



**CANADA**

**OFFICE OF THE SENATE ETHICS OFFICER**

**OPINION REGARDING SENATOR WALLIN**

**PURSUANT TO SUBSECTION 42(1)  
OF THE  
*CONFLICT OF INTEREST CODE FOR SENATORS***

**JEAN T. FOURNIER  
SENATE ETHICS OFFICER**

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## 1. REQUEST FOR AN OPINION

The Honourable Pamela Wallin, a member of the Senate of Canada, requested that I provide her with a written opinion, pursuant to subsection 42(1) of the *Conflict Interest Code for Senators* (the Code), respecting certain allegations raised in media reports, including social media, concerning the Senator's obligations under the Code in connection with Bill C-311, the *Climate Change Accountability Act*. In particular, it was alleged that, by voting at Second Reading on the Bill, she acted in a manner to further her own private interests and those of Oilsands Quest Inc., a company on whose board she sits. It was also alleged that she was required to declare her private interest in Oilsands Quest Inc. when the Bill was being debated in the Senate and then to recuse herself from voting on the measure.

Subsection 42(1) of the Code reads as follows:

**42.(1)** In response to a request in writing from a Senator on any matter respecting the Senator's obligations under this Code, the Senate Ethics Officer shall provide the Senator with a written opinion containing any recommendations that the Senate Ethics Officer considers appropriate.

Senator Wallin's request for an opinion was made on July 20, 2011 and subsequently confirmed in writing. A written opinion under the above-noted provision is confidential and may only be made public by the Senator or with his or her written consent. Senator Wallin has advised that she intends to make this opinion public.

This matter engages the following provisions of the Code: section 8, which prohibits Senators from acting in any way to further their own private interests, their family members' private interests, or to improperly further another person's or entity's private interests, while they are engaged in their parliamentary duties and functions -- the phrase "furthering private interests" being defined in section 11 of the Code; subsection 12(1), which requires a Senator who has a private interest in a matter before the Senate or a committee of the Senate of which he or she is a member to make a declaration of this interest in the Senate or in the committee, as the case may be; and section 14, which prohibits Senators from voting where they have made or were required to make such a declaration. These sections of the Code are virtually identical to the corresponding provisions found in the *Conflict of Interest Code for Members of the House of Commons*.

## 2. RELEVANT PROVISIONS OF THE CODE

The relevant provisions of the Code are as follows:

**Carrying on activities**

5. Senators who are not ministers of the Crown may participate in any outside activities, including the following, as long as they are able to fulfil their obligations under this Code:

- (a) engaging in employment or in the practice of a profession;
- (b) carrying on a business;
- (c) being a director or officer in a corporation, association, trade union or not-for-profit organization; and
- (d) being a partner in a partnership.

**Furthering private interests**

8. When performing parliamentary duties and functions, a Senator shall not act or attempt to act in any way to further his or her private interests, or those of a family member, or to improperly further another person's or entity's private interests.

**Clarification: furthering private interests**

11.(1) In sections 8 to 10, furthering private interests of a person or entity, including the Senator's own private interests, means actions taken by a Senator for the purpose of achieving, directly or indirectly, any of the following:

- (a) an increase in, or the preservation of, the value of the person's or entity's assets;
- (b) the elimination, or reduction in the amount, of the person's or entity's liabilities;
- (c) the acquisition of a financial interest by the person or entity;
- (d) an increase in the person's or entity's income from a contract, a business or a profession;
- (e) an increase in the person's income from employment;
- (f) the person becoming a director or officer in a corporation, association, trade union or not-for-profit organization; or
- (g) the person becoming a partner in a partnership.

**Clarification: not furthering private interests**

(2) A Senator is not considered to further his or her own private interests or the private interests of another person or entity if the matter in question

- (a) is of general application;
- (b) affects the Senator or the other person or entity as one of a broad class of the public; or
- (c) concerns the remuneration or benefits of the Senator as provided under an Act of Parliament or a resolution of the Senate or of a Senate committee.

**Declaration of a private interest: Senate or committee**

**12.** (1) If a Senator has reasonable grounds to believe that he or she, or a family member, has a private interest that might be affected by a matter that is before the Senate or a committee of which the Senator is a member, the Senator shall, on the first occasion at which the Senator is present during consideration of the matter, make a declaration regarding the general nature of the private interest. The declaration can be made orally on the record or in writing to the Clerk of the Senate or the Clerk of the committee, as the case may be. The Speaker of the Senate shall cause the declaration to be recorded in the *Journals of the Senate* and the Chair of the committee shall, subject to subsection (4), cause the declaration to be recorded in the Minutes of Proceedings of the committee.

