all, of the more modern writing on the topic. The Public Policy Forum's 2018 research report "Independent and Accountable: Modernizing the Role of Agents of Parliament and Legislatures"¹⁸⁵ is an excellent example of a publication that has this language. Regardless, the literature seems to continue to be unclear. It is for the sake of clarity in this project that I am drawing a semantic distinction to help distinguish between the two types of institutions.

It is not the case yet, but I also hope that writers begin to use the language of "agents" or "agencies" on a more consistent basis. That being said, the word 'officer' has and will be

¹⁸² The two exceptions are the Chief Electoral Officer, which does not report in to the unelected Senate, and the Conflict of Interest and Ethics Commissioner, which only reports to the Senate with respect to its mandate under the *Conflict of Interest Act* and does not have any responsibilities towards the Senate under the Conflict of Interest Code for Members of the House of Commons. Notably, there is separate Senate Ethics Officer who reports directly to Senate (see *PC Act*, *supra* note 15, s 20.1).

¹⁸³ There are arguably nine in total, including the Conflict of Interest and Ethics Commissioner that is the focus of this project. Whether the Conflict of Interest and Ethics should properly be characterized as an agent of parliament is a matter of some debate however and will be addressed throughout this project.

¹⁸⁴ *Fraser Speech*, *supra* note 85.

¹⁸⁵ *PPF Report*, *supra* note 67.

used occasionally throughout when I am quoting or referring to the work of other scholars. With this distinction in mind, the next section looks at how agents of parliament came to exist, how they fit into our constitutional monarchy and what, in general terms, they offer our democratic system of parliamentary government.

2.7 Conclusion

There are either eight or nine agents, depending on how they are defined, that have been created to assist Parliament with its oversight and accountability functions. These agents are all delegated responsibilities that could in theory be taken up by Parliament itself, perhaps through the committee system, but that are clearly too extensive for it to give adequate attention to. This chapter provided a description of these agents within the context of our parliamentary democracy and the principle of responsible government. I offered a brief overview of how each of the agents are appointed, what their mandates are and how they are held accountable. The purpose of this overview was to situate the subject of this study within the class of institutions that it has been placed in and to understand their roles in the overall system. Although a bit of a granular analysis, it is crucial to identify the important tie between Canada's parliamentary democracy and Britain's Constitutional Monarchy so that we can later have this context to help us understand the role that parliamentary privilege plays in supporting the principle of responsible government. In the next chapter I will take a closer look at what the literature says about the constitutional legitimacy of agents of parliament. I will also describe how agents' mandates are set, the rules surrounding their appointment and removal from office, how their budgets are determined and modified and how they are generally held accountable. This will provide us

with a general comparative background within which we will be able to contextualize the emergence and evolution of Canada's modern parliamentary ethics regime.

3. Agents of Parliament (Literature Review)

3.1 Introduction

In this chapter I explore the constitutional legitimacy of agents of parliament. I address the criticism that there is no constitutional basis for their existence and that they represent an improper erosion of Parliament's powers. This is an important discussion that will help inform our understanding of the implications of delegating duties to the COIEC that are properly among the rights and privileges of Parliament. We will arrive at a better understanding of what an agent is and what important characteristics they have in common. Despite the questions surrounding the legitimacy of these agents, I will explain that they have been touted as important to parliamentary democracy because they are independent oversight bodies that help to enhance public trust in government. Because of Canadian Federalism, agents also play an important role in the governance of the provinces and territories. The literature related to Canada's sub-national jurisdictions is also relied upon to help us understand the federal context. This chapter will accordingly explain what the literature tells us is needed to create an independent agent of parliament, including how mandates are set, what the rules are surrounding the appointment and removal from office of an appointee, how budgets are determined and modified and how agents are held accountable.

3.2 The Constitutional Foundation

According to Megan Furi, we can better understand the concept of responsible

government¹⁸⁶ by looking closely at what is meant by the word responsible. She argues that the word has three meanings in the context we are considering. First, “ministers and cabinet have been granted power to advise the Crown and are responsible for the use of this power.”¹⁸⁷ This means that ministers must be held accountable for the administration of their department(s) and every agency, board and commission under that department’s umbrella. Second, government is responsible for managing the nation’s affairs and ensuring that national interests are responded to through the development of policy.¹⁸⁸ Third, ministers are not only generally responsible for the use of their powers, but they are more specifically responsible to the House of Commons, as a body of elected individuals who represent the will of the people.¹⁸⁹

Agents of parliament represent a shift in the concept of responsible government because they bypass the traditional reporting structure and this affords them a degree of protection from ministerial or central agency control that is not generally available to departments of government.¹⁹⁰ This direct reporting mechanism establishes these agents as institutions that exist outside of the traditional configuration of government. Critical of the lack of clarity regarding how agents fit into Canada’s constitutional framework, some commentators have even labeled agents of parliament as a “watchdog bureaucracy for Parliament.”¹⁹¹

¹⁸⁶ This concept was initially described by me in chapter 2, above.

¹⁸⁷ *Ibid* at 10.

¹⁸⁸ *Ibid*.

¹⁸⁹ *Ibid*.

¹⁹⁰ *PP&F*, *supra* note 45 at 298.

¹⁹¹ *Ibid* at 295.

According to Ann Chaplin, there are two important themes or concerns that apply to the exercise of power in a parliamentary democracy. The first is that “the use of public power must be justified by law”¹⁹² and the second is that we must ask: to “which of the constitutional centres of power do they, as government actors, belong?”¹⁹³ The answer to the first is straight-forward: agents of parliament exercise powers that are granted to them through legislative enactments and therefore “exercise authority on the basis of a mandate obtained from Parliament acting in its sovereign legislative capacity.”¹⁹⁴ They are, in this sense, creatures of parliament. The answer to the second concern is not so obvious.

(a) The Puzzle of Legitimacy

To the casual observer of politics, the fact that Canadians now have nine separate agents of parliament is not particularly noteworthy. After all, these agents help to hold government accountable and they occasionally expose public sector mismanagement that may not have come to light otherwise. To the political scientist or constitutional scholar however, these agents pose a real intellectual challenge. They seem to originate from the legislative branch, but their legislative mandates allow them to function in ways that Parliament simply does not. This has caused many scholars to question the constitutional legitimacy of agents of parliament. According to the Supreme Court of Canada, “[t]o be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through

¹⁹² *Constitutional Legitimacy*, *supra* note 83 at 86.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid* at 87.

public institutions created under the Constitution.”¹⁹⁵ Where do agents of parliament find their legitimacy? A quick scan of the literature reveals the extent of the concern:

- “In this country, while we have not yet considered enshrining our officers in the Constitution, neither have we limited them to activities that Parliament itself might do.”¹⁹⁶
- “The roles and powers of these legislative officers have developed with little constitutional definition...”¹⁹⁷
- “...officers of Parliament have been created without clarifying how they fit into the constitutional framework.”¹⁹⁸
- “...it is not clear how such entities fit within the existing constitutional framework of ministerial responsibility and administrative accountability.”¹⁹⁹

Agents of parliament are clearly not part of the judicial branch. Likewise, they do not fit comfortably into the executive branch. Even though agents are appointed by the Governor in Council, they do not take instructions from the executive or report back to the executive about their day-to-day operations. It is very clear then that agents of parliament were intended to form part of the legislative branch. Unfortunately, they do not fit cleanly into that box either because they are not elected to office nor do they exclusively support parliamentary operations. A vein of scholarly criticism has emerged that argues agents have become a sort of new branch of government that we can call the Integrity Branch.²⁰⁰ This new branch finds support and is sustained by the fact that we are turning into an audit society.

¹⁹⁵ *Secession*, supra note 19 at para 67.

¹⁹⁶ *Chaplin LLM*, supra note 77 at 141.

¹⁹⁷ Canadian Study of Parliament Group, *Whom do you Trust? The growing relationship between legislative assembly officers and citizens* – Conference Summary Report (9 Dec 2006), online: <http://cspg-gcep.ca/pdf/2006_Dec_9_Conference_Report-e.pdf> at 1.

¹⁹⁸ Donald Savoie, “The broken chain of answerability”, *The Globe and Mail* (16 May 2008), Opinion [*Savoie Broken*].

¹⁹⁹ *PP&F*, supra note 45 at 288.

²⁰⁰ See *Bell*, supra note 92 at 1 (for a good overview of this scholarly discussion).

This social change has reinforced the largely pragmatic emergence and evolution of this unique fourth branch even without any great effort being made to define a constitutional niche for these new institutions.²⁰¹

Some of these integrity branch institutions have significant powers that do not directly mirror the powers of Parliament. As Ann Chaplin explains:

The officers of Parliament have other powers which Parliament has never given itself or assumed. These include the capacity of the COL [Commissioner of Lobbying], IC [Information Commissioner] and PC [Privacy Commissioner] to go to court to enforce the rights they establish during the investigation of a complaint. Various officers can make orders that would be different from any measures parliamentarians could take. The CEO [Chief Electoral Officer] may adapt provisions of the Elections Act as an election proceeds; the COIEC [Conflict of Interest and Ethics Commissioner] can impose administrative monetary penalties on public office holders who fail to report conflicts of interest and can order them to take measures to correct conflicts of interest... These are all matters that a parliamentary committee could issues recommendations about, but not orders with legal effect.²⁰²

It is perhaps the constant concern about independence that has opened the door for such novel legislative mandates. We use the language of independence to describe the ideal that we strive for in relation to these agents, but the truth is that actual full independence would not only be impossible, but it would actually be constitutionally improper.²⁰³ Agents of parliament are clearly not meant to be a fourth branch of government,²⁰⁴ so where then do they derive their constitutional legitimacy from?

²⁰¹ *PP&F*, *supra* note 45 at 310.

²⁰² *Constitutional Legitimacy*, *supra* note 83 at 94-95.

²⁰³ *Ibid* at 87.

²⁰⁴ Paul G Thomas, "Trust and the Role of Independent Parliamentary Agencies" (A paper prepared for Canada's Public Sector Integrity Commission, 30 June 2015), online: <https://web.archive.org/web/20110120192925/http://www.psic-ispc.gc.ca/quicklinks_liensrapides/pres_thomas_paper_document-eng.aspx> at 6 [*Thomas PSIC*]; See also John M Ackerman, "Understanding Independent Accountability Agencies," in Susan Rose-Ackerman & Peter Lindseth, eds, *Comparative Administrative*

This question of how to locate the constitutional legitimacy of agents of parliament is not one that has been taken up by very many scholars. Some have downplayed these concerns, noting that agents of parliament do not undermine the constitution because Parliament has delegated them the authority to promote certain values and Parliament can take that authority back.²⁰⁵ Paul Thomas has argued that we should praise independent agents for what they contribute to democracy and citizen confidence in government by virtue of how they stretch the surveillance capacity of Parliament.²⁰⁶ Others, like Jeffrey Graham Bell, admit that the legitimacy of agents poses an interesting intellectual challenge, but see these institutions as being overall beneficial while causing no real harm:

Yes, they change the dominant policy networks, the political discourse, and citizens' impressions of government. But they leave our fundamental democratic mechanism intact.... we must not allow precedent and constitutional idealism to prevent new toolboxes from being opened.²⁰⁷

There are others who have put forth arguments for why and how these agents have gained, or are gaining, constitutional legitimacy. John Whyte argues that agents represent a type of constitutional change through political practice.²⁰⁸ As these agents continue to do the work of specialists who review government, they will add value but also receive tremendous criticism. It is therefore likely that they will increasingly be seen as needing formal protection

Law (Cheltenham, UK and Northampton, MA: Edward Elgar Publishing, 2010) 265 and 265-6 (Although this is not the case in Canada, Ackerman explains that independent accountability agencies are categorized together as a separate branch of government in Ecuador and Venezuela).

²⁰⁵ *Bell, supra* note 92 at 19.

²⁰⁶ *Luncheon Speech, supra* note 36 at 21.

²⁰⁷ *Bell, supra* note 92 at 20.

²⁰⁸ *Whyte, supra* note 88 at 426.

through the establishment of constitutional convention.²⁰⁹ In other words, the unwritten principles of our Constitution will have to catch up to reflect the reality of our present day political and administrative institutions.²¹⁰ Agents can be seen as a sort of pre-constitutional innovation. As John Whyte further argues:

...not yet constitutional law or, even, constitutional convention. They arise from increasing concerns over political legitimacy and, it can be said, reflect the markedly lower degree of confidence in the notion that electorally mandated legislatures provide all the political legitimacy and political accountability that the exercise of governmental power requires.²¹¹

The most comprehensive and deepest defence of the legitimacy of agents has been put forth by Ann Chaplin.²¹² Chaplin points out that the success of agents of parliament seems to reflect a sense among the populace “that probity, justice and integrity are missing from government and that current levels of transparency and accountability are inadequate to correct that situation.”²¹³ The legitimacy of agents could therefore lie in their ability to embody these virtues while contributing to public sector governance “in ways that are to some degree alien from traditional constitutional theory.”²¹⁴

Chaplin draws on former Chief Justice Beverley McLachlin’s speech entitled Unwritten Constitutional Principles.²¹⁵ In the Chief Justice’s view, the legitimacy of the state

²⁰⁹ *Ibid* at 428.

²¹⁰ *Savoie Broken*, *supra* note 198.

²¹¹ *Whyte*, *supra* note 88 at 426.

²¹² I do not propose to put forth a full and detailed account of Chaplin’s argument, which itself emerged as the product of her LLM thesis (See *supra*, note 90).

²¹³ *Chaplin LLM*, *supra* note 77 at 107-8.

²¹⁴ *Ibid* at 100.

²¹⁵ The Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, “Unwritten Constitutional Principles: What is Going On?” (Remarks of the Right Honourable given at the 2005 Lord Cooke Lecture in Wellington, New Zealand, 1 December 2005),

“depends on its adhesion to fundamental norms that transcend the law and executive action.”²¹⁶ She elaborates:

Rule of law. Human rights. Good governance. Principles that all branches of government, including the judiciary, must seek to uphold. Principles that may be written down, in some measure in some countries. But principles that the Commonwealth countries have asserted should prevail everywhere.²¹⁷

These remarks give support to Chaplin’s creative argument that officers of parliament could possibly derive their legitimacy from being responsible for mandates that have something to do with restoring the virtues that are perceived as missing from government.²¹⁸ Or, as former Chief Justice McLachlin has explained by “being the mouthpieces for the general will of the country, as concerns the standards of behavior expected of government actors.”²¹⁹

(b) An Erosion of Power?

John D. Whyte has argued that there is a “weakening influence – and relevance – of legislatures.”²²⁰ David E. Smith has similarly noted that although agents were once seen as servants of Parliament, they are now evolving into its masters.²²¹ M. Harold Martens, a former member of the Legislative Assembly in Saskatchewan, believes that legislative

online: <<https://www.scc-csc.ca/judges-juges/spe-dis/bm-2005-12-01-eng.aspx>> [McLachlin].

²¹⁶ *Constitutional Legitimacy*, *supra* note 83 at 104.

²¹⁷ *Supra*, note 215.

²¹⁸ *Constitutional Legitimacy*, *supra* note 83 at 105.

²¹⁹ *Ibid* at 106, citing *McLachlin*, *supra* note 215.

²²⁰ *Whyte*, *supra* note 88 at 428.

²²¹ David Pond, “The Impact of Parliamentary Officers on Canadian Parliamentary Democracy: A Study of The Commissioner of the Environment and Sustainable Development & The Environmental Commissioner of Ontario” (2010), online: <http://cspg-gcep.ca/pdf/Pond_Paper_Final_2010-e.pdf> at 3 (citing David E Smith. “A Question of Trust: Parliamentary Democracy and Canadian Society” (2004) 27:1 Can Parl Rev 24) [Pond].

assemblies or Parliament cannot allow their power to be eroded by giving it to other officers of the assembly.²²² The argument that agents of parliament are legitimate because they derive their authority from the fact that they were created by and meant to serve Parliament does not get much sympathy from critics who see the direct connection that agents have with the public and the media as actually undermining the role of the legislature and being harmful to self-government.²²³

Even though agents contribute a great deal to one of Parliament's most important functions, Ann Chaplin believes that they are not in fact members of the legislative branch. Instead, Chaplin argues that agents exist outside of Parliament's administrative structure and many of their functions and features are in fact distinct from those of parliamentary bodies.²²⁴ The requirement that agents report to parliamentarians is not the same as requiring parliamentarians to undertake their own studies or investigations on an issue. Not only do agents of parliament bring their expertise and detached perspective to their tasks, but they are also subject to stringent privacy requirements that mean much of the material they gather during investigations must remain confidential. Accordingly, unless Parliament wants to hold its own hearing into a matter, it is largely dependent on the agent's assessment of the facts on which the report is based.²²⁵ Furthermore, it is well known that agents discourage

²²² Canadian Study of Parliament Group, "Seminar Transcript: Accountability Committees and Parliament" (19 May 1993), online: <http://cspg-gcep.ca/pdf/1993_05-b.pdf> at 2:21 (M Harold Martens, MLA Sask).

²²³ *Constitutional Legitimacy*, *supra* note 83 at 103.

²²⁴ *Ibid* at 102.

²²⁵ *Ibid* at 84.

Parliament from conducting parallel investigations. This seems to fly in the face of the understanding that accountability ultimately rests with Parliament.

All that said, Donald Savoie has argued that opposition parties tend to treat agents of parliament kindly and view them as their allies.²²⁶ Agents are usually investigating the work of government, which means that it is possible they may uncover something that will embarrass the governing party. This can be useful to opposition parties and it makes them reluctant to challenge agents or to hold them to account.²²⁷ Despite the fact that uncovering problems in the public sector can help to motivate improvements in public sector management, some still argue that giving these powers to agents works against the ideal of responsible government.²²⁸ To commentators like Tolga Yalkin and Patrick Baud, agents represent an abdication of Parliament's responsibility to hold the government to account. They instead advocate for increased resources to be provided to parliamentarians themselves rather than to independent officers.²²⁹

On the other hand, there are also those who believe that agents of parliament represent an improvement to the idea of responsible government. Jack Stilborn has pointed out that agents do not pose a competitive threat in the way that many think they do, but that agents are instead undertaking work that Parliament itself could have performed, rather than

²²⁶ *Savoie Broken*, *supra* note 198.

²²⁷ *Ibid.*

²²⁸ *Pond*, *supra* note 221 at 56.

²²⁹ *Supra*, note 70 at 30.

displacing substantive functions that Parliament currently fulfills.²³⁰ Paul Thomas agrees and notes that agents have stretched the surveillance capacity of Parliaments and that they make a positive contribution to democracy and to increasing citizens' confidence in government.²³¹

(c) Agency Drift or Mandate Creep?

Objections to the growth in the number of agents of parliament centre on the idea that they have stretched the surveillance capacity of Parliament further than it was intended to have been stretched and therefore represent an erosion of Parliament's power. Some commentators are willing to look past this as long as the job of accountability is getting done, but others either do not believe that the job is getting done or remain traditionalists and object to the idea that Parliament should be comfortable delegating some of its responsibilities to a new accountability branch of government that seems to have emerged without a clear constitutional origin.

Much of the opposition to the ongoing growth in the number of agents of parliament has been fueled by concerns over agency drift or mandate creep. Agency drift occurs when:

...the policy preferences of Agents diverge from those originally envisioned by Principals – a phenomenon made possible by the discretion afforded to Agents in carrying out their activities and because monitoring these activities is itself a costly process.²³²

²³⁰ Jack A Stilborn, "The Officers of Parliament: More Watchdogs, More Teeth, Better Governance?" in G Bruce Doern & Christopher Stoney, eds, *How Ottawa Spends 2010-2011: Recession, Realignment, and the New Deficit Era* (Montreal: McGill-Queen's University Press, 2010) 243 at 252 [*Stilborn Watchdogs*].

²³¹ *Luncheon Speech*, *supra* note 36 at 21.

²³² *Baxter*, *supra* note 64 at 260.

Agents are afforded so much discretion that Jack Stilborn thinks they are no longer making any “obvious direct contribution to Parliament and its proceedings.”²³³ Three further examples of this idea of drift are offered by Donald Savoie, Ann Chaplin and Jamie Baxter. Savoie points out that some agents are beginning to circumvent Parliament entirely. They do this by informing the media first of their findings or, as in the case of the Privacy Commissioner in 2002, by launching constitutional court challenges without first consulting Parliament.²³⁴ Ann Chaplin adds that agency drift may be by design, whether or not it is intentional: “...if their investigative function was intended simply as an extension of that exercised by parliamentary committees, we would expect that the reports of their investigations would come to Parliament, but that is not always the case.”²³⁵ Some agents actually do not submit their investigation reports to Parliament at all.²³⁶ Finally, Jamie Baxter argues that underperformance can be considered a type of agency drift. The case of Public Sector Integrity Commissioner Christiane Ouimet provides an example of this type of drift. Ouimet was criticized by the media and later investigated by a parliamentary committee for investigating just seven of the 228 complaints received by her office during her tenure.²³⁷

There is also concern that the emphasis on the independence of these new agents of parliament has allowed them to turn themselves into “turf warriors just like other

²³³ *Stilborn Watchdogs*, *supra* note 230 at 246-7.

²³⁴ Donald Savoie, *Court Government and the Collapse of Accountability in Canada and the United Kingdom* (Toronto: University of Toronto Press, 2000) at 167.

²³⁵ *Constitutional Legitimacy*, *supra* note 83 at 92.

²³⁶ This is the case with the COIEC’s investigation reports under the *Act*, for example.

²³⁷ *Baxter*, *supra* note 64 at 246.

bureaucrats.”²³⁸ There is also apprehension about the perception that some agents tend to regularly push for the expansion of their mandates.²³⁹ A good example of this can be found in Ontario, where the Environmental Commissioner has been known to protest any move by the provincial government or the Legislature to restrain his actions.²⁴⁰ Peter Aucoin argues that this emerging reality is:

...neither shocking nor, on the whole detrimental... AP mandate creep is a rational maximization of public expertise finally freed from the defence of the government of the day. The political power exercised by APs is *influence*. Even when APs use the courts to achieve their ends, Parliament retains the ultimate power of rewriting legislation to override undesirable interpretations.²⁴¹

Regardless of the lens through which one views these relatively new additions to the public sector accountability landscape, it is clear that their growth represents a significant shift in how political accountability is achieved in Canada.²⁴²

3.3 Creating a New Agent of Parliament

As I have noted above, the growth in the number of agents has happened over time in an ad hoc and improvised manner.²⁴³ They are generally established in response to social and political pressures²⁴⁴ and there are absolutely no laws or conventions to assist parliamentarians with determining when it is appropriate to create a new agent of parliament. On the contrary, Canada’s first Auditor-General was created in response to a scandal

²³⁸ *Pond, supra* note 221 at 3.

²³⁹ *Thomas PPF, supra* note 50 at 1.

²⁴⁰ *Pond, supra* note 221 at 54.

²⁴¹ *Bell Emergence, supra* note 75 at 19 (where “AP” means Agent of Parliament).

²⁴² *Whyte, supra* note 88 at 428.

²⁴³ *PP&F, supra* note 45 at 288.

²⁴⁴ *Hurtubise -Loranger, supra* note 172 at 72.

involving Prime Minister John A. MacDonald.²⁴⁵ Subsequent agents were direct responses to political unrest in Quebec,²⁴⁶ a Task Force report released by the Department of Justice²⁴⁷ and most recently, a public inquiry headed by Justice Gomery that related to what has now come to be known as the Sponsorship scandal.²⁴⁸

Being created in response to a scandal does not necessarily mean that agents are poorly thought through, but it does mean that Parliaments who create them must be especially careful. They must be careful not to act in haste by creating a new agent when one is not needed. Sometimes people simply fail in their duties for reasons that can be identified and guarded against. The appropriate solution may not always be to delegate responsibilities to another person or entity. One way to guard against the possibility of acting in haste has been to ensure that agents of parliament derive their powers and duties from legislative enactments.²⁴⁹ Except perhaps when there is a majority government, passing legislation ensures that there is at least some level of parliamentary debate about whether it is necessary to create a new agent in the wake of a scandal. At the federal level, a legislative mandate also ensures that there is some Senate input, which (depending on the Senate's composition, whether mostly partisan or independent) may allow for some further critical analysis of the mandate being proposed.

²⁴⁵ *Ibid* at 72.

²⁴⁶ *Ibid* at 73 (See the Commissioner of Official Languages and the Quiet Revolution in Quebec).

²⁴⁷ *Ibid* (see the Privacy Commissioner and Information Commissioner).

²⁴⁸ See *ibid* at 74 (specifically, the passing of the *Federal Accountability Act* in 2006); Lori Turnbull, "Rules are Not Enough: How Can We Enforce Ethical Principles?" (2008) 1 JPPL 351 at 2 [*Turnbull Rules*].

²⁴⁹ See e.g. *Bell*, *supra* note 92; *Constitutional Legitimacy*, *supra* note 83.

Although agents are generally created to take on work that is otherwise in the domain of Parliament, no rules or conventions have been adopted to require all-party consensus or even all-party input into an agent's creation. There are likewise no rules or conventions to require specific public consultation when the creation of new officer is being contemplated. Bills obviously end up at committee before they are passed, but there is no reason to believe that the bills creating officers of parliament are treated any differently from those that do not. Agents of parliament are so unique that it is difficult to know whether being created in an ad hoc manner is a deficiency or simply a matter of necessity. Ann Chaplin has considered this question and strongly urges that parliamentarians take a very deliberate and value-driven approach when considering whether to create new agents of parliament.

Chaplin suggests that there are two types of criteria that must be considered before creating a new agent: substantive criteria and structural criteria. In regard to the substantive criteria, Chaplin asks: "...does the proposed mandate, including the ways in which it is to be fulfilled, advance the cause of democracy, the rule of law, or good governance?" If so, does it advance those concepts by "protecting virtues such as justice, probity or integrity in government, or the transparency required to ensure them?" and does the proposed mandate address a "sufficiently significant issue that it can be said that either the "general will" or the underlying ethical culture of the country demands that it be addressed?"²⁵⁰ With respect to the structural considerations, Chaplin also argues that it is important to consider whether the

²⁵⁰ *Chaplin LLM, supra* note 77 at 131.

agent model is the only one that can properly accomplish the mandate in question.²⁵¹

Given how little study there has been of the process by which new agents of parliament are created, it is important to take seriously concerns about whether Parliament is delegating away too much of its responsibility for watching and controlling government. A more deliberate and transparent approach to this decision-making process is perhaps overdue and is certainly worthy of further study. What we do know however, is that these agents are all created by statute through regular legislative processes and this tells us something about the legitimacy of their existence, if not the legitimacy of the nature of their work.

(a) Enabling legislation

Parliament has long recognized the value in establishing agents of parliament through legislation. As Paul Thomas explains, enabling legislation “identifies the primary purpose of an agency. It also defines its relationships with Parliament, the executive and the public,”²⁵² including the degree to which independence is contemplated and how it is expected to be operationalized and protected. This clarity ensures that the public has information about what an agent is supposed to be doing, which in turn allows the public to have a better understanding of how government is held accountable. Furthermore, given that most of Canada’s agents have express legal authority to order the production of documents, summon

²⁵¹ *Ibid.*

²⁵² *Thomas PPF, supra note 50 at 5.*

witnesses and compel oral testimony, having legislative mandates also gives them something they can easily point to if and when they need to assert or defend their rights.

One drawback with creating agents via legislative enactment is that it can and has given majority governments too much unilateral power to terminate or make changes to an agent's mandate. The Senate can of course act as a check on the exercise of majority power, but a partisan Senate can also contribute to a majority government's ability to advance a particular legislative agenda. A majority government acting without consensus in relation to the creation of an agent of Parliament is a rare occurrence to be sure, but it certainly challenges the idea that these agents can be considered creatures of parliament in any broad sense. They are instead more carefully characterized as being creatures of parliamentary enactment, subject to the usual rules of democratic governance which may not include broad consensus from all political parties. It is possible to build more protection into a legislative mandate so that changes to an agent are consensus-driven, but that has not been an approach we have seen to date.

(b) Recruitment, Appointment, Renewal and Term

After an agent of parliament has been created by the passing of legislation, the next step is to fill that position. Given that this individual is expected to take on duties that are properly parliamentary in nature, it would seem reasonable that there be broad engagement in the recruitment and appointment process. Unfortunately, that has not historically been the case. The 1979 report of the Royal Commission on Financial Management and Accountability ("Lambert Report") advanced an argument that having no opposition

involvement in the appointment process would make it less partisan and thus more desirable than if opposition were to play a meaningful role. The report's authors concluded that the:

...Commission rejects parliamentary participation in the appointment process. Confirmation hearings conducted by committees could become highly partisan and deter experienced and competent individuals from permitting their names to be put forward, thus reducing the already small number of outstanding individuals who are able and willing to serve their country in this capacity.²⁵³

The position taken by the Commission seems to have valued expediency over legitimacy and led to the adoption of poor processes. For example, it became accepted practice that "...Cabinet would make a choice. They may have forwarded the name to the opposition parties in advance but rarely in a way that signaled meaningful consultation and would simply introduce the motion and make the appointment."²⁵⁴ This may not seem surprising given the historically acceptable practice of the governing party and its executive branch indiscriminately appointing its supporters to senior positions within government (i.e. making patronage appointments).²⁵⁵

Agents of parliament are expected to hold government to account, so it is important that the people appointed to those positions do not have real or perceived partisan connections or biases, either in their past or anytime thereafter. It is also important for the appointment process to be balanced and fair and for all voices to be heard before a decision

²⁵³ *Lambert, supra* note 43 at 321.

²⁵⁴ Michael Smith, "*Keeping Independent Officers of Legislatures Independent: The Institutional Design of the Appointment Process under the Condition of Majority Government*" (2010), Canadian Political Science Association Papers, online: <<https://www.cpsa-acsp.ca/papers-2011/Smith.Michael.pdf>> at 13 (citing personal interview with Deborah Deller on 8 February 2011) [*Smith*].

²⁵⁵ See *Ibid* at 4 (the interview with Deborah Deller on 8 February 2011 provides an example of this type of appointment process where government pushes its own recommendation).

is made. It is for this reason that the approach taken in the Lambert Report is no longer viewed as acceptable.

It is now generally agreed that agents of parliament are legislative (not governmental) appointments and that their appointment must not be the sole prerogative of Cabinet or the governing political party. The entire legislature should properly be included in the process of appointing agents of parliament.²⁵⁶ The ongoing dysfunction of the appointment process garnered unwanted attention in 2017 when five of the nine federal agents of parliament were up for renewal and could not be filled in a timely manner.²⁵⁷ There is clearly a great deal of work to be done to understand and improve upon the many deficiencies of the appointment process.

The first question that a Parliament must address is what its needs are. Once this has been settled, the next question is what would it take for a person to be able to meet those needs? When setting the necessary qualifications for being an agent, Parliament must consider whether there are skillsets and/or levels of professional success or career attainment that are required of an individual before they ought to be considered for such a position. The individuals chosen must not only have a certain level of technical skill, but they must also have soft skills such as interpersonal and management skills. They must possess attributes like legitimacy, credibility, impartiality, courage, fairness and trustworthiness.²⁵⁸ An

²⁵⁶ *Smith, supra* note 254 at 3.

²⁵⁷ Joan Bryden, “‘Rigorous approach’ delays replacements for officers of Parliament”, *CBC News* (9 June 2017), online: <<https://www.cbc.ca/news/politics/ethics-lobbying-commissioner-delays-1.4153123>>.

²⁵⁸ *Thomas PPF, supra* note 50 at 7.

important component of these roles is being able to earn the trust of internal and external stakeholders by having a strength of character and conviction that allows others, including the public, to see that agent as worthy of holding what effectively amounts to an important position that comes with a tremendous amount of job security.

The high bar that candidates must meet reflects the fact that the public expects and depends on agents of parliament to uncover and expose public sector failures. To do this, agents must also, at a bare minimum, not be beholden to any master other than their legislative mandate(s). It is therefore important that every effort be made during the selection process to ensure that candidates for these offices are not actively engaged with a political party²⁵⁹ and that they demonstrate themselves to be above partisan disputes.²⁶⁰ This is no small task, which is why a great deal of thought must be put into who will conduct the initial search for a new agent.

The Search

There are several ways that candidate search processes can be structured. One option is to post a traditional job opening (i.e. have an open competition²⁶¹); another is to assemble a search committee; and another is to hire an outside recruitment firm to target candidates with specific qualifications and invite them to consider entering the competition.²⁶² Realistically, parliamentarians themselves might sometimes lack the expertise needed to be

²⁵⁹ *Smith, supra* note 254 at 4.

²⁶⁰ *Bell Emergence, supra* note 75 at 20.

²⁶¹ *Gay, supra* note 174 at 32.

²⁶² Public Policy Forum, *Understanding and Debating the Role of Agents of Parliament: Interviews Report*, by Alan Freeman (December 2017) at 13 [*Freeman Interviews*].

able to make hiring decisions about individuals with the degree of specialized knowledge as is required of an agent of parliament.²⁶³ Parliamentarians are trusted by the public to deal with a broad array of complicated matters however, so having an MP assist with hiring an accountant should seem no more troublesome than asking that same MP to be a critic to the Minister of Finance.

Another possibility for a search process is to assemble a multi-party committee of parliamentarians. Having members of every party on the committee would serve to help establish distance between the government and that future agent.²⁶⁴ This would reinforce for the public that parliamentarians take seriously the idea that agents of parliament must be highly qualified individuals who are non-partisan and not appointed to their position as a result of patronage. A parliamentary committee could engage former agents and/or other outside experts to assist in the decision-making.²⁶⁵ This would allow for some flexibility in the recruitment process and further serve as a reflection of how serious Parliament takes its responsibilities.

Unfortunately, what actually happens right now at the federal level in Canada is far from ideal. As I have outlined above in chapter 2, agents of parliament are governor-in-council appointments that may only be made after consultation with the leader of every recognized party in the Senate and House of Commons and after the Senate and House pass

²⁶³ *PPF Report, supra* note 67 at 23-4.

²⁶⁴ Roberto P Leone, “Comparing Parliamentary Change in Canada and the U.K.: Do the similarities Outweigh the Differences?” (2009) 4 *JPPL* 499 at 510 [*Leone*].

²⁶⁵ *PPF Report, supra* note 67 at 23-4.

resolutions to demonstrate their approval of the appointment.²⁶⁶ To check these boxes, the government hires its own recruitment firm and asks them to come up with a short list of candidates who will then be considered by Cabinet.²⁶⁷ The Privy Council Office generally plays a role in the vetting process as well.²⁶⁸ In conditions of a majority government, Cabinet then sends the name to leaders of the opposition parties and pretends to consult. The requirement for the government to consult with other parties is not the same as providing the other parties with a formal veto.²⁶⁹ In fact, it is unclear from the public record how genuine the consultation process is in actual practice.²⁷⁰ This can lead to suspicion that a nominee will be beholden to the prime minister and their government.²⁷¹

Michael Smith argues that there ought to be consensus on any legislative appointments from all recognized political parties to ensure that those appointments are separated from the mere will of the government.²⁷² This has not been the case for some time at the federal level however.²⁷³ Even though each agent is nominally an agent of parliament,

²⁶⁶ See e.g. *PSDPA*, *supra* note 150, s 39(1).

²⁶⁷ Marie-Danielle Smith, “Liberals paid headhunters \$77K to help with botched appointment of a new languages czar”, *National Post* (21 Sept 2017), online: <<https://nationalpost.com/news/politics/liberals-hired-headhunters-to-help-choose-madeleine-meilleur-for-languages-czar-and-now-ethics-lobbying-information-commissioners>>.

²⁶⁸ See e.g. Ian Greene, “The way we pick our ethics commissioner is a little...unethical”, *iPolitics* (21 July 2017), online: <<https://ipolitics.ca/2017/07/21/the-way-we-pick-our-ethics-commissioners-is-a-little-unethical/>> [*Unethical*].

²⁶⁹ See *Democracy Watch v Canada (A-G)*, 2018 FC 1290 (for a good discussion of what is required by the consultation process).

²⁷⁰ *Thomas PPF*, *supra* note 50 at 8.

²⁷¹ *Ibid* at 7.

²⁷² *Smith Keeping*, *supra* note 254 at 13.

²⁷³ Although meaningful consensus is not yet sought for these appointments at the federal level of government in Canada, some provinces have adopted an appointment process that minimizes the risk of this undesirable outcome by ensuring that all party consensus is

Parliament has had very little role in choosing appointees. This puts agents of parliament in the tricky position of being both informally beholden to the prime minister, and yet formally responsible to Parliament.²⁷⁴

What is the Senate's role?

The Senate has an important role in the appointment process because it is expected to act as a balance to the partisan House of Commons. The Senate is supposed to be “a place where decisions made in the House of Commons are reviewed and evaluated, in theory, away from strict party discipline.”²⁷⁵ This has not actually been the case however. The Senate has historically been considered a holding tank for patronage appointments and personally profitable partisan paybacks. This has only begun to change very recently. As the Senate continues to add independent members, the Senate will continue to become more independent and less partisan so that it can eventually function as a proper house of sober second thought during the process of selection and appointment of agents of parliament. I do not mean to suggest here that there is evidence the Senate has allowed partisanship to inform its decisions about whether to agree to the appointment of a particular individual as an agent.

achieved before an appointment is made. See e.g. Ontario's *Members' Integrity Act, 1994*, SO 1994, c 38, s 23(3) [*MIA*] (potential appointees must be selected by “unanimous agreement of a panel composed of one member of the Assembly from each recognized party, chaired by the Speaker who is a non-voting member”). By contrast, Alberta's *Conflict of Interest Act*, RSA 2000, C-23, s 33, merely requires consultation but potential appointees like Marguerite Trussler, Q.C., have insisted on all party consensus before accepting the position. The Senate Ethics Officer does not have to be appointed with consensus of all parties (see *PC Act*, *supra* note 15 at 20.1), but the informal practice established when Jean Fournier was appointed to be the first Officer was for all-party consensus (see *HP Now*, *supra* note 78 at 149).

²⁷⁴ Colin J Bennett, “The privacy commissioner of Canada: Multiple roles, diverse expectations and structural dilemmas” (2003) 46:2 *Can Pub Admin* 218 at 220 [*Bennett*].

²⁷⁵ *Furi MA*, *supra* note 46 at 51.

The concerns raised by the Senate in this context have mostly been in relation to the perception of partisanship.

Length of Appointment

Another important matter for which there is no clear consensus is what the appropriate length of time is for which an individual should hold office as an agent. What people feel is acceptable may in fact vary depending on the role in question. As explained above, some agents are appointed for seven years while some can only hold office for one term, and others can be appointed for unlimited terms. Studies suggest there is “consensus that mandates should be longer than the average electoral term so as to keep agents on a different cycle than electoral calendars.”²⁷⁶ There is however disagreement about whether reappointment is a good idea. In the Public Policy Forum’s report on agents, findings on this point are relayed:

...most believed that a single mandate was sufficient, particularly if it were at least seven or eight years long. Multiple terms may discourage agent independence and objectivity. One former agent said he knew of a colleague who was anticipating a second term and wondered about whether to “go easy” on the government and ensure reappointment. “A fixed term will focus the mind,” said another former agent, who believed that a serving agent should not be re-appointed.²⁷⁷

Ontario’s former Ombudsman André Marin is on record as supporting an extended term of office, but no reappointment. Marin believed that automatic reappointment tends to politicize the appointment process.²⁷⁸ On the other hand, former Environmental Commissioner of Ontario Gord Miller disagrees and has taken the position that “a

²⁷⁶ *PPF Report*, *supra* note 67 at 24.

²⁷⁷ *Ibid* at 25.

²⁷⁸ *Smith*, *supra* note 254 at 14.

government that knows an officer's term is coming to an end could ignore his or her recommendations, putting that person in a "lame duck" situation."²⁷⁹

The appointment processes for agents of parliament is currently inconsistent. There is no consensus about what an appropriate term of office and/or condition for renewal ought to be. What does seem clear is that many people believe the appointment process is in need of reform.²⁸⁰ The real concern is that agents of parliament must be able to command the trust of their stakeholders in order to be effective, but "[t]he shambolic nature of the appointments process has done nothing to elevate the standing of agents in the mind of legislators, public servants and the public."²⁸¹

It is my opinion that what is appropriate for reform depends on the nature of the work that an agent undertakes and the ease with which experts can be found in that particular field. We do not want to implement rules that place unreasonable pressure to appoint someone who may be under-qualified simply because there is a deadline to do so. That being said, we do need to have term limits and the ability to apply pressure so that a search committee actually does the work of filling upcoming vacancies in these positions. In that regard, I believe there should be term limits for agents and that the appropriate committees must be required not only to conduct searches, but to begin them far enough in advance that they have a reasonable amount of time in which to complete them before an agent's term limit expires.

²⁷⁹ *Ibid* at 14.

²⁸⁰ *PPF Report, supra* note 67 at 21.

²⁸¹ *Ibid* at 22.

Another important reform that ought to be made to the recruitment and appointment process was put forth in 2001 by the Special Committee on the Modernization and Improvement of the Procedures of the House of Commons. The Committee's report to the House of Commons recommended that the government should always consult with opposition parties before putting forward a name. That nominee should then be required to appear before the appropriate standing committee to answer questions from parliamentarians.²⁸² This would allow Parliament to do what it is supposed to do by asking questions of the nominee that are designed to hold the government to account for its selection.²⁸³ These committee proceedings could be made public and, in my opinion, all parties should reach a unanimous and transparent consensus on every appointment.

The Standing Orders should also be amended so that a formal motion to appoint could only be tabled if it is sponsored by all the political parties. This change would ensure that there is an institutional mandate regarding the consensus on which these appointments should be based.²⁸⁴ Having all party support demonstrates a level of confidence in the independence and impartiality of the nominee and reinforces the idea that an agent of Parliament must act to resist pressure from the executive because that individual knows that more than one party agreed to their appointment.²⁸⁵ This could help address the concern that

²⁸² *PP&F*, *supra* note 45 at 300.

²⁸³ *Smith*, *supra* note 254 at 8 (“An officer must have, at the time of appointment, the trust and support of the Legislature, and given the realities of the party system, a simple majority of Members is not enough. Agreement from all political parties is the preferred method of appointment...”).

²⁸⁴ *Ibid* at 14.

²⁸⁵ *Thomas PPF*, *supra* note 50 at 7.

majority governments might push through appointments simply by using their majority in the House and ignoring the voice of the opposition.²⁸⁶ Allowing the executive to continue to have so much influence over the appointment process will doubtless leave the public with the impression that partisanship and political calculation are components of an agent's appointment.²⁸⁷ This will serve to decrease public trust in those offices.

3.4 Removal, Resignation and Dissolution of Office

Once the office of an agent of Parliament is created, there is no obvious mechanism for its dissolution.²⁸⁸ It is accordingly just as important to ensure that the mechanisms for removal and resignation of an agent are free from unhelpful partisanship as it is to ensure that the selection and appointment process is. There are four ways that an agent may be removed from or leave his or her position. First, an agent may simply resign from his or her position. This happens very rarely, but it has happened. Former Privacy Commissioner George Radwanski resigned his position amid incredible public, media and parliamentary criticism²⁸⁹ in June of 2003. Mr. Radwanski's resignation came following a very critical report from the Commons' Standing Committee on Government Operations and Estimates about his personal expenses, that was also complemented by public demonstrations made against him by his own staff.²⁹⁰ Canada's first Ethics Commissioner, Bernard Shapiro, also

²⁸⁶ See *Smith*, *supra* note 254 (for a good discussion of this concern).

²⁸⁷ *PPF Report*, *supra* note 67 at 22.

²⁸⁸ *Ibid* at 10.

²⁸⁹ *Bennett*, *supra* note 274 at 220.

²⁹⁰ *Gay*, *supra* note 174 at 25.

resigned his office in 2006 amid intense criticism from Prime Minister Stephen Harper²⁹¹ and the first Public Sector Integrity Commissioner Christiane Ouimet resigned in 2010²⁹² right before an audit of her office led to a scathing report from the Auditor General.²⁹³

The second way that an agent may leave or be removed is if they are not or cannot be renewed at the end of their term. One reason this might happen is because there are term limits in the legislation under which that agent was appointed. These term limits are an important part of the appointment and removal rules that help to secure the independence of that office.²⁹⁴ In fact, several agents have clear term limits, which ensures, at least in theory, that they will not take it easy on government in order to ensure their next appointment.

The resignation of Canada's first Ethics Commissioner provides an example of how an agent may not be able to be reappointed. Bernard Shapiro was effectively forced to resign his position after learning that he would not be qualified to continue in that role under proposed legislation that Prime Minister Stephen Harper had signaled he was putting forward under an upcoming accountability bill. Harper had outright refused to accept Shapiro's findings in his report into former Liberal member David Emerson's defection to the

²⁹¹ "Tories name long-time civil servant to fill watchdog post", Toronto Star (13 June 2007) A17; Ian Stedman & Ian Greene, "Ethics Commissions" in *HP Now*, *supra* note 78 at 147.

²⁹² Ms. Ouimet retired from the public service on 18 October 2010. See Canada, Office of the Auditor General, *2010 December Report of the Auditor General of Canada: The Public Sector Integrity Commissioner of Canada* (Ottawa, December 2010), online: <http://www.oag-bvg.gc.ca/internet/English/parl_oag_201012_e_34448.html>.

²⁹³ *Ibid.*

²⁹⁴ *Leone*, *supra* note 264 at 510.

Conservative party.²⁹⁵ This was followed by the media reporting Harper's new *Federal Accountability Act*²⁹⁶ would eliminate the Ethics Commissioner and replace it with the COIEC. The new qualifications for being appointed to this role would necessarily exclude Shapiro from consideration.²⁹⁷

Third, the legislation administered by all but one²⁹⁸ of the individual officers of parliament explicitly states that they may be removed for cause by an order of the Governor-in-Council on address of the Senate and House of Commons.²⁹⁹ Parliamentarians must therefore decide how to evaluate the circumstances under which an agent should be removed for cause. The requirement for parliamentary approval before removal in fact strengthens an agent's independence from the executive by ensuring that they cannot be simply unilaterally removed by the government of the day.³⁰⁰ This removal mechanism is also important to have

²⁹⁵ Tim Naumetz, "PM deliberately shoving Shapiro out of job", *The Ottawa Citizen* (12 April 2008) A6 [*Shoving*].

²⁹⁶ *Federal Accountability Act*, SC 2006, c 9 [*FAA*].

²⁹⁷ *Ibid*; See also Maryantonett Flumian & Karl Salgo, "Harper's Accountability Act, ten years on", *ipolitics.ca* (16 July 2016), online:< <https://ipolitics.ca/2016/07/16/harpers-accountability-act-ten-years-on/>> (Harper was widely criticized for advancing accountability legislation to create bodies that many thought unnecessary or redundant. Flumian and Salgo argued that some of the measures taken in the FAA were not evidence-based. In other words, they did not "fill functional gaps — that is, to actually stop practices that had been identified as prevalent." Instead, they "were simply legislative expressions of collective anger").

²⁹⁸ The exception is the Conflict of Interest and Ethics Commissioner, whose removal does not require the approval of the Senate.

²⁹⁹ See *Constitutional Legitimacy*, *supra* note 83 at footnote 79; *A-G Act*, *supra* note 96, s 3(1.1); *Elections Act*, *supra* note 111, s 13(1); *OLA*, *supra* note 117, s 49(2); *Access to Info*, *supra* note 128, s 54(2); *Privacy Act*, *supra* note 127, s 53(2); *PC Act*, *supra* note 15, s 82(1); *PSDPA*, *supra* note 150, s 39(2); *Lobbying Act*, *supra* note 141, s 4.1(2).

³⁰⁰ *PP&F*, *supra* note 45 at 301.

for situations where an agent has demonstrated that they are incapable of fulfilling their duties.³⁰¹

Finally, *The Judges Act*³⁰² stipulates that the Minister of Justice may request that the Canadian Judicial Council investigate whether a “person appointed pursuant to an enactment of Parliament to hold office during good behavior”³⁰³ should be removed from his or her position for any of the reasons set out in section 65(2)(a)-(d) of the Act.³⁰⁴

- (a) age or infirmity,
- (b) having been guilty of misconduct,
- (c) having failed in the due execution of that office, or
- (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office.³⁰⁵

Although section 69(3) of the *Judges Act* then says that the Judicial Council cannot remove an Officer of Parliament on its own accord, the power to conduct an investigation allows the Judicial Council to report back to Parliament as to whether it thinks the person should be removed.³⁰⁶ This process could be used to obtain an independent assessment of an officer’s capacity to continue in their position.³⁰⁷ Such a report could prove useful in minimizing criticism in relation to whether that individual was being removed for partisan political reasons, especially in a majority government situation.

3.5 Budgets

³⁰¹ *Denham, supra* note 81 at 269.

³⁰² *Judges Act*, RSC 1985, c J-1, s 69(1).

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*, s 65(1).

³⁰⁵ *Ibid.*, s 65(2)(a)-(d).

³⁰⁶ *Chaplin Constitutional Legitimacy, supra* note 83 at 102.

³⁰⁷ *Ibid.*

The funding process for agents of parliament has been a hot topic for most of the past two decades. There is an (arguably) unavoidable tension when it comes to funding agents because parliamentarians must seek to balance the desire for those individuals to be independent against the foundational constitutional principle that “[i]t is the exclusive prerogative of the Crown to place recommendations for spending before Parliament”³⁰⁸ (which effectively means that Cabinet must initiate spending³⁰⁹). This important principle leaves the process for determining funding open to the criticism that it cannot prevent against government interference in the operations of the many agents. Strict adherence to this constitutional principle might also work against the governing party on a political level, because if the government feels it has no choice in times of austerity but to cut an agent’s budget, then opposition members will likely argue that the government is using budget cuts to silence criticism.³¹⁰

According to Jack Stilborn, by the late 1990s there was a general sense among agents of Parliament that the processes in place to review their budgets and spending could give rise to interference in their operations.³¹¹ Restrictions on an agent’s budget, for example, could “serve to limit the scope of audit activities and the calibre of staff.”³¹² To better understand this general concern, it is important to look at how budgeting and funding decisions were made. The budget process has historically required agents to submit spending estimates to

³⁰⁸ Jack A Stilborn, “Funding the Officers of Parliament: Canada’s Experiment” (2010) 33:2 Can Parl Rev 38 at 38 [*Stilborn Funding*].

³⁰⁹ *Bell Emergence*, *supra* note 75 at 18.

³¹⁰ *Freeman Interviews*, *supra* note 262 at 4.

³¹¹ *Stilborn Funding*, *supra* note 308 at 38.

³¹² *Denham*, *supra* note 81 at 268.

the Treasury Board Secretariat (“TBS”). They would then engage directly in discussions with the TBS before the Treasury Board itself would approve the estimates. The President of the Treasury Board (who is an elected MP) would then place the spending estimates before Parliament for its approval. This approval was effectively a rubber-stamping exercise, which gave rise to some concerns. The principle concern was that agents were being asked to use the same process by which government departments would request their budgetary changes.³¹³ There was no parliamentary involvement, broadly speaking.

