Legislative Summary **LS-522E**

BILL C-2: THE FEDERAL ACCOUNTABILITY ACT

Law and Government Division
Political and Social Affairs Division
Economics Division

21 April 2006
Revised 18 December 2006

Library of Parliament

Bibliothèque du Parlement

Parliamentary Information and Research Service

LEGISLATIVE HISTORY OF BILL C-2

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	11 April 2006	First Reading:	22 June 2006
Second Reading:	27 April 2006	Second Reading:	27 June 2006
Committee Report:	16 June 2006	Committee Report:	26 October 2006
Report Stage:	21 June 2006	Report Stage:	6 November 2006
Third Reading:	21 June 2006	Third Reading:	9 November 2006

Message sent to the House of Commons: 9 November 2006

Returned to the Senate with amendments: 21 November 2006

Royal Assent: **12 December 2006**

Statutes of Canada**: S.C. 2006, c. 9**

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

CE DOCUMENT EST AUSSI PUBLIÉ EN FRANÇAIS

TABLE OF CONTENTS

Page

Page

PART 2 – SUPPORTING PARLIAMENT

PART 3 – OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS, ADMINISTRATIVE TRANSPARENCY AND DISCLOSURE OF WRONGDOING

Page

Page

PART 5 – PROCUREMENT AND CONTRACTING

CANADA

LIBRARY OF PARLIAMENT
BIBLIOTHÈQUE DU PARLEMENT

BILL C-2: THE FEDERAL ACCOUNTABILITY ACT*

INTRODUCTION

Bill C-2, An Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability (the Federal Accountability Act) was given first reading in the House of Commons on 11 April 2006. The bill makes a series of amendments to existing legislation and proposes two new Acts, in diverse areas that are generally linked to political accountability. The bill's short title, the Federal Accountability Act, is the name under which it became known as part of the Conservative Party of Canada's platform in the January 2006 election campaign.

Part 1 of Bill C-2 enacts the proposed Conflict of Interest Act, creating for the first time a legislative regime governing the ethical conduct of public office holders, both during and after employment. In addition to creating a series of compliance measures, the bill also establishes a complaints regime, sets out the powers of the new Conflict of Interest and Ethics Commissioner, and provides for public reporting and penalties. The Commissioner's mandate, appointment and term are governed by amendments to the *Parliament of Canada Act*, which also prohibits members of the House of Commons from accepting income from certain trusts and requires them to disclose all trusts to the Commissioner. Part 1 also makes amendments to the *Canada Elections Act* dealing with political donations, contributions, gifts and prosecutions under that Act. It amends the *Lobbyists Registration Act* to provide for the appointment of a Commissioner of Lobbying upon approval by Parliament. The amendments will extend the scope of the Commissioner's investigative authority (compared with that of the existing

---

* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this legislative summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

Registrar of Lobbyists), make the office more independent of government, and give it new enforcement powers. Amendments to the *Public Service Employment Act* eliminate preferential hiring for ministers' political staff.

Part 2 makes a number of amendments related to political appointments and creates the new Parliamentary Budget Officer, whose mandate is to provide objective economic and financial analysis to Parliament.

Part 3 enacts new legislation to establish a Director of Public Prosecutions with the authority to initiate and conduct criminal prosecutions on behalf of the Crown. Amendments to the *Access to Information Act* extend its application to 15 Officers of Parliament, Crown corporations and foundations, and also establish new exemptions or exclusions relating to the added entities. The *Public Servants Disclosure Protection Act* is amended to strengthen protection for whistleblowers, including through the creation of the Public Servants Disclosure Protection Tribunal. A new Public Appointments Commission is established under Part 3 to establish and report to Parliament on guidelines governing selection processes for Governor in Council appointments to agencies, boards, commissions and Crown corporations.

Part 4 amends the *Financial Administration Act* to establish deputy ministers and equivalent senior officials as accounting officers accountable for certain matters before parliamentary committees, and to enhance the penalty for fraud under that Act. Other changes to the *Financial Administration Act* and other statutes deal with matters related to internal audit in the federal public administration.

Part 5 amends the *Auditor General Act* by expanding the class of recipients of grants, contributions and loans into which the Auditor General may inquire as to the use of public funds. Amendments in Part 5 to the *Financial Administration Act* deal with fairness, openness and transparency in government contract bidding, and create a regulation-making power to deem certain clauses to be set out in government contracts.

Debate on second reading of Bill C-2 took place in the House of Commons during 25-27 April 2006. Following second reading, the bill was referred to the House of Commons Legislative Committee on Bill C-2 ("the House Committee"), chaired by Mr. David Tilson. Amid some controversy, the House Committee met intensively, holding 28 meetings in May and June and hearing witnesses in groups between 3 May and 6 June 2006. Clause-by-clause study of the 317-clause bill took place over a one-week period (7-14 June). The bill was reported back to the House of Commons on 16 June with significant amendments, some proposed by the government and others by opposition parties. Committee amendments to each part of the bill are detailed in the text of this document.

The short title of the bill itself gave rise to a linguistic debate concerning the use of the term “imputabilité” rather than “responsabilité,” judged by some to be more appropriate terminology. In committee, the French short title of the bill was changed to *Loi fédérale sur la responsabilité*.

Questions relating to the effect of the bill on the constitutional privileges of Parliament led to a series of amendments. Both Mr. Robert Marleau, former Clerk of the House of Commons, and the Law Clerk and Parliamentary Counsel of the House of Commons, Mr. Robert Walsh, indicated in their testimony before the House Committee that the statutory requirement for a secret ballot, as part of the process of appointing Officers of Parliament, impinged on the constitutional autonomy of Parliament in relation to its own procedures. As a result, the sections requiring a secret ballot were deleted by the House Committee.

A further general amendment was made in response to the comments of the Law Clerk concerning the potential impact of Bill C-2 on parliamentary privilege. A new subsection (2) was added to section 64 of the proposed Conflict of Interest Act, to preserve “the privileges, immunities and powers referred to in section 4 of the *Parliament of Canada Act*.” At report stage, this non-derogation clause was revised, and three explicit exceptions to the protection of parliamentary privilege were created (these exceptions are discussed below under heading 11, “Penalties,” in section C of the part concerning the proposed Conflict of Interest Act).

Bill C-2 was debated at report stage in the House of Commons on 20 June 2006, with some further amendments (also noted in this document). On 21 June, both report stage and third reading were completed. The bill was then sent to the Senate for introduction and first reading on 22 June 2006.

The bill was then referred to the Standing Senate Committee on Legal and Constitutional Affairs (“the Senate Committee”) on 27 June 2006, and the Committee, chaired by Senator Donald Oliver, held extensive hearings on it. After hearing more than 160 witnesses, the Senate Committee made significant amendments to the bill, and reported it back to the Senate on 26 October 2006.

The Senate Committee considered evidence about many aspects of the draft legislation. Considering the Conflict of Interest Act as proposed in clause 2 of the bill, the Committee members were particularly concerned about the possibility of the functions of the Senate Ethics Officer and the Ethics Commissioner being combined in the proposed Conflict of Interest and Ethics Commissioner. As the Senate Committee amended the provisions, the

functions of the Senate Ethics Officer in relation to the Senate will be retained. The new Conflict of Interest and Ethics Commissioner's mandate will cover the ethical codes governing only public office holders and Members of Parliament. **The Senate's changes retaining the Senate Ethics Officer were concurred in by the House of Commons on 8 December 2006. Most of the Senate's other substantive changes were disagreed with, as discussed below.**

The Senate's amendments that were not retained in the final version of the bill included those discussed below that deal with the recognition of roles for both Houses of Parliament in various contexts, increased contribution limits under the *Canada Elections Act*, the appointment processes for two new officers, a number of limitation periods, and a series of new amendments to the *Access to Information Act*.

The Senate Committee, with the advice of the Senate Law Clerk, Mr. Mark Audcent, had amended several provisions of Bill C-2 which would have recognized only the House of Commons, adding an equivalent role for the Senate in each case. Retention of the Senate Ethics Officer was also supported by the evidence of Mr. Audcent and Mr. Jean Fournier, the current Senate Ethics Officer.

The political financing provisions of the bill were also amended, including the provisions governing contribution limits. The Senate Committee's amendments included increasing the proposed contribution limits under section 405 of the *Canada Elections Act* from $1,000 to $2,000 in a calendar year to each of a political party, a registered association, a candidate, or a nomination or leadership contestant.

Amendments were made to appointment processes for both the Director of Public Prosecutions and the Parliamentary Budget Officer. The Procurement Auditor was renamed the Procurement Ombudsman. A number of limitation periods provided in the bill were also amended.

Also altered were several clauses amending the *Access to Information Act* (ATIA). New exclusions were inserted for certain records held by the Canada Foundation for Sustainable Development Technology and the National Arts Centre. For the first time, a general public interest test was added in new section 26.1, to permit heads of institutions to release information when "the public interest in the disclosure clearly outweighs in importance any loss, prejudice or harm that may result from the disclosure," unless the information relates to national security. New clauses exclude from release any information held before the coming into force of the bill by the foundations and Officers of Parliament that are added to the ATIA by Bill C-2.

At third reading in the Senate, more amendments were made, mostly of a technical nature. The bill was then returned to the House of Commons, where many of the amendments were not agreed to, some were amended, and some were agreed to. A message was sent back to the Senate on 21 November 2006. Following debate in the Senate Chamber, on 23 November the bill was again referred to the Senate Committee. **When the bill was referred to it for the second time, the Senate Committee held several meetings to hear witnesses and to discuss their response to the message that had been received from the House. On 7 December 2006 the Senate Committee reported to the Senate, recommending that the Senate concur in the three amendments made by the House of Commons in its 21 November message, that it not insist on most of the amendments it had made to the bill after its original study (as reported to the Senate on 26 October), and that it insist only on the amendments retaining the Senate Ethics Officer, and one other amendment (number 2) that excludes Parliament from the definition of "public sector entity" in the Conflict of Interest Act. The Senate sent a message to that effect to the House. The House of Commons accepted the Senate's final amendments on 8 December 2006, and the bill was given Royal Assent on 12 December 2006.**

PART 1 – CONFLICTS OF INTEREST, ELECTION FINANCING, LOBBYING AND MINISTERS' STAFF

THE CONFLICT OF INTEREST ACT (CLAUSE 2)*

A. Introduction

Clause 2 of Bill C-2 enacts the Conflict of Interest Act (CIA), An Act to establish conflict of interest and post-employment rules for public office holders. In essence, clause 2 enacts the current non-statutory Prime Minister's *Conflict of Interest and Post-Employment Code for Public Office Holders* (the Code), makes some significant changes to it, and expands somewhat the powers of the new Conflict of Interest and Ethics Commissioner (the Commissioner)(1) as its administrator, in comparison to the powers of the current Ethics Commissioner.

---

* Authors: Margaret Young and Kristen Douglas, Law and Government Division.

(1) Clauses 113-116 of the bill make some amendments to the appointment provisions relating to the current Ethics Commissioner and Senate Ethics Officer (sections 20.1, 20.2, 72.01 and 72.02 of the *Parliament of Canada Act*) to provide for the possibility that one of these positions will become vacant before the new Commissioner is in place.

The Prime Minister's Code has existed for many years, changing slightly with each new administration.(2) When it took office, Prime Minister Harper's Conservative government made some significant changes, most of which have been incorporated into the proposed Act. At the same time, the proposed Act drops some aspects of the Code and substantially reorganizes and streamlines it. The resulting regime is more understandable and accessible than is the current Code.

B. Elements of the Prime Minister's Code That Are Omitted From the Proposed Conflict of Interest Act

The proposed CIA *drops* the following elements from the existing Code:

- most of the "Principles";(3)
- the introduction to the Code's section entitled "Object" (renamed "Purpose"). The omitted words state that the object of the Code is to enhance public confidence in the integrity of public office holders (POHs) and the decision-making process in government;
- blind management trusts;
- the provision in the current Code that permits POHs to accept invitations to special events (such as sporting events), provided certain criteria are met; and
- the numerous informal narrative explanations, which are unsuitable in a statute.

C. Elements of the Prime Minister's Code That Are Expanded or Changed in the Proposed Conflict of Interest Act

The following significant elements have been either *added to* or *changed from* the current Code.

1. Definition of "Conflict of Interest"

Since the inception of the Code, there has been only an implicit definition of the meaning of "conflict of interest." Section 4 of the proposed CIA remedies that by stating that "a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her

---

(2) Public office holders are both parliamentarians (ministers, ministers of state and parliamentary secretaries) and non-parliamentarians. The latter group includes ministerial staff and advisers, and Governor in Council appointees (with a number of exceptions, such as lieutenant governors, heads of missions, and judges).

(3) The only principle that will be directly preserved is that relating to post-employment, although several others are found in a different form throughout the Act.

relatives or friends or to improperly further another person's private interests." Section 4 was significantly amended by the Senate Committee, to add potential and apparent conflicts of interest in the new CIA. A potential conflict of interest is defined as existing when the public office holder's ability to exercise an official power, duty or function could be influenced by his or her private interests or those of his or her relatives or friends, or could be improperly influenced by another person's private interests. An apparent conflict of interest exists when there is a reasonable perception, which a reasonably well-informed person could properly have, that the public office holder's ability to exercise an official power, duty or function must have been influenced by his or her private interests or those of his or her relatives or friends, or must have been improperly influenced by another person's private interests. Consequential amendments were made to other provisions of the CIA to cover actual, apparent and potential conflicts of interest. These amendments regarding potential and apparent conflicts of interest were disagreed with by the House.[(4)]

Section 6 of the CIA provides that the POH shall not make a decision or participate in making a decision that would place him or her in a conflict of interest. In the first version of the bill, a POH who is a parliamentarian could not debate or vote on a question that would place him or her in a conflict of interest. This provision was removed by the House of Commons Legislative Committee on Bill C-2 on the grounds that it was an unwarranted intrusion into internal House matters. At report stage in the House, however, it was reinstated only to be removed again by the Senate Committee. The House, however, disagreed with that amendment.

2. Definition of "Ministerial Adviser"

This definition includes advisers who provide policy, program or financial advice to ministers; interestingly, it covers people who provide such advice either full-time or part-time, and regardless of whether they are compensated or not.

3. Definition of "Public Office Holder"

"Public office holder" is defined in the Code. That definition is reproduced in section 2 of the CIA, with the addition of a new term – "reporting public office holder." The

(4) Unless the text indicates otherwise, any amendments with which the House of Commons disagreed were not retained in the Royal Assent version of the bill.

latter list of positions permits distinctions to be made among members of ministerial staffs who work on average 15 hours or more a week, part-time Governor in Council appointees who receive an annual salary and benefits, and full-time Governor in Council appointees, all of whom are reporting public office holders. As such, they are prohibited from engaging, by and large, in the activities listed in the current Code (being employed, operating a business and so on); they are subject to the rules regarding disclosure and the divestment of assets; and they are also subject to all of the post-employment rules that are contained in the CIA.(5)

4. Travel

Section 12 of the CIA prohibits parliamentary POHs, their families, ministerial advisers and ministerial staff from accepting travel on non-commercial chartered or private aircraft unless required by the POH's functions. In exceptional circumstances, the Commissioner may approve such travel.