**Prohibition on voting**

**14.** A Senator who has made a declaration under section 12, or a Senator who is required to make such a declaration but has not yet done so, may not vote on the matter but may abstain.

**Clarification: having a private interest**

**16.** For the purpose of sections 12 to 14, private interest means those interests that can be furthered in subsection 11(1), but does not include the matters listed in subsection 11(2).

**3. FACTS****Senator Wallin's Appointment to the Senate**

On December 22, 2008, the Prime Minister, the Right Honourable Stephen Harper, announced the appointment of Senator Wallin to the Senate. The Senator was officially appointed on January 2, 2009 and was sworn in on January 26, 2009.

Senator Wallin is currently Chair of the Standing Senate Committee on National Security and Defence. She also serves on the Subcommittee on Veterans Affairs and the Standing Senate Committee on Foreign Affairs and International Trade. Finally, she has also been a past member of the Special Senate Committee on Anti-terrorism.

Senator Wallin was already a member of the board of directors of Oilsands Quest Inc. at the time of her appointment to the Senate. She was appointed to the board on June 28, 2007, 18 months prior to her appointment to the Senate.

## **Background on Oilsand Quest Inc.<sup>1</sup>**

Incorporated in 1998, Oilsands Quest Inc. is a U.S. public company, with its head office in Calgary, Alberta, engaged in the exploration of oil sands located in Saskatchewan and Alberta. Oilsands Quest Inc., operating through its Canadian subsidiary corporations, is an exploration company, not an oil sands producer, and does not currently have any income from operating activities. The primary focus of the company's exploration program is on well drilling, seismic, environmental, engineering, construction and other activities, with test sites on the Company's Saskatchewan and Alberta permits. It is a relatively small company with 17 employees as of April 30, 2011.

Senator Wallin is a member of the company's Governance and Nominating Committee and of its Community Relations, Environment, Health and Safety Committee. Like other directors, she receives directors' fees, owns shares of common stock and stock options. According to information filed by the company with the United States Security and Exchange Commission, Senator Wallin's shares in the company in July 2011 represented far less than 1% of the issued shares.

### **Bill C-311, the *Climate Change Accountability Act***

Bill C-311 (the Bill), a private member's bill, was first introduced in the House of Commons by a member of the New Democratic Party on February 10, 2009 and was reinstated in the next parliamentary session on March 3, 2010. It was adopted in the House on May 5, 2010 by a vote of 149 to 136. The Bill was then introduced in the Senate on May 6, 2010 and was defeated at Second Reading on November 16, 2010 by a vote of 43 to 32. Conservative Senators voted against the Bill while Liberal Senators voted in favour.

According to the summary of the Bill, its purpose is:

...to ensure that Canada meets its global climate change obligations under the United Nations Framework Convention on Climate Change by committing to a long-term target to reduce Canadian greenhouse gas emissions to a level that is 80% below the 1990 level by the year 2050, and by establishing interim targets for the period 2015 to 2045. It creates an obligation on the Commissioner of the Environment and Sustainable Development to review proposed measures to meet the targets and submit a report to Parliament. It also sets out the duties of the National Round Table on the Environment and the Economy.

The preamble to the Bill recognizes that climate change is an urgent problem for Canada and requires government action. It states that, according to scientific research, the reduction of greenhouse gases emissions is required in order to prevent the global average temperature

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<sup>1</sup> The information in this section is based on Oilsands Quest Inc.'s Annual Report for the year ended April 30, 2011 and other disclosures to the United States Securities and Exchange Commission.

from rising. Finally, it states that the intent of the legislation is to ensure that Canada reduces its emissions to an extent similar to that required by all industrialized countries in order to prevent dangerous climate change.

Section 5 of the Bill establishes targets and timelines to reduce Canadian greenhouse gas emissions: a long-term target that is 80% below the 1990 level by the year 2050 and a medium-term target that is 25% below the 1990 level by the year 2020. The proposed targets are ambitious, comprehensive and on a scale of national significance, with explicit measures for accountability and oversight. Section 6 of the Bill provides the Minister of the Environment with six months to table an interim plan with targets for every five years. That plan is required to be reviewed at least once every five years. Section 10 provides that the Minister would have to report annually to Parliament on the measures taken by the Government of Canada to ensure that its commitment and the targets set out under the target plan are being met, as well as to report on the level of Canadian greenhouse gas emission reductions that are reasonably expected to result from each of those measures in each of the next 10 years.