Much of the interest in this issue started coming to a head in 2001 when the Special Committee on the Modernization and Improvement of the Procedures of the House of Commons released a report covering officers of parliament.³¹⁴ This report contained detailed analysis of several of the structural characteristics that the members of the committee thought it was important to preserve in agents of parliament to help maintain their independence. There was no mention of the significance of how these offices are funded.

At the same time as this discussion was taking place in the House, the government was receiving a tremendous amount of criticism for its management of the sponsorship program. There was also some ongoing interest in what seemed to be money management problems that were surfacing at the Office of the Privacy Commissioner. The opposition challenged the government to do better by putting forward a motion calling for the

³¹³ *Ibid.*

³¹⁴ Canada, House of Commons, Special Committee on the Modernization and Improvement of the Procedures of the House of Commons (October 2001), online: <<https://www.ourcommons.ca/DocumentViewer/en/37-1/SMIP/report-1/>> at 45 (Chair: Bob Kilger).

implementation of recommendations found in a recent report about good financial governance that was filed by the Standing Committee on Procedures and House Affairs.³¹⁵ This led to the creation of the Standing Committee on Government Operations and Estimates in May 2002.³¹⁶ Overall, there was a tremendous thirst for debate surrounding how the public sector managed money and how it held individuals to account when money management went awry.

This situation inspired Paul Thomas to write his seminal 2003 paper on the past, present, and future of agents of parliament, in which he explains what he sees as the most important indicia of independence for these offices.³¹⁷ Unlike the 2001 committee report on officers however,³¹⁸ Thomas drew close attention to the important role that decision-making processes for funding, as well as budget-setting and control over spending, play in establishing the real and perceived independence of these offices.³¹⁹ This focus on agent finances by an academic may have been inspired in part by the very public and ongoing concerns that were being expressed about the Privacy Commissioner.

³¹⁵ Canada, House of Commons, Standing Committee on Procedure and House Affairs, “The Business of Supply: Completing the Circle of Control” (December 1998), online: <<https://www.ourcommons.ca/DocumentViewer/en/36-1/PRHA/report-51/page-9>> (Chair: Peter Adams).

³¹⁶ Canada, House of Commons, Standing Committee on Government Operations and Estimates, “Matters relating to the Office of the Privacy Commissioner” (June 2003) at 4 (Chair: Reg Alcock).

³¹⁷ See *PPF*, *supra* note 45 at 289.

³¹⁸ *Supra*, note 314.

³¹⁹ See *PPF*, *supra* note 45 at 289.

The Privacy Commissioner's woes continued over the next couple of years, with the Auditor-General releasing a scathing report about the commissioner in 2003. The Standing Committee on Public Accounts reviewed the report, along with the annual estimates of all the agents of parliament. The Committee decided in the course of these meetings that it had lost confidence in the then-Privacy Commissioner.³²⁰ Around the same time, the Auditor-General was investigating allegations that had been made about improper spending by the government in its management of the sponsorship program. The Auditor-General released another damaging report in 2004, which led to a commission of inquiry being called. It was in the course of its meetings with agents about their estimates that the Public Accounts Committee finally became aware of the long-standing concerns agents had about the manner in which they were funded.

Interested in digging deeper into the concerns about funding, the Standing Committee on Access to Information, Privacy and Ethics (ETHI) began its own hearings. A 2005 article by Kristen Douglas and Nancy Holmes explains that throughout ETHI's hearings the Information Commissioner described his office as being in a financial crisis³²¹ because he had only received emergency and partial funding despite repeated requests to the Treasury Board.³²² The committee released a report in May 2005 entitled "A New Process for

³²⁰ *Ibid.*

³²¹ Canada, House of Commons, Standing Committee on Access to Information, Privacy and Ethics, 38th Parl, 1st Sess, (3 November 2004) at 1540 (John Reid).

³²² Kristen Douglas & Nancy Holmes, "Funding Officers of Parliament" (2005) 28:3 Can Parl Rev 13 at 13 [*Douglas & Holmes*].

Funding Officers of Parliament”³²³ that considered potential models of funding and recommended “that a new permanent parliamentary body be created as the budget-determination mechanism for the funding of all Officers of Parliament.”³²⁴ The report also echoed concerns that the process by which agents of parliament secured their funding every year (i.e. through submissions made to the Treasury Board) was incompatible with their government scrutiny mandate.³²⁵

The ETHI report coincided with two others. The Senate Standing Committee on National Finance was responsible for reviewing annual estimates at that time and heard similar concerns as ETHI about funding and budgets from different agents of parliament. The Committee released its report on officers of parliament in May 2005, in which it put forth recommendations for improving the appointment process and the funding policies and processes related to agents.³²⁶ The Commons Standing Committee on Public Accounts also continued to meet to discuss issues that arose in the wake of its 2003 rebuke of the Privacy Commissioner. The committee released yet another report in May 2005, this one called “Governance in the Public Service of Canada: Ministerial and Deputy Ministerial Accountability.”³²⁷

³²³ Canada, House of Commons, *Standing Committee on Access to Information, Privacy and Ethics*, “Fourth Report: A New Process for Funding Officers of Parliament” (May 2005) 38th Sess, 1st Parl (Chair: David Chatters) [*ETHI Funding*].

³²⁴ *Douglas & Holmes*, *supra* note 322 at 16.

³²⁵ *Hubertise-Loranger*, *supra* note 172 at 76-7.

³²⁶ *ETHI Funding*, *supra* note 323.

³²⁷ Canada, House of Commons, Standing Committee on Public Accounts, “Governance in the Public Service of Canada: Ministerial and Deputy Ministerial Accountability” (May 2005), online: <<https://www.ourcommons.ca/DocumentViewer/en/38-1/PACP/report-10/>> (Chair: John Williams).

The outcome of all these reports on financial management and accountability was the creation of a pilot project called the House of Commons Advisory Panel on Funding and Oversight of Officers. The advisory panel was composed of thirteen Members of the House of Commons, including the Speaker as chairperson and representatives from all political parties in proportion to their numbers in the House.³²⁸ It was an informal panel³²⁹ that allowed a group of members of parliament to review budget requests from agents and to make recommendations to the Treasury Board. This was a slight change to the old process because it allowed parliamentarians to have input rather than simply being tasked with the duty of rubber-stamping the Treasury Board's recommendation. The theory was that an officer would not be hindered by cabinet's refusal to provide money if their budget was instead set by a committee.³³⁰ The Panel's first meeting was on November 3, 2005,³³¹ only two days after the release of the first volume of Justice Gomery's report into the Sponsorship Scandal.³³² The minority Liberal government lost the confidence of Parliament on November 28, 2005, in the wake of the Gomery report, and an election was triggered for January 23, 2006.

³²⁸ See *Stillborn Funding*, *supra* note 311 at 39 (“The Panel is composed of 13 Members of the House of Commons, including the Speaker (who serves as chairperson) and representatives of all political parties in proportion to their numbers in the House”).

³²⁹ Specifically, it has no formal authority and is not part of the Standing Orders of the House of Commons.

³³⁰ *Supra*, note 294 at 510.

³³¹ *Stillborn Funding*, *supra* note 311 at 38.

³³² Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who is Responsible? Fact Finding Report* (Ottawa: Public Works and Government Services Canada, 2005) (Commissioner: John H Gomery, report released 1 Nov 2005) [*Sponsorship Scandal*].

Stephen Harper was the leader of the Conservative opposition when the Liberal government fell and seized upon the opportunity to make government accountability a cornerstone of his campaign. If he were to become the Prime Minister, Stephen Harper promised to push forward a public sector accountability reform bill called the *Federal Accountability Act* that would renew and standardize many matters relating to agents of parliament, including how they were appointed and how they were funded. When he did become the Prime Minister of a minority government in early 2006, Parliament passed the *Federal Accountability Act* and left the Advisory Panel on Funding and Oversight of Officers untouched.

Despite the progress that was clearly being made in regard to how to handle funding decisions, commentators like Jack Stilborn still expressed concern about the limited occasions when the Treasury Board had set aside the recommendation of the parliamentary advisory panel, such as in relation the Access to Information Commissioner's request in 2009. On that occasion, the Treasury Board cited concerns about the commissioner's "proactive" activities, even though no such concerns were raised by the panel.³³³ Perhaps emboldened by the constitutional principle that Cabinet must initiate spending, Canadian governments have traditionally been extremely reluctant to allow Parliamentary committees to negotiate budgets with agents of parliament.³³⁴ The Treasury Board therefore still retained the final decision in budget approvals despite all the concerns that had been expressed by parliamentary committees and the agents themselves. The Treasury Board is a central agency

³³³ *Stilborn Watchdogs*, *supra* note 230 at 249.

³³⁴ *Bell Emergence*, *supra* note 75 at 18.

of government that approves spending within the Government of Canada;³³⁵ it is not a parliamentary body. This was accordingly something that Parliament needed to be vigilant about monitoring.

Everything changed again in 2011 after the Conservative Party won a majority of seats in the general election:

...the Harper government stopped seeking the panel's advice in 2011 after forming a majority government and asserting greater control over the work of parliamentary committees. As one former agent who went through the panel experience noted, it was successful when the Harper government was in minority position but once the Conservatives won a majority, the idea that a parliamentary committee could act independently from the party in power "went out the door" and the panel died.³³⁶

The rules related to the funding of agents of parliament reverted to being what they were before the informal 2005 Advisory Panel experiment. According to a former agent of parliament, "...the problem with the panel was a lack of capacity and the fact there was "nothing in it" politically for the MPs who participated in it, so interest waned."³³⁷

With the process for determining how agents are funded being sent right back to where it started before the three 2005 reports and the Privacy Commissioner and sponsorship program scandals, government again has a great deal of power over appointments, re-appointments and the budgets of agents of parliament. With the exception of the COIEC, annual budget estimates are submitted directly to the Treasury Board for review, which then places those estimates before Parliament for its approval. There is accordingly renewed

³³⁵ *Ibid.*

³³⁶ *PPF Report, supra note 67 at 14.*

³³⁷ *Ibid.*

reason to be concerned that an agent might soften their criticism of the executive in an effort to minimize the risk of being retaliated against by way of a decision about their office budget.³³⁸ Based on the structural requirements of institutional independence outlined above, the decision to require agents to submit funding requests to Treasury Board affords a government official a lever of control over funding that stands in stark contrast to the sense of independence agents are expected to have to do their jobs well and to inspire public confidence in their work.

Agents' budgets must be determined through a process that minimizes the risk for political interference. A process like that which was implemented as part of the Advisory Panel on Funding and Oversight of Officers would better protect an agent's independence while also ensuring that they are held accountable for their spending decisions. That being said, accountability for their budgeting decisions is only one of the many ways in which agents of parliament must be held accountable.

3.6 Accountability

Conversations about accountability are fundamentally conversations about relationships. Agents of parliament have a large number of relationships with a wide variety of stakeholders. Some of those relationships give rise to expectations and some of those expectations amount to a duty to account. Peter Aucoin describes accountability as being a two-sided process that includes both "holding to account" and "rendering an account."³³⁹

³³⁸ *PP&F*, *supra* note 45 at 301.

³³⁹ *Aucoin*, *supra* note 79 at 25-6.

Both sides of the process are important because simply rendering an account is less meaningful if there is nobody to hold you to account for the account you rendered. If officials merely render an account, the accountability process is invariably reduced to a public relations exercise in self-congratulation via self-reported results.³⁴⁰ In the unique world of agents of parliament however, the objective must of course be to find a balance between the need for agents to ensure accountability and the importance of protecting their independence.³⁴¹ What follows is an overview of the different accountability structures that have been applied to the work agents of parliament. This overview lays the groundwork for my chapter six analysis of the COIEC's accountability relationships.

(a) Why is Accountability Important?

Fundamental to the role of Parliament is that it is expected to “compel the executive to boast and confess about its activities in public.”³⁴² The activities of an agent of parliament are not akin to those of government actors or government appointees however. Even though Cabinet is closely involved in the appointment process, being appointed an agent of parliament “solidifies independence and signifies that loyalty must lie with the legislature and not with the governing party.”³⁴³ The balance between independence and accountability for agents has traditionally been heavily skewed in favour of independence,³⁴⁴ but the fact

³⁴⁰ *Ibid* at 25-6.

³⁴¹ *Hubertise-Loranger, supra* note 172 at 77.

³⁴² *PP&F, supra* note 45 at 297.

³⁴³ *Furi MA, supra* note 46 at 25.

³⁴⁴ *Stilborn Watchdogs, supra* note 230 at 254-5.

that agents serve Parliament as accountability enforcers is no reason why they themselves should be held less accountable.³⁴⁵

Except for those occasions where they are being asked to account, agents of parliament operate largely unchallenged. What they write is “often taken as gospel”³⁴⁶ and no matter how objective and balanced they strive to make their findings, public reports about issues they have investigated tend to wind up being amplified, distorted and sensationalized in Parliaments and in the media.³⁴⁷ Even though the opposition is supposed to help keep the government honest,³⁴⁸ opposition members generally “have little interest in reading reports which cannot be wielded as a weapon against ministers.”³⁴⁹ As a result, agents of parliament are subject to too little scrutiny. Of course, they gain some of their legitimacy from the fact that they are independent from government, but they also gain some legitimacy from the public knowing that they “are not all-powerful creatures”³⁵⁰ of parliament who can easily go rogue.

(b) How do Agents Account?

Trying to figure out accountability relationships in the public sector can be very complicated, and this is no different when it comes to agents of parliament. Agents are often ignored by the parliamentarians whose job it is to hold them to account. As David Pond explains:

³⁴⁵ *Luncheon Speech, supra* note 36 at 23.

³⁴⁶ *Savoie Broken, supra* note 198.

³⁴⁷ *Luncheon Speech, supra* note 36 at 10.

³⁴⁸ *Potter, supra* note 34 at 85.

³⁴⁹ *Pond, supra* note 221 at 3.

³⁵⁰ *Furi MA, supra* note 46 at 39.

Westminster style legislatures are poorly equipped to supervise their own bureaucracies. Members have a vested interest in playing the roles assigned to them under the conventions of responsible government which ensures that the political executive is held accountable. But they lack similar incentives in their working relationships with parliamentary officers.³⁵¹

Despite the lack of a regular and consistent accountability relationship, what is clear to any observer is that agents of parliament do not have unbridled power. Agents have authority and influence, but they must also be transparent and meaningfully accountable to Parliament in a manner that is appropriate to functions they have.³⁵²

Megan Furi has argued that agents account to Parliament in several ways. First, they account through the reports that they file with the Speaker(s), who then table them with Parliament. Second, some agents have been given jurisdiction that places limits on the actions and imposes some responsibility to account to their fellow agents. Third, agents may occasionally be required to appear before Parliament or a parliamentary committee.³⁵³ This includes an annual appearance before a funding board or committee that has the ability to question the agent's expenses and consider their funding requests.³⁵⁴

First, every agent except the Chief Electoral Officer is responsible for filing an annual report with Parliament that details the office's work and accomplishments.³⁵⁵ Often these reports will include summaries of investigations that have been conducted and advice or

³⁵¹ *Pond, supra* note 221 at 55-56.

³⁵² *Thomas PSIC, supra* note 204 at 6-7.

³⁵³ *Ibid.*

³⁵⁴ *Douglas & Holmes, supra* note 322 at 16.

³⁵⁵ *Constitutional Legitimacy, supra* note 83 at 75 (the CEO is only responsible for reporting if there have been elections or by-elections).

recommendations that have been provided to stakeholders. These reports also generally detail outreach activities, if any, and office expenses. Further to their annual reports, most agents are also responsible for producing special reports, such as investigation or audit reports. The modern practice is for these reports to be made available to the public on the agent's website after they have been tabled with the Speaker.³⁵⁶ Importantly, if Parliament is not in session, agents cannot report to it. This was the case with Auditor-General Sheila Fraser's report into the Sponsorship Scandal, which although completed in 2003 could not be tabled and made public until 2004.³⁵⁷

Second, some officers have duties that limit the jurisdiction of other officers. For example, the Commissioner of Lobbying may be responsible for investigating specific conflicts of interest that also involve public officials who would otherwise be under the jurisdiction of the Conflict of Interest and Ethics Commissioner. Situations like this could require the agents to account to one another and work together on an investigation. Most agents are also subject to periodic financial and performance audits initiated by the Auditor General³⁵⁸ These interactions between agents can be characterized as examples of oversight or accountability, but history suggests that agents do not generally like to cross paths in these ways. Agents tend to want to support one another rather than account to one another and

³⁵⁶ There are some exceptions to this throughout the country, such as Nova Scotia's Conflict of Interest Commissioner's reports, but this is generally the practice that has been adopted by most officers of parliaments and legislatures.

³⁵⁷ S L Sutherland, "Gomery: Prequel and Sequel" (2006) 3:1 *Revue Gouvernance*, online: <<https://www.erudit.org/en/journals/gouvernance/2006-v3-n1-gouvernance02971/1039123ar.pdf>> at 10 (footnote 14).

³⁵⁸ *Gay, supra* note 174 at 28; See also *Stilborn Watchdogs, supra* note 230 at 250 (This article was written before any of the Auditor-General's audits had been completed on the three new offices that were created under Harper's *Federal Accountability Act, 2006*).

prefer to accomplish their oversight goals with as little controversy as possible.

Third, agents are required to appear before parliamentary committees and other select bodies. This is perhaps the most robust accountability mechanism that is in place for agents. There are four agents of parliament in Canada who administer legislation that specifically designates a committee of the House of Commons or Senate (or both) to review their reports and work: the Commissioner of Official Languages,³⁵⁹ the Access to Information Commissioner,³⁶⁰ the Privacy Commissioner³⁶¹ and the Public Sector Integrity Commissioner.³⁶² The other agents administer mandates that have no home committee dedicated to their work,³⁶³ although most have committees designated to them under the Standing Orders of the House of Commons.³⁶⁴ Accordingly, there is never any guarantee that an agent's reports will be the subject of parliamentary review or hearings.

Although the relationship between agents and committees could benefit from being strengthened through legislation, parliamentarians do generally trust that agents will bring forward matters that require a committee's attention.³⁶⁵ David Pond has studied this imperfect accountability relationship and noted that:

In order to hold a parliamentary officer to account Members on both sides of the House would have to tone down the partisanship and devote considerable time and effort to mastering problems of administration and management. This would

³⁵⁹ See *OLA*, *supra* note 117, s 88.

³⁶⁰ *Access to Info Act*, *supra* note 128, s 75(1).

³⁶¹ *Privacy Act*, *supra* note 127, s 75(1).

³⁶² *PSDPA*, *supra* note 150, s 38(4).

³⁶³ *PPF Report*, *supra* note 67 at 11.

³⁶⁴ *Standing Orders*, *supra* note 176, s 108(3).

³⁶⁵ *Thomas PSIC*, *supra* note 204 at 15.

require developing some level of expertise in the policy field relating to the mandate of the parliamentary officer under scrutiny.³⁶⁶

This is of course unlikely given the amount of extra work parliamentarians would be required to undertake to gain such skills and probably explains why matters move so slowly when agents are seeking improvements to their legislative mandates.³⁶⁷ Perhaps the most that agents can do is hope that Parliament will take their observations and recommendations seriously, especially when it comes to putting pressure on ministers and the bureaucracy to undertake reforms that are needed to help deal with obvious problems.³⁶⁸

Not only do agents account to parliamentary committees with respect to their work, but they can also be held personally accountable by those same committees. As I have explained above, it is occasionally the case that a committee chooses to investigate an agent. Despite the fact that there are many ways to discipline parliamentarians when they misbehave, short of removing an agent for incompetence or misbehavior it can be very difficult to deal with serious complaints about their conduct.³⁶⁹

Further to their formal reporting relationships to Parliament, agents must also be accountable to some degree to the public and to their many public sector stakeholders. Even though most of the agents do not have a formal obligation to report their findings to all individuals who may be adversely affected by them,³⁷⁰ every agent must take seriously their

³⁶⁶ *Pond, supra* note 221 at 55-56.

³⁶⁷ *PP&F, supra* note 45 at 298.

³⁶⁸ *Thomas PSIC, supra* note 204 at 15.

³⁶⁹ *PPF Report, supra* note 67 at 17.

³⁷⁰ *Constitutional Legitimacy, supra* note 83 at page 83.

moral obligation to everyone who is impacted by their work. As we will see, this is an important theme that also emerges in relation to the work of the COIEC.

3.7 Conclusion

In this chapter I analyzed literature that looks at the constitutional foundation agents of parliament are built on and asks whether they represent a legitimate innovation or an unacceptable erosion of parliamentary power. Independent oversight bodies in general play a key role in enhancing public trust in government, which supports Parliament in its accountability work. Despite some confusion about their constitutional legitimacy, agents of parliament are no different. Although there are very few comprehensive studies about individual agents, the literature does tell us what these agents tend to have in common and how those commonalities reflect a shared philosophical commitment to independence and accountability. I will return to this important discussion below, in chapter eight in order to better understand the implications of delegating a mandate to the COIEC that is properly one of the privileges and rights of Parliament, but also to better contextualize the ways in which the COIEC's accountability relationships are evolving.

4. Independence in Action

4.1 Introduction

Agents of parliament have been delegated a notable share of the oversight and accountability tasks that have traditionally been the responsibility of Parliament. Some of these have been actively performed by Parliament in the past, but most have been given attention only if and when necessary. If delegation to agents is going to be meaningful, then they must each be trusted and empowered to assert some degree of independence from government. This chapter offers a further overview of the literature on agents of parliament in order to explain how these institutions generally operationalize their independence through their work. I will begin by discussing the importance of independence and will then look at how this philosophical commitment by Parliament has been integrated into the structural foundation of these offices. Finally, I will look at what duties agents generally undertake and how those duties allow them some further room to assert independence. This review will be drawn upon in chapter six to help situate the COIEC's capacities and decisions in relation to how it operationalizes its own independence.

4.2 The Importance of Independence

An agent would not be able to earn the public's trust if their operations were controlled by government or by Parliament, or if they were even perceived to be partisan³⁷¹ or unduly

³⁷¹ Conservative MP Mark Adler sponsored Bill C-520 in 2014 in an attempt to tackle concerns about partisanship in the offices of agents of parliament. Among other things, the bill required applicants for agent positions to declare whether they had occupied a politically partisan position within the ten years prior. The bill made it to the Senate despite a fair bit of objection, but was never passed into law. See Canada, Bill C-520, *An*

influenced. It is accordingly necessary to make the operations of agencies free from both executive and parliamentary interference.³⁷² This independence is different in character from constitutional independence however, which applies to the judiciary, for example. The independence of agents of parliament (as well as other administrative adjudicative and regulatory tribunals) is derived from Parliament's intent, as it is reflected in the individual legislative enactments that establish each agent.³⁷³

The only way to ensure that an agent has operational independence however, is to ensure that they first have structural independence.³⁷⁴ This chapter will take a closer look at the relationship between government, Parliament and agents of parliament, to understand the degree to which agents have been given structural independence, what that means for their operational independence, and what the implications of this independence are in terms of their constitutional legitimacy.

To begin, it is important to note that Parliament in Canada had already considered what was required for independence long before it ever created the first agent of parliament in 1878. An excellent example of the concepts and elements of structural independence existed with respect to the judiciary.³⁷⁵ The challenge faced in the context of agents of

Act supporting non-partisan offices of agents of Parliament, 2nd Sess, 41st Parl, 2015, cl 6(1) (second reading in Senate 11 December 2014) [*Bill C-520*].

³⁷² *PP&F*, *supra* note 45 at 298.

³⁷³ See e.g. *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 SCR 781, 2001 SCC 52 at 782 (where it is established that "...absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute").

³⁷⁴ *Pond*, *supra* note 221 at 3.

³⁷⁵ *Supra*, note 197 at 11.

parliament has been to figure out how they differ from the judiciary and what the limits on their independence ought therefore to be. Paul Thomas suggests that we begin by asking the following questions “...independence for what purpose? from whom? and in relation to which activities?”³⁷⁶ We must also keep in mind that our answers will have an impact on how we arrive at the right balance between independence and accountability.³⁷⁷

Crucial to sorting these questions out is to always remember that the judiciary’s independence is constitutionally mandated, whereas the independence we desire for agents is simply an optional component of a purely parliamentary innovation. If we want them to be useful however, then what we really want for agents is that they do not feel compelled to take direction from the executive in terms of their policy mandates and that they do not allow pressure from Parliament to influence their handling of individual cases.³⁷⁸ Jeffrey Graham Bell expands on this and argues that agents must:

...retain their independence from their partisan ‘clients’ in order to furnish effective, politically-sensitive yet expert knowledge about the bureaucracy and its leadership – or in the case of ‘democracy branch’ institutions, about Parliamentarians themselves – to Parliament.³⁷⁹

Independence helps to “ensure more neutral, handling of citizen complaints away from the glare of partisan controversy and media publicity,”³⁸⁰ so that agents can perform their oversight functions of audit and investigation as they see fit.³⁸¹

³⁷⁶ *PP&F*, *supra* note 45 at 297.

³⁷⁷ *Luncheon Speech*, *supra* note 36 at 22.

³⁷⁸ *PP&F*, *supra* note 45 at 307.

³⁷⁹ *Bell*, *supra* note 92 at 20.

³⁸⁰ *PP&F*, *supra* note 45 at 293.

³⁸¹ *Aucoin*, *supra* note 79 at 21.

This desire for real and perceived independence stands in stark contrast to the historically accepted practice of the governing party and its executive branch appointing its supporters to positions within government (i.e. making patronage appointments).³⁸² To simply say that an agent is or must be independent, however, is not enough to make sense of what that ‘independence’ means. Ross Denham took up this challenge and put together a list in 1974 of what he thought was necessary to protect the auditor general’s capacity for objectivity and independence:

- 1 the auditor’s reporting responsibility must be established and the general kind of information to be reported must be understood by all parties;
- 2 the auditor general must be guaranteed access to all pertinent information;
- 3 realistic procedures must be established for funding the Office of the Auditor General;
- 4 special arrangements must be established for the appointment, dismissal, term of service, and salary level of the auditor general;
- 5 the level of technical qualification of the auditor general and his staff should be clearly stated in order to suggest the level of expertise and judgment expected from the office; and
- 6 a separate Auditor General Act should be enacted.³⁸³

Denham’s list was only focused on the Auditor-General, but Paul Thomas has built from it and created a newer list of indicia that applies more broadly to all agents of parliament. Thomas lists five structural features that we must consider when assessing the level of independence of parliamentary agencies:

- the nature of the mandate of the agency, including how it is defined initially and how it is updated periodically;
- the provisions respecting the appointment, tenure and removal of the leadership of the agency;
- the processes for deciding budgets and staffing for the agency;
- whether the agency is free to identify issues for study and whether it can compel the production of information; and

³⁸² *Smith, supra* note 254 at 4 (the interview with Deborah Deller on 8 February 2011 provides an example of this type of appointment process where government pushes its own recommendation).

³⁸³ *Denham, supra* note 81 at 266.

- the reporting requirements for the agency and whether its performance is monitored.³⁸⁴

These indicia are instructive and will help to clarify during our analysis below that the COIEC suffers from an institutional structure that limits its independence in several important ways. It is also important to remember however, that Parliament itself must retain some meaningful degree of control over agents. It is only through the parliamentary process that accountability and performance improvement can be achieved.³⁸⁵ This complicated interplay between independence and accountability should always remain front of mind in the design of these agencies. That being said, it will become clear in chapter six that the COIEC benefits from neither robust independence nor a meaningful accountability relationship with Parliament.

4.3 Structural Independence

If Parliament would like agents to be as effective as they can be at holding government to account, then parliamentarians ought to be constantly concerned about both the structural and operational independence of those agents. Limits to structural independence have become clear from our analysis of the appointment and annual budget determination processes, but unsettled concerns about their constitutional legitimacy may also play a role in why governments are hesitant to commit to greater structural independence. Where agents have been notably more successful at solidifying their independence from government has been in relation to their operations. Several of the agents run rather large bureaucracies with significant budgets and a great deal of responsibility.

³⁸⁴ *PP&F*, *supra* note 45 at 297.

³⁸⁵ *Thomas PSIC*, *supra* note 204 at 12.

Their ability to exercise autonomy with regard to the hiring and firing of staff, salaries, day-to-day operations and their relationships with their stakeholders is very important.

(a) Control over operations and finances

To guard against government relinquishing too much control over how public funds are spent, the Treasury Board has long made it a policy to retain specific oversight powers in relation to some administrative matters, such as human resources, reporting and compensation. These Treasury Board directives pre-dated the Advisory Panel pilot study and applied to agents of parliament. One of the policies that the Treasury Board adopted was to require advance approval by the Privy Council office of communication strategies from some federal institutions. Another was that Treasury Board officials had the right to audit and examine the records of any federal institution. This effectively meant that government officials could potentially access investigation records held by an agent of parliament.³⁸⁶ Although there is no record of any agent having been audited by the Treasury Board in this way, the existence of this right made them very nervous. Allowing the Treasury Board to retain such power could give rise to real or apparent government interference in the independence of agents.³⁸⁷

Agents of parliament responded to this concern by forming a working group and engaging in discussions with the Treasury Board and arguing that they ought to be exempted from directives that could compromise their independence.³⁸⁸ These discussions were partly

³⁸⁶ *Hurtubise-Loranger, supra* note 172 at 77.

³⁸⁷ *Fraser Speech, supra* note 85.

³⁸⁸ *Chaplin LLM, supra* note 77 at 30.

successful, and the government House Leader declared on May 1, 2008, that the government “has no intention of requiring those independent agents of Parliament to vet their communications through the government in any way.”³⁸⁹

In an interesting assertion of its independence after having expressed concerns about the Treasury Board’s oversight role, the Parliamentary Budget Officer released a study on October 9, 2008 that examined the fiscal impact of the Canadian mission in Afghanistan. The study was met with considerable resentment because a federal election was set to take place only five days later. Parliamentarians, especially those in government who were running for re-election, argued that the timing of this study’s release was “...in violation of the long standing practice in the federal public service that no public servant can release any report during the writ period on the basis that no public servant should influence the outcome of an election.”³⁹⁰

Then in June 2009, perhaps as an indirect response to the Parliamentary Budget Officer’s decision about the Afghanistan mission report and after lengthy discussions with the agents, the Treasury Board Secretariat modified its directives so that agents of parliament would have full autonomy over matters that other deputy heads were still being held accountable for by their ministers and Treasury Board.³⁹¹ This applied to matters such as

³⁸⁹ *House of Commons Debates*, 39th Parl, 2nd Sess (1 May 2008) at 14:15 (Peter van Loen).

³⁹⁰ *Lee*, *supra* note 158 at page 24 (i.e. the caretaker convention).

³⁹¹ *Fraser Speech*, *supra* note 85.

hospitality, engaging legal counsel, creating policies on evaluation, common-look-and-feel standards for the Internet, internal controls and financial management.³⁹²

Not having to answer to the Treasury Board provides agents of parliament with the autonomy they need to be able to manage their offices on a day-to-day basis without being worried about whether they are going to be undermined. This allows them to make decisions that may seem controversial or undesirable to government officials. For example, operational independence is important for agents who want to conduct special studies or research projects, such as the Afghanistan report released by the Parliamentary Budget Officer. The Privacy Commissioner has used the power to conduct special studies to justify producing research reports on such issues as drug testing, AIDS and genetic testing.³⁹³ Of course the executive ultimately retains significant control over office budgets and can use that power to influence and affect the work of the agents (e.g. smaller budgets might mean fewer special projects can be undertaken), but there is significant political pressure placed on governments to avoid this type of interference. We have also seen agents become very vocal about the fact that their capacity to do meaningful work is being impacted by having small budgets. The Commissioner of Lobbying, for example, told the House Standing Committee on Access to Information, Privacy and Ethics that she has “concerns about her budget envelope”³⁹⁴ and this was reported by the news media.³⁹⁵

³⁹² *Ibid.*

³⁹³ *Bennett, supra* note 274 at 229.

³⁹⁴ Canada, House of Commons, Standing Committee on Access to Information, Privacy and Ethics, 42nd Parl, 1st Sess (16 May 2019) at 1635 (Nancy Bélanger).

³⁹⁵ Samantha Allen Wright, “Lobbying czar has ‘concerns’ for her office’s budget, warns court decision could widen workload” (22 May 2019) *The Hill Times*, online:

Finally, operational separation from government allows agents to conduct investigations and provide advice without having to be concerned about political matters or about whether they will be asked to answer directly to anyone for their individual operational decisions. This is especially helpful in relation to the sensitive investigations that many agents must conduct. As Ann Chaplin notes, "...none of the officers are required to hold a hearing, similar to a court process. All of their investigations can proceed behind closed doors – indeed, in some cases the legislation requires this."³⁹⁶ For agents like the Public Sector Integrity Commissioner or the Commissioner of Lobbying, both of whom may be required to conduct investigations into allegations that specific individuals have done something wrong, it can help to move an investigation forward if you are able to reassure witnesses that their testimonies will remain confidential.

(b) Control over staffing, including salaries

Agents of parliament are delegated their staffing authority from the Public Service Commission.³⁹⁷ There are accordingly certain reasonable limitations to the control that most agents have over their staffing decisions, including that their employees remain subject to federal laws and policies. An early study of the Auditor General's office by Ross Denham concluded that a certain level of independence over hiring is important because it allows agents to proactively address concerns about stagnation and inertia while also working to

<<https://www.hilltimes.com/2019/05/22/lobbying-czar-has-concerns-for-offices-budget-warns-court-could-widen-workload/200781>>.

³⁹⁶ *Constitutional Legitimacy*, *supra* note 83 at 82.

³⁹⁷ *Ibid* at 91; See also e.g. *Public Service Employment Act*, SC 2003, c 22, s 15.

enhance the prestige of their office by recruiting a group of motivated, highly professional and well-trained individuals.³⁹⁸

(c) Judicial Review and Parliamentary Privilege

Many agents of Parliament are subject to access to information requests.³⁹⁹ This may seem odd given the emphasis placed on their independence, but it is also very informative. Being subject to the *Access to Information Act* is a clear limit on independence. The Integrity Commissioner of Ontario, by contrast, is expressly excluded from that province's Access to Information legislation.⁴⁰⁰ If agents can be compelled to disclose information about their operations, then the question arises as to whether they can also be judicially reviewed. If a person questions a decision made by an agent of parliament, can they ask the court to intervene? The answer is necessarily yes. The court determined in *Page v Mulcair* that:

It is a fundamental principle of the separation of powers among Parliament, the Executive and the Courts, that Parliament cannot oust the superintending power of superior courts when it comes to ordinary citizens. Despite their wording, privative clauses are of limited value and go more to the standard of judicial review, rather than to the right of review.⁴⁰¹

Instead, the only choice agents have if they wish to avoid judicial review of their work is to assert that their work is protected by parliamentary privilege. There is very little case law on this point however, and so it is not clear when, if ever, each individual agent can claim such privilege in the face of judicial review. There are examples of the Conflict of Interest and Ethics Commissioner asserting parliamentary privilege in the context of the work that the

³⁹⁸ *Denham*, *supra* note 81 at 269-71.

³⁹⁹ *Access to Info*, *supra* note 128, Schedule I (neither the Information Commissioner nor the COIEC are listed here).

⁴⁰⁰ See *MIA*, *supra* note 273, s 29(2).

⁴⁰¹ *Page v Mulcair*, [2014] 4 RCF 297, 2013 FC 402 at para 32 [*Page*].

office does for MPs, but the right to do so has been expressly provided for in the *Parliament of Canada Act*:⁴⁰²

Functions: members of House of Commons

86 (1) The Commissioner shall perform the duties and functions assigned by the House of Commons for governing the conduct of its members when they are carrying out the duties and functions of their office as members of that House.

Privileges and immunities

(2) The duties and functions of the Commissioner under subsection (1) are carried out within the institution of the House of Commons. The Commissioner enjoys the privileges and immunities of the House of Commons and its members when carrying out those duties and functions.

Even though the Courts have demonstrated tremendous deference to Parliament as having conferred in the text of enabling statute all the rights it intended to,⁴⁰³ and even though only the Conflict of Interest and Ethics Commissioner has been expressly conferred parliamentary privilege, it is still possible that some agents will be able to assert parliamentary privilege in some circumstances. For example, when an agent's work deals directly with the work of Parliament to hold government to account. That being said, none of this is clear. The only thing that is clear is that most of the agents of parliament cannot be compelled to testify in court relating to the substantive work that they undertake.⁴⁰⁴ As will be explained below in chapter 4.4(g), Parliament went out of its way to ensure these protections were part of the agents' legislative mandates. Ann Chaplin has observed:

If the officers' functions were considered to be under the control of or answerable to Parliament, it would logically follow that privilege would protect their activities from judicial scrutiny. However, Parliament itself does not seem

⁴⁰² *PC Act, supra* note 15, s 86.

⁴⁰³ Karine Azoulay, "Making the Case: Canada's PBO, the Courts and the Fourth Branch of Government" (2014) 8 JPPL 107 at 125.

⁴⁰⁴ See discussion below, in chapter 4.4(g).

sufficiently confident of this point to leave the officers unprotected from suits and prosecution before the courts.⁴⁰⁵

Given the effort that we will see has been made in relation to both compellability and libel and slander, it is clear that Parliament chose not to deal with parliamentary privilege. It is therefore quite possible that agents can be subjected to judicial review in relation to their work. They will have to handle each application for judicial review on a case-by-case basis.

Knowing that they could be subject to judicial review could influence how an agent of Parliament undertakes their operational responsibilities. It could, for example, persuade an agent to be more conservative and less aggressive in their interpretation of their legislative mandate(s). As I have explained above, agents can potentially be removed from their positions very easily. In a majority government, for instance, there may be very little to protect an agent who makes a mistake from being removed from their position. If an agent is concerned that their office's work product may be subject to judicial review that could embarrass them, they may be less likely to make decisions that threaten the status quo. I will explain in chapter eight how the possibility of being subjected to judicial review can be creatively guarded against by an agent who is protected by parliamentary privilege.

In the next section, I will explain the operational responsibilities that most agents of parliament have in common. Each individual agent must approach their work through their own personal philosophical and interpretive lens. Some may take a restrictive approach and not allow too much flexibility in how they interpret their mandate(s), whereas others may be

⁴⁰⁵ *Constitutional Legitimacy*, *supra* note 83 at 94.

more flexible and permissive. It is through their personal choices regarding how to fulfil their responsibilities that agents are able to operationalize their independence in different ways.

4.4 Operational Responsibilities

Our brief look in chapter two at eight of the nine mandates drew attention to Ann Chaplin's point that agents of parliament are not simply Parliament's whole mandate of holding government to account divided up into eight pieces.⁴⁰⁶ Each office is different and responds to a different need. Some of these offices complement each other very well, such as the Information and Privacy Commissioners' offices and the Parliamentary Budget and Chief Electoral Officers, but there is generally very little overlap amongst them in terms of their mandates. What does unite them all however, is that Parliament has created them to fulfil functions that it either does not believe itself capable of fulfilling, or that it believes the public is more comfortable with a person fulfilling who is independent of Parliament and/or government. This makes sense, especially given the inherent conflict of interest that exists in Parliament policing itself. Having these independent bodies to evaluate it allows government to present itself as being more dependable and trustworthy.

Even though these agents may exist for the purpose of offering a type of solution to concerns about public trust, their constant oversight presence can also give rise to some tensions. As Alan Freeman explained: "...governments are loathe to create independent Agents – "What's in it for you but grief?" – and only do it because they are forced to

⁴⁰⁶ *Ibid.*

politically.”⁴⁰⁷ Because parliamentarians are effectively giving up power when they create these agents, it is no surprise to hear a legislator like Mr. Freeman say that “...when an Office is created, you want to give them the least amount of power possible.”⁴⁰⁸

This puts agents of parliament in a bit of a challenging position. On the one hand, their mandates are all values-based and values-driven so they want to be effective at fulfilling those values-driven mandates, presumably even when their legislation is too inflexible to allow them to do so. Having some legislative flexibility, for example, would allow agents of parliament to be more responsive when they are criticized by others for not doing enough to respond to concerns about matters over which they merely appear to have jurisdiction because of the values at play in their mandates, but do not have any actual jurisdiction. On the other hand, if agents do push the limits of their mandates in their search for common sense, value-driven solutions to matters that are on their radar but slightly outside of their reach, then they risk falling into a trap where their behaviour can irreparably damage their own position and the reputation of the office they hold. It is accordingly very important that agents of parliament not only understand the limitations of their legislative mandates, but also that they have a strong sense of how their offices fit into the broader constitutional scheme that legitimizes their existence. This understanding of their limitations allows agents to more effectively carry out their operational responsibilities in a way that maximizes their independence.

⁴⁰⁷ *Freeman Interviews, supra* note 262 at 3.

⁴⁰⁸ *Ibid.*

Having established the importance of independence in theory, I will now turn to an overview of the common operational responsibilities held by the agents of parliament in order to draw attention to how independence can and does manifest itself in different ways through the actions of the individuals who hold these offices. As will be further explored in the context of the COIEC in chapters seven and eight, each individual who is appointed as an agent is generally provided with sufficient autonomy within their legislative mandate(s) to be able to make choices about the manner in which they will assert their independence.

(a) Advisory Functions

The advisory function is fundamental to each of the nine agents of parliament. The stakeholders to whom they are permitted or required to offer advice obviously varies amongst them, but it is clear that advice-giving is one of their primary functions. What becomes an interesting point of difference between the agents is the question of when and to whom they can offer advice. For example, the Parliamentary Budget Officer is now required to cost out potential election campaign proposals for some individuals.⁴⁰⁹ The Commissioner of Lobbying is charged with “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.”⁴¹⁰ This would doubtless necessitate giving advice to pretty much anyone who asks a question about lobbying in Canada.

Advice is provided by agents in many forms. For example, every agent responds to

⁴⁰⁹ *PC Act*, *supra* note 15, s 79.21(1).

⁴¹⁰ *Lobbying Act*, *supra* note 141, s 4.2(2).

telephone and emailed/written inquiries from their stakeholders. Some agents are even pushing the envelope and integrating technology into their advisory work. Their websites are loaded with helpful resources, including information bulletins,⁴¹¹ current and past annual reports that contain sample advisory opinions, and several of them are even active on social media.⁴¹² Some agents have legislative mandates that are very restrictive about what information can be shared publicly, including what can be contained in an annual report, but most allow flexibility as long as confidential information is not disclosed by the agent in the exercise of their duties.

An interesting challenge to the generally broad advisory function of most agents of parliament arises when we consider that they are also charged with investigating alleged violations of the rules found in their respective legislative mandates. This can lead to some tensions. For example, the Privacy Commissioner may audit the personal information handling practices of a federal institution and then offer that institution advice on how to fix something. If that practice is then fixed, but still becomes the subject of a complaint by a member of the public, then the Privacy Commissioner has a conflict. Can the commissioner legitimately investigate the acceptability of an information handling practice that the commissioner has already approved of? Proceeding with an investigation in this

⁴¹¹ See e.g. Alberta, Office of the Ethics Commissioner, “Ethics Bulletins” (accessed 19 July 2019), online/: <<http://www.ethicscommissioner.ab.ca/publications/ethics-bulletins/>>.

⁴¹² See e.g. Ian Stedman “Harnessing the Twittersphere: How using social media can benefit government ethics offices” (2018) 61:S1 Can Pub Admin 79 (for a discussion of Offices with Twitter accounts) [*Harnessing Twitter*].

circumstance might give rise to questions about whether the investigation is acceptably unbiased.

This concern about agents of parliament investigating whether their own advice was expressed by Herbert Balls back in the 1970s:

...it was recognized that active intervention by the Comptroller and Auditor General in administrative matters would prejudice the independence of his work as a servant of the legislature. This was based on the belief that any interference by an auditor before transactions were complete lessened the responsibility of the administrative or accounting officer and rendered the auditor incompetent to express an independent opinion and to form objective judgments on acts which he had advised or sanctioned.⁴¹³

If one of the motivations behind creating agents of parliament is to improve public trust in government accountability and oversight, then it is important to be attentive to this challenging aspect of the advisory function. Advice-giving is no less valuable because of the possibility of this type of conflict arising, but it is certainly important for parliamentarians to ensure that there are other, independent ways to investigate a complaint in such circumstances. An example of such an alternative will be provided in the 'Investigatory Functions' section below, at chapter 4.4.(c).

(b) Auditing Functions

Only some agents of parliament examine or inspect their stakeholders' financial accounts or other work product. The Auditor General and Commissioner of Official Languages are two obvious examples of agents who undertake audits. Audits are built into legislative mandates as being mandatory and routine, depending on the matter being

⁴¹³ *Balls, supra* note 49 at 602.

considered or the time of year where something is designated to take place. For example, the Auditor General is required to “examine the several financial statements required by section 64 of the *Financial Administration Act* to be included in the Public Accounts.”⁴¹⁴ The Commissioner of Official Languages may initiate a review of:

- (a) any regulations or directives made under this Act, and
 - (b) any other regulations or directives that affect or may affect the status or use of the official languages,
- and may refer to and comment on any findings on the review in a report made to Parliament...⁴¹⁵

Audit reports are provided to the subject(s) of the audit,⁴¹⁶ but they are also generally tabled with Parliament and made available to the public on agents’ websites. These audit reports help government stakeholders improve their own operations and/or work product, but they also arguably serve as further helpful forms of public outreach and education.

(c) Investigatory Functions

The power to conduct investigations is central to how the oversight and accountability functions of agents of parliament have been operationalized. How investigations can be triggered varies widely however, and seems to depend on what values underpin each individual agent’s mandate(s). An investigation can be triggered by a complaint being received from a member of the public or a public official, or by an agent of

⁴¹⁴ *Auditor General Act*, *supra* note 96, s 6.

⁴¹⁵ *OLA*, *supra* note 117, s 57.

⁴¹⁶ *Ibid*, s 59.

parliament exercising their ‘own initiative’ right to investigate. Some examples of the investigative power are as follows:

- The Commissioner of Lobbying has the right to investigate whether someone is engaging in unregistered lobbying;⁴¹⁷
- The Commissioner of Official Languages has a responsibility to investigate any complaint that is made about a federal institution not recognizing the status of an official language;⁴¹⁸ and,
- The Privacy Commissioner must investigate any complaint received from an individual who alleges “that personal information about themselves held by a government institution has been used or disclosed otherwise than in accordance [with the Act].”⁴¹⁹

The power and duty to conduct investigations mirrors the power that Parliament has to do the same. In fact, Parliament cannot fully delegate away its own powers of investigation to agents of parliament. Parliament therefore retains the right to investigate a matter even if an agent is also doing so. It may not always be the case that the public trusts Parliament to investigate matters, especially if they concern Parliament itself, but that does not prevent it from doing so. Most often such investigations would be conducted by committees or sub-committees that include members from each of the parties. Obviously, this can still lead to controversial outcomes, especially in super-majority situations, but it is important that Parliament retain this right to investigate. One reason why this is particularly important is

⁴¹⁷ *Lobbying Act*, *supra* note 141, s 10.4(1).

⁴¹⁸ *OLA*, *supra* note 117, s 58(1)(a).

⁴¹⁹ *Privacy Act*, *supra* note 127, s 29(1)(a).

because an agent may do a poor job on an investigation or may become embroiled in a controversy relating to a file they are working on.⁴²⁰

The investigatory function also often overlaps with an agent's advisory functions. An agent's advice may be relied upon and followed, for example, but the recipient may still find themselves in a compromising position. This gives rise to questions about whether an agent should be permitted to investigate a matter that arose after an individual followed that agent's advice. Some of the agents' legislative mandates contemplate that these types of conflicts may arise, but others are silent on this possibility. Should an agent be bound by their own advice and, if so, how should that agent be held accountable if their advice was wrong? There are at least two different ways to handle these situations. One approach is to allow agents to engage external experts who can independently undertake an investigation on their behalf. The agent would not be involved in any way whatsoever and Parliament would consider that report. Another approach is to stipulate that an agent is bound by their own advice and then require a parliamentary committee to conduct the investigation instead. There are implications for an agent's ability to exercise independence depending on how the mandate is structured. That being said, Parliament must have a right to step in and take over when such challenges present themselves.

⁴²⁰ See e.g. Jane Taber & Robyn Doolittle, "PEI's conflict-of-interest commissioner steps down over gaming deal", *The Globe and Mail* (8 March 2015), online: (<https://www.theglobeandmail.com/news/national/pei-conflict-of-interest-commissioner-steps-down/article23352036/>)> (where the Commissioner resigned after losing the confidence of the members of the Legislative Assembly).

How an agent reports the results of an investigation and whether they are allowed to make decisions or simple recommendations also tells us something about the limits of their independence. For example, if they are required to provide a copy to the government for approval instead of making it directly available to the public. Such a requirement signals that the office's independence is in how they conduct an investigation, not in deciding what happens as a result of that investigation. Most agents have no powers to punish or compel remedial conduct,⁴²¹ but have instead been given the power to issue reports that are made available to the public for its consideration. In other words, the power to influence behaviour generally stems from the power to embarrass a party (e.g. individuals, agencies or governments), rather than from any legislated power to compel conduct.

(d) Power to Compel Testimony

Although the investigations conducted by most agents result only in reports that are made available to the public, some agents do have the power to compel witnesses to provide documents and oral testimony during those investigations.⁴²² They also have the complementary power to administer oaths. These powers again mirror the power of parliament to do the same⁴²³ and are incredibly important for ensuring that agents of parliament are given the tools they need to be able to do their work efficiently and effectively. Compelling oral testimony under oath can help legitimate an agent's findings of fact and minimize criticism about those findings within the political arena. This power is also

⁴²¹ As I will explain in chapter 6, the COIEC has some limited power to issue administrative monetary penalties.

⁴²² See e.g. *Access to Info*, *supra* note 128, s 36(1)(a); Lobbying Act, *supra* note 141, s 10.4(2).

⁴²³ This power exists by virtue of *Constitution Act 1867*, *supra* note 18, Preamble & s 18.

important because agents can conduct several investigations per year. The cost of taking every witness to court in order to compel them to provide testimony could add up quickly. According to the Public Policy Forum of Canada, “seven of the national agencies...have legal authority to order the production of documents, summon witnesses and compel oral testimony.”⁴²⁴

The agents have been given complementary powers as well, depending on their mandate. For example, the Privacy Commissioner has the power to:

- enter any premises occupied by any government institution on satisfying any security requirements of the institution related to the premises;
- converse in private with any person in any premises entered and carry out inquiries within the authority of the privacy commissioner; and
- examine or obtain copies or extracts from books or other records found in any premises entered...containing any matter relevant to the investigation.⁴²⁵

With these powers comes a corresponding expectation that investigations will be conducted fairly and with a view to preserving the rights of the parties involved. Agents are not formally expected to conduct themselves as though they are courts of law or administrative tribunals, but when their enforcement tools are more robust and/or invasive, the subjects of their investigations ought to be afforded greater procedural protection. What types of enforcement mechanisms are appropriate for each agent is not important for this discussion, but what is important is that agents with these powers ought to hold themselves to high ethical and legal standards when conducting investigations.