5. Contracting With the Government

New provisions in sections 13 and 14 govern contracting with the government.(6) POHs who are parliamentarians may not contract with public sector entities under which they receive benefits (with the exception of pension benefits). Nor may they have an interest in a partnership or private corporation that has a contract with a public sector entity. In each case, a contract may be permitted if the Commissioner is of the opinion that the contract is unlikely to affect the POH's exercise of his or her powers, duties and functions.

No non-parliamentary POH who is in charge of a public sector entity may permit the entity to enter into a contract with his or her spouse, common-law partner, child, sibling, or parent unless the hiring process is an impartial one in which the POH plays no part.

A parliamentary POH who is in charge of a public sector entity may not permit the hiring of the above-named individuals (unless they are to be ministerial staff or advisers) if they are related to *other* ministers, ministers of state or parliamentary secretaries, with the same exception relating to an impartial process. Finally, no parliamentary POH responsible for a public sector entity may permit that entity to hire the POH's own spouse, common-law partner, child, sibling, or parent. There are no exceptions in this situation.

---

(5) Note that there are additional rules in the Lobbying Act, discussed below.

(6) These contracting provisions fill a gap left when the *Parliament of Canada Act* was amended to establish the position of the Ethics Commissioner. The antiquated contracting provisions were deleted and replaced by provisions in both the House of Commons and the Senate Codes. Those provisions, however, do not cover public office holders.

6. Recusal

Recusal occurs when a person declines to take a decision, participate in debate or vote in any matter in which the person would be in a conflict of interest. In section 21 of the proposed CIA, the rule is straightforward and the responsibility is placed on the POH, although the House Committee clarified that recusal was also required from discussions, as well as decisions, debate or voting. In the current Code, in contrast, the provisions are less direct, and the onus seems to be on the Ethics Commissioner to recognize the situation and impose rules to regulate it.

7. Rules Regarding Assets and Liabilities

The general structure of the current Code is retained in the CIA: confidential disclosure to the Commissioner, divestment of controlled assets (defined in section 20),[7] public disclosure of certain assets, rules about blind trusts and so on, although it should be noted that the language of the rules in the Act is more specific and direct. The following changes, found in section 25, are notable:

- Recusals will be publicly declared in such a way that the conflict can be identified. Certain declarations, however, will not be made public (Cabinet confidences and information relating to security concerns), and those that are made public may not include specified information. The list of matters that may not be made public is significantly more extensive than in the current Code.[8]
- Liabilities over $10,000 will now be publicly disclosed, together with their source and nature but not their value.
- Some outside activities are permitted for specified POHs if the Commissioner is of the opinion that the activities are not incompatible with their public duties (see CIA sections 15(2) and (3)). These will now be disclosed.
- In a major change from the Code, sections 27(1) and (3) specify that controlled assets may not be divested by means of a blind management agreement. They may only be sold at arm's length, or placed in a blind trust that meets the substantial (but unchanged from the Code) requirements of section 27(4). The blind management agreement was a tool developed to permit the POH to retain an ownership interest in private corporations and partnerships. The trustee was permitted to consult with the POH in defined situations, such as an extraordinary corporate event likely to materially affect the value of the assets.

(7) Controlled assets are defined generally as assets whose value could be directly or indirectly affected by government decisions or policy. The most common controlled assets are publicly traded securities, whether held individually, in an investment account, or in a self-administered RRSP.

(8) See section 51 of the CIA (discussed below).

Communication was through the Commissioner, but took place nevertheless. Given that the properties subject to the management agreements were often family affairs, and that the contents of the trust were clearly known to the POHs, commentators argued that such "trusts" could hardly be described as "blind."(9) In contrast, in a true blind trust, the assets may change (as with publicly traded securities), and the only specific information that passes to the POH is what is required by law. Of course, in such a case the total value of the trust will be communicated, and the POH may withdraw money or receive dividends.

8. Post-employment Rules

Many of the post-employment rules are the same as in the current Code. The differences are noted below.

- The prohibition against using information improperly has been broadened by section 34(2) to include giving advice to business associates and employers, in addition to clients, as is currently the case. Moreover, the rule extends to all information gained as a former POH, not just to the departments with which he or she was employed or had a substantial relationship.
- The prohibitions applying to former reporting POHs in section 35 relate to contracting or accepting employment with, and making representations to, entities with which they had direct and significant official dealings, or, in the case of former ministers, contacting former Cabinet colleagues. These do not change in the CIA. A major change, however, is that *all communications* that are covered by specified sections (5(1)(a)) of the proposed Lobbying Act,(10) or *any meeting* that is set up (section 5(1)(b)), must be reported to the Commissioner, along with detailed information about the communication or meeting.(11)
- Currently, all waivers relating to the post-employment rules must be issued by the Ethics Commissioner.(12) In its original version, section 38 of the CIA provided that a minister could waive those rules for ministerial staff who worked on average 15 hours or more per week and reported to that minister, if the staff member in question met specified criteria.(13) In committee, the power to issue these waivers was given to the Conflict of Interest and Ethics Commissioner. In the Senate Committee, the section was further amended to require that waivers be granted only on application, and that a decision to grant such a waiver be communicated in writing to the person who applied for the exemption and published, with reasons, in the public registry. The House agreed with these amendments.

---

(9) Indeed, they were popularly called "venetian blind trusts."

(10) This is the current *Lobbyists Registration Act*, which is renamed by Bill C-2.

(11) This provision, however, applies only to those who are not *prohibited* from lobbying activities altogether (see below).

(12) Waivers continue in the CIA, and the factors that the Commissioner is to consider are very similar to those in the current Code.

(13) There are four criteria: that the person was not senior; did not handle political or sensitive material; had little influence, visibility or decision-making power; and that the salary was low, reflecting the fact that his or her role in the office was not important.

- The five-year ban on lobbying activities for designated POHs is found in the proposed Lobbying Act rather than in the CIA.[14] The Commissioner of Lobbying may exempt individuals from the application of the provisions, applying any criteria deemed relevant, including: being a designated POH for only a short time, being employed on an acting or administrative basis only, or being employed as a student. Reasons for exemptions must be made public.

9. Mandate of the Commissioner

Sections 43-50 of the proposed CIA reorganize the similar sections of the Code and the *Parliament of Canada Act* (POCA) to consolidate a statutory ethics regime for POHs and former POHs. Section 43 sets out the requirement, currently found in section 72.07 of the POCA, that the Commissioner provide advice to the Prime Minister, as well as to individual POHs, on the application of the Act. As amended by the Senate Committee, clause 43 permits such advice to be given to the Prime Minister on a confidential basis only if no contravention is found. If the Commissioner concludes that a POH has contravened the CIA, the Commissioner must report to the Prime Minister, make the report available to the public, and provide a copy of the report to the POH who is the subject of the report. The House disagreed with these amendments.

In a significant change from the current regime, section 44 of the CIA permits parliamentarians to request, based on a belief on reasonable grounds that there has been a contravention of the Act, that the Commissioner examine a possible contravention by *any* POH or former POH. At present, section 72.08 of the POCA allows such requests only in relation to current ministers, ministers of state or parliamentary secretaries. Deleted by the House Committee was a requirement that the requesting parliamentarian swear an oath or affirm as to the reasonable grounds giving rise to the request for an examination by the Commissioner. Section 44 also codifies and elaborates upon the current requirement under section 5(4) of the Code (new in 2006) that the Commissioner consider information from the public that is brought to his or her attention by a member of Parliament suggesting that a POH has not complied. Deleted by the Senate Committee was a new confidentiality requirement in proposed section 44(5) of the CIA to prohibit the parliamentarian who has received such information from the public from disclosing it while considering whether to bring it to the attention of the Commissioner, or if submitted to the Commissioner, before the issuance of a report. Also

(14) See clause 75 of Bill C-2, which adds new section 10.11; the definition of “designated public office holder” is found in clause 67. The House Committee amended clause 67 to clarify that members of the transition team, as identified by the Prime Minister, are considered designated public office holders for the purpose of the five-year lobbying ban. At report stage, the Commissioner of Lobbying was given the power to grant exemptions to the ban, subject to the application of specified criteria.

deleted by the Senate Committee was proposed section 44(6), which provided that if a parliamentarian did fail to comply with the confidentiality provisions, the Commissioner could refer the matter to the Speaker of the parliamentarian's chamber. The House rejected these amendments. As amended by the Senate Committee, the Commissioner will not be able to report publicly on a request that was discontinued or was frivolous, vexatious or made in bad faith. **That amendment was also rejected by the House.**

Proposed section 45 creates a new power permitting the Commissioner, when he or she has reason to believe that a POH or former POH has contravened the Act, to examine a matter on his or her own initiative. This mirrors a comparable power to that provided the Ethics Commissioner under section 27(4) of the *Conflict of Interest Code for Members of the House of Commons*. As is already required under section 72.09 of the POCA, under section 46, the Commissioner must provide the affected POH or former POH with a reasonable opportunity to present his or her own views before reporting on an examination.

Section 47 provides that a conclusion by the Commissioner as to whether the Act has been contravened may not be altered by anyone, but is not "determinative of the measures to be taken as a result," which is similar in effect to section 23 of the Code. The Commissioner will have powers to summon witnesses and compel them to give evidence or to produce documents similar to those available to the Ethics Commissioner under the current regime.

Section 49 continues the requirement that the Commissioner suspend an examination under section 43, 44 or 45 if he or she believes the POH or former POH has committed an offence under another statute, in which case the relevant authorities must be notified. Section 50 continues the immunity from prosecution currently provided to the Ethics Commissioner by section 72.12 of the POCA.

10. Public Registry

Section 51 provides a legislative base for the public registry that was established previously under the Code. It will contain a number of documents required to be made public under the CIA, including public declarations, summary statements, notes of gifts forfeited, decisions on waiver or reduction applications, and any other documents the Commissioner considers appropriate. Recusals will not be made public in the registry if the publication would reveal Cabinet confidences or special operational information.[15] Recusal declarations that are

(15) Within the meaning of section 8(1) of the *Security of Information Act*.

published must not reveal information that is subject to solicitor-client privilege; that must not be disclosed under another statute; that could injure international relations, national defence or security, or the detection, prevention or suppression of criminal or hostile activities; that could invade someone's privacy; or that could injure commercial interests.

11. Penalties

Section 52 creates a new offence, making POHs who contravene listed provisions of the CIA liable to an administrative monetary penalty of up to $500. The listed provisions include a number of reporting requirements, provisions requiring the disclosure of gifts and offers of employment, and a provision requiring confirmation of divestment of controlled assets.

Where the Commissioner believes, on reasonable grounds, that a POH has committed a violation, the Commissioner may issue and serve a notice of violation under section 53, setting out the violation, the proposed penalty and the time within which the POH must pay. If the POH pays the penalty, section 55 provides that he or she will be considered to have committed the violation, and proceedings in respect of it will be ended. However, section 56 permits the POH to make representations to the Commissioner, and in such a case the Commissioner will decide whether or not the violation was committed. If the penalty is not paid, and no representations are made to the Commissioner, the POH will be deemed to have committed the violation.

Section 58 makes due diligence a defence in a proceeding in relation to a violation. Unless it would be inconsistent with the CIA, common law principles that may provide a justification or excuse also apply to a violation. Section 60, as amended by the Senate Committee, specifies that proceedings must be commenced within two years of the Commissioner becoming aware of the possible violation, and within five years after the subject-matter of the proceeding arose. The House disagreed with this amendment. In its original form, this section provided for a five-year limitation period from the day the Commissioner became aware of the subject-matter of the proceedings.

When an administrative monetary penalty is imposed on a POH, the Commissioner must make public the nature of the violation, the identity of the POH, and the amount of the penalty imposed.

Section 63 expressly provides that section 126 of the *Criminal Code*, which makes it an indictable offence to wilfully breach a federal law, does not apply to the CIA. Section 65, as amended by the Senate Committee, restated the two- and five-year limitation periods provided by section 60. The House disagreed with this amendment and would retain the original five- and ten-year limitation periods. Section 66 provides that the Commissioner's decisions are final, and cannot be reviewed except on judicial review by the Federal Court of Appeal, under section 18.1(4)(*a*), (*b*) or (*e*) of the *Federal Courts Act*. (The Court's jurisdiction is extended under clause 6 of Bill C-2, enabling it to hear such applications.) The criteria in section 66 upon which the Commissioner's decisions can be quashed by the Court are: if they were made by a decision-maker acting outside his or her jurisdiction, without procedural fairness, or on fraudulent or perjured evidence.

The House Committee added a new provision (section 64(2)) to emphasize that nothing in the Act affects parliamentary privilege. At report stage in the House, this was refined so as to be subject to three exceptions: the prohibitions on POHs who are parliamentarians from debating or voting on questions that would place them in a conflict of interest (section 6(2)); the requirement that POHs recuse themselves from discussions, decisions, debate or voting on any matters in which they would be in a conflict of interest (section 21); and the power of the Commissioner to order a POH to take any compliance measure, including recusal (section 30). The exceptions reflect the awareness that, in these particular respects, the CIA could indeed affect parliamentary privilege. The exceptions were deleted by the Senate Committee, in order to ensure that nothing in the CIA could limit parliamentary privilege, but the House disagreed with this deletion.

The House Committee also added a provision calling for a five-year comprehensive review of the Act by a committee of either or both of the Senate and the House of Commons (section 67).

D. Other Provisions (Clauses 3-38, 99, 112-116)

1. Transitional Provisions and Consequential Amendments (Clauses 3-25, 112-116)

As noted below, Senate Committee amendments retaining the Senate Ethics Officer were disagreed with by the House. **However, these amendments were insisted upon in the Senate's second message to the House, and were accepted by the House on 8 December 2006.**

Clause 3 of Bill C-2 will automatically transfer all staff of the current Ethics Commissioner to the office of the new Conflict of Interest and Ethics Commissioner. References to the Commissioner's predecessor in contracts or other instruments he has executed will be read as referring to the Conflict of Interest and Ethics Commissioner, who will similarly replace him in any ongoing litigation. The new Commissioner will also assume the powers and duties of the Ethics Commissioner under the two Codes he now administers.(16)

A number of consequential amendments will replace references to the Ethics Commissioner in various statutes with references to the Conflict of Interest and Ethics Commissioner.

Since the Senate Ethics Officer **will be** retained, these provisions will apply to him and his office as they do to the Ethics Commissioner.