The regulation-making authority under the Bill is very broad, potentially affecting every region of the country and every sector of the economy. Under section 7, the Governor in Council may make regulations:

- (a) limiting the amount of greenhouse gases that may be released into the environment;
- (b) limiting the amount of greenhouse gases that may be released in each province;
- (c) establishing performance standards designed to limit greenhouse gas emissions;
- (d) pertaining to the use or production of any equipment, technology, fuel, vehicle or process in order to limit greenhouse gas emissions;
- (e) respecting permits or approvals of the release of any greenhouse gas;
- (f) regarding trading in greenhouse gas emission reductions, removals, permits, credits, or other units;
- (g) pertaining to monitoring, inspections, investigations, reporting, enforcement, penalties or other matters to promote compliance with the regulations made under the Act;
- (h) designating the contravention of a provision or class of provisions of the regulations as an offence punishable by indictment or on summary conviction and prescribing a fine and imprisonment for the offence; and,
- (i) relating to any other matter that is necessary to carry out the purpose of the Act.

## **Annual Disclosure Requirements under the Code<sup>2</sup>**

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<sup>2</sup> The annual disclosure requirements under the Code are separate and distinct from the requirement to make declarations of private interests in the Senate and in committees of the Senate. The disclosure process involves confidential disclosure, on an annual basis, by Senators to the Senate Ethics Officer of their financial interests, as well as the public disclosure of summaries of these various interests. The public information is filed in a public registry, which is regularly updated, and which may be consulted by the public at any time during the year. By

As noted earlier, Senator Wallin was officially appointed to the Senate on January 2, 2009. On January 5, 2009, I wrote to Senator Wallin to provide her with a copy of the confidential disclosure statement, a form which must be completed by each newly summoned Senator within 120 days after being summoned, as well as information about the Code and my Office. The annual disclosure process under the Code is a rigorous one involving detailed forms to be filed, the exchange of documents between my Office and individual Senators, and face-to-face meetings with Senators. Senators are required to disclose sources of income, assets, liabilities, outside activities, sponsored travel, gifts and any federal Government contracts, in accordance with the relevant provisions of the Code.

Senator Wallin completed her confidential disclosure statement on January 28, 2009 and sent it to my Office the next day. In accordance with paragraphs 28(1)(a) and (b) of the Code, the Senator indicated that she was an independent director of Oilsands Quest Inc. and that she held other official positions with a number of for-profit and not-for-profit organizations.

Based on this information, I prepared a letter of advice to the Senator, dated February 19, 2009, regarding her particular obligations under the Code and recommended measures to ensure that she was in compliance with the Code. Similar letters of advice are sent to all Senators as part of the annual disclosure process in order to provide guidance to them concerning their obligations under the Code and, in particular, to address the provisions that are directly relevant to them in light of the information that they have disclosed.

My letter of advice to Senator Wallin referred to section 5 of the Code, which provides that Senators who are not ministers of the Crown may participate in any outside activities, including sitting on boards or holding office in corporations, partnerships or other entities, provided that they are able to fulfil their obligations under the Code. The letter also noted that the first obligation of Senators is to serve the public interest and where their private interests come in conflict, or appear to come in conflict with the public interest, they are to resolve the matter in favour of the public interest (paragraph 2(1)(c)). The letter also draws attention to several provisions of the Code that highlight the importance of ensuring that the public interest always prevails over private interests (section 8 - furthering private interests, section 9 - use of influence, and section 10 - use of insider information). These provisions are aimed at ensuring that Senators will not act or attempt to act in a manner that would be beneficial to them or to

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contrast, a declaration of a private interest is made by a Senator in the Senate or in a committee of the Senate whenever a matter is being examined that may affect a private interest of the Senator, or of a family member. The main purpose of the public registry of information is to give public notification, on a continuing basis, of those interests held by Senators that might, at some point, be thought to have a general influence upon their parliamentary conduct or actions. The main purpose of declarations of private interests is to ensure that fellow Senators, other members of Parliament, Ministers, officials and the public are made aware at the point at which a Senator is actually faced with a matter before the Senate or in a Senate committee in which he or she reasonably believes that a private interest he or she has might be affected by that matter. A Senator who is in this situation is then required to recuse himself or herself from any deliberations on the measure, including the vote.



their family members or that would improperly benefit another person or entity in any manner listed under subsection 11(1) of the Code.

In accordance with section 30 of the Code, I prepared a public disclosure summary, dated January 28, 2009. The summary stated that Senator Wallin was a member of the board of directors of Oilsands Quest Inc., as well as a member of the board of directors of several other corporations and not-for-profit organizations.

