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THE RULES APPLICABLE TO CONFLICTS OF INTERESTS FOR CANADIAN STATE REPRESENTATIVES

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Abstract
Conflicts of interest among public officials and public servants have long been an issue of public concern. This paper discusses the various legal instruments implemented by Canada as well as the legal principles that directly address the different aspects of this issue in Canada
Keywords: *conflicts of interests, public service, State representatives, Vietnam, Canada*

1. Introduction

The Supreme Court of Canada described the importance of individuals who represent the State in Canada, namely the public service, in the following terms: "The government of a large modern state is impossible to manage without a relatively large public service which effectively participates in the exercise of political power under the supervision of responsible ministers."[1] Responsible (ministers and) government is an important feature of the Canadian parliamentary system.[2] The Conflict of

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1 *Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2, p. 96 (hereinafter "OPSEU").

2 Hogg P. (1985), *Constitutional Law of Canada*, 2nd ed., Toronto, Carswell, p. 191; Garant P. (1990), 'La liberté politique des fonctionnaires à l'heure de la Charte canadienne' [*Political Freedom of Public Servants in the Age of the Canadian Charter*], *Les Cahiers de droit*, Vol. 31, issue 2, p. 413. Professor Garant summarily explained that the principle of mininsterial responsibility means that the "minister is responsible for all decisions made in his department by his officials, whether good or bad" [translated in English by Sébastien Lafrance].

Interest and Ethics Commissioner[3] also wrote that "[to] maintain a culture of ethics and integrity is a cornerstone of good governance."[4] Professor Garant wrote that public servants "remain in the background scene of the Parliament. This anonymity includes […] what was described as public service neutrality",[5] which was worded in different terms by the Supreme Court of Canada and designated as the "political impartiality of the public service."[6]

2. Vietnam and public servants

In Vietnam, "public servants play […] a central role within the state and the society."[7] They benefit from a "special status that is related to an ancient tradition",[8] in which status may be illustrated, for example, by the fact that they represent the "sole intermediary between power and the people."[9] In 2018, the Vietnamese authorities deemed that the Anti-Corruption Legislation of 2005[10] had not met its objectives, including with respect to the declaration of assets.[11] There are also "practices [in Vietnam], which lack of transparency tended to taint the credibility of the State".[12] More recently, the Prime Minister of Vietnam, Nguyễn Xuân Phúc, urged to "multiply the measures against corruption within the public service."[13]

3 Ferguson G. (2018), *Global Corruption: Law, Theory & Practice*, 3rd ed., Victoria BC, University of Victoria, p. 875: "At the centre of the Canadian conflict of interest regime is the Office of the Conflict of Interest and Ethics Commissioner".

4 Dion M. (2018), Conflict of Interest and Ethics Commissioner, *L'évolution de l'approche fédérale en matière d'éthique : événements déterminants, bilan et perspectives* [*The evolution of the federal approach to ethics, decisive events, results and perspectives*], McLaughlin College, York University, Toronto, Ontario, Canada, p. 2 [translated in English by Sébastien Lafrance].

5 Garant P., *supra* note 2.

6 OPSEU, *supra* note 1, p. 12.

7 Fontanel F. (2001), *Les fonctionnaires au Viêt Nam: une classe sociale en transition* [*Public Servants in Viêt Nam : A Social Class in Evolution*], Presses de Science Po, vol. 3 n°3, Paris, France, p. 56 [translated in English by Sébastien Lafrance].

8 *Ibid.,* p. 62.

9 *Ibid.*

10 *Law no. 55/2005/QH11.* Retrieved from https://vanbanphapluat.co/law-no-55-2005-qh11-of-november-29-2005-on-anti-corruption [accessed 11 July 2020]

11 Haute autorité pour la transparence de la vie publique [*High Authority for Transparency in Public Life*] (2018), 'Séminaire sur la déclaration de patrimoine au Vietnam' [*Seminar on Wealth Declaration in Vietnam*]. Retrieved from https://www.hatbp.fr/presse/la-haute-autorite-participe-a-un-seminaire-sur-la-declaration-de-patrimoine-au-vietnam/ [accessed 11 July 2020]

12 Henaff N. (2001), *Les fonctionnaires vietnamiens dans la transition* [*Vietnamese Public Servants in Transition*], Presses de Science Po, Vol. 4 n° 20, Paris, France, p. 158.