2. Consequential Amendments to the *Parliament of Canada Act* and Other Statutes (Clauses 26-34)

Clauses 26 and 27 of Bill C-2 repeal all of the sections of the POCA that apply to the Ethics Commissioner. Clause 28 inserts a series of new sections applying to the new Commissioner. These clauses, and a number of others in this part of the bill, were amended by the Senate Committee to retain the existing provisions applying to the Senate Ethics Officer. A new subsection 20.5(4) of the POCA was added by an amendment to clause 26, to provide, for greater certainty, that the administration of the CIA in relation to POHs who are ministers or parliamentary secretaries is not part of the mandate of the Senate Ethics Officer. The House disagreed **initially** with amendments restoring the Senate Ethics Officer**, but they were ultimately accepted.**

Under new section 81 of the POCA, the Commissioner will be appointed by Cabinet after consultation with every party leader in the House of Commons and the Senate, and approval by resolutions of both chambers of Parliament. The requirement that resolutions be arrived at by secret ballot was deleted by the House Committee. Section 81(2) requires, for the first time, that the successful candidate must be a former judge, or a member of another board, commission or tribunal who has demonstrated expertise in conflicts of interest, financial arrangements, professional discipline or ethics. An amendment by the House Committee added

(16) Clauses **112 and 113** of the bill make some amendments to the appointment provisions relating to the current Ethics Commissioner and Senate Ethics Officer (sections 20.2 and 72.02 of the *Parliament of Canada Act*) to provide for the possibility that one of these positions will become vacant before the new Commissioner is in place.

that a former Senate Ethics Officer or Ethics Commissioner could also be appointed, thus permitting the appointment of the incumbents of those positions. The term of the Commissioner's appointment is seven years, compared to the current five for the Ethics Commissioner and seven for the Senate Ethics Officer. The Commissioner will be subject to removal for cause on address of the Senate and the House of Commons.

The Senate Committee's decision to retain a separate ethics officer to administer the Senate's ethical code was in line with that Chamber's long-standing preference for its own ethics officer. The possibility of a single ethics officer to govern the ethical conduct of members of both Houses of Parliament, as well as the executive branch of government, had been considered during the evolution of the current ethics regime, as was the desirability of requiring that such an officer have legal training or experience. In a report dated 10 April 2003, following its study of what at that point were only a proposed bill and a proposed Code, the Standing Senate Committee on Rules, Procedures and the Rights of Parliament recommended that the Senate have its own officer, the Senate Ethics Officer. The government agreed. **That** Committee further recommended that the officer have legal experience. The final bill did not reflect that, and the Senate did not insist. Neither the Ethics Commissioner nor the Senate Ethics Officer is required to have, or indeed has, legal training or experience, although, as noted above, each is eligible for appointment as Commissioner.

New section 85 of the POCA sets out the mandate of the new Commissioner, which is to perform the functions set out in sections 86-88, and to provide confidential policy advice to the Prime Minister about conflict of interest and ethical issues. The Commissioner's functions in relation to the House of Commons and its members will be those assigned by that House, again under the direction of a designated committee. In relation to public office holders, the Commissioner will perform the duties assigned under the CIA.

A new section 86.1 was added by the Senate Committee under the amended clause 28, providing that the Commissioner and his or her staff are not compellable witnesses regarding knowledge acquired in the performance of duties under the Act. Immunity from criminal and civil proceedings is also provided. This amendment was agreed with by the House. The Commissioner may not, without consent, use personal information collected for any purpose inconsistent with that for which the information was collected. Section 91 sets out the Commissioner's reporting obligations, which include annual reports on his or her activities under the House of Commons Conflict of Interest Code and the CIA. The reports must not contain any

information that the Commissioner is required to keep confidential, including Cabinet confidences.

3. Coordinating Amendments (Clauses 35-38)

Clauses 35-38 provide for coordination between the CIA and several other statutes to allow for potentially different coming into force dates for the provisions of the bill.

4. *Parliament of Canada Act* Prohibition Against Accepting Benefits From Certain Trusts (Clause 99)

Clause 99 adds three new sections to the POCA dealing with members of the House of Commons and trusts. New section 41.1 prohibits Members from benefiting from any trust "established by reason of his or her position as a member of the House of Commons." Contravening the prohibition is a summary conviction offence, for which the penalty is a fine between $500 and $2,000.

Section 41.2 requires Members to disclose to the Commissioner every trust from which he or she could benefit, in accordance with the provisions of the *Conflict of Interest Code for Members of the House of Commons*, although failing to do so is not a *Criminal Code* offence. In any case where a Member discloses a trust that was not established by a relative, the Commissioner must order the termination of the trust, if possible, or at least order that the Member not use any benefit or income from it for nomination, leadership or election campaign purposes. Even funds from family-established trusts may not be used for such purposes. The only exceptions to this restriction are for trusts that meet the blind trust requirements of section 27(4) of the CIA or that are governed by either a registered retirement savings plan or a registered education savings plan.

An order to terminate a trust or not to benefit from one will expire when a Member ceases to be an M.P., pursuant to section 41.3(4); for the purposes of that section, an M.P. is deemed to continue being an M.P. throughout the election period. In other words, if the M.P. is a candidate, he or she will not be able to benefit from such funds during a re-election campaign. Contravening such an order is a summary conviction offence, for which the penalty is a fine between $500 and $2,000. These provisions are not subject to judicial review in the Federal Court (clause 38).

Clause 99 was amended by the House Committee, adding new sections 41.4 and 41.5 to the POCA. These sections require any person, including the Commissioner, who has reasonable grounds to believe that an offence has been committed under section 41.1 (the prohibition against accepting funds from trusts) to notify the designated House of Commons committee. The Commissioner will be required to provide orders made under section 41.3 (orders to terminate or not benefit from trusts) to the designated House of Commons committee.

POLITICAL FINANCING AND ENFORCEMENT (CLAUSES 39-64, 99, 121)*

The Conservative Party's campaign platform promised to reform the political financing rules in the *Canada Elections Act* (CEA) and to strengthen some of the enforcement mechanisms in the Act. Bill C-2 will implement **many** of these proposals.(17)

A. Gifts or Advantages (Clauses 39-40)

1. Prohibition Against Candidates Accepting Gift or Advantage Where Attempt to Influence

Clause 40 of Bill C-2 prohibits candidates from accepting a gift or an advantage that would appear to a reasonable person to have been given to influence the candidate in carrying out his or her duties and functions as a Member of Parliament, were the candidate to be elected. (The amendments add sections 92.1-92.6 to the CEA.)

A gift or an advantage includes money given with no obligation to repay it and a service or property provided without charge or at less than commercial value. This form of contribution is distinct from a financial contribution permitted under Part 18 of the Act (see section C below, "Contribution Limits on Political Financing"). Gifts or other advantages given by relatives, received from a will, or given as a "normal expression of courtesy or protocol" are not prohibited.

---

* Author: Sebastian Spano, Law and Government Division.

(17) See Sebastian Spano, *Political Financing and Campaign Regulation*, PRB 05-79E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 23 February 2006. See also *Canada's Electoral Process: Frequently Asked Questions*, PRB 05-46E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 5 April 2006, http://lpintrabp.parl.gc.ca/lopimages2/prbpubs/bp1000/prb0546-e.asp.

2. Period During Which Prohibition Applies

The prohibition against accepting gifts or advantages in the circumstances set out in the bill applies from the time the candidate becomes a candidate until the day he or she withdraws his or her candidacy, or the day the candidate becomes a Member of Parliament, or to polling day if the candidate is not elected. A candidate is deemed to have become a candidate, for the purposes of this section, on the earlier of: the day on which he or she is selected at a nomination contest; and the date of the issuance of an election writ.

3. Reporting Requirements

The candidate must provide a statement to the Chief Electoral Officer of all gifts and advantages received by him or her in the prescribed period, where the value to the candidate of those gifts and advantages exceeds $500. A series of gifts or advantages from one individual or entity that total more than $500 must also be reported.

The statement must indicate: the nature and commercial value of each gift or advantage; the name and address of the person or entity giving it; and the circumstances under which it was given.

The statement to the Chief Electoral Officer must be provided within four months after polling day or the withdrawal of the election writ. The Chief Electoral Officer or a judge may extend the time for filing or correcting the statement in cases of the candidate's illness or an honest mistake of fact or inadvertence.

The first reading version of the bill stated that if an elected candidate failed to provide the required statement or a correction to the statement within the prescribed time, he or she would not have been permitted to sit or vote as a Member of Parliament until the statement was provided (former clause 40, proposed new section 92.6(2) of the CEA). During the House Committee's proceedings, the Law Clerk and Parliamentary Counsel raised concerns that the provision would affect the exclusive authority of the House of Commons to discipline MPs in their capacity as Members of Parliament, a capacity distinct from other roles that they may play as ministers or parliamentary secretaries. As a result, the requirement was removed.

4. Offences and Prosecutions

Bill C-2 makes it an offence for a candidate to: accept a prohibited gift or advantage; fail to provide the statement within the required period; or provide an incomplete statement (clause 56). The offence is punishable by a fine not exceeding $1,000 or

imprisonment for up to three months or both. If the offence was committed knowingly or the candidate provided a false or misleading statement, it may result in a fine of up to $5,000 or imprisonment for up to five years, or both. Statements provided to the Chief Electoral Officer on the receipt of gifts and contributions, although confidential, may be provided to the Director of Public Prosecutions who may use them in a prosecution of an offence under the Act (new sections 92.5(2), (3)).

B. Transfer of Funds (Clauses 44, 99)

The Conservative Party campaigned to eliminate the use of trust funds by political parties and candidates. Its concern was that political financing through these vehicles lacked transparency and amounted to a hidden source of funding that could be used to avoid the rules governing political financing.

The *Canada Elections Act* makes no mention of trust funds. Elections Canada, however, treats money contributed to a political campaign from a trust fund as a contribution from the entity or person holding the trust property. The limits and reporting rules in the Act that apply to persons or entities (corporations, trade unions or unincorporated associations) are applied to the contribution. Thus, under the current rules, if a contribution comes from a trust held by a corporation, the contribution will be subject to the limits imposed on corporate contributions: $1,000 in any calendar year. If the contribution comes from a trust held by an individual, that contribution will be subject to the limit imposed on individual contributions: $5,000.[18]

Bill C-2 seeks to restrict the use of trust funds by amending the parts of the CEA that deal with transfers of goods, services and funds between the various entities that make up a political organization. Currently, goods, services and funds may be transferred with few restrictions. These transfers are not considered contributions for the purposes of the contribution limits established in the Act.

It should be noted that the amendments do not ban the use of trust funds as a source of contributions to political campaigns. They impose some restrictions which mainly affect electoral candidates.

---

(18) Elections Canada, *Making Contributions Through Trusts*, Information Sheet 13, 20 January 2004, http://www.elections.ca/content.asp?section=loi&document=fs13&dir=gui&lang=e&textonly=false.

1. Transfers of Goods and Services

The new scheme established by Bill C-2 permits the following transfers of *goods and services* between political entities (clause 44(1), amending section 404.2(2) of the Act):

- from a registered political party to an unregistered constituency association, or to a candidate;
- from a registered constituency association to another registered constituency association affiliated with that party, or to a candidate;
- from a candidate to the party, or to a registered constituency association; and
- from a candidate to himself or herself in his or her capacity as a nomination contestant.

2. Transfers of Funds

The bill limits the transfer of funds, *including trust funds*, to the following situations (clause 44(2), adding section 404.2(2.1) to the Act):

- from a registered party to an unregistered constituency association of the party;
- from a registered constituency association to the party or to another registered constituency association of the party;
- from a candidate to the party or to a registered constituency association of the party; and
- from a candidate to himself or herself in his or her capacity as a nomination contestant in respect of the same election.

Trust funds may be not transferred among the following entities:

- from a registered party to a candidate; and
- from a registered constituency association to a candidate.

The result of these amendments is that candidates may no longer receive funds from a registered constituency association or a political party if the source of those funds is a trust fund.

3. Trust Funds for Members of Parliament

In a related amendment to the *Parliament of Canada Act*, clause 99 of Bill C-2 prohibits members of the House of Commons from directly or indirectly accepting a benefit or income from a trust fund established by reason of their position as members of the House of

Commons.[19] All members will be required to disclose such trusts to the Conflict of Interest and Ethics Commissioner, who may order the termination of the trust and prohibit funds from a terminated trust to be distributed for the purpose of financing a nomination contest, a leadership campaign or an electoral campaign.

C. Contribution Limits on Political Financing (Clauses 41-43, 45-58, 60-64)

1. Individual Contributions

Currently, Canadian citizens and permanent residents may contribute:

- a maximum of $5,000 in any calendar year to a particular registered political party and its constituency associations, candidates and nomination contestants, collectively;
- a maximum of $5,000 in a particular election to a candidate who is not a candidate of a registered political party; and
- a maximum of $5,000 to leadership contestants in a particular leadership contest.[20]

The bill will reduce the maximum amounts that individuals may contribute to the various entities that make up a political organization, and it will modify the way in which those amounts may be allocated among those entities. These limits were increased by the Senate Committee, but the increase was rejected by the House of Commons. The result is that individuals may make the following contributions:

- $1,000 in total in any calendar year to a registered party;
- $1,000 in total in any calendar year to the constituency associations, nomination contestants and candidates of a registered party;
- $1,000 to the contestants in a leadership contest; and
- $1,000 in total to a candidate in an election, where that candidate is not a candidate of a registered party.

Had the Senate Committee's amendments been accepted, the limits would have been $2,000 in each case.

---

(19) See the section of this legislative summary entitled "The Conflict of Interest Act," which concludes with a summary of the amendments to the *Parliament of Canada Act* dealing with conflicts of interest and income from trusts.

(20) See Spano (2006).

The net result is that an individual may make three contributions of up to $1,000 to the various entities that make up a single political organization, as follows: $1,000 to a registered party; $1,000 to a registered party's candidates, nomination contestants, and constituency associations, collectively; and, $1,000 to leadership contestants collectively. In addition, the individual may also contribute $1,000 to a candidate who is not associated with a registered party (clause 46(1)). Again, had the Senate Committee's amendments been accepted, each limit would have been $2,000.

Candidates, nomination contestants and leadership contestants are currently permitted to contribute up to $5,000 of their own funds to their own election campaigns or nomination or leadership contests. That amount is deemed not to be a contribution. Bill C-2 reduces that amount to $1,000 (clause 46(3)). The Senate Committee's amendment would have increased this amount to $2,000, but the amendment was rejected.

Clause 46 was also amended to provide that the contribution limits in the Act are multiplied by the number of elections held in the same calendar year, but only in respect of contributions to registered parties, nomination contestants, and candidates of registered parties. This amendment was rejected by the House.

The issue of fees paid by participants at conventions held by political parties was very controversial during the Senate Committee's study of Bill C-2. A new subsection was added to clause 44, adding a new section 404.2(7) to the CEA, which provides, for greater certainty, that fees paid for a political convention are contributions to the political party. This amendment was accepted by the House.

2. Corporations and Trade Unions

Corporations and unions are currently permitted to contribute $1,000 to candidates, constituency associations and nomination contestants, collectively, in any calendar year.[21] Bill C-2 prohibits all contributions from corporations and trade unions. (See clause 43, which repeals section 404.1 of the *Canada Elections Act*.)

(21) The following, however, are not permitted to make any contributions: unions that do not hold bargaining rights for employees in Canada; corporations not carrying on business in Canada; Crown corporations; and corporations receiving more than 50% of their funding from the Government of Canada.

3. Cash Contributions

Bill C-2 prohibits cash contributions greater than $20 (clause 49, which adds section 405.31 to the Act) and requires that they be remitted to the Chief Electoral Officer if the name of the contributor is not known. Currently, cash contributions greater than $25 whose source is unknown must be remitted to the Chief Electoral Officer. The bill also requires that receipts be issued for any contribution greater than $20 (clause 45(1)). Currently, the threshold for the issuance of a receipt is $25 (section 404.4(1)).