I met Senator Wallin in March 2009, at which time I had the opportunity to discuss her disclosure statement, my letter of advice to her, as well as her public disclosure summary. Senator Wallin signed her public disclosure summary on that day and a certified copy was placed in the Office's Public Registry, in accordance with subsection 33(1) of the Code, on March 25, 2009. I concluded that she was in compliance with the requirements of the Code and advised her accordingly. I also met Senator Wallin in January 2010 and in November 2010 as part of the annual disclosure process and was of the view that she fulfilled her obligations under the Code.<sup>3</sup>

### **Activities Outside Official Parliamentary Duties**

A number of Senators and Members of the House of Commons are engaged in a wide range of activities outside their official parliamentary duties. Both the conflict of interest code applicable to Senators (section 5 of the Code) and that applicable to Members of the House of Commons (section 7 of the *Conflict of Interest Code for Members of the House of Commons*) authorize private members to engage in outside activities **provided they are able to comply with the provisions of the Code applicable to them**. In fact, these sections in the Senate and House codes are virtually identical. (The rules that apply to Cabinet ministers are much more restrictive, reflecting the fact that they have considerable executive powers.)

A clear statement on the matter of Canadian parliamentarians engaged in activities outside their official duties was made in 1992 by a special joint committee of the Senate and of the House of Commons, the Special Joint Committee on Conflict of Interest (the Blenkarn-Stanbury Report):

The Canadian tradition has seen a mix of politicians who have given up outside activities for their parliamentary activities and "citizen politicians", citizens who entered politics after pursuing active business or professional lives, and who retain those businesses during their tenure in public life. We believe this mix enhances the quality of Parliament as a whole, contributing to an expression of diverse views and the representation of a broad range of interests.

Committee members recognize that it is not necessarily wrong or improper for a conflict between a Member's public duties and private interests to arise. To

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<sup>3</sup> For a more detailed description of the annual disclosure process in the Senate, please refer to Appendix E of the Senate Ethics Officer's Annual report 2010-2011, pages 84-86.

say otherwise would be to demand that all Members sever all ties with their former lives. Not only do we believe such a demand would work excessive hardship (and dissuade talented and capable individuals from public life), but we believe it is unnecessary. What is important is to ensure that any conflict that could arise is and is seen to be always resolved in the public interest.

Senators who sit on boards of directors of not-for-profit and for-profit organizations are required to disclose the positions they hold to the Senate Ethics Officer and I then make this information available to the public (see paragraphs 31(1)(a) and (b)). Moreover, Senators must ensure that they arrange their affairs to prevent their private interests from coming in conflict, or appearing to come in conflict, with the public interest. As noted earlier, a number of sections of the Code highlight the importance of ensuring that the public interest always prevails over private interests (paragraph 2(1)(c) and sections 8, 9 and 10).

The conflict of interest laws and rules in other Canadian jurisdictions also permit members of legislative assemblies to engage in certain activities outside their official duties and functions. Permitting legislators to maintain some involvement in these activities is also a recognized practice in many countries, including the United States, the United Kingdom, Australia and France. The general view, in Canada and elsewhere, is that outside activities enable legislators to become more knowledgeable and experienced in certain areas of public policy which, in turn, assists them in carrying out their duties and functions as lawmakers.<sup>4</sup>

#### **4. SENATOR WALLIN'S POSITION**

Both in my meeting with Senator Wallin on August 17, 2011, as well as in a letter to me dated August 31, 2011, Senator Wallin stated that she believed that the Bill was of general application and broad effect.

She stated that, having examined the Bill, she did not believe that she would be in a conflict of interest if she participated in the vote at Second Reading since the Bill did not affect Oilsands Quest Inc. as an exploration company specifically, or oil sands companies as a class, or even the energy sector as a broader class.

She noted that the Bill did not target, or even mention, any particular sector of the economy, instead setting out overall national targets for the reduction of greenhouse gas emissions. She also indicated that, if the Bill had passed, it would have been up to the Government of Canada to decide what regulations to bring in to meet the steep reduction targets set out under the Bill. And, given these steep targets, she argued that all sectors of the economy would have been affected, particularly since all Canadian citizens, all businesses in Canada, and the entire public sector contribute to greenhouse gas emissions.

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<sup>4</sup> For a more detailed account of the restrictions and compliance measures involving outside activities which Senators are required to follow in order to comply with their obligations under the Code, please refer to my Annual Report 2006-2007, pages 25-28.