13 Le Courrier du Vietnam (2019), 'Le PM ordonne de renforcer la lutte anti-corruption' [*PM orders to step up for the fight against corruption*] (bold characters added). Retrieved from https://www.lecourrier.vn/le-pm-ordonne-de-renforcer-la-lutte-anti-corruption/607827.html [accessed 11 July 2020]

Vietnam is not the only state in the world experiencing issues with corruption. A good example is the existence of the United Nations Convention against Corruption.[14] Its adoption "clearly means that the international community is determined to prevent and control the phenomenon",[15] which suggests that such issues are experienced on a wide scale in the world. Many States, including Vietnam on August 19, 2009 and Canada on October 2, 2007, ratified this international convention.[16] Therefore, these two States are legally bound by it. As noted by the Conflict of Interest and Ethics Commissioner of Canada, "[t]he public confidence in the integrity of the Government of Canada and its institutions was [also] been shaken by a series of controversies".[17] For example, the "sponsorship scandal" in 2004 that involved a major political party in Canada.[18]

What is the definition of a 'public servant'? Defining what it is remained "uneasy"[19] in Vietnam until the end of the 20th century. An Ordinance on "executives and officials" adopted on February 26th, 1998 defined public servants as "Vietnamese citizens who are employees of the state and who receive a salary paid by the budget of the State".[20] However, it should be noted that employees of "State management agencies" (*cơ quan quản lý nhà nước*), which may be the equivalent of departments in Canada, are different from "public non-business units" (*đơn vị sự nghiệp công lập*), which include the sectors of health, education, research and culture.[21] In Canada, there are more than 260,000 federal public servants.[22] The term 'employee' (of the public service) is defined in a laconic fashion in the Public Service Employment Act: "a person employed in […] the public

14 United Nations General Assembly (2003), United Nations Convention against Corruption, UN Doc. A/57/422 (in force on December 14th, 2005). See more specifically paragraph 7(4) that relates to the "public sector": "Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest" (bold characters added). See also Article 27.

15 *Ibid.,* "Avant-Propos".

16 *Ibid*.

17 Dion M., *supra* note 4, p. 3 [translated in English by Sébastien Lafrance].

18 See, e.g., *Petit c. Guimond*, 2010 QCCS 3458, p. 33.

19 Henaff N., *supra* note 12, p. 146. The author mentions the following terms that are used in Vietnamese statistics: "*công nhân viên chức nhà nước*" where "*công nhân*" means *worker*; "*nhân viên*" means *employee*; "*viên chức*" means *public servant*and "*nhà nước*" means *State*. In addition, Fontanel F., *supra* note 7, notes (p. 57) that "the term public servant (*công chức*) covers very different administrative and sociological realities" [translated in English by Sébastien Lafrance].

20 Fontanel F., *supra* note 7 [translated in English by Sébastien Lafrance].

21 Fontanel F., *supra* note 7, p. 58 [terms mentioned in Vietnamese were fixed by Sébastien Lafrance].

22 Dion M., *supra* note 4, p. 5.

service to which the Commission [of the public service] has exclusive authority to make appointments."[23]

3. Canada: A leader in the study of conflicts of interests

Canada is an international leader in the field of the study and the management of conflicts of interests.[24] Therefore, the Canadian experience in this area may be quite interesting and perhaps inspiring for Vietnam. As the Vietnamese proverb says, *hay học thì sang, hay làm thì có*.[25] This obviously does not suggest that what is understood by one State to be an effective policy against conflicts of interests should be replicated without any adjustments by another State, mainly because "political cultures vary widely across the globe."[26] For example, if Western countries such as Canada, the United States and the European Union member States do not approach these issues in the exact same way,[27] then why would Vietnam? However, the Conflict of Interest and Ethics Commissioner of Canada noted four pillars that are *common* to all effective conflict of interest regimes. These pillars are the accountability,[28] transparency,[29] fairness,[30] and consistency.[31] We will examine in this text a few measures that were put in place in Canada to fight against conflicts of interestsin the public service.

With respect to the definition of conflicts of interests, Professor Piché wrote: "Rare are those who can ascertain with certainty the existence of a conflict of interests […]: it is malleable, abstract and difficult to circumscribe."[32] She also wrote that a conflict of interests is "ambiguous, vague and ubiquitous."[33] Keeping that in mind, it is important to examinea few specific elements defined by the Canadian legislation and

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23 *SC 2003, c 22, ss 12, 13*, section 2(1), "*employee*".

