

July 18, 2005

The Honourable Paul Massicotte
Room 144, East Block
The Senate of Canada
Ottawa ON K1A 0A4

Dear Senator Massicotte:

Request for an Opinion

With the recent coming into force of the *Conflict of Interest Code for Senators*, your letter of June 1, 2005 seeks my confidential opinion pursuant to section 8 of the Code, on what steps you may need to take to be in compliance with the Code.

Background

In addition to being a Senator you are the President and Chief Executive Officer of Alexis Nihon Real Estate Investment Trust (Alexis Nihon). I understand that you hold approximately 12% of the shares of this publicly traded company. The three federal contracts held by the company are leases in Alexis Nihon properties: one in Gatineau and two in the Montreal region. The Gatineau contract involves a \$99 million, 15 year lease with the federal government for a 333,000 square foot office building. The other two leases totaling some 40,000 square feet, were part of a larger real estate portfolio acquired by Alexis Nihon from a third party in 2003.

The Gatineau lease agreement between the Department of Public Works and Government Services and Alexis Nihon was the result of an open and competitive bidding process involving five bidders in the final stage. KPMG, one of Canada's largest firms providing audit services, oversaw the bidding process, which was a timely initiative I might add. KPMG's final report concluded that "the overall process is deemed to have been fair". Alexis Nihon was awarded the contract in December 2001, some 18 months **before** you became a Senator.

I note as well that at the time of your appointment you sought expert advice from several sources, both inside and outside government, about the possibility of conflicts between your public duties as a Senator and your personal interests in Alexis Nihon.

That those experts were unable to reach a consensus would have been frustrating. Now that the Code is in place and with the establishment of the Office of the Senate Ethics Officer, I trust that newly appointed Senators or potential candidates will be able to identify, at the earliest possible opportunity, any real or apparent conflicts and quickly take whatever action may be required to comply with the Code. My door will always be open to you and your colleagues, and all such informal consultations will take place in the most complete confidence.

As I consider how best to deal with the issue of parliamentarians contracting with government, I would note that this is not a new issue, nor is it a uniquely Canadian one. In our parliamentary system, this question goes back to the days in Britain many years ago when the King and his ministers resorted to various schemes to “buy” Members of Parliament in order to win support. Today, the issue is debated publicly in many countries and, as we will see later, different approaches are being followed to avoid or minimize the possibility of parliamentarians using their position of influence to obtain preferential treatment in the awarding and management of government contracts, for themselves, their families or their friends, to the disadvantage of other potential candidates or bidders.

Coming back to your request for my opinion, with the *Senate Code* and the Office both being so new, and without any past rulings to draw upon, I intend to set out in detail how the Code, in my view, applies specifically to your situation. This will subsequently allow me to draw upon my analysis, as appropriate, to provide advice to other Senators who may also have private interests in contracts with the federal government, recognizing at the same time that no two situations are alike and that each should be judged on its merit. This pragmatic approach will allow for the development of guidelines, for the assistance of Senators and the general public, to interpret the Code on this and other key issues.

Opinions and Advice under the Code

As noted earlier, this opinion along with its recommendations is provided to you pursuant to Section 8 of the Code. I draw your attention in particular to sub-sections 8(1) and 8(4).

Section 8(1) reads:

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 recommendation that the *Senate Ethics Officer* considers appropriate.

Section 8(4) reads:

A written opinion or advice is confidential and may be made public only by the Senator or with his or her written consent.

One point of clarification is appropriate. My responsibility as Senate Ethics Officer relates exclusively to the Senate Code which sets out, for the first time, comprehensive standards on conflict of interest for Senators. The recent controversy over whether you were in compliance with the *Parliament of Canada Act* **before** the Senate Code came into force is not, therefore, a matter that I will or can address. In any event, Sections 22 to 28 of the Code have now replaced Sections 14 and 15 of the *Parliament of Canada Act* which were repealed last month.