In her view, the suggestion that regulations promulgated under the Bill might have targeted the energy sector, and oil sands companies in particular, to the detriment of Oilsands Quest Inc. and her own personal interests, is entirely speculative, again, given a plain reading of the Bill, the provisions of which do not target any one sector of the economy, and given the steep reduction goals that are required to be met thereunder.

Senator Wallin also explained that she believed that, given the Bill's broad application, not only did she have a right to vote on the measure, but that it was her responsibility as a member of the Senate to do so. She stated that, in her view, the Bill would have been detrimental to the Canadian economy as a whole and that the approach of the Government of Canada in reducing greenhouse gas emissions was far more responsible than the approach taken under the Bill. She stated that when she voted, she was motivated, not by her own personal interests, but rather by a sense of duty and responsibility as a legislator and a member of the Senate.

Finally, the Senator also confirmed that at no point in time did she discuss this measure with the board of directors of Oilsands Quest Inc., nor did any of the individual board members ever raise the matter with her.

## **5. ANALYSIS**

### **(a) Allegations**

As noted earlier, the allegations raised in media reports suggest that Senator Wallin furthered her own private interests, as well as those of Oilsands Quest Inc., when she participated in the vote in the Senate on the Bill. As such, questions were raised about whether she should have recused herself from the vote.

The provisions of the Code that pertain specifically to these allegations are as follows: section 8, subsection 12(1) and section 14.

### **(b) Section 8 – Furthering Private Interests**

Section 8 of the Code reads:

**8.** When performing parliamentary duties and functions, a Senator shall not act or attempt to act in any way to further his or her private interests, or those of a family member, or to improperly further another person's or entity's private interests.

This provision raises three issues on these particular facts:

- (1) Was the Senator engaged in her parliamentary duties and functions when she voted at Second Reading in the Senate on the Bill?

- (2) Does the Senator have a 'private interest' in Oilsands Quest Inc.?
- (3) Did the Senator further her own private interest and/or those of Oilsands Quest Inc., within the meaning of section 11 of the Code, when she voted on the Bill?

First, there can be no doubt that Senator Wallin was performing her parliamentary duties and functions when she voted in the Senate on the Bill.

Second, the Senator clearly has a 'private interest' in Oilsands Quest Inc. As noted earlier, she is a member of the board of directors and, as a member of the board, she has an interest in the affairs of the company. Moreover, like other directors, she receives directors' fees, owns shares (although her interest in this respect is minimal, i.e., far less than 1% of the value of the issued capital stock), and she holds stock options.

The remaining issue is whether, in participating in the vote on the Bill, the Senator furthered her own private interests and/or those of Oilsands Quest Inc. within the meaning of section 11 of the Code. If I find that she furthered Oilsands Quest Inc.'s private interests, I would also have to determine whether the furthering of such interests was 'improper' within the meaning of section 8 of the Code.

The phrase 'furthering private interests' is defined in subsection 11(1); it is exhaustive in nature. For the purposes of this definition, subsection 11(2) of the Code clarifies situations in which a Senator is not considered to have furthered his or her own private interests or those of another person or entity. These are, in effect, exceptions to the list of activities in subsection 11(1).

Under subsection 11(1), the Senator would have furthered her own private interests, or those of Oilsands Quest Inc., if she took any action for the purpose of achieving, directly or indirectly, any of the following:

- (a) an increase in, or the preservation of, the value of the Senator's or the company's assets;
- (b) the elimination, or reduction in the amount, of the Senator's or the company's liabilities;
- (c) the acquisition of a financial interest by the Senator or the company;
- (d) an increase in the Senator's or company's income from a contract, a business or a profession;
- (e) an increase in the Senator's income from employment;
- (f) the Senator becoming a director or officer in a corporation, association, trade union or not-for-profit organization; or
- (g) the Senator becoming a partner in a partnership.

Subsection 11(2) provides as follows:

**11.(2)** A Senator is not considered to further his or her own private interests or the private interests of another person or entity if the matter in question

- (a) is of general application;
- (b) affects the Senator or the other person or entity as one of a broad class of the public; or
- (c) concerns the remuneration or benefits of the Senator as provided under an Act of Parliament or a resolution of the Senate or a Senate committee.