24 Dion M., *supra* note 4, p. 11.

25 *If you study, you may get the honors. If you work, you may obtain wealth* [translated by Sébastien Lafrance].

26 Ferguson G., *supra* note 3, p. 855.

27 Regulating Conflicts of Interest for Holders of Public Office in the European Union – A Comparative Study of the Rules and Standards of Professional Ethics for the Holders of Public Office in the EU-27 and EU Institutions (2008), p. 31.

28 Dion M., *supra* note 4, p. 7: "accountability means being responsible and answerable for one's own actions".

29 *Ibid*.: "Transparency relates to the public disclosure of public officials' private interests and providing the public with unobstructed access to that information".

30 *Ibid*.: "Fairness requires a lack of bias on the part of the decision maker and relates to procedural fairness".

31 *Ibid*.: "Consistency means ensuring the same results when the facts are the same".

32 Piché C. (2013), 'Définir, prévenir et sanctionner le conflit d'intérêt' [*Define, Prevent and Punish Conflicts of Interests*], 47 *RJTUM* 497, p. 506.

33 *Ibid*., p. 507.

discussed by the Canadian jurisprudence in order to determine what the notionalfoundations of a conflict of interests are.

4. Canada's legal instruments (and rules) pertaining to conflicts of interests

The Conflict of Interest Act ("COIA") applies to approximately 2200 public office holders. It is the act that "deals with conflicts of interest most directly".[34] It provides 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."[35] The objective of the legislative provisions pertaining to conflicts of interests in Canada was summarized by Justice Robins of the High Court of Justice of Ontario, which later became the Ontario Court of Appeal, in *Re Moll and Fisher et al.* rendered in 1979:[36]

"… all conflict-of-interest rules[are]based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. And the Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less."

The decision *Democracy Watch v. Campbell* rendered by the Federal Court of Appeal also examined the concept of conflicts of interests. It stated:[37]

"The common element in the various definitions of conflict of interest is, in my opinion, the presence of competing loyalties.

[…]

… the idea of conflict of interest is intimately bound to the problem of divided loyalties or conflicting obligations. While the specific facts giving rise to a conflict of interest will vary from one profession to another, that

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34 Ferguson G., *supra* note 3, p. 881.

35 *SC 2006, c 9, s 2*, section 4 (italics added).

36 1979 CanLII 2020 (ON SC), p. 509 (emphasis and bold characters added). This excerpt was also cited more recently, for example in the decisions *Grand Forks (City) v. Butler*, 2016 BCSC 349, p. 5 and *Ferri v. Her Majesty the Queen*, 2015 ONSC 4047, p. 27.

37 [2010] 2 FCR 139, pp. 41 and 45 (emphasis added).

which leads to the conclusion that a person is subject to a conflict of interest is the presence of a tension between the person's duty and some other interest or obligation."

In addition, it is important to recall what was stated about it in the decision *Ontario Public Service Employees Union v. Ontario (Ministry of Education)*:[38]

"A conflict of interest occurs when the public interest in proper administration of a government office and a government official's interest in his private economic affairs clash or appear to clash; and a finding of conflict of interest does not depend on wilful wrongdoing by the official or on the issue of whether the official's judgment has in fact been affected."

Further, Professor Ferguson defined conflict of interests in the following terms:[39]

"Although the definitions vary, generally speaking, a conflict of interest exists where a public official has private interests that could improperly influence the performance of his or her public duties and responsibilities."

Moreover, Professor Piché also noted more specifically that the conflicts of interests are either monetary or non-monetary, and they may include various areas of the life of a person.[40] She also wrote:[41]

"… conflicts of interests may be real, potential or apparent. A conflict of interest is *real* when a person sees their personal interests conflict with those for which they are in charge. The *potential* conflict of interests stems from the notion of predictability. There will be the possibility of a conflict as soon as the person realizes that he has one or more interests likely to enter possibly, and in a reasonably foreseeable manner, in conflict with those for which he or she is in charge. As for the *apparent* conflict of interests, it arises when there is on the part of a well-informed person, a reasonable fear of conflict between the interests of the agent and those of the entity that he or she represents (regardless of whether this is actually the case or not)."