Parliamentarians contracting with Government

Before I address the various sections of the Code which are relevant to your situation, I would like to review briefly the question of Members of Parliament holding government contracts in the United Kingdom and the United States.

The British House of Commons in 1957 decided to remove from the *House of Commons Disqualification Act, 1931* any prohibition against the holding of government contracts by Members of Parliament because, it seems, Members have not abused their rights over a considerable period of time. We note as well that the House of Lords' 2002 Code of Conduct contains **no** restrictions regarding government contracts with Members.

In the United States the general rule is that Senators may not enter into a contract or agreement with the government. "Any such contract is deemed void, and both the member and the officer or employee who makes the contract on behalf of the government may be fined". However, there are exceptions. For example, a corporation with a relationship to a Member of Congress may enter into a contract with the federal government for the general benefit of the corporation. Thus, the U.S. Department of Justice has ruled that a Member of Congress "may be a stockholder even a principal stockholder, or an officer of a corporation that holds a Government contract without incurring criminal liability". The U.S. Senate Code of Conduct generally prohibits any outside activity that "is inconsistent or in conflict with the conscientious performance of official duties".

Considerations

I now move to the specific situation you find yourself in as a Senator and an officer of a major real estate company with federal government contracts. The Code for Senators contains several sections which bear directly on your circumstances and offer guidance on (1) what steps you will need to take to comply with the Code and on (2) what limitations the Code will place on your activities as a Senator given present and future contracts between Alexis Nihon and the Government of Canada.

1. Principles of the Code

The Senate Code has, in Sections 22-28, very specific rules of conduct concerning government contracts. Before considering these sections, however, I would like to begin

by underlining the importance of the Principles of the Code which serve as the setting against which subsequently to apply the rules.

Section 2.(1) sets out these Principles as follows:

Given that service in Parliament is a public trust, the Senate recognizes and declares that Senators are expected

- (a) to remain members of their communities and regions and to continue their activities in those communities and regions while serving the public interest and those they represent to the best of their abilities;**
- (b) to fulfill their public duties while upholding the highest standards so as to avoid conflicts of interest and maintain and enhance public confidence and trust in the integrity of each Senator and in the Senate; and**
- (c) 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.**

I would highlight the **first** of these Principles as particularly relevant to your situation.

That Senators are expected to remain involved in activities in their communities and regions reflects an important parliamentary tradition; that by being engaged in their communities they bring a valuable perspective to their parliamentary responsibilities.

It is only recently that Canadian federal parliamentarians have become subject to conflict of interest codes but for a number of years successive Prime Ministers have set out rules for those parliamentarians who are also members of the Cabinet. To reflect the fact that Cabinet Ministers have considerable executive powers the *Conflict of Interest and Post-Employment Code for Public Office Holders* places tight restrictions on the types of assets Ministers may hold and specifically prohibits them from engaging in outside employment, practicing a profession, having a directorship in a corporation, etc. The role, responsibilities and powers of legislators are, however, quite distinct with the result that the two new federal codes permit a wide range of outside activities. This distinction between Ministers and other parliamentarians is reflected in the various conflict of interest codes applied in most provinces and territories as well as in the United Kingdom.

One of the better statements on the importance of continuing community and professional engagement was made by the UK Committee on Standards in Public Life in their first report in 1995. The Committee, set up by the then Prime Minister, was specifically dealing with the House of Commons but subsequently took the same position with respect to the House of Lords. In addressing paid outside employment they stated:

“We believe that those Members who wish to be full-time MPs should be free to do so, and that no pressure should be put on them to acquire outside interests. But we also consider it desirable for the House of Commons to contain Members with

a wide variety of continuing outside interests. If that were not so, Parliament would be less well-informed and effective than it is now, and might be more dependent on lobbyists. A Parliament composed entirely of full-time professional politicians would not serve the best interests of democracy. The House needs if possible to contain people with a wide range of current experience which can contribute to its expertise”.