⁴²⁴ *Thomas PPF*, *supra* note 50 at 6.

⁴²⁵ *Bennett*, *supra* note 274 at 226.

(e) Enforcement (Punishment and Deterrence)

One of the major criticisms of most agents of parliament is that they have the independence to critique the work of government but almost no power of enforcement if they uncover wrongdoing.⁴²⁶ This is a fair criticism. In fact, their power is often limited to influence⁴²⁷ and the weak powers of punishment and enforcement they do have are unquestionably by design. As Paul Thomas explains:

Why would ministers agree to create institutions that were bound to be critical of them and their departments? One explanation might be that ministers believed they were establishing “watchdogs” who could bark but not bite, because parliamentary agencies rely almost exclusively on publicity and persuasion.⁴²⁸

It is perhaps for good reason that parliamentarians are hesitant to relinquish more power than is politically expedient. Agents of parliament are not elected to their roles in the way that legislators are, nor do they exist as a result of some clear provision in the Constitution requiring them to exist. As such, there is some apprehension about allowing agents powers of enforcement that can be exercised without also having to be specifically approved by Parliament. This apprehension is accompanied by a general sense that agents’ mandates must not allow them to have unbridled influence over the political realm.

In search of that fine balance between too little impact, too much influence and unchecked power, Parliament has been creative about how it has handled the penalties and enforcements powers it has given to agents of parliament. Because each agent is expected to file annual and/or special reports, the power of the pen has been foregrounded by

⁴²⁶ See e.g. *PPF Report*, *supra* note 67 at 3.

⁴²⁷ *Hubertise-Loranger*, *supra* note 172 at 78.

⁴²⁸ *PP&F*, *supra* note 45 at 293.

parliamentarians. It is often argued that short of kicking someone out of public office for a transgression, the most powerful penalty you can impose in the political realm is to publicly name and shame an individual, department or organization who/that has done something wrong. This is especially the case for an MP or senior public servant who relies on their name and their reputation to help them get hired or re-elected, and for a lobbyist who relies on their reputation as a reliable and trustworthy source of information to help them secure meetings with public office holders. As a minister whose ministry is audited by the Auditor General, your party leader could remove you from your ministerial post if it is revealed that you are doing a poor job of managing public funds.

There are no studies to date that tackle the question of which punishments are most effective and/or the best deterrents for people in public life who have committed particular transgressions. The risk of being named and shamed may in fact be a sufficiently strong deterrent, especially given the permanence that comes along with the publication of a person's name and transgression(s) in our modern digital world. Annual reports, special reports, parliamentary debates, newspaper articles, social media and other online forums, all work together to ensure that a person who commits, and who cares that they have committed, a transgression never has a chance to outrun their shame. Ultimately however, finding an appropriate balance between blaming and teaching is crucial to whether agents can contribute to levels of trust both inside and outside of government.

Some other, rarer powers of punishment include: the ability to recommend and/or issue fines (also called "administrative monetary penalties"); the ability to restrict an

individual from doing something (e.g. prohibiting an individual from registering as a lobbyist after they have been found in violation of the *Act* or restricting their employment options after they leave the public service); and, referring a matter to law enforcement for further investigation. This latter option only exists in limited circumstances when an agent's legislative mandate sets out offences. The *Access to Information Act*, for example, sets out that "[n]o person shall obstruct the information Commissioner or any person acting on behalf or under the direction of the commissioner in the performance of the commissioner's duties and functions under this Act"⁴²⁹ and provides possible penalties for doing so.

(f) Outreach and Education

Any agent who has a mandate that involves interacting with members of the public, rather than simply interacting with government or parliamentary officials,⁴³⁰ will feel some obligation to engage in public outreach initiatives. The Commissioner of Lobbying, as detailed above, is a good example of this. The question of whether an agent's mandate ought to expressly include outreach is an important one that cannot be understated. These institutions are institutions of Parliament and Parliament is an institution that is expected to represent the voice of the voting public. It seems logical that agents would engage the public about issues that matter to them so that the public can learn and be informed. That being said, the Privacy Commissioner "has no mandate for public education and therefore no budget for such activities."⁴³¹

⁴²⁹ *Access to Info*, *supra* note 128, s 67.

⁴³⁰ An example of an agent who has no express public education mandate under a legislative mandate is the Integrity Commissioner of Ontario under the *MIA*, *supra* note 273.

⁴³¹ *Bennett*, *supra* note 274 at 229.

Public engagement takes many forms, including public appearances (e.g. speaking at conferences), publishing special reports and annual reports online, appearing before televised parliamentary committee meetings,⁴³² engaging with the news media, engaging directly with the public through social media, answering phone calls and adding other engaging and informative materials to an office’s website. The public outreach aspect of the work of agents has not traditionally been foregrounded, but it is beginning to command a great deal of interest and attention.⁴³³ This interest is likely growing because “[p]arliamentarians tend to be better at reading people than at reading reports”⁴³⁴ and this is frustrating for the agents who work hard to prepare those reports. It has become common now for an agent to rely on the response of the public to a report⁴³⁵ rather than to put extra effort into trying to get Parliament’s attention. It is likely that we will see even greater public outreach if the work of agents continues to fly under the radar of parliamentarians.

(g) Compellability as a Witness and Protection from Libel and Slander

As a result of the sensitive and often personal nature of the work undertaken by many of the agents, consideration has been given by Parliament to whether they need protection against being compelled to testify in court. The Privacy Commissioner,⁴³⁶ Auditor-

⁴³² Although it may seem like a stretch to call this public engagement, there are many agents who publicize their committee appearances on their websites and social media accounts. The fact is that these opportunities to testify before parliamentary committees do represent an opportunity to speak indirectly to the public about the work that an agent does.

⁴³³ See e.g. *Harnessing Twitter*, *supra* note 412.

⁴³⁴ *PP&F*, *supra* note 45 at 292.

⁴³⁵ *Denham*, *supra* note 81 at 267.

⁴³⁶ *Privacy Act*, *supra* note 127, s 67.

General⁴³⁷ and Public Sector Integrity Commissioner are all excellent examples of agents who regularly come into possession of highly sensitive information in the course of their work. Parliament does not want these agents to be hindered in the fulfilment of their mandates by concerns about whether they will be forced to testify in court and, possibly, disclose information that others do not want them to disclose. Many of their legislative mandates therefore include provisions that are similar to this one from the *Public Servants Disclosure Protection Act*:

The Commissioner or any person acting on behalf of or under the direction of the Commissioner is not a competent or compellable witness in any proceedings, other than a prosecution for an offence under this Act, in respect of any matter coming to the knowledge of the Commissioner, or that person, as a result of performing any duties under this Act.⁴³⁸

Similar to the concerns about privacy, parliamentarians have also considered whether the threat of a lawsuit might have a chilling effect on the ability of agents to effectively do their jobs. If it was not being done by agents, the work of public sector oversight and accountability would have to be done by Parliament, the members of which would benefit from being protected by parliamentary privilege. Whether agents of parliament enjoy parliamentary privilege is not always clear and this has inspired parliamentarians to sidestep the confusion by inserting clear protections against libel and slander in many of the agents' legislative mandates.⁴³⁹ An example of this type of provision can be found in the *Privacy Act*:

For the purposes of any law relating to libel or slander,

⁴³⁷ *A-G Act*, supra note 96, s 18.1.

⁴³⁸ See *PSDPA*, supra note 150, s 46 (see also *Access to Info*, supra note 128, s 65; *OLA*, supra note 117, s 75).

⁴³⁹ See e.g. *Access to Info*, supra note 128, s 66; *A-G Act*, supra note 96, s 18.2; *OLA*, supra note 117, s 75, *PSDPA*, supra note 150, s 47.

(a) anything said, any information supplied or any document or thing produced in good faith in the course of an investigation carried out by or on behalf of the Privacy Commissioner under this Act is privileged; and

(b) any report made in good faith by the Privacy Commissioner under this Act and any fair and accurate account of the report made in good faith in a newspaper or any other periodical publication or in a broadcast is privileged.⁴⁴⁰

These protections are incredibly important for agents to have, even if they may end up being unnecessary because they are never relied upon.

(h) Periodic Mandate Reviews

Several of the agents' legislative mandates include mandatory annual or periodic reviews by Parliament.⁴⁴¹ The purpose of these reviews is of course to consider whether the legislation needs to be updated to ensure that the agents are doing what needs to be done and have the tools they need in order to do so. Interestingly, none of the agents are explicitly required to offer recommendations to Parliament about how their legislative mandates can be improved. Many of them do offer suggestions on a regular basis however. They do this by including subtle and not-so-subtle comments in their annual and special reports, by providing their opinion when they appear in front of legislative committees, and by occasionally engaging with the media to help them understand why they do not have jurisdiction over a matter. Some agents are occasionally asked to prepare reports for Parliament to consider in the course of its review of their legislation, but being asked to do so is not a given. This is unfortunate, because as Paul Thomas notes, "...informally they see

⁴⁴⁰ *Privacy Act*, *supra* note 127, s 67(2).

⁴⁴¹ See e.g. *Lobbying Act*, *supra* note 141, s 14.1; *PSDPA*, *supra* note 150, s 54; *OLA*, *supra* note 117, s 88; *Privacy Act*, *supra* note 127, s 75; *Access to Info*, *supra* note 128, s 75.

it as their mission, to promote public trust and confidence in government by providing oversight, strengthening accountability, improving efficiency and effectiveness and helping to resolve problems which citizens encounter when dealing with large, bureaucratic organizations.”⁴⁴² Agents can draw directly from their own experience acting as the foremost experts on their office’s particular subject matter. It ought to be mandatory to include agents in every periodic legislative review.

It is also important to note that mandatory periodic reviews serve as a way for Parliament to force itself to actually pay attention to the work of individual agents of parliament. It can become too easy for Parliament to simply delegate parts of its oversight responsibilities to an agent and then not spend any time or effort monitoring that agent’s work. This is especially the case when there are no obvious controversies that are drawing the public’s attention to an agent’s work and thus demanding that it be given parliamentary oversight. As government grows, the demands on parliamentarians’ time grow as well. Agents of parliament who perform their duties effectively and without much controversy can easily get lost in the shuffle. One way to ensure that this does not happen is to foreground their insights in the periodic review process.

What we sometimes see instead of periodic reviews however, is that agents get creative and leverage their relationships with external stakeholders in order to advance their interests. In other words, they sometimes fulfil their operational responsibilities by leveraging unofficial or informal networks of influence.

⁴⁴² *Thomas PSIC, supra* note 204 at 6.

4.5 Relationships with External Stakeholders

Agents of parliament do not exist in a vacuum. They exist as part of formal networks and informal communities of interest, that include parliamentarians, other officers and agents of parliament, public servants and even external stakeholders.⁴⁴³ Most agents interact regularly with the public, the media, and with parliamentary committees. There is an agent of parliament community that meets occasionally in an effort to support each other and discuss common problems.⁴⁴⁴ The agents even consider ways that they might be able to reduce expenses by sharing services.⁴⁴⁵ Jamie Baxter's work helpfully explains these relationships as being part of what he calls 'accountability networks'. These are groups of interconnected agencies that function as alternative institutional arrangements and serve to reinforce agency independence.⁴⁴⁶ Each agent of parliament exists as a node in a network of the many actors who are involved in that domain of work and their collective success is in part dependent on the recognition that there are many different policy instruments at work to help encourage greater oversight and accountability.⁴⁴⁷

4.6 Conclusion

In this chapter I looked at how Parliament grants agents a measure of structural and operational autonomy that allows agents to act with varying degrees of independence while

⁴⁴³ *PP&F*, *supra* note 45 at 305; See also Adam Dodek, "What lies ahead for public sector ethics?" (2018) 16:1 *Can Pub Admin* 102 at 108 (for a discussion of the growth of the parliamentary accountability industry) [*Dodek*].

⁴⁴⁴ *Fraser Speech*, *supra* note 85.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Baxter*, *supra* note 64.

⁴⁴⁷ *Bennett*, *supra* note 274 at 239.

fulfilling their individual mandates. This overview was intended to be representative, but certainly not exhaustive. Some agents have other functions that I have not covered, including things like holding inquiries, for example, but the above represent what I feel are the most important common denominators. The agents also have important relationships within broader accountability networks, as explained in chapter three, but having a grasp of the breadth of what is possible in relation to agents' operational autonomy gives us important information about what it means to be in one of these positions. This analysis will be further drawn upon in chapter six to help situate the COIEC's capacities and decisions in relation to how it is capable of operationalizing its own independence.

5. The Evolution of Parliamentary Ethics in Canada

5.1 Introduction

An important component of the Westminster system is that there is a privilege possessed by the House of Commons that affords it the right to discipline its own members and to regulate its own internal affairs. The approach taken to the operationalization of this privilege has varied throughout Canada's history. In fact, as we will see, the regulation of the ethical conduct of members of the House of Commons has taken on many forms over the years. With the understanding that neither of the office's commissioners have characterized their role as being that of an agent of parliament, this chapter moves into a more detailed study of the office itself. I begin by providing an historical overview of the law, politics and structure of parliamentary ethics rules in Canada that will help us understand why and how these regimes have evolved. The COIEC is Canada's fourth iteration of its parliamentary ethics oversight office, with the design of each successive iteration placing greater emphasis on structural and operational independence. I explain the political and legal tensions that have served to inspire the emergence of the COIEC and then draw attention to the landscape of complementary ethical and legal regimes in which it is situated. Despite the primacy of the COIEC in the modern media, it is important to be clear that it is only one of many regimes that have authority over the conduct of public officials. This is important because it helps us understand why parliamentarians may lack the political will to make progressive changes to the *Act* and Code.

5.2 History of the Office

There has historically been a tremendous amount of trust in and deference to Parliament in relation to dealing with parliamentarians who allow their private interests to hinder their ability to accomplish their public duties – also known as being in a conflict of interest. This started to change in 1964 under Prime Minister Lester B. Pearson’s government when he introduced the first written conflict of interest guidelines for cabinet ministers.⁴⁴⁸ No doubt inspired by this unprecedented move by Pearson, Stanley Westall wrote in 1965 that it did not seem necessary:

This is more often seen at the municipal level. The infrequency of the occurrence at the higher level is due, not to a higher standard of morality, but to the fact the member’s private life and associations are more widely known, that he is policed by his own party and particularly by his own leadership and watched eagerly by the Opposition.⁴⁴⁹

Pearson’s guidelines were replaced in the early 1970s after President of the Privy Council Allan MacEachen published a Green Paper called “Members of Parliament and Conflict of Interest.”⁴⁵⁰ The 1973 Green Paper drew attention to the fact that Prime Ministers were implementing unified guidelines for ministers, but that the rules for MPs were still set out in many different places, including the Criminal Code, the Canada Elections Act, the Standing Orders, etc. MacEachen’s paper set out an analysis of a gap that he saw between evolving public standards of ethical conduct and those formal rules that existed to govern MPs’ conduct. The paper was not written in response to any particular event or issue, but included a set of proposals designed to encourage both parliamentary and public debate on conflict of

⁴⁴⁸ Round Table, “Conflict of Interest Guidelines: Too Little or Too Much?” (1998-9) 21:4 Can Parl Rev 16 at 17 [*Round Table*].

⁴⁴⁹ Stanley Westall, *Morality in Government* (Toronto: The Ontario Woodsworth Memorial Foundation, 1965) at 7.

⁴⁵⁰ *House of Commons Debates*, 29th Parl, 2nd Sess (17 July 1973) at 5687 (Statement by Hon Allan J MacEachen, President of the Privy Council).

interest.⁴⁵¹ Although the Green paper discussed two ways to address conflicts of interest: 1) the principle of avoidance (i.e. requiring public officials to completely avoid putting themselves in conflict of interest situations) and 2) the principle of disclosure (i.e. requiring public officials to disclose the existence of their conflicts to some sort of official), MacEachen took the position that neither approach would be ideal in every case and that any new codification of rules must factor in both approaches.⁴⁵²

It was in the wake of these important discussions about finding new ways to address conflicts of interest that Prime Minister Pierre Elliott Trudeau issued new conflict of interest guidelines for cabinet ministers in July 1973.⁴⁵³ These guidelines defined what was meant by a conflict of interest, required ministers to sever all business, commercial or professional associations while holding office and required that shares be disposed of or put in a trust in certain circumstances. Prime Minister Trudeau was very clear to note that the guidelines would not apply to ministers' spouses and their families, but encouraged ministers to “act within the spirit of the guidelines” and “have regard for the possibility of a conflict of interest

⁴⁵¹ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Personal Trading Policies, Proactive Public Financial Disclosure and Conflicts of Interest” (Public Sector Ethics Conference – Panel Discussion, Toronto, 1 June 2018), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Public%20Sector%20Ethics%20Conference%20Panel%20Discussion%20June%201%202018%20EN.pdf>> at 4 [*Dion Trading Policies*].

⁴⁵² Canada, Office of the Privy Council, *Members of Parliament and Conflicts of Interest*, by Allan J MacEachen (Ottawa: Information Canada, July 1973) at 6 [*MacEachen Green Paper*].

⁴⁵³ *House of Commons Debates*, 29th Parl, 2nd Sess (18 July 1973) at 5735 (Statement by Right Honourable Pierre Elliott Trudeau) reprinted in at Kenneth M Gibbons & Donald C Rowat, eds, *Political Corruption in Canada: Cases, Causes and Cures* (Toronto: McClelland and Stewart Limited, 1976) at 264.

arising or appearing to arise from dealings...in which his spouse or dependent children may be involved.”⁴⁵⁴

New guidelines for various groups of public servants and governor-in-council appointees were also announced at that time.⁴⁵⁵ It was not until 1974 that Canada’s first federal conflict of interest administrator, the Assistant Deputy Registrar General (ADRG), was appointed.⁴⁵⁶ The ADRG’s office was established within what was formerly the Department of Consumer and Corporate Affairs⁴⁵⁷ and had several responsibilities, including: providing advice to the Prime Minister and members of his Cabinet and processing compliance documents that cabinet ministers were required to file as part of their obligations under Trudeau’s 1973 guidelines. The ADRG appears to have been established not because of any deficiency of the committee system, but in direct response to MacEachen’s green paper. MacEachen had proposed what he called an Independence of Parliament Act and recommended that it be administered and enforced by the Attorney

⁴⁵⁴ *Ibid.*

⁴⁵⁵ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Canada’s Federal Conflict of Interest Regime: History, Present Course and Future Directions” (30th Annual Administrative Law Seminar, Ottawa, 9 May 2013), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Podium%20CALS%20speaking%20notes%20May%209%202013.pdf>> at 3 [*Dawson Future Directions*].

⁴⁵⁶ *Dion Trading Policies*, *supra* note 451 at 5.

⁴⁵⁷ Canada, Office of the Conflict of Interest and Ethics Commissioner, “The Conflict of Interest and Ethics Commissioner: A Hybrid” (Paper delivered at 5th Annual National Forum on Administrative Law and Practice, Toronto, 14-15 October 2009), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Osgoode%20Hall%20companion%20paper%20Oct%202009%20EN.pdf>> at 18 (Author: Commissioner Mary Dawson) [*Dawson Hybrid Paper*].

General.⁴⁵⁸ Instead of burdening an MP with this responsibility however, the Prime Minister decided to create a separate administrative office to oversee the new guidelines.

(a) Assistant Deputy Registrar General (1974)

The Assistant Deputy Registrar General was not independent of government and reported back in two different ways. The ADRG reported through the Minister of Consumer and Corporate Affairs for matters related to the office’s resources and through the Clerk of the Privy Council to the Prime Minister for matters related to the office’s operations.⁴⁵⁹ The rules administered by the ADRG included rules against the use of insider information for personal gain, restrictions on permissible outside activities and a requirement for ministers to either divest or publicly declare particular assets that they held. Ministers were also prohibited from sitting as directors on corporate boards. The first formal post-employment rules for ministers did not come into effect until January 1, 1978.⁴⁶⁰

Joe Clark succeeded Trudeau as Prime Minister and in 1979 made the guidelines public for the first time, while also broadening them so that they applied to spouses and dependent children of cabinet ministers.⁴⁶¹ The principle innovation under Clark’s revised

⁴⁵⁸ *MacEachen Green Paper*, *supra* note 452 at 35.

⁴⁵⁹ Ian Greene & David P Shugarman, *Honest Politics: Seeking Integrity in Canadian Public Life* (Toronto: James Lorimer & Company Ltd., 1997) at 156 [*Honest Politics*].

⁴⁶⁰ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Opening Statement to the Oliphant Commission on mandate of the Conflict of Interest and Ethics Commissioner and post-employment rules” (Ottawa, 17 June 2009), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Presentation%20Oliphant%20Commission%2017%20juin%202009%20EN.pdf>> at 1 [*Dawson Oliphant*] (these were called the ‘Conflict of Interest and Post-Employment Code for Public Office Holders’).

⁴⁶¹ *Honest Politics*, *supra* note 459 at 50.

guidelines was a new requirement that even interests that did not give rise to conflicts would have to be publicly disclosed.⁴⁶² The move to make the rules applicable to spouses was poorly received and would eventually be walked back by Trudeau when he was re-elected as Prime Minister in 1980.⁴⁶³

It was also after Trudeau's re-election that some of the deficiencies of the ADRG model started to come to light. In 1983, shortly after he left office, former cabinet Minister Allistair Gillespie was accused of having business dealings with his old department.⁴⁶⁴ These types of dealings were prohibited by the post-employment rules, but the problem with enforcing those rules was clearly that the ADRG was not independent of government. Sitting MPs came to Gillespie's defense and insisted that he asked for no favours when he approached his old department with his profit-making idea.⁴⁶⁵ The opposition parties persisted however, which caused Prime Minister Trudeau in 1983 to ask former cabinet ministers Michael Starr and Mitchell Sharp (Conservative and Liberal, respectively) to form a Task Force and prepare a report that would offer recommendations for a revised conflict of interest regime. The end result was a May 1984 report that included the most comprehensive attempt to date to document what it meant to be in a conflict of interest.⁴⁶⁶

⁴⁶² Andrew Stark, "Conflict of Interest in Canada" in Christine Trost & Alison L Gash, eds, *Conflicts of Interest and Public Life: Cross-National Perspectives* (New York: Cambridge University Press, 2008) 125 at 126-7 [*Stark COI*].

⁴⁶³ *Round Table*, *supra* note 448 at 17.

⁴⁶⁴ *Honest Politics*, *supra* note 459 at 50.

⁴⁶⁵ Mary Janigan, "Uncommon Scent of Scandal", *Maclean's* (7 March 1983), online (archived): <<http://archive.macleans.ca/article/1983/3/7/uncommon-scent-of-scandal#!&pid=14>> at 14-15.

⁴⁶⁶ Michael Starr and Mitchell Sharp (co-chairs), "Ethical Conduct in the Public Sector: Task Force on Conflict of Interest" (Ottawa: Ministry of Supply and Services, May 1984) [*Starr & Sharp*].

The Starr and Sharp Report drew attention to the independence deficiency in the current ADRG model when it noted that “conflict-of-interest rules are intended to promote impartial decision-making and equality of treatment.”⁴⁶⁷ The report put forth a vision for a legislated code of ethical conduct that could be applicable to practically all public office holders, not only ministers of the Crown, and it also recommended that a new office be created to administer the comprehensive legislative rules.

Brian Mulroney had different plans when he became Prime Minister in 1985. Instead of following up on Starr and Sharpe’s recommendations, Mulroney quickly introduced a new *Conflict of Interest and Post Employment Code for Public Office Holders* in January 1986.⁴⁶⁸ Mulroney’s Code was simply a guideline and was not legislated. The Code consolidated everything into one document, including rules for ministers, parliamentary secretaries, ministerial staff, all public servants and governor-in-council appointees.⁴⁶⁹ During that time, Ontario’s government had also been dealing with scandals of its own and took the important step of commissioning a now famous report from former Lieutenant-Governor John Black Aird. Aird was asked to “review the compliance of all cabinet members with the guidelines and to recommend improvements to the rules.”⁴⁷⁰ In his report, Aird argued that conflict of

⁴⁶⁷ Ian Greene, David P Shugarman & Robert Shepherd, “Chapter 3: Ethical Problems in Public Life” in *HP Now*, *supra* note 78 at 75 (citing *Starr & Sharp*, *supra* note 466).

⁴⁶⁸ *Honest Politics*, *supra* note 459 at 51; *Dion Trading Policies*, *supra* note 451 at 6.

⁴⁶⁹ *Dawson Future Directions*, *supra* note 455 at 2.

⁴⁷⁰ John B Aird, *Report on Ministerial Compliance with the Conflict of Interest Guidelines and Recommendations with Respect to those Guidelines* (Toronto: Blake, Cassels & Graydon, 1986) [Aird] (see Ian Stedman, *Understanding the Unwritten Rules: Examining the Use of Ontario Parliamentary Convention to Guide the Conduct of Elected Officials in Ontario* (LLM Thesis, University of Toronto, 2015), online:

interest guidelines ought to be replaced by legislation and that this would help ensure that they are “drawn with the precision of a statute” instead of being vague and imprecise.⁴⁷¹ Despite what may have looked like a progressive move by Mulroney to issue his new guidelines, they were not legislative and seem to have fallen into the trap of imprecision that Aird had warned about. The next two years proved to be rather difficult for the governing party. According to Ian Greene and David Shugarman, Mulroney’s government found itself embroiled in no less than fourteen conflict of interest scandals involving ministers and their staff.⁴⁷² The most widely publicized of these fourteen was the Sinclair Stevens affair.

Sinclair Stevens was a cabinet minister who was accused of violating the Code by continuing to be involved in the management of his private companies.⁴⁷³ There were numerous allegations against him and the pressure on Mulroney to deal with them led the Prime Minister to call for a judicial inquiry. The inquiry was conducted by Mr. Justice William Parker, Chief Justice of what was then the High Court of Ontario. Mulroney’s Code quickly became the subject of national attention. In his report that was released in December 1987, Mr. Justice Parker recommended that ministers’ assets, interests and activities all be publicly disclosed. Justice Parker also favoured divestment by ministers of their private assets where ownership of those assets could lead to obvious conflicts of interest, and he

<<https://tspace.library.utoronto.ca/handle/1807/74475>> (for a comprehensive history of parliamentary conflict of interest rules in Ontario, including an in-depth analysis of the Aird Report)).

⁴⁷¹ *Aird*, *supra* note 470 at 2.

⁴⁷² *Honest Politics*, *supra* note 459 at 51.

⁴⁷³ See Canada, *Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens*, (Ottawa: Minister of Supply and Services, 1987) (Commissioner: The Honourable W D Parker) [*Sinclair Stevens*].

favoured recusal by ministers when an actual conflict of interest arose in the course of their duties.⁴⁷⁴ Mere disclosure of a conflict of interest was thought to be insufficient.

The Parker report was followed three months later by the introduction of the first of four conflict of interest bills, none of which made it through to becoming law.⁴⁷⁵ Bill C-114 in 1988, Bill C-46 in 1991, Bill C-43 in 1991 and Bill C-116 in 1993, which was the final of these bills to be tabled by Mulroney.⁴⁷⁶ Bill C-116 would have created an Ethics Commissioner, but that commissioner would have been responsible for administering a Code (again, not law). The bill died when Parliament prorogued on Nov 12, 1993.⁴⁷⁷

(b) Office of the Ethics Counsellor (1994)

Jean Chrétien was elected Prime Minister in 1993 after running a campaign that focused largely on the idea of “governing with integrity.”⁴⁷⁸ Part of his platform was a promise to create a new code of conduct for MPs and public office holders and to appoint an independent ethics counsellor who would administer this Code.⁴⁷⁹ A new independent counsellor was not immediately created however, and in June 1994 Chrétien instead

⁴⁷⁴ *Dion Trading Policies*, supra note 451 at 6.

⁴⁷⁵ Canada, Library of Parliament, Research Branch, *Conflict of Interest: Selected Issues*, by Margaret Young November, Publication No. BP-362E (Revised October 1998), online: <<http://publications.gc.ca/Collection-R/LoPBdP/BP/bp362-e.htm>> at 3 (all four bills died on the order paper in the course of the 33rd and 34th Parliaments).

⁴⁷⁶ *Stark COI*, supra note 462 at 127.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ See *Honest Politics*, supra note 459 at 52; Ian Greene, “The Chrétien Ethics Legacy” in Lois Harder & Steve Patten, eds, *The Chrétien Legacy: Politics and Public Policy in Canada* (Montreal, QC, McGill-Queen’s University Press, 2006) at 276 [*Greene on Chrétien*].

⁴⁷⁹ *Ibid.*

chose to change the name of the Assistant Deputy Registrar General to that of the Ethics Counsellor.

The Ethics Counsellor reported to and served at the pleasure of the Prime Minister while being under the general direction of the Clerk of the Privy Council and receiving administrative support from Industry Canada.⁴⁸⁰ The first Counsellor named was Howard Wilson and he was responsible for ensuring ministerial and bureaucratic compliance with a new conflict of interest code for MPs and other public office holders that he himself helped to develop. It was not until late in 1995 that a special joint committee of the Senate and House of Commons was formed to begin to consider what a new, modernized code of conduct should look like if it were to be legislative in nature. That joint committee reported in 1997 (in what was called the Milliken-Oliver Report⁴⁸¹) and recommended that all parliamentarians, and not just ministers, confidentially disclose their financial assets, liabilities and sources of income and any paid or volunteer positions they hold. They also recommended that this information be made public.⁴⁸²

According to Denis Saint-Martin, the public and the politicians also started to turn their attention seriously to the need for an independent ethics commissioner after a 1997

⁴⁸⁰ Canada, Library of Parliament, *Background Paper: Conflict of Interest at the Federal Level: Legislative Framework and Oversight*, by Michel Bédard, Kristen Douglas & Hurtubise-Loranger, Publication No 2005-09-E (revised 24 Nov 2010) at 1 [*Bédard Background*].

⁴⁸¹ Canada, Parliament of Canada, *Special Joint Committee on a Code of Conduct of the Senate and the House of Commons*, (2nd Report, March 1997) (co-chairs Peter Milliken & Donald Oliver).

⁴⁸² *Dion Trading Policies*, *supra* note 451 at 6.

incident where Prime Minister Chrétien made a phone call to the Federal Business Development Bank came to light. In this call, Chrétien encouraged the bank to provide a loan to a hotel that was located adjacent to a golf course that he once had an ownership interest in. This may not seem problematic on the surface, but the hotel was not doing well and the purchaser of the Prime Minister's shares in the golf course had not yet paid him for those shares. The opposition MPs argued that Chrétien was in a conflict of interest because he was more likely to be able to collect the money owed to him for the golf course if the adjacent hotel was not in financial ruin.⁴⁸³ The ethics counsellor at the time, whose office was created by the Prime Minister in 1993⁴⁸⁴ and who reported directly to the Prime Minister,⁴⁸⁵ investigated the matter and found that the Prime Minister's phone call did not breach the conflict of interest rules. Saint-Martin argues that this finding is what really drove the dialogue surrounding the need for an independent ethics commissioner.⁴⁸⁶

In the decade after Prime Minister Chrétien was elected to office, Ian Greene notes that there were eleven prominent ethics scandals.⁴⁸⁷ It was these scandals that prompted academics like Denis Saint-Martin to become highly critical of the then current ethics infrastructure. In a 2003 paper, Saint-Martin wrote:

⁴⁸³ Denis Saint-Martin, "Should the Federal Ethics Counsellor Become an Independent Officer of Parliament?" (2003) 29:2 Can Pub Pol'y 197 at 197 [*Saint-Martin Counsellor*].

⁴⁸⁴ Michael M Atkinson & Gerald Bierling, "Politicians, the Public and Political Ethics: Worlds Apart" (2005) 38:4 Can Journal of Poli Sci 1003 at 1004 [*Atkinson & Bierling*].

⁴⁸⁵ *Turnbull Rules*, *supra* note 248 at 1.

⁴⁸⁶ It should be noted that Ian Greene had published a paper in 1991 arguing that the Federal ethics counsellor should be independent (see Ian Greene, "Government ethics commissioners: the way of the future?" (1991) 34:1 Can Pub Admin 165 [*Greene Future*]).

⁴⁸⁷ *Greene on Chrétien*, *supra* note 478 at 278.

The Office of the Ethics Counsellor is a case of flawed institutional design that needs to be reformed. Either the government has an ethics counsellor who advises ministers and senior officials how they can avoid conflicts of interest, or an ethics commissioner, who is expected to be an investigator and an enforcer with some independent authority. But the same person cannot at the same time play the role of a civil servant advising government and a legislative ethics watchdog.⁴⁸⁸

This sentiment was also echoed in the media, with journalists calling out the Ethics Counsellor for lacking “the independence necessary to investigate ethical breaches.”⁴⁸⁹

Although revisions had been made to Mulroney’s *Conflict of Interest and Post Employment Code for Public Office Holders* during that decade,⁴⁹⁰ it was not until May 2002 that Chrétien would introduce a bill to establish an independent ethics commissioner and a new conflict of interest code for MPs.⁴⁹¹ That bill did not make it through before Parliament prorogued for a Liberal leadership convention in November 2003.⁴⁹² The convention saw the party leadership and Prime Minister change to Paul Martin, who was also committed to making changes to the office of the Ethics Counsellor.

(c) Office of the Ethics Commissioner (2004)

Before winning the general election in June 2004, Paul Martin used his majority government to pass new legislation that would eliminate the Ethics Counsellor position and replace it with an independent Ethics Commissioner. Part of the challenge experienced by

⁴⁸⁸ *Saint-Martin Counsellor*, *supra* note 483 at 209.

⁴⁸⁹ Gloria Galloway and Bill Curry, “An ethics czar who reigns with a careful grip”, *The Globe and Mail* (April 7, 2010) A4 [*Galloway & Curry*].

⁴⁹⁰ That Code would also be amended again in 2003 & 2004 (see *Dawson Hybrid Paper*, *supra* note 457).

⁴⁹¹ *Greene on Chrétien*, *supra* note 478 at 292.

⁴⁹² *Ibid* at 292-3.

Chrétien's most recent bill was that the Senate did not want to share an ethics official with the House. As such, Martin's Bill C-4 made sure to allow both chambers to choose their own ethics official. The bill entitled "An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence", received Royal Assent on March 31, 2004.⁴⁹³

The new legislation allowed Prime Minister Martin to appoint an Ethics Commissioner after simply consulting with the leader of every recognized party.⁴⁹⁴ So after a brief and rushed consultation with opposition leader Stephen Harper,⁴⁹⁵ Martin appointed Bernard Shapiro on May 17, 2004 to be Canada's first independent Ethics Commissioner. Commissioner Shapiro was appointed for a five-year term, the office was a separate parliamentary entity and no longer part of the public service and the commissioner could only be removed "for cause by the Governor in Council on address of the House of Commons."⁴⁹⁶

Commissioner Shapiro assumed responsibility for the *Conflict of Interest and Post Employment Code for Public Office Holders* dating back to 1985, but also for a newer *Conflict of Interest Code for Members of the House of Commons*, which had come into effect in October 2004 as an appendix to the Standing Orders of the House of Commons. The new

⁴⁹³ See Canada, Library of Parliament, *Conflict of Interest and Ethics Commissioner*, by Kristen Douglas, Publication No. PRB05-59E (11 October 2007) at 1 [Douglas].

⁴⁹⁴ See *HP Now*, *supra* note 78 at page 147.

⁴⁹⁵ *Greene on Chrétien*, *supra* note 478 at 293 (according to Ian Greene, this consultation left a "sour note for the new office to start on").

⁴⁹⁶ *An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence*, SC 2004, c 7, s 72.02(1).

Members' Code was built around the conflict of interest rules that could be found in the *Parliament of Canada Act* and the former *Senate and House of Commons Act*.⁴⁹⁷ Shapiro's office had jurisdiction over 1250 full-time order-in-council appointees and 2200 part-time appointees and reported to two separate parliamentary committees under the Standing Orders of the House of Commons.⁴⁹⁸ Duties relating to the *Members' Code* fell under the mandate of the Standing Committee on Procedure and House Affairs, whereas duties regarding the *Conflict of Interest and Post-Employment Code for Public Officer Holders* fell under the jurisdiction of the House of Commons Standing Committee on Access, Information, Privacy and Ethics.⁴⁹⁹

Despite the fact that the office had a relatively high status within the parliamentary system, Bernard Shapiro had difficulties with Stephen Harper right from the start as a result of the manner of his appointment. The media also took to criticizing Shapiro for his lack of experience with public sector ethics regimes⁵⁰⁰ (a criticism that Harper did not disagree with), and Harper followed along by expressing his displeasure with Shapiro when he spoke publicly about the commissioner's work.⁵⁰¹ As I alluded to above in chapter 3, Shapiro's tenure as Ethics Commissioner was fraught with some well-earned criticism. At one point

⁴⁹⁷ See *Dawson Hybrid Paper*, *supra* note 457 at 18 (the details of those Acts is not important for our analysis here); C E S Franks, "Parliamentarians and the New Code of Ethics" (2005) 28:1 Can Parl Rev 11 (for a detailed explanation of the new legislative regime).

⁴⁹⁸ See *Standing Orders*, *supra* note 176, s 108(3)(h).

⁴⁹⁹ *Douglas*, *supra* note 493 at 2.

⁵⁰⁰ *HP Now*, *supra* note 78.

⁵⁰¹ See e.g. Norma Greenaway, "Harper tells ethics chief to butt out", *National Post* (8 March 2006) A4.

during an interview with a media outlet, he improperly revealed details about an investigation he had been undertaking.⁵⁰²

The move to an independent commissioner initially sat well with Martin Saint-Denis who had been critical of the Ethics Counsellor regime. Saint-Denis noted that “[t]he move towards a more external form of ethics regulation is designed to enhance public trust and confidence in the procedures that Parliament uses to discipline its members. It is intended to depoliticize the process of ethics regulation.”⁵⁰³ But others, like former Ethics Counsellor Howard Wilson thought the new regime was actually weaker. He believed that the principles established during his tenure “set a high bar with requirements to act with honesty and uphold the highest ethical standards. And that the new Code focused only on the non-government duties of MPs.”⁵⁰⁴

Regardless, and perhaps unsurprisingly, the Office of the Ethics Commissioner would be quickly replaced after Conservative Stephen Harper became Prime Minister in 2006. Harper had refused to accept one of Shapiro’s reports when he was the opposition leader by completely ignoring that report’s findings. This generated quite a buzz in the media and all five major parties were eager to address ethics-related issues in their platforms for

⁵⁰² See e.g. Peter O’Neill, “Ethics chief apologizes for huge privacy breach: E-mail names and addresses released”, *Edmonton Journal* (23 March 2006) A9 [O’Neill]; “Ethics czar admits goof: Office distributed private data” *The Windsor Star* (23 March 2006) A10.

⁵⁰³ Denis Saint-Martin, “Path Dependence and Self-Reinforcing Process in the Regulation of Ethics in Politics: Toward a Framework for Comparative Analysis” (2005) 8:2 Intl Pub Mgmt J 135 at 135 [*Path Dependence*].

⁵⁰⁴ *Galloway & Curry, supra* note 489.

the 2006 elections.⁵⁰⁵ After becoming Prime Minister, Harper moved ahead with his ethics-related promises and quickly signaled that he would be putting forward an accountability bill to create a new Ethics Commissioner. Interestingly, the new bill also changed the qualifications for being the Ethics Commissioner, and these new requirements necessarily excluded Shapiro from consideration.⁵⁰⁶

(e) Conflict of Interest and Ethics Commissioner (2006)

The *Federal Accountability Act*⁵⁰⁷ received Royal Assent on December 12, 2006 and established a new *Conflict of Interest Act*⁵⁰⁸ to replace the then long-standing *Conflict of Interest and Post-Employment Code for Public Office Holders*. The ethics rules for public office holders accordingly became legislated for the first time. The *Federal Accountability Act* also amended the *Parliament of Canada Act* to create the new position of Conflict of Interest and Ethics Commissioner.⁵⁰⁹ This new commissioner would be responsible for the new *Conflict of Interest Act*, but also the *Conflict of Interest Code for Members of the House of Commons* which, as noted above, had come into effect in October 2004 as an appendix to the Standing Orders of the House of Commons.

The first person appointed commissioner was Mary Dawson, a career lawyer in the federal Department of Justice. Ms. Dawson had a strong background in legislative drafting

⁵⁰⁵ *Douglas*, supra note 493 at 7 (for an overview of the parties' platforms as they related to ethics).

⁵⁰⁶ *Shoving*, supra note 295.

⁵⁰⁷ *FAA*, supra note 296.

⁵⁰⁸ *Act*, supra note 13 (the *Act* did not come into force July 9, 2007).

⁵⁰⁹ *PC Act*, supra note 15, s 81.

and interpretation and was the driving force behind the removal of pronouns from the *Canadian Charter of Rights and Freedoms*.⁵¹⁰ According to former Justice Minister Irwin Cotler, Ms. Dawson's "legal footprints are all over the department... [s]he's like the Constitution incarnate. If you look at the historical constitutional moments of the last 25 years, she's been a central actor in all of them."⁵¹¹

Despite her extensive experience, it is hard to imagine that anything could have prepared Ms. Dawson for the unique role she would play in Canada's parliamentary democracy during the final stretch of her career. The position of the Conflict of Interest and Ethics Commissioner is created in a rather typical way for an office of this nature, i.e. by legislation, but the office's mandate is incredibly unique. As Commissioner, Ms. Dawson would be responsible for administering a piece of legislation that applied to public office holders, including those MPs who are also members of the executive council but only in their roles as members of the executive council, and a code of conduct applicable only to MPs in their role as MPs that is simply appended to the Standing Orders of the House of Commons. An MP who sits in cabinet is subject to both the *Act* and the Code in relation to some aspects of their conduct.

As I have explained above, the public and political pressure put on successive Prime Ministers to create a meaningful independent ethics oversight body caused the position to be ingrained in legislation to help ensure that the newly created commissioner could stand at

⁵¹⁰ Don Butler, "She took the 'hes' out of the Charter", *Times Colonist* (17 July 2005) C4.

⁵¹¹ *Ibid.*

arm's length from government. By making this new official a creature of statute under the *Parliament of Canada Act*, it is more difficult for Parliament to unilaterally eliminate an agent or to make changes to their mandate, especially during a majority government situation where it might otherwise have been very easy to amend a non-legislative Code. It is generally more difficult to pass legislative amendments through the House and Senate, so legislating this role into existence makes it harder to eliminate for a governing party that finds itself in muddy ethical waters.

By contrast, the general ethics rules for MPs over which this position has authority were kept in the Standing Orders so that they could be amended quickly by the House, without possible interference from the Senate. This seems rather convenient, but it should not be viewed as surprising or scandalous. Keeping the MPs' ethical conduct rules in the Standing Orders means that they do not need Senate approval to be amended. This is important because the Code emanates from the parliamentary privilege possessed by the House of Commons as a collectivity to discipline its members and to regulate its own internal affairs.⁵¹² Because Parliament has the exclusive power to discipline its own members, including by removing them from office, not legislating the code of conduct has effectively insulated it from oversight by the Senate.

⁵¹² House of Commons, Standing Committee on Procedure and House Affairs, *Thirty-Ninth Report*, 41st Parl, 2nd Sess (11 June 2015) at 1 (citing Audrey O'Brien and Marc Bosc, *House of Commons Procedure and Practice*, 2nd ed, (Montreal: Editions Yvon Blais, 2009) at 119).

The Members' Code exists alongside legislation that applies to designated public office holders, including MPs who are members of the executive council. Most provinces and territories in Canada include specific provisions for ministers in their general parliamentary ethics legislation, instead of carving out two separate instruments. The two-instrument approach at the federal level reflects the fact that there are two houses of Parliament and having a non-legislative Code is a way for the House of Commons to ensure that the Senate is not able to influence the way in which the House chooses to codify its rules of ethical conduct. It also ensures that Parliament does not have the power to remove public office holders, including ministers, from their positions. Members of cabinet are purely political appointments who sit at the pleasure of the Prime Minister. These are not necessarily merit-based positions. The *Act* was therefore written to reflect the desire to ensure that the power to make decisions about cabinet members stays right where it currently is: with the Prime Minister. Although it could change in the future, the House's role at present is in the establishment and amendment of the *Act*, as well as in the oversight of its administration and application. Senate's only role is in relation to its legislative mandate. As will be further explored below, neither the House nor Senate have any role with respect to the enforcement of the *Act*. With the exception of small administrative monetary penalties that the commissioner can mete out, it is for the Prime Minister alone to decide when a violation of the *Act* ought to result in some sort of discipline.

Former Associate Chief Justice and Integrity Commissioner of Ontario Coulter Osborne commented in an appearance before the Standing Committee on Rules, Procedures and the Rights of Parliament in 2003 that a setup like this is very much by design because

“...the rules route effectively eliminates the courts from judicially reviewing the commissioner’s decision. If, on policy or other grounds that is thought to be desirable, then the way to go is not to have a statute.”⁵¹³ This reason to avoid legislating the rules applicable to MPs was echoed by Denis Saint-Martin when he wrote that:

Parliament...is an institution that should remain the sole manager of its discipline...[t]he issue of court revision is something that is of great concern. Judges should not be involved in the disciplining of parliamentarians. Otherwise, you mix up the two systems.⁵¹⁴

The caselaw to date has made it very clear that the legislature has exclusive right to set standards of conduct, monitor compliance with these standards, and to impose discipline on its members.⁵¹⁵ Parliamentarians have adopted rules under the standing orders to govern their own behavior rather than passing legislation as they did for public office holders, because not legislating makes it even more obvious that the courts have no oversight jurisdiction.

Returning to the role of the Conflict of Interest and Ethics Commissioner, we can say something now about how that position ought to be characterized. In a 2009 speech, Commissioner Dawson said of herself: “I am an Officer of Parliament...I was nominated by the Prime Minister but the appointment could only take effect after consultation with the

⁵¹³ Senate, *Proceedings of the Standing Committee on Rules, Procedures and the Rights of Parliament*, 37th Parl, 2nd Sess, No 15 (3 June 2003) at 15:24 (Ontario’s Conflict of Interest Commissioner Coulter Osborne) [*Osborne Senate*].

⁵¹⁴ *Path Dependence*, *supra* note 503 at 138 (citing Paco Francoli, “PM Ethics Bill Headed for Roadblock”, *The Hill Times* (26 May 2003), online: <<https://www.hilltimes.com/2003/05/26/pms-ethics-bill-headed-for-roadblock/2007>>).

⁵¹⁵ See *e.g.*, *Morin v Crawford*, 14 Admin LR (3d) 287, 1999 NWTJ No. 5 (SC), at para 65; *McIver v Alberta (Ethics Commissioner)*, 2018 ABQB 240, 423 DLR (4th) 551 at para 44.

leader of every recognized party in the House of Commons, and after approval of the appointment by resolution of the House.”⁵¹⁶ But this self-categorization is not so obviously correct. It seems like it could be almost accurate with respect to the commissioner’s mandate under the Code, but Parliament includes the Senate and the Senate has absolutely no role when it comes to the commissioner’s responsibilities relating solely to MPs. To adopt Commissioner Dawson’s characterization would be to look past the fact that it does not fully account for the commissioner’s two distinct roles.

When you consider that the commissioner has two very distinct mandates, the COIEC does not seem to be an officer of Parliament at all. In the case of the non-legislative mandate over MPs, that title seems too broad because Parliament includes the Senate. Recognizing this, Commissioner Dawson later re-characterized her role while speaking at an event in 2017: “As Conflict of Interest and Ethics Commissioner, I am actually an Officer of the House of Commons.”⁵¹⁷ The second and current commissioner, Mario Dion, adopted this same position.⁵¹⁸ It seems to me that both commissioners took this position because of the following:

⁵¹⁶ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Perspectives on the importance of independence for the role of the Conflict of Interest and Ethics Commissioner” (Speaking notes for a presentation to The Canadian Political Science Association Annual Meeting at Carleton University, Ottawa, 29 May 2009), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Presentation%20to%20the%20Canadian%20Political%20Science%20Association%20Annual%20Meeting.pdf>> at 4 (Commissioner Mary Dawson) [*Dawson Carleton*].

⁵¹⁷ *Dawson Relationship*, *supra* note 168.

⁵¹⁸ See Canada, Office of the Conflict of Interest and Ethics Commissioner, “Independence of the Commissioner” (last updated 9 January 2018), online: <<http://ciec-ccie.parl.gc.ca/EN/AboutUs/WhoWeAre/Pages/IndependenceOfTheCommissioner.aspx>> (this self-characterization appears to have changed without explanation to “Officer of Parliament” on October 24, 2019 when the Office’s website was updated, see Canada,

- 1) Agents of parliament are created by the legislation they administer, whereas the Conflict of Interest and Ethics Commissioner is created directly by the *Parliament of Canada Act*⁵¹⁹ which suggests that the role ought to be considered an officer;
- 2) The Conflict of Interest and Ethics Commissioner does not report to Parliament through a minister; and,
- 3) According to the *Parliament of Canada Act*, the duties and functions of the COIEC related to members of the House of Commons are carried out within the institution of the House of Commons⁵²⁰ and the Commissioner therefore enjoys the privileges and immunities of the House of Commons and its members when carrying out those duties and functions.⁵²¹

When we view the role established by the *Parliament of Canada Act* holistically, we see that Officer of the House of Commons is technically incorrect. Despite being an office that was created by a legislative enactment for which both House and Senate approval were required, the COIEC does not have the full legal protections of an officer. At best, the characterization offered by the office's two commissioners can be understood to be a verbal line of best fit that emphasizes organizational independence and justifies being granted the privileges and immunities of a member of the House of Commons. Although the position taken by the commissioners is compelling, I think it is also a simplification. In reality, the

Office of the Conflict of Interest and Ethics Commissioner, "Independence" (accessed 29 October 2019), online: <<https://ciec-ccie.parl.gc.ca/en/About-APropos/Pages/Independence-Independance.aspx>>).

⁵¹⁹ So too is the Parliamentary Budget Officer, see *PC Act*, *supra* note 15 at 79.1-79.5.

⁵²⁰ *PC Act*, *supra* note 15, s 86(1).

⁵²¹ *Ibid*, s 86(2).

dual mandates confuse matters in a way that it seems is being glossed over by the commissioners out of either confusion or convenience. It seems confusing because the COIEC's work under the *Act* is not protected by parliamentary privilege as an officer of either House would be. Under the Code however, the same individual is protected by parliamentary privilege. It may be convenient to characterize the COIEC as an officer because it is easier to explain than a nuanced characterization, but also because it gives the impression that the COIEC is protected by parliamentary privilege in the exercise of its duties. I will explain in chapter eight how the COIEC stands to benefit from this characterization.