The bill reduces to $20 (from the current $25) contributions that need not be reported to the Chief Electoral Officer if they were collected at a meeting or fundraising event (clause 45(2)). (This kind of collection is sometimes referred to as "passing the hat.") Details of the event will still need to be reported to the Chief Electoral Officer.

D. Other Amendments Affecting the *Canada Elections Act* (Clauses 59, 121)

1. Chief Electoral Officer to Be Appointed by Secret Ballot

The Chief Electoral Officer is appointed by resolution of the House of Commons under section 13 of the CEA. Bill C-2 initially proposed that such resolution be based on a secret ballot conducted in accordance with any standing orders of the House (former clause 111, proposed new section 13(1.1) of the CEA). Clause 111 of the bill was ultimately deleted at the committee stage in light of concerns raised by the Law Clerk and Parliamentary Counsel that the provision could violate section 49 of the *Constitution Act, 1867*, which requires that questions arising before the House of Commons be decided by a "Majority of Voices." According to the Law Clerk and Parliamentary Counsel, secret votes would not satisfy a constitutional requirement for voice votes.

2. Director of Public Prosecutions to Initiate and Conduct Prosecutions

Part 3 of Bill C-2 enacts the Director of Public Prosecutions Act (DPPA). The Director will be responsible for initiating and conducting prosecutions of offences under the CEA on behalf of the Crown (see section 3(8) of the DPPA under clause 121 of the bill).[22] Currently, that role is filled by the Commissioner of Canada Elections.

---

(22) For a discussion of the newly created Office of the Director of Public Prosecutions, see Wade Riordan Raaflaub, *The Possible Establishment of a Federal Director of Public Prosecutions*, PRB 05-67E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 2 March 2006, http://lpintrabp.parl.gc.ca/lopimages2/prbpubs/bp1000/prb0567-e.asp.

3. Extension of the Limitation Period for Initiating Prosecutions

The CEA currently provides that a prosecution of an offence under the Act must be initiated within 18 months of the Commissioner of Canada Elections becoming aware of the facts that gave rise to the prosecution. There is an absolute limit of seven years from the date the offence was committed.(23) Clause 59, in its original form, would have amended section 514(1) of the CEA to extend the time limit within which a prosecution may be initiated by the Director of Public Prosecutions to *five* years from the date on which the Commissioner of Canada Elections becomes aware of the facts that gave rise to the prosecution. The absolute limit within which to initiate a prosecution would have been extended to *ten* years. As amended by the Senate Committee, clause 59 would have provided that prosecutions under the *Canada Elections Act* must be initiated not later than two years after the Commissioner became aware of the facts, and not later than seven years after the offence was committed. This amendment was rejected by the House.

AMENDMENTS TO THE *LOBBYISTS REGISTRATION ACT* (CLAUSES 65-98)*

A. Introduction(24)

Clauses 65-80 of Bill C-2 contain substantive amendments to the *Lobbyists Registration Act* (LRA).(25) The amendments respond to issues of disclosure, compliance, enforcement, and the independence of the Registrar of Lobbyists that have been raised since the law's inception in 1989, particularly in the course of parliamentary reviews of the Act.(26) The

---

(23) The Chief Electoral Officer recently reported that the current limitation renders the Commissioner incapable of pursuing allegations of the kind made during the Commission of Inquiry into the Sponsorship Program and Advertising Activities concerning breaches of the financial reporting obligations of the Act, which go back to periods outside the limitation period. See Elections Canada (2005), pp. 40-41.

* Author: Nancy Holmes, Law and Government Division.

(24) For an overview of the lobbyists registration system in Canada, see Nancy Holmes, *The Federal Lobbyists Registration System*, PRB 05-74E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 8 March 2006.

(25) R.S. 1985, c. 44 (4th Supp.). Clauses 81-98 of the bill also concern the LRA, but pertain only to the use of new terminology, transitional provisions and consequential amendments.

(26) A statutory review provision in the Act has required periodic parliamentary reviews of its provisions and operation. For more on what took place during these parliamentary reviews see A. Paul Pross, *The Lobbyists Registration Act: Its Application and Effectiveness*, research paper prepared for the Commission of Inquiry into the Sponsorship Program and Advertising Activities, http://www.gomery.ca/en/phase2report/volume2/CISPAA_Vol2_5.pdf.

issue of non-compliance with the rules and laws respecting lobbying was of particular interest to Justice John Gomery in the 1 February 2006 report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities (the Gomery Commission). Bill C-2 will implement most of the Commission's recommendations in this regard.(27)

Bill C-2 will make the following changes to the lobbyists registration system:

- rename the LRA the "Lobbying Act" (LA), presumably because it will seek to regulate the activities of lobbyists, rather than simply monitor them by means of a registry system;
- replace the Office of the Registrar of Lobbyists with an independent Office of the Commissioner of Lobbying;
- grant the new Commissioner of Lobbying increased investigatory and reporting powers as well as some enforcement measures;
- prohibit any contingency fee arrangements by lobbyists;
- impose a five-year lobbying ban on designated public office holders;
- impose greater disclosure requirements on lobbyists, particularly in relation to dealings with designated public office holders;
- increase the monetary penalties for offences under the Act; and
- provide longer limitation periods for the commencement of summary conviction proceedings under the law.

B. Office of the Commissioner of Lobbying (Clause 68)

Clause 68 of Bill C-2 will establish the Commissioner of Lobbying (the Commissioner) as an Officer of Parliament, whose appointment and removal will be harmonized with that of other Officers of Parliament pursuant to new procedures set out in clauses 109-111 and 118-119 of the bill. (See Part 2 of this legislative summary, "Supporting Parliament," below.) Clause 68 was amended by the House Committee to remove the requirement that the resolution of the Commissioner's appointment be conducted by secret ballot.

---

(27) Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Recommendations*, 1 February 2006, Chapter 9, pp. 171-174. In terms of ensuring compliance with the legislation, the Gomery Commission specifically recommended the independence of the Registrar of Lobbyists. It recommended that he or she report directly to Parliament rather than through a Cabinet minister and that he or she be provided with sufficient resources to publicize and enforce the requirements of the *Lobbyists Registration Act*, including investigation and prosecution by its own personnel. The Commission also recommended that the limitation period for investigation and prosecution under the Act be increased from two to five years from the time the Registrar becomes aware of an infringement.

The new Commissioner of Lobbying will be responsible for promoting an understanding of, acceptance of and compliance with the LA. In addition to enhanced investigatory and reporting powers, as well as some enforcement measures (discussed below), the Commissioner will have a public education mandate, particularly with respect to lobbyists, their clients and public office holders (proposed section 4.2(2) of the Act). The Commissioner will also have the ability to submit special reports to Parliament on any matter within his or her mandate that requires attention prior to the tabling of his or her annual report (proposed section 11.1). As a result of legal advice provided by House of Commons Legal Counsel, the House Committee amended all references to reports "to Parliament" and instead specified that these reports shall be transmitted to the Speaker of the Senate and the Speaker of the House of Commons for tabling in those Houses.

C. Investigations Pursuant to the Act and the *Lobbyists' Code of Conduct* (Clauses 77, 78)

Currently, the Registrar of Lobbyists has no powers to investigate under the Act,[(28)] although he can conduct investigations into possible breaches of the *Lobbyists' Code of Conduct*[(29)] (section 10.4). Clause 77 of the bill will provide the new Commissioner of Lobbying with broad investigatory powers in relation to compliance with both the Code and the Act. These powers largely mirror those which the Registrar currently possesses with respect to the Code (e.g., power to summon witnesses or compel the production of documents, similar to that of a superior court).

Proposed section 10.4 of clause 77 states that the Commissioner must conduct an investigation where he or she has reason to believe that one is necessary to ensure compliance with the Act and the Code. An amendment to section 10.4 was adopted by the House Committee to provide that information received by the Commissioner from a member of the Senate or the House of Commons may serve as the basis for a determination that an investigation is warranted.

---

(28) The Registrar may conduct administrative reviews (merely the assembling and reviewing of factual evidence to determine whether a formal investigation is warranted); where such a review indicates a possible contravention of the Act, the matter is turned over to the RCMP.

(29) The *Lobbyists' Code of Conduct* establishes standards of conduct for all lobbyists communicating with federal public office holders, and forms a counterpart to the obligations that federal officials are required to observe in their interactions with the public and with lobbyists (sections 10.2 and 10.3 of the LRA).

All investigations under the new LA will continue to be conducted in private.(30) Clause 78 of Bill C-2 requires the new Commissioner to report to Parliament on his or her findings and conclusions after the completion of an investigation. As noted earlier, as a result of legal advice provided by House of Commons Legal Counsel, the House Committee amended all references to reports "to Parliament" and instead specified that these reports shall be transmitted to the Speaker of the Senate and the Speaker of the House of Commons for tabling in those Houses.

Proposed section 10.4(1.1) allows the Commissioner to refuse to conduct, or to cease conducting, an investigation in certain cases (where the matter might be better dealt with pursuant to procedures under another Act of Parliament, where the Commissioner believes that the issues are not sufficiently important, where dealing with the disclosure would serve no useful purpose as too much time has elapsed since the matter arose, or there is any other valid reason for not dealing with the matter). This appears to be a fairly broad exemption power; however, it may be designed to allow the Commissioner, for example, to deal with some outstanding files that were already decided by the former Ethics Counsellor, but are still being pursued by certain parties.(31)

The Commissioner must cease an investigation and advise the appropriate authorities where he or she believes on reasonable grounds that a person has committed an offence under this Act or any other Act of Parliament or of a provincial legislature (proposed section 10.4(7)). Thus, the Commissioner, like the current Registrar of Lobbyists, will not have the authority to impose administrative or monetary penalties as alternatives to criminal charges under the Act. It therefore remains to be seen how effective these new investigatory powers will be, given that the ultimate enforcement of the law will still rely on the use of criminal sanctions by a body outside of the lobbyists system.(32)

---

(30) The current Registrar of Lobbyists, Michael Nelson, has interpreted this to mean that he will not publicly confirm or deny the existence of any ongoing investigation by his office.

(31) Some complaints stem from the decision of the Federal Court in *Democracy Watch* v. *The Attorney General of Canada (Office of the Ethics Counsellor)*, 2004 F.C. 969, which overturned decisions of the former Ethics Counsellor with respect to lobbying practices on the basis that the Ethics Counsellor lacked the independence to be an unbiased arbiter between Cabinet ministers and the lobbyists they dealt with. Between 1994 and 2004, the Ethics Counsellor was responsible for the *Lobbyists' Code of Conduct* under the LRA.

(32) Some observers contend that the fact that no charges have been laid since the LRA was enacted in 1989 is an indication that the law cannot be adequately enforced in this manner. In fact, it is argued that the RCMP are reluctant to lay charges under the LRA for what are in most cases administrative breaches.

D. Prohibition of Contingency Fees (Clauses 75, 312)

Clause 75 of Bill C-2 attempts to eliminate any confusion and/or inconsistency in the area of contingency fees[33] by inserting a broad prohibition on contingency fee arrangements into the LA (proposed section 10.1).[34] Lobbyists will be prohibited from receiving any payment that is in whole or in part contingent on the outcome of their lobbying efforts, and their clients will similarly be prohibited from making any such payments.

The contingency fee ban will address concerns that have been increasingly raised by the public and also some parliamentarians about the apparent conflict between Treasury Board policy prohibiting contingency fees in certain instances[35] and the requirement in the LRA that lobbyists report such arrangements (section 5(2)(*g*)).[36] Thus, section 5(2)(*g*) of the LRA will also be amended by clause 69(2) of Bill C-2 to require lobbyists to indicate in their registration forms that they are not operating on a contingency fee basis. As well, clause 312 of Bill C-2 will address the issue of contingency fee prohibitions in relation to the *Financial Administration Act*.

E. New Definition of "Designated Public Office Holder" (Clauses 67, 69, 70, 72, 73, 75)

Currently, the LRA applies to paid lobbyists who communicate with federal public office holders (POHs) on behalf of a third party. POHs, as defined under the Act, are virtually all persons occupying an elected or appointed position in the federal government, including members of the House of Commons and the Senate and their staff. Clause 67(2) of Bill C-2 in its original form added "senior public office holder" to the definition section of the Act. Clause 67 was amended by the Senate Committee to replace the term "senior public office holder" with "designated public office holder" in the proposed LA. This change in wording was intended to better respect the range and hierarchy of positions to be included under the definition

(33) Essentially, a contingency fee arrangement is one where the payment or benefit to a lobbyist is contingent upon the outcome/success of his or her consultant activities.

(34) The LA will ban all contingency fee arrangements and not just those in relation to government contracts or agreements.

(35) Treasury Board policy prohibits contingency fee arrangements in relation to procurement or grant of funds from the Government of Canada.

(36) The Registrar of Lobbyists currently attempts to address this dichotomy by advising lobbyists who indicate that they are receiving contingency fees that the transfer payment policy of the federal government prohibits departments from entering into contracts with lobbyists who charge a contingency fee.

of designated public office holder. Further consequential amendments replaced all references with the new term throughout the LA. Also, the definition of designated public office holder was amended to specifically exclude staffs of Commissions of Inquiry and parliamentary institutions. These amendments were accepted by the House of Commons. The new definition includes ministers of the Crown, their staff and senior public servants (i.e., deputy or assistant deputy ministers), and it relates to post-employment limitations on lobbying as well as new disclosure requirements.

The House Committee added a new clause 67(3) to include within the definition of "senior public office holder" (now "designated POHs") persons identified by the Prime Minister as having provided support and advice to him or her during the transition period from election to swearing-in as Prime Minister (see below with respect to the application of the five-year lobbying prohibition on these transition team members).

1. Five-year Post-employment Lobbying Ban

Proposed section 10.11 (clause 75 of the bill) prohibits a designated POH from lobbying pursuant to the LA for a period of five years after leaving office. Currently, section 29(1) of the *Conflict of Interest and Post-Employment Code for Public Office Holders* provides that former ministers, senior public servants and designated ministerial staff may not act as consultant lobbyists, or accept employment as in-house lobbyists, for a period of five years after leaving public office. Although POHs are bound by their obligations under the Code, the Code does not have the force of law. Thus, Bill C-2 will not only legislate a five-year ban on lobbying with respect to designated POHs, but it will do so under the new LA as opposed to the proposed Conflict of Interest Act.

A new clause 88.1 was added to the bill by the House Committee. This clause is a transitional provision that will take effect as soon as the bill becomes law (the lobbying provisions of the bill will, however, come into force on a day to be set by order of the Governor in Council), thereby creating a self-contained system that will apply to transition team members who ceased to function as such after 26 January 2006.[37] The same provisions will essentially apply to these members as will apply generally to transition team members after the lobbying

(37) It would appear that the rationale for this provision coming into force when the bill becomes law is to ensure that all designated public office holders will be subject to a five-year lobbying ban. Those designated public office holders who will be affected by clause 75 when that provision is proclaimed into force will, until that time, continue to be subject to the five-year lobbying ban under the *Conflict of Interest and Post-Employment Code for Public Office Holders*.

provisions of the bill come into force (proposed section 10.11). The five-year lobbying ban will apply to persons identified by the Prime Minister as having provided support and advice to him or her during the transition period from election to swearing-in as Prime Minister; the five-year period will commence from the time the member ceased to carry out his or her functions with the team; everyone who contravenes this provision will be subject to an offence and liable on summary conviction to a fine not exceeding $50,000; and the Registrar of Lobbyists will have the power to make public any offence committed under this section, as well as the name of the offender.