Equally strong views were expressed on this matter, from a Canadian perspective, by Senator Richard J. Stanbury and Don Blenkarn, M.P. in their 1992 Report to the Senate and to the House of Commons on conflict of interest:

“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 interest.

Insofar as Parliament includes individuals who are active in the outside community, or who come to Parliament after building successful business or professional careers, there will be situations where a Member’s public duties could impact on their private interests. Government and Parliament are today so deeply involved in a myriad of issues touching on diverse aspects of business and the professions, that it is virtually impossible for this not to occur.

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 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”.

2. Section 5 of the Code

We note that the *Senate Code* is quite explicit on the legitimacy of outside activities. The language is similar to that in Section 7 of the *Conflict of Interest Code for Members of the House of Commons*. Section 5 of the *Senate Code* reads as follows:

Senators who are not ministers of the Crown may participate in any outside activities, including the following, as long as they are able to fulfill 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 non-for-profit organization; and**
- (d) being a partner in a partnership.**

The outside activities that parliamentarians engage in will cover a very wide spectrum. Some of these will be of a commercial nature but many others will not. The essential point is nothing prevents a Senator from being involved in these activities. Some of these may, however, raise real or potential conflicts which Senators will have to resolve in a way that upholds the highest standards (Principle 2.(1)b)) and protects the public interest (Principle 2.(1)c)). Strict enough conflict management rules must be in place to deter unethical practices and maintain the good reputation of Parliament, but they should not be needlessly strict to the point of discouraging persons of ability and experience from entering public life. In my view, specific factual circumstances should be evaluated and differential standards applied as appropriate.

3. Government Contracting under the Code

The Senate Code **does not** contain a blanket prohibition against a Senator having any direct or indirect contractual relations with the Government of Canada or its agencies, although a quick reading of Sections 22 and 24 might suggest otherwise.

The Code sets out provisions for Senators being a party, directly or through a subcontract, to contracts with the federal government or its agencies; where they own securities in a public corporation that contracts with the federal government or its agencies; or have an interest in a partnership or private corporation that is a party, directly or through a subcontract, to a contract with the federal government or its agencies. I attach, for ease of reference, the full text of sections 22-28.

As I mentioned at the outset, given the newness of the Code, this is my first opportunity to review the contract provisions. It will help me in coming to a conclusion on your specific situation to review these provisions broadly.

Section 22 which is entitled “Government contracts”, at first examination, would not seem to apply to your situation. It reads as follows:

Government contracts

22. A Senator shall not knowingly be a party, directly or through a subcontract, to a contract or other business arrangement with the Government of Canada or any federal agency or body under which the Senator receives a benefit unless the Senate Ethics Officer provides a written opinion that

- (a) due to special circumstances the contract or other business arrangement is in the public interest; or**
(b) the contract or other business arrangement is unlikely to affect the Senator's obligations under the Code.

Your involvement with Alexis Nihon is that of unit-holder, trustee and officer. The contracts with the federal government are not with you personally or through a subcontract. Nonetheless section 22 offers important guidance, in my view, in subsection (b) where it is stated that such a contract may be permissible if I conclude that the contract is unlikely to affect your obligations under the Code.

The specific provisions of the Senate Code are more complex with respect to shareholdings (or unit-holdings) in public corporations. In my view most do not apply to your situation.

Section 23(1) states:

Public corporations

23. (1) A Senator may own securities in a public corporation that contracts with the Government of Canada or any federal agency or body unless the holdings are so significant that the Senate Ethics Officer provides a written opinion that they are likely to affect the Senator's obligations under this Code.

With 12% of the equity you are the second largest unit-holder in Alexis Nihon. Are your holdings, nonetheless, so significant as to affect your obligations under the Code? In these early days of the Code, I find this a difficult line of enquiry. I think it more fruitful, for reasons I will explain, to approach the question from the opposite direction, i.e. are your holdings unlikely to affect your obligations under the Code?

Section 23.(2) on public interest would seem to have no application to your situation.