The *Parliament of Canada Act* provision that accords the office parliamentary privilege also makes clear that this privilege applies only with respect to the duties that relate to members under the Code, and not to those that apply to public office holders under the *Act*. The commissioner is required to submit annual reports on his or her activities related to the *Conflict of Interest Act* to both the House of Commons and the Senate under section 90(b) of the *Parliament of Canada Act*. Both those mandates are the responsibility of the same individual holding the same position, and those roles cannot be separated. The commissioner must report to the Senate for one mandate, but not for the other. One half of the office's work is protected by parliamentary privilege and the other half is not. Commissioner Dawson recognized this incongruity in 2009 when she tried to explain her position by saying that it is "...an entity that does not fit neatly into a particular class of

administrative decision-makers, given the unique characteristics of my mandate and role, the two distinct instruments my staff and I administer, and the way my Office is constituted.”⁵²²

What does this mean for the way we should categorize the role of the COIEC and why, if at all, should this matter? It seems impossible to say that the commissioner is either an Officer of Parliament or of the House of Commons because of the stark differences between the two mandates. An Officer of either house of Parliament is someone who is embedded in the administration of that house and who is afforded privileges and protections as a result. The distinction between officer and agent that I have adopted in chapter two recognizes agents of parliament as being those individuals who formally report to parliamentarians, which distinguishes them from those who work directly for Parliament. Those who work directly for Parliament have parliamentary privilege. The commissioner is one person who is asked to wear two different hats. Identifying this role as being an officer of the House of Commons fails to acknowledge the internal inconsistency of choosing this one identity in spite of the fact that it does not reflect the position’s dual reality. The role that offers the most operational independence is the one that has been chosen as a label, despite the fact that this label lacks the nuance needed to properly capture the complexity of the combined roles. The literature on agents and officers is already confusing and the way this office has been designed simply serves to perpetuate that confusion.

⁵²² Canada, Office of the Conflict of Interest and Ethics Commissioner, “Presentation to “Ombudsmen and Accountability Officers: A Growing Class of Administrative Decision-Makers” (A session organized as part of the 5th Annual National Forum on Administrative Law and Practice at Osgoode Hall Law School, Toronto, 15 October 2009), *online*: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Osgoode%20Hall%20speaking%20notes%20Oct%202009%20EN.pdf>> at 1 (Commissioner Mary Dawson) [*Dawson Hybrid Speech*].

This may seem to some like it is an unnecessary analysis given Parliament's obvious right to create this office however it likes due to its privileges, but it is important to be clear that the duties assigned to the Conflict of Interest and Ethics Commissioner place it on conceptually unusual footing. The remainder of this dissertation therefore explores and analyzes an office that is unique and impossible to place in one of the categories of officer or agent that are currently at our disposal. This means that the COIEC stands in stark contrast to the other agents outlined above in chapter two and makes it difficult to situate its work cleanly within the paradigms that we have come to expect from agents of parliament. This has implications for how the commissioner can and does carry out the office's mandates. It also has implications for why it is difficult for observers to clearly understand the limits of the commissioner's structural and operational independence.

Despite having taken a position on how their office ought to be categorized, both of the office's commissioners have also repeatedly called for the harmonization of the *Act* and Code.⁵²³ These requests have been outwardly motivated by a need to clarify the rules applicable to MPs who serve as ministers, but harmonization may also make sense because it could help to improve ethical governance in the public sector while mitigating some of the conceptual confusion that I have identified above. I will look at these calls for harmonization in further detail in chapters seven and eight, and explain why and how political and structural barriers stand in the way of such harmonization.

⁵²³ Specific examples will be provided below, in chapter 7 & 8.

5.3 Complementary Domestic Legal and Ethical Regimes

Despite the primacy of the COIEC in the parliamentary ethics landscape, it is important to be clear that it is only one of many regimes that have jurisdiction over the conduct of public officials. To better understand the role of the COIEC, it is important to situate it within the broader legal and ethical infrastructure that governs the conduct of public officials. The public sector ethics oversight industry is a veritable alphabet soup of accountability offices. The COIEC accordingly exists within a complex tapestry of overlapping and complementary legal and ethical regimes. This complexity can unnecessarily complicate democratic engagement by making it difficult to understand who plays what role and how the players all fit together and interact, if at all. This can be challenging for public office holders as well as outside observers (e.g. the public) who want to understand what rules public office holders are subject to and who is responsible for enforcing those rules. The following is a list of different offices and regimes that play a role in public sector ethics oversight in Canada, as well as brief descriptions of how they apply. The Conflict of Interest and Ethics Commissioner overall occupies a very narrow and clearly defined space within an otherwise broad and expansive playing field.

(a) Agents and Officers of Parliament

As outlined above in chapter two, the other agents and officers of parliament play a key role in ethics oversight. One obvious example is the Commissioner of Lobbying, who is responsible for ensuring that lobbyists are open and transparent and that they do not place

public office holders in positions of conflict of interest.⁵²⁴ The Commissioner of Lobbying is occasionally asked to investigate the same matters as the Conflict of Interest and Ethics Commissioner.⁵²⁵ The investigation into Prime Minister Justin Trudeau’s trip to the Aga Khan’s private island is one such example that has even given rise to some disagreement about whether it was unreasonable for the commissioner to have refused to investigate. The Federal Court decided in 2019 that the commissioner must reconsider whether to proceed with an investigation.⁵²⁶ The government responded to that ruling by filing an appeal.⁵²⁷

Important work is also done by the Information Commissioner, the Public Sector Integrity Commissioner and the Auditor General. Each play a role in different aspects of overseeing the conduct and decision-making of public officials.

(b) Political Party Codes of Conduct

The 1991 Royal Commission on Electoral Reform and Party Financing⁵²⁸ recommended that Canadian political parties develop their own internal codes of ethics. This

⁵²⁴ Canada, Office of the Commissioner of Lobbying, “Lobbyists Code of Conduct”, online: <https://lobbycanada.gc.ca/eic/site/012.nsf/vwapj/LobbyistsCodeofConduct2015_En.pdf/%24FILE/LobbyistsCodeofConduct2015_En.pdf> at s 6 (under the authority of *Lobbying Act*, *supra* note 141, s 10.2) [*Lobby Code*].

⁵²⁵ Although, the Commissioner of Lobbying does not always agree to undertake those investigations.

⁵²⁶ *Democracy Watch v Canada (A-G)*, 2019 FC 388.

⁵²⁷ Sean Kilpatrick, “Ottawa appeals court ruling that ordered fresh look at Trudeau’s Aga Khan-commissioned vacation”, *The Globe and Mail*, online: <<https://www.theglobeandmail.com/canada/article-ottawa-appeals-court-ruling-that-ordered-fresh-look-at-trudeaus-aga/>>.

⁵²⁸ *Honest Politics Now*, *supra* note 78 at 321 (citing Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy, Vol. 1* (Ottawa: Ministry of Supply and Services, 1991)).

recommendation had still not been taken up by the major parties in 2014 when Elections Canada commissioned a report by Paul Thomas called “A Code of Ethics or Code of Conduct for Political Parties as a Potential Tool to Strengthen Electoral Democracy in Canada.”⁵²⁹ One of Thomas’ conclusions was that adoption of a code would cause political parties and their followers to be “more aware of, sensitive to and capable of reasoning about ethically challenging situations in ways that they otherwise might not have in the past.”⁵³⁰ Despite this obvious endorsement of party-specific codes, Ian Greene and David Shugarman note that no party has yet adopted what can properly be understood to be a comprehensive and meaningful code of ethics.⁵³¹ Some sub-national political parties have released codes of conduct however, including the Quebec Liberal Party,⁵³² the Green Party of Canada⁵³³ and the United Conservative Party of Alberta.⁵³⁴ Regardless, there is potential in this space for more regulation of the ethical conduct of federal public officials. This could be particularly well received in relation to creating standards of conduct surrounding campaign tactics, constituency work (including supporting local and charitable organizations) and voter mobilization.

⁵²⁹ Paul G Thomas, *Research Study prepared for Elections Canada*, “A Code of Ethics or Code of Conduct for Political Parties as a Potential Tool to Strengthen Democracy in Canada” (December 2014), online:

<https://www.elections.ca/res/rec/tech/cod/pdf/code_of_ethics_e.pdf>.

⁵³⁰ *Ibid* at 17.

⁵³¹ *HP Now*, *supra* note 78 at 321.

⁵³² Quebec Liberal Party, *Code of Ethics and Conduct* (Accessed 19 July 2019), online; <https://plq.org/app/uploads/2016/08/03_code_of_ethics.pdf>.

⁵³³ Green Party of Canada, “Members’ Code of Conduct” (Version 1.3 enacted January 20, 2019), online:

<<https://www.greenparty.ca/en/members/resources/party/procedures/member-code-of-conduct>>.

⁵³⁴ United Conservative Party, “Code of Conduct” (Last Updated 14 May 2018), online: <https://unitedconservative.ca/Content/UCP_Code_of_Conduct.pdf>.

(c) Supplementary Guidelines

One way in which the potential for more regulation has actually manifested itself is through supplementary guidelines from party leaders. As explained above in chapter four, what are now the Code and *Act* both began simply as guidelines. As those guidelines evolved into laws, they also became much more difficult to revise. The same is true for the non-legislative Code, but perhaps for different reasons. Instead of the Prime Minister being able simply to amend guidelines and re-issue them to ministers, senior public servants and appointees, they became subject to broader consultation and approval. The *Act* obviously needs parliamentary approval to be amended, whereas the Code is part of the standing order of the House of Commons⁵³⁵ and may be changed or repealed only by a decision of the House.⁵³⁶ Such a decision can be arrived at by consensus or by a majority vote, which would make amendment a mere formality in a majority government, but either approach is still more involved than a unilateral change by the Prime Minister. As a result of the slightly more involved process for making amendments, the Code and *Act* are sometimes regarded by Prime Ministers as being the minimum standard that they expect from members and senior public officials. To set higher standards (or at least to signal that they are trying to do so), some Prime Ministers have also implemented supplementary guidelines.

⁵³⁵ *Code*, *supra* note 14, s 34.

⁵³⁶ See Robert Marleau & Camille Montpetit, eds, *House of Commons Procedure and Practice*, 2000 edition, online: <<https://www.ourcommons.ca/marleaumontpetit/DocumentViewer.aspx?DocId=1001&Language=E&Sec=Ch05&Seq=3>> at chapter 5 “Parliamentary Procedure” (for a good discussion of the different ways that the standing orders can be amended).

Prime Minister Harper released his “Accountable Government: A Guide for Ministers and Ministers of State” in 2011, wherein he outlines extra ethical guidelines for public office holders. This includes such things as best practices for dealing with lobbyists and guidelines regarding political activity.⁵³⁷ Prime Minister Justin Trudeau also released a guide in 2015 that he called “Open and Accountable Government.”⁵³⁸ It is structured similarly to Harper’s, except notably adds some guidance regarding the appropriate use of social media by Ministers and Parliamentary Secretaries.⁵³⁹ Critics have unsurprisingly argued that the rules in these documents are poorly enforced and serve as little more than meaningless lip-service to higher ethical standards.⁵⁴⁰

(d) Lawyers’ Professional Codes of Conduct

Many elected and unelected public office holders are also members of the legal profession. There is accordingly an open question as to whether the rules of professional conduct apply to them when they are acting in their official roles as politicians or public servants.⁵⁴¹ Andrew Flavelle Martin has written several important articles on public sector lawyers, including about those who are elected to public office. In his 2012 article “Legal Ethics Versus Political Practices: The Application of the Rules of Professional Conduct to

⁵³⁷ The Honourable Prime Minister Stephen Harper, *Accountable Government: A Guide for Ministers and Ministers of State* (Ottawa: Privy Council Office, 2011), online: <http://publications.gc.ca/collections/collection_2011/bcp-pco/CP1-3-2011-eng.pdf>.

⁵³⁸ The Honourable Prime Minister Justin Trudeau “Open and Accountable Government” (Ottawa: Privy Council Office, 2015), online: <https://pm.gc.ca/sites/pm/files/docs/OAG_2015_English.pdf>.

⁵³⁹ See *Ibid* at Annex J.

⁵⁴⁰ *HP Now*, *supra* note 78 at 375 (see footnote 8).

⁵⁴¹ It is not clear whether engineers and doctors who become politicians may also be limited in their activities by their profession’s codes of ethical conduct.

Lawyer-Politicians”, Martin concludes that lawyer-politicians appear to remain free to violate the rules of legal ethics inside legislatures with complete impunity from any disciplinary consequences,⁵⁴² but that this does not mean they should not strive to meet the highest standards:

Regardless of enforcement and disciplinary considerations, lawyer politicians themselves should voluntarily accept their ethical obligations as lawyers and attempt to meet them. Politicians that do not want to be bound by these duties, or feel that they will adversely impact the ability to serve the office or constituents, should do the honourable thing and surrender their licenses.⁵⁴³

The Ontario Rules of Professional Conduct were amended soon after this article (in October 2014) to stipulate that “[a] lawyer who holds public office shall, in the discharge of official duties, adhere to standards of conduct as high as those that these rules require of a lawyer engaged in the practice of law.”⁵⁴⁴ This new rule might be too vague to be helpful, but it applies to these lawyers nonetheless. The commentary that follows is unfortunately also very vague. There is however a growing body of literature that considers the role that the rules of professional conduct actually play in governing the behaviours of individuals who work in these spaces.

Andrew Flavelle Martin has also written about what it means for a lawyer to tell a lie when they are acting in their role as politician. He considers whether the rule on

⁵⁴² Andrew Flavelle Martin, “Legal Ethics Versus Political Practices: The Application of the Rules of Professional Conduct to Lawyer-Politicians” (2013) 91:1 Can Bar Rev 1 at 37.

⁵⁴³ *Ibid* (interestingly, Martin’s paper was published before the R 7.4-1 was added to Ontario’s rules).

⁵⁴⁴ Law Society of Ontario, *Rules of Professional Conduct* (current to 26 April 2018), Rule 7.4-1.

undertakings⁵⁴⁵ should apply to political promises made by lawyer-politicians and argues that in general they should not:

... these promises should not be considered undertakings such that their breach would be an appropriate matter for law society discipline. However, in a narrow subset of situations, where lawyer-politicians cloak their political promises in a particular kind of form, i.e. the trappings of law, disciplinary action may be appropriate. It [sic] in these circumstances that the honour and integrity of the lawyer-politician, and arguably that of lawyers in general, is implicated in the same way as in the breach of a traditional undertaking.⁵⁴⁶

There has not yet been a public case of a lawyer-politician being subject to disciplinary proceedings for such a matter.

(e) House and Senate Committees

Matters of importance relating to the conduct of public officials can also be considered by committees of the House of Commons and the Senate. Committees are created under the rules established by either the Standing Orders of the House of Commons⁵⁴⁷ or the Rules of the Senate.⁵⁴⁸ House standing committees can change over time but are typically in place for a long period without significant changes being made to their overall mandate(s). Senate committees are clearly named and established under the Rules⁵⁴⁹ and given very specific mandates. When formed, House committees are composed of members of each of the official parties that have seats in the House of Commons, whereas Senate committee

⁵⁴⁵ *Ibid*, Rule 5.1-6.

⁵⁴⁶ Andrew Flavelle Martin, “Consequences for Broken Political Promises: Lawyer-Politicians and the Rules of Professional Conduct” (2016) 10:2 JPPL 337 at 348.

⁵⁴⁷ *Standing Orders*, *supra* note 176 at Chapter XIII.

⁵⁴⁸ Canada, Senate, *Rules of the Senate* (updated September 2017) at Chapter Twelve: Committees.

⁵⁴⁹ *Ibid* at Rule 12-7.

members are selected using a process that includes the recommendations of a Committee of Selection.⁵⁵⁰

These bodies are typically engaged when either house of Parliament finds itself contentiously debating an issue and concluding that the matter is too important not to investigate further. Matters will be referred to a specific committee that will then conduct a study or an investigation, during which they will request documents and compel people to appear before them to testify under oath. Ultimately, reports are completed and filed back with the house from which the referral came, which would then vote on how to proceed. This is of course all very vague, but the point is simply to draw attention to another forum in which public office holders can be held to account for unethical conduct.

Interestingly, there have also been several high profile instances of individuals, both MPs and agents of parliament, being accused and/or found guilty of contempt of Parliament. According to the House of Commons Procedure and Practice Manual, contempt of Parliament is “any conduct which offends the authority or dignity of the House, even though no breach of any specific privilege may have been committed.”⁵⁵¹ Former federal privacy commissioner George Radwanski was found in contempt of Parliament in 2003 for providing misleading information to a Commons committee about

⁵⁵⁰ *Ibid* at Rule 12-1.

⁵⁵¹ Canada, House of Commons, *House of Commons Procedure and Practice, 3rd ed.* (2017), online: <https://www.ourcommons.ca/About/ProcedureAndPractice3rdEdition/ch_03_1-e.html> at Chapter 3.

his spending.⁵⁵² Former Ethics Commissioner Bernard Shapiro was also found to be in contempt of Parliament in 2005 by a Commons committee because of comments that he made about a file in a media interview.⁵⁵³

The committee model is an important part of public sector ethics oversight because it allows Parliament to fully investigate matters that may not have another office responsible for their oversight. A clear drawback of the model is that the processes can be rather formal and the costs of proceedings, especially hearings *in personam*, can be extraordinary. These same concerns have been raised with respect to conducting public inquiries, but it has also been argued that the rigour and value of the findings of these two procedural approaches to investigating misconduct can in many cases lead to beneficial remedial outcomes that might not otherwise be achievable.⁵⁵⁴

(f) Public Inquiries

There are several kinds of public inquiries, including commissions of inquiry and specialized task forces. At the federal level in Canada, public inquiries are originated under the *Inquiries Act*⁵⁵⁵ and must be called/initiated by the Governor in Council. The purpose of a public inquiry is to be able to fully and impartially review matters that are of national

⁵⁵² *House of Commons Debates*, 37th Parl 2nd Sess, No. 152 (6 November 2003) at 1100 (Acting Speaker Réginald Bélair).

⁵⁵³ Canada, House of Commons, *Standing Committee on Procedure and House Affairs, Report 51: Question of privilege relating to an inquiry conducted by the Ethics Commissioner*, 38th Parl 1st Sess (18 November 2005) (Chair: Don Boudria).

⁵⁵⁴ See e.g. John H Gomery, “The Pros and Cons of Commissions of Inquiry” (2006) 51 McGill LJ 783 (for a good discussion about the impact of public inquiries).

⁵⁵⁵ *Inquiries Act*, RSC 1985, c I-11.

importance. The order-in-council would set out the purpose of the inquiry and the investigation would necessarily include establishing the facts and causes of an event or issue (i.e. whatever it is that has been deemed to be of concern) and then make recommendations back to the government. Inquiries often look at something that has gone wrong, but can also deal with structural issues, including institutional procedures, mandates that may have caused problems, and systemic issues, which could include concerns about governance, infringement of rights and other matters of injustice.

A public inquiry is typically led by a judge or former judge, but it could also be led by an expert or an individual who is otherwise distinguished. This person is appointed as part of the order-in-council and is given the power under the *Inquiries Act* to be able to subpoena witnesses,⁵⁵⁶ request the production of documents⁵⁵⁷ and take evidence under oath.⁵⁵⁸ The goal of an inquiry is to produce a report that includes explanations, recommendations and perhaps even outlines further areas of concern. Recommendations made are not binding but may have a significant impact on public opinion and political action. Because an inquiry must be called on the advice of cabinet, it is reasonable to view an inquiry as a strong recognition by the governing party that something has gone wrong and is in serious need of more attention than it has otherwise been given.

Two excellent examples of public inquiries related to public officials are the Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the

⁵⁵⁶ *Ibid*, s 8.

⁵⁵⁷ *Ibid*, s 8(1)(c).

⁵⁵⁸ *Ibid*, s 7.

Honourable Sinclair M. Stevens⁵⁵⁹ and the Commission of Inquiry into the Sponsorship Program and Advertising Activities.⁵⁶⁰ As noted above, Commissioner Parker's report concerning the Honourable Sinclair M. Stevens led directly to the introduction of a series of bills intended to strengthen parliamentary ethics rules.

(g) Criminal Code of Canada

The *Criminal Code of Canada* includes several laws that are designed not only to protect, but also to help regulate the conduct of elected politicians and other public officials. There are laws against bribing judicial officers or other government actors,⁵⁶¹ committing frauds on government,⁵⁶² influencing or negotiating appointments or dealings in offices⁵⁶³ and committing breaches of trust.⁵⁶⁴ Civil actions can also be brought against government officials for behaviour that amounts to misfeasance in public office⁵⁶⁵ or breach of their fiduciary duties.⁵⁶⁶ Although it is beyond the scope of this dissertation to provide further specifics about each of these offences, it is very important to note that the courts play a crucial role in parliamentary ethics oversight.

⁵⁵⁹ *Sinclair Stevens*, *supra* note 473.

⁵⁶⁰ *Sponsorship Scandal*, *supra* note 332.

⁵⁶¹ See *Criminal Code*, RSC 1985, c C-46, ss 119-20.

⁵⁶² *Ibid*, s 121 (this section was referenced in a letter sent by Conservative MP Peter Kent to the RCMP in relation to Justin Trudeau's visit to the Aga Khan's private island. See Jolson Lim, "Conservatives want RCMP to investigate Aga Khan trip for Criminal Code Breaches", *ipolitics* (2 May 2019), online: <<https://ipolitics.ca/2019/05/02/conservatives-want-rcmp-to-investigate-aga-khan-trip-for-criminal-code-breaches/>>.

⁵⁶³ *Ibid*, s 125.

⁵⁶⁴ *Ibid*, s 122.

⁵⁶⁵ See e.g. *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263.

⁵⁶⁶ See e.g. *The Toronto Party v Toronto (City)*, 2013 ONCA 327.

(h) Canada Elections Act

The *Canada Elections Act* is perhaps one of the least obvious legal regimes that has some role in setting limits on the behaviour of individuals who hold public office. The *Act* disqualifies a person from becoming a candidate in a federal election or holding office if they are found guilty of either illegal practices⁵⁶⁷ or corrupt practices.⁵⁶⁸ In the case of an illegal practice, that person cannot be elected to or sit in the House of Commons or hold any governor-in-council appointments⁵⁶⁹ for the next five years after a conviction. In the case of a corrupt practice, they cannot be elected to or sit in the House of Commons or hold any governor-in-council appointments⁵⁷⁰ for the next seven years after being convicted. This clearly means that an individual holding office can be removed from their position if they are convicted of such an offence.

5.4 Conclusion

Controversy about parliamentary ethics is not new. It is through these controversies that Canada has emerged as an international leader in its approach to public sector ethics.⁵⁷¹ In this chapter I have described how Canada's public sector ethics regime has been in a state of constant flux. Change has always happened in the wake of controversy, political campaigning and/or public pressure. By understanding its history, we can clearly see how public sector ethics oversight stands out as an obvious candidate for delegation to an agent

⁵⁶⁷ *Elections Act*, *supra* note 111, ss 502(1), 502(3).

⁵⁶⁸ *Ibid*, ss 502(2), 502(3).

⁵⁶⁹ *Ibid*, s 502(3).

⁵⁷⁰ *Ibid*, s 502(3).

⁵⁷¹ Jean Fournier, "Emergence of a Distinctive Model of Parliamentary Ethics" (2009) 2 JPPL 411 at 421.

of Parliament, particularly because of the strong need for independence in this role. The COIEC represents Canada's most recent experiment with this regime, but it also represents the first attempt to delegate an actual parliamentary privilege to someone who is widely considered to be an agent of Parliament. As we will see in chapters six and seven, the COIEC has some unique complexities in its institutional design. Understanding why these complexities exist and how they impact the COIEC's work will help us to identify the limits of the office's impact. That being said, it is important to also remember that the COIEC is not alone. It is complemented by many other legal and ethical regimes that have significant influence over the governance of public sector ethics in Canada.

6. The Conflict of Interest and Ethics Commissioner

6.1 Introduction

This chapter presents a comprehensive analysis of the COIEC's ongoing work. As the only actor in the class of agents that has been explicitly given the powerful protection of parliamentary privilege over some of its operations, it is crucial to understand how this rare delegation of independence is situated structurally and how it is being operationalized. I begin by looking at how the COIEC is appointed, removed and has its budgets determined. This structural analysis closely mirrors the broader analysis of agents that I undertook in chapter three in order to allow me to offer some comparative insights. I then describe in detail what the office's responsibilities are and how they are managed, who its stakeholders are, who its influential relationships are with and how the COIEC is held accountable. This information will inform my analysis in chapter eight in relation to the COIEC's efforts to push for reform. Most importantly however, I confirm in this chapter that the COIEC is not in fact akin to an agent of Parliament and explain that the parliamentary privilege bestowed upon it under the *Parliament of Canada Act* in relation to one part of its mandate (i.e. the Code) can be used to shield some of the office's work under the *Act* from judicial scrutiny. The implications of this privilege are drawn out and will provide support for my arguments in chapter eight.

6.2 Appointment and/or Renewal

The Conflict of Interest and Ethics Commissioner is appointed under section 81 of the *Parliament of Canada Act*.⁵⁷² The Act stipulates specific qualifications that the commissioner must have⁵⁷³ and also outlines how that person is appointed:

The Governor in Council shall, by commission under the Great Seal, appoint a Conflict of Interest and Ethics Commissioner after consultation with the leader of every recognized party in the House of Commons and approval of the appointment by resolution of that House.⁵⁷⁴

The legislation is silent on how exactly the consultation process ought to play out between the Governor in Council and the party leaders. Given this gap in the legislation, it has been left to Parliament to figure out how to approach the task of filling this position. When the COIEC was first created, it was not posted publicly. Instead, then Prime Minister Stephen Harper chose to directly nominate a highly-regarded and long-serving government lawyer named Mary Dawson for the position in June 2007.⁵⁷⁵ Ms. Dawson had retired from the public service and was not looking for a new position at the time, but was contacted by the Prime Minister's head of appointments.⁵⁷⁶ Harper also evidently consulted with the other party leaders before making his nomination to ensure that the nomination would succeed.⁵⁷⁷ Ms. Dawson then appeared before the House of Commons Standing Committee on Access to Information, Privacy and Ethics⁵⁷⁸ for what has been described as a "brief, mostly cordial

⁵⁷² *PC Act*, *supra* note 15, s 81(1).

⁵⁷³ *Ibid*, s 81(2).

⁵⁷⁴ *Ibid*, s 81(1).

⁵⁷⁵ See Jack Aubry, "Respected PS veteran is new ethics chief: Master of writing laws takes on job of enforcing them", *The Ottawa Citizen* (13 June 2007) A4 [*Master*]; "Harper nominates two watchdogs" *The Gazette (Montreal)* (13 June 2007) A14.

⁵⁷⁶ *Master*, *supra* note 575.

⁵⁷⁷ *Ibid*.

⁵⁷⁸ *Standing Orders*, *supra* note 176, s.111.1(1).

vetting by MPs.”⁵⁷⁹ Eight out of ten of the committee members recommended Ms. Dawson’s appointment to the House of Commons⁵⁸⁰ and she was appointed to the position by Order in Council on July 9, 2007.⁵⁸¹ As per the *Parliament of Canada Act*, Senate’s approval was not required.⁵⁸²

Ms. Dawson was replaced as Commissioner in early 2018 when Mario Dion was appointed to fill the position. Similar to Ms. Dawson, Mr. Dion had already had a long and distinguished career with the Government of Canada. Also a lawyer, Mr. Dion began his career as a legal advisor within the Ministry of the Attorney General, but continuously moved between other senior positions, such as assistant deputy minister in multiple ministries and Deputy Clerk and Counsel and the Privy Council Office. Interestingly, Mr. Dion had previously served as the Public Sector Integrity Commissioner, which is one of the agents of parliament covered briefly in chapter two, above.

A much different approach to recruitment was taken to find Mr. Dion than was taken for Ms. Dawson. Instead of hand-picking a favourite candidate,⁵⁸³ an executive search firm

⁵⁷⁹ Bruce Cheadle, “New Ethics Czar passes first vetting”, *The Toronto Star* (15 June 2007) A16.

⁵⁸⁰ *Ibid.*

⁵⁸¹ *Douglas, supra* note 493 at 1.

⁵⁸² *PC Act, supra* note 15, s 81(1).

⁵⁸³ As I have noted above, it is customary for the Privy Council Office and the Prime Minister’s Office to be involved in the initial vetting of candidates. In the case of the COIEC however, there is no clear evidence available to suggest that the Privy Council was in fact directly involved in Ms. Dawson’s recruitment and appointment. We do know that Ms. Dawson initially contacted directly by the Prime Minister’s Office (see *Master, supra* note 575).

was retained⁵⁸⁴ to run a recruitment program that included a public posting to encourage anyone interested to apply. As explained by Marie-Danielle Smith in the National Post:

A 3,000-word explainer on the government's appointments website mentions briefly that candidates may have "an initial discussion with a search firm that has been engaged to support the selection committee," though it implies that the role of such firms would be minimal compared with the role of a selection committee made up of government officials.⁵⁸⁵

The requirements that candidates must meet to be considered for the position are also rather exclusionary. To be appointed to the position of Conflict of Interest and Ethics Commissioner, an individual must be:

- (a)** a former judge of a superior court in Canada or of any other court whose members are appointed under an Act of the legislature of a province;
- (b)** a former member of a federal or provincial board, commission or tribunal who, in the opinion of the Governor in Council, has demonstrated expertise in one or more of the following:
 - (i)** conflicts of interest,
 - (ii)** financial arrangements,
 - (iii)** professional regulation and discipline, or
 - (iv)** ethics; or
- (c)** a former Senate Ethics Officer or former Ethics Commissioner.⁵⁸⁶

The person chosen must also be and be seen to be independent, which helps to increase the possibility that the public will have confidence in their rulings.⁵⁸⁷ In this regard, being a public servant could possibly work against a candidate. For example, if the candidate is a judge or former judge, there may be concerns about double-dipping (i.e. receiving two

⁵⁸⁴ *Supra*, note 267.

⁵⁸⁵ *Ibid.*

⁵⁸⁶ *PC Act*, *supra* note 15, s. 81(2).

⁵⁸⁷ *Osborne Senate*, *supra* note 513 at 15:13 (Ontario's Conflict of Interest Commissioner Coulter Osborne highlights the importance of the perception of independence for ethics commissioners).

incomes at once - e.g. salary and/or pension).⁵⁸⁸ Also, given that one of the pre-requisites is that the individual must have held a previous position as a judge, member of a board, commission or tribunal or as an ethics officer, it is clear that they would have to have been appointed to that previous position. Given that appointments are generally made by the party in power, it is easy to see how any strong candidate being considered could face resistance from the party that was not responsible for their previous appointment.

Although this requirement seems like it could give rise to some level of tension, both commissioners to date were former long-standing public servants. There may have been some resistance to their appointments, but voices of dissent can be easily muted under the process for appointment that is currently in place. Specifically, the *Parliament of Canada Act* states that “[t]he Governor in Council shall, by commission under the Great Seal, appoint a Conflict of Interest and Ethics Commissioner after consultation with the leader of every recognized party in the House of Commons and approval of the appointment by resolution of that House.”⁵⁸⁹ Mere consultation is all that is required. This is not the same as needing the opposing parties’ approval. Furthermore, the process for the Conflict of Interest and Ethics Commissioner’s appointment stands in contrast to those in place for other agents of

⁵⁸⁸ British Columbia, Legislative Assembly, Select Standing Committee on Parliamentary Reforms, Ethical Conduct, Standing Orders and Private Bills, *Hansard*, 36th Parl, 1st Sess, No 2 (7 August 1996) at 8:30 (The Honourable Ted Hughes QC, Acting Conflict of Interest Commissioner in B.C.) (Commissioner Hughes notes to the Committee that he is working for free as interim Commissioner so that he is not perceived to be “double-dipping”).

⁵⁸⁹ *PC Act*, *supra* note 15, s 81(1).

parliament because consultation with the leaders in the Senate is not required nor is a resolution of the Senate.⁵⁹⁰

Once a person is appointed to the commissioner position, they hold office for seven years (dependent upon “good behavior”⁵⁹¹) and can be re-appointed for an indefinite number of terms of up to seven years each. There is even a possibility of being appointed on an interim basis after the end of a term. The process for a new appointment is the same as the original appointment. The process for making an interim appointment is notably different however. As per the *Parliament of Canada Act*:

In the event of the absence or incapacity of the Commissioner, or if that office is vacant, the Governor in Council may appoint any qualified person to hold that office in the interim for a term not exceeding six months, and that person shall, while holding office, be paid the salary or other remuneration and expenses that may be fixed by the Governor in Council.⁵⁹²

The glaring difference is that the governor-in-council reappointment does not require advance consultation to take place with the leaders of the opposition parties nor does it require a resolution of the House of Commons. This difference in process has given rise to a great deal of criticism. Commissioner Dawson’s original term ended in 2014, after which she was reappointed to a two-year term. That two-year term ended in July 2016 and Ms. Dawson did not wish to apply for a renewed term. Instead, she agreed to be appointed on an interim basis while a search was undertaken to find a new commissioner. She ultimately agreed to three consecutive interim appointments for six months each.

⁵⁹⁰ *Dawson Relationship*, *supra* note 168 at 3.

⁵⁹¹ *PC Act*, *supra* note 15, s 82(1).

⁵⁹² *Ibid*, s 82(2).

Controversy arose in January 2017 when Commissioner Dawson received a complaint about the Prime Minister and decided to investigate that complaint under both the Code and the *Act*. When her first six month interim appointment expired in January 2017, Ms. Dawson was then appointed for a further interim period of six months. These appointments were made solely on the recommendation of cabinet, without consultation with the leaders of the other parties. It was in January 2017 however, that Commissioner Dawson had decided to investigate the Prime Minister. Duff Conacher of Democracy Watch, a not for profit government watchdog organization, argued that Commissioner Dawson would be in a conflict of interest if she were to continue to investigate the person who was ultimately deciding whether she could remain employed as the Conflict of Interest and Ethics Commissioner.⁵⁹³ Conacher argued that Commissioner Dawson should recuse herself from the investigation and ask one of her provincial colleagues to take over. Although Dawson did not agree to step aside, she commented publicly shortly thereafter that “[r]epeated use of the interim appointments for the same position can also create perceptions of a lack of independence and becomes problematic.”⁵⁹⁴

One way to solve this problem could be to limit reappointments to the position of Conflict of Interest and Ethics Commissioner or to simply not allow reappointment at all. Commissioner Dawson expressed this very idea in a 2017 speech:

I have reason to wonder whether the Commissioner’s term should be made non-renewable...in order to forestall any doubts about the incumbent’s

⁵⁹³ Democracy Watch, News Release, “Democracy Watch files complaint with Ethics Commissioner to stop Trudeau Cabinet from appointing their own ethics and lobbying watchdogs” (14 December 2016), online: <<https://democracywatch.ca/democracy-watch-files-complaint-with-ethics-commissioner-to-stop-trudeau-cabinet-from-appointing-their-own-ethics-and-lobbying-watchdogs/>>.

⁵⁹⁴ *Dawson Relationship*, *supra* note 168 at 3.

independence. Without the possibility of reappointment, there would not be any suggestion that the Commissioner might be in a conflict of interest when making determinations about the government...Repeated use of the interim appointments for the same position can also create perceptions of a lack of independence and becomes problematic.⁵⁹⁵

Member of Parliament and NDP ethics critic Alexandre Boulerice has also suggested that “[t]he establishment of an independent appointment process that would put the decision out of the hands of the prime minister is the “next step,” worthy of consideration.”⁵⁹⁶ This is an important next step that has also been suggested by Ian Greene, who argued that Prime Minister Trudeau “should recuse himself from the appointment process for *all* agents of Parliament, due to investigations that currently or may involve himself, and delegate these responsibilities to cabinet colleagues.”⁵⁹⁷ A Public Policy Forum report goes one step further and suggests that “...the executive needs to be distanced from the appointments of agents when the agent is tasked with oversight of executive performance and behaviour, as in the case of ethics and integrity commissioners.”⁵⁹⁸

The idea that a poorly conceived process can have a negative impact on the public’s perception of the integrity of the commissioner could also be viewed as quite simply unfair. As Scott Thurlow argues, “[i]t is a nefarious inference, which is not grounded in reality, that either impugns her character by suggesting that she isn’t taking the appropriate safeguards, or it infers that the conflict of interest and ethics commissioner’s office can’t deal with a

⁵⁹⁵ *Ibid.*

⁵⁹⁶ Marco Vigliotti, “Calls for appointment reform grow, as ethics chief investigates PM while he weighs her future”, *The Hill Times* (1 Feb 2017), online: <<https://www.hilltimes.com/2017/02/01/ndp-mp-bemoans-awkward-situation-ethics-commissioner-investigating-trudeau-bahamas-trip/93941>>.

⁵⁹⁷ *Unethical*, *supra* note 268.

⁵⁹⁸ *PPF Report*, *supra* note 67 at 23.

conflict of interest.”⁵⁹⁹ That being said, the commissioner is responsible for administering conflict of interest rules and the perception of a conflict can garner just as much attention in today’s digital world as does an actual conflict. In my opinion, it is important to ensure that members and the public have no reason to distrust a commissioner before they are even appointed.

The appointment process for the COIEC ought to be amended so that the individual’s paper qualifications are less important than their actual demonstrable skillsets. They must also be appointed by unanimous consent of all major parties. This would help to ensure that there are checks in place to protect against patronage appointments to such an important position.

6.3 Removal or Resignation from Office

Once a commissioner has been appointed, there are four ways in which he or she may leave that position or be removed from it. First, the commissioner may simply choose not to seek renewal at the end of their term. This of course is exactly what happened with the office’s first commissioner, Mary Dawson.

Secondly, the commissioner can be removed from office in several ways. The *Parliament of Canada Act* explicitly states that the commissioner holds office “during good behaviour” and can only be removed from the position for cause by an order of the Governor

⁵⁹⁹ *Supra*, note 596.

in Council “on the address of the House of Commons.”⁶⁰⁰ As noted above, the Conflict of Interest and Ethics Commissioner is different than the other officers of parliament because only the House of Commons needs to be involved in the removal process, not the Senate. That being said, removal by an order of the Governor in Council means that it can only be done on the advice of cabinet. Technically speaking then, the Governor General should need a request from cabinet as well as proof that there has been a request for removal by the House of Commons. That being said, the House does not have the same authority to remove the commissioner as it does to dismiss its employees and other officers because it is the Governor in Council who must ultimately dismiss the commissioner. If there is a majority government however, then a request from the House to remove a sitting commissioner may be a mere formality inspired by strong party loyalty that allows a government to act unilaterally.

Removal by an order of the Governor in Council may seem like a foregone conclusion if Cabinet and the House properly request it, but the fact that removal must be for cause is also important because it again speaks to the idea that the commissioner must be treated as being independent of the House. The House must ensure that it is transparent with any request for removal and that it is being requested for reasons that can withstand scrutiny.

As Ann Chaplin explains:

If an officer of Parliament is suspected of being untrustworthy by the parliamentarians to whom the officer reports, that assessment can provoke an address by the Senate and House of Commons and provide a “cause” for which the Governor in Council may remove the officer.⁶⁰¹

The challenge of needing to prove cause for dismissal can be tackled in several ways. The

⁶⁰⁰ *PC Act, supra* note 15, s 82(1).

⁶⁰¹ *Constitutional Legitimacy, supra* note 83 at 101.

most obvious would be if there was serious impropriety for which law enforcement authorities had to become involved. A likely more common approach would be for the House to ask one of its committees to investigate any concerns that it may have. This happened to former Privacy Commissioner George Radwanski, who was called before a Commons committee amid criticism of his office's spending.⁶⁰² Radwanski apologized publicly, but MPs later voted to find him in contempt. Although he resigned his position in June 2003,⁶⁰³ the fact that he was found in contempt could have very well been used as cause for his dismissal. The House could also simply pass a motion indicating that members had lost trust in the commissioner.

As noted above in chapter three, there is even a mechanism available under *The Judges Act*⁶⁰⁴ that can be leveraged to obtain an independent assessment of a commissioner's capacity to continue in office.⁶⁰⁵ The Judicial Council can then report back to Parliament if it thinks the person should be removed.⁶⁰⁶

Situations of resignation, such as George Radwanski's, are another way that the Conflict of Interest and Ethics Commissioner could leave office. Although he held an earlier version of the position, Bernard Shapiro's experience as the House of Commons' first

⁶⁰² Kristian Laughlin, *Holding the Prime Minister to Account: A Study Examining the Institutionalized Checks on Prime Ministerial Power* (1 January 2009) [unpublished, archived on Author's Academia.edu page, online: <http://www.academia.edu/943773/Holding_the_Prime_Minister_to_Account> at 15.

⁶⁰³ *Supra*, note 552.

⁶⁰⁴ *Judges Act*, RSC 1985, c J-1, s 65(1), s 65(2)(a)-(d), s 69(1).

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *Constitutional Legitimacy*, *supra* note 83 at 102.

independent Ethics Commissioner serves as an instructive example here. Commissioner Shapiro's tenure as commissioner was cut short after controversy surrounded his office and its work.⁶⁰⁷ Meetings with members were delayed;⁶⁰⁸ public disclosure statements were slow to be posted;⁶⁰⁹ investigations were untimely and incomplete;⁶¹⁰ and his office accidentally disclosed information about members that should not have been made public.⁶¹¹ Shapiro was called to account for these issues by the House of Commons Standing Committee on Access to Information, Privacy and Ethics. The Committee's report describes Shapiro as having committed contempt of Parliament in 2005 when he violated rules found in the MPs' code of conduct and made inappropriate comments to the media. No sanctions were recommended, but the Honourable Ed Broadbent moved a motion of non-confidence which was based entirely on Commissioner Shapiro's action and inaction.⁶¹² As explained in chapter three, Shapiro chose to resign his position in 2006⁶¹³ in anticipation of the legislative changes that new Prime Minister Stephen Harper was planning on making.⁶¹⁴

This is an example of a resignation, but it is possible that legislative reform could make an individual unqualified to hold the position. It has never been the case that the person

⁶⁰⁷ *Shoving, supra* note 295.

⁶⁰⁸ "Federal ethics Commissioner has to get lead out", Editorial, *The Vancouver Sun* (18 April 2006) A16.

⁶⁰⁹ "Ethics guru says job is a nightmare: Bernard Shapiro tells MPs he's way behind schedule", *The Gazette* (16 April 2006) A16.

⁶¹⁰ Glen McGregor, "Radiation treatment kept ethics czar off job", *The Ottawa Citizen* (16 March 2006) A3.

⁶¹¹ *O'Neill, supra* note 502.

⁶¹² Canada, House of Commons, *Standing Committee on Access to Information, Privacy and Ethics*, 38th Parl, 1st Sess, No 034 (28 June 2005) at 0900 (Ed Broadbent)

⁶¹³ "Tories name long-time civil servant to fill watchdog post", *Toronto Star* (13 June 2007) A17.

⁶¹⁴ *Shoving, supra* note 607.

serving has been willing yet unable to seek renewal, but this could happen if, for example, the *Parliament of Canada Act* were to be amended so that it prohibited anyone from being appointed if they had previously been appointed to a position by an order-in-council.

One challenge that might possibly arise in the context of removing a Conflict of Interest and Ethics Commissioner could come from the fact that the commissioner is responsible for two very different mandates. In theory, the commissioner could do an excellent job at administering the Code, but a terrible job at administering the *Act*. Under the *Act* however, the commissioner reports back to the Prime Minister with respect to examinations and tables annual reports with both the House and Senate. All parallel reporting under the Code is made simply to the Speaker of the House. It is possible that the Prime Minister would want the commissioner removed because of disagreements about how the *Act* is being administered, but that the House is not willing to make such an address. Given that the Senate has no role whatsoever in either the commissioner's appointment or removal, it could be the case that a Prime Minister under a minority government appoints a commissioner after minimal consultation with the leaders of the opposition parties and is then stuck with not being able to remove that person. I believe this is a good thing, but it also speaks to why a Prime Minister should want to properly consult with opposition parties before recommending an individual for a governor-in-council appointment. Inadequate consultation could leave the governing party in a more vulnerable position than it might otherwise have liked.

6.4 Budget, Staffing, Salaries and Financial Autonomy

As noted above, the office's two commissioners have both considered their status to be that of an officer of the House of Commons. Primary to their position, it seems, is the office's relationship to the treasury board through the *Financial Administration Act*⁶¹⁵ (*FAA*). The *FAA*, among many other things, sets out that the Conflict of Interest and Ethics Commissioner is considered a department for the purposes of the Act,⁶¹⁶ but that it is not a division or branch of the federal public administration. Being a department means that there are some financial accountability rules that apply to the office under the *FAA*. For example, the commissioner is deemed to be a "deputy head"⁶¹⁷ and is therefore "responsible for ensuring an internal audit capacity appropriate to the needs of the department."⁶¹⁸ The office accordingly releases audited financial statements each year.⁶¹⁹

Not being included in the Schedules to the *FAA* as a division or branch of the federal public service means that the commissioner does not report to a minister. The *Act* deems the Speaker of the House of Commons to serve in that reporting role. The Act also sets out that the Treasury Board has authority to make policies applicable to the ministries, divisions and branches, but it has no authority to make policies applicable to the House of Commons. The commissioner accordingly is not subject to Treasury Board policies,⁶²⁰ nor does the Treasury

⁶¹⁵ *Financial Administration Act*, RSC 1985, c F-11 [*Financial Admin Act*].

⁶¹⁶ *Ibid*, s 2.

⁶¹⁷ *PC Act*, *supra* note 15, s 84(1).

⁶¹⁸ *Financial Admin Act*, *supra* note 615, s 16.1.

⁶¹⁹ See Canada, Office of the Conflict of Interest and Ethics Commissioner, "Publications" (accessed 29 October 2019), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Pages/search-recherche.aspx>> (the annual audited financial statements can be found by clicking on the "Financial Reports" publication category).

⁶²⁰ Canada, Office of the Conflict of Interest and Ethics Commissioner, "Opening Statement before the House of Commons Standing Committee on the Status of Women in

Board determine the amount of funding available to the office. Instead, the *Parliament of Canada Act* sets out that the office’s budgetary estimates are to be considered “by the Speaker of the House of Commons and then transmitted to the President of the Treasury Board, who shall lay it before the House of Commons with the estimates of the Government for the fiscal year.”⁶²¹ The Speaker of the House simply includes them without change in the estimates of the government for that fiscal year and the commissioner is called to defend them before the Standing Committee on Access to Information, Privacy and Ethics.⁶²² This process sets the COIEC apart from the other eight agents of parliament.

The process of defending the office’s estimates is worth looking at a bit more closely. There are no formal rules anywhere for what this is supposed to look like, but the commissioner has consistently posted transcripts online⁶²³ of the opening statements that have been made to the Standing Committee on Access to Information, Privacy and Ethics. The submission is typically broken down into rather standard topics that the commissioner discusses with the Committee. In May 2016 for example, the commissioner discussed the office’s Organization and Operations (including explaining the five employment divisions,

the context of its study on Sexual Harassment in the Federal Workplace” (Ottawa: 7 Feb 2013), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Opening%20statement%20Status%20of%20Women%20Cttee%20Feb%207%202013.pdf>> at 1 (Commissioner Mary Dawson) [*Dawson on Harassment*].

⁶²¹ *PC Act*, *supra* note 15, s 84(7)-(8).

⁶²² *Dawson Relationship*, *supra* note 168 at 5.

⁶²³ See e.g. Canada, Office of the Conflict of Interest and Ethics Commissioner, “Presentations to Standing Committee on Access to Information, Privacy and Ethics” (accessed 19 July 2019), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Pages/search-recherche.aspx>> (the speaking notes can be found by clicking on the “Presentations” publication category).

outlined immediately below), Accountability Framework, Previous Budgetary Requirements, the Main Estimates for the year ahead, Management Initiatives and any other matters that have had or may have an impact on the office's operations. The House will certainly not approve the commissioner's budget without the committee first scrutinizing it, but the process of defending the estimates seems to be rather friendly and efficient. This may be the case because the office has rarely asked for more money and has even decreased its estimates on occasion.⁶²⁴ It is also interesting to note that the commissioner's estimates pass through the Speaker's hands, the House, a committee of the House and the hands of the Treasury Board President. This process seems to be loosely designed to at least informally ensure that multiple actors will have a role in the handling and scrutiny of these estimates so as to limit the risk of one voice significantly overpowering the others. Again, this stands in stark contrast to the other agents who submit their estimates directly to the Treasury Board.

The *FAA* also reinforces the commissioner's budgetary autonomy by listing the commissioner alongside the House of Commons, the Senate and Senate Ethics Officer, the Library of Parliament and the office of the Parliamentary Budget Officer as departments that do not answer to a minister in relation to their budgets. The office therefore considers itself to be part of Parliament and its employees (who enter into their own employment contracts and are not unionized⁶²⁵) to not be part of the public service.⁶²⁶ The commissioner has the

⁶²⁴ See e.g. *Dawson Relationship*, *supra* note 168 at 3.

⁶²⁵ *Dawson on Harassment*, *supra* note 620 at 2.

⁶²⁶ *Dawson Carleton*, *supra* note 516 at 4.

power to enter into contracts⁶²⁷ and to hire and pay⁶²⁸ any staff and/or consultants⁶²⁹ that are deemed necessary. In exercising this autonomy, the office is now organized into five different divisions: Advisory and Compliance, Policy, Research and Communications, Reports and Investigations and Legal Services and Corporate Management.⁶³⁰ The staff is even subject to its own Code of Values and Standards of Conduct that all employees must read and sign when they join the office and again every year.⁶³¹ All of these points seem to be strong indicia that the commissioner is given sweeping operational autonomy when it comes to making decisions about staffing, salary and employment relationships.

Despite the many ways in which independence seems to be protected in the staffing context, it is possible for Parliament to very easily hinder this autonomy. In 2014, for example, a Conservative MP advanced a private members bill that would require agents and their employees to disclose their past political activity.⁶³² Although there was no definition of political activity in the bill and there were no penalties for having engaged in such activity, the bill demonstrates how easily an agent's autonomy and control over operations can be

⁶²⁷ *PC Act*, *supra* note 15, s. 84(2).

⁶²⁸ *Ibid*, s. 84(5)-(6).

⁶²⁹ *Ibid*, s. 84(3).

⁶³⁰ Canada, Office of the Conflict of Interest and Ethics Commissioner, "Opening Statement before the Senate Standing Committee on National Finance during the consideration of the expenditures set out in Main Estimates for the fiscal year ending March 31, 2014" (Ottawa, 4 February 2014), online: < <https://ciec-cciee.parl.gc.ca/en/publications/Documents/Presentations/Opening%20Statement%20Feb%204%202014%20EN.pdf> > at 1.

⁶³¹ *Dawson on Harassment*, *supra* note 620 at 3.

⁶³² *Bill C-520*, *supra* note 371.

hindered. Bill C-520 never passed into law and was widely criticized as seeking to enable a “witch hunt.”⁶³³

The structural safeguards that are in place to preserve the COIEC’s autonomy and independence are not fail proof. Commissioners must also make philosophical commitments in relation to how they will approach their role. As I explained above in relation to agents of parliament in general, it is through their personal choices regarding how to fulfil their duties that commissioner are able to operationalize their independence. It is therefore important to better understand the COIEC’s structural basis and operational functions.