Thus, the Values and Ethics Code for the Public Sector (hereinafter "Code") also speaks to the avoidance and prevention of "situations that

38 2002 CanLII 45780 (ON GSB), p. 54 (emphasis added) citing *McKendry and the Treasury Board* (May 31, 1973), E. B. Jolliffe, unreported, quoted in *Re Regional Municipality of Hamilton-Wentworth and Canadian Union of Public Employee, Local 167* (1978), 18 L.A.C. (2d) 46 (Kennedy), pp. 54-55.

39 Ferguson G., *supra* note 3, p. 854 (emphasis added).

40 Piché C., *supra* note 32, pp. 507-508.

41 *Ibid.,* pp. 508-509 (italics in the original; bold characters added).

could *give rise* to a conflict of interest, or the *appearance* of a conflict of interest, is one of the primary means by which a public service employee maintains public confidence in the impartiality and objectivity" in the public service.[42] Therefore, a public servant must be "[a]voiding or withdrawing from activities or situations that would place the employee in *real, potential or apparent* conflict of interest with his/her official duties."[43]

Many States have mechanisms in place to address conflicts of interests before they take place, for example, the duty to disclose financial information by public servants.[44] In Canada, the COIA clearly provides the obligation for the public office holder to manage their "private affairs in a manner that will *prevent* the public office holder from being in a conflict of interest."[45] There are three general ways to address conflicts of interests in a *preventative* manner:[46]

"First, it may be a matter of imposing the disclosure of the conflict situation on the person whose interests are at stake […] Second, it may be a matter of getting rid of, annihilating or disposing of the conflict before it even happens [and t]hirdly, we may want to avoid or prevent the conflict, in particular by putting an end to the service of the person affected by the conflict of interests, or by preventing the person from accepting duties that would give rise to the conflict."

There are also mechanisms in place that apply after conflicts of interests have been identified. Some of these mechanisms are intended to punish certain conduct by way of regulatory penalties or even criminal sanctions in the most extreme cases. In the latter cases, paragraph 121(1)(*c*) of the Criminal Code of Canada[47] provides:

"Every one commits an offence who […] being an *official or employee* of the government, directly or indirectly demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind for themselves or another person, unless they have the consent in writing of the head of the branch of government that employs them or of which they are an official."

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42 *Values and Ethics Code for the Public Sector*, Ottawa: Treasury Board of Canada, 2011, p. 4; Policy on Conflict of Interests and Post-Employment, Office of the Public Sector - Integrity Commissioner of Canada. Retrieved from: https://www.psic-ispc.gc.ca/en/resources/corporate-publications/policy-conflict-interest-and-post-employment [accessed on March 25, 2021]

43 *Ibid.,* p. 25 (emphasis and bold characters added).

44 Ferguson G., *supra* note 3, p. 861.

45 *Supra* note 35, article 5 (italics added).

46 Piché C., *supra* note 32, pp. 517-518 [translated in English by Sébastien Lafrance].

47 *RSC, 1985, c C-46* (emphasis and bold characters added).

The Supreme Court of Canada stated about this paragraph of the Criminal Code: "Parliament worded this section *broadly* and did not intend to restrict its application solely to situations where the gift was motivated by the recipient's position in government."[48]

The appropriate action to take will depend on the significance and nature of the conflict.[49] It may be "1) to prohibit the conflict of interests, regardless of the circumstances, 2) to allow certain types of conflicts after disclosure […] or 3) to allow the conflict of interests that are of minimal importance and that are not significant (*de minimis* rule)."[50] Gifts of little value offered to a public servant appear to illustrate these conflicts of interests of minimal importance. However, "[i]f a reporting public office holder or a member of his or her family accepts any single gift or other advantage that has *a value of $200 or more*, other than one from a relative or friend, the reporting public office holder shall, within 30 days after accepting the gift or other advantage, make a public declaration that provides sufficient detail to identify the gift or other advantage accepted, the donor and the circumstances under which it was accepted."[51] Therefore, gifts of a value of less than $200 received from a family member or a friend do not necessarily fall under the scrutiny of the Conflict of Interest and Ethics Commissioner.[52] Nevertheless, the Vietnamese proverb *bán anh em xa mua láng giềng gần*[53] does not unfortunately always hold true when it comes to the friendships of those who work in the public service in light of the possible existence of conflicts of interests.