Public interest

(2) A contract between a public corporation and the Government of Canada or any federal agency or body that, in the Senate Ethics Officer's opinion is in the public interest due to special circumstances, shall not preclude a Senator from holding securities in that public corporation.

There would not appear to be any "special circumstances" for which Section 23.(2) might be applicable.

Section 24 (partnerships and private corporations) does not directly apply to your situation but, as is the case with section 22, offers important guidance. This section reads as follows:

Partnerships and private corporations

24. A senator shall not have an interest in a partnership or in a private corporation that is a party, directly or through a subcontract, to a contract or other business arrangement with the Government of Canada or any federal agency or body under which the partnership or corporation receives a benefit unless the Senate Ethics Officer provides a written opinion that

- (a) due to special circumstances the contract or other business arrangement is in the public interest; or**
- (b) the contract or other business arrangement is unlikely to affect the Senator's obligations under the Code.**

In effect, if Alexis Nihon was a private corporation a contract would be permissible if I, as the Senate Ethics Officer, were to conclude that the contract is unlikely to affect your obligations under the Code; the same test as set out in Section 22.

Lastly in this discussion of contracts, section 27 of the Code grandfathers contracts that existed before a Senator's appointment to the Senate (or before the entry into force of the Code) but not to their renewal or extension. This provision applies to the three contracts previously referred to, but since the intent of Alexis Nihon is to pursue future leasing contracts with the federal government I consider it important to determine definitely on what basis, if any, Alexis Nihon can continue to compete for federal contracts as long as you are a Senator.

4. Your Obligation as a Senator under the Code

The specific rules set out in the Code on contracting by public corporations (Section 23) relate to Senators as shareholders (unit-holders), not as directors (trustees) or officers of the corporation. Nonetheless Section 5 of the Code allows Senators to be a director or officer in a corporation, so long as they are able to fulfill their obligations under this Code.

When this is coupled with the critical standard of Sections 22 and 24 as to whether the contract is likely to affect the obligations of the Senator under the Code, the test becomes clear.

The question then is whether your position as director, CEO and a significant shareholder of Alexis Nihon creates a situation where the company's contracts with the federal government affect negatively your obligations under the Senate Code?

What are your obligations under the Code?

First, I assume you will continue to be engaged in the management of Alexis Nihon. This means that, from time to time, as CEO you will become involved in corporate decisions to bid on new leasing contracts with the federal government. As a Senator, however, the Senate Code in Section 11 states:

Use of influence

11. A Senator shall not use or attempt to use his or her position as a Senator to influence a decision of another person so as to further the Senator's private interests, or those of a family member, or to improperly further another person's or entity's private interests.

In my view this requires that in no circumstance may you become involved in any negotiation or discussion with officials of the federal government on matters related to the company's government contracts, both existing and potential. It would require that you not have any dealings whatsoever with officials in Public Works and Government Services Canada.

Second, your duties as a Senator may make you privy to information that is not generally available to the public. Section 12 of the Code states:

Use of information

12.(1) If as a result of his or her position, a Senator obtains information that is not generally available to the public, the Senator shall not use or attempt to use the information to further the Senator's private interests, or those of a family member, or to improperly further another person's or entity's private interests.

Conveying information

12.(2) A Senator shall not convey or attempt to convey information referred to in subsection (1) to another person if the Senator knows, or reasonably ought to know, that the information may be used to further the Senator's private interests, or those of a family member, or to improperly further another person's or entity's private interests.

These require that if any such insider information comes to your knowledge, which could affect favourably the interests of Alexis Nihon, it be held confidential and not conveyed under any circumstances to other members of the company's management or board.

Third, the Code requires more generally that in the performance of your Senate duties you do not attempt to further your private interests. Section 10 states:

Furthering private interests

10. 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.

Sections 14 to 18 set out the procedures for declaring a private interest that might be affected by a matter that is before the Senate or a committee. These sections are not yet in force. They are being examined with the intent to provide explicit guidance to you and other Senators by the return of Parliament in the fall.