6.5 What does the COIEC do?

The Conflict of Interest and Ethics Commissioner has what amounts to three separate but connected roles: to provide counsel or advice, to investigate allegations that someone under his or her jurisdiction has acted improperly and to evaluate and/or judge the behavior of elected officials and public office holders in regards to matters that fall under the Commissioner’s jurisdiction.⁶³⁴ As the history of this office has demonstrated, the innovation of having a Conflict of Interest and Ethics Commissioner who answers to Parliament and not to the Prime Minister or cabinet has been received as progressive. This

⁶³³ Alex Boutillier, “Tory MP’s proposed bill likened to witch hunt”, *The Toronto Star* (15 January 2014), online: <https://www.thestar.com/news/canada/2014/01/15/tory_mps_proposed_bill_likened_to_witch_hunt.html>.

⁶³⁴ Tonda MacCharles, “Questions raised about the ethics watchdog’s role in Morneau’s woes: Analysis”, *Toronto Star* (27 October 2017), online: <<https://www.thestar.com/news/canada/2017/10/27/questions-raised-about-the-ethics-watchdogs-role-in-morneaus-woes-analysis.html>>.

office is slightly different from the other agents of parliament we have looked at however, and that difference gives rise to some complications that it is important to unpack.

(a) Legislation vs. Rules (Standing Orders)

As explained above, the Conflict of Interest and Ethics Commissioner is responsible for two major mandates:

- 1) Administering the *Conflict of Interest Act*,⁶³⁵ which applies to designated public office holders; and,
- 2) Administering the Conflict of Interest Code for Members of the House of Commons, which is not legislative, but is instead part of the standing orders of the House of Commons.⁶³⁶

Who counts as a public office holder for the purposes of the *Act* is set out in the definitions section.⁶³⁷ Some of the more notable positions captured are:

- Ministers of the Crown, such as ministers of state or parliamentary secretaries;
- Members of ministerial staff;
- The Chief Electoral Officer;
- Ministerial advisers;
- Governor-in-council appointees, other than a lieutenant governor, officers and staff of the Senate, House of Commons and Library of Parliament, a judge who receives a salary under the *Judges Act*⁶³⁸, and a few others.

⁶³⁵ *Act*, supra note 13.

⁶³⁶ *Code*, supra note 14.

⁶³⁷ *Act*, supra note 13, s 2(1).

⁶³⁸ *Judges Act*, RSC, 1985, c J-1.

- The Parliamentary Budget Officer; and,
- Ministerial appointees whose appointments are approved by the Governor in Council.

What is interesting to note again here is that the *Act* and the Code have some overlap. If you are a Minister of the Crown or a parliamentary secretary, then you are subject to both sets of rules. This can lead to confusion among those individuals about which rules they must follow and when. This confusion also leads to the unique scenario where the Conflict of Interest and Ethics Commissioner must file annual reports to both the Senate and the House of Commons with respect to the *Act* that governs the ethical conduct public office holders, but only to the House of Commons when it comes to the Code that applies to Members.⁶³⁹

(b) Advisory Functions

The Conflict of Interest and Ethics Commissioner is tasked with giving advice to stakeholders under both the *Act* and the Code. This responsibility generally requires the individual about whom the advice applies to contact the commissioner directly. Under the Code, for example, a member may request an opinion about their own personal responsibilities under the Code.⁶⁴⁰ The same is true under the *Act* in respect of individual public office holders,⁶⁴¹ but with one exception. Under the *Act*, the commissioner is also obligated to receive requests from and provide the Prime Minister with confidential advice about how the *Act* applies to any individual public office holder.⁶⁴² This effectively means

⁶³⁹ *PC Act*, *supra* note 15, s 90(1).

⁶⁴⁰ *Code*, *supra* note 14, s 26(1).

⁶⁴¹ *Act*, *supra* note 13, s 43(b).

⁶⁴² *Ibid*, s 43(a).

that the Prime Minister can request advice about a public office holder without that public office holder's involvement or consent being needed by the Prime Minister before doing so.

As former Commissioner Dawson explained, "...there is a provision for me to provide confidential policy advice and support to the Prime Minister in respect of conflict of interest and ethical issues in general."⁶⁴³ This is a notable provision because it stands in contrast to the usual approach of only allowing public office holders to ask for advice about things that apply to them in their role as public office holders. Because this mandate is required to be undertaken in confidence however, it is also questionable whether the commissioner has the right to investigate a possible violation of the *Act* or Code based solely on information that was clearly first obtained in the fulfillment of the duty to assist the Prime Minister. For these reasons, allowing the Prime Minister to receive confidential advice from the commissioner about a staffer is problematic. The best way to correct this would be to require the commissioner to communicate with the public office holder in question before any advice is given to the Prime Minister about that individual. Given the commissioner's right to initiate an investigation autonomously, they would not have to disclose that the inquiry came from the Prime Minister. This approach would however ensure that the public office holder has an opportunity to help ensure that the commissioner has all accurate and relevant information necessary to be able to provide meaningful advice. The advisory opinions that the commissioner provides to stakeholders cover a variety of matters. The first and most common area of advice is with respect to questions about whether an individual has acted in a way that could put them in or is confronted with a concern that could place

⁶⁴³ *Dawson Oliphant, supra* note 460.

them in a conflict of interest. Both the *Act* and the Code attempt to define conflicts of interest, but in different ways. The Code restricts members from exercising their parliamentary duties and functions in a way that “furthers his or her private interests or those of a member of the Member’s family, or to improperly further another person’s or entity’s private interests.”⁶⁴⁴ The *Act* more directly states that “...a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person’s private interests.”⁶⁴⁵

These two approaches are very different. One difference is found in the fact that the Code explicitly lays out the situations in which a member would be furthering a private interest and also carves out exceptions for when a private interest would not be engaged.⁶⁴⁶ The *Act* on the other hand is much less specific and merely offers three types of situations in which a private interest would not be engaged.⁶⁴⁷ This means that the rules for public office holders lend themselves to a greater deal of discretion on the part of the commissioner than do the rules under the Code. This may be because it is ultimately only the Prime Minister who can make enforcement decisions under the *Act*, but given the overlap between who the

⁶⁴⁴ *Ibid*, s 8.

⁶⁴⁵ *Act*, supra note 13, s 4.

⁶⁴⁶ See *Code*, supra note 14, s 3(2), s 3(3).

⁶⁴⁷ Canada, Office of the Conflict of Interest and Ethics Commissioner, “The Cheques Report: The use of partisan or personal identifiers on ceremonial cheques or other props for federal funding announcements – made under the *Conflict of Interest Act*” (29 April 2010), online: < <https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/The%20Cheques%20Report%20-%20Act.pdf>> at 14 (the Commissioner writes that: “Unlike the Code, where the circumstances are set out under which a Member is considered to further a private interest, the Act provides little guidance as to the meaning of “private interest”) [*Cheques Report*].

Code and *Act* apply to, this can also be challenging for the commissioner. One of the most obvious challenges arises because there is sufficient leeway for advisory opinions about similar issues to vary and evolve over time and this has left the office open to criticism from members. As MP Candice Bergen complained to the media in 2016:

I remember being really frustrated and standing up in caucus to complain about not being able to help a good cause. It was nothing to do with me personally or politically. She (Dawson) is incredibly inconsistent in her interpretation of the (Conflict of Interest) act.⁶⁴⁸

Inconsistencies can be difficult to avoid when an individual is afforded a high level of discretion however. Variation of opinion may also be necessary to help capture new and unanticipated nuances in otherwise familiar scenarios. It not surprising then that a member might get frustrated by their inability to predict the commissioner's advice.

Another way in which the advisory role of the commissioner is complicated with respect to conflicts of interest is because it also allows the commissioner to consider apparent conflicts of interest. The Code sets out in its principles section that "Members are expected...to arrange their private affairs so that foreseeable real or apparent conflicts of interest may be prevented from arising, but if such a conflict does arise, to resolve it in a way that protects the public interest."⁶⁴⁹ The commissioner is then given the right, but not the duty, to have regard to the purposes and principles sections when interpreting and applying Members' obligations under this Code.⁶⁵⁰ The *Act* for public office holders has no corresponding duty to avoid the appearance of a conflict of interest, even though it has long

⁶⁴⁸ John Ivison, "Watchdog only barks when safe", *National Post* (8 April 2016) A4 [Ivison].

⁶⁴⁹ *Code*, *supra* note 14, s 2(d).

⁶⁵⁰ *Ibid*, s 3.1.

been understood that public sentiment seems to expect public officials to have a duty to avoid apparent conflicts.⁶⁵¹ That being said, members who are subject to the *Act* in their capacity as public office holders are of course also subject to the Code.

The City of Toronto's former Integrity Commissioner Valerie Jepson has written in support of a broad-based approach to conflict of interest regulation that includes apparent conflicts:

...unless there is a firm precedent by a previous commissioner, Court or an express exclusion, restrictions against conflicts of interest for elected officials ought to be interpreted in a broad and purposive manner, consistent with the common law, which includes the duty to avoid apparent conflicts of interest.⁶⁵²

Jepson refrains from extending her analysis to unelected officials, but this approach has real implications for the work that elected members do. Members are already required to refrain from participating in votes related to matters in which they have a private interest.⁶⁵³ Members who are also public office holders must already refrain from any matters in which they “would be in a conflict of interest”⁶⁵⁴ and make a public declaration of their recusals that includes “sufficient detail to identify the conflict of interest that was avoided.”⁶⁵⁵ Enforcing the idea that conflicts of interest include apparent conflicts could lead to more recusals, especially since members who are public office holders are already subject to strong recusal rules. This could have a real impact on democratic processes when there are close votes in Parliament.

⁶⁵¹ *Round Table, supra* note 448 at 16.

⁶⁵² Valerie Jepson, “Apparent conflicts of interest, elected officials and codes of conduct” (2018) 61:51 *Can Pub Admin* 36 at 50.

⁶⁵³ See *Code, supra* note 14, s 13.

⁶⁵⁴ *Act, supra* note 13, s 21.

⁶⁵⁵ *Ibid*, s 25(1).

Additionally, the general public's expectations of public officials does not always align with the rules that the commissioner is tasked with enforcing. As Professor Gerry Ferguson has noted, "...the concept of a "private interest" has expanded over time to recognize that subjective private interests informed by ideological, personal, and political matters may improperly influence public duties."⁶⁵⁶ Worried perhaps about the potential that the public's expectation for her to interpret the rules broadly could lead down a slippery slope, former Commissioner Mary Dawson concluded in her 2010 Cheques Report that conflict of interest rules are meant to deal with private personal interests and not partisan political interests.⁶⁵⁷

Further muddying the commissioner's ability to provide advice about conflicts of interest is the fact that the *Parliament of Canada Act* assigns a formal title to the commissioner that does not align with the mandates established under the Code and *Act*. As former Commissioner Dawson has been quoted as saying, "[i]t is a bit confusing when my title is conflict of interest and ethics commissioner and yet when you look into the Code and Act, there's no mention of a mandate for ethics."⁶⁵⁸ This was echoed by Lori Turnbull who noted that "[a] gap exists between the standard in the code and the public's sense of what it means to be ethical."⁶⁵⁹ It clearly does not make sense to call the commissioner an 'ethics

⁶⁵⁶ Gerry Ferguson, E-Book, *Global Corruption: Law, Theory and Practice* (International Centre for Criminal Law Reform & Criminal Justice Policy, 1 June 2018), online: <<https://icclr.law.ubc.ca/resources/global-corruption-law-theory-and-practice/>> at 9-4.

⁶⁵⁷ See *Cheques Report*, *supra* note 647; Les Whittington, "Ethics czar wants right to explain", *The Toronto Star* (30 Sept 2010) A7 [*Whittington*].

⁶⁵⁸ *Whittington*, *supra* note 657.

⁶⁵⁹ *Turnbull Rules*, *supra* note 248 at 352.

commissioner' if the person is responsible for commenting on conflict of interest in particular, but not on principles of ethics in general. Having this label only serves to perpetuate confusion that already exists in relation to this very unique role.

Having a mandate to opine about general matters of ethics would be very useful for an office of this nature. Ian Greene has poignantly explained that understanding principles of ethics can be more useful than following specific rules of ethics. He notes that:

...comprehensive rules by themselves are not a complete solution. Rules are more effective if it is clear that they are designed to implement some general principles which are understood by all who are affected by them. Moreover, the rules themselves may extend too far, or not far enough, if the principles which they are intended to promote are not well understood.⁶⁶⁰

Former commissioner Dawson agrees, noting that "...the more important thing is to instill the values in people that they follow."⁶⁶¹

(c) Disclosure Filings

One of the requirements of both the *Act* and Code that helps to empower the Conflict of Interest and Ethics Commissioner to be able to inform stakeholders about the rules that apply to them is the private disclosure process. Among other things, individuals subject to the *Act* and Code must inform the commissioner about certain classes of assets and liabilities, as well as their business interests (regardless of whether they are active) and volunteer

⁶⁶⁰ Ian Greene, "Conflict of Interest and the Canadian Constitution: An analysis of Conflict of Interest Rules for Canadian Cabinet Ministers" (1990) 23:2 Can J Pol Sci 233 at 255.

⁶⁶¹ John Geddes, "The Watchdogs who never bite", *Macleans's* (15 November 2010), online: <<https://www.macleans.ca/news/canada/the-watchdogs-who-never-bite/>>.

activities. These disclosure requirements have become progressively more robust over the years because, as Paul Thomas notes: “[c]alls for greater transparency, in the form of disclosure requirements, are part of the growing public insistence that governments become more responsive to the public will.”⁶⁶² Under the *Act*, ministers and parliamentary secretaries must also make reasonable efforts to provide information specific to their spouse, common law partner and/or dependent children.⁶⁶³

The commissioner will review the filings submitted by each individual and then advise that person (and/or their family members) about specific rules that they should pay closer attention to. For example, if an MP owns shares of a company that could benefit from a legislative initiative currently being considered by Parliament, then the commissioner may remind that MP about the provision in the Code that may require them to recuse themselves from voting on that matter. It may also be the case that the *Act* or Code mandates divestment of an asset, recusal from voting and/or resignation from outside activities or engagements. Importantly, although divestment and recusal are identified as specific compliance measures, the *Act* does not limit the commissioner’s authority in this regard and other creative measures have also been employed, including conflict of interest screens.⁶⁶⁴

⁶⁶² Paul G Thomas, “The Changing Nature of Accountability” in Donald J Savoie & Guy B Peters, eds, *Taking Stock: Assessing Public Sector Reforms* (Montreal, QC: McGill-Queen’s University Press, 1998) at 355.

⁶⁶³ *Act*, *supra* note 13, s 22(3).

⁶⁶⁴ See e.g. Canada, Office of the Conflict of Interest and Ethics Commissioner, “Morneau Report made under the *Conflict of Interest Act*” (June 2018), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/Morneau%20Report.pdf>>; *Democracy Watch v Canada* (A-G), 2018 FCA 195.

Another compliance measure that is allowed under both the *Act* and Code is the implementation of a blind trust to manage an individual's assets.⁶⁶⁵ A blind trust ensures that the individual who owns the asset is not also actively managing it. This rather demanding requirement helps to maintain the public's trust in that minister's decision-making. If an asset is placed in a blind trust, then the owner of the asset (i.e. the MP or public office holder) will not be regularly informed about that asset's management (e.g. whether it has been sold or otherwise disposed of) or performance. This distancing from assets ensures, in theory, that the individual's private interest in the asset's performance does not influence the actions they take on behalf of the public interest. Blind trusts are not perfect however. As former commissioner Dawson mused:

...[i]f you've got a huge set of holdings in one area and you put it in a blind trust, what do you think is in your blind trust?" she said. "You know what the hell's in there. That's a defect on a blind trust. You've got to have other measures around the blind trust, like conflict screens."⁶⁶⁶

Regular disclosure filings play an important role in providing an opportunity for the commissioner to educate stakeholders about their obligations. Interestingly however, the commissioner has never proactively audited any public office holders to make sure that they were recusing themselves in situations where they may have conflicts.⁶⁶⁷

⁶⁶⁵ See *Act*, *supra* note 13, s 27 (reporting Public Office Holders are prohibited from holding controlled assets under the *Act* and must divest those assets or place them in blind trust within 120 days of their appointment to their position).

⁶⁶⁶ Laura Stone, "Ethics Commissioner Mary Dawson says she 'went out with a bang'", *The Globe and Mail* (8 January 2018), online: <<https://www.theglobeandmail.com/news/politics/ethics-commissioner-mary-dawson-says-she-went-out-with-a-bang/article37517088/>>.

⁶⁶⁷ Althia Raj, "Federal Ethics Commissioner Mary Dawson Has Never Proactively Checked If Ministers Are Following Rules", *HuffPost Canada* (Oct 27, 2017), online: <https://www.huffingtonpost.ca/2017/10/27/federal-ethics-commissioner-mary-dawson-has-never-proactively-checked-if-ministers-are-following-rules_a_23258196/>.

(d) Investigatory Functions

To complement the commissioner's advisory function, he or she is also responsible for investigating alleged breaches of the *Act* and Code.⁶⁶⁸ The advisory opinions that the commissioner provides to members under the Code are binding on the commissioner with respect to "any subsequent consideration of the subject-matter, as long as the commissioner was aware of all relevant facts known to the member when the advice was provided."⁶⁶⁹ Advice under the *Act* is afforded no similar protection, but the *Act* does allow the commissioner to easily discontinue an own initiative examination without having to give reasons for doing so.⁶⁷⁰ If an examination was requested by a parliamentarian however, then reasons for discontinuing the examination must be provided in a report that is provided only to the Prime Minister.

Interestingly, the two regimes use different language to describe the commissioner's investigatory powers. They are called "inquiries" under the Code⁶⁷¹ and "examinations" under the *Act*.⁶⁷² This distinction is helpful because they are in fact processes that have meaningfully different outcomes.⁶⁷³ Under the *Act*, the commissioner addresses and provides an examination report directly to the Prime Minister. The report is made available to the

⁶⁶⁸ *Dodek*, *supra* note 443 at 109 (in which Adam Dodek puts forward the idea that the advisory and investigatory functions should be kept separate, which is in fact the case in some Canadian cities).

⁶⁶⁹ *Code*, *supra* note 14, s 26(3).

⁶⁷⁰ *Act*, *supra* note 13, s 45(2).

⁶⁷¹ *Code*, *supra* note 14, s 27.

⁶⁷² *Act*, *supra* note 13, s 44.

⁶⁷³ Regardless of the differences between the two, I will hereafter refer to both processes simply as investigations that are conducted by the Commissioner. I will use more precise language only when necessary.

public, but it is not considered by either house of Parliament. Under the Code, the inquiry report is filed with the Speaker of the House of Commons, who then tables it in the House so that it can be considered/debated for no more than two hours.⁶⁷⁴

Investigations can be initiated as a result of requests received from a member of the House or, in the case of examinations under the *Act*, requests can also be received from a member of the Senate. They can be self-initiated by the commissioner⁶⁷⁵ or commenced under the Code as a result of a resolution passed within the House of Commons. Neither the *Act* nor the Code obligate the commissioner to launch an investigation if a complaint is received from a member of the public. Having this discretion to act in response to information received from members of the public could be regarded as another indicia of the commissioner's independence.⁶⁷⁶ This discretion is very important because it addresses a concern raised by Ian Greene in a 1991 paper, that the complaints process could be abused by people who send frequent complaints to the commissioner for investigation.⁶⁷⁷

Unsurprisingly, the commissioner has considerably more robust investigatory powers under the *Act* than under the Code. In particular, the commissioner has the same power under the *Act* as a court of record has to be able to compel witnesses and the

⁶⁷⁴ *Code*, *supra* note 14, s 28(11).

⁶⁷⁵ I have also referred to this as an “own initiative” right to conduct an investigation. See above, page 4.4(c).

⁶⁷⁶ This stands in stark contrast to Ontario's Integrity Commissioner, who cannot accept complaints from a member of the public and cannot conduct investigation on their own initiative.

⁶⁷⁷ *Greene Future*, *supra* note 486 at 170.

production of records.⁶⁷⁸ The *Act* and Code both also emphasize the importance of privacy and confidentiality, ensuring fairness of process and the broad reasons for which the commissioner may refuse to investigate. Section 66 of the *Act*, for example, says that the commissioner’s decisions and orders are final and “shall not be questioned or reviewed in any court”, except in accordance with subsections 18.1(4)(a), (b) or (e) of the *Federal Courts Act*.⁶⁷⁹ It also important to note that both the Code and *Act* provide instructions for when an investigation must be suspended.⁶⁸⁰ For example, if the commissioner suspects that the subject of the investigation has committed a criminal offence.⁶⁸¹

Despite the robustness and clarity of the investigatory mandates, it has also been argued that an ethics commissioner should not sit in judgment of his or her own advice because they may not be or even appear to be impartial.⁶⁸² This concern was raised in 1991 by Ian Greene but has also more recently been echoed in 2018 by Adam Dodek. Dodek put forward the idea that the advisory and investigatory functions of these offices should be separated and one possible solution to this tension that he identified would be for an alternate commissioner to be engaged when conflict situations arise.⁶⁸³

⁶⁷⁸ *Act*, *supra* note 13, s 48(2).

⁶⁷⁹ *Ibid*, s 66.

⁶⁸⁰ See e.g. Canada, Office of the Conflict of Interest and Ethics Commissioner, “Carson Report – Discontinuance of an examination” (June 2018) (in which the Commissioner discontinued an examination because the same matter was also being considered by the Supreme Court of Canada SCC).

⁶⁸¹ See *Act*, *supra* note 13, s 49; *Code*, *supra* note 14, s 29.

⁶⁸² *Greene Future*, *supra* note 486 at 169-70.

⁶⁸³ *Ibid*.

Another criticism of the idea that ethics commissioners should be responsible for conducting investigations rests on the belief that doing so could have a negative impact on how our parliamentary democracy functions. As Andrew Potter argues:

...when a commissioner becomes involved in an investigation...it could have the effect of taking the issue out of the political realm entirely...could backfire by actually making it harder for the opposition to hold government's feet to the fire... Canadian governments have always found royal commissions and judicial inquiries extremely useful instruments for burying politically inconvenient issues.⁶⁸⁴

On the other hand, receiving complaints and questions, especially from the public, could allow an ethics commissioner to “become better aware of the public’s standards of ethics and [this] could [allow the Commissioner to] keep politicians informed of them.”⁶⁸⁵

An ethics commissioner can quickly become attuned to the tremendous pressure that is on them to make sure they do not overstep their delegated role(s). As former commissioner Dawson noted in a talk she gave at Osgoode Hall Law School in 2009:

...I would not intervene in policy disputes or other political matters unless they also involve a deliberate and focused attempt by a Member of the House of Commons to further a private interest. It is sometimes difficult to determine exactly where to draw the line between a private interest and a “political” or “partisan” interest, and it will always depend on the circumstances of the case.⁶⁸⁶

It is precisely this concern that independent commissioners might intentionally or inadvertently insert themselves into purely political and/or policy matters that regularly emanates from commentators.⁶⁸⁷ One way to address and maybe even reduce this cynicism

⁶⁸⁴ *Potter, supra* note 34 at 88.

⁶⁸⁵ *Turnbull Rules, supra* note 248 at 365.

⁶⁸⁶ *Dawson Hybrid, supra* note 457 at 6.

⁶⁸⁷ In fact, this was a key criticism leveled at Commissioner Dion in the wake of the *Trudeau II* report, *supra* note 10 (See e.g. Ian Austen, “A Watchdog Found Trudeau

would be to make sure that commissioners can always fully explain their decisions, particularly when the decision is to not investigate a matter that is getting significant public attention. As former commissioner Dawson once explained, she has been “absolutely muzzled”⁶⁸⁸:

The Code prevents me from making any public comment relating to a preliminary review or inquiry. The purpose of this prohibition is to prevent attention being drawn to allegations of wrongdoing unless and until the Commissioner has conducted an inquiry and issued a report on the matter. This reflects an important principle in procedural fairness and my Office takes care to ensure that investigative work is conducted in confidence.

There are, however, certain occasions where I believe it would be in the interest of Members for me to be able to communicate the results of a preliminary review. In particular, I have in mind cases where the allegations in question have been made public, either by the Member requesting the inquiry, through media reports, or in some other way.⁶⁸⁹

This applies equally to investigations that the commissioner has discontinued because the matter complained of falls outside the Office’s jurisdiction or has no basis in evidence.⁶⁹⁰

(e) Enforcement (Punishment and Deterrence)

The *Act* and Code take different approaches towards their role in influencing the behaviours of the individuals to whom they respectively apply. The *Act* provides the commissioner with a larger selection of tools that can be used to encourage compliance than

Broke the Law, but Not Everyone Agrees”, *The New York Times* (16 August 2019), online: <<https://www.nytimes.com/2019/08/16/world/canada/trudeau-snc-ethics.html>>).

⁶⁸⁸ *Whittington, supra* note 657.

⁶⁸⁹ Canada, Office of the Conflict of Interest and Ethics Commissioner, “The 2008-2009 Annual Report made under the Conflict of Interest Code for Members of the House of Commons” (Ottawa: June 2009) at 2.

⁶⁹⁰ *Whittington, supra* note 657; see also Bruce Cheadle, “Ethics watchdog seeks power to fine MPs for conflicts of interest”, *The Globe and Mail* (3 Jan 2013) A4 (Cheadle writes that Commissioner Dawson “...argues that she’d like to be able to address “misinformation put into the public domain in relation to investigative work.”).

does the Code. These tools tend to focus first on prevention and second on punishment. The Code leaves most of the decision-making in the hands of the House, with the commissioner's role being primarily that of an educator and investigator. Former commissioner Dawson described her personal philosophy about her role as follows: “[i]t is important to understand that our practice is primarily collaborative, not adversarial. My staff and I work with individuals to avoid conflicts of interest from arising. Our aim is prevention, not punishment.”⁶⁹¹

Dawson's approach is rather typical. As Paul Thomas explains, “...the majority of agencies operate on the basis of what is called the “ombudsman model” that involves reliance on persuasion, mediation, recommendations and publicity.”⁶⁹² It is unclear whether this is the best approach for public sector ethics regulation, but after several years in office former commissioner Dawson did believe that the simple act of publicly disclosing violations could have a tremendous impact. She noted that, “[w]hile I think the enforcement tools in the Act and the Members' Code could be strengthened, public disclosure following an investigation is, in my view, the most potent sanction for a failure to comply.”⁶⁹³ Dawson has also rhetorically chided: “[w]ould you like to have a report written about you? I don't think so.”⁶⁹⁴

Given that the Code and the *Act* have overlap in their application despite the fact that they are structured to operate very differently, individual commissioners do have to make

⁶⁹¹ Dawson *Hybrid Paper*, *supra* note 457 at 16.

⁶⁹² Thomas *PPF*, *supra* note 50 at 7.

⁶⁹³ Dawson *Future Directions*, *supra* note 455 at 6.

⁶⁹⁴ Tim Harper, “Time to give ethics act some teeth”, *The Toronto Star* (28 Mar 2012) A6.

some philosophical decisions about how they would like to approach their role. For some, like former commissioner Dawson, their approach to administering the *Act* is based primarily on prevention.⁶⁹⁵ Other commissioners may decide that using resources to continue to improve education and early prevention is a lower value approach and instead prioritize pure enforcement because they think it is more likely to compel greater compliance. These rules of conduct are not new, and it may be reasonable to take the position that public office holders should no longer be able to pretend that they are ignorant of the rules and their application. Enforcement can also serve as a strong deterrent that helps with prevention. A considered balancing of values and mechanisms is undoubtedly required. Under the *Act*, there are three types of enforcement measures that are each limited in their scope: compliance orders, examination reports containing recommendations that are consequently adopted and administrative monetary penalties.

With respect to matters like annual disclosure filings, section 30 of the *Act* allows the Commissioner to “...order a public office holder, in respect of any matter, to take any compliance measure, including divestment or recusal, that the Commissioner determines is necessary to comply with this Act.”⁶⁹⁶ Compliance orders issued under this provision are made public on the COIEC’s website⁶⁹⁷ and are regularly shared by the office on Twitter.

⁶⁹⁵ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Opening Statement before the House of Commons Standing Committee on Access to Information, Privacy and Ethics, (23 February 2016), online: <<https://ciec-cciee.parl.gc.ca/en/publications/Documents/Presentations/Opening%20Statement%20ETHI%20%20Feb.%2023,%202016%20EN.pdf>> at 2.

⁶⁹⁶ *Act*, *supra* note 13, s 30.

⁶⁹⁷ See Canada, Office of the Conflict of Interest and Ethics Commissioner, “Public Registry Home: All results published under the Act” (accessed 29 October 2019), online: <<http://prciec-rpcciee.parl.gc.ca/EN/PublicRegistries/Pages/PublicRegistryAct.aspx>>

Examinations under the *Act* always result in a report that is provided to the Prime Minister and that includes an explanation of the conclusion reached by the commissioner. The Prime Minister is not permitted to alter the conclusion reached but is also under no obligation to accept it.⁶⁹⁸ When the commissioner uncovers a contravention while conducting an examination under the *Act*, their report also does not include any sort of recommendation. The *Act* does allow the imposition of administrative monetary penalties (AMPs) of up to \$500 for failures to meet a number of reporting requirements, but those are dealt with separately from the types of matters that require an examination to be conducted. Only violations related to failing to meet reporting deadlines can trigger an AMP⁶⁹⁹ and those violations are dealt with in a much more administrative manner.⁷⁰⁰

Inquiries under the Code are much different. The reports are tabled with the Speaker⁷⁰¹ and debated in the House of Commons.⁷⁰² A finding of contravention in a report

(Compliance Orders are publicly disclosed despite the fact that there is no clear provision in the *Act* requiring same. The Commissioner chooses to exercise discretion to do so. See *Act*, *supra* note 13, s 51(1)(e)).

⁶⁹⁸ *Act*, *supra* note 13, s 47.

⁶⁹⁹ See e.g. *Supra*, note 9 (Prime Minister Justin Trudeau was handed a \$100 administrative monetary penalty for not disclosing sunglasses that he received as a gift).

⁷⁰⁰ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Opening Statement before the House of Commons Standing Committee on Access to Information, Privacy and Ethics on 2008-2009 Annual Report in respect of the Conflict of Interest Act, October 20, 2009 (20 October 2009), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Opening%20Statement%20ETHI%20October%2020%202009%20EN.pdf>> at 2 (Commissioner Dawson remarks that: “After developing appropriate processes, including a system of reminder notices, my Office implemented the regime in November 2008”).

⁷⁰¹ *Code*, *supra* note 14, s 28.

⁷⁰² *Ibid*, s 28(11).

is also expected to be accompanied by a recommendation from the commissioner. Although there may be small fines for failing to meet a deadline under the *Act*, there are no penalties for substantive contraventions under either the *Act* or the Code. The commissioner may recommend actions that could be taken by the members of the House of Commons in response to a reported violation, but the commissioner has no right to impose a sanction of any kind. Former commissioner Dawson did not see a problem with this however, and commented before the House of Commons Standing Committee on Access to Information, Privacy and Ethics that:

I recognize that there are differences of opinion on whether it is necessary or desirable to impose penalties in such cases. My view is that issuing a public report in which a contravention is found is itself a significant adverse result, and that the imposition of monetary penalties is not necessary.⁷⁰³

Others, like Adam Dodek, disagree with former commissioner Dawson's perspective. Dodek says "[t]here is a need to both expand the range of formal sanctions and to increase their strength."⁷⁰⁴ He further argues that "...the remarkably low maximum amount of the AMP under the Conflict of Interest Act undermines the efficacy of an ethics regime precisely because it makes it look equivalent to a municipal parking system."⁷⁰⁵ It is difficult, if not impossible, to measure the effectiveness of naming and shaming as a deterrent to bad ethical behavior but, as will be further discussed in chapter eight, it is abundantly clear that there is little interest in expanding the sanctions or increasing their strength.

⁷⁰³ Canada, Office of the Conflict of Interest and Ethics Commissioner, "Opening Statement before the House of Commons Standing Committee on Access to Information, Privacy and Ethics in the Context of the Five-Year Review of the Conflict of Interest Act" (11 Feb 2013), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Opening%20Statement%20Five-Year%20Review%20Act.pdf>> at 3.

⁷⁰⁴ *Dodek*, *supra* note 443 at 106.

⁷⁰⁵ *Ibid* at 105.

(f) Gifts and Benefits

The rules in place regarding the receipt of gifts and other benefits by MPs and other public office holders are incredibly similar throughout the different national and subnational jurisdictions in Canada. Furthermore, rules prohibiting certain types of gifts and benefits and/or requiring their disclosure rarely change to become either more or less nuanced.⁷⁰⁶ Despite the consistency of these types of rules, it is incredibly common to read an ethics commissioner's annual report in which they explain that members tend to find the rules confusing.⁷⁰⁷ It seems clear to me however, that members simply choose not to take these rules very seriously.

Members of Canada's House of Commons ought to concern themselves with the possibility that the public might respond negatively to them receiving too many gifts or gifts from the wrong people and/or for the wrong reasons. The Code explicitly allows members to accept what it calls 'sponsored travel' as long it is related to their position and a statement is filed with the commissioner that describes the travel and nature of the sponsorship that has been provided.⁷⁰⁸ The commissioner is not obligated to approve such travel, but is required

⁷⁰⁶ One of the amendments made to the Code in 2015 was to lower the threshold for public declarations of gifts and benefits from \$500 to \$200. Other than that, there has been no notable change to these rules.

⁷⁰⁷ See e.g. Canada, Office of the Conflict of Interest and Ethics Commissioner, "The 2010-2011 Annual Report made under the Conflict of Interest Code for Members of the House of Commons" (Ottawa: 16 June 2011) at 6 (in which the Commissioner remarks that: "Although the rules relating to gifts and other benefits received by Members and members of the families seem relatively straightforward, their application is not always clear-cut.") [*AR 2010-11 Code*].

⁷⁰⁸ *Code*, *supra* note 14, s 15.

to publicly disclose all reported travel by filing one comprehensive list with the Speaker of the House by no later than March 31 every year.⁷⁰⁹ The only restriction on this travel is that it must relate to a member's duties as a member. This is very broad in scope and effectively absolves members from obvious conflicts of interest (e.g. having direct stakeholders pay for flights and accommodations) under the rationale that it can sometimes be too expensive for members to pay for these trips on their own.⁷¹⁰

(g) Outreach and Education

Compliance with the law is of course only one of the many ways that we attempt to shape the behaviour of public officials. As Warren Bailie and David Johnson explain,

...the law is limited. It is only one of the means, and certainly not the best means, by which public morality is forged and developed. It is to these other means that ethics agencies should direct more attention, and the greatest of these is that of broad public education.⁷¹¹

In her 2008-2009 annual reports, Commissioner Dawson noted the importance of her public education mandate under section 32 of the Code⁷¹² and reported that she had formed a new learning and communications group within her office.⁷¹³ The office would now publish

⁷⁰⁹ *Ibid*, s 15(3).

⁷¹⁰ See *Trudeau Report*, *supra* note 8 (for an example of a member who did not disclose his sponsored travel, as required).

⁷¹¹ Warren R Bailie & David Johnson, "Governmental ethics and ethics agencies" (1991) 34:1 *Can Pub Admin* 158 at 162 [*Bailie & Johnson*].

⁷¹² Canada, Office of the Conflict of Interest and Ethics Commissioner, "The 2008-2009 Annual Report made under the Conflict of Interest Code for Members of the House of Commons" (Ottawa: June 2009) (interestingly, there is no corresponding public outreach mandate under the *Act*).

⁷¹³ *Ibid* at 17.

Advisory Opinions to explain how the Code operates⁷¹⁴ and Information Notices⁷¹⁵ to help explain how the *Act* operates. Transcripts from talks that the commissioner and staff had given were also posted on the office’s website.⁷¹⁶

Looking at the transcripts from talks given can be instructive. While the commissioner and staff no doubt interact with many different people and sources of information outside of their office, seeing who they engage with in an official capacity tells us a great deal about who the commissioner feels the office owes its time and energy to. The office makes presentations to the caucuses of parties represented in the House of Commons,⁷¹⁷ but also to a variety of other groups. The publicly available transcripts disclose presentations that have been given to:

- Committees of the House and the Senate;⁷¹⁸

⁷¹⁴ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Browse Advisory Opinions” (accessed 29 October 2019), online: <<https://ciec-ccie.parl.gc.ca/en/rules-reglements/Pages/AdvOpinion-AvisCons.aspx>>.

⁷¹⁵ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Browse Information Notices” (accessed 29 October 2019), online: <<https://ciec-ccie.parl.gc.ca/en/rules-reglements/Pages/InformationNotices-AvisInformation.aspx>>.

⁷¹⁶ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Publications” (accessed 29 October 2019), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Pages/search-recherche.aspx>> (the presentation notes can be found by clicking on the “Presentations” publication category).

⁷¹⁷ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Presentation by Mary Dawson before the House of Commons Standing Committee on Access to Information, Privacy and Ethics” (Ottawa, 29 September 2011), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/ETHI%20-%20Sept%2029%202011.pdf>> at 3 [*Dawson ETHI 29 Sep 2011*].

⁷¹⁸ See e.g. Canada, Office of the Conflict of Interest and Ethics Commissioner, “Publications” (accessed 29 October 2019), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Pages/search-recherche.aspx>> (notes from presentations to parliamentary committees can be found by clicking on the “Presentations” publication category).

- Federal and Provincial commissions;
- Conferences at academic institutions (e.g. law, public policy and political science);
- Officials from other national governments (e.g. Korea,⁷¹⁹ China⁷²⁰);
- International governance organizations (e.g. Group of States against Corruption of the Council of Europe – GRECO⁷²¹); and,
- Canadian Think Tanks (e.g. the Institute of Public Administration of Canada (IPAC), Canadian Study of Parliament Group).

Further to the presentations given, the commissioner’s Annual Reports also refer to outreach undertaken that is less demanding or atypical in nature. For example, the office usually responds to simple requests received from other countries,⁷²² makes presentations to the

⁷¹⁹ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Presentation to Special Committee on Ethics from the National Assembly of the Republic of Korea” (Ottawa: 5 August 2011), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Korean%20delegation%20Aug.%205%202011%20EN.pdf>>.

⁷²⁰ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Values and Ethics at a Political Level”, Presentation at a Bilateral Workshop on Perspectives on Innovation in the Public Service Hosted by the Public Service Commission for a Delegation from China (Ottawa: 18 April 2011), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/PSC%20Symposium%20April%2018%20ENGLISH.pdf>>.

⁷²¹ Canada, Office of the Conflict of Interest and Ethics Commissioner, “GRECO High-Level Conference Strengthening transparency and accountability to ensure integrity: United against corruption “National bodies or authorities in charge of preventing and/or fighting corruption: the next steps of their co-operation at an international level”” (Ottawa: 16 October 2018), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/GRECO%20High-Level%20Conference%20-%20Oct%2016%202018.pdf>> (Speaker: Lyne Robinson-Dalpe – Director, Advisory and Compliance) [*GRECO*].

⁷²² See e.g. Canada, Office of the Conflict of Interest and Ethics Commissioner, “The 2017-2018 Annual Report in respect of the *Conflict of Interest Act*” (Ottawa: 4 June 2018) at 17 (where Commissioner Dion writes: “As part of our international outreach, we responded to information requests from Australia, Indonesia, Ireland, Kazakhstan, South Korea, the Group of States against Corruption (GRECO) and ParlAmericas”) [*AR 2017-18 Act*].

caucuses of parties represented in the House of Commons,⁷²³ has participated in the Members' Orientation Program, the House of Commons Service Fair, a Library of Parliament seminar⁷²⁴ and information on members' obligations under the Code has even been added to the 'Source', which is the House of Commons' mobile-enabled portal that is accessible on iPads that are provided to members.⁷²⁵ These presentations are important because they allow the commissioner and staff to engage with the public in a way that helps them to "become greater activists in the process of tracking ethics within society..."⁷²⁶ As Penny Collenette has argued, this active engagement is very important because ethics issues like conflicts of interest often hide in plain sight and can be easily overlooked unless there is rigorous awareness and training about these issues.⁷²⁷

(h) Stakeholders and Influential Relationships

The public profile of the commissioner's role seems to have steadily increased over the years. This is not only because Commissioner Dawson was in the role for an extended period of time while ethics scandals become more visible in the traditional and online media,

⁷²³ Dawson *ETHI 29 Sep 2011*, supra note 717 at 3.

⁷²⁴ See Canada, Office of the Conflict of Interest and Ethics Commissioner, Opening Statement before the House of Commons Standing Committee on Access to Information, Privacy and Ethics" (3 May 2016), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Opening%20Statement%20ETHI%20%20May%203,%202016%20EN.pdf>> at 4.

⁷²⁵ Canada, Office of the Conflict of Interest and Ethics Commissioner, "The 2015-2016 Annual Report made under the Conflict of Interest Code for Members of the House of Commons" (Ottawa: 14 June 2016) at 2 [*AR 2015-16 Code*].

⁷²⁶ *Bailie & Johnson*, supra note 711 at 162.

⁷²⁷ Penny Collenette, "Political conflicts of interest will only get trickier: Collenette", *The Toronto Star* (Nov 18, 2017), online: <<https://www.thestar.com/opinion/star-columnists/2017/11/18/political-conflicts-of-interest-will-only-get-trickier-collenette.html>>.

but also because the office itself has become much more outward-looking and social in its work. Further to taking on a very strong stakeholder education and outreach role,⁷²⁸ the office's commissioners have both viewed the role as being one that is responsible for educating the public and they have accordingly become very active with their outreach and participation in conferences and other community events. As a result, the commissioners have been able to build and nurture important relationships with other individuals and organizations who have shared interests.

The office of the COIEC does not exist on an island. It works within an industry of organizations inside and outside of the public service that are interested in ethics, accountability and good governance. It is important for the office to have a meaningful relationship with these industry players so that its work can be reflective of broader perspectives and emerging trends. Engaging with people and organizations who see things through different lenses and who challenge the status quo can also help to inform best practices. That being said, it is important to be clear about what other influences are at play in the commissioner's work so that we can pay attention to how, if at all, those influences manifest themselves.

Although it would be impossible to substantiate an assertion that any such relationships have a direct impact on the commissioner's work, it is much less controversial to say that these are the obvious relationships that have a greater likelihood of informing and

⁷²⁸ Reference to this operational emphasis can be seen in every annual report and there is now also a division within the office that is dedicated to education and outreach.

influencing the office's work. When the commissioner is out and engaging with these individuals and organizations, theirs are the voices and perspectives that are encountered. Some may be sympathetic to the commissioner's work and some not. Some of the voices may be progressive and some may be more interested in the status quo. Regardless, it is important to note that the commissioner's work informs and is informed by the conversation that is being had by and between all of these individuals and groups. In this section I will look at who these stakeholders are and how their relationships with the commissioner generally manifest themselves. I will draw out the implications of these relationships where doing so is possible.

Non-Governmental Organizations

Two of arguably the most important relationships that the office has are with its biggest critic and with its counterparts around the world. First, the Canadian non-governmental organization Democracy Watch is perpetually challenging the commissioner's decisions. Democracy Watch has been questioning and seeking judicial review of everything from Commissioner Dawson's reappointments⁷²⁹ and Commissioner Dion's appointment⁷³⁰ to decisions about whether to investigate a complaint⁷³¹ and whether the commissioner has

⁷²⁹ See Ryan Maloney, "Democracy Watch files Court Case Against Ethics Commissioner Mary Dawson", *HuffPost* (26 June 2017), online: <https://www.huffingtonpost.ca/2017/06/26/democracy-watch-files-court-case-against-ethics-commissioner-mar_a_23002888/> (in which it is noted that Democracy Watch filed an application for judicial review of Commissioner Dawson's refusal to recuse herself from investigating the Prime Minister).

⁷³⁰ *Democracy Watch v Canada (A-G)*, 2018 FC 1290.

⁷³¹ *Democracy Watch v Canada (A-G)*, 2018 FCA 195.

the authority to give certain advice.⁷³² Although it has never been noted in the office's annual reports, it is likely the case that challenges brought by Democracy Watch account for a large percentage of the office's annual legal spending.

It is a good thing that Democracy Watch exists and takes such an active role in holding the office to account for its decisions. The office has been delegated significant authority by the House of Commons to monitor the behaviour of members. As we will see in chapter seven, the House has mostly relieved itself of any responsibility in this area by disregarding the expertise of the commissioner and refusing to move the office's mandates in a progressive direction. Democracy Watch plays an important role not only in holding the commissioner to account for any missteps, but also in continuing to call attention to the inherent limitations in the role that the commissioner plays within our parliamentary democracy.

The other relationship the commissioner has that may arguably be one of its most important is its connection to the Council on Government Ethics Laws (COGEL) and regular participation in COGEL's annual international conferences. Attendance at COGEL's conferences exposes the commissioner (and those office staff who also attend) to global perspectives on public sector ethics governance. Among other things, they learn about new initiatives, new technologies, new approaches to outreach and education, new ideas to create operational efficiencies, and make new connections. COGEL is by far the largest

⁷³² *Democracy Watch v Canada (A-G)*, 2018 FCA 194.

organization of its kind in the world and provides invaluable opportunities for ethics officials to be able to spend time thinking outside the limits of their demanding day-to-day operational mandates.

Political Parties

Political parties are not subject to the COIEC's jurisdiction,⁷³³ but play a fundamental role in shaping the types of issues that find their way to the office. Members will often ask ethics-related questions to their caucus or leader's office before possibly asking that same question of the Conflict of Interest and Ethics Commissioner. As was discussed in chapter five above, some political parties in Canada actually have their own codes of conduct. Most often however, there is no official code of conduct and it is simply regarded as politically expedient to seek advice about potential ethics concerns from one's caucus or party leader. The party may have already encountered a similar situation and may be able to give advice quickly or perhaps the party knows a reason why a member should or should not file a complaint with the commissioner about another member. The party's role in this initial advice-seeking process is mostly unofficial, yet very firmly entrenched in politics.

Members also tend to seek advice from their party leaders or caucuses first because of the commissioner's own-initiative investigation rights that were discussed above. One of the reasons that own-initiative investigation rights have not been granted to some sub-

⁷³³ See e.g. *Cheques Reports*, *supra* note 647 (MP Martha Hall Findlay filed a complaint alleging partisan use of government advertising. Commissioner Dawson found no violation under the Code because political parties are not "persons" under the *Conflict of Interest Act*).

national ethics commissioners is likely because of parliamentarians' fear that they may accidentally alert that commissioner to a matter worthy of investigation during what they might otherwise perceive to be a regular consultation. If, for example, a member seeks advice about a controversial matter after the fact, then they may put themselves at risk. This is accordingly one of the reasons that political parties seem to have so much control over how their members handle ethics-related matters and why it sometimes seems like the commissioner is the last person to be brought in to the discussion when there is an ethics-related controversy.

Media and Social Media

When it is not a member or their political party, it is typically a member of the media or a user of social media who brings ethics-related controversies to light. Because the media covers so much of what politicians do on a daily basis, they often stumble upon questionable conduct and then skillfully follow the lead. An excellent example of this type of discovery was when a member of the media uncovered that Prime Minister Trudeau and his family took a trip to the Aga Khan's private island during their holidays. This came to light simply because a reporter saw that the Prime Minister's Christmas vacation was listed as 'confidential' on his official itinerary. The reporter casually asked a member of Trudeau's staff where he went, was told he had gone to visit the Aga Khan, and then started to piece together that such a visit might possibly be inappropriate.⁷³⁴

⁷³⁴ CTV Staff, "PMO Tried to keep Trudeau's Vacation Details Secret", *CTV News* (2 January 2017), online: <<https://www.ctvnews.ca/politics/pmo-tried-to-keep-trudeau-s-vacation-details-secret-1.3225061>>.

It is because the news media is omni-present that they regularly report on ethics matters and seek information from the commissioner's office. Whereas it was once left to the media to figure out these matters for themselves, matters of public sector ethics can often be incredibly nuanced so it behooves ethics commissioners to engage with the media when they can. The media sometimes needs help sorting out who the players are and what issues, if any, actually fall under the commissioner's jurisdiction. Former commissioner Mary Dawson's approach to dealing with the media varied throughout her time in office, but in 2016 she acknowledged the importance of her relationship with the media when she said: "I am also as open with the media as I am permitted to be under the two regimes. I believe the media can only help to communicate the existing ethics rules, thus performing an educational role."⁷³⁵

Part of the media's educational role is in interpreting the commissioner's reports, especially annual and investigation reports, and relaying that information to the public. Stories about scandals generate interest and the fact that much of the news is consumed online now means that this interest can be tracked and monetized. Because scandals get attention, the media has a powerful platform from which to educate or mis-educate the public. This has not always been the case however. Ethics commissioners have not always been able to put out a press release about something interesting they have seen or done and have that matter garner significant public attention. Many reports have historically gone unnoticed by the media and have even received little to no attention from Parliament itself. Commissioners can no longer afford to decline to comment and say that a report "speaks for

⁷³⁵ Dawson *Emerging Issues*, *supra* note 883 at 3.

itself.”⁷³⁶ They must now find ways to intentionally leverage the media in order to raise the public’s awareness.

In fact, the online world and the ubiquity of social media have helped to dramatically expand the traditional media’s reach. The public now has greater access to reporting and can share information through online networks with greater ease and at very low cost. Social media users can even help to expose controversies⁷³⁷ or simply to bring more attention to them. The commissioner’s relationship with the media and social media is more important now than ever.

Academia

Although there are only a modest number of academics in Canada whose work focuses on public sector ethics, there are enough that they have made a real and lasting impact on the field. Academics have written books and scholarly articles, they write op-eds for major newspapers, blog posts and commentaries on social media. These works are all consumed by ethics commissioners across the country who themselves understand that they must be among Canada’s intellectual leaders in this space.

⁷³⁶ Monique Scott, “‘I want very badly to get it done,’ says Dawson of Trudeau report”, *Global News* (14 January 2018), online: <<https://globalnews.ca/news/3958992/mary-dawson-trudeau-ethics-report/>> (this web article is accompanied by a rare televised interview with Commissioner Dawson).

⁷³⁷ See *Harnessing Twitter*, *supra* note 412 (for a discussion of the active role that the general public is now taking in news reporting and news-making and how social media use plays an important role in enabling this engagement).

Aside from their written works however, academics also appear before House and Senate committees considering ethics matters, they interact with and are regularly relied upon by the media as experts and they regularly host conferences. In fact, the Conflict of Interest and Ethics Commissioner has attended numerous administrative law and public sector ethics conferences organized by Canadian academics. The commissioner must expect that certain academics will always read the office's reports and that feedback may be received from them. These are important relationships that allow for a high level of theoretical and practical engagement and have the potential to help advance thinking about these issues.

