CHECK AGAINST DELIVERY

REMARKS BY JEAN T. FOURNIER, SENATE ETHICS OFFICER, BEFORE THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS ON BILL C-2, THE *FEDERAL ACCOUNTABILITY ACT*, AS IT AFFECTS THE OFFICE OF THE SENATE ETHICS OFFICER,
SEPTEMBER 6, 2006.

Honourable Senators, thank you for the invitation to be here today.

I intend to limit my remarks to those aspects of Bill C-2, the *Federal Accountability Act*, which would have an impact on the Office of the Senate Ethics Officer and, as such, on the Senate as a whole.

I am referring specifically to clause 26 of the Bill which would repeal sections 20.1 to 20.7 of the *Parliament of Canada Act*, establishing the position of the Senate Ethics Officer; and to clause 28 which would add sections 81 to 91 to that Act. These provisions combine the functions of the Ethics Commissioner and the Senate Ethics Officer and create a new position of the Conflict of Interest and Ethics Commissioner who would administer and interpret three sets of rules i.e. those applicable to senators, those applicable to members of the House of Commons, and those applicable to public office holders. Under the new ethical structure, senators would continue to be subject to the existing rules, i.e. the *Conflict of interest Code for Senators* adopted on May 18, 2005 would still govern the conduct of senators.

The proposed structure raises an obvious and important question – whether one Ethics Commissioner administering three sets of rules on conflicts of interest would be more efficient and effective than having two or three Commissioners. This is really the key question for the Committee to consider and to ultimately decide when it makes its recommendations to the Senate.

As senators know, this is certainly not a new issue – indeed, the advantages of the one-person model, the two-person model and the three-person model have been the subject of discussions dating back several years, including the Stanbury-Blenkarn Report (1992), the Milliken-Oliver Report (1997) and the Milne-Andreychuk Report (2003).

The previous government proposed a single ethics commissioner for both parliamentarians and public office holders. This gave rise to serious discussions in the Senate. Senators were united and determined in their opposition to the proposal. The government relented and Bill C-4 was adopted in 2004 establishing two ethics positions,

one for senators and one for both members of the House of Commons and public office holders. Two years later, to everyone's surprise, the issue was reopened with the tabling of Bill C-2, the *Federal Accountability Act*, on April 11th of this year. This led me to review the earlier discussions in the Senate and the very good presentations that had been made by witnesses at the time on this particular matter.

During the Senate deliberations, a variety of views were expressed by parliamentarians, government officials, academics and others. For example, government officials generally favoured the one-Commissioner model for senators, members of the House of Commons and public office holders, citing administrative efficiency and consistency of opinions as the justification. Others, including the Honourable Herb Gray, supported the three-Commissioner model on the basis that the responsibilities of senators, members of the House of Commons, and public office holders are significantly different and this reality should be reflected through separate and distinct institutional arrangements.

Several senators focused on the constitutional questions that having one Commissioner for both Houses raises, namely, issues respecting the independence of the Senate from the House and the Executive and its constitutional right to govern its own internal affairs free from interference, including the disciplining of its own members. Constitutionally, the Senate, like the House, is a self-regulating body and has exclusive jurisdiction over the conduct of its members. In the words of Mr. Joseph Maingot, the learned and well known former Law Clerk and Parliamentary Counsel to the House of Commons: "The privilege and the control over its own affairs and proceedings is one of the most significant attributes of an independent legislative institution". The constitutional questions are no less important now and the Committee will want to address them carefully.

For my part, what I may be able to contribute today is a practitioner's perspective based on my personal, first-hand experience as the Senate Ethics Officer as well as my knowledge of provincial and international ethics regimes and structures. I hope that this will be helpful to you in your deliberations and I would be pleased to answer any of your questions afterwards.

The Advisory Function: Direct Relationship with Members

I want to start by underlining the importance of the advisory function of the Senate Ethics Officer. The primary function of the Senate Ethics Officer (and in my view of any other ethics commissioner) is to provide independent, judicious and timely advice to senators in order to ensure that they remain in compliance with the *Conflict of interest Code for Senators*.