One last consideration. Should you establish a trust for your holdings in Alexis Nihon as is provided for in Section 23.(4)? I would recommend against this. As I have just explained it will be possible for you to meet your obligations under the Code, provided certain steps are taken. If you were to place your holdings in a trust it would also be necessary to resign as trustee and CEO. In other words you would need to withdraw completely from any involvement with the company.

Summary Conclusions and Recommendations

Based on the information available to me, I conclude that the Gatineau lease between Alexis Nihon and the federal government does **not** create a real or apparent conflict of interest for you as a Senator. For the reasons already stated, the lease will not prevent you from fulfilling your obligations as a Senator. It has also been demonstrated that the lease was awarded after a public, fair and competitive bidding process; a process that would lead a reasonable person to conclude that neither you or Alexis Nihon received any special advantage or consideration as a result of your position as a Senator. This is an important point of clarification because of allegations of preferential treatment. The fact that the contract was awarded some time before your appointment and signed several months **after** you were appointed does not change my conclusion that the awarding of the contract was aboveboard;

Furthermore, I conclude that as a Senator you should abstain from involvement in all or any negotiations and discussions with officials of the federal government on matters relating to the company's government contracts, both existing and potential. This is not limited to the acquisition of new leases but also the terms and conditions of leases similar to those currently held by Alexis Nihon in the Montreal region, or their renewal. This specifically requires that you not have any dealings whatsoever with decision-makers or officials in Public Works and Government Services Canada.

I note as well that you took reasonable steps to ascertain your ethical obligations, both before and following your appointment as a Senator. Now that the Senate Code is in place and with the recent appointment of a Senate Ethics Officer, it would seem timely for both the Prime Minister's Office and the Privy Council Office to review existing appointment procedures for Senators to allow potential candidates to be briefed in

advance about their obligations under the Code, well before they discover to their consternation what they have gotten themselves into.

Recommendations

I am of the view that you can continue to be a unit-holder, trustee and CEO of Alexis Nihon and that the company can continue to hold its existing leasing contracts with the federal government and compete for future contracts provided that you take the following steps in order to live up to your obligations under the Code:

1. I recommend that you send a letter of direction to a designated Senior Officer in the company, possibly the Executive Vice-President and Chief Operating Officer, instructing him that under the *Conflict of Interest Code for Senators* you are required to refrain from having any dealings whatsoever with the federal government and that he and other employees of the company, should deal with those issues to your complete exclusion. The letter should be approved by my Office and will be included in your public disclosure file;

2. I also recommend that you retain a senior and well respected outside counsel to periodically assure you, the Board and myself that management continues to understand how critically important these compliance measures are. I believe it would be equally desirable for me to speak to your management team about the importance of keeping you distanced from any of their direct dealings with the federal government;

3. You have informed me that you will be seeking a resolution from the Board with respect to your compliance obligations under the Code. I agree that Board approval is essential given your fiduciary responsibilities as an officer of Alexis Nihon and I would propose to include a copy of the resolution as part of your public disclosure file;

4. I propose that we examine these arrangements in the fall of 2006 to ensure that they are sufficient for my purposes and are not unnecessarily onerous for you and Alexis Nihon. Given the publicity surrounding this matter, I would want to review at that time the latest information on the nature, extent and value of Alexis Nihon's federal leases, as well as what proportion of your business such contracts represent;

5. Should any inside information come to your knowledge as a Senator, which could affect favourably the interests of Alexis Nihon, I remind you that you must hold it confidential and not convey it under any circumstances to other members of the company's management or Board;

6. Finally, in the unlikely event that a matter is brought before the Senate or a committee of which you are a member, that might directly affect your interests as an officer of Alexis Nihon, you will have to declare the nature of the interest in accordance with sections 14, 15 and 16 of the Code.