Other Government Actors (internal)

The Conflict of Interest and Ethics Commissioner is regularly called upon to give advice to other public sector actors who are interested in establishing or updating their ethics or accountability-related policies. Three examples may be instructive here. First the office “provided input to the Government of Canada Values and Ethics Network with regard to a new draft policy on conflict of interest for the public service.”⁷³⁸ Second, the office “provided advice to a Government of Canada working group seeking to establish a guideline on the reimbursement of costs for the divestment of assets.”⁷³⁹ Finally, the office entered into an agreement in 2017 that would allow its employees access to a wide range of learning opportunities through the Canada School of Public Service.⁷⁴⁰ Engagements like these are

⁷³⁸ *AR 2010-11 Code, supra* note 707 at 22.

⁷³⁹ *Ibid.*

⁷⁴⁰ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Opening Statement before House of Commons Standing Committee on Access to Information, Privacy and Ethics” (2 May 2017), online: <<https://ciec->

undertaken on a voluntary basis and are not reflected in the office's formal mandates, but they certainly have an influence on the office and its employees.

Other Accountability Actors

Agents of parliament have been created and have evolved in an uncoordinated manner. This may be less than ideal. Christopher Dunn thinks that these offices should have an element of collegiality in their operation. He argues that there should be something akin to a college of legislative officers. This level of coordination could help to raise their individual and collective profiles, allow them to engage in common/collective public consciousness-raising, engage in common media training and allow them to sponsor and/or undertake common studies about related or identical issues.⁷⁴¹ Although no such college has been established to date, there are other ways in which legislative ethics officers have begun to work together.

First, ethics commissioners across Canada formed a group called the Canadian Conflict of Interest Network (CCOIN) in 1992. As Canada's first Senate Ethics Officer Jean Fournier explained:

Since the conflict of interest rules applicable to legislators in the various jurisdictions generally cover the same broad subject areas, it is useful for ethics commissioners to maintain a level of contact with colleagues across Canada in

ccie.parl.gc.ca/en/publications/Documents/Presentations/Opening%20Statement%20ETHI%20%20May%20202,%202017%20EN.pdf at 3.

⁷⁴¹ Christopher Dunn, "The ethical structure of provincial governments" (Presentation delivered to the Public Interest Disclosure Conference in St. John's, Newfoundland, 3 October 2012).

order to be able to exchange information, thoughts on best practices, and ideas on issues of common interest.⁷⁴²

The group receives administrative support from the Office of the Conflict of Interest and Ethics Commissioner and continues to meet at least once a year. Although there are no agendas or proceedings made public from their meetings, it is known that they regularly invite at least one guest speaker.⁷⁴³ The agenda otherwise covers matters of common interest to the commissioners (e.g. best practices) and provides opportunity to brainstorm new ideas and share recent developments. The group also maintains a master shared document that describes and analyzes all of their major investigation reports, including those requests that result simply in reports to explain why no investigation will take place. Members of CCOIN also have an email listserv and will email one another on rare occasion with questions about how others might handle a particular situation.

Despite the existence of CCOIN and the usefulness of their annual meetings, Canada's many ethics commissioners do not produce any joint publications that might draw attention to leading industry standards. Given the growth in interest in the work of these individuals, CCOIN could be leveraged as a way to gather and disseminate more information for public consumption. A simple example that might go a long way to helping to inform the public about the ethics rules applicable to their elected representatives might be the publication of a comparative analysis of all the major aspects of the different regimes.

⁷⁴² Jean T Fournier, "Recent Developments in Canadian Parliamentary Ethics" (2009) 32:2 Can Parl Rev 9 at 11.

⁷⁴³ York University's University Professor Emeritus Ian Greene was invited to give a presentation in 2018. No transcripts of those proceedings are publicly available however.

As mentioned above in chapter three, a working group of federal agents of parliament was once formed so that they could collectively advocate to be excluded from Treasury Board policies that might compromise their independence.⁷⁴⁴ This group appears to still exist⁷⁴⁵ because working together with other agents and officers is crucial. One reason why this is crucial is because parts of their mandates can sometimes overlap and/or conflict.

An excellent example of such a conflict can be found in the definition of private interest that is found in the *Lobbying Act* versus the one that is found in the *Conflict of Interest Act*. The meaning of a private interest has been interpreted differently by the two commissioners. Rule 8 under the Lobbyists Code of Conduct states that “lobbyists should not place public office holders in a conflict of interest by proposing or undertaking any action that would constitute an improper influence on a public office holder.”⁷⁴⁶ Former Lobbying Commissioner Karen Shepherd’s interpretation of Rule 8 was that political activities undertaken by lobbyists could count as actions that put a public office holder in a conflict of interest by advancing the public office holder’s private interest.⁷⁴⁷ This suggested a broader interpretation of private interest than that which had been advanced by Commissioner

⁷⁴⁴ *Chaplin LLM, supra* note 77 at page 30.

⁷⁴⁵ Bill Curry, “Watchdogs of Parliament forge closer ties”, *The Globe and Mail* (12 May 2004), online: <<https://www.theglobeandmail.com/news/politics/watchdogs-of-parliament-forge-closer-ties/article4170488/>> (Curry notes that: “...most of the agents now meet about every other month over meals, sometimes at Ottawa’s Rideau Club, to discuss mutual issues”).

⁷⁴⁶ *Lobby Code, supra* note 524 at Rule 8.

⁷⁴⁷ See e. g. Canada, House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Hansard*, 40th Parl, 3rd Sess, No 26 (21 October 2010) at 1710 (Commissioner Karen Shepherd).

Dawson under the *Conflict of Interest Act*.⁷⁴⁸ Commissioner Dawson had decided in the Cheques Report in 2010 that private interests were limited to pecuniary interests and did not include advancing someone's political interests.⁷⁴⁹ The lesson learned from this confusion was that there is a need to work together on some matters so that there is consistency across different regimes that apply to the same people.⁷⁵⁰

Adam Dodek agrees that there are some important synergies between the two offices and has even suggested that it might be prudent to combine them.⁷⁵¹ In fact, Ontario's Integrity Commissioner is also its Lobbyists Registrar. So are Alberta's, Manitoba's, New Brunswick's and Prince Edward Island's.⁷⁵² Combining the federal offices would require action by Parliament, which has not yet taken place. Instead, Commissioner Mario Dion worked with the Commissioner of Lobbying Nancy Bélanger to put together a Memorandum of Understanding in March 2018. Under this MOU they have "undertaken to jointly organize

⁷⁴⁸ Canada, Library of Parliament, *41st Parliament Current and Emerging Issues: The Federal Accountability Act: Ethics and Public Office*, by Élise Hurtubise-Loranger & Dara Lithwick (June 2011).

⁷⁴⁹ *Cheques Report*, *supra* note 647 at 16.

⁷⁵⁰ Interestingly, Commissioner Dion has expanded the definition of private interest to potentially include financial, social and/or political interests (See *Trudeau II*, *supra* note 10 at paras 290-291).

⁷⁵¹ *Dodek*, *supra* note 443 at 109.

⁷⁵² Ian Stedman, "Everything Under one Roof: Canada's Evolving Model of Parliamentary Ethics" (2018) 9:1 *Jindal Global LR* 109 [*Stedman Roof*].

educational activities for their respective audiences.”⁷⁵³ It is conceivable that further agreements could arise as the two offices realize their synergies and identify further opportunities for collaboration. The Office of the Conflict of Interest and Ethics Commissioner is also a founding member of a newly formed network of conflict of interest and parliamentary ethics organizations within the Francophonie. This network occupies a role that is similar to CCOIN’s and allows participants to share best practices with a view to enhancing their expertise. The first meeting took place on July 9, 2018 in Quebec City.⁷⁵⁴

International Influences

Outside of CCOIN, there are several other international bodies with which the COIEC has engaged, either directly or indirectly. This includes being invited to international conferences and being asked to give opinions about reports published by international agencies with an interest in public sector ethics.

⁷⁵³ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Memorandum of Understanding between the Conflict of Interest and Ethics Commissioner and the Commissioner of Lobbying of Canada” (dated 22 March 2018), online: <<http://ciec-ccie.parl.gc.ca/EN/AboutUs/WhatWeDo/Pages/WorkingWithOthers.aspx>> (NB: this document appears to have been removed from the Office’s website on 24 October 2019, but can still be found on the website for the Commissioner of Lobbying’s website; see Canada, Office of the Commissioner of Lobbying, “Memorandum of Understanding” (accessed 29 October 2019), online: <https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_01451.html>).

⁷⁵⁴ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Working with Others” (accessed 19 July 2019), online: <<https://ciec-ccie.parl.gc.ca/en/About-APropos/Pages/WorkingOthers-TravaillerAutres.aspx>> (where Commissioner Dion writes: “Commissioner Mario Dion participated in the network’s first meeting, which took place on July 9, 2018 in Quebec City, in conjunction with the 44th plenary assembly of the Assemblée parlementaire de la Francophonie.”).

Former commissioner Dawson was asked to make a presentation at the Ethics in Democracy II Conference in El Salvador, in November 2009. This event was organized by the government of Canada with a focus on Mesoamerica but was attended by representatives from a broader range of countries.⁷⁵⁵ Dawson was also asked to testify at a government commission that was looking into public sector ethics issues related to the Airbus Affair⁷⁵⁶ and was asked to address a report from the Organization for Economic Cooperation and Development (OECD) that called on independent fiscal institutions to “develop a mechanism for external evaluation of their work to be conducted by local or international experts.”⁷⁵⁷

The OECD, alongside the Dutch National Integrity Office, hosted former commissioner Dawson at the Global Forum on Public Governance in Paris in May 2009, where post-employment rules were among the top issues discussed. The OECD acknowledged that member countries were having implementation challenges in relation to post-employment restrictions because contraventions become difficult to manage when an individual is no longer employed in a public sector position.⁷⁵⁸

A senior member of the COIEC’s team also attended and presented at a conference held in October 2018 in Croatia that was hosted by the Council of Europe’s anti-corruption monitoring body. All Council of Europe members have taken part in GRECO since 2010

⁷⁵⁵ Canada, Office of the Conflict of Interest and Ethics Commissioner, “The 2009-2010 Annual Report made under the Conflict of Interest Code for Members of the House of Commons” (Ottawa: 12 June 2010) at 20 [*AR 2009-10 Code*].

⁷⁵⁶ See *Dawson Oliphant*, *supra* note 460.

⁷⁵⁷ *PPF Report*, *supra* note 67 at 17.

⁷⁵⁸ *AR 2009-10 Code*, *supra* note 755 at 21.

and GRECO, as well as the separate “high-level conference”,⁷⁵⁹ is open to non-European states. As such, members of the COIEC’s team had an opportunity to engage with and learn from a very international community of state-level actors. This is not unusual of course, as the office regularly hosts delegations interested in learning about the Canadian model of parliamentary ethics, such as delegations from Mali, Kenya, Australia and even the United States.⁷⁶⁰

It is important to understand who the commissioner’s office works with and who they might be influenced by, but it is also important to be clear that the commissioner really only occupies one of many roles that are being played in the overall public sector ethics landscape.

6.6 Accountability Relationships

In chapter three I looked at how accountability generally works for agents of parliament. I relied then on Peter Aucoin’s description of accountability as being a two-part process: first of “holding to account” and second of “rendering an account.”⁷⁶¹ I will now describe how the COIEC satisfies those two requirements of accountability.

The Conflict of Interest and Ethics Commissioner exists because there was a perceived need to have someone neutral and independent who could provide opinions and

⁷⁵⁹ Although it is not clear what a “high level conference” is, there is a website that can be accessed. See Council of Europe, Group of States Against Corruption (accessed 19 July 2019), online: <<https://www.coe.int/en/web/greco/conferences>>.

⁷⁶⁰ *GRECO*, *supra* note 721 at 6.

⁷⁶¹ *Aucoin*, *supra* note 79 at 25-6.

analysis about conflicts of interest and other ethics issues. This position was created by statute and expected to be independent, but also required to be accountable in some way that makes sense given the constitutional framework from which the right to establish the office emerged. Given the unique nature of the office's very different mandates, figuring out how to make accountability work in an intelligible way seems to have been a challenge. What accountability means is different under the Code than it is under the *Act*. It is therefore impossible to say that the commissioner is held accountable in some particular way, but rather that the accountability expectations are nuanced, unclear and require a well thought out chart to even begin to keep track of (see Tables 1 and 2, below).

The Conflict of Interest and Ethics Commissioner notably does not report to a Minister under either the Code or the *Act*. This means that the office is also not subject to Treasury Board policies. The relationships outlined below are the only formal and informal accountability relationships that exist.

(a) The Prime Minister

The commissioner reports to the Prime Minister⁷⁶² with examination reports under the *Act* and these reports are provided to the subject of the report and made available to the public.⁷⁶³ The Prime Minister also has the power to appoint and remove the commissioner by virtue of the cabinet's role in governor-in-council processes, which could give rise to some tension. In a majority government the executive has a disproportionate amount of

⁷⁶² *Act*, supra note 13, s 44(7) (the Commissioner also reports to the Prime Minister under section 68(a), which relates to referrals made by the Public Sector Integrity Commissioner – this is not important for this dissertation).

⁷⁶³ *Act*, supra note 13, s 44(8).

power and does not need the approval of the other political parties to be able to remove the commissioner. As Paul Thomas explains, “[t]heory suggests that Parliament controls the executive, but in practice the reverse seems to be true.”⁷⁶⁴ The threat that is posed by this power to dismiss can in some Parliaments be seen as a power to hold the commissioner to account.

(b) To the House of Commons

Annual reports under the Code and the *Act* and inquiry reports⁷⁶⁵ under the Code are filed with the Speaker of the House of Commons. The Speaker then tables those reports in the House,⁷⁶⁶ but it has an obligation to debate the inquiry reports. There should be a reasonable expectation of being questioned by legislators after an annual report is filed with either house of Parliament. It is for this reason that two standing committees exist to review the commissioner’s work.

Standing Committees

Two standing committees of the House of Commons play a role in ensuring the commissioner’s accountability. Chapter 13 of the Standing Orders of the House of Commons establishes the Standing Committee on Access to Information, Privacy and Ethics (ETHI). Among other things, ETHI is responsible for reviewing the government’s proposed appointment(s) to the position of Conflict of Interest and Ethics Commissioner. Proposed

⁷⁶⁴ *PP&F*, *supra* note 45 at 289.

⁷⁶⁵ Again, this is the technical language used in the *Code* to denote investigations into alleged breaches of the *Code*.

⁷⁶⁶ *PC Act*, *supra* note 15, s 90(1)(a).

appointments are deemed referred to the committee that then has thirty days to decide whether to put forward a notice of motion to the House of Commons to ratify the appointment.⁷⁶⁷ Any such notice of motion is to be decided on without debate or amendment.⁷⁶⁸

With respect to the Code, the commissioner is required to carry out “duties and functions under the general direction of any committee of the House of Commons that may be designated or established by that House for that purpose.”⁷⁶⁹ The committee that has been created for this purpose is the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI). The commissioner is not required to report to ETHI or take any regular part in its deliberations *per se*,⁷⁷⁰ but is required to report to whatever committee has been given the same authority under the Standing Orders as ETHI has been given. The commissioner also does not have a positive obligation to regularly report to ETHI, only to answer to ETHI if and when the committee calls on the commissioner. This happens at least once every year however, when estimates are being considered.

The reasons ETHI might call on the commissioner are related to its precise mandate. ETHI is responsible for “the review of and report on the effectiveness, management and operation together with the operational and expenditure plans relating to the Conflict of

⁷⁶⁷ *Standing Orders*, *supra* note 176, s 111.1(1).

⁷⁶⁸ *Ibid*, s 111.1(2).

⁷⁶⁹ *PC Act*, *supra* note 15, s 86 (and section 86(4) says that duties under the *Act* are not to be overseen by this committee).

⁷⁷⁰ *Dawson Carleton*, *supra* note 516 at 4-5.

Interest and Ethics Commissioner”⁷⁷¹ as well as the review of the commissioner’s reports made under the Code⁷⁷² and the *Act*.⁷⁷³

The commissioner’s work is also overseen by the Standing Committee on Procedure and House Affairs.⁷⁷⁴ This committee is responsible for “the review of and report on all matters relating to the *Conflict of Interest Code for Members of the House of Commons*”⁷⁷⁵ including “any clarification, change or amendments to the Code or any of its related forms or guidelines.”⁷⁷⁶ The Standing Committee on Procedure and House Affairs has no mandate with respect to the *Act*.

Unlike with ETHI, the commissioner has rarely been asked to appear before the Standing Committee on Procedure and House Affairs. This is notable because the Committee has conducted reviews of the Code to which the commissioner has contributed,⁷⁷⁷ yet has only sought the commissioner’s attendance at committee on five occasions. This is a very low number. Evert Lindquist and Irene Huse have posited that parliamentary committees might be struggling to meet their oversight responsibilities because they are over-burdened by too much reporting. In their words, “...increased reporting has not necessarily led to more accountability or better organizational performance; rather, it might crowd-out other forms of assessments such as evaluation and reduce the ability of legislatures to hold the executive

⁷⁷¹ *Standing Orders*, *supra* note 176, s 108(3)(h)(iii).

⁷⁷² *Ibid*, s 108(3)(h)(vii).

⁷⁷³ *Ibid*, s 108(3)(h)(v).

⁷⁷⁴ *Ibid*, s 108(3)(a)(vii).

⁷⁷⁵ *Ibid*, s 108(3)(a)(vii)-(viii).

⁷⁷⁶ *Dawson Carleton*, *supra* note 516 at 4-5.

⁷⁷⁷ This will be detailed further in chapter 6, below.

to account.”⁷⁷⁸ This could be the same for the Standing Committee on Procedure and House Affairs. It may be the case that there is so much to do otherwise that oversight duties like this one can be given less energy unless and until something pressing arises.

Gwyneth Bergman and Emmett MacFarlane conducted a detailed study of the commissioner’s committee appearances. In their study they noted, among other things, that the commissioner’s work under the Code has been relatively ignored by the Standing Committee on Procedure and House Affairs⁷⁷⁹ and that this serves to limit the commissioner’s influence and the capacity of the office to exercise informal power.⁷⁸⁰ It seems to me that the Committee would call the commissioner to appear more often if it were actually under pressure to do so, which it arguably is not. The Code is currently structured so that any report after an inquiry must be debated in the House of Commons for a maximum of two hours after being tabled. This means that the House does get an opportunity to discuss important matters like inquiries when they arise. Unless they are looking to amend the Code then, the committee may see no reason to need to meet with the commissioner.

In my opinion, the Committee on Procedure and House Affairs ought to be required to meet with the commissioner every year in order to discuss the office’s annual report under the Code. This would ensure that the committee is forced to turn its attention to issues related to the governance of the ethical conduct of members, but also that the commissioner has an

⁷⁷⁸ Evert A Lindquist & Irene Huse, “Accountability and monitoring government in the digital era: Promise, realism and research for digital-era governance” (2017) 60:4 Can Pub Admin 627 at 631 [*Lindquist & Huse*].

⁷⁷⁹ *Bergman & Macfarlane, supra* note 91 at 20.

⁷⁸⁰ *Ibid* at 22.

opportunity to further explain anything found within the annual report. It also importantly provides the commissioner with a further opportunity to put recommendations on the record.

The commissioner should also be required to appear before ETHI whenever an examination report is released under the *Act*. Examination reports are provided directly to the Prime Minister, the subject of the complaint and posted online. Because members of parliament have absolutely no decision making role in relation to these reports, the *Act* has not been drafted so as to require them to be tabled in either house for debate. Requiring the committee to review these reports could help to inspire amendments to the *Act*, even if those amendments have to come from private members bills. Unfortunately, the history of parliamentary ethics laws in Canada is that public pressure has been necessary in order to really get Parliament's attention to take any progressive steps. The Code is not likely to change without public pressure and the *Act* is not likely to change unless it can be done without government members' votes. Given how much power to decide on disciplinary action is left in the hands of the Prime Minister under the *Act*, it is unlikely that a governing party would agree to open up the *Act* for amendment and risk the Senate using its leverage to force the government pull back on some of its powers. This is precisely what happened with the passing of the *Federal Accountability Act*, which initially attempted to assign Senate ethics oversight responsibilities to the COIEC. The Senate refused to pass the bill unless oversight over Senators' ethical conduct was removed from the COIEC's powers and assigned to an independent Senate Ethics Officer who would report directly and only to the Senate. All of these tensions might be lessened if the standing orders were amended to require mandatory committee attendances by the commissioner. Given the twenty-four hour

news cycle and rising public engagement in relation to public sector ethics, it might be possible to generate increased public pressure that could lead to meaningful reform.

(c) To the Senate

Annual reports under the *Act* are filed with the Speaker of the Senate. The Speaker then tables those reports in the Senate.⁷⁸¹ Although it could if it wanted to, the Senate is not obligated to respond to these reports and has not done anything in response to them to date. Given that the Senate has a role in the legislative process however, the Commissioner is still required to abide by the formality of filing annual reports with the Speaker of the upper house.

(d) To the Speakers

Further to filing annual reports and inquiry reports through the two speakers, the commissioner also submits the office's spending estimates to the Speaker of the House of Commons, who, as outlined in chapter four, provides them to the Treasury Board. The Standing Committee on Access to Information, Privacy and Ethics⁷⁸² then calls the commissioner to defend the estimates.

(e) To the Federal Court of Appeal

Section 28 of the *Federal Courts Act* makes clear that the Federal Court of Appeal has jurisdiction to "hear and determine applications for judicial review made in respect

⁷⁸¹ *PC Act*, *supra* note 15, s 90(1)(b).

⁷⁸² *Dawson Carleton*, *supra* note 516 at 4-5.

of...the Conflict of Interest and Ethics Commissioner appointed under section 81 of the *Parliament of Canada Act*.⁷⁸³ This jurisdiction is tempered by the *Parliament of Canada Act*, which stipulates that “[t]he Commissioner shall perform the duties and functions assigned by the House of Commons for governing the conduct of its members when they are carrying out the duties and functions of their office as members of that House”⁷⁸⁴ and that “[t]he Commissioner enjoys the privileges and immunities of the House of Commons and its members when carrying out those duties and functions.”⁷⁸⁵ The commissioner’s decisions under the Code are therefore not subject to judicial review, but decisions under the *Act* are.⁷⁸⁶ This difference exists because the *Act* of course applies to public office holders and not to members of the House of Commons. Overseeing the conduct of public office holders is not something that falls within the constitutional rights and privileges of Parliament, as will be explored further below. That being said, the commissioner is considered to be a “Commissioner” under *Federal Courts Act*⁷⁸⁷ and this means that the reasons for which a judicial review can be sought are very specific:

Grounds of review

⁷⁸³ *Federal Courts Act*, RSC 1985, c F-7, s 28(1)(b.1) [*FCA*].

⁷⁸⁴ *PC Act*, *supra* note 15, s 86(1).

⁷⁸⁵ *Ibid*, s 86(2).

⁷⁸⁶ See also Canada, Office of the Conflict of Interest and Ethics Commissioner, “Speaking Notes during a Panel Discussion on Ethics in Government at the Annual General Meeting of the Canadian Political Science Association at the University of Ottawa” (4 June 2015), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Speaking%20Notes%20Annual%20General%20Meeting%204%20juin%202015%20EN.pdf>> at 1 [*Dawson Ottawa CPISA*].

⁷⁸⁷ Except with respect to the Commissioner’s functions under the Code (See *FCA*, *supra* note 783, s 2(2)).

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.⁷⁸⁸

Although one might think that it is generally members or public office holders who would bring an application for judicial review of a decision made by the Conflict of Interest and Ethics Commissioner, these applications have only been brought by the advocacy group Democracy Watch.⁷⁸⁹

Advocacy groups and members of the public cannot however bring civil proceedings against the commissioner, nor can the Crown bring criminal charges. The *Parliament of Canada Act* states that:

No criminal or civil proceedings lie against the Commissioner, or any person acting on behalf or under the direction of the Commissioner, or any person acting under the direction of the Commissioner, for anything done, reported or said in good faith in the exercise or purported exercise of any power, or the performance or purported performance of any duty or function, of the Commissioner under this Act.⁷⁹⁰

⁷⁸⁸ *FCA*, *supra* note 783, s 18.1(4).

⁷⁸⁹ See e.g. *Democracy Watch v Conflict of Interest and Ethics Commissioner*, 2009 FCA 15; *Democracy Watch v Canada (A-G)*, 2018 FCA 194.

⁷⁹⁰ *Ibid*, s 86.1(2).

This applies to work that is done under either the *Act* or the Code and serves to insulate the commissioner and staff from judicial scrutiny of their personal conduct as long as they acted in good faith and in the purported exercise of their official duties. Presumably this was meant to insulate the commissioner and staff if/when they published something that, if not for the fact that it was published in the course of their work, might be considered defamatory.

(f) To the Public

Although the public can certainly disagree with the commissioner and can seek judicial review of decision made under the *Act*, the Commissioner is not actually held to account by the public through any direct formal mechanisms. It is the Federal Court of Appeal that must be engaged in order to hold the commissioner to account if and when appropriate. The office is also not subject to Access to Information laws, which means that the commissioner does not have to provide individuals with access to documents upon request. This is a defacto recognition that the office is not a government institution.⁷⁹¹

There are other specific public reporting requirements however. The *Act* requires that a public office holder report to the commissioner when they recuse themselves from a decision in an effort to avoid a conflict of interest. Information about this recusal is then declared publicly. Other declarations made by public office holders are also made public, such as when certain gifts are received,⁷⁹² when certain outside activities are engaged in⁷⁹³

⁷⁹¹ *Dawson Carleton, supra* note 516 at 6.

⁷⁹² *Act, supra* note 13, s 25(5).

⁷⁹³ *Ibid*, s. 25(4).

and when particular assets are owned.⁷⁹⁴ The commissioner is even expected to make examination reports under the *Act* available to the public.⁷⁹⁵ Similarly, the Code requires that inquiry reports be made public,⁷⁹⁶ disclosure summaries be made available for public inspection at the office and online⁷⁹⁷ and that the commissioner “undertake educational activities for Members and the general public regarding this Code and the role of the Commissioner.”⁷⁹⁸

The following two tables are a visual representation of the commissioner’s accountability relationships, as have been described herein. They are divided into those relationships where the commissioner is required to render an account (Table 1) and those relationships where another entity is charged with holding the commissioner to account (Table 2).

⁷⁹⁴ *Ibid*, s. 25(2).

⁷⁹⁵ *Ibid*, s 44(8).

⁷⁹⁶ *Code, supra* note 14, s 28(2).

⁷⁹⁷ *Ibid*, s 23(2).

⁷⁹⁸ *Ibid*, s 32.

Table 1: Commissioner Renders Account To

	Prime Minister	House of Commons (Speaker)	The Senate (Speaker)	The Public
Under the Act	Submits Examination Reports.	1) Submits Annual Reports, 2) Submits the office's spending estimates	Submits Annual Reports.	Several Public Registry items, as described in s. 51(1), ⁷⁹⁹ including, but not limited to: public declarations, summary statement, gifts forfeited and any other documents the Commissioner considers appropriate. Examination reports must also be made available to the public (see s 45(3)).
Under the Code		1) Submits Inquiry Reports, 2) Submits Annual Reports		Annual reports, financial disclosures, sponsored travel, educational outreach.

⁷⁹⁹ *Act, supra* note 13, s 51(1).

Table 2: Holds Commissioner to Account

	The Federal Court of Appeal	The House of Commons Standing Committee on Procedure and House Affairs (PROC)	The House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI)
Under the Act	Reports under the <i>Act</i> are subject to judicial review on limited grounds. ⁸⁰⁰	It has no role with respect to the <i>Act</i> .	ETHI is responsible for reviewing and reporting to House & Senate on matters related to the office’s work. The commissioner can be called to appear (discretionary) but does not specifically report directly to ETHI.
Under the Code	Reports under the Members’ Code are <u>not</u> subject to judicial review.	The Standing Committee on Procedure and House Affairs has been delegated oversight responsibility for the Code. The Committee Reports back to the House.	

⁸⁰⁰ See *Act*, *supra* note 13, s 66.

(g) Other

Not all relevant accountability structures are formal in nature. Greg Inwood has described accountability as requiring some combination of the types of relationships and regimes found in the following list:

- 1) Accountability to a superior
- 2) Accountability to elected officials
- 3) Accountability under the law
- 4) Accountability to professional norms and institutions
- 5) Accountability to the public⁸⁰¹

It is number four that needs to be further addressed. While I have discussed ways in which the Conflict of Interest and Ethics Commissioner is formally accountable to the institutions of Parliament, there are also other relationships and professional norms that we must take into consideration. The first of these is the office's relationship to other accountability offices. I have earlier outlined some of the specific interactions that take place between these offices, but the commissioner arguably also has informal obligations to those other agents and officers of parliament by virtue of their shared status as accountability officers. These individuals have all been trusted by Parliament to receive delegated powers that are properly the jurisdiction of Parliament itself. If one officer or agent abuses that trust it can possibly have a deleterious effect on the reputations of the others. Likewise, each of these individuals must take seriously that they are expected to be both independent (to the extent that they can be) and accountable. If any one does not take these obligations seriously, then they risk causing damage to the trust that Parliament and the public place in all of these institutions.

⁸⁰¹ Gregory J Inwood, "The Accountable Public Official: Teaching Accountability and Ethics to Public Servants" (2008) 1 JPPL 379 at 384 (citing R L Gagne, "Accountability and Public Administration" (1996) 39 Can Public Admin 214).

The second relationship of accountability worth considering exists because more than one individual has held the position of Conflict of Interest and Ethics Commissioner. Each successive commissioner must be accountable to the established history of the office itself. This is not an obligation that emerges from the legislation that creates the commissioner but can instead be understood as showing respect for the history of the office and the decisions it has made. If each successive commissioner treated the office as though it were newly established at the time that they received their appointment, the office's stakeholders (members, public office holders, the public, etc.) might lose confidence in either the principles upon which the office is built or the rules that are being administered. This accountability relationship is similar in nature and complimentary to the idea that the commissioner must be accountable to other officers and agents.

Finally, there is a professional relationship of accountability that exists with the academic community whose work relates to the COIEC and the other agents and officers of parliament. Academic commentators analyze and interpret the COIEC's work and engage in a dialogue with the COIEC and the public through their writing and teachings. This relationship is very important because it offers the COIEC a shared community of interest with which the office and its staff can regularly interact and look to for high-level independent third-party analysis about their work.

The challenge with these three additional accountability relationships that I am proposing is that it is not clear at first glance how they fit into the categories of 'holding to

account’ or ‘rendering an account.’⁸⁰² This is easily resolved by framing these relationships as being ones where the commissioner is informally rendering an account to a party that is different than the one that will hold the commissioner to account. The COIEC benefits from having this robust and heightened environment of accountability, but it is only Parliament that can formally (and the public more informally) hold the commissioner to account for neglecting these relationships.

6.7 The Role of Parliamentary Privilege

The challenge of securing a meaningful level of structural and operational independence is made clear from our close look at the many formal and informal accountability relationships to which the office must attend. Coupled with the general recognition that it could be political suicide for a party to ask the commissioner to stop doing work that the public deems important, the law of parliamentary privilege also serves as a mechanism by which a degree of independence for the office is secured.

Parliamentary privilege refers to the collection of constitutional rights and immunities that are enjoyed by the House of Commons and its members. According to the House of Commons’ Compendium of Procedure:

The rights and immunities related to Members individually may be grouped under the following headings:

- freedom of speech;
- freedom from arrest in civil actions;
- exemption from jury duty; and
- exemption from being subpoenaed to attend court.

⁸⁰² *Aucoin, supra* note 79 at 25-6.

The two most important collective privileges or powers of the House of Commons are its disciplinary powers and its exclusive right to regulate its own internal affairs.⁸⁰³

Because these rights are constitutional in nature, they exist separate from and are not decided upon by parliamentarians. It is for the court to recognize when privilege applies. That being said, the court cannot determine the extent or breadth of a privilege, but can instead merely determine that one exists.⁸⁰⁴ Perhaps because of the odd nature of the commissioner's dual mandates, Parliament made clear in the *Parliament of Canada Act* that “[t]he Commissioner enjoys the privileges and immunities of the House of Commons and its members when carrying out those duties and functions” that are related to Members of the House of Commons.⁸⁰⁵ The commissioner's work related to public office holders under the *Act* received no corresponding recognition. This makes sense because it is the collective (not individual) privileges that would apply by virtue of the office's delegated authority. Unlike the Code that applies only to members, the *Act* also looks outward at public office holders who are not also members, rather than inward at the House's own internal affairs.⁸⁰⁶

All of this has obvious implications for whether and which stakeholders can challenge or appeal the commissioner's decisions in court, such as a decision about whether or not to investigate a matter. As a metric of independence, the existence of parliamentary privilege serves to clarify that the commissioner is able to act free from a certain type of

⁸⁰³ Canada, House of Commons, *Compendium of Procedure – Parliamentary Privilege* (accessed 18 July 2019), online: <https://www.ourcommons.ca/About/Compendium/ParliamentaryPrivilege/c_g_parliamentaryprivilege-e.htm>.

⁸⁰⁴ See *Canada (House of Commons) v Vaid*, [2005] 1 SCR 667, 2005 SCC 30 at para 29.

⁸⁰⁵ *PC Act*, *supra* note 15, s 86(2).

⁸⁰⁶ *Supra*, note 803.

accountability oversight. According to section 18 of the *Constitution Act, 1867*, the House of Commons enjoys such privileges and immunities “as are from time to time defined by Act of the Parliament of Canada” as long as at the time the Act is past those privileges do not exceed the privileges, immunities, or powers of Parliament that exist in the United Kingdom of Great Britain and Ireland.⁸⁰⁷ Not only has Parliament expressly conferred parliamentary privilege on the COIEC in the *Parliament of Canada Act*, but the court in *Duffy*⁸⁰⁸ has also confirmed that parliamentary privilege extends to Parliament’s right to regulate its own affairs and procedures, including the right to enforce discipline on Members.

The Supreme Court of Canada explained in *New Brunswick Broadcasting Co*, that:

If a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body.⁸⁰⁹

This means that once the court recognizes a privilege it cannot dig into or opine about what the breadth and scope of the privilege is. As I will demonstrate below in chapter eight, this is an incredibly important point that has huge implications for the COIEC.

Recognizing also that some matters may be so significant that the commissioner will refer them to the RCMP for investigation, it was made clear in the *Parliament of Canada Act* that the commissioner, and any person acting under the their direction, “is not a competent or compellable witness in respect of any matter coming to his or her knowledge as a result of exercising any powers or performing any duties or functions of the

⁸⁰⁷ *Constitution Act 1867*, *supra* note 18, s 18.

⁸⁰⁸ *R v Duffy*, 2015 ONCJ 694, paras 89-91.

⁸⁰⁹ *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319.

commissioner under this Act.”⁸¹⁰ This applies to the commissioner’s work under both the *Act* and the Code and, coupled with the commissioner’s parliamentary privileges and immunities, effectively restricts the Crown from being able to subpoena the commissioner’s documents. This is an important reason why the *Act* and the Code place all responsibility in one person and do not carve out sub-powers for other individuals, such as a deputy commissioner. Having broad exclusion from being subject to a subpoena makes a clear statement about the Office’s independence from judicial oversight.

6.8 Important Limits on Independence

Despite the important role that parliamentary privilege plays in strengthening the office’s independence, it is arguably more meaningful in minority government situations. In part, having privilege allows the commissioner to act independently and to avoid being subject to legal proceedings in relation to work done under the Code if a member or the governing party disagrees with a decision or report. In a majority government with strong party discipline however, the commissioner can simply be removed at the whim of the Prime Minister. There would be no way to sue the government or Parliament for wrongful dismissal since the commissioner has no legal right to demand that cabinet explain its decisions.⁸¹¹

There are also two other important limits to the commissioner’s independence. First, as noted above, renewals of appointment need not be approved by all political parties. Instead, they are decided upon by cabinet. This could lead a commissioner seeking re-

⁸¹⁰ *PC Act*, *supra* note 15, s 86.1(1).

⁸¹¹ See e.g. *Marin v Office of the Ombudsman*, 2017 ONSC 1687 (in which a former Ombudsman of Ontario brought an unsuccessful suit for wrongful dismissal).

appointment to look favourably upon the current government. Former commissioner Dawson had already been reappointed twice during the time that she was investigating Prime Minister Justin Trudeau. These facts caused Democracy Watch to launch a public campaign calling for changes to be made to the re-appointment process⁸¹² and to advocate for the commissioner to delegate her investigation to a third party who could conduct the investigation without the obvious tension of it being related to the person who had the sole authority to renew the investigator's contract.⁸¹³

The second limit to independence is that there is nothing that would prevent a sitting commissioner from being offered or given extra duties or mandates. For example, legislation could be passed that assigns further duties and gives a pay raise to the sitting commissioner. This could be especially problematic if that legislation is passed by and under a majority government. There are examples of sitting commissioners at the provincial levels in Ontario⁸¹⁴ and Northwest Territories⁸¹⁵ receiving contracts from governing parties that add

⁸¹² Democracy Watch, *Petition*, "Stop Bad Government Appointments" (18 January 2018), online: <<https://democracywatch.ca/democracy-watch-files-lawsuits-challenging-trudeau-cabinets-appointments-of-new-ethics-commissioner-and-lobbying-commissioner/>>.

⁸¹³ *Supra*, note 729.

⁸¹⁴ See Financial Accountability Office of Ontario, *Media Release*, "Integrity Commissioner J. David Wake Appointed Temporary Financial Accountability Officer of Ontario" (28 September 2017), online: <https://www.fao.on.org/en/Blog/media/Temporary-Officer-announcement_MR> (in which Ontario's Integrity Commissioner was given temporary new duties via an Order in Council appointment).

⁸¹⁵ *Stedman Roof, supra* note 752 at 72 (where I write that: "Interestingly, the Conflict of Interest Commissioner also has a separate contract with the Office of the Executive Council to serve as its Ethics Counsellor for senior appointees in the Government. This requires the Commissioner to provide advice under the Code of Conduct Respecting Conflict of Interest and Oath of Office and Secrecy for the Employees of the Government of the Northwest Territories.").

temporary new duties. These commissioners then take direction from their Parliaments but also become employees of the government. Coupled with the possible pressures of seeking reappointment, this could lead to situations where a commissioner is inclined to agree to a raise and/or new contracts or mandates even when doing so would be undesirable. Ethics commissioners should therefore not be subject to salary adjustments that are not pre-determined and should not receive extra contracts or temporary pay from governments⁸¹⁶ unless those changes also require broad parliamentary consensus and approval. Commissioners must not be placed in a position where they may be concerned about maintaining the extra pay that comes with a government contract instead of simply fulfilling their primary duties.

The existence of the Senate at the federal level arguably serves to limit the governing party's ability to create new legislative duties for a sitting commissioner. That being said, the Senate would play no role in non-legislative contracts or emergency delegations. This happened in Ontario when Integrity Commissioner David Wake was appointed Temporary Financial Accountability Officer (FAO) for the province when the FAO went on extended medical leave.⁸¹⁷ It would be incumbent upon the sitting commissioner to decide whether or not it is appropriate to accept extra duties, but the pressure to do so is quite simply unacceptable if we want these roles to at least appear to be independent of government. This

⁸¹⁶ Chris Stockwell, "The Independence of Parliament and its Officials" (1999) 22:1 Can Parl Rev 2.

⁸¹⁷ Office of the Integrity Commissioner of Ontario, *News Release*, "Integrity Commissioner J. David Wake appointed Temporary Financial Accountability Officer" (27 October 2016), online: <<http://www.oico.on.ca/info/news---full-article/2016/10/27/integrity-commissioner-j.-david-wake-appointed-temporary-financial-accountability-officer>>.

is accordingly an example of how the structure of the COIEC's office could leave it vulnerable to political pressures. The best way to avoid this would be to make it clear in the *Parliament of Canada Act* not only that the commissioner is expected to carry out the duties as assigned,⁸¹⁸ but also that the commissioner shall not be permitted to be assigned nor accept further contracts or remuneration without broad consultation and consent. In other words, to ensure that a governing party with a majority could not unilaterally compromise the commissioner's independence.

6.9 Conclusion

In some ways, the COIEC is similar to other agents of parliament. In other ways it is completely different. In this chapter I have explained the appointment and removal processes for the commissioner, as well as how budget estimates are handled and how autonomy over operational and human resource decisions is ensured. I have demonstrated that the COIEC is different than other agents in all of these areas. I have also looked at what the COIEC's operational responsibilities are and how they are managed, who the office's stakeholders are, who its influential relationships are with and how the COIEC is held accountable. The purpose of this analysis was to establish clarity with respect to the office's operations and it will inform my arguments in chapter eight in relation to the COIEC's efforts to push for reform. This information also situates the COIEC as an entity that has been given parliamentary privilege that shields work under the Code from judicial review. As I will argue, the implication of this privilege under the law is that the commissioner also has the ability to shield some work related to the *Act* from judicial scrutiny.

⁸¹⁸ See *PC Act*, *supra* note 15, s 85.

7. Parliament is Resisting Modernization

7.1 Introduction

In this chapter I explain why the office's commissioners have been unable to convince parliamentarians to work towards adequately modernizing the office's mandates. Commissioner Dawson has made submissions to standing committees in 2012, 2013 and 2015 regarding how to improve the *Act* and the Code. The response to those recommendations has been insufficient. Not only have the office's commissioners carefully expressed their disappointment, but so too have academia, the media, the public and civil society groups. I argue that progress is slow because there is an inherent conflict of interest in the fact that parliamentarians are solely responsible for strengthening the conflict of interest and ethics rules that apply to them under the Code and the Prime Minister is reluctant to advance a reform agenda under the *Act*. Due also perhaps to parliamentarians' busy schedules or to a lack of pressure being put on them by the electorate, the committees' studies of the *Act* and Code have become stale-dated.

7.2 Commissioner's Calls for Amendment and Related Responses

Included in the Code is a requirement that the Standing Committee on Procedure and House Affairs undertake a comprehensive review of the rules every five years and report back to the House.⁸¹⁹ The *Act* requires only one such review and it must be conducted by whichever committee or committees the House and Senate assign the task to and begin within five years of the *Act* coming in to force.⁸²⁰ That/those committees are then

⁸¹⁹ *Code, supra* note 14, s 33.

⁸²⁰ *Act, supra* note 13, s 67(1).

expected to report back to Parliament with any recommended changes to the *Act*.⁸²¹ There is no indication as to what exactly these reviews must entail or who, if anyone, must be consulted.

These mandatory periodic reviews of parliamentary ethics laws are actually uncommon in Canada. That being said, they are incredibly important so that Parliament has an opportunity to keep its standards current and to have effective systems of administration in place.⁸²² One review of the *Act* and two reviews of the Code have been undertaken to date. On December 10, 2012 the House of Commons designated the Standing Committee on Access to Information, Privacy and Ethics for the purposes of conducting a mandatory section 67 review of the *Act*. Although the *Act* had come into force back in 2007, this first review was allowed to slip under the radar until January 2013. By contrast, the first reviews of the *Code* (which was adopted by the House of Common in April 2004) happened much earlier - in 2007. This was perhaps too early to be as robust and meaningful as it might have been had it been undertaken at a later date, but it did allow some early wrinkles to be ironed out. The Standing Committee on Procedure and House Affairs began its second comprehensive review of the Code in May 2012.

Former commissioner Dawson was in office for each of the reviews that have been conducted of both the *Act* and the Code. She was called to make submissions before the

⁸²¹ *Ibid*, s 67(2).

⁸²² Jean T Fournier, “Strengthening Parliamentary Ethics: A Canadian Perspective” (Paper delivered at the Australian Public Sector Anti-Corruption Conference in Brisbane, 29 July 2009), online: <<http://sen.parl.gc.ca/seo-cse/PDF/BrisbaneSpeech-e.pdf>> at 13 [*Fournier in Brisbane*].

committees and the office posted those submissions online so that they could be downloaded by anyone interested. This process contrasts with the Senate’s Standing Committee on Ethics and Conflicts of Interest for Senators, which meets in camera when reviewing its Code of Ethics. Dawson’s submissions were reasonably consistent across the board, in that she focused a great deal on adding mandatory training requirements to both regimes, amending the *Act* and Code to require all public office holders and members to participate in training sessions within a reasonable period of time after taking office and emphasized greater transparency and greater harmonization of the two regimes to help reduce confusion about their application.⁸²³

(a) 2013 Submission re: Act

Commissioner Dawson’s 2013 submissions were very comprehensive and focused a great deal on the clarity of the language in the *Act*. Her experience administering the *Act* to that point had allowed her to make note of situations where the language used gave rise to unintended loopholes⁸²⁴ and unnecessary over-reach.⁸²⁵ There are many recommendations of this nature, but there are also some important recommendations that focus more broadly on the importance of educating and informing the office’s many stakeholders. For example, that all public office holders should be required to participate in training sessions⁸²⁶ and that

⁸²³ *Dawson CPSA Ottawa, supra* note 786 at 2-3.

⁸²⁴ Canada, Office of the Conflict of Interest and Ethics Commissioner, “The Conflict of Interest Act: Five-Year Review – Submission to the Standing Committee on Access to Information, Privacy and Ethics” (30 January 2013), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InternalReports/ETHI%20submission%20re%20five-year%20review%20of%20Act%20-%20Jan2013.pdf>> (see e.g. recommendation 2-10 on page 76 and recommendation 3-4 on page 77) [*2013 Act Submission*].

⁸²⁵ *Ibid*, recommendation 2-11 on page 76.

⁸²⁶ *Ibid* at 60.

the commissioner be permitted to comment publicly when it is necessary to correct misinformation that is in the public domain.⁸²⁷

Commissioner Dawson had historically taken a very conservative approach to her interpretation of the *Act*. It is for this reason that she would have been requesting amendments to allow her to do something as simple as speaking publicly to correct misinformation. The *Act* does not however explicitly prohibit public engagement by the commissioner. Another person holding the same position might have instead taken the liberty of asserting their independence by issuing clarifications as needed. The Committee also heard from individuals and organizations with different perspectives. These included university Professors (e.g. Ian Greene, Lorne Sossin, Lori Turnbull, Adam Dodek, etc.), professional and civil society groups (e.g. Democracy Watch, Canadian Bar Association, Government Relations Institute of Canada) and other officers and agents of parliament from across the country.

Dawson made over 70 recommendations in her submissions to the committee. Although many of them were mentioned in the Committee's final report, only two were adopted.⁸²⁸ The general format of the Report's content was that it was divided into topic areas. It first addressed the commissioner's recommendations under each particular heading and then considered other witness's opinions about the commissioner's recommendations.

⁸²⁷ Canada, House of Commons, *Standing Committee on Access to Information, Privacy and Ethics*, "Statutory Review of the *Conflict of Interest Act*", 41st Parl, 2nd Sess (Ottawa: February 2014) at Appendix A [2014 Code Review].

⁸²⁸ *Supra*, note 695 at 2-3.

Dawson later noted that many of the opinions that the committee included in the Report were new to her and that she had not been given the opportunity to comment on them before the report was finalized. This may seem strange given that she was the individual who would ultimately be responsible for administering those new rules, but it is not technically improper in any legal sense because neither the *Act* or Code even suggest that the commissioner's perspective ought to be given greater weight.

The committee's final report was not unanimous. The opinions from the NDP and the Liberal party that accompanied its release were both dissenting. The Liberal committee vice chair Scott Andrews called the report "a complete farce" and said that the "recommendations outlined in this report are certainly not those of the committee as a whole."⁸²⁹ The NDP took the position that the process was carried out in bad faith and highly politicized.⁸³⁰ Despite these dissenting positions, the Conservative government actually reviewed and supported the report.⁸³¹ Despite their support however, the overall result was that absolutely no amendments were put forward.

(b) 2012 Submission re: Code

Reviews of the Code have come to much different outcomes than reviews of the *Act*. Whereas a comprehensive report outlining clear and specific recommendations to improve

⁸²⁹ 2014 Code Review, *supra* note 827 at 69.

⁸³⁰ *Ibid* at 65.

⁸³¹ Canada, House of Commons, "Letter to Mr. Pat Martin, Chair of the Standing Committee on Access to Information, Privacy and Ethics" (5 June 2014), online: <<https://www.ourcommons.ca/DocumentViewer/en/41-2/ETHI/report-1/response-8512-412-34>>.

the *Act* can easily be abandoned in the midst of political posturing and uncertainty,⁸³² the Code is not legislative and is accordingly much easier to amend in the face of partisanship. Because the process is much less formal, the commissioner has been able to make recommendations much more regularly, especially during appearances before the standing committee. The Code was first amended in May 2012 and Commissioner Dawson has continued to suggest changes ever since.⁸³³

In stark contrast to her submissions in respect of the *Act*, Commissioner Dawson provided nineteen new recommendations to improve the Code. She also re-submitted previous recommendations that she had made in 2010 that had not yet been taken up. Those recommendations were accompanied by draft wording of how exactly the Code could look if amended to conform her with suggestions, including how the related forms ought to be modified.⁸³⁴ Overall, it was generally the same themes that were woven throughout these submissions as were included in her submissions under the *Act*.

⁸³² See Lori Turnbull, “Ethics Rules”, *Canadian Government Executive* (10 April 2018), online: <<https://canadiangovernmentexecutive.ca/ethics-rules/>> (in which Turnbull comments that “Every five years, the Conflict of Interest Act is subject to review by Parliament, but partisan bickering tends to take precedence over thoughtful dialogue about ethical standards in public life.”).

⁸³³ In 2007, an interpretation section was added, the reporting deadline for gifts was extended to 60 days, and there were several changes to the disclosure statement provisions. In 2008, an exemption was introduced as a result of an inquiry report so that Members would not be considered to be furthering their own private interests or those of another person if the matter in question consisted of being a party to a legal action relating to actions of the Member as an MP. In 2009, the gift rules were amended.

⁸³⁴ Although a relatively uninteresting component of the Code, parliament must approve and re-publish any forms that are required for filings. What a form looks like is typically a matter of discretion for other ethics commissions across the country, but is a task retained by parliament at the federal level. This can in theory lead to delayed updates to those forms, but in reality it has not yet proven an impediment to making small changes when they have been requested by the Commissioner.

The first theme that emerged was greater clarity and precision in the language used.⁸³⁵ Second, she believed that members ought to be meeting with the commissioner for frank one-on-one conversations that will help them better understand the rules.⁸³⁶ Third, if it is public knowledge that a request for an inquiry was received, then the commissioner wanted to be able to speak publicly about why no inquiry was undertaken.⁸³⁷ Finally, the *Act* and Code needed to be harmonized.⁸³⁸

The committee never ended up releasing a report in relation to this 2012 review. Instead, the Committee's review was interrupted and set aside due to what it said were "conflicting priorities"⁸³⁹ and the study was later recommenced on February 19, 2015.

(c) 2015 Submissions re: Code

⁸³⁵ Canada, Office of the Conflict of Interest and Ethics Commissioner, "The Conflict of Interest Code for Members of the House of Commons: Five-Year Review – Submission to the Standing Committee on Procedure and House Affairs" (14 May 2012), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InternalReports/PROC%20submission%20review%20of%20Code%20-%20May2012.pdf>> (the need for greater clarity is evident from the fact that the Commissioner provides the Committee with draft language in relation to her suggestions).