The exceptions in paragraphs 11(2)(a) and (b) are found in virtually all conflict of interest regimes for legislators in Canada. More specifically, the conflict of interest laws applicable to legislators in Alberta,<sup>5</sup> British Columbia,<sup>6</sup> New Brunswick<sup>7</sup>, Newfoundland and Labrador,<sup>8</sup> Nova Scotia,<sup>9</sup> Nunavut,<sup>10</sup> Prince Edward Island,<sup>11</sup> Ontario,<sup>12</sup> and Saskatchewan<sup>13</sup> all contain both of the above-mentioned exceptions. The *Conflict of Interest Code for Members of the House of Commons* also contains both exceptions.<sup>14</sup> The legislation in the Northwest Territories contains the broad class exception.<sup>15</sup> The legislation in Manitoba defines ‘direct pecuniary interest’ and ‘indirect pecuniary interest’ and an exception to these definitions is provided for ‘common interests’.<sup>16</sup> In Quebec, a member is not required to declare a private interest in a matter before the National Assembly or a committee of which he or she is a member if it is a financial interest shared by other Members or by the general public.<sup>17</sup>

These exceptions have also been included in the federal *Conflict of Interest Act* (the Act),<sup>18</sup> which applies to public office holders. Subsection 2(1) of the Act defines ‘private interest’ by what it is not, as is the case in most Canadian jurisdictions. Both the general application and the broad class exceptions are included within the definition.

Clearly, the Senate conflict of interest regime is in no way unique with respect to its approach in this area.

Professor Levine, from York University, who has written extensively in the area of government ethics laws, explains the reason for these exceptions in his book *The Law of Government Ethics*. He writes<sup>19</sup>:

<sup>5</sup> *Conflicts of Interest Act*, RSA 2000, c C-23, para 1(1)(g).

<sup>6</sup> *Members’ Conflict of Interest Act*, RSBC 1996, c 287, s 1.

<sup>7</sup> *Members’ Conflict of Interest Act*, SNB 1999, c M-7.01, s 1.

<sup>8</sup> *House of Assembly Act*, RSNL 1990, c H-10, s 25.

<sup>9</sup> *Conflict of Interest Act*, SNS 2010, c 35, para 3(l).

<sup>10</sup> *Integrity Act*, SNU 2001, c 7, ss 3(1).

<sup>11</sup> *Conflict of Interest Act*, RSPEI, 1988, c Q-1, para 1(g).

<sup>12</sup> *Members’ Integrity Act, 1994*, SO 1994, c 38, s 1.

<sup>13</sup> *Members’ Conflict of Interest Act*, SS 1998, c M-11.11, para (1)(h).

<sup>14</sup> *Conflict of Interest Code for Members of the House of Commons*, paragraphs 3(3)(a) and (b).

<sup>15</sup> *Legislative Assembly and Executive Council Act*, SNWT 1999, c 22, para 74(2)(a).

<sup>16</sup> *The Legislative Assembly and Executive Council Conflict of Interest Act*, CCSM c L112, ss 1(1), 3(1) and 3(3).

<sup>17</sup> *Code of Ethics and Conduct of the Members of the National Assembly*, RSQ, c C-23.1, s 25.

<sup>18</sup> SC 2006, c 9.

<sup>19</sup> Gregory J. Levine, *The Law of Government Ethics* (Ontario: The Cartwright Group Ltd, 2007), at 18.

This approach of excluding what are essentially interests held in common with others is a typical approach to this kind of legislation. It acknowledges that legislators and decision-makers are in and of the community, and so long as they are not focused on their own interests may deal with matters which affect their own interests in a general way.

Professor Dennis F. Thompson, the founding Director of Harvard University's ethics program (now the Edmond J. Safra Foundation Centre for Ethics) and recognized for his pioneering work in the field of political ethics, makes the following point, in his classic book entitled *Ethics in Congress: From Individual to Institutional Corruption*: "A conflict of interest exists only when a member would personally benefit from some piece of legislation in a way and to the extent that other people would not."<sup>20</sup>

These exceptions are also found in other conflict of interest regimes outside of Canada. For example, the code of conduct for US Senators includes these exceptions to the rule that prohibits individuals from using their legislative power to advance their personal financial interests.<sup>21</sup>

Turning now to the case at hand, if the Bill is of general application, then this matter would fall under the exception in paragraph 11(2)(a) of the Code.

If, on the other hand, the passing of the Bill would have affected Oilsands Quest Inc. and the Senator's interest in the company as one of a 'broad class', this matter would fall under the exception in paragraph 11(2)(b). The concept of "broad class" is not defined in the Code (nor is it defined in the conflict of interest rules and laws in other Canadian jurisdictions). As such, the term should be given its plain, ordinary meaning. 'Broad' is generally defined as "large in area or scope".<sup>22</sup>

As already noted above, the Bill sets national targets for reducing greenhouse gas emissions, although it does not outline the means by which such targets are to be met. How such targets would have been met, which industries would have been regulated, and to what extent they would have been regulated, would have depended on the regulatory scheme put in place by the Governor in Council under section 7 of the Bill. In other words, the regulations would have provided the method by which the targets under the Bill were to be achieved.