Let us note that gifts and contracts are the main areas covered by the legislation and litigations in the area of conflicts of interests.[54] It is prohibited, for example, for 'public office holders' to "accept any gift or other advantage, including from a trust, that might reasonably be seen to have been given to influence the public office holder in the exercise of an official power, duty or function".[55] For example, the former Conflict of Interest and Ethics Commissioner of Canada concluded in her report about

48 *R. v. Hinchey*, [1996] 3 S.C.R. 1128, p. 46 (italics added).

49 Piché C., *supra* note 32, p. 517.

50 *Ibid.,* p. 519.

51 *Supra* note 35, paragraph 25(5) (italics added).

52 Wilson H. (2003), *Managing Conflict of Interest in the Public Service – OECD Guidelines and Country Experiences*, Ethics Counsellor, Government of Canada, p. 133.

53 A good neighbor/friend is worth more than a hundred relatives [translated in English by Sébastien Lafrance].

54 Unknown author (1961), 'Conflict of Interests: State Government Employees', 47 *Va. L. Rev.* 1034, p. 1035.

55 *Supra* note 35, paragraph 11(1) (italics added).

Prime Minister Trudeau that a vacation accepted by him and his family on the private island of the Aga Khan "could reasonably be seen to have been given to influence Mr. Trudeau in the exercise of an official power, duty or function".[56] The existence of any wrongdoing is not necessary in order to find a conflict of interests; it is the *appearance*, not necessarily the existence, of corruption that we are looking to avoid.

The COIA prohibits preferential treatments. It provides: "No public office holder shall, in the exercise of an official power, duty or function, give preferential treatment to any person or organization based on the identity of the person or organization that represents the first-mentioned person or organization."[57] This provision applies to "situations in which an official's private interest is not objectively ascertainable, but it is nonetheless clear that an individual or organization has received preferential treatment from the official on the basis of their identity."[58] The Conflict of Interest and Ethics Commissioner has interpreted this provision of the COIA narrowly.[59] The classic example stemming from the jurisprudence on this topic, although it is not directly about the application of the COIA, is the decision of the Supreme Court of Canada in *Brossard (Town) v. Quebec (Commission des droits de la personne)*. In that decision, the Court wrote, "It is appropriate and indeed necessary to adopt rules of conduct for public servants to inhibit conflicts of interest, of which nepotism is one serious form."[60]

Professor Piché noted, "Once the conflict of interests is identified, appropriate instruments aimed at preventing, treating and punishing it must be put in place."[61] The Code,[62] the government document titled Accountable Government - A Guide for Ministers and Ministers of State,[63] the COIA,[64] the Lobbying Act,[65] the Public Servants Disclosure Protection Act[66] and the Conflict of Interest Code for Members of the

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56 Dawson M. (2017), Conflict of Interest and Ethics Commissioner, 'The Trudeau Report', p. 61 (italics added). Retrieved from https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/The%20Trudeau%20Report.pdf [accessed 11 July 2020]

57 *Supra* note 35, section 7.

58 Ferguson G., *supra* note 3, p. 856.

59 *Ibid.,* p. 881.

60 [1988] 2 SCR 279, p. 282.

61 Piché C., *supra* note 32, p. 516 [translated in English by Sébastien Lafrance].

62 *Supra* note 42.

63 Retrieved from http://publications.gc.ca/collections/collection_2011/bcp-pco/CP1-3-2011-eng.pdf [accessed 11 July 2020]

64 *Supra* note 35.

65 *RSC 1985, c 44 (4th Supp).*

66 *SC 2005, c 46.*

House of Commons[67] are the key legal instruments adopted in Canada to fight against conflicts of interests within the public service. The Conflict of Interest and Ethics Commissioner of Canada also noted that we are "gone from a values-based approach to arules-based approach."[68] Howard Wilson, Ethics Counsellor, Government of Canada, noted, "Rather than setting out a long list of rules, Canada's approach has been to establish broad and clear standards based on a set of principles."[69] It is also important to recall that it is possible for a person to be subject to more than one act or one code pertaining to conflicts of interests.[70] In a nutshell, all these instruments were enacted to ensure that public servants "will work solely in the public's interest, not their own private interest".[71]

5. Canada's historical background regarding conflicts of interests

Before discussing in greater detail some of the rules applicable to conflicts of interests for State representatives in Canada, let us recall some of the key events that marked the evolution of how conflicts of interests are addressed in Canada.