This involves working closely with senators so that conflicts of interest are prevented, as opposed to trying to deal with them once they have already arisen. This

approach is proactive and preventative, not reactive or punitive. But in order for this system to work well, it is essential that the Senate Ethics Officer be regularly available to senators and, in working with them personally, develop a trust relationship in which they feel comfortable disclosing information, both personal and financial, and seeking my advice. This aspect of my role occupies a large measure of my time. And this is as it should be. The inquiries and investigative roles, which I have not had to exercise to date, ideally would comprise only a small fraction of my time.

Over the last year, I met with most senators and, in some cases, more than once at their request. I view the Code as an opportunity to work with senators to arrange their private affairs so that conflicts of interest are avoided and, to this end, I have made myself available to them for advice and guidance throughout the year. When a senator recognizes that there may be some doubt about how to proceed in a given situation, he or she is encouraged to discuss it with me with a view to obtaining confidential advice regarding the conflict of interest rules and how they would apply to those particular circumstances. I then recommend a course of action that will bring the senator in compliance with the rules.

From June 2005 to March 31, 2006, there were well over **300** requests from senators for opinions and advice.

If my experience is consistent with the provincial experience in this area, I would expect this number to grow as senators gain more confidence in the process and seek advice before taking action. In general, my policy has been to respond to request for advice within a 24 hour time period whenever possible, as is the practice in the Office of the Integrity Commissioner in Ontario to which I refer later on in my remarks. For more information on my advisory activities of last year, I refer you to my Annual Report.

With **1,350** full-time public office holders and **1,940** part-time Governor in Council appointees, plus **308** members of the House of Commons, the direct relationship to which I have referred above may already be difficult to establish for one ethics commissioner. If one were to add **105** members of the Senate, there would be a large number of clients for a single commissioner, some **3,700** in total. This would, in my opinion, make it very difficult to establish direct relations with clients and for a single commissioner to provide, and for senators to receive judicious and timely advice.

As senators know, the members of the Senate, the members of the House of Commons and the various public office holders play very different roles in the system and, as such, require the application of different rules. While there are similarities between the Code applicable to senators and that applicable to members of the House, there are in fact some important differences which reflect the unique role the Senate plays in Canada's constitutional framework. For example, senators are expected to remain involved in activities in their communities and regions, and to engage in a wide range of activities outside their parliamentary duties. Some of these activities may give rise to real or apparent conflicts. Under the Code, senators are expected to resolve these in a way that upholds the highest standards and protects the public interest. This underlines again

the importance of the Senate Ethics Officer's advisory function and of a close and ongoing relationship between senators and the Senate Ethics Officer.

Another important point to keep in mind is that the two codes are still relatively new. They have only been in effect for two years in the case of the House of Commons, and one year in the case of the Senate. Any new conflict of interest regime requires that considerable thought be given to the interpretation and proper explication of the rules, especially at the outset. I am not convinced that the existing system has been in place long enough for a single individual, however competent he or she may be, to have the knowledge, time and experience to apply all three sets of rules effectively, giving some **3,700** parliamentarians and public office holders the attention they want and deserve.

As senators know, Bill C-2 would codify into law the rules on conflict of interest for public office holders and would also enhance the powers and functions of the new Conflict of Interest and Ethics Commissioner, thereby significantly increasing the office's already heavy workload. Consider that during 2005-2006, six inquiries were conducted by the Ethics Commissioner under the House of Commons' Code and a further seven requests for inquiries were made but not pursued. As well, an additional five requests for investigations were made under the Public Office Holders' Code, although they did not lead to formal investigations. Moreover, the Ethics Commissioner's office is still relatively new and experiencing inevitable growing pains. Their latest Annual Report outlines the work being done to address staffing, operational and organizational problems, and to improve the quality of the workplace for staff.

Again, I ask myself whether a single person can be expected, under such trying conditions, to find the necessary time to meet with individual senators to provide them with the advice they seek bearing in mind that, as stated earlier, this year alone involved over 300 requests for opinions and advice from senators.