⁸³⁶ *Ibid*, at 8 (the Commissioner recommends mandatory meetings with members).

⁸³⁷ *Ibid*, at 13 (see recommendation 14).

⁸³⁸ *Ibid* (see recommendation 18).

⁸³⁹ See Canada, House of Commons, *Standing Committee on Procedure and House Affairs*, "Thirty-Ninth Report" 41st Parl, 2nd Sess (11 June 2015), online: <<https://www.ourcommons.ca/Content/Committee/412/PROC/Reports/RP8040054/procrp39/procrp39-e.pdf>> [*Committee Code Report*].

Commissioner Dawson re-submitted an updated list of recommendations to the Committee in February 2015.⁸⁴⁰ There were now twenty-three suggestions in total, though none of them were arguably new or surprising. The committee filed its final report on June 11, 2015 and noted in that report that it had only completed “its assessment of ten recommendations brought forward by the Commissioner.”⁸⁴¹ This time, the committee heard from individuals who occupied positions within parliamentary bodies across the country, but not from academics or from other outside organizations. The committee’s report again foregrounded Commissioner Dawson’s submissions and then contrasted them with the opinions of other witnesses. As if to subtly say right up front that it would not consider harmonization of the Code and *Act* as the commissioner had recommended, the Report said very early in the body of its text that the “Code emanates from the parliamentary privilege possessed by the House of Commons as a collectivity to discipline its members and to regulate its own internal affairs” and that it is separate from the *Act*, which is legislative and does not form part of the Standing Orders.⁸⁴²

The committee report resulted in amendments to the Code related to gift rules (i.e. lowering the disclosure threshold from \$500 to \$200), changes to the thresholds for reporting sponsored travel and also introduced deadlines for Members in relation to signing their

⁸⁴⁰ Canada, Office of the Conflict of Interest and Ethics Commissioner, “The 2015 Review of the Conflict of Interest Code for Members of the House of Commons: Submission to the Standing Committee on Procedure and House Affairs” (19 February 2015), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/InternalReports/PROC%20submission%20re%202015%20review%20of%20Code%20-%20Feb2015.pdf>> (see summary list of recommendations on page 20) [*Dawson 2015 Code*].

⁸⁴¹ *Committee Code Report*, *supra* note 839 at 6.

⁸⁴² *Ibid* at 1.

disclosure summaries and completing the annual review processes. Each of these changes reflected recommendations that Commissioner Dawson had made during the review.

Despite her success at having some of her recommendations adopted, Commissioner Dawson later appeared before the Standing Committee on Procedure and House Affairs and reminded its members that the review they had conducted was not in fact complete: “...I made 13 other recommendations, and I would be pleased to discuss them should the Committee chose to proceed with a comprehensive review of the Members’ Code as recommended in the June report.”⁸⁴³ Those other recommendations continue to be all but ignored despite the fact that they were submitted in response to a request from the committee by the sole person who had been entrusted to administer the Code up to that point in time.

The reluctance of the committees to advance recommendations made by the commissioner has led to a situation where observers and officials alike are acutely aware of Parliament’s failure to adopt the recommendations of the expert that they themselves appointed. Consider that Commissioner Dawson’s submissions to both committees were respectively inspired by having identified the main issues that created challenges for her in the administration of the Code⁸⁴⁴ and that would make the *Act* “easier to administer and

⁸⁴³ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Opening Statement before the House of Commons Standing Committee on Procedure and House Affairs” (Ottawa, ON, 18 February 2016), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Opening%20Statement%20PRO C%20February%2018%202016.pdf>> at 2 (Commissioner Mary Dawson).

⁸⁴⁴ *Supra*, note 835 at 17.

enforce”⁸⁴⁵ and it is difficult to believe even for a second that Parliament has taken these mandatory reviews seriously.

7.3 The Public Weighs In

In spite of the commissioner’s efforts to fully and thoughtfully contribute to the periodic reviews of the Code and the *Act*, there remains a general sense that Canada is not doing enough to strengthen its parliamentary ethics laws. Some observers have attributed this to the commissioner not taking an aggressive enough approach to enforcement, whereas others have noted the limitations inherent in the commissioner’s mandates and constitutional role.⁸⁴⁶

As has been explained above, the commissioner has very little stand-alone enforcement power that is not simply a delegated authority to conduct investigations and make recommendations back to a house of Parliament or to the Prime Minister. The committee system is supposed to fill this gap by reviewing the commissioner’s work and making recommendations. Committees can only be effective however if they make a concerted effort to exercise influence over houses of Parliament for the purpose of championing and pushing through their suggestions. Parliamentarians are also incredibly busy though, and getting an issue to be placed high on the agenda of things that need to be accomplished is not always straight-forward.

⁸⁴⁵ *2013 Act Submission*, *supra* note 824 at i.

⁸⁴⁶ Examples will be provided below.

This criticism of the committee system is not new. Former MP Jean-Robert Gauthier argued back in 1993 that "... we should review how the present parliamentary committee system operates or works. It is a parliamentary structure that needs to be modernized to make it more responsive to public expectations, and more efficient by giving members of parliament greater authority and powers."⁸⁴⁷ What seems to be new is the fact that the public is now finding unimpeded and unfiltered ways to vocalize its dissatisfaction. Pressure to continue to push the envelope and criticism of slow-to-evolve parliamentary ethics laws are commonly heard from the academy, within the traditional and social medias, from civil society groups and even from international anti-corruption bodies. A brief look at some of these pressures and criticisms follows.

(a) Academia

Academics from all over Canada are very alive to the fact that the country's parliamentary ethics laws have been slow to evolve. Professor Gerry Ferguson has written a free online treatise about global corruption. In this work, Ferguson offers a comparative analysis of anti-corruption laws in Canada, the United Kingdom and the United States. In the section focusing on Canada's conflict of interest rules, Ferguson notes that the Conflict of Interest and Ethics Commissioner has been drawing attention to deficiencies in some of the definitions within the Code. Despite Commissioner Dawson's recommendations,

⁸⁴⁷ Canadian Study of Parliament Group, "Seminar Transcript: Accountability Committees and Parliament" (19 May 1993), online: <http://cspg-gcep.ca/pdf/1993_05-b.pdf> at 2:16 (Mr. Jean-Robert Gauthier, MP Ottawa-Vanier).

especially in regard to the definition of “family member”, amendments have not been made to ensure that the Code is in line with the standards found in the *Act*.⁸⁴⁸

Ian Greene and David Shugarman’s edited collection *Honest Politics Now* features a great many criticisms of parliamentary ethics laws in Canada. In particular, Ian Greene and I note that there is too little public consultation about what these laws should look like and that the appointment process for the Conflict of Interest and Ethics Commissioner remains deficient and unacceptable for a position of this stature.⁸⁴⁹ Lori Turnbull wrote in 2018 that partisan bickering tends to get in the way of meaningful review and discussion by parliamentarians about when and how to update the *Act* and Code.⁸⁵⁰

Gwyneth Bergman and Emmett Macfarlane have looked at the many recommendations that the commissioner has submitted to Parliament and noted that “[d]espite the persistence of these and other recommendations, however, much of the COIEC’s significance seems to have been relegated to an educational and advisory role for public office holders and MPs.”⁸⁵¹ Echoing some of those recommendations, University of Ottawa Law School’s Dean Adam Dodek argues that there is a need to consider expanding the formal sanctions that can be levied by the Conflict of Interest and Ethics Commissions and that Parliament should also consider whether the advisory and investigatory functions of offices like this one should properly be separated.⁸⁵² I have similarly written that there is

⁸⁴⁸ *Supra*, note 656 at 9-24.

⁸⁴⁹ *HP Now*, *supra* note 78 at 151-152.

⁸⁵⁰ *Supra*, note 832.

⁸⁵¹ *Bergman & Macfarlane*, *supra* note 91 at 21.

⁸⁵² *Dodek*, *supra* note 443 at 106 & 109.

a trend of combining government oversight offices across the country and that we ought to be collecting more data so that we can truly understand if this is a meaningful direction to be heading in.⁸⁵³

Professor Anita Anand and Justice Lorne Sossin (then Dean of Osgoode Hall Law School) have identified several ways in which public sector ethics could be improved. Two of their suggestions are that: first, these regimes could benefit from including provisions related to civil recovery following misconduct by public officials. Secondly, accountability offices should be encouraging more whistleblowing.⁸⁵⁴ Many other academics⁸⁵⁵ are also writing about these regimes and offering ideas for how we can continue to position Canada as a public sector ethics leader on the global stage.

(b) Traditional Media

The online and print media have been very critical of the lack of progressive policy-making in relation to parliamentary ethics. The media plays an important role in inspiring and shaping civic and political engagement.⁸⁵⁶ Here are two brief excerpts:

In what has become a long-running, if largely fruitless, campaign, Ethics Commissioner Mary Dawson is once again attempting to persuade MPs to tighten up the House conflict of interest code. Judging from the response she

⁸⁵³ See generally *Stedman Roof*, *supra* note 752.

⁸⁵⁴ Anita Anand & Lorne Sossin, “Independence and accountability in public and private governance” (2018) 61:S1 Can Pub Admin 15.

⁸⁵⁵ See e.g. Professors Rob Shepherd, Susan Dimock, Luc Juillet, Val Jepson, etc.

⁸⁵⁶ See e.g. Brenda O’Neill, “The Media’s Role in Shaping Canadian Civic and Political Engagement” (2009) 3:2 Can Poli Sci R 105.

has received, however, it appears her parliamentary charges still aren't ready to heed her call.⁸⁵⁷

The House of Commons has not amended the Conflict of Interest Act to close many key loopholes. Liberal MPs rejected an effort to do so – and to also condemn Morneau's actions – when they defeated a motion Tuesday.⁸⁵⁸

The media has not only been critical of Parliament, but it has also been highly critical of the commissioner. John Ivison wrote that “Dawson's office is the source of frustration for many in Ottawa...this is an office that should have as its emblem the three mystic apes – see no evil, hear no evil, speak no evil.”⁸⁵⁹ Tonda MacCharles noted that “[o]thers who've dealt with Dawson say her advice has been clear but baffling nevertheless because it is seen as overzealous, misguided and based on a fundamental misinterpretation of the law, its intent and how Parliament actually works.”⁸⁶⁰ Most scathingly, Mark Bonokoski of the Toronto Sun wrote that:

Mary Dawson should at least be tossed off the bus, if not under it, not just because Trudeau was using her as an excuse for his finance minister's ethical pickle but because her ticket long ago expired... Now, there is no question that Mary Dawson is one smart cookie, but she appears to have lost the intensity her job requires...the time for her to go has come.⁸⁶¹

Articles like these serve as a constant reminder of how difficult the commissioner's job can be, especially when the regimes being administered are clearly outdated and insufficient and

⁸⁵⁷ Kady O'Malley, “Ethics watchdog tries again to get MPs to limit gift bags, junkets”, *CBC News* (21 Feb 2015), online: <<https://www.cbc.ca/news/politics/ethics-watchdog-tries-again-to-get-mps-to-limit-gift-bags-junkets-1.2964822>>.

⁸⁵⁸ *Supra*, note 667.

⁸⁵⁹ *Ivison*, *supra* note 648.

⁸⁶⁰ *Supra*, note 634.

⁸⁶¹ Mark Bonokoski, “Bonokoski: Time to toss the ethics commissioner off the bus”, *Ottawa Sun* (23 October 2017), online: <<https://ottawasun.com/opinion/columnists/bonokoski-time-to-toss-the-ethics-commissioner-off-the-bus>>.

Parliament seems intent on modernizing them as little as possible. This can make it seem nearly impossible for a commissioner to meet the public's expectations.

(c) Social Media

Social media websites have come to the fore as platforms for political engagement since the creation of Facebook and Twitter. Citizens, corporations and other actors have learned to leverage social media in order to engage in discussions about politics and political ethics. Political parties and most MPs now also have Facebook and Twitter accounts where they post news and even live-stream press conferences.⁸⁶² This drives constituents to these online platforms to keep abreast of what is happening in the world of the political. The internet has accordingly overtaken the print media several times over as being the most direct, lowest cost and easiest to control way for elected officials to communicate with the public.⁸⁶³

A highly engaged citizenry has emerged that consumes and circulates nearly anything that has the scent of a political ethics scandal. Since the Liberal party won the federal election in 2015 for example, government ethics has trended in Canada several times. Whether or not they ended up being violations of the *Act*, Code or other norms, some controversies have even received enough attention to be honoured with their own social media hashtags:

⁸⁶² The Canadian Press, "Political parties clamour for social media influence in the election", *CTV News* (25 May 2018), online: <<https://www.ctvnews.ca/canada/political-parties-clamour-for-social-media-influence-in-the-election-1.3945503>>.

⁸⁶³ See generally *Harnessing Twitter*, *supra* note 412 (for a broad discussion of the value of social media within this space).

#LavScam

#MorneauSheppell

#AgaKhan

#NormanGate

While there are of course also many people who are happy with the ethical conduct of Canada's politicians, social media seems to find a way to amplify the voices of those who express their discontent. This happens because the algorithms upon which these platforms function tend to create echo chambers that animate greater polarization of opinion.⁸⁶⁴ This polarization can lead to greater discontent, but it can also lead to deeper engagement and debate about real issues. A newspaper may post a story about a scandal that will then take on a life of its own as users of social media instantaneously publish and share their mostly unfiltered opinions with the whole internet or simply with their own networks of friends and followers.⁸⁶⁵

Political parties, parliamentarians, and the Conflict of Interest and Ethics Commissioner are all using social media. It is accordingly common to see these platforms rife with lively debate about parliamentary ethics issues. It is also not uncommon to see official accounts engage in these debates with members of the public. The Courts in the United States have already been asked to consider whether politicians should be allowed to

⁸⁶⁴ See e.g. Cass R Sunstein, *#Republic: Divided Democracy in the Age of Social Media* (New Jersey, Princeton University Press, 2017) at 60.

⁸⁶⁵ Notably, platforms are beginning to take a more active role in filtering content. This is also complemented by users who report content to the platform.

block constituents on Twitter.⁸⁶⁶ Social media therefore provides us with another window into the criticisms that are being levelled against Canada's ethics regimes.

(d) Civil Society and International Community

Civil society and international anti-corruption groups have taken on a very visible and influential role in relation to political ethics. When Parliament chose to delegate its right to govern the ethical conduct of its own members, it created a sort of intermediary between itself as an institution and any criticism that might be levelled at how ethical misconduct is treated. With a Conflict of Interest and Ethics Commissioner in place, Parliament can take the position that it is that individual who is responsible for investigation and oversight when there is a live controversy about a member's ethical conduct. We saw this with Prime Minister Trudeau, who repeated a similar mantra incessantly when questioned about the Aga Khan scandal and the SNC-Lavalin affair, instead of actually answering questions: "I am pleased to work with the conflict of interest and ethics commissioner to answer any questions she may have may have."⁸⁶⁷ This is an important point because as we have seen from the media excerpts above, the commissioner shoulders quite a bit of the burden when there is

⁸⁶⁶ See e.g. Tom Kludt, "Trump can't block users on Twitter, federal court rules", *CNN.com* (23 May 2018), online: <<https://money.cnn.com/2018/05/23/media/judge-rules-trump-cant-block-twitter-users/index.html>>; Ann E Marimow, "President Trump cannot block his critics on Twitter, Federal appeals courts rules", *The Washington Post* (9 July 2019), online: <https://wapo.st/32jTd9F?tid=ss_tw&utm_term=.f0f7541d1a3b>.

⁸⁶⁷ See e.g. Aaron Wherry, "Opposition asks 18 times, but Trudeau won't answer on ethics commissioner meetings", *CBC News* (10 May 2017), online: <<https://www.cbc.ca/news/politics/trudeau-question-period-ethics-commissioner-1.4108903>>; Daniel Leblanc, "Trudeau is 'hiding' behind ethics commissioner on SNC-affair, Scheer says", *The Globe and Mail* (1 March 2019), online: <<https://www.theglobeandmail.com/politics/article-pm-hiding-behind-ethics-commissioner-on-snc-affair-opposition-says/>>.

persistent ethical misconduct by parliamentarians. The public does not seem to have a good understanding of how the commissioner's role and powers are limited. At the same time, the commissioner has been unable to convince parliamentarians to update the regimes so that there is a duty and/or a right for the Office to engage with the media and to provide public explanations when her role is being debated in public or when she has decided that an investigation will not be pursued.

We are left with a gap. The commissioner's role serves to insulate Parliament from criticism that it might otherwise receive about the conduct of its members, while at the same time being intentionally designed so as to ensure that the commissioner is unable to effectively respond to many of those criticisms. This allows organizations like Democracy Watch to step in to the public dialogue and frame the narrative around parliamentary ethics. A large part of how this is done by Democracy Watch is by agreeing to make continuous appearances in the media and by filing regular applications for judicial review. For example, Democracy Watch has brought an application for judicial review of the appointment of Mario Dion as the COIEC, alleging the consultation process was insufficient.⁸⁶⁸ The organization has also sought judicial review in relation to advice given by Commissioner Dawson that allowed a minister to establish a conflict of interest screen as a compliance measure under section 29 of the *Conflict of Interest Act*.⁸⁶⁹

⁸⁶⁸ *Democracy Watch v Canada (A-G)*, 2018 FC 1290.

⁸⁶⁹ *Democracy Watch v Canada (A-G)*, 2018 FCA 194.

In his 2018-2019 annual report for the Members' Code of Conduct, Commissioner Dion explained that he is attentive to and interested in understanding the levels of public trust in Canada. In particular, he regularly reviews the Latin American Public Opinion Project report called Americas Barometer: The Public Speaks on Democracy and Governance in the Americas, Transparency International's Corruption Perceptions Index and the Edelman Trust Barometer.⁸⁷⁰

Canada plays a role in several other international organizations that influence thinking about public sector anti-corruption, including: The Organization for Economic Co-operation and Development (OECD), The World Bank, the World Economic Forum and the United Nations. Although these organizations have not been overly critical of Canada, they do conduct regular analysis and produce reports that draw attention to failures they observe. The mere existence of these international organizations puts pressure on governments to not be on the receiving end of one of their rebukes. Despite this pressure however, there have been very few improvements made to the Code and *Act*.

7.4 The Insulating Motivation of Self-Interest

Both houses of Parliament have been very clear in the past that the conflict of interest regime is always a "work in progress" and that adjustments, improvements, and refinements are required over time.⁸⁷¹ While this is of course true, these words do not seem to be inspiring

⁸⁷⁰ Canada, Office of the Conflict of Interest and Ethics Commissioner, "The 2018-2019 Annual Report made under the Conflict of Interest Code for Members of the House of Commons" (Ottawa: June 2019) at 19 [*AR 2018-19 Code*].

⁸⁷¹ Canada House of Commons, Standing Committee on Procedure and House Affairs, *Seventh Report*, 39th Parl, 1st Sess (May 2006); Canada, Senate, Standing Committee on

much action. There is an obvious tension that exists by virtue of the fact that both the *Act* and the Code apply to members of parliament and that neither can be amended without those amendments passing through the House of Commons. If parliamentarians were to strengthen these regimes as the commissioner has requested, they would be placing further obligations and restrictions on themselves. From an historical perspective, it appears that only when members of parliament could possibly lose or gain votes in an upcoming election on this file will they make and keep promises to champion improvements.

Under the leadership of Prime Minister Justin Trudeau, we have also seen a sitting PM investigated under the *Conflict of Interest Act* for the first (and second) time. This simple fact all but guaranteed that the majority Liberal government would not look to make amendments to the *Act* or the Code while the investigation was ongoing and interest in ethics laws was heightened. First, because of the political challenges they were facing due to the mere fact of the investigation, the governing Liberals would not want to intentionally invite further debate about matters of parliamentary ethics. The PM's troubles are widely viewed as an embarrassing distraction to the Party and opening up debate on these rules would give the opposition even more opportunity to remind the Prime Minister about his transgressions. What should ideally be a non-partisan parliamentary discourse aimed at improving trust in the country's public institutions and governance models, would likely turn into a collection of political talking points instead. Second, any weakening in the rigorousness of the rules or even a refusal to make suggested improvements could lead to criticism from the opposition

Conflict of Interest for Senators, *Fourth Report*, 39th Parl, 2nd Session (May 2008) (the same sentiment has been expressed in both houses of parliament).

that the governing party is declining to improve them because the PM knows he will get away with less if he does. This is not to say that Prime Minister Trudeau is pining to break the ethics rules, but simply that the rhetoric would doubtless be something to that effect. In either scenario, the Liberal party would be doing itself a great political disservice if it were to allow dialogue about ethics rules and its leader's ethical transgressions to remain a live political issue.

On the other hand, parliamentary ethics regularly plays a role in opposition parties' campaign platforms. We have seen this in the past and it has generally resulted in overhauls of the regimes, as it did when Prime Minister Stephen Harper campaigned on the promise of passing the *Federal Accountability Act*. Regardless of which party forms government in 2019 however, there is very little historical precedent to suggest that these regimes will be modernized in a meaningful way that factors in the many ignored recommendations that have been made by the office's two commissioners and puts the public interest squarely before the private interests of parliamentarians. The resistance to modernization is palpable.

7.5 Conclusion

In chapter seven I demonstrated that despite having been asked by standing committees to contribute to three total reviews of the *Act* and Code, the commissioners' suggestions have been largely dismissed. This has left the office's commissioners noticeably disappointed. Similar disappointment has also been reflected in the academic literature, in traditional and social media and by both domestic and international civil society organizations. Despite the obvious disappointment that has been expressed however,

parliamentarians have yet to make a good faith commitment to improving these regimes. Part of the problem may lie in the inherent conflict of interest that exists by virtue of the fact that the Code and *Act* apply directly to and can only be amended by parliamentarians. There may be very little incentive for a government to open up debate about the *Act* and Code, particularly if that government has found itself in the hot seat with respect to its ethical conduct. As we saw in chapter five, Parliament has historically only been keen to make changes when votes are at stake.

8. Countering the Resistance: Asserting Greater Independence and Re-Framing Accountability

8.1 Introduction

In this chapter I demonstrate that the two commissioners' obvious frustration has compelled them to offer a counter-resistance to Parliament's clear indifference towards the work of updating the parliamentary ethics rules. Not only have both commissioners expressed their discontent, but Commissioner Dion has begun to bring greater attention to the rules by taking a strict approach to how he interprets them. The office is trying to draw parliament's attention to the *Act* and Code by, in part, leveraging the COIEC's unique status as the only 'agent' to have parliamentary privilege to help it assert a more aggressive operational independence. I explain that Commissioner Dion's strict interpretation of his office's independence has been complemented by his increased investment in public outreach and education. This is not only an attempt to get Parliament's attention however, but also to subtly re-frame the COIEC as having authority to act outside of the confines of its delegated mandates by virtue of the legitimacy it receives from its broader contributions to governance in the public interest. Drawing from the discussion above in chapter three, I explain the implications this has for the legitimacy of the COIEC's role within Canada's parliamentary democracy and conclude by offering suggestions for how the regime ought to be reformed.

8.2 Frustrated by Inaction

In 2011, Commissioner Dawson made the bold move of writing a letter to the editor of the *Globe and Mail* to provide clarity about her work and respond to an article that had

been printed on July 19. The article in question appeared in the paper five days after Commissioner Dawson had released a report in which she determined that Conservative MP Helena Guergis contravened sections 8 and 9 of the Code.⁸⁷² The author of the article criticized the commissioner for not conducting enough investigations and for the fact that the two reports she had recently completed did not reflect poorly on the government at all. The article further outlined different ways in which Democracy Watch had been critical of the office and its work.⁸⁷³ Commissioner Dawson's brief letter to the editor laid bare her frustration at the fact that the *Globe and Mail* would print such a criticism: "...in all of my annual reports, under both the act and the code, I clearly identify all cases where questions or complaints are raised with my office and how these have been dealt with."⁸⁷⁴ This was an interesting early indication that Commissioner Dawson may occasionally feel it necessary to defend her work in the media if she believed it to be under attack.

The next year, a few months after she had made recommendations to the Standing Committee on Procedure and House Affairs in relation to the Code, Commissioner Dawson again took to the media. In what could be seen as a bold step, she sat down for an extended interview with Postmedia to discuss the recommendations she had made to the Committee. The rationale for this must have been that the interview was in relation to the Code and there was a clear public education mandate in the Code. Excerpts from the interview were

⁸⁷² Canada, Office of the Conflict of Interest and Ethics Commissioner, *The Guergis Report made under the Conflict of Interest Code for Members of the House of Commons* (14 July 2011) (Commissioner: Mary Dawson) at 1.

⁸⁷³ Lawrence Martin, "How do lawmakers stand such harsh scrutiny?" *The Globe and Mail* (19 July 2011) A15.

⁸⁷⁴ Mary Dawson, "Conflicts of Interest", Letter to the Editor, *The Globe and Mail* (23 July 2011) F8.

posted widely on different Postmedia websites and in various papers.⁸⁷⁵ Perhaps out of interest in following the public's reaction to news about her work more closely, her office then joined Twitter in June 2013. Dawson spoke with Global News in September 2013 about the suggestions she had made in 2012 in relation to Code, as well as her 2013 suggestions in relation to the *Act*.⁸⁷⁶ With this interview, Commissioner Dawson seemed to be signaling to Parliament that she would not only respond to media inquiries as necessary, but that she would also leverage the media (both traditional and social) to help maximize the impact of her work. This included using the media to raise awareness about the *Act*, even though the provisions of the *Act* gave her no explicit mandate to undertake public education and outreach. This of course stands in stark contrast to the Code.

Dawson continued to engage with the media in very intentional ways, but she also took advantage of the office's website and started to build content that would help members and public office holders understand their obligations.⁸⁷⁷ This content was made available for download by members of the public as opposed to being password protected. It was after her follow-up 2015 testimony before the Standing Committee on Procedure and House Affairs in relation to the Code that we began to see a more deliberate and sustained effort at public outreach and education from the office. In her 2015-2016 annual report under the Code, Dawson specifically noted that she had been invited to appear before the Standing

⁸⁷⁵ Mike De Souza, "Ethics watchdog calls MPs honest", *Edmonton Journal* (1 Sept 2012) A15.

⁸⁷⁶ Amy Minsky, "'No end' to recommendations to improve conflict-of-interest system: commissioner", *Global News* (8 September 2013), online: <<https://globalnews.ca/news/848769/no-end-to-recommendations-to-improve-conflict-of-interest-system-commissioner/>>.

⁸⁷⁷ *AR 2015-16 Code*, *supra* note 725 at 27.

Committee on Access to Information, Privacy and Ethics to discuss her work under the *Act*. She wrote in that annual report that she had reminded the Committee that a five-year review was conducted and that no amendments to the *Act* had resulted from that review. She also reminded the Committee that no further review is in fact required under the *Act*.⁸⁷⁸ In a clear sign of frustration, she repeated these points again at the end of the annual report and reassured her readers that she "...would be pleased to contribute to a potential review of the Members' Code or the Act should either committee decide to undertake one."⁸⁷⁹

This understandable frustration continued to make its way in to Commissioner Dawson's reports, her speeches and her submissions to the committees. When invited to appear before a newly formed Standing Committee on Procedure and House Affairs early in 2016, she emphasized in her submission that the Committee had not been reviewing her Annual Reports and that they still need to complete their broader review of the Code:

In the early years of my mandate, I was invited to discuss with the Committee two of my annual reports, but have not been given the opportunity to do so since 2010.⁸⁸⁰

...

I note that the Members' Code is generally working quite well. But I also note that I made 13 other recommendations, and I would be pleased to discuss them should the Committee choose to proceed with a comprehensive review of the Members' Code as recommended in the June report.⁸⁸¹

She also expressed her general frustration about the fact that the Committee needed to approve simple form changes proposed by her office so that they could be used to help ensure compliance with the *Act*:

⁸⁷⁸ *Ibid* at 24.

⁸⁷⁹ *Ibid* at 33.

⁸⁸⁰ *Supra*, note 843 at 4 (Commissioner Mary Dawson).

⁸⁸¹ *Ibid* at 3.

Generally, the approval requirement has hampered my efforts to help Members comply with their obligations. I cannot issue any guidelines or forms under the Members' Code, notably guidelines in relation to gifts, an area that appears to cause a lot of confusion and prompts many questions from Members... I have raised this concern with the Committee in the past and asked it to consider whether there is really a need for the Committee to approve any guidelines and forms that I may develop under the Members' Code.⁸⁸²

Dawson later gave a public speech at a September 2016 public sector ethics conference in Toronto where she again made it clear that the limits on her jurisdiction had been frustrating her for a long time. She provided an example of her courage to push the envelope that reached back to 2010:

My mandate is quite precise and touches on many ethics issues only incidentally. I do, however, comment on ethical matters of concern to Canadians that are not covered by the Act or Members' Code where I believe it useful to do so...A case in point is my 2010 Cheques Report... Even though I found no breach of the Act or the Members' Code, I suggested that the practice was inappropriate and should be stopped.⁸⁸³

Realizing then that perhaps not having a standing committee willing to pay attention to her work in any meaningful way might afford her an opportunity to innovate a bit, Commissioner Dawson also commented at that September 2016 event that she had begun to see a real benefit in leveraging the media: "I am also as open with the media as I am permitted to be

⁸⁸² *Ibid*, at 3; See also *AR 2015-16 Code*, *supra* note 877 at 24 (where Commissioner Dawson says "I was left with little choice but to proceed with the consequential amendments so that the forms would reflect the amended provisions of the Members' Code and could be used by new and returning Members in fulfilment of their obligations. ... The Committee met to retroactively approve the changes on February 23, 2016.").

⁸⁸³ Canada, Office of the Conflict of Interest and Ethics Commissioner, Mary Dawson, "The State of Public Sector Ethics: Exploring Emerging Issues and Challenges in the Field" (Panel Presentation Public Sector Ethics Conference, Toronto, ON, 30 September 2016), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/The%20State%20of%20Public%20Sector%20Ethics-%20Exploring%20Emerging%20Issues%20and%20Challenge%20in%20the%20Field%200Sept%202016%20EN.pdf>> at 2 [*Dawson Emerging Issues*].

under the two regimes. I believe the media can only help to communicate the existing ethics rules, thus performing an educational role.”⁸⁸⁴ Shortly thereafter, in November 2016, Commissioner Dawson wrote an op-ed article for the *National Post*⁸⁸⁵ to publicly respond to a column about political fundraising that had misinterpreted sections 7 and 16 of the *Act*. The outreach work to help ensure that the public understood the rules had, for the most part, been historically reserved for inclusion in the commissioner’s investigation and annual reports. What we were beginning to see at this point was a much more aggressive and proactive strategy take hold.

It was in March 2017, with the controversy of her first sixth month interim appointment having caught the media’s attention that past January, that Commissioner Dawson gave a speech to the Canadian Study of Parliament Group. In that speech she remarked that the idea of independence in the context of her role “means not only being independent, but also being seen to be independent.”⁸⁸⁶ To help her operationalize this philosophical commitment to being seen to be independent, Dawson decided to expand her use of Twitter in order to provide the public with more general information about the regimes she administered.”⁸⁸⁷ Dawson also continued to remind parliamentarians that they have been

⁸⁸⁴ *Ibid* at 3.

⁸⁸⁵ Canada, Office of the Conflict of Interest and Ethics Commissioner, “The 2016-2017 Annual Report in respect of the *Conflict of Interest Act*” (Ottawa: 8 June 2017) at 40 (Commissioner Mary Dawson) [*AR 2016-17 Act*].

⁸⁸⁶ *Dawson Relationship*, *supra* note 168 at 2 (emphasis in the original).

⁸⁸⁷ Canada, Office of the Conflict of Interest and Ethics Commissioner, “The 2016-2017 Annual Report made under the Conflict of Interest Code for Members of the House of Commons” (Ottawa: 9 June 2017) at 27 [*AR 2016-17 Code*]; See also *AR 2016-17 Act*, *supra* note 885 at 41 (Commissioner Dawson writes: “...we sent our first “storytelling” tweet, with text images, about sponsored travel. We are also using more infographics and tweeting more frequently”).

ignoring her for too long. In an October 2017 appearance before the House of Commons Standing Committee on Procedure and House Affairs during its study of a bill related to political fundraising (Bill C-50), Dawson demonstrated frustration at the fact that things only get done when there is obvious public outrage and scandal:

The level of public interest in fundraisers involving federal politicians is particularly high at present. However, concerns about political fundraisers were also raised much earlier during my mandate as Commissioner...I also addressed the matter in my submission to the parliamentary committee that conducted the five-year review of the Act, which concluded in 2014...I have recommended strengthening the fundraising provision in the Act on several occasions, for example, by putting in place a more stringent rule for ministers and parliamentary secretaries... As amendments to the regimes that I administer are not the issue currently before the Committee, I mention these recommendations only as context and to establish my longstanding general position that fundraising rules should be tightened.”⁸⁸⁸

Finally, in the last annual reports she would table before the end of her tenure as the Conflict of Interest and Ethics Commissioner, Ms. Dawson again reminded committee members, who likely would not read her report, that she still hopes “...Parliament will in the future consider the recommendations that I have made in the context of the five-year reviews of the Members’ Code and the Act and elsewhere.”⁸⁸⁹ She then continued her outreach efforts after filing her joint investigation report in relation to Prime Minister Trudeau and his family trip to the Aga Khan’s private island by giving an exclusive interview to the Globe

⁸⁸⁸ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Opening statement before the House of Commons Standing Committee on Procedure and House Affairs during its Study of Bill C-50” (Ottawa, ON, 17 October 2017), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Opening%20statement%20PRO C%20C-50%20October%2017%202017.pdf>> at 2 (Commissioner Mary Dawson).

⁸⁸⁹ See *AR 2016-17 Code*, *supra* note 887 at 35; *AR 2016-17 Act*, *supra* note 885 at 49.

and Mail where she discussed her major investigations and her accomplishments in office. She even remarked in that interview that “she went out with a bang.”⁸⁹⁰

Mario Dion replaced Ms. Dawson in January 2018 and became the country’s second Conflict of Interest and Ethics Commissioner. Commissioner Dion he was quick to pick up right where Ms. Dawson had left off.

8.3 The Audacity to Innovate

In his first appearance before the Standing Committee on Access to Information, Privacy and Ethics after his appointment, Commissioner Dion immediately made it clear that he had done his homework. Knowing that Ms. Dawson had spent a great deal of energy trying to convince parliamentarians to take her recommendations seriously and to make improvements to the *Act* and Code, Commissioner Dion reminded the Committee that they have work to do: “Like my predecessor, I do not think the Act is broken, but there is clearly room for improvement.”⁸⁹¹ He then made a suggestion that he must have thought would be an easy win for him being that he was in a room full of people who seemed resistant to more onerous regulation. He recommended that the commissioner be given the power to prohibit complainants, witnesses and even the media from discussing or reporting about ongoing investigations:

⁸⁹⁰ *Supra*, note 666.

⁸⁹¹ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Opening Statement before the House of Commons Standing Committee on Access to Information, Privacy and Ethics” (8 February 2018), online: <<https://ciec-cciee.parl.gc.ca/en/publications/Documents/Presentations/Opening%20Statement%20ETHI%20%20February%208,%202018%20EN.pdf>> at 1 (Commissioner Mario Dion) [*Dion 8 Feb 2018 ETHI*].

... I suggest that the Commissioner be given the power to issue confidentiality orders to witnesses and that the Act be amended to require complainants to maintain confidentiality until the Commissioner has reported.⁸⁹²

These recommendations did not sit well with the media however. In an editorial written by the Toronto Star editorial board, the commissioner was rebuked for expressing a desire to gag journalists:

...he suggested he should have the power to issue confidentiality order to prevent MPs from informing the public about a complaint and stop the media from reporting on an investigation, no matter who their source was for the information in the first place.

Those are very dangerous ideas, indeed, and Dion should immediately drop them from his otherwise sensible proposed reforms on ethics issues.⁸⁹³

For a former Public Sector Integrity Commissioner, it seems implausible that Dion would think that the media needed to be muzzled. It is much more likely that this suggestion was a way to get both the members' and the media's attention to help bring awareness to the regimes and to his other recommendations. The more palatable recommendations that he made included that the commissioner be empowered to make recommendations in examination reports that were undertaken under the *Act*; that there should be more sanctions available under the *Act*; that training sessions be made mandatory for public office holders and that rules on fundraising be strengthened.⁸⁹⁴ Nothing else was nearly as controversial as his suggestion that he be permitted to issue confidentiality orders.

⁸⁹² *Ibid* at 4.

⁸⁹³ "Memo to ethics czar: Don't gag MPs or media", Star Editorial Board, *The Toronto Star* (11 Feb 2018), online: <<https://www.thestar.com/opinion/editorials/2018/02/11/memo-to-ethics-czar-dont-gag-mps-or-media.html>>.

⁸⁹⁴ *Supra*, note 891 at 3-4.

Commissioner Dion filed his first annual reports only six months after he took office. This was a short enough time period that he was obviously still getting up to speed on some things, but long enough for him to have developed a real philosophy about how he would administer the *Act* and the Code. Early in the reports, Dion offered up the office's new mission statement and emphasized its independence: "Our office is an independent institution that serves an important purpose: to enhance Canadians' trust and confidence in the Members of Parliament they elected and in the public office holders appointed by the government."⁸⁹⁵ This language is a bit of an extrapolation. It would be more accurate to say that one of the general purposes of the Code created by members of the House of Commons is to "maintain and enhance public confidence and trust in the integrity of Members as well as the respect and confidence that society places in the House of Commons as an institution."⁸⁹⁶ The *Act* has no corresponding statement in it about public trust or confidence and the *Parliament of Canada Act* states simply that the commissioner's mandate is to "(a) carry out the functions of the Commissioner referred to in sections 86 and 87; and (b) provide confidential policy advice and support to the Prime Minister in respect of conflict of interest and ethical issues in general."⁸⁹⁷ Nowhere in sections 86 and 87 is there mention of it being the commissioner's responsibility to ensure public confidence. If the *Act* and Code are properly administered and they still do not inspire

⁸⁹⁵ See Canada, Office of the Conflict of Interest and Ethics Commissioner, "The 2017-2018 Annual Report made under the Conflict of Interest Code for Members of the House of Commons" (Ottawa: 11 June 2018) at 4 [*AR 2017-18 Code*]; Canada, Office of the Conflict of Interest and Ethics Commissioner, "The 2017-2018 Annual Report in respect of the *Conflict of Interest Act*" (Ottawa: 4 June 2018) at 4.

⁸⁹⁶ *Code*, *supra* note 14, s 1.

⁸⁹⁷ *PC Act*, *supra* note 15, s 85.

public trust and confidence, then it is technically incumbent on parliamentarians to fix that, not the commissioner.

The office's new mission statement therefore emphasizes a philosophical commitment to going above and beyond the commissioner's formal mandates by acting in the spirit, but not exactly the letter of the *Act* and Code. This seems to reflect an idea about how Commissioner Dion thinks independence ought to be operationalized within his role. As I will explain, Commissioner Dion's approach to his advisory functions, investigations, enforcement and education/outreach all boldly reflect a sense of independence and purpose that challenge the traditional accountability structures that we know underpin the design of this unique parliamentary role.

(a) Advisory Functions

Commissioner Dion has called for some amendments to his regimes and issued several advisory opinions since taking office that have signaled his reluctance to settle for the status quo. For example, Dion appeared before the Standing Committee on Information, Privacy and Ethics early in his tenure and suggested removing a clause in the *Act* that allows public office holders to accept gifts from friends.⁸⁹⁸ He then started to interpret the rules around gifts and benefits much more strictly than they had been interpreted in the past. In May 2018 Dion decided, against a precedent established under former Commissioner Dawson, that the Code prohibits members from accepting barbecue services that have historically been provided free of charge by organizations in order to allow members to hold

⁸⁹⁸ *Supra*, note 891 at 2.

community events in their ridings. These community events are incredibly common in the summer months. Then in October 2018, he told members that they can no longer accept intern services that are provided to them free-of-charge by third parties.⁸⁹⁹ Evidently this was very common as well, especially in the context of constituency offices.

In his next controversial move, Commissioner Dion issued an advisory opinion in late 2018 where he expanded the post-employment and cooling-off prohibitions that apply to public office holders. In what some have described as a “stunning” ruling,⁹⁰⁰ Dion clarified the rule that a reporting public office holder cannot accept an offer of employment with an entity that he or she had direct and significant official dealings with for one year after leaving their position. Whereas an ‘entity’ has historically been interpreted to be an actor outside government, Dion’s new interpretation holds that the restriction also applies to federal public sector entities.⁹⁰¹ This interpretation of course means that political staff and governor-in-council appointees will have a difficult time competing for and accepting positions within the federal public service.⁹⁰²

⁸⁹⁹ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Advisory Opinion: Gifts or other benefits to Members – Services of interns provided free of charge” (October 2018), online: <<https://ciec-ccie.parl.gc.ca/en/rules-reglements/Documents/AdvisoryOpinion/Advisory%20Opinion%20-%20Gifts%20to%20MPs%20-%20interns.pdf>>.

⁹⁰⁰ Laura Ryckewaert, “Conflict of interest commissioner’s new interpretation of post-employment restrictions ‘stunning,’ disputed: observer”, *The Hill Times* (13 May 2019), online: <<https://www.hilltimes.com/2019/05/13/conflict-of-interest-commissioners-new-interpretation-of-post-employment-restrictions-stunning-disputed-observers/199674>>.

⁹⁰¹ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Information Notice for Public Office Holders: Post-Employment Rules” (December 2018) online: <<https://ciec-ccie.parl.gc.ca/en/rules-reglements/Documents/InformationNotice/Info-Notice-PE-Rules.pdf>>.

⁹⁰² Etienne Rainville & Tom Jarmyn, “Expanding the cooling-off period for public office holders”, *Policy Options* (29 March 2019), online:

Despite his clear willingness to push forward with new ideas and stricter interpretations of the *Act* and Code, Commissioner Dion has also ensured that his office invests in an updated case management system that will bring older advice forward into a more user-friendly platform. The upgraded Integrated Case Management System was deployed in November 2018⁹⁰³ and was invested in to help ensure the consistency and timeliness of the advice being offered by the office. Dion even made the bold prediction in a public speech given at York University that he thinks the future of prevention and avoidance of ethical transgressions may lie in applications of artificial intelligence. This stands out as being one of the very few times that either of the office's commissioners have spoken freely (i.e. outside of a committee hearing or official report) about what they think the future of their work might look like. Previous presentations of this sort have tended to merely repeat the commissioner's recent recommendations in regard to improving the *Act* and Code.

(b) Investigatory Functions

The commissioner's call for the power to issue gag orders was not well received.⁹⁰⁴ This recommendation appears to have been inspired by a general sentiment about the

<<https://policyoptions.irpp.org/fr/magazines/march-2019/why-expand-the-cooling-off-period-for-public-office-holders/>>.

⁹⁰³ See Canada, Office of the Conflict of Interest and Ethics Commissioner, "The 2018-2019 Annual Report in respect of the *Conflict of Interest Act*" (Ottawa: June 2019) at 21 (Commissioner Mario Dion) [*AR 2018-19 Act*]; *AR 2018-19 Code* supra note 870 at 18 (Commissioner Mario Dion).

⁹⁰⁴ *Supra*, note 893.

danger of unfounded accusations that has been echoed for quite some time, including in 1998 by Glenn Hagel when he was the Speaker of Saskatchewan's Legislative Assembly:

As we know in this modern day and age, where public officials are accused of being in conflict of interest, the public judge us to be guilty until proven innocent. Often it is just the passage of time by which it becomes clear later on that a member was not in a conflict of interest, but the accusations itself was enough to kill their political reputation.⁹⁰⁵

Dion appears to have taken the feedback about his bold suggestion and reconsidered what the actual result was that he was trying to achieve. Now, instead of continuing his call for muzzling, he has undertaken to conduct investigations with what he is calling “due dispatch” to minimize the sometimes-irreversible damage that allegations can do to individual members and public office holders' reputations. It is difficult to argue with the results of this re-framed “due-dispatch” initiative given the statistics that Commissioner Dion has since disclosed:

The average length of time it took to complete the five examinations that I reported on in 2018-2019, including two that were launched by my predecessor, was 212 days, compared to an average of 336 days during our Office's first 10 years of operation.⁹⁰⁶

This is an important step in the right direction. As I have noted in an earlier publication, “the public no longer waits for a commissioner's investigation report to be released before coming to its own conclusions about the appropriateness of an official's actions...”⁹⁰⁷ This progress in time to publication also stands to benefit from a decision Commissioner Dawson made that I believe could prove to be one of the most important decisions a commissioner has ever made, which is to issue combined examination and inquiry reports where possible.

⁹⁰⁵ *Round Table*, *supra* note 448 at 22.

⁹⁰⁶ *AR 2018-19 Act*, *supra* note 903 at 14.

⁹⁰⁷ *Harnessing Twitter*, *supra* note 412 at 81.

In her 2009-2010 annual reports, Commissioner Dawson noted that she recently had to release parallel reports under the Code and the *Act* for the first time in relation to two separate matters because the procedures for releasing reports under the two regimes is different.⁹⁰⁸ Commissioner Dawson also noted very clearly that she “must produce two separate reports in these circumstances.”⁹⁰⁹ In the wake of this obvious frustration, Commissioner Dawson decided in September 2010 to release the Dykstra Report as her first unified investigation report under both the Code and the *Act*.⁹¹⁰ Her next annual reports in June 2011 again asked that the *Act* and Code be “streamlined.”⁹¹¹

Although Commissioner Dion has not yet had occasion to do so, combined reports have been issued three times in the office’s history. In 2010 in relation to Rick Dykstra, in 2013 regarding Christian Paradis and in 2017 in relation to Prime Minister Justin Trudeau. All three of these reports have been about individuals in both their capacities as members of parliament and as public office holders. The stakes were accordingly higher and the public interest greater. Interestingly however, it is not so obvious that this approach is appropriate. Given the caselaw related to parliamentary privilege that has been explored above in chapter six, it is clear that the commissioner’s investigatory work under the *Act*

⁹⁰⁸ Canada, Office of the Conflict of Interest and Ethics Commissioner, “The 2009-2010 Annual Report in respect of the *Conflict of Interest Act*” (Ottawa: 16 June 2010) at 20 (Commissioner Mary Dawson).

⁹⁰⁹ *Ibid.*

⁹¹⁰ Canada, Office of the Conflict of Interest and Ethics Commissioner, *The Dykstra Report made under the Conflict of Interest Act and the Conflict of Interest Code for Members of the House of Commons* (7 September 2010) (Commissioner: Mary Dawson).

⁹¹¹ See Canada, Office of the Conflict of Interest and Ethics Commissioner, “The 2010-2011 Annual Report in respect of the *Conflict of Interest Act*” (Ottawa: 16 June 2011) at 25; *AR 2010-11 Code*, *supra* note 707 at 26.

in relation to these three files would now be protected from judicial review. This may have implications going forward for how the commissioner conducts investigations about matters that bridge both mandates.

(c) Enforcement (Punishment and Deterrence)

In his opening statement before the Standing Committee on Access to Information, Privacy and Ethics in May 2018, Commissioner Dion firmly resolved to take a strict approach to enforcement of the Code and the *Act*.⁹¹² The examples offered above certainly demonstrate that this has been the case, but there may be more to this philosophical approach than meets the eye. It is clear at this point that both commissioners have believed the Code and the *Act* need to be updated. Parliamentarians have not historically found time to take these requests seriously unless there is a risk to their reputations or chances of re-election. By strongly asserting that he will take a strict approach to enforcement, Commissioner Dion appears to be attempting to put the committee on notice.

In my opinion, it is much more likely that Parliament will be willing to amend the Code than the *Act*. I believe this is the case because the Standing Orders can be amended quickly on consensus. Furthermore, a majority government can move quickly to amend the

⁹¹² Canada, Office of the Conflict of Interest and Ethics Commissioner, “Opening Statement before the House of Commons Standing Committee on Access to Information, Privacy and Ethics” (1 May 2018), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Opening%20Statement%20ETHI%20May%201,%202018%20EN.pdf>> at 3.

Standing Orders all by itself with little risk of political resistance. Even if an opposition member or party disagreed with the government's proposed changes, their vote against those changes would have very little impact. In fact, we have seen more changes made to the Code post-*Federal Accountability Act* than we have seen made to the *Act*. The *Act* is much less likely to be amended because even a majority government would not be able to move amendments through quickly and efficiently. Despite the fact that the *Act* applies only to public office holders and not to backbench MPs or Senators, legislative amendments require debate and compromise in order to pass. A government looking to make amendments to the *Act* would likely be reluctant to give up control over disciplinary decision-making. A bill may of course still be able to move through the House of Commons quickly, but the Senate will study that bill and almost certainly look to make changes as they did with the passing of the *Federal Accountability Act*. A majority of Senators are also independent now, which means that they ought to be more interested in supporting public sector ethics reforms that emphasize strong principles of ethical governance than they are to be concerned with political expediency and toeing the party line. It is for these reasons that, short of wholesale reform that takes place as a result of a campaign promise and/or tremendous public pressure, I believe we are more likely to see progress made under the Code than under the *Act*.

Despite the above, it is still realistic to expect that changes might be made to the *Act*. The 2019 general election gave rise to a minority parliament, which clearly gives opposition parties an opportunity to work together to introduce a bill without needing government members' votes to pass it through the House. A bill can of course also be introduced in the Senate. Given the interest that Canadians and parliamentarians are now taking in

parliamentary ethics and the number of Senators who now identify as independents, we could in fact see a bill advanced that seeks to modernize the *Act*.

Hoping to inspire a push to modernize the *Act*, Commissioner Dion has called repeatedly for the power to make recommendations in examination reports,⁹¹³ such as that an improper gift be repaid,⁹¹⁴ and for the power to either recommend or apply sanctions for substantive contraventions of the *Act*.⁹¹⁵ He asks that these new powers of course be accompanied by criteria that can be used to guide the commissioner when making a recommendation or imposing a sanction.⁹¹⁶ Sanctions are important to him as commissioner because they can have a dissuasive effect and they also “provide Canadians with the assurance that there are consequences for breaching the Act that are more serious than what has been called naming and shaming.”⁹¹⁷ Given the way that information travels in our digital age, stricter enforcement may also help to generate greater public interest and this would in turn serve an educational role by promoting greater awareness and understanding of the rules.⁹¹⁸

⁹¹³ *Dion 8 Feb 2018 ETHI*, *supra* note 891.

⁹¹⁴ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Letter to Chair Bob Zimmer in relation to Commissioner Dion’s 8 Feb 2018 appearance before the House of Commons Standing Committee on Access to Information, Privacy and Ethics” (7 March 2018), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/Letter%20to%20ETHI.pdf>> [*Dion Letter*].

⁹¹⁵ *Supra*, note 893.

⁹¹⁶ *Dion Letter*, *supra* note 914 at 5.