- In 1867, first year of the Canadian Confederation, the House of Commons prohibited members to vote on matters in which they have a direct monetary interest.

Nowadays, the Conflict of Interest Code for Members of the House of Commons provides that members of parliament shall not "participate in debate on or vote on a question in which he or she has a private interest".[72] The individuals covered by this provision will then have the duty to recuse themselves or to not participate in such discussions or votes. The COIA provides a similar provision.[73] Its scope is broader and does not only apply to members of parliament.

- In 1973, the Prime Minister Pierre Elliott Trudeau establishes guidelines on conflicts of interests for cabinet ministers.[74] In a speech he

67 Standing Orders of the House of Commons – Consolidated version as of December 11, 2019, 'Conflict of Interest Code for Members of the House of Commons. Retrieved from https://www.noscommunes.ca/About/StandingOrders/appa1-e.htm [accessed 11 July 2020]

68 Dion M., *supra* note 4, p. 6 [translated in English by Sébastien Lafrance].

69 Wilson H., *supra* note 52, p. 128.

70 See, for example, *Stevens c. Canada (Procureur général)*, 2004 CF 1746, au paragraphe 25 : "*the applicant was subject to three different regimes pertaining to conflicts of interests while he was Member of Parliamanet or a Minister of the Cabinet: the Clark Guidelines, the Trudeau Guidelines, and the Mulroney Code*" [translated in English by Sébastien Lafrance].

71 *Roberts v. Commissioner of the NWT et al*, 2002 NWTSC 68, p. 12.

72 *Supra* note 67, article 13.

73 *Supra* note 35, p. 6(1).

74 Wilson H., *supra* note 52, p. 129.

gave in 1973 to the Parliament of Canada, Mr. Trudeau explained the reasons why the government has adopted directives *instead of* a statute:[75]

"Because of their particular functions and responsibilities, ministers will […] be required to comply with a series of directives that will impose additional restrictions on them, in particular with regard to financial interests. *The government has opted for directives rather than additional legislative measures* specifically concerning ministers, because certain behaviors can only be defined in accordance with specific circumstances."

As a side note, let us mention that administrative guidelines are not, by nature, without normative value. In other words, they are not left to the discretion of the person to whom the directive is intended to apply. Indeed, they "are intended to *regulate* the activity within an administrative entity".[76]

- In 1979, the Prime Minister Joe Clark extended these directives to the spouses of ministers.[77]

- In 1985, the Prime Minister Brian Mulroney published the first Policy on Conflict of Interest and Post-Employment. The Conflict of Interest and Ethics Commissioner of Canada noted, "this code, *although it does not have the force of law*, gathered in a single document the *rules* that apply to ministers, parliamentary secretaries, departmental staff, etc."[78]

- In 1994, the Prime Minister Jean Chrétien released a new code on conflicts of interests.[79]

6. Practical impacts of the rules of conflicts of interests on employability

In Canada, the purpose of the COIA is to "encourage experienced and competent persons to seek and accept public office",[80] not to discourage them. It is not uncommon in Canada to see experienced and qualified individuals working in the private sector joining the public service. For example, the current Commissioner of Competition began his career in private practice prior to becoming a prosecutor and after that he eventually

75 Dion M., *supra* note 4, p. 4 (emphasis added; translated in English by Sébastien Lafrance).

76 Dussault R. and Borgeat L. (1984), *Traité de droit administratif* [*Administrative Law Treatise*], 2e éd. Tome 1, Québec, Presses de l'Université Laval, p. 418 [emphasis added; translated in English by Sébastien Lafrance].

77 Wilson H., *supra* note 52, p. 129.

78 Dion M., *supra* note 4, p. 5 [bold characters added; translated in English by Sébastien Lafrance].

79 Wilson H., *supra* note 52, p. 128.

80 *Supra* note 35, section 3(d).

became the Commissioner of Competition.[81] Professor Ferguson wrote, "In practice, most States aim to strike a balance between the need to avoid conflicts of interest and the need to attract high-quality candidates."[82] The opposite is also true. One example could be what is called the "revolving door" phenomenon, which is a "smooth transition of public officials to lucrative jobs in the private sector, in which the insider knowledge gained in office can be put to use in the new company".[83] This practice is common. For example, at the end of his mandate, the former Prime Minister of Canada Stephen Harper joined Dentons law firm.[84] How could conflicts of interests be *prevented* in the first place in such cases? The COIA provides, "No public office holder shall allow himself or herself to be *influenced in the exercise of an official power, duty or function* by plans for, or offers of, outside employment."[85] Therefore, the possibility of working in the private sector afterwards should not interfere, directly or indirectly, with the exercise of a State representative. In addition, the COIA also provides, "No *former* public office holder shall act in such a manner as to take *improper* advantage of his or her *previous* public office."[86] Thus, the transition of public officials from the public to the private sectors is covered by the COIA.