The Ontario, British Columbia and Alberta Experience

In considering the importance of the direct relationship between members and ethics commissioners in carrying out the advisory function, the provincial experience is instructive. Let's examine briefly the case of three provinces that have long established and well respected ethics officers, namely Alberta (1991), Ontario (1988) and British Columbia (1990).

A direct relationship with clients is considered to be so critical that, in Alberta, the legislation that establishes the Office of the Ethics Commissioner requires an annual meeting of each of the 83 members of the Legislature with the Commissioner (section 13 of the *Conflicts of Interest Act*.) Bob Clark, Alberta's first and long time Ethics Commissioner describes his role as "90% priest and 10% policeman", reflecting the fact that most of his time is occupied with meeting members to advise them on how to comply with the legislation.

Ontario has a similar requirement **(subsection 20(3) of the *Members' Integrity Act, 2004*).** In his 2005-2006 Annual Report, Ontario's Integrity Commissioner, The Honourable Coulter Osbourne, emphasizes the importance he attaches to his direct relationship with the 103 members of the Assembly, a job which keeps him fully occupied: "Last year there were 446 inquiries under the *Members' Integrity Act*. We try to respond to all of these inquiries within 24 hours. Occasionally, where additional information is required, the response may take slightly longer. The number of requests for opinions under s. 28 is encouraging. Almost all of these requests are made before the event. This confirms that members, to their credit, are asking before acting or deciding. At a minimum this works to avoid more serious problems. It seems to me that there is an inverse relationship between the number of requests for an opinion under s. 28 of the *Act* and the number of complaints of *Members' Integrity Act* breaches – the more requests for an opinion, the fewer formal complaints." Osbourne makes another interesting point in his Annual Report: "My office remains small and is thus able to preserve the confidentiality which is required in the administration of the *Members' Integrity Act*. It operates with a staff of four." In other words, size matters.

Ontario's approach has been proactive and, because of this, has produced solid results over the years in raising public confidence in the integrity of the government. This did not happen overnight. In the words of Ontario's first Integrity Commissioner, the Honourable Greg Evans: "…in the early days of my office, few people called me. They didn't know I was there or they didn't care. But now we find there are many many requests asking whether members can do this or that. I think that one of the duties of the Commissioner is to protect the members from getting into trouble. I know we have to represent the public and protect the public, but you're protecting the public if you protect the member from getting into difficulties through prudent advice".

I would also note that the Ontario Integrity Commissioner's jurisdiction is limited to conflicts of interest with respect to members of the Legislative Assembly including ministers. There are separate institutional arrangements in place regarding deputy ministers and other Governor in Council appointees.

British Columbia has also pursued a preventative approach based on a close and ongoing relationship between the 75 members of its Legislature and the Commissioner (the Honourable Bert Oliver, Q.C.), the latter of whom describes his role in these terms in his 2004-2005 Annual Report: "By far the greatest portion of the Commissioner's time is taken up by informal, confidential meetings with Members…to discuss Members' problems…or to provide assistance to Members in identifying potential future problems not readily observable at first glance with a view to their avoidance. It is in the exercise of this informal and confidential consultative function that the most valuable aspect of the Commissioner's work may be found". Mr. Oliver also emphasizes the importance of having a direct relationship with his clients: "I have throughout my time in office tried to encourage all Members to make the widest possible use of the consultative or advisory services of my office and have made myself available to every Members of the House for confidential advice 24 hours a day on all 365 days of the year. The effectiveness of that

informal confidential advisory process depends very largely on the measure of trust which can be developed between the Commissioner and each Member…".

Similar thoughts were expressed by the Honourable Ted Hughes, the province's first Ethics Commissioner, who will be known to some of you, some fifteen years ago: "I have endeavored to encourage Members to bring their concerns to me, no matter how insignificant they might believe them to be. The telephone is frequently used and having established a relationship with each Member as a result of the meeting I must have annually with each of them, a rapport has been built that facilitates that kind of approach. I hope that close contact will continue, particularly where the Member feels the need for immediate assistance and also in situations that are likely trivial in nature".