⁹¹⁷ *Dion 8 Feb 2018 ETHI*, *supra* note 891 at 3.

⁹¹⁸ *AR 2018-19 Code* *supra* note 870 at 9.

By asking for more power to recommend and punish, the commissioner has again signaled to Parliament that he believes he does not have the proper tools at his disposal. Because he believes that the regimes need desperately to be strengthened, Commissioner Dion has made it clear that he intends to continue to be aggressive with using the limited tools that he does have. In my opinion, greater tools of enforcement would also require more dense legal protections and possibly cause bureaucratic and other delays that could in fact serve to lessen the office's effectiveness and ability to respond quickly to complaints.

(c) Outreach and Education

The Conflict of Interest and Ethics Commissioner has no express mandate to proactively audit compliance with the *Act* or the Code.⁹¹⁹ As such, one of the office's big challenges is that it relies on stakeholders to reach out for advice when needed. This puts the burden on individual public office holders to recognize when a problematic situation has arisen. A big part of the commissioner's mandate is accordingly to make sure that stakeholders trust the office and know when and how to reach out and ask questions. One of the ways that the office has been tackling this challenge is by the creation and continued improvement of its outreach and education work.

Commissioner Dion noted in a speech at York University's McLaughlin College that three-quarters of Commissioner Dawson's investigation reports started from information

⁹¹⁹ Interestingly, some of the most famous ethics violations in Canadian history have been in relation to incomplete or false declarations. Democracy Watch has called for the Commissioner to have the power to audit declarations and private disclosures.

that came to her attention from a member of the public.⁹²⁰ He has accordingly identified education and outreach as one of his three key priority areas.⁹²¹ In his opinion, more outreach and education would help to refine public engagement.

It is also uncontroversial that communication, education and outreach can help prevent conflicts of interest from arising in the first place. With this in mind, Commissioner Dion has decided to take the bold step of publicly declaring that he will conduct education and outreach in relation to both the *Act* and the Code.

...section 32 of the Code requires the Commissioner to undertake educational activities for Members and the general public regarding the Code and the role of the Commissioner. There is no similar requirement in the Act, but my Office conducts education and outreach on both regimes.⁹²²

This is an incredibly powerful and bold statement by the commissioner. He is explicitly acknowledging that his jurisdiction is limited, but that he is going to proceed with public education work in relation to the *Act* regardless. He has also chosen to proceed by leveraging technology, including social media platforms that are open to the public and, despite his assertion that Twitter allows him to communicate directly with Members and public office holders,⁹²³ are very clearly not directed exclusively at Members and public office holders.

⁹²⁰ Canada, Office of the Conflict of Interest and Ethics Commissioner, “The Federal Approach to Ethics from an Evolutive Perspective: Key Milestones, Past and Future” (Annual Public Policy Lecture, McLaughlin College, York University, Toronto, ON, 29 November 2018), check page #), online: <<https://ciec-ccie.parl.gc.ca/en/publications/Documents/Presentations/York%20University%20Nov%202018%20EN.pdf>> (Commissioner Mario Dion) (remarks were made during lecture, but are not from script) [*Dion at McLaughlin*].

⁹²¹ *Supra*, note 912 at 2.

⁹²² *Dion at McLaughlin*, *supra* note 920 at 9.

⁹²³ Canada, Office of the Conflict of Interest and Ethics Commissioner, “Opening Statement before the House of Commons Standing Committee on Access to Information, Privacy and Ethics” (Ottawa: 16 May 2019), online: <<https://ciec->

In his 2018-2019 annual report under the *Act*, Dion explains rather tongue-in-cheek that his office has "...used Twitter to communicate directly with Members. For example, we tweeted reminders about deadlines for disclosing to our office any outstanding sponsored trips in preparation for the annual publication of the list of sponsored travel."⁹²⁴ In fact, Tweeting is not a form of direct communication with a Member or public office holder. Absent tagging a person, mentioning them in a tweet or sending a direct message to their inbox, tweeting is merely a modern form of broad communication that is akin to using a public billboard because you expect a particular individual will drive by that billboard on a regular basis.

The commissioner explains his decision to use these newer technologies by pointing to a brief survey that Commissioner Dawson sent to members of the House of Commons in October 2017 in order to gauge their satisfaction with the outreach and education tools produced by the office and to identify possible areas for improvement.⁹²⁵ This survey applied only to matters under the Code and not to the *Act*, which is why it was only referenced in the 2017-2018 annual report filed under the Code.⁹²⁶ Based on the survey findings, the commissioner notes that the office "will develop webinars, online videos and other products using new media in order to inform and educate Members about their obligations under the

ccie.parl.gc.ca/en/publications/Documents/Presentations/Opening%20Statement%20ETH I%20May%2016,%202019%20EN.pdf> at 2 (similar language is also in *AR 2018-19 Code* supra note 870 at 10).

⁹²⁴ See also *AR 2017-18 Code*, supra note 895 at 8; *AR 2017-18 Act*, supra note 722 at 11 (the Commissioner writes in both reports: "We will leverage modern technology to implement education and outreach initiatives. With a greater presence on Twitter, we have already begun making more use of the possibilities this information-sharing platform has to offer.").

⁹²⁵ *AR 2017-18 Code*, supra note 895 at 20; *AR 2017-18 Act*, supra note 722 at 24.

⁹²⁶ *AR 2017-18 Code*, supra note 895 at 20.

Code.”⁹²⁷ This exact same language to announce the decision to develop new communication tools is found in the annual report under the *Act*, with no corresponding reference to survey results upon which that decision was based. This missing reference is of course because the survey was only about the Code and likely provides no clear justification for conducting public outreach under the *Act*.

What we are therefore seeing under the leadership of Commissioner Dion is that he is moving to harmonize the administration of the Code and the *Act* in rather subtle ways. He is not holding his breath and waiting for amendments, but is instead quietly administering the *Act* in a way that helps to modernize it. These decisions also have a clear impact on how much information is made available directly to the public and this should in theory contribute to the public education goal that Commissioner Dion set for himself when taking office. For example, the office uses Twitter to post information that might otherwise have only been made available to a particular individual and then buried deep on the office’s website. The COIEC issues media advisories, news releases about the office’s work, including notifications about the release of public reports, and even tweets about administrative monetary penalties and compliance orders.⁹²⁸ The office retweets items that are of interest to itself and to the broader ethics community, including reports from other ethics commissioners and international organizations.⁹²⁹ This is more than mere outreach to the “general public regarding this Code and the role of the Commissioner,” as is required by section 32 of the Code.

⁹²⁷ *Ibid.*

⁹²⁸ *Ibid* at 13-14.

⁹²⁹ *Ibid* at 16.

Most interesting however, is that Commissioner Dion is still very much aware of the fact that he has no express mandate under the *Act* to engage in these activities. Although the *Act* does not directly prohibit these actions, it mirrors the Code in many ways and there is no reason that Parliament would not include the public education mandate if it intended it to be included among the commissioner's responsibilities. Regardless, Commissioner Dion wrote about the office's new YouTube channel in the 2018-2019 annual report that was filed under the *Act*⁹³⁰ and not the report that was filed under the Code. The 'Ethics Canada' YouTube channel will host videos the office produces that are specifically focused on how the rules are applied. This is not a private YouTube channel however, which indicates that its purpose is also to help educate the public. This decision to create another open public account with which to share information is a clear reflection of the fact that Commissioner Dion wishes to assert his independence and is likely very much aware that parliamentary privilege and the public's expectation that he behaves independently afford him some protection if he wants to blend or co-mingle his duties under the *Act* and Code. This is a very clear example of a parliamentary institution publicly acknowledging that it does not have a clear mandate to do something but then deciding to do it anyway.

The real overall benefit that comes from increasing public disclosure and education about the commissioner's work is that it should give rise to more opportunities for public debate about the future of these regimes. As Andrew Stark explained in 2009 "... informal norms imposed through media and public debate will always assume a critical role. This

⁹³⁰ *AR 2018-19 Act*, supra note 903 at 10.

means that beyond rules, public discourse will have to become a key part of Canada's conflict-of-interest regime."⁹³¹ Commissioner Dion echoed this sentiment in his speech at York University when he acknowledged the challenge of making sure that his interpretation of the *Act* and Code is modern and reflective of the evolution of thinking on these subjects. The office received 3,073 communications from the public and media in 2017-2018, which represented a 29% increase compared to the previous year.⁹³² Making better educational resources publicly available should also be a way to help reduce the amount of time that office staff spend tending to public questions that do not in fact relate to the two regimes.

Finally, it should come as no surprise to anyone when Commissioner Dion follows in Commissioner Dawson's footsteps and issues joint investigation reports or prepares joint annual reports and submits the same document to the Speakers of both houses of Parliament. Much of the text in the office's 2018-2019 annual reports is the exact same, including the statistics that are reported about the office's advisory work and public inquiries. The two reports are mostly identical, with small changes as are necessary. Preparing them as one document is the next logical cost and time saving move for this office, especially given how little interest has been taken in the implications of Commissioner Dawson's 2010 decision to combine investigation reports. Such a move could help incentivize parliamentarians reading the report, but would also help signal to Parliament that it will slowly lose control over the *Act* if it does not move soon to properly harmonize or fully separate it from the Code so that the commissioner's *Act*-related work can still be subject to judicial review.

⁹³¹ *Stark COI, supra* note 462 at 149.

⁹³² *AR 2017-2018 Code, supra* note 895 at 8; see *AR 2017-18 Act, supra* note 722 at 11.

(d) Relationship with the Media

As detailed above, both the office's commissioners have recognized that the media plays an important role in helping them to fulfil their mandates. Commissioner Dion vowed early in his mandate to leverage the media so that he could inform the public about his role and activities.⁹³³ The statistics related to his efforts in this regard seem to bear out that he has been doing exactly that. Commissioner Dawson's office received and responded to 315 media inquiries in 2016-2017 (more than double the number in the previous year), the Office was mentioned 426 times in the media and she participated directly in four media interviews.⁹³⁴ After Commissioner Dion's first full year in the role, the office was referenced in 33% of question periods in the House of Commons, mentioned 7,345 times on Twitter and 491 times in the media.⁹³⁵ The commissioner also participated directly in 14 interviews with journalists throughout 2018-2019.⁹³⁶

Both of the office's commissioners have emphasized public awareness and education in their work and established service standards in relation to how they handle inquiries from the public and from the media. In 2016-2017, the first year for which Commissioner Dawson collected data, the office "exceeded its target and met its service standards in 83% of cases for media requests and 81% of cases for public inquiries."⁹³⁷ This demonstrates how much

⁹³³ *Supra*, note 912 at 3; See also *AR 2018-19 Act*, *supra* note 903 at 19 (where Commissioner Dion writes: "...we will be as forthcoming with Parliament, the media and the public as we are permitted to be under the Act.").

⁹³⁴ *AR 2016-17 Act*, *supra* note 885 at 40.

⁹³⁵ *AR 2018-19 Code*, *supra* note 870 at 14.

⁹³⁶ *Ibid.*

⁹³⁷ *AR 2016-17 Act*, *supra* note 885 at 39.

of a priority the media and public engagement have become. As she wrote in her 2016-2017 annual report under the Act:

My approach is for the Office to be as forthcoming with information for the media as is permitted under the Act and the Members' Code. My Office regularly issues news releases, media statements and backgrounders. In the past fiscal year, we have taken a more proactive approach when inaccurate information about my Office's administration of the Act and the Members' Code appears in the media.⁹³⁸

Commissioner Dion has taken this one step further and has noted that he even sees Twitter as a way to inform and communicate indirectly with the media:

Cognizant of the important role that the media plays in promoting awareness of the mandate and activities of our Office, I have undertaken to ensure we provide them with as much information as the regimes that I administer allow. . We issue media advisories and news releases about our work, such as the issuance of public reports, and publicize other information, such as the imposition of administrative monetary penalties and compliance orders via Twitter.⁹³⁹

At this point it is very clear that the office is investing some of its time and money into communicating more regularly and robustly with the traditional media, not simply with members and public office holders. The office is now being very proactive and intentional, rather than reactive, when creating resources for public consumption. If a standing committee were in fact to read the annual reports and think critically about what was happening, it is possible that they would want to know why the commissioner is worrying so much about public awareness and trust rather than simply administering the regimes as they have been delegated? Whose responsibility is it to ensure that the *Act* and Code work towards the challenging goal of improving public trust when they are properly administered? Parliamentarians may in fact feel that the commissioner has taken some liberties and

⁹³⁸ *Ibid* at 40.

⁹³⁹ *Ibid* at 16.

operationalized the office's independence in a way that was not intended when the office was created.

The 2018-2019 annual reports also marked the first time in the office's history that the commissioner has explicitly listed academics, ethics practitioners, the media and the general public as being stakeholders of the office and its work.⁹⁴⁰ This was a subtle re-framing of how Commissioner Dawson had previously recognized the importance of these stakeholders, which was as another activity statistic that reflected growing public awareness of the office's work.⁹⁴¹ Characterizing these groups as actual stakeholders in the annual report is a new idea brought forth by Commissioner Dion.⁹⁴² This move suggests that he is thinking strategically about the fact that these reports may never be properly reviewed by a parliamentary committee and that the committees will accordingly never have occasion to take issue with his re-characterization of who his stakeholders are. A statement like this one could very easily help to steer the future direction of the office and its work. Nearly everything that Commissioner Dion has done since his appointment appears to be aimed at emphasizing the office's independence from government and its role in improving transparency and public engagement. This re-framing of who the office's stakeholders are also signals that perhaps the commissioner sees his role as being less accountable to

⁹⁴⁰ *AR 2018-19 Code*, *supra* note 870 at 3; *AR 2018-19 Act*, *supra* note 903 at 3.

⁹⁴¹ See e.g. *AR 2015-16 Code*, *supra* note 877 at 38; Canada, Office of the Conflict of Interest and Ethics Commissioner, "The 2015-2016 Annual Report in respect of the *Conflict of Interest Act*" (Ottawa: 9 June 2016) at 26-27.

⁹⁴² See *AR 2017-18 Act*, *supra* note 722 at 5 (Commissioner Dion did not include the heading "Stakeholders" in his 2017-18 annual report under the Code (see *AR 2017-18 Code*, *supra* note 895)).

Parliament now and more accountable to the general public. The implications of this move are important to unpack.

8.4 Strategically Asserting Greater Independence

Commissioner Dion has continued his predecessor's efforts towards establishing greater operational independence in the face of formal accountability structures whose productivity has stalled. He has clearly expressed his governance philosophy as one that foremost emphasizes the importance of independence:

Effective institutions are independent, impartial oversight bodies that administer the rules. For example, my status as an Officer of the House of Commons means I am solely responsible to Parliament and not to the federal government or an individual minister.⁹⁴³

It is also clear at this point in the office's evolution that its responsibility to Parliament is a formality that has been mostly unproductive and ineffective. Having both been appointed and/or re-appointed in what are now widely criticized as deficient processes where the executive council plays a disproportionate role, the office's two commissioners have come to be more reflective about what it means for them to appear to be independent. Instead of being tied to their formal reporting relationships in a way that causes them to become exasperated while patiently repeating the same recommendations over and over whenever they are invited to do so, both commissioners have sought new ways to relay their message and to do their work. Their advice and investigations continue to be well supported and to meet the overall goals of the regime, which has allowed them to take risks that have not yet piqued the curiosity of the committees to which they have reported.

⁹⁴³ *Dion at McLaughlin, supra* note 920 at 7.

By investing resources in advancing a public engagement agenda and by continuing to speak publicly about what the future of parliamentary ethics regimes might look like (even when not being asked for an opinion), Commissioner Dion is now working to establish and nurture a new accountability relationship that may prove to be more productive than that which was formally in place. The least objectionable way to do this is arguably by reinforcing values that underpin the Code and the *Act*, especially those of transparency and public trust or confidence. Dion accordingly does this very thing in his speeches and reports.

As Michael Atkinson and Gerald Bierling wrote in 2005, around the time when the current regimes were being implemented, “[l]aws against public sector corruption...will remain dormant and ineffective unless ordinary citizens become engaged and alert enough to pressure public officials into disciplining each other, something they are unlikely to do of their own sweet will, whatever the written law.”⁹⁴⁴ Commissioner Dion’s outreach is one way to help empower ordinary citizens to become more engaged.

8.5 Re-Framing Accountability in the Public’s Interest

Although he has only been in office for a relatively short period of time, Commissioner Dion has made a point of been very clear about how important he thinks transparency is and why:

⁹⁴⁴ *Atkinson & Bierling, supra* note 484 at 1025.

In my opinion, transparency remains the main tool that our Office has at its disposal to increase public confidence and trust in Members and in the House of Commons, in support of one of the Code's purposes...⁹⁴⁵

He notes that the purpose of the regimes he administers is "...to support and enhance public confidence and trust in the integrity of those holding public office in Canada"⁹⁴⁶ and in his 2018-2019 annual reports suggest that maintaining and enhancing public trust is one of the challenges that he himself must also meet as commissioner.⁹⁴⁷ He has accordingly committed to making the office's work as transparent as possible⁹⁴⁸ and has been vocal about the fact that section 51(1)(e) of the *Act* gives him very broad discretion to add any document he deems appropriate to the public registry.⁹⁴⁹

Increased transparency can support better public trust because it can help to facilitate more active engagement and citizen oversight, which Dion has also said he believes will play a big role in the future of his work:

Citizen oversight is another area where we might see some major changes in the next 50 years. I envision much better and easier access for the public at large to share information and concerns about possible conflicts of interest. Currently, anyone who has a concern can contact my Office by email, telephone or post, but perhaps one day there will be an app that would make such disclosures easier and more accessible.⁹⁵⁰

⁹⁴⁵ *AR 2018-19 Code* supra note 870 at 19; *AR 2018-19 Act*, supra note 903 at 22 (this notable because the Code is not legislation and these are principle statements. There is no indication that they are supposed to guide the Commissioner's work in any way. It is simply a statement of expectations. Dion seems to have taken this to mean that he is supposed to rely on these to support his work in order to do what he has to do to help members meet those expectations).

⁹⁴⁶ *Dion at McLaughlin*, supra note 920 at 6.

⁹⁴⁷ *AR 2018-19 Code* supra note 870 at 19 (this is included in the Annual Reports).

⁹⁴⁸ *AR 2018-19 Act*, supra note 903 at 18.

⁹⁴⁹ *Dion at McLaughlin*, supra note 920 at 8.

⁹⁵⁰ *Ibid* at 11.

Coupled with the work he has already undertaken in administering the regimes, this emphasis on increased transparency and public engagement strongly suggests that Commissioner Dion is happy to move the goal posts as they relate to which accountability relationships will take precedence for him moving forward. As Lewis et al have recently argued though, “[c]alls to address the democratic deficit through increasing participation of citizens in governing have added to the confused picture of who it is that public sector organizations are actually accountable to.”⁹⁵¹ Calls for greater citizen participation can therefore add to the complications of holding governments to account.⁹⁵² From Dion’s perspective however, progress with public sector ethics regimes is often preceded by scandal⁹⁵³ and parliamentarians have made it very clear to both of the office’s commissioners that the only way to get their attention as parliamentarians is by reminding them that they are accountable to the voting public.

8.6 Implications for Responsible Government

The ideal goal of responsible government is to ensure that the government is continuously held accountable for its actions. As covered above in chapter two, this accountability consists of both individual ministerial responsibility and collective responsibility. The principle of collective responsibility dictates that Cabinet is responsible to the monarch, to itself, and to elected parliamentarians for its actions. There is accordingly an accountability to Parliament that is crucial for good governance. Some aspects of

⁹⁵¹ Jenny M Lewis, Janine O’Flynn & Helen Sullivan, “Accountability: To Whom, in Relation to What, and Why?” 73:4 Aust J of Pub Admin 401 at 404.

⁹⁵² *Ibid* at 401.

⁹⁵³ *Dion at McLaughlin*, *supra* note 920 at 3 (This opinion reflects work done by Greene and Shugarman, see *Honest Politics*, *supra* note 459).

Parliament's duties to hold government to account have of course been delegated to agents and officers.

The Conflict of Interest and Ethics Commissioner is delegated a role that is premised on the idea of holding members and other public officials to account for their ethical conduct. The commissioner does not evaluate government policy in any broad sense, only the actions of individual members. The right to govern the conduct of members is properly a privilege that the House of Commons possesses as a collective, which is why it has been delegated to the commissioner along with the privileges and immunities that the House of Commons would otherwise have if it were to refrain from delegating that responsibility. Things became complicated when Parliament also had the unprecedented idea of assigning a non-parliamentary role to this individual who was already delegated the House of Commons' privileges and immunities. The commissioner they had created would then be required to report to two masters (i.e. the House of Commons under the Code and both the House and Senate under the *Act*). This has led to incredible frustration for commissioners who are expected to play the role of both an independent officer of the House of Commons and what amounts to an agent of Parliament more broadly. The impossible task of balancing these two roles that Parliament refuses to harmonize or restructure has led to tensions in the traditional accountability relationships and we have very clearly seen two Conflict of Interest and Ethics Commissioners who have been continuously trying to make sense of the purpose and value of their roles. We also see a Parliament that is responsible for oversight, but that could arguably take a much more active approach to the task.

(a) Watching and Controlling

As the commissioner has progressively put less trust in the traditional accountability relationships and begun to tie the office's legitimacy more closely to its public interest role, we are seeing some of the implications of Parliament having delegated this oversight duty in an ad hoc manner. While trying to enhance its capacity for oversight over the conduct of its own members, the House of Commons has delegated to a body that has been given limited autonomy and is not being paid attention to by the committees to which it reports. This takes away from Parliament's ability to fulfil its responsibility to watch and control government. This may in fact have seriously negative implications for the way that Parliament works. The Conflict of Interest and Ethics Commissioner can only be an effective oversight body responsible for governing the conduct of members if the House is attentive to its work. If it is not attentive, then the COIEC will look more like a fourth branch of government, as Paul Thomas has argued.⁹⁵⁴

The office's commissioners have asked countless times for improvements to be made to both the *Act* and the Code. Academia, the media and the public have all become highly critical of both the regimes and of the commissioner's work. Furthermore, a sitting Prime Minister was found to have contravened the ethics rules for the first, second and third times in Canadian history and has suffered no clear consequences outside of having to be subjected to unpleasant media scrums where he is asked to apologize. The public calls 'government ethics' an oxymoron and has serious doubts about whether the COIEC's office has the power to do anything. The relative powerlessness of the commissioner in the

⁹⁵⁴ *Thomas PSIC, supra* note 204 at 6.

face of the relative uselessness of the committee system accordingly creates a gap for civil society groups like Democracy Watch to be able to control the government ethics narrative that emerges through the media. This group aggressively criticizes the COIEC, which in turn causes the public to distrust the historically shy-to-speak-out institution and serves to shield members of the House of Commons from criticism in relation to how poorly they are actually overseeing their own ethical conduct.

In all this, the commissioner becomes more frustrated (after all, they cannot simply quit the position without risking their reputation) and starts to look for other ways to be heard. Until relatively recently, the commissioner did not feel comfortable fully engaging with the real or social media either, which left both of those spaces without sympathetic voices to help explain how the regimes work. If the public knew what the commissioner was actually responsible for, then it is more likely that government would bear more of the criticism for its laissez-faire approach to ethics regulation.

Canada's parliamentary ethics regime has many challenges to overcome. Parliament's low interest in overseeing and reforming the regime has led the commissioners to adopt a more strict and aggressive approach to how they administer their mandates. Their goal appears to be to generate greater public engagement in order to inspire the public to pressure Parliament for reform. This is a promising approach given that each previous overhaul of the public sector ethics regimes have been a direct result of public interest and pressure during a general election. Coupled with the Liberal party's ethics challenges throughout their time in office, history suggests that public education and

outreach may be the most promising approach for a commissioner to take. That being said, all the energy being expended on public engagement to try to convince parliamentarians to improve these regimes takes away from the office's ability to operationalize the idea of responsible government the way it is technically supposed to be operationalized – by accounting to Parliament.

(b) An Erosion of Power?

As the commissioner (not so) subtly expands the office's mandates without the express jurisdiction to do so, we are seeing a very clear erosion of Parliament's power. The commissioner's work is no longer a direct reflection of the mandates assigned under the *Parliament of Canada Act*, but instead looks more like an experiment in institutional design. Can you create a new officer who is only accountable to the House of Commons, give that person the privileges and rights that properly belong to the House of Commons and then also assign a legislative mandate for which no privileges and immunities attach and for which they must report back to Parliament as a whole? The answer is clearly yes, but you may also want to check in with that individual to understand how that experimental design is working out.

The office's two commissioners have identified their role as being that of an officer of the House of Commons and have chosen not to acknowledge the internal inconsistency of choosing this one identity given that it does not reflect the reality of also having a legislative mandate under the *Act* for which the commissioner's work can be subject to judicial review. The role that offers the most operational independence is the one that has been chosen as a

label, despite the fact that this label lacks the nuance needed to properly capture the complexity of the combined role:

Unlike any of the other agents, my Office is considered an entity of Parliament and is part of the Parliamentary Precinct...my Office is covered by parliamentary privilege when I carry out duties and functions related to the Members' Code. This is not the case for other agents of Parliament.⁹⁵⁵

The creation of the Conflict of Interest and Ethics Commissioner looks more like an absolute delegation of power by the House of Commons than the other agents do. This may be why Parliament has not given the COIEC more powers as requested, because it realizes that it has already given up too much power and that it will be hard to pare back (particularly in a minority Parliament if parties cannot come to a clear agreement) because of the commissioner's growing public profile.⁹⁵⁶ It is also becoming increasingly more difficult for parliamentarians to hold the commissioner to account, not only because it is politically risky to imply that the regimes are too strict or that they are being too strictly enforced, but because it can also come across as silencing the commissioner if changes are made that do not give the commissioner more authority.

Having parliamentary privilege makes the Conflict of Interest and Ethics Commissioner unique among the parliamentary oversight bodies with which it has been grouped. The duties of someone who might otherwise be an agent of Parliament have been delegated to an Officer with privilege. The individuals who have held this role with this privilege have very publicly attempted to simplify the administration of the two mandates

⁹⁵⁵ *Dawson Relationship*, *supra* note 168.

⁹⁵⁶ See e.g. *Bergman & Macfarlane*, *supra* note 91 (for a discussion of the CIEC's growing public profile).

by combining or streamlining them where possible. One example of this unifying approach can be found in the investigation reports that cover allegations made under both the *Act* and the Code. Combining the work being done under the two mandates will make it impossible for the Federal Court of Appeal to be able to judicially review an examination conducted under the *Act* because it will necessarily be inseparable from the inquiry and report that was conducted under the Code, for which the commissioner can assert parliamentary privilege. Although none of the three combined reports have been the subject of an application for judicial review to date, that this possibility exists clearly represents an erosion of Parliament's power to hold the commissioner to account.

(c) Both Drifting and Creeping

Building from our analysis in chapter three, we can see now that the Conflict of Interest and Ethics Commissioner's office has been slowly moving away (i.e. drifting) from doing what the office was originally designed to do in the way that it was expected to do it. We can also see that it has been slowly and discretely moving into (i.e. creeping) jurisdictional territory that was not originally assigned to it by Parliament. Whether and why this might matter are important questions worth considering.

It is unquestionable that the office has been fundamentally reliable at administering its mandates. While there have been many critics of some of the commissioners' decisions, there has been very little controversy about the office itself, relatively speaking. What we have seen however, is that the office has found ways to accomplish its goals by leveraging tools it was not and has not been given by Parliament (e.g. it has no jurisdiction to undertake

public outreach about the *Act* and its administration). It also seems to be creatively leveraging the tools it has been given, but in ways that Parliament likely did not contemplate they would be used. For example, section 51 of the *Act* allows the commissioner absolute discretion about what documents should be made public. This section has accordingly been relied upon to justify tweeting out notices about section 30 compliance orders that have been issued. The *Act* does not in fact require the publication of these compliance notices.

This mandate drift appears to have happened mostly in response to the commissioners' frustrations with the parliamentary committee system. Informing the public about matters has taken the place of appearing before committee to discuss the office's work. Getting the public's attention so that it can see what is wrong with the regimes and understand the commissioner's challenges has become the only way to communicate with Parliament. If political ethics can become an issue of public anxiety again, then maybe it will return to the policy agenda. Commentators like Paul Thomas have certainly raised concerns about the idea that some agents tend to push too regularly for the expansion of their mandates,⁹⁵⁷ but this is clearly a case where the mandates have become so stale that they are insufficient to meet their own stated goals.

Parliament's power to keep the commissioner in check has been further eroded by the COIEC's unusual institutional design. Commissioners can assert much more independence than seems to have been originally contemplated and this is also allowing them to intentionally drift into new territory in order to perform their duties effectively. As Evert

⁹⁵⁷ *Thomas PPF, supra* note 50 at 1.

Lindquist and Irene Huse have explained, "...developing transparency regimes in the digital era requires balancing competing values, with the significant tensions among efficiency, equity, and democratic accountability."⁹⁵⁸ The Conflict of Interest and Ethics Commissioner is an excellent example of this re-balancing in action, with democratic accountability being where the real challenge lies.

Ian Greene has noted that one of the criticisms that can be leveled at ethics commissioners is that they can push too hard and be accused of empire-building.⁹⁵⁹ The COIEC's jurisdictional creep is a good example of this. In their ongoing efforts to make themselves seen and heard by Parliament, the office's commissioners have been trying to become players in the policy process. Gwyneth Bergman and Emmett Macfarlane argued in a 2018 article that "[t]he absence of significant media attention and the attendant public pressure suggests that the COIEC's ability to effect policy change is limited to the efficacy of her reports and recommendations in convincing parliamentarians or the government to act"⁹⁶⁰, but my analysis suggest that this may be changing quickly under Commissioner Dion's leadership. By posting media releases with reports and recommendations, by foregrounding academia, the public and the media as among the office's primary stakeholders and by relentlessly reminding anyone who will listen that the commissioners have shared and submitted nearly one hundred recommendations for how to improve the two

⁹⁵⁸ *Lindquist & Huse, supra* note 778 at 633.

⁹⁵⁹ *Greene Future, supra* note 486 at 169.

⁹⁶⁰ *Bergman & Macfarlane, supra* note 91 at 17.

regimes, both commissioners have done more than simply performing the “duties and functions they have been assigned.”⁹⁶¹

But does any of this matter? If Parliament does not want to do the work of overseeing the ethical conduct of its own members, then does it really create a problem if they have delegated that privilege to a parliamentary body and chosen to allow it to roam free? Jack Stilborn argues that it can be practically difficult for Parliament to hold its agents and officers to account and because of this “[t]he accountability of officers of Parliament to Parliament will likely continue to be less robust than their independence.”⁹⁶² This certainly seems to be what is happening with the COIEC. If this is simply the new reality however, then the drifting and creeping we have noted may not be a real problem. Instead, the problem may be that our theories of responsible government need to be re-conceptualized in order to properly account for this new reality.⁹⁶³

8.7 The Puzzle of Legitimacy

In my view, the puzzle of the COIEC’s constitutional legitimacy stems from the fact that it has been given two distinct mandates that do not seem to work well together as they have been designed. If the commissioner was only responsible for the *Act* and had no duties under the Code, then the position would be akin to the other agents of parliament, as I have described them above in chapter two. In other words, the commissioner would be categorized

⁹⁶¹ See *PC Act*, *supra* note 15, ss 85-87.

⁹⁶² *Stilborn Watchdogs*, *supra* note 230 at 252.

⁹⁶³ John Reid, “Accountability as a Pillar of Democratic Governing” (2008) 1 JPPL 419 at 420.

among the new and emerging institutions that not only support Parliament but that also serve Canadians.⁹⁶⁴ The commissioner's mandate under the Code however, means that he or she is also an officer of Parliament (more precisely, of the House of Commons because the rest of Parliament played no role in establishing and assigning this mandate), a term that I have reserved for those positions that are purely parliamentary in their focus.⁹⁶⁵ This means then that the COIEC is an institution that is independent of Parliament in its focus (like an officer), but that is also expected to serve Canadians in the way that an agent is.

If it were purely an officer, the COIEC would be responsible for assisting the House of Commons with operationalizing its parliamentary privileges and rights in relation to governing the conduct of members. The COIEC would be assigned some subset of types of conduct to watch over and it would report back to the House as instructed. The House would make all relevant decisions unless they had delegated them to the commissioner, but even then MPs would not be obligated to accept the commissioner's decisions (e.g. administrative monetary penalties) if the House disagreed with them – which could very easily happen in the context of a majority government. Privilege would also be easily preserved if groups like Democracy Watch brought applications for judicial review, much like it is for other officers of parliament and other ethics commissioners throughout the country who do not report to bi-cameral legislatures.

⁹⁶⁴ *Barnes & Hurtubise-Loranger*, *supra* note 171 at 1.

⁹⁶⁵ *PP&F*, *supra* note 45 at 307.

We want to be able to think of the commissioner as being either an officer or an agent because those are the only two categories we have available to us, but doing this leads us directly into an analytic roadblock. In fact, the commissioner is both. This complicates matters unnecessarily and prevents us from being able to rely on any of the other officers or agents as a precedent. If we accept that the commissioner is only an officer of the House of Commons, then we must accept that work undertaken under the *Act* can and should be protected by parliamentary privilege. This was clearly not Parliament's intent.

In my opinion, the commissioner's constitutional legitimacy should not be in question despite this confusion about categorization. Parliament has the right to use legislation to create bodies that help it to oversee the administration of the public service, including the conduct of public office holders, and the House of Commons has the right to delegate the administration of its own privileges and rights. The only puzzle here is understanding why the drafters of the legislation would proceed with such an imprecise, if not also poor, institutional design. Given the fact that the *Federal Accountability Act* was what emerged from Stephen Harper's electoral campaign promises, these regimes may have simply been a product of the pressure to make good on a promise. The governing Conservatives may have been more concerned with the appearance of decisive action rather than with taking the time to do what was necessary to meticulously think through the design of their new regime.

Because the formal accountability mechanisms (i.e. the committee system) have moved both the office's commissioners to a point of frustration in administering their

mandates, the office's relationship with Parliament has been strained and the delegated jurisdiction has been flouted. The office's constitutional legitimacy is arguably unchanged, but the commissioners appear to be framing the role as having an authority to act outside of the confines of its delegated authority by virtue of the authority it receives from its broader contributions to governance in the public interest. This could possibly be a natural response for an independent body that is confronted with challenges in its accountability relationships,⁹⁶⁶ but it could also give rise to critics challenging the office's legitimacy to act. This challenge could come not because the COIEC has chosen to merge reports or engage the public (many officers and agents do that), but because it has chosen to do so while also expressly acknowledging that Parliament has not given it the jurisdiction to do so in the way that it is.

8.8 Is Reform Necessary?

Government agencies must evolve over time in response to new circumstances, a fact that is no more obvious than it is in the world of parliamentary ethics and accountability oversight. The Office of the Conflict of Interest and Ethics Commissioner must accordingly be re-designed so that it is either fully integrated into Parliament's watching and controlling work like an Officer or so that it stands alone as an independent agent that has the power to administer its mandate(s) in a way that is similar to the other agents. Parliament places much

⁹⁶⁶ See Carl Baar "Patterns and strategies of court administration in Canada and the United States" (1991) 20:2 Can Pub Admin 242 (for an analysis of the maintenance and enhancement needs of courts as organizations. The COIEC is similar to courts in terms of independence and it has reacted in a manner that is a typical reaction for organizations that require independence).

more emphasis on its law-making role than on its accountability functions,⁹⁶⁷ but it must find a way to actively oversee the conduct of its own members, especially if it chooses to delegate some of that administrative responsibility. Parliamentary ethics oversight is not simply about public trust in the institution, but is also about parliamentarians having a way to protect their personal reputations in the face of damaging allegations.

If it continues as it has however, Parliament will soon lose control over how its ethics laws evolve. The simple fact that Commissioner Dawson issued a report in 2010 that combined the investigations conducted under both the *Act* and the Code should have sent a signal to parliamentarians that they needed to pay closer attention to how that institution was evolving in its approach to administering its mandates. It chose not to however, and it is clear now that this office has been designed in a way that gives the commissioner freedom to operate with a level of independence that was not contemplated when the two regimes were first united under one roof. Parliament should want to design institutions like this one with more intention, which they can certainly still do.

Perhaps the most important thing Parliament should have learned from this experimental institutional design is that parliamentary privilege acts as a very effective shield from judicial oversight. It is accordingly important that the Code and the *Act* not be administered by the same individual unless there is clarity with respect to the ways in which they can be combined and the ways in which them must be kept separate. There must also be strong mandatory parliamentary oversight, especially through the committee system.

⁹⁶⁷ *PP&F*, *supra* note 45 at 290.

There is no real evidence yet to suggest that the office's digitization or public engagement efforts have helped it to administer the *Act* or Code more effectively. It seems instead that the commissioners might simply be searching for greater engagement with the office's work. Given how little interest is shown by Parliament despite how essential this office is for enhancing the public's trust in government and protecting their own reputations, it makes sense that the commissioners would search externally for reflective engagement and to help highlight the office's import role. Any restructuring of these regimes must account for the importance of this type of public engagement and education. It is not good enough for the Code to require the commissioner to undertake educational activities directed towards the public while the *Act* does not.

This critical overhaul must absolutely be undertaken in a non-partisan manner while engaging the public and being transparent about the reasons for the overhaul. New ethics regulations do not magically make people ethical, but restructuring the regime so that the committee system must exercise mandatory and meaningful oversight⁹⁶⁸ can help to nudge parliamentary culture in the right direction. Committees must be obligated to consider every significant report tabled by the COIEC and to conclude their reviews by filing some sort of opinion(s) about those reports with the appropriate house(s) of Parliament. This requirement will ensure that the work of the commissioner becomes Parliament's responsibility and that it cannot simply be ignored as has generally been the case to date. The COIEC would then

⁹⁶⁸ See *supra* note 36 at 552 (The Lambert Commission Report says that "...the key to more effective scrutiny lies in the committee system").

be able to legitimately respond to criticism by saying that it did its work and that Parliament is the proper forum for accountability on these matters. Without proper parliamentary oversight however, we will continue to see commissioners used by parliamentarians as a shield against criticism, even when the commissioner's mandates are not engaged.

In the interim however, and on the expectation that changes are not forthcoming, I believe that the commissioner ought to refrain from publishing joint reports under the Code and *Act*. The Trudeau II report is a good example of why restraint is preferable. In paragraph 226 of the report, Commissioner Dion concluded that Prime Minister Trudeau and Privy Council Clerk Michael Wernick met with Ms. Wilson-Raybould and emphasized that SNC-Lavalin's corporate headquarters were located in a riding that was close to the one that Trudeau himself represented.⁹⁶⁹ According to Commissioner Dion, the Prime Minister drew attention to this fact to make it clear to Ms. Wilson-Raybould that her "decision not to intervene could have larger political repercussions in Quebec, both for the federal and provincial orders of government."⁹⁷⁰ Despite the fact that there may be good reason to conduct an inquiry under the Code because Mr. Trudeau seemed to be seeking to advance his interests as an MP, Commissioner Dion did not conduct an inquiry under the Code. By not conducting a joint investigation, the Trudeau II report is now subject to judicial review. In fact, Prime Minister Trudeau has publicly stated that he disagrees with some of the commissioner's findings,⁹⁷¹ which suggests that a request for judicial review

⁹⁶⁹ *Trudeau II*, *supra* note 10 at para 266.

⁹⁷⁰ *Ibid* at 53.

⁹⁷¹ See e.g. The Canadian Press, "Trudeau Accepts, but disagrees with parts of the Ethics Commissioner's report", *CityNews* (14 August 2019), online:

could in fact be forthcoming. This is a good thing in my opinion, but not because I think there were mistakes in the report.⁹⁷²

I take this position because allowing decisions under the *Act* to be judicially reviewed will bring more attention to them. The *Act* and the Code have many similarities. Allowing the Court of Appeal to interpret the *Act* could serve to help advance dialogue about those rules and improve our understanding of what the rules in both the *Act* and the Code ought to be. As noted above, the *Act* is unlikely to be amended with any regularity because of what seems to be a fear that Senate will take over the process and demand reforms that government does not want. The Code is much more likely to be updated however, and public dialogue about a judicial review could increase the likelihood of Parliament undertaking such an exercise. I believe a strong argument can be made that you lose a potential opportunity to drive greater public engagement if you are unable to challenge a decision under the *Act* because it is in a joint report and is therefore shielded by the parliamentary privilege that was intended to only apply to matters under the Code. Reports under the Code and *Act* should always be in separate documents.

It is also important to note again that a report under the Code must be debated by the House of Commons for no more than two hours. The Trudeau II report was completed under the *Act* only and is accordingly not subject to mandatory debate. Commissioner Dion

<<https://toronto.citynews.ca/2019/08/14/trudeau-accepts-but-disagrees-with-parts-of-ethics-commissioners-report/>>.

⁹⁷² I do not here wish to express any personal opinion whatsoever about the Trudeau II report.

could have chosen to publish two separate Trudeau II reports however, which would have ensured that one would be debated and the other could be subjected to judicial review. This simple act of publishing two separate reports increases the likelihood that there will be greater public engagement about the issues covered in the reports.

Absent a majority government surprisingly deciding to open the *Act* for amendment so that it can be modernized, the best chance for reform will come from either the *Act* being eliminated and replaced by a Code (which was the case before the *Federal Accountability Act* was passed), the Senate tabling a bill or the opposition parties in a minority government working together to pass a private members bill. Although I do not believe the first option is very likely, the 2019 federal general election did result in a minority government for the Liberals and this could inspire the opposition parties and/or the Senate to find a way to work together in order to pass amendments to the *Act* without needing government votes.

8.9 Conclusion

As Canada's first Senate Ethics Officer Jean Fournier said about the Senate at that time: "[a]s the owners of the codes they have to demonstrate leadership by "fighting complacency.""⁹⁷³ The same can now be said about all of Parliament. It is accordingly through its resistance to Parliament's complacency that we have been able to learn the most about what makes the COIEC different than agents of parliament. In Chapter eight, I demonstrated that the COIEC's obvious frustration has compelled it to leverage its unique status as the only 'agent' to have been given parliamentary privilege in order to help it assert

⁹⁷³ *Fournier in Brisbane, supra* note 822 at 13.

its operational independence in a manner that Parliament could not have intended. This reimagined approach to its independence has been complemented by Commissioner Dion expressly re-framing both the public and the media as among the office's key stakeholders, while investing more resources into public outreach and education. These efforts appear to be an attempt not only to get Parliament's attention, but also to subtly re-frame the COIEC as having authority to act outside of the confines of its delegated mandates by virtue of the legitimacy it receives from its broader contributions to governance in the public interest. Absent action by Parliament, the commissioner seems intent on leveraging this new philosophical approach to his office's independence in order to enable it to expand and modernize its work. Recognizing this stronger assertion of autonomy gives us an opportunity to assess its implications and conclude that the office is no less legitimate as a result of its assertive choices. These are the tools it has been given by Parliament and it is using them with full transparency. It is up to Parliament to decide if reform is necessary or if this new status quo is acceptable.

9. Conclusion

We live in an historical moment where the public's scrutiny of government officials is unlike anything we have seen before. There is so much data available and there is so much access to information in real time, that Canada's parliamentary ethics regime is garnering a tremendous amount of attention. This is also the first time in history that a sitting Prime Minister has been found in violation of the ethics rules, and he has done so on multiple occasions.⁹⁷⁴ It is undoubtedly a rather poignant time to take a deeper look at how this regime came to be, what it is, how it works and where it seems to be headed.

Rules about ethics represent the political system's current efforts to reconcile general principles with what its members understand society's expectations to be in relation to the appropriate behavior of public officials.⁹⁷⁵ Thinking about this topic has evolved over time and the Canadian conflict of interest regime has clearly demonstrated a capacity to survive transition and to adapt itself to contemporary circumstances.⁹⁷⁶ Political parties do not wield power indefinitely, and what we should learn from Donald Trump's time as President of the United States is that the appropriate time to protect your democracy against the risk of politicians using public office for personal gain is always *now*.

This dissertation has offered a comprehensive study of Canada's parliamentary ethics regime through an historical legal, political and institutional lens. The history of parliamentary ethics rules in Canada is one that begins with Prime Ministers implementing

⁹⁷⁴ See *supra*, notes 8 & 9.

⁹⁷⁵ *Round Table*, *supra* note 448 at 16.

⁹⁷⁶ *Bédard Background*, *supra* note 480 at 8.

codes of conduct that apply to their cabinet ministers. Cabinet ministers are of course appointed to these positions by the Prime Minister, so it has been important for the Prime Minister to maintain control over the enforcement of these rules. Over time however, too many members of cabinet have found themselves in difficult ethical situations and the public has started to take notice. This has given rise to increasing public pressure on Prime Ministers to demonstrate that poor ethical decision-making from people who occupy the highest offices of government will be met with punishment. Prime Ministers have been reluctant to live up to this demand from the public however and so the public has instead come to insist that someone independent be put in charge of overseeing the rules of ethical conduct for parliamentarians. This eventually led to the appointment of Canada's first Ethics Commissioner in May 2004.

Commissioner Shapiro was responsible for administering two sets of ethics rules, one applying to members and one to public office holders. Both sets of rules were simply Codes, not laws, which ensured that the rules that applied to public office holders would remain under the control of the Prime Minister and the rules that applied to MPs would remain under the control of MPs as part of the Standing Orders of the House of Commons. Even though the commissioner was responsible for administering these two sets of rules, they could be easily amended by the Prime Minister and/or Parliament and a majority government would have a great deal of de facto control over the rules that applied to all members.

Everything changed in 2006 when Parliament passed the *Conflict of Interest Act* that applied to public office holders. This was the first time that the Prime Minister had completely given up control over the rules of ethical conduct that applied to members of cabinet. This is also when Prime Minister Stephen Harper's government seems to have rushed the creation of a new institution that would be responsible for overseeing parliamentary ethics. As I explained in chapter six, this new office had an unprecedented and unusual institutional design.

Despite being grouped with agents of parliament in the literature and despite the fact that its two commissioners have asserted that the role is properly described as an Officer of the House of Commons, the Office of the Conflict of Interest and Ethics Commissioner is neither. Notwithstanding this confusion about its proper categorization, the COIEC in its current form teaches us something about how to improve the institutional design of agents of parliament in order to strengthen their structural and operational independence. For example, the COIEC's annual budget estimates are reviewed and considered through a much less problematic process than are the budgets of agents and the COIEC also has greater autonomy over its staffing and office-specific policies.

In chapter three I drew attention to concerns that have been expressed in the literature about the constitutional legitimacy of agents of parliament. The purpose of this discussion was to make clear that there is real skepticism about the propriety of Parliament delegating its oversight and accountability duties to un-elected officials who are given a rather high degree of independence. The COIEC has been subject to the same criticism. What I have

demonstrated throughout chapters four and six however, is that the COIEC's independence is in fact much more robust than that which characterizes the agents of parliament. The COIEC has been afforded a different status by Parliament than that of an agent, and has also been granted the protection of parliamentary privilege over some of its work.

Given that the COIEC has generally been characterized as an agent of Parliament, it is surprising that this interesting quirk in its institutional design has not garnered much attention. This may be because the office's first commissioner was not keen to aggressively assert the office's independence when she took the role. Commissioner Dawson was instead happy to stay within the lines and approached her responsibilities in a manner that emphasized prevention over enforcement and punishment. Over time however, Commissioner Dawson seems to have taken notice of the fact that her work was not given enough attention by Parliament for it to be able to have the impact that it should have. For example, the recommendations she offered to the standing committees reviewing both the Code and *Act* did not result in significant amendments being made to either of those instruments.

While the office's commissioners were reliably administering their mandates, the parliamentary infrastructure to which they reported and accounted seemed to be under-performing. Parliamentarians rarely took interest in the office's work if they did not have to. This has unfortunately led to a situation where Canada's parliamentary ethics regime has not kept pace with public expectations. Even though parliamentarians are always quick to point out to the media that they will co-operate with COIEC's investigation(s), they are not

quick to point out that the COIEC may not in fact have the power to investigate the types of issues that are getting the media's attention.

I then explained in chapter seven that both individuals who have served as the office's commissioners (i.e. former Commissioner Mary Dawson and current Commissioner Mario Dion) have called repeatedly for changes to the Code and *Act*, including calling for their harmonization. This has not happened however. Instead, what we have seen is the commissioners becoming more assertive and stricter about how they administer their mandates. Commissioner Dawson started by drastically increasing her public engagement in an effort to ensure that the public would be better informed about the work that the COIEC does and does not do. Commissioner Dion has been even more assertive about public engagement during his time in office.

In chapter eight I detailed the ways in which Commissioner Dion has responded to the tensions that have arisen in connection to the office's accountability to Parliament and its independence from government. In an effort to ensure that the office remains effective at promoting public confidence in the ethical conduct of public officials, the commissioner has become proactive about asserting its independence. The office has drastically boosted its commitment to direct engagement with the public (which is likely, at least in part, a response to Parliament's indifference to its recommendations) and there is clear evidence that Commissioner Dion is operationalizing a philosophical commitment to treating his office as being directly accountable to the public as well as to Parliament. I argue that this response to the frustration over parliamentary inaction appears to be an attempt not only to get

Parliament's attention, but also to re-frame the COIEC as having authority to act outside of the confines of its delegated mandates by virtue of the legitimacy it receives from its broader contributions to governance in the public interest. I also brought attention in chapter six to the office's informal stakeholders and influential relationships. These were important to address within this study because they can tell us something about who and what influences a commissioner's thinking about their roles and responsibilities.

In chapters six and eight I argued that the parliamentary privilege granted to the COIEC allows the office to move beyond its intended mandates by intentionally blending the administration of the *Act* and the Code. Although it has yet to be challenged in court in this context, the law of parliamentary privilege clearly tells us that combining inquiries under the Code with examinations under the *Act* into one report will serve to shield work done under the *Act* from judicial review. Commissioner Dion has yet to release a combined report, but he has been very clear in his annual reports that he is willing to assert his independence by acting in ways that allow him to create greater efficiencies in the administration of his mandates. He has done this, for example, by prioritizing public education about the *Act* despite having no clear mandate to do so.

This new philosophical direction does not seem problematic to me, but Parliament may wish to reconsider the design of this regime to ensure that it retains the ability to hold it to account in the way that was originally intended. Not taking action could mean that decisions by the COIEC with respect to matters that fall under both the Code and the *Act*

might be shielded from judicial review. It is difficult to imagine that anyone who is a subject of one of these reports would want that to be the case.

Finally, I argued that the commissioner ought to refrain from publishing joint reports under the Code and *Act*. Given that the rules for public office holders are now legislative and therefore more deeply embedded in the political arena, it seems unlikely to me that the *Act* will undergo meaningful reform anytime soon. The commissioner's interest in public engagement might therefore be better served by leaving open the possibility for judicial review in relation to the office's work under the *Act*. Overall however, it seems abundantly clear that Canada is again at a moment in its history where it ought to reconsider the design of its parliamentary ethics regime.

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