These steps which I have recommended will, in my judgment, ensure that you are in full compliance with your obligations under the *Conflict of Interest Code for Senators*. Inevitably questions will arise from time to time and I remain available to offer my advice.

Yours sincerely,

Jean T. Fournier

Government contracts

22. A Senator shall not knowingly be a party, directly or through a subcontract, to a contract or other business arrangement with the Government of Canada or any federal agency or body under which the Senator receives a benefit unless the Senate Ethics Officer provides a written opinion that

(a) due to special circumstances the contract or other business arrangement is in the public interest; or

(b) the contract or other business arrangement is unlikely to affect the Senator's obligations under this Code.

Public corporations

23. (1) A Senator may own securities in a public corporation that contracts with the Government of Canada or any federal agency or body unless the holdings are so significant that the Senate Ethics Officer provides a written opinion that they are likely to affect the Senator's obligations under this Code.

Public interest

(2) A contract between a public corporation and the Government of Canada or any federal agency or body that, in the Senate Ethics Officer's opinion is in the public interest due to special circumstances, shall not preclude a Senator from holding securities in that public corporation.

Government programs

(3) For the purpose of subsection (1), a public corporation shall not be considered to contract with the Government of Canada or any federal agency or body merely because the corporation participates in a Government program that meets the criteria described in section 25.

Trust

(4) If the Senate Ethics Officer is of the opinion that the Senator's obligations under this Code are likely to be affected under the circumstances of subsection (1), the Senator may comply with the Code by placing the securities in a trust under such terms as the Senate Ethics Officer considers appropriate.

Partnerships and private corporations

24. A Senator shall not have an interest in a partnership or in a private corporation that is a party, directly or through a subcontract, to a contract or other business arrangement with the Government of Canada or any federal agency or body under

which the partnership or corporation receives a benefit unless the Senate Ethics Officer provides a written opinion that

- (a) due to special circumstances the contract or other business arrangement is in the public interest; or
- (b) the contract or other business arrangement is unlikely to affect the Senator's obligations under this Code.

Clarification: Government programs

25. For the purposes of sections 22 and 24, it is not prohibited to participate in a program operated or funded, in whole or in part, by the Government of Canada or any federal agency or body under which a Senator, or a partnership or private corporation in which a Senator has an interest, receives a benefit if

- (a) the eligibility requirements of the program are met;
- (b) the program is of general application or is available to a broad class of the public;
- (c) there is no preferential treatment with respect to the application; and
- (d) no special benefits are received that are not available to other participants in the program.

Trust

26. Section 24 does not apply if the Senator has entrusted his or her interest in a partnership or private corporation to one or more trustees on all of the following terms:

- (a) the provisions of the trust have been approved by the Senate Ethics Officer;
- (b) the trustees are at arm's length from the Senator and have been approved by the Senate Ethics Officer;
- (c) except as provided in paragraph (d), the trustees may not consult with the Senator with respect to managing the trust, but they may consult with the Senate Ethics Officer;
- (d) the trustees may consult with the Senator, with the approval of the Senate Ethics Officer and in his or her presence, if an extraordinary event is likely to materially affect the trust property;
- (e) in the case of an interest in a corporation, the Senator resigns any position of director or officer in the corporation;

(f) the trustees provide the Senate Ethics Officer annually with a written report setting out the nature of the trust property, the value of that property, the trust's net income for the preceding year and the trustees' fees, if any; and

(g) the trustees give the Senator sufficient information to permit the Senator to submit returns as required by the *Income Tax Act* and give the same information to the appropriate taxation authorities.

Pre-existing contracts

27. The rules in sections 22, 23 and 24 do not apply to a contract or other business arrangement that existed before a Senator's appointment to the Senate, but they do apply to its renewal or extension.

Interest acquired by inheritance

28. The rules in sections 22, 23 and 24 do not apply to an interest acquired by inheritance until the first anniversary date of the transfer of legal and beneficial ownership. In special circumstances, the Senate Ethics Officer may extend this time period.