Some issues arose before the House Committee with respect to the application of the lobbying prohibition provision to former members of the current Prime Minister's transition team. Specifically, some members of the House Committee felt that this provision would have retroactive application, thereby affecting choices made by persons prior to the coming into force of this law. Officials from the Department of Justice explained to the House Committee, however, that this provision would have retrospective and not retroactive application. Reference was made in this regard to the provisions set out in clause 88.1(2). Thus, the transition team provision would only cover the carrying out of activities after the law comes into force, as opposed to making illegal anything that was done by any of those members between the time they left the transition team and the time when this law comes into force.

Pursuant to proposed section 10.11(3), a former designated POH may, however, apply to the Commissioner for an exemption under this part, and the Commissioner may grant such an exemption where doing so would be in keeping with the purpose of the legislation and consistent with criteria set out in the statute (i.e., if the applicant was a designated POH for only a short time, or was employed on an acting or administrative basis only, or was employed as a student). The Commissioner will be required to make public every exemption granted, along with his or her reasons for doing so.

Clause 75 was further amended by the Senate Committee, which added a new section 10.111 to the LA, to apply the five-year ban on lobbying to any person who has a contract for services with the government, or who is employed by an entity that has a contract for services with the government. This amendment was rejected by the House.

Amendments made at report stage in the House (clause 88.11) will allow previous (see proposed clause 88.1, above) and future members of a Prime Minister's transition team to apply to the Commissioner for an exemption under this part; however, the criteria for this exemption differ from those with respect to other designated public office holders. In the case of transition team members, reference will be had, for example, to the circumstances under which the member left the team, the authority and influence the member possessed while on the team

and the degree to which the member's new employer might gain unfair commercial advantage upon hiring the member. Presumably these criteria are in place because it is felt that transition team members are very closely involved in senior government offices – often in the staffing of high-level positions – and that they could thus potentially exercise considerable influence over these offices if they were permitted to lobby them within five years of leaving the team.

2. Disclosure Requirements

Under the new LA, lobbyists will be required to identify not only whether they were a POH (a recent requirement), but also whether they were a designated POH and if so, the date on which they ceased to hold that office. This requirement appears to tie in to the new prohibition on lobbying by designated POHs under the LA. As well, lobbyists will be required to file monthly returns that record lobbying activities involving a designated POH (including name, date, and particulars).

With respect to the new monthly filing requirement, proposed section 9.1 of the LA (clause 73) will allow the Commissioner of Lobbying to contact present or former designated POHs to verify the information provided and to post these responses on its public Internet-based registry (clause 72). An amendment made by the House Committee will allow the Commissioner to prescribe the time, manner and form for providing the requested information and, for that matter, for providing any information that is to be submitted to his or her Office pursuant to proposed section 9(1) of the Act (see clause 72(2)). The Commissioner will be required to report to Parliament on the failure of a present or former designated POH to respond, or satisfactorily reply, to a request for verification (proposed section 9.1(2)). Originally, proposed section 9.1(2) permitted the Commissioner to make such a report. An amendment by the Senate Committee making this a mandatory requirement to report was rejected by the House of Commons. As noted earlier, as a result of legal advice provided by House of Commons Legal Counsel, the House Committee amended all references to reports "to Parliament" and instead specified that these reports shall be transmitted to the Speaker of the Senate and the Speaker of the House of Commons for tabling in those Houses.

F. Offence Provisions and Sanctions (Clause 80)

Section 14 of the LRA contains penalty provisions for non-compliance with the legislation. Clause 80 of Bill C-2 amends section 14(1) of the Act to make it a new offence to fail to file a return as required by sections 5(1) or (3) or sections 7(1) or (4) of the Act. It will

continue to be an offence to knowingly make a false or misleading statement in those returns or any document submitted to the Commissioner. It will also be a new offence to knowingly make a false or misleading statement in response to the Commissioner's request for information pursuant to proposed section 9.1(1) (verification of information with designated POHs).

Anyone convicted of these offences by way of summary conviction is liable to a maximum fine of $50,000 (up from $25,000) or imprisonment for up to six months, or both. Where proceedings are by way of indictment, the maximum fine will be $200,000 (up from $100,000) or imprisonment for up to two years, or both. Amendments to section 14(2) of the LRA will provide that anyone convicted of contravening any provision of the Act, other than sections 5(1) and (3), 7(1) and (4), or in relation to the *Lobbyists' Code of Conduct*, will be liable to a maximum fine of $50,000 (up from $25,000).

Another offence provision was added to the LA by the Senate Committee. Clause 79.1 prohibits obstructing the Commissioner of Lobbying and his or her staff in the performance of duties and functions under the LA. The amendment was rejected by the House.

Changes to section 14(3) of the Act would have increased the limitation period for instituting proceedings by way of summary conviction from two to ten years. Specifically, the Act would have provided that such proceedings may be instituted no later than five years from the time when the Commissioner becomes aware of the matter, and in any event, no later than ten years after the day on which the subject-matter of the proceedings arose. Clause 80 was amended by the Senate Committee to change the limitation period for prosecutions under the LA to not later than two years after the Commissioner became aware of the facts and not later than five years after the offence was committed. Clause 80 was also amended to add a penalty provision providing that a person who fails to comply with a prohibition of the Commissioner is guilty of an offence and liable on summary conviction to a fine not exceeding $50,000. The amendments to clause 80 were rejected by the House.

In addition to the proposed amendments to the penalty provisions of the Act, Bill C-2 will allow the Commissioner to prohibit anyone who has been convicted of an offence under the Act from lobbying for a period of up to two years. The Commissioner must be satisfied that the prohibition is necessary in the public interest, and he or she must also take into consideration the gravity of the offence and the existence of any previous convictions. The Commissioner will also have the power to make publicly available any information related to a person convicted of an offence under the Act, including the person's name, the nature of the offence, the punishment imposed and any lobbying prohibition the Commissioner may have imposed.

Again, as no charges have ever been laid under the LRA and much of the enforcement provisions under the proposed LA will continue to rely on criminal prosecutions, the question arises as to the extent to which these new enforcement powers will be effective in practice. It also remains to be seen what role the new Director of Public Prosecutions (clause 121) will play in this regard.

PRIORITY STATUS OF MINISTERIAL STAFF (CLAUSES 100-107)*

Currently, under sections 41(2) and (3) of the *Public Service Employment Act* (PSEA), ministerial staff (and staff of the Leader of the Opposition in the House of Commons or Senate) are entitled to bypass the normal public service competitive hiring process and be appointed to positions in the public service with priority over all others except for surplus employees and those on leave.(38)

Clause 103 of Bill C-2 repeals those sections. Clauses 100, 102, 104 and 105 are housekeeping amendments to the PSEA to reflect the repeal of sections 41(2) and (3).

Clause 101 will allow people who have been employed for three years with a minister or the Leader of the Opposition in the House of Commons or Senate to apply for internal competitions (i.e., those open to employees of the public service) for positions in the public service, for a period of one year after the end of their employment. The transitional provision (clause 107) will allow ministerial staff to retain priority status under sections 41(2) and (3) of the PSEA for one year after their employment ends, so long as the day on which they were no longer employed was prior to the coming into force of Bill C-2.

At the House Committee stage, clause 101 was amended to include a provision allowing employees of the Senate, the House of Commons, the Library of Parliament, or the Office of the Conflict of Interest and Ethics Commissioner and Senate Ethics Officer to apply for competitions internal to the public service.

---

* Author: Alex Smith, Political and Social Affairs Division.

(38) More information about the priority status of ministerial staff can be found in Alex Smith, *Ministerial Staff: Issues of Accountability and Ethics*, PRB 06-02E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 12 April 2006.

Clause 106 will allow the Governor in Council to appoint and fix the remuneration of deputy ministers (or deputy heads), associate deputy ministers and special advisers to a minister. The Senate Committee amended clause 106 to delete a reference to special advisers to a deputy minister or a deputy head, removing these types of officers from the proposed list of Governor in Council appointments. This was accepted by the House. Currently, the authority for the Governor in Council to appoint most deputy heads is the legislation establishing a given department.

Clause 107, a transitional provision governing the provisions amending the priority status of ministerial staff, was amended by the Senate Committee, to create an additional transitional regime for ministerial staff who earned priority status for appointment before the coming into force of clause 103 of the bill and who did not cease to be employed before the coming into force of clause 107, allowing these individuals to maintain priority status when they cease to be employed, in accordance with sections 41(2) or (3) of the PSEA. The amendments to clause 107 were rejected by the House.

PART 2 – SUPPORTING PARLIAMENT

THE APPOINTMENT OF OFFICERS OF PARLIAMENT (CLAUSES 109-111, 118, 119)*

Clauses 109-111, 118 and 119 of Bill C-2 establish a new procedure for the appointment of Officers of Parliament,(39) namely the Information Commissioner, the Auditor General, the Chief Electoral Officer, the Commissioner of Official Languages, the Privacy Commissioner, and the new Public Sector Integrity Commissioner.(40)

---

* Author: Lydia Scratch, Political and Social Affairs Division; Élise Hurtubise-Loranger, Law and Government Division.

(39) The term Officers of Parliament has been used in different contexts to mean different things; it has not been legally defined. Traditionally, Officers of Parliament are responsible directly to Parliament rather than to the federal government or an individual minister. This emphasizes their independence from the government of the day. They carry out duties assigned by statute, and report to one or both of the Senate and House of Commons. The Privy Council Office, and some government documents, refer to these officers as Agents of Parliament, thereby emphasizing that they carry out work for Parliament and are responsible to Parliament, and as a means of distinguishing them from other parliamentary officers such as the Speaker or the Clerk of the House of Commons and the Senate.

(40) Clause 2 of Bill C-2 (see section 28 of the proposed CIA, adding new section 81 to the *Parliament of Canada Act*) provides that the same appointment process will apply to the Conflict of Interest and Ethics Commissioner, whose position is established by the CIA. Clause 68 of Bill C-2 establishes the Commissioner of Lobbying as an Officer of Parliament; the appointment of this Commissioner will follow the same process as that of the Officers of Parliament listed here.

Under the new procedure, the Governor in Council will appoint the Officers of Parliament after consulting with the leader of every recognized party in the Senate and the House of Commons. Previously, Officers of Parliament were appointed by a resolution of the Senate and House of Commons without all-party consultation.(41)

The components of the clauses related to the appointment of Officers of Parliament by secret ballot of the members of both Houses were deleted by the House Committee due to concerns over parliamentary privilege.(42)

Bill C-2 also states that these Officers of Parliament may only be removed from their positions for cause by the Governor in Council. In addition, the term of the Auditor General will be no more than 10 years; as is currently the case, it ceases upon the Auditor General's reaching 65 years of age.

Finally, in the event of an Officer of Parliament's absence or incapacity, any qualified person will be able to hold that office in the interim for a term not exceeding six months.

PARLIAMENTARY BUDGET OFFICER (CLAUSES 114-116)*

Clauses 114-116 of Bill C-2 amend the *Parliament of Canada Act* (POCA) to create the position of Parliamentary Budget Officer (PBO) within the Library of Parliament.

In recent years, annual budget forecasts have regularly been followed by substantial unpredicted surpluses, to the frustration of some parliamentarians. The Senate and the House of Commons have not had specialized forecasting expertise available on a continuing basis for the purpose of holding the government accountable for budget projections. At present, Library of Parliament analysts support pre-budgetary and other hearings of the House of Commons Standing Committee on Finance (which in recent years has also engaged fiscal forecasting specialists under contract). Research and analysis based on publicly available information is provided to other committees and individual parliamentarians.

---

(41) For a discussion of the established procedures for appointing Officers of Parliament, see James R. Robertson, *Appointment of Parliamentary Officers*, TIPS 24E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, June 2004, http://lpintrabp.parl.gc.ca/apps/tips/tips-cont-e.asp?Heading=16&TIP=40.

(42) Please see the introduction to this legislative summary for a discussion of the details surrounding the parliamentary privilege issue.

* Author: Jack Stilborn, Acting Principal, Political and Social Affairs Division.

The proposed PBO will be a senior official with explicit responsibility for analysis related to Parliament's consideration of government budgets, as well as cost implications of private Members' bills and parliamentary initiatives. Also, the PBO will be entitled in law to obtain relevant financial and economic data from government departments (subject to certain restrictions). The Senate Committee added the words "free and timely" to section 79.3(1), to qualify the access to financial information which must be provided to the PBO by departments. This amendment was accepted by the House.

A. Position (Clause 116)

Bill C-2 adds a new section 79.1 to the POCA, establishing the position of PBO. The office holder will be appointed by the Governor in Council for a renewable term of up to five years (revised from the original three-year term by committee amendment). The bill originally provided that appointments will be made from a list of three nominees provided by a committee to be chaired by the Parliamentary Librarian. The Senate Committee amended clause 116 to provide that the list of three names will be submitted through the Leaders of the Government in the Senate and the House of Commons (instead of through the Leader of the Government in the House of Commons alone). Also, the Senate Committee amended the clause to prescribe the membership of the committee that would provide the list of candidates for the office of PBO. The composition of the committee, which previously was to have been established by the Parliamentary Librarian, will include the Leaders of the Government and the Opposition in both the Senate and the House of Commons, and the Parliamentary Librarian. The Senate Committee's amendments to the appointment process for the PBO were rejected by the House.

B. Mandate (Clause 116)

New section 79.2 of the POCA states that, in addition to providing budget-related analysis and, as amended in committee, estimates-related analysis to the Senate and the House of Commons, the PBO will provide such analysis, on request, to the following three committees or their equivalents: the Standing Senate Committee on National Finance, the House of Commons Standing Committee on Finance, and the House of Commons Standing Committee on Public Accounts. As well, reflecting a committee amendment, the PBO will provide estimates-related research and analysis on request to any parliamentary committee mandated to consider estimates. Cost estimates for private Members' bills and, more broadly, any proposal within the jurisdiction

of Parliament are to be provided on request to any Senator or Member of Parliament. Cost estimates of proposals may also be requested by any committee of the Senate or the House, or by a joint committee. Among the amendments made to the PBO provisions by the Senate Committee was the removal of a subsection that specifically dealt with estimating the financial costs of private members' bills (section 79.2(*d*)), on the basis that this work would be included in estimating the financial costs of any proposal within Parliament's jurisdiction, which is covered under section 79.2(*e*). This amendment was accepted by the House.

C. Powers (Clause 116)

New section 79.3 of the POCA entitles the PBO to obtain financial or economic data as required from government departments. Information protected under the *Access to Information Act*, or contained in material that is confidential to Cabinet, is excluded from this entitlement, however. Section 79.4 requires this information to be kept confidential in most cases. Section 79.5 empowers the PBO independently to hire specialists, as required. The exercise of this power is subject to the direction and control of the two Speakers and the Parliamentary Librarian.