York University professors Ian Greene and D.P. Shugarman have studied the ethics regimes put in place in Ontario, British Columbia and Alberta. In their book "Honest Politics", they conclude that the provincial experiments with independent ethics commissioners have been a "remarkable success" in raising the level of ethical behaviour in politics and raising public confidence in the integrity of government. They attribute this to the fact that most of the commissioners' time is spent meeting elected officials and providing advice on how to comply with their ethics rules and, but only rarely, investigating complaints about possible breaches. Internationally, this is sometimes referred to as the "Canadian model" – A model that is being emulated in all provinces and territories as well as in other countries.

The International Experience

Speaking of other countries, it is also useful to examine the international experience, not so much to imitate but to be aware of what works in countries that have well established ethical structures.

We find that the ethics regimes in a number of other bicameral jurisdictions to which Canada often compares itself on parliamentary matters, have clearly separated the executive and legislative branches as well as the two legislative chambers, for example, the United Kingdom, the United States and Australia.

In other words, in all three countries, each House controls its own ethics regime, including its own Code, as does the Executive. No one officer has jurisdiction over more than one of these bodies.

These separate and distinct institutional arrangements allow sufficient time for a direct relationship to be established – something which is key if parliamentarians are to be properly informed regarding conflicts of interest and how they may be avoided.

The reasons given for these separate regimes relate to the different rules and responsibilities of these bodies, the differences in their respective conflict of interest

rules, as well as the legislatures' long-standing tradition of managing their own internal affairs, including disciplining of their members. In these countries, there has been to my knowledge no discussion regarding combining the various regimes or otherwise modifying them and it would seem that the existing arrangements are considered to be satisfactory.

For additional information, I refer senators to a paper dated July 18, 2006, prepared by Margaret Young from the Research Branch at the Library of Parliament, entitled "Structures to enforce ethics in The United Kingdom, The United States and Australia".

Conclusion

In closing, I am not aware of any serious work that has been done on the advantages and disadvantages for Canada, federally, of alternative ethics structures. Perhaps such a study should be undertaken. In any event, in terms of efficiency, I do not believe that there are any significant cost savings to be had; you will note from my Annual Report that I have a small office with only four members, but notwithstanding this, we had a successful first year and met all of our objectives, on time and under budget.

In particular, I was pleased that all senators filed their confidential disclosure statements on time. All senators are in compliance with the Code and the Senate Public Registry was officially open on May 9, 2006. This would not have been possible without the excellent cooperation we received from senators during a period that was very much a learning experience for all concerned. As senators know, the 2006-2007 Annual Review will start shortly.

In terms of consistency in interpretation, as noted earlier, there are important differences between the Senate and the House conflict of interest codes, reflecting in part the historic differences in the roles and responsibilities of the members of the two Houses. Notwithstanding this, through regular discussions between my Office and the Office of the Ethics Commissioner's, we ensure consistency in our interpretation of the two codes when this makes sense, but also apply different interpretations where the circumstances warrant it. We have close contacts with our provincial colleagues as well -- Ontario in particular since there are a number of similarities between the Senate Code and the conflict of interest rules in Ontario. A national organization of the various ethics commissioners (the Canadian Conflict of Interest Network) meets yearly to discuss issues of common interest and share best practices, thereby ensuring a measure of consistency across the country. These informal arrangements, and the flexibility they provide, have always been one of the strengths of Canadian federalism.

Moreover, and as already noted, other bicameral legislatures, i.e., the United Kingdom, the United States and Australia, have adopted a model whereby each of their

two Houses have their own ethics regime. Lack of efficiency and consistency does not appear to have become a problem in those jurisdictions. In fact, as is the case in the Canadian provinces and territories where the number of clients for each commissioner is manageable, the separate ethics regime for each House in these countries also ensures that the conflict of interest system is not overwhelmed, due to an excessive number of members being subject to a regime administered by one body. This in turn results in an effective and timely service overall, protects the public interest and enhances public confidence in government. This is also the approach I have adopted with respect to my responsibilities under the *Conflict of Interest Code for Senators* since my appointment on April 1, 2005.

Finally, I refer senators to a brief paper prepared by my staff which outlines the key provisions of Bill C-2 as they affect the Office of the Senate Ethics Officer.