The Code also provides for situations where public servants would work at the same time both for the public service and for a job outside the public service. The Code provides, "Public servants may engage in employment outside the public service and take part in outside activities unless the employment or activities are likely to give rise to a real, apparent or potential conflict of interest or would undermine the impartiality of the public service or the objectivity of the public servant."[87] What about political activities conducted by public servants? Suffice it to say for the purposes of this text, that "Government lawyers", for example, "must comply not only with legislation on government employees but also with the professional obligations that apply to lawyers under legislation on the legal profession."[88]

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81 Retrieved from https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00109.html [accessed 11 July 2020]

82 Ferguson G., *supra* note 3, p. 862.

83 *Ibid.,* p.16.

84 Dickson J. (2018), 'Harper elected chairman of the International Democrat Union'. Retrieved from https://ipolitics.ca/2018/02/21/harper-elected-chairman-international-democrat-union/ [accessed 11 July 2020]

85 *Supra* note 35, section 10.

86 *Ibid.,* section 33 (italics added).

87 *Supra* note 42, Chapter titled "Outside employment or activities".

88 Martin A. F. (2018), 'Legal Ethics and the Political Activity of Government Lawyers', 49-2 *Ottawa Law Review* 263, pp. 269-270.

The refusal of President Donald Trump to disclose his income tax returns and financial records,[89] who did not follow the tradition of disclosing information, would simply not happen in Canada. In Canada, such a tradition does not (need to) exist. For instance, the COIA provides, "A reporting public office holder shall […] provide a confidential report to the Commissioner"[90] that will include, among other things, "a description of all of the reporting public office holder's assets and an estimate of their value".[91]

There would be much more to write about conflicts of interests in the context of State representatives in Canada. This article provided an overview of its main important features, which is just the tip of the (Canadian) iceberg on the topic! As the Vietnamese proverb says, *quá khứ mở ra con đường của tương lai*.[92] Future possible events that may cause issues in light of potential conflicts of interests could eventually shed more light on what needs to be addressed further in that field. ●

References

Cases

[1] *Re Moll and Fisher et al.*, 1979 CanLII 2020 (ON SC)

[2] *Democracy Watch v. Campbell*, [2010] 2 FCR 139

[3] *Stevens c. Canada (Procureur général)*, 2004 CF 1746

[4] *Ontario Public Service Employees Union v. Ontario (Ministry of Education)*, 2002 CanLII 45780 (ON GSB)

[5] *Roberts v. Commissioner of the NWT et al*, 2002 NWTSC 68

[6] *R. v. Hinchey*, [1996] 3 S.C.R. 1128

[7] *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 SCR 279

[8] *Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2

Literature

[9] Bach N. (2019), 'Will We Ever See Trump's Tax Returns – And Does It Matters?', *Fortune*. Retrieved from https://fortune.com/2019/04/10/trump-tax-returns/ [accessed 11 July 2020]

[10] Dawson M. (2017), Conflict of Interest and Ethics Commissioner, 'The Trudeau Report', p. 61 (italics added). Retrieved from https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/The%20Trudeau%20Report.pdf [accessed 11 July 2020]

[11] Dickson J. (2018), 'Harper elected chairman of the International Democrat Union'. Retrieved from https://ipolitics.ca/2018/02/21/harper-elected-chairman-international-democrat-union/ [accessed 11 July 2020]

[12] Dion M. (2018), Conflict of Interest and Ethics Commissioner, *L'évolution de l'approche fédérale en matière d'éthique : événements déterminants, bilan et perspectives* [*The evolution of the federal approach to ethics, decisive events, results and perspectives*], McLaughlin College, York University, Toronto, Ontario, Canada, p. 2

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89 See, for example, Bach N. (2019), 'Will We Ever See Trump's Tax Returns – And Does It Matters?', *Fortune*. Retrieved from https://fortune.com/2019/04/10/trump-tax-returns/ [accessed 11 July 2020]

90 *Supra* note 35, paragraph 22(1).