PART 3 – OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS, ADMINISTRATIVE TRANSPARENCY AND DISCLOSURE OF WRONGDOING

DIRECTOR OF PUBLIC PROSECUTIONS (CLAUSES 121-140)*

A. Introduction

Clause 121 of Bill C-2 enacts the proposed Director of Public Prosecutions Act (DPPA), which itself consists of 16 sections. Several amendments were made to the DPPA by the Committee, all of which were passed by the House of Commons. More changes were made by the Senate Committee, but they were rejected by the House.

---

* Author: Wade Riordan Raaflaub, Law and Government Division.

The Director of Public Prosecutions (DPP) is a new position having authority over all federal prosecutions, which include prosecutions, prospective prosecutions, related proceedings and appeals under the jurisdiction of the Attorney General of Canada (section 2) as well as those under the *Canada Elections Act* (section 3(8)).

B. Responsibilities (Clause 121)

As the prosecution of most *Criminal Code* offences is under the jurisdiction of the provinces, they will continue to have responsibility for those, whereas the DPP will generally have responsibility for prosecutions under other federal statutes.(43) One such federal statute is the *Financial Administration Act*, which sets out offences for fraud against Her Majesty by officers and employees of the government (see clause 261) and of Crown corporations (see clause 269). The DPP also exercises federal duties and functions under the *Extradition Act* and the *Mutual Legal Assistance in Criminal Matters Act* (section 3(9)). Further, the DPP may enter into agreements or arrangements with the provinces in order to carry out his or her responsibilities (section 3(7)).

The DPP acts under and on behalf of the Attorney General of Canada, has the rank and status of a deputy head of a department, and is considered the Deputy Attorney General for the purpose of exercising his or her powers, duties and functions (section 3). The DPP has the following enumerated responsibilities: initiating and conducting prosecutions except where the Attorney General has assumed conduct of them, intervening in matters of public interest that may affect prosecutions or investigations except where the Attorney General has decided to intervene, issuing guidelines to federal prosecutors regarding prosecutions generally, advising law enforcement agencies or investigative bodies, communicating with the media and public on all matters relating to federal prosecutions, exercising federal authority in relation to private prosecutions, and carrying out any other compatible power, duty or function assigned by the Attorney General. The assignment of additional powers, duties and functions must be by written notice in the *Canada Gazette* (section 3(6)). General guidelines issued to federal prosecutors are not considered to be statutory instruments, which means that they do not need to be registered, published or made accessible to the public under the *Statutory Instruments Act* (section 3(5)).

(43) For a discussion of Canada's federal and provincial prosecution framework, see Riordan Raaflaub (2006), pp. 4-7.

With respect to the functions of the DPP, the House Committee deleted a paragraph according to which the DPP "conducts … any appeal or other proceeding in which the Crown is named as a respondent." This paragraph was removed because appeals and other proceedings are already included in the definition of "prosecution."

C. Appointment (Clause 121)

The DPP is to be appointed by the Governor in Council (i.e., Cabinet) on the recommendation of the Attorney General (section 3(1)). The Attorney General must establish a selection committee consisting of a representative from the Federation of Law Societies of Canada, a representative from each recognized political party in the House of Commons, the Deputy Minister of Justice, the Deputy Minister of the Department of Public Safety and Emergency Preparedness, and a person selected by the Attorney General (section 4). Section 4 was amended by the Senate Committee to change the composition of the selection committee for the DPP, adding a representative from each recognized party in the Senate to the committee. This amendment was rejected by the House. In its original form, section 4 required the Attorney General to submit a list of up to 10 candidates for the position of DPP, each of whom must have been a member of a provincial bar for at least 10 years. The selection committee was to establish a short list of three candidates, from whom the Attorney General would select a final candidate. As amended by the Senate Committee, section 4 provides that, instead of the Attorney General submitting ten names to the selection committee for consideration, the selection committee will identify candidates itself, and then assess them and recommend three to the Attorney General. This change was rejected by the House. It may be noted that the Attorney General would still have been indirectly involved in the initial selection of candidates, as there are two deputy ministers on the selection committee, as well as a person appointed by the Attorney General. The final candidate must be approved by a parliamentary committee designated or established for that purpose. After approval by the parliamentary committee, the Attorney General must recommend the appointment of the final candidate or, if the committee does not give its approval, refer one of the other two short-listed candidates to the parliamentary committee.

The DPP holds office during good behaviour for a non-renewable term of seven years, but continues to act at the expiry of the term until a successor is appointed (section 5). He

or she may be removed by the Governor in Council for cause with the support of a resolution of the House of Commons to that effect. The Senate Committee amended section 5 to provide that the DPP may be removed for cause with the support of not only a resolution of the House of Commons, but also of the Senate. This change was also rejected by the House. The position of DPP is full-time, meaning that no concurrent office or employment is permitted. The DPP's salary and allowable expenses are to be fixed by the Governor in Council and, once set, may not be reduced.

At report stage in the House of Commons, the government unsuccessfully moved to reverse the House Committee amendments by which the Attorney General must (rather than may) appoint a DPP who has been approved by the parliamentary committee, and by which the DPP may be removed only with the support of the House of Commons. It was argued that the DPP, a member of the executive branch of government, should remain primarily accountable to the Attorney General and Governor in Council rather than Parliament.

D. Deputy Director(s) (Clause 121)

The Attorney General must, in consultation with the DPP, the Deputy Minister of Justice and a representative of the Federation of Law Societies of Canada, recommend to Cabinet the appointment of one or more Deputy DPPs, who, like the DPP, must be lawyers admitted to a bar for at least 10 years (section 6). Under the supervision of the DPP, a Deputy DPP may exercise any of the powers, duties and functions of the DPP, including those under any other Act, and is considered a lawful deputy of the Attorney General. In the event of the DPP's incapacity, a Deputy DPP may step in for a period of up to 12 months, which period may be extended with the approval of the Governor in Council.

E. The Office of the Director (Clause 121)

The Office of the DPP shall be staffed by federal prosecutors and other employees appointed in accordance with the *Public Service Employment Act*, but the services of other prosecutors and technical or specialized experts (i.e., contract staff) may also be engaged (sections 7 and 8). All prosecutors must be members of a provincial bar.

The DPP may delegate any responsibility, with any restrictions or limitations, to employed prosecutors, contract prosecutors and employed staff, except the power to further delegate (section 9). A person acting with the authorization of the DPP is his or her agent and is not required to prove the authorization. Further, the DPP, a Deputy DPP and any prosecutor may be designated as an agent of the Minister of Public Safety and Emergency Preparedness for the purpose of applying for an authorization to intercept communications under section 185 of the *Criminal Code*.

F. Advice or Intervention by the Attorney General (Clause 121)

The government has indicated that the model for the new Office of the DPP reflects the best features of similar offices in other provinces and countries.(44) For instance, although the Attorney General may provide input or overrule the DPP by issuing directives with respect to a specific prosecution or prosecutions generally, the directives must be in writing and published in the *Canada Gazette* (section 10). Further, general directives may be made only after consultation with the DPP. The Attorney General or DPP may delay the publication of a directive in the interests of the administration of justice, but not beyond completion of the particular or a related prosecution (section 11). For clarity, directives are not statutory instruments within the meaning of the *Statutory Instruments Act*, meaning that they do not have to be registered, published or made accessible under that Act (section 12).

If a prosecution or intervention raises important questions of general interest, the DPP must inform the Attorney General (section 13). The Attorney General may intervene in proceedings that raise questions of public interest, whether at trial or on appeal, after notifying the DPP (section 14).(45) Intervention implies that the DPP would continue to conduct the prosecution and that the Attorney General might be added as a party to the proceedings for the purpose of making submissions to the court. In other cases, the Attorney General may take over

---

(44) Government of Canada, *Creating a Director of Public Prosecutions*, Fact Sheet, Ottawa, last updated 11 April 2006, http://www.faa-lfi.gc.ca/fs-fi/13fs-fi_e.asp. For a review of approaches in select jurisdictions, see Riordan Raaflaub (2006), pp. 1-4.

(45) A distinction is made between the term “public interest” and the broader term “general interest” (considered to subsume “public interest”) so that the DPP will have a broader duty to inform the Attorney General of important matters. The House Committee removed the need for questions of general or public interest to be “beyond the scope of those usually raised in prosecutions,” as it was considered to be unnecessary and unduly limit the ability of the Attorney General to intervene.

the prosecution, provided that the DPP is first consulted (section 15). The Attorney General's intention to assume the conduct of a prosecution must be indicated by written notice to the DPP, published in the *Canada Gazette*. Publication may be delayed in the interests of the administration of justice. If the Attorney General takes over a prosecution, the DPP must turn over the file and provide any other required information within a specified time.

G. Reporting (Clause 121)

By 30 June of each year, the DPP must report on the activities of the Office of the DPP during the preceding fiscal year, except those relating to proceedings under the *Canada Elections Act* (section 16). The report must be submitted to the Attorney General, who must then table it in each House of Parliament within 15 sitting days.

H. Transitional Provisions (Clauses 122-128)

Clauses 122-128 set out transitional provisions with respect to the operation of the Office of the DPP. Until the appointment of a DPP, the current Assistant Deputy Attorney General (Criminal Law) will act as DPP, and he or she may choose two Deputy DPPs until the appointment of a Deputy DPP under the new Act. The House Committee removed a time limit of one year during which the interim DPP may act, in case appointment of the new DPP takes longer. Further, in the event of the interim DPP's death or incapacity, one of the interim Deputy DPPs may step in. Staff occupying positions in the Federal Prosecution Service will be considered to occupy positions in the Office of the DPP, with the status of their employment unaffected. Other members of the public service may be transferred to the Office of the DPP, if desirable and recommended by Treasury Board. Prosecutors already retained on contract will be considered to be retained under the DPPA. When the DPPA comes into force, the unexpended budget of the Federal Prosecution Service will be transferred to the Office of the DPP. Finally, whereas existing prosecutions to which the Attorney General is a party will be continued by the DPP without further formality, the Commissioner of Canada Elections may retain responsibility for prosecutions pending under the *Canada Elections Act*.

I. Consequential Amendments (Clauses 129-140)

Clauses 129-140 make consequential amendments to other Acts. First, the Office of the DPP will be subject to the provisions of the *Access to Information Act* (clause 129). Additionally, several amendments are made to the *Canada Elections Act*, given that the DPP will become responsible for prosecuting election-related offences (clauses 130-136). If the Commissioner of Canada Elections believes that an offence has been committed, he or she may refer the matter to the DPP, who will then decide whether or not to prosecute. If an individual is meeting the terms of an agreement with the Commissioner to comply with the *Canada Elections Act*, the DPP may not proceed with a prosecution but must receive copies of the compliance agreement and any notice of default. The *Canada Elections Act* is further amended to allow the Chief Electoral Officer, before making a report, to consult with the DPP and to allow the DPP, for the purpose of a prosecution, to obtain access to election-related documents that may not otherwise be disclosed.

The *Department of Justice Act* is amended to indicate that, although the Deputy Minister of Justice is normally considered the Deputy Attorney General, he or she is not so for the purpose of powers, duties and functions exercised by the DPP (clause 137). Schedules to the *Financial Administration Act* are amended to indicate that the Minister of Justice presides over the Office of the DPP and that the Office forms part of the core public administration for the purpose of various provisions of that Act (clauses 138 and 139). The final consequential amendment indicates that the Office of the DPP is subject to the provisions of the *Privacy Act* (clause 140).

J. Commentary

The primary objective of the proposed Director of Public Prosecutions Act is to ensure that prosecutions under federal law operate independently of the Attorney General of Canada and the political process.(46) However, the Act has been criticized in the media for failing to actually give the DPP the independence that the government asserts that it is giving. The DPP acts “under and on behalf of the Attorney General,” is appointed from among candidates proposed by the Attorney General, and the Attorney General may intervene in matters

(46) Government of Canada, *Creating a Director of Public Prosecutions* (2006).

of public interest.(47) While these points are true, the proposed Act sets out a relatively open and transparent appointment process, and interventions and input by the Attorney General into prosecutions must be by written notice.

Given that the provinces have jurisdiction over most *Criminal Code* offences,(48) some commentators have predicted that the Office of the DPP will be ineffective in overseeing the prosecution of fraud cases. Bill C-2, however, actually enhances the jurisdiction of the DPP in these types of matters. In addition to existing offences under the *Financial Administration Act*, the prosecution of which will become the responsibility of the DPP, new offences are added. Specifically, an officer or employee who defrauds the government or a Crown corporation of more than $5,000 will be subject to a maximum term of imprisonment of 14 years.(49) Where the fraud relates to $5,000 or less, the maximum punishment is five years in prison. The nature of these offences, and the penalties on conviction, are essentially the same as those under section 380 of the *Criminal Code*. The government has also indicated that, through the Office of the DPP and in collaboration with other jurisdictions, it will review lessons learned and best practices for prosecuting fraud cases involving governments.(50)

The proposed Act has been cited as an unwarranted "further Americanization of our system," given that there are no real concerns regarding the conduct of Canadian Crown prosecutors or the RCMP.(51) The extent of any existing problem relating to prosecutorial independence may be overstated, an Office of the DPP may not guarantee impartiality and accountability, and there are arguably other mechanisms to ensure independence and proper prosecutorial conduct.(52)

---

(47) Greg Weston, "Poor case for prosecutor," *Ottawa Sun*, 20 April 2006, p. 11.

(48) *Ibid.*

(49) See also Janice Tibbetts, "New prosecutor's office to trim power of Justice: Independent system will combat discretion in department: Tories," *Ottawa Citizen*, 12 April 2006, p. A5.

(50) Government of Canada, *Creating a Director of Public Prosecutions* (2006).

(51) Campbell Clark, "Senators' concern could slow down accountability law," *The Globe and Mail* [Toronto], 17 April 2006, p. A4.

(52) For further discussion, see Riordan Raaflaub (2006), pp. 8-12.

AMENDMENTS TO THE *ACCESS TO INFORMATION ACT* AND THE *PRIVACY ACT* (CLAUSES 141-172.1, 181-193)*

A. Expanding the Scope of the *Access to Information Act* (Clauses 141, 164-172.1)

Bill C-2 expands the coverage of the *Access to Information Act* (ATIA)(53) to a number of Officers or Agents of Parliament,(54) Crown corporations, and foundations created under federal statute. The following bodies are added to Schedule I to the ATIA:

(1) Officers of Parliament:

- Office of the Information Commissioner
- Office of the Privacy Commissioner
- Office of the Commissioner of Official Languages
- Office of the Chief Electoral Officer
- Office of the Auditor General
- Office of the Public Sector Integrity Commissioner(55)
- Office of the Commissioner of Lobbying(56)

(2) Foundations:

- Canada Foundation for Innovation
- Canada Foundation for Sustainable Development Technology
- Canada Millennium Scholarship Foundation
- Asia-Pacific Foundation of Canada
- The Pierre Elliot Trudeau Foundation

---

* Author: Kristen Douglas, Law and Government Division.