In the absence of any regulations, the Bill, on its face, is comprehensive and appears to address all industries that contribute to greenhouse gas emissions. It does not target any particular industry or sector of the economy.

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<sup>20</sup> Dennis F. Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (Washington, DC: Brookings Institute Press, 1995), at 56.

<sup>21</sup> *The Senate Code of Official Conduct*, Select Committee on Ethics, United States Senate, rule 37, para 4.

<sup>22</sup> *Concise Oxford English Dictionary*, 11ed (Oxford: Oxford University Press, 2004).

According to information provided by Environment Canada on climate change,<sup>23</sup> there are a number of sectors of the economy that account for greenhouse gas emissions in Canada: the transportation industry, which accounts for 22% of emissions; the fossil fuel industry also accounting for 22%; electric utilities at 16%; the heavy industry and manufacturing sector at 15%; the service industries at 8%; residential at 7%; and agriculture at 10%.

As such, on its face, the Bill would have affected companies in any of the industries that are recognized as contributing to greenhouse gas emissions. This is certainly a large enough class to be considered a 'broad class' within the meaning of paragraph 11(2)(b) of the Code.

While it is also possible to argue that the passing of the Bill would have affected all Canadians on some level (as opposed to only a broad class of the public), in my view, the general application exception in paragraph 11(2)(a) is intended to address those measures that could potentially affect each and every Canadian in a relatively similar way, for example, a bill that increases or reduces the GST. As already noted above, the Bill would more likely have targeted, through regulations, the sectors of the economy that contribute the most to greenhouse gas emissions. In other words, its impact would have been greater on some than on others. It is not likely that it would have affected individual Canadians in the same way as it would have affected companies involved in activities that largely contribute to greenhouse gas emissions.

Moreover, it is not likely that any regulatory scheme adopted by the Governor in Council would have targeted one or two industries exclusively, with the result that the class of emitters affected by the Bill would have been narrowed. In this respect, it may be interesting to note that the Environment Minister has publicly stated that the Government is taking a sector-by-sector approach to regulating greenhouse gas emissions beginning with the transportation sector, which he referred to as 'the leading sector'.<sup>24</sup> As such, the Government's approach to greenhouse gas emissions to date has been to address emitters sector-by-sector. Based on this approach, it is likely that any regulations under the Bill would have targeted all significant emitters at some point.

Furthermore, the Bill's ambitious reduction goals could not have been met if only one or two industries responsible for greenhouse gas emissions had been targeted by regulation. In order to achieve the reduction goals set out in the Bill, most, if not all, industries would have had to have been affected at some point to a greater or lesser extent.

In light of the above, in my view, the exception in paragraph 11(2)(b) of the Code applies and disposes of the matter with respect to section 8.

### **(c) Sections 12 and 14 – Declarations of Private Interests and Voting**

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<sup>23</sup> Environment Canada, online: <http://www.climatechange.gc.ca/default.asp?lang=En&n=72A588AB-1>.

<sup>24</sup> Jessica Bruno, "Kent Estimates Canada is 'a quarter of way' to Meeting 2020 GHG Emissions Targets", *The Hill Times*, 20 June 2011.

I now turn to sections 12 and 14 of the Code. The relevant portion of subsection 12(1) is as follows:

**12.(1)** If a Senator has reasonable grounds to believe that he or she, or a family member, has a private interest that might be affected by a matter that is before the Senate or a committee of which the Senator is a member, the Senator shall, on the first occasion at which the Senator is present during consideration of the matter, make a declaration regarding the general nature of the private interest....

Section 14 of the Code is related to subsection 12(1). It reads:

**14.** A Senator who has made a declaration under section 12, or a Senator who is required to make such a declaration but has not yet done so, may not vote on the matter but may abstain.

Section 16 of the Code is helpful in understanding the above-noted provisions. It states that, for the purposes of sections 12 to 14, 'private interest' means those interests that can be furthered in subsection 11(1), but does not include the matters listed in subsection 11(2).

As such, under the Code, the term "private interest" means assets, liabilities, financial interests, income from contracts, businesses or professions, income from employment, and official positions in partnerships, corporations, associations, trade unions and not-for-profit organizations.