91 *Ibid.,* paragraph 22(2)(a).

92 "The past opens the path of the future" [translated in English by Sébastien Lafrance].

[13] Dussault R. and Borgeat L. (1984), *Traité de droit administratif* [*Administrative Law Treatise*], 2e éd. Tome 1, Québec, Presses de l'Université Laval, p. 418

[14] Ferguson G. (2018), *Global Corruption: Law, Theory & Practice*, 3rd ed., Victoria BC, University of Victoria, p. 875

[15] Fontanel F. (2001), *Les fonctionnaires au Viêt Nam: une classe sociale en transition* [*Public Servants in Viêt Nam : A Social Class in Evolution*], Presses de Science Po, vol. 3 n°3, Paris, France, p. 56

[16] Garant P. (1990), 'La liberté politique des fonctionnaires à l'heure de la Charte canadienne' [*Political Freedom of Public Servants in the Age of the Canadian Charter*], *Les Cahiers de droit*, Vol. 31, issue 2, p. 413

[17] Haute autorité pour la transparence de la vie publique [*High Authority for Transparency in Public Life*] (2018), 'Séminaire sur la déclaration de patrimoine au Vietnam' [*Seminar on Wealth Declaration in Vietnam*]. Retrieved from https://www.hatbp.fr/presse/la-haute-autorite-participe-a-un-seminaire-sur-la-declaration-de-patrimoine-au-vietnam/ [accessed 11 July 2020]

[18] Henaff N. (2001), *Les fonctionnaires vietnamiens dans la transition* [*Vietnamese Public Servants in Transition*], Presses de Science Po, Vol. 4 n° 20, Paris, France, p. 158

[19] Hogg P. (1985), *Constitutional Law of Canada*, 2nd ed., Toronto, Carswell, p. 191

[20] Le Courrier du Vietnam (2019), 'Le PM ordonne de renforcer la lutte anti-corruption' [*PM orders to step up for the fight against corruption*] (bold characters added). Retrieved from https://www.lecourrier.vn/le-pm-ordonne-de-renforcer-la-lutte-anti-corruption/607827.html [accessed 11 July 2020]

[21] Martin A. F. (2018), 'Legal Ethics and the Political Activity of Government Lawyers', 49-2 *Ottawa Law Review* 263, pp. 269-270

[22] Piché C. (2013), 'Définir, prévenir et sanctionner le conflit d'intérêt' [*Define, Prevent and Punish Conflicts of Interests*], 47 *RJTUM* 497, p. 506

[23] Regulating Conflicts of Interest for Holders of Public Office in the European Union – A Comparative Study of the Rules and Standards of Professional Ethics for the Holders of Public Office in the EU-27 and EU Institutions (2008), p. 31

[24] Unknown author (1961), 'Conflict of Interests: State Government Employees', 47 *Va. L. Rev.* 1034, p. 1035

[25] Wilson H. (2003), *Managing Conflict of Interest in the Public Service – OECD Guidelines and Country Experiences*, Ethics Counsellor, Government of Canada, p. 133

Legal documents

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

[27] *Conflict of Interest Code for Members of the House of Commons*, Standing Orders of the House of Commons – Consolidated version as of December 11, 2019, 'Conflict of Interest Code for Members of the House of Commons. Retrieved from https://www.noscommunes.ca/About/StandingOrders/appa1-e.htm [accessed 11 July 2020]

[28] *Criminal Code*, RSC, *1985, c C-46*

[29] *Law no. 55/2005/QH11*

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

[31] *Petit c. Guimond*, 2010 QCCS 3458

[32] *Public Servants Disclosure Protection Act*, *SC 2005, c 46*

[33] *Public Service Employment Act, SC 2003, c 22, ss 12, 13*

[34] United Nations General Assembly (2003), United Nations Convention against Corruption, UN Doc. A/57/422 (in force on December 14th, 2005)

[35] *Values and Ethics Code for the Public Sector*, Ottawa: Treasury Board of Canada, 2011, p. 4; Policy on Conflict of Interests and Post-Employment, Office of the Public Sector - Integrity Commissioner of Canada. Retrieved from: https://www.psic-ispc.gc.ca/en/resources/corporate-publications/policy-conflict-interest-and-post-employment [accessed on March 25, 2021]