(53) More information about the ATIA is available in Nancy Holmes, *Access to Information*, TIPS 91E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 24 February 2006, http://lpintrabp.parl.gc.ca/apps/tips/tips-cont-e.asp?Heading=16&TIP=94.

(54) As mentioned previously (see note 38), the term Officers of Parliament (or Agents of Parliament) has been used in different contexts to mean different things. For the purposes of this paper it includes the Information and Privacy Commissioners of Canada, as well as the Auditor General of Canada, the Commissioner of Official Languages, and the Chief Electoral Officer. The Office of the Public Sector Integrity Commissioner and the Office of the Commissioner of Lobbying, as proposed in this bill, would also be Officers of Parliament.

(55) Clause 222 of Bill C-2 amends the *Public Servants Disclosure Protection Act* to add the Office of the Public Sector Integrity Commissioner to Schedule I to the ATIA.

(56) Clauses 90 and 91 of Bill C-2 replace the Office of the Registrar of Lobbyists with the Office of the Commissioner of Lobbying on Schedule I to the ATIA.

In the House Committee, the bill was amended to expand the definition of "government institution" to include any parent Crown corporation, and any subsidiary of such a corporation, within the meaning of section 83 of the *Financial Administration Act*. This amendment expands the scope of the ATIA significantly. A new section 3.01(2) clarifies that the Canadian Race Relations Foundation and the Public Sector Pension Investment Board are parent Crown corporations for the purposes of the ATIA (clause 142). Also, the Canadian Wheat Board, which is not a Crown corporation, would have been brought under the Act by new clause 165, which added it to Schedule I to the ATIA. Clause 165, which had been added to the bill at report stage in the House of Commons, was deleted by the Senate Committee. This amendment was rejected by the House. The bill also contemplates that additional bodies may be added to the Act in the future. Under section 77 of the ATIA, as amended by clause 163(2) of the bill, Cabinet will have the power to make regulations prescribing criteria for adding a body or office to Schedule I.

B. New Exclusions and Exemptions (Clauses 144-150, 159)

Under the ATIA, individuals may apply for access to government information, and, unless the requested information falls within certain specific and limited exceptions, the Act requires the government to release the information within specified time limits. Bill C-2 proposes new exemptions and exclusions related to the addition of the Officers of Parliament, Crown corporations and foundations to the government institutions covered by the ATIA.

New provisions will protect particular types of information gathered or generated by Officers of Parliament. Under clause 144, a new section 16.1 will require the heads of some government institutions, including the Auditor General of Canada, the Information, Privacy and Official Languages Commissioners and the Commissioner of Lobbying to refuse to disclose information obtained or created in the course of an investigation, examination or audit. However, as amended by the House Committee, section 16.1(3) would have required the Information and Privacy Commissioners to disclose any record that contains information that was created by them or on their behalf in the course of their investigations or audits once the process is concluded. The inclusion of the Commissioner of Lobbying in section 16.1 was rejected by the House.

A new section 16.3 will permit the Chief Electoral Officer (CEO) to refuse to disclose information related to investigations, examinations or reviews under the *Canada*

Elections Act unless the information must be made public under the *Canada Elections Act*. The Senate Committee's amendment to section 16.3 giving the CEO this discretionary, rather than mandatory, power, was accepted by the House. Section 541 of the *Canada Elections Act* requires the Chief Electoral Officer to make available to the public all financial reports that are filed with Elections Canada by all the various entities that make up a political organization, including: parties (sections 424, 429); candidates (sections 451, 455); constituency associations (section 403.35); nomination contestants (sections 478.23, 478.3); and leadership contestants (sections 435.3, 435.35).

Various kinds of information contained in these returns may be obtained, including: audits, the names of contributors and the amount contributed (if over the threshold amount of $200), and election or campaign expenses incurred by each entity. In addition, the public may access: instructions issued by the Chief Electoral Officer under the Act; rulings or decisions made by him or her on matters arising under this Act; and all correspondence with election officers or others in relation to an election.

The House Committee deleted some new exclusions that had been proposed in Bill C-2, including one that would have protected information the disclosure of which could interfere with institutions' contractual negotiations, and another that would have required the head of the National Arts Centre to refuse to disclose records that would reveal the terms of a contract with a performing artist or the identity of a donor. The latter was reinserted as section 20.4 (clause 148) by the Senate Committee. This change was accepted by the House. A new exemption was added by the Senate Committee (section 20.3, clause 148) to require the head of the Canada Foundation for Sustainable Development Technology to refuse to disclose certain records containing information relating to applications for funding, eligible projects or eligible recipients. This exemption was rejected by the House.

One of the Crown corporations brought within the scope of the ATIA under the amended Bill C-2 is the Canada Pension Plan Investment Board. The House Committee added a new exclusion to the bill relating to certain documents held by the Board. A new subsection 20.2 was added to clause 148, requiring the head of the Board to refuse to disclose a record that contains advice or information "relating to investment that the Board has obtained in confidence from a third party if the Board has consistently treated the advice or information as confidential."

The economic interests of certain Crown corporations, including Canada Post, Export Development Canada, the Public Sector Pension Investment Board, VIA Rail and the Canada Foundation for Sustainable Development Technology, are protected by a new

section 18.1 (clause 147). (The inclusion of the Canada Foundation for Sustainable Development Technology in section 18.1 was rejected by the House.) This section permits the head of the corporation to refuse to disclose a record containing trade secrets or financial, commercial, scientific or technical information that the corporation owns and has consistently treated as confidential. The head shall not rely on this provision, however, to refuse to release information related to the general administration of one of the listed Crown corporations, or to a Canada Post activity that is fully funded by Parliament.

New section 22.1 of the ATIA (see clause 150 of Bill C-2) will permit the heads of government institutions to refuse to disclose records less than 15 years old that contain draft reports of internal audits of government institutions or related audit working papers, unless the audit is not reported within two years of its commencement.

The Senate Committee added clause 150.1 to the bill, adding a new section 26.1 to the ATIA. This section would have created a public interest override in the Act, permitting heads of government institutions to disclose documents which would otherwise be exempt from disclosure, if disclosure is determined to be in the public interest, unless the information relates to national security. The amendment was rejected by the House.

Clause 159 creates two new exclusions removing certain documents from the application of the ATIA. New section 68.1 excludes information under the control of the Canadian Broadcasting Corporation that relates to its journalistic, creative or programming activities, but not information relating to its general administration. Section 68.2 excludes all information under the control of Atomic Energy of Canada other than information relating to its general administration or the operation of a nuclear facility subject to regulation by the Canadian Nuclear Safety Commission. Clause 159 was also amended by the Senate Committee to add new sections 68.3 to 68.8 to the ATIA. The new sections would have excluded from the application of the Act any documents held by the five foundations and the offices of the five Officers of Parliament newly covered by the ATIA before clause 166 of Bill C-2 comes into force. This provision would have excluded from the operation of the ATIA any records held by those entities before they are added to it by the bill. This is an unusual approach to the application of the ATIA to new entities. These amendments were rejected by the House.

Another new exclusion is found in clause 172.01, inserted by the Senate Committee, to provide that the *Canada Elections Act* is to be added to Schedule II of the ATIA, along with a reference to section 540 of the CEA. The effect of this inclusion would be to exclude from the ATIA certain election documents the release of which is restricted by section 540. This amendment was accepted by the House.

Proposed clause 172.1, added by the House Committee, which would have authorized a reconsideration of the inclusion of the Canadian Wheat Board in Schedule I of the ATIA, was deleted by the Senate Committee. The House disagreed with that deletion.

C. A New Duty to Assist Requesters (Clause 143)

Clause 143 of Bill C-2 adds a new section 4(2.1) to the ATIA, creating a duty requiring institutions to assist requesters without regard to their identity. The new provision requires the head of a government institution, without regard to the identity of the requester, to make "every reasonable effort to assist," to respond accurately and completely, and to provide access in the format requested. The Senate Committee amended clause 143 to require that the access provided by departments to requesters be timely. This amendment was accepted by the House. Clause 151 amends section 31 of the ATIA to clarify the time limit for making a written complaint to the Information Commissioner.

D. Annual Reports (Clause 162)

The House Committee added clause 162 to the bill, creating a new section 72.1 of the ATIA, which requires heads of departments or ministries of state of the Government of Canada to publish annual reports of all expenses incurred by their office and paid out of the Consolidated Revenue Fund.

E. Amendments to the *Privacy Act* (Clauses 181-193)

Clauses 181-193 make a number of amendments to the *Privacy Act*, adding to its schedule some of the same government institutions as were added to Schedule I to the ATIA, including the Offices of the Information and Privacy Commissioners, all Crown corporations and the five foundations named earlier, and making some consequential amendments. Clause 188 excludes from the operation of the *Privacy Act* information that the Canadian Broadcasting Corporation collects, uses or discloses for journalistic, artistic or literary purposes.

F. Other Proposals to Reform the *Access to Information Act*

When Bill C-2 was released, the government indicated that it hoped that the legislative proposals of the Information Commissioner (the "Open Government Act")[57] and its

(57) Information Commissioner of Canada, *Proposal of the Information Commissioner to amend the Access to Information Act*, http://canada.justice.gc.ca/en/dept/pub/atia/prop/SBS_CAC_2006-04-07.pdf.

own discussion paper[58] would be studied by the House of Commons Standing Committee on Access to Information, Privacy and Ethics. The ATIA has been reviewed many times over the past 20 years, giving rise to a significant accumulation of reform proposals.[59] Of the many committee amendments to the provisions affecting the ATIA, the most significant was the expansion of the scope of the Act to cover all Crown corporations. However, many issues relating to access to information remain contentious.

APPOINTMENT OF RETURNING OFFICERS (CLAUSES 173-178)*

Returning officers are responsible for the administration of an election in their electoral districts. They are appointed by the Governor in Council. The Chief Electoral Officer, among others, has recommended that the *Canada Elections Act* (CEA) be amended to require that returning officers be appointed by him.[60]

A. Appointment of Returning Officers by Chief Electoral Officer (Clauses 173-176)

Bill C-2 will give the Chief Electoral Officer the authority to appoint returning officers for 10-year terms (clause 174(1)). The bill will also authorize the Chief Electoral Officer to: establish qualifications for returning officers; develop a process for their appointment based on merit; and remove returning officers.

The Chief Electoral Officer will be required to submit a report to the Speaker of the House of Commons whenever he or she prescribes the qualifications for returning officers, establishes a process for their appointment or their removal, or significantly modifies those qualifications or procedures (clause 177, adding new section 535.2 to the CEA). The

---

(58) Government of Canada, *Strengthening the Access to Information Act: A Discussion of Ideas Intrinsic to the Reform of the Access to Information Act*, 11 April 2006, http://canada.justice.gc.ca/en/dept/pub/atia/index.html.

(59) For more information regarding the ATIA and proposals for its reform, see Kristen Douglas, *The Access to Information Act and Recent Proposals for Reform*, PRB 05-55E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 6 February 2006, http://lpintrabp.parl.gc.ca/lopimages2/prbpubs/bp1000/prb0555-e.asp.

* Author: Sebastian Spano, Law and Government Division.

(60) See for example Elections Canada, *Completing the Cycle of Electoral Reforms: Recommendations from the Chief Electoral Officer on the 38th General Election*, Ottawa, 2005, pp. 14-17, http://www.elections.ca/gen/rep/re2/r38/rec38ge_e.pdf.

appointment process must be an external process as that term is defined in section 2(1) of the *Public Service Employment Act*. That is, the Chief Electoral Officer must hold a competition that is open to the public.

B. Termination or Extension of Term of Office (Clause 174)

A returning officer's term of office can end before the 10-year term in case of death, resignation, ceasing to reside in the electoral district, or removal from office for reasons enumerated in section 24(7) of the CEA (clause 174(3)). Section 24(7) authorizes a removal from office if a returning officer:

- is mentally or physically incapable of satisfactorily performing his or her duties;
- fails to competently discharge a duty under the CEA or fails to follow an instruction of the Chief Electoral Officer;
- fails to complete the revisions to the boundaries of polling divisions; and
- engages in partisan conduct, including making a financial contribution under the CEA and holding a position in a political party or a constituency association.

The Chief Electoral Officer may reappoint a returning officer for a further 10-year term only after consulting with the leader of every recognized political party in the House of Commons (new section 24(1.4)).

AMENDMENTS TO THE *PUBLIC SERVANTS DISCLOSURE PROTECTION ACT* (CLAUSES 194-226)*

Bill C-2 proposes significant amendments to the *Public Servants Disclosure Protection Act* (PSDPA). Notably, it enhances protections for public servants making disclosures of wrongdoings and it creates an independent Public Servants Disclosure Protection Tribunal. When originally introduced in the House of Commons, the bill contained a proposed special recognition award of up to $1,000 for public servants or others who expose wrongdoing. This provision, however, was removed by the Legislative Committee on Bill C-2 in its examination of the bill.

---

* Authors: Sam N. K. Banks, Law and Government Division; Philippe Le Goff and Tara Gray, Economics Division.

Bill C-2 is the latest of numerous efforts addressing the disclosure of wrongdoings in the public sector and the protection from reprisals of public servants who make disclosures. These issues have been the subject of task forces, policies, codes, reports, studies, and previous bills introduced, both by governments and by private members, since at least 1996.(61) More recently, the November 2003 Report of the Auditor General of Canada(62) underlined the need for better protection for whistleblowers who attempt to disclose wrongdoings in the federal public service. This was followed by the introduction of Bill C-25, which was an earlier version of the PSDPA, and the reports of the Gomery Commission. According to the Commission's first report, attempting to disclose questionable business practices and possible mismanagement of public funds effectively cost one public servant his job.(63)

A. Coverage of the PSDPA and Access to the Commissioner (Clauses 194, 196, 200)

In clause 194, the Senate Committee amended several definitions in section 2(1) of the *Public Servants Disclosure Protection Act* (PSDPA). The amended definition of "protected disclosure" would include disclosures made by a whistleblower who is lawfully permitted, or required as is already provided, to do so. The effect of the amendment is to broaden the circumstances in which disclosures will be allowed and covered by the PSDPA. The amended definition of "public sector" clarifies that public sector does not include the Canadian Forces, and the effect of the amendment, in addition to specifically excluding the Forces, is to include the Communications Security Establishment and the Canadian Security Intelligence Service. The amendments to the definitions were rejected by the House.

---

(61) For a review of the chronology of these activities, see David Johansen and Sebastian Spano, *Bill C-11: The Public Servants Disclosure Protection Act*, LS-482E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, revised 2 November 2005, http://lpintrabp.parl.gc.ca/lopimages2/prbpubs/ls3811000/381c11-e.asp.

(62) Auditor General of Canada, *November 2003 Report*, http://www.oag-bvg.gc.ca/domino/reports.nsf/ html/03menu_e.html.

(63) Commission of Inquiry into the Sponsorship Program and Advertising Activities, Justice John H. Gomery, Commissioner, *Who is Responsible? Fact Finding Report*, Minister of Public Works and Government Services, Ottawa, 2005, pp. 201-203, http://www.gomery.ca/en/phase1report/ffr/index.asp. For a more thorough review of the *Public Servants Disclosure Protection Act* and the changes to the legislation proposed in the Phase 2 report of the Gomery Commission (*Restoring Accountability*), see Tara Gray, *The Public Servants Disclosure Protection Act and Proposed Amendments*, PRB 05-56E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 9 February 2006, http://lpintrabp.parl.gc.ca/lopimages2/prbpubs/bp1000/prb0556-e.asp.

Clause 196 of Bill C-2 amends section 3(a) of the *Public Servants Disclosure Protection Act* in order to remove the government's ability to exclude Crown corporations from coverage under the PSDPA. It does this by removing the words "or deleting" from paragraph 3(a) of the Act so that it reads, "Schedule 1 by adding the name of any Crown corporation or other public body."

Clause 200 replaces section 13(1) of the PSDPA in order to give public sector employees direct access to the Public Sector Integrity Commissioner to report wrongdoing in the workplace. Currently, the PSDPA allows a public servant to disclose wrongdoings directly to the Commissioner only if he or she believes *on reasonable grounds* that it would not be appropriate to disclose the information directly to the supervisor or designated senior officer first, or if he or she had already done so but believed that the matter had not been appropriately dealt with.

B. Complaints Relating to Reprisals (Clauses 194, 201)

Clause 194 was amended by the Senate Committee to add two new subsections to the section 2(1) definition of "reprisal." The effect of the amendment would be to expand that definition, which currently deals with measures related to working conditions, to include any other measure that may adversely affect the public servant, whether directly or indirectly, and threats to take any of the measures included in the new definition. Also, clause 201 was amended to add new section 19.01, which creates a rebuttable presumption that administrative or disciplinary measures taken against a public servant who makes a protected disclosure are reprisals against that public servant. All of these amendments were rejected by the House.

Clause 201 of Bill C-2 replaces sections 19-21.9 of the PSDPA and gives the Public Sector Integrity Commissioner the authority to deal with complaints, conduct investigations, and attempt to conciliate a settlement between the parties. If there is no settlement, the Commissioner may decide to refer the matter to a new, independent Public Servants Disclosure Protection Tribunal.

Currently, under the PSDPA, public servants making an allegation of reprisal are authorized to seek redress from the relevant government administrative tribunal (that is, the Public Service Labour Relations Board or the Canada Industrial Relations Board). Under the amendments proposed by Bill C-2, it is the Commissioner (or his/her designate), and not the

administrative tribunals, who has the power to investigate allegations of reprisal, and, if reprisal is found, to negotiate a settlement with all parties involved (including the person with the authority to take disciplinary action).

The Public Sector Integrity Commissioner does not, however, have the power to enforce a settlement. The Commissioner will be an Officer of Parliament, hallmarks of which are their independence of the government of the day and their accountability and scrutiny (sometimes referred to as "watchdog") functions. Such officers traditionally have the power to make observations, suggestions and recommendations rather than enforce orders. Enforcement matters are usually left to tribunals or the court system. Thus, a settlement approved by the Commissioner may be enforced by order of the Federal Court on application of the Commissioner or a party to the settlement.

C. Public Servants Disclosure Protection Tribunal (Clause 201)

Clause 201 of Bill C-2 adds new section 20.7(1) to the PSDPA, creating an independent Public Servants Disclosure Protection Tribunal. This tribunal will have the power to decide whether reprisal occurred, to order action to remedy the situation, and to ensure that those who took reprisal are disciplined.

- The Tribunal also has the power under the new section 21.2(1) to summon witnesses, administer oaths and receive evidence.
- Section 21.7(1)(f) gives the Tribunal, in addition to all previous remedies available to the labour boards, the power to require an employer to compensate the complainant by an amount of not more than $10,000 for any pain and suffering that he or she may have suffered as a result. The $10,000 limit was removed by the Senate Committee, but the House disagreed with the removal of the limit.
- Members of the Public Servants Disclosure Protection Tribunal will be appointed by the Governor in Council, and must be judges or former judges of the Federal Court of Canada or a superior court of a province.

This new quasi-judicial administrative tribunal will have significant powers similar to those of other, longer-established tribunals such as the Canadian Human Rights Tribunal or the Competition Tribunal.

As set out in the PSDPA's new section 21 proposed by Bill C-2, this tribunal is subject to the requirements of natural justice and its decisions, therefore, may be subject to judicial review. In practice this will mean that decisions of the new Public Servants Disclosure Protection Tribunal may be appealed through the judicial system for review. That process may add to the time and expense in resolving complaints of alleged reprisals.

D. Right to Refuse, Delegation, and Access to Legal Counsel for Whistleblowers (Clause 203)

Clause 203 of Bill C-2 replaces sections 24 and 25 of the PSDPA and adds new section 25.1. Section 24 deals with the Commissioner's right to refuse to deal with a disclosure or to commence or cease an investigation. Section 25 deals with the Commissioner's delegation powers. Section 25.1 gives the Commissioner the power to authorize free access to legal advice for public sector employees who are considering making a disclosure of wrongdoing, serving as a witness, or alleging a reprisal. The same section also gives the Commissioner the power to authorize free access to legal advice for non-public sector employees who are considering providing information to the Commissioner about government wrongdoing. The maximum amount normally provided for legal advice under the Act is $1,500. In exceptional circumstances, up to $3,000 may be authorized. The maximum amounts payable to public servants for legal advice under section 25.1 were increased by the Senate Committee from $1,500 to $25,000, and from $3,000 to an amount in the discretion of the Public Sector Integrity Commissioner. However, these increases were rejected by the House.

E. Reporting (Clauses 209-211)

Clauses 209, 210 and 211 of Bill C-2 amend sections 37 and 38 of the PSDPA in order to provide more guidance on reporting. These clauses require that:

- The Commissioner, within 60 days, must report to Parliament the finding of wrongdoing, the recommendations if any, and any response to date by the chief executive of the organization involved (section 38(3.1)).
- The Commissioner must also submit the report to the Speaker of the Senate and the Speaker of the House of Commons, who must table it in their respective Houses (new section 38(3.3)). This new provision was added by the House Committee in its examination of the bill. It was amended by the House of Commons in report stage to require that every report, once tabled, stands referred to the relevant committee of the Senate or the House of Commons, or both Houses, for the purpose of reviewing the Commissioner's reports (section 38(4)).
- Chief executives must make public reports of corrective action they have taken where they have found wrongdoing following investigations by senior officers within their organization (section 38.1(1)).
- The Public Service Human Resources Management Agency of Canada, through its minister, must make an annual report to Parliament that provides an overview of all departmental disclosure activity (sections 38.1(2) and (3)).

F. Delegation (Clause 212)

The Commissioner may delegate some of his or her powers, duties and functions to the Deputy Commissioner (clause 212). This clause was amended by the House Committee to state that the Commissioner cannot delegate the reporting powers, duties and functions in section 38 of the Act.

G. Protection of Private Sector Employees or Contractors Having Business or a Contractual Relationship with the Public Sector (Clause 215)

Clause 215 expands protection to all those – not just public sector employees – who disclose government wrongdoing. It prohibits:

- non-public sector employers from undertaking reprisal against employees who will be providing, or have provided, information concerning an alleged federal public sector wrongdoing to the Public Sector Integrity Commissioner (new sections 42.1(1), (2) and(3));
- the government from terminating a contract or withholding payments to a contractor because the contractor or any of the contractor's employees provided information concerning an alleged wrongdoing (new section 42.2(1));
- the government from refusing to enter into a contract because the contractor or any of the contractor's employees provided information concerning an alleged wrongdoing (new section 42.2(2)); and
- the government from withholding a grant or contribution because the recipient or any of the recipient's employees provided information concerning an alleged wrongdoing (new section 42.2(3)).

Clause 215 also adds section 42.3 to the PSDPA; the new section introduces specific penalties for offences under the Act, including tougher penalties for those who wilfully impede investigations of wrongdoing. These offences will be punishable by fines of up to $10,000, imprisonment for up to two years, or both. There may be some question of the constitutionality of this provision. Relations between employers and employees are normally a matter of property and civil rights, and therefore within provincial jurisdiction (*Constitution Act, 1867*, section 92(13)).

H. Temporary Measures and Assignment (Clause 219)

Clause 219 adds section 51.1 to the PSDPA, providing guidelines regarding temporary measures needed to maintain the effective operation of the workplace.

I. Recognition and Rewards (Former Clause 220)

The Committee removed former clause 220, which would have amended the *Public Servants Disclosure Protection Act* by adding a provision regarding rewards. Under former clause 220, public sector employees who exposed wrongdoing would have been eligible to receive a special recognition award of up to $1,000.(64)

J. Protection of Sensitive Information (Clause 221)

Clause 221 replaces section 55 of the PSDPA in order to protect from release, under the *Access to Information Act*, information created for the purpose of making a disclosure or information created during the course of an investigation. This measure is to ensure that sensitive information held by the Public Sector Integrity Commissioner is protected in a manner consistent with that held by other Agents of Parliament who conduct investigations. This provision was amended by the House of Commons at report stage to state that these non-disclosure provisions do not apply if the person who gave the information consents to the record being disclosed. The provision was further amended by the Senate Committee, expanding the class of records that must not be disclosed by the Public Sector Integrity Commissioner under section 16.4 of the ATIA in order to further protect the identities of public servants who make disclosures or give evidence in an investigation under the PSDPA. Clause 221 was also amended to limit the exemption provided for records related to disclosures or investigations under the PSDPA, to cases where the information could reveal the identity of a whistleblower or a witness, or where the investigation is not yet completed. These amendments were rejected by the House.

---

(64) In addition to these new provisions, the Parliamentary Secretary to the President of the Treasury Board, Pierre Poilievre, had been asked to work on proposals for establishing a regime similar to that which exists in the United States, under the False Claims Act, that would allow members of the public to initiate legal action against private companies that may be defrauding the government of taxpayers' money. Should legal action be successful, those who identified the wrongdoing may be eligible to receive damages that are imposed upon the defendants. See the Government of Canada, *Federal Accountability Action Plan*, "Providing real protection for whistleblowers," 11 April 2006, http://www.faa-lfi.gc.ca/docs/ap-pa/ap-pa10_e.asp.

Clauses 223 and 224 were amended by the Senate Committee to protect certain information under federal privacy laws, but these amendments were also rejected by the House. Clause 223 was amended to limit the exemption under the *Personal Information Protection and Electronic Documents Act* (PIPEDA) new subsection 9(3)(*e*), which covers records related to disclosures or investigations under the PSDPA, to cases where the information could reveal the identity of a whistleblower or a witness. Accordingly, such documents would not have to be provided to an individual applying for access to personal information. Clause 224 was amended to replace section 22.2 of the *Privacy Act* with a new provision intended to protect the identity of disclosers under the PSDPA. Under the new section, the Public Sector Integrity Commissioner may not disclose personal information related to an investigation under the PSDPA that is requested under section 12(1) of the *Privacy Act* if it could identify a whistleblower or a witness, without the consent of that whistleblower or witness.

PART 4 – ADMINISTRATIVE OVERSIGHT AND ACCOUNTABILITY

AMENDMENTS TO CROWN CORPORATION APPOINTMENTS AND GUIDELINES (CLAUSES 227, 229-245, 247-256, 267, 276-299)*

These clauses of Bill C-2 establish a Public Appointments Commission, shift internal audit authority to the Canada Revenue Agency, change Crown corporation board appointments from three to four years, and make minor changes to the National Capital Commission. Other clauses in Part 4 of Bill C-2 involve housekeeping matters with respect to Crown corporations, such as updating titles by replacing “Chairman” with “Chairperson.”

A. Establishment of Public Appointments Commission (Clause 227)

Clause 227 amends the *Salaries Act* to allow for the establishment of a Public Appointments Commission by the Governor in Council. The Commission will consist of a chairperson and not more than four members who can hold office for five years and may be

---

* Author: Lydia Scratch, Political and Social Affairs Division.

reappointed for further terms. The five-year term was increased to seven years by the Senate Committee, but their amendment was rejected by the House. This clause was amended by the House Committee to include details of the role of the Public Appointments Commission, which includes:

- overseeing, monitoring, reviewing and reporting on the appointments selection process;
- developing and establishing a code of practice for appointments;
- auditing appointment policies and practices; and
- reporting publicly on compliance with the code of practice.

Also added at the committee stage was the direction that the Prime Minister will consult with the leader of every recognized party in the House of Commons prior to appointing a person to the Public Appointments Commission.

B. Appointments and Guidelines Amendments (Clauses 229-245, 247-256, 267, 276-299)

Clause 237 includes internal audit in the Canada Revenue Agency within the authority of the Agency itself, rather than under the authority of the Treasury Board (as detailed in clause 258 with respect to other parts of the federal public administration).

Clause 267 will amend the *Financial Administration Act* to allow members of Crown corporation boards of directors to be appointed for up to four years.

Clause 285 increases the number of members of the National Capital Commission from 13 to 15. Clause 286 allows the National Capital Commission to authorize another member of the Commission to act as the Chairperson or Chief Executive Officer of the Commission for no more than 60 days without the approval of the Governor in Council. No time limit was in place in the section of the *National Capital Act* that this clause replaces.

Clause 297 restricts the membership of the Public Sector Pension Investment Board's audit committee: none of the members of the audit committee may be officers or employees of the Board or its affiliates.

Some of the clauses relating to appointments and guidelines limit to four years the maximum term that chairpersons, directors and members of the boards of directors of specified

Crown corporations can serve.[65] Others update the term "Chairman" to "Chairperson" in certain Crown corporation Acts, and still others replace such terms as "Vice-Chairman," "Vice-President," and "Chairperson" by "Chief Executive Officer."[66] Finally, some clauses provide for the continuation of specific Crown corporations.[67]

INTERNAL AUDIT, ACCOUNTING OFFICERS AND FRAUD (CLAUSES 257-275)*

Clauses 257-275 of Bill C-2 amend sections of the *Financial Administration Act*. These clauses require departments to have an adequate internal audit capacity and audit committees; establish the position of accounting officer; and conduct a review of their grants and contributions programs. Penalties for fraud against the Crown are also strengthened.

A. Internal Audit (Clauses 258-260, 268)

Currently, the internal audit capacity of departments is inconsistent. Clause 258 of the bill, which amends section 7(1) of the *Financial Administration Act*, adds responsibility for internal audit in the federal public administration to the mandate of the Treasury Board. Clause 259 adds sections 16.1 and 16.2 to the *Financial Administration Act*. Section 16.1 makes the deputy head of a department responsible for ensuring there is an adequate internal audit

(65) The following Crown corporations are included in these clauses: Canadian Broadcasting Corporation, Business Development Bank of Canada, Canadian Council for the Arts, Canada Mortgage and Housing Corporation, Canada Post, Canada Commercial Corporation, Canadian Race Relations Foundation, Cape Breton Development Corporation, Export Development Canada, Farm Credit Canada, Freshwater Fish Marketing Corporation, museums covered under the *Museums Act*, National Arts Centre, National Capital Commission, Pilotage Authority, Public Sector Pension Investment Board, Royal Canadian Mint, Standards Council