As already noted earlier in the analysis under section 8, Senator Wallin clearly had a 'private interest' in Oilsands Quest Inc. Under subsection 12(1), the remaining issue is whether Senator Wallin had reasonable grounds to believe that her private interest in Oilsands Quest Inc. might have been affected by the Bill, thus requiring her: (a) to make a declaration of a private interest in the Senate in accordance with the procedure set out under subsection 12(1); and (b) to recuse herself from the vote at Second Reading in accordance with section 14, unless the matter fell within an exception under subsection 11(2) of the Code.

Unlike section 8 of the Code, subsection 12(1) requires a belief by the Senator on reasonable grounds that her private interest might be affected by the measure in question. In other words, unlike section 8, which requires that the Senator further the company's private interests or her own, section 12 only requires that she believe, on reasonable grounds, that the Bill might have affected the company's interest or her own interest in the company. The exceptions in subsection 11(2) of the Code would factor into the Senator's decision as to whether to declare the interest and so refrain from voting, or not.

In the course of my meeting with Senator Wallin, and as noted earlier, she indicated that, having examined the Bill, she was of the view that it was of general application and of broad effect and, therefore, she believed that she would not be in a conflict of interest if she participated in the vote on the Bill. She stated that all Canadians, all businesses in Canada, and



the entire public sector contribute to greenhouse gas emissions. She noted that, given the Bill's steep reduction goals and that it did not target or even mention any particular sector, everyone would have been affected by the Bill had it become law. She stated that if the Bill would have affected the oil sands industry alone, she would have been concerned about a potential conflict and would have sought my advice about whether to participate in the vote. She also added that any suggestion that regulations promulgated under the Bill might have targeted the energy sector exclusively, and oil sands companies in particular, to the detriment of Oilsands Quest Inc. and her personal interests, is entirely speculative in the absence of any regulations. She also noted that the company is only an exploration company. In addition, she stated that she believed it was her duty and responsibility as a member of the Senate to participate in the vote, particularly since she was of the view that the Bill would cause serious harm to the Canadian economy.

In my opinion, and as already outlined above, the matter properly falls under the exception in paragraph 11(2)(b). As such, the Senator's belief that she did not have to make a declaration of a private interest under subsection 12(1) of the Code was reasonable.

In making a decision under subsection 12(1), the Senator was required to consider the exceptions under subsection 11(2) of the Code, which she did. As noted earlier, the Bill does not specifically target any one industry that contributes to greenhouse gas emissions, nor does it appear to exclude any. On its face, it appears to target all emitters. As such, it would likely have affected a very broad class. There is no evidence to support the conclusion that the Bill, through regulations, would have specifically targeted Oilsands Quest Inc., or even the fossil fuel industry alone. In fact, given what the Environment Minister has publicly stated about the Government's approach to reducing greenhouse gas emissions, this would have been highly unlikely. Moreover, and as already noted, the ambitious reduction targets imposed under the Bill would have made it impossible for the Government, through regulations, to target only one or two industries. The Bill would likely have affected all companies, to a greater or lesser extent, operating in any sector of the economy that contributes to greenhouse gas emissions.

In light of the above, Senator Wallin was not required to make a declaration of a private interest under subsection 12(1) of the Code and, consequently, the prohibition against voting in section 14 did not apply to these circumstances.

## **6. CONCLUSION**

In conclusion, I am of the view that:

- Given that the Bill would have affected all companies responsible for greenhouse gas emissions, not only those in the fossil fuel sector but also those in other sectors of the economy, the Bill would only have affected Oilsands Quest Inc. as one of a very broad class. Therefore, under paragraph 11(2)(b) of the Code, the Senator is not considered to have furthered her own private interests or those of Oilsands Quest Inc. by having voted on the Bill.

- While Senator Wallin was required to disclose her private interest in Oilsands Quest Inc., both confidentially and publicly, as part of her public disclosure summary (which she did do, as noted earlier), she was not required, under subsection 12(1) of the Code, to make a declaration of a private interest in the Senate when the Bill was under consideration, and consequently, the prohibition against voting in section 14 did not apply to these circumstances. The reason for this conclusion is that, whatever impact the Bill might have had on Oilsands Quest Inc., the company would have been affected as one of a broad class, bringing this matter within the exception in paragraph 11(2)(b) of the Code.

In light of the above-stated reasons, I am of the view that the Senator did not contravene section 8, subsection 12(1) or section 14 of the Code. I therefore find that the allegations against Senator Wallin are unsubstantiated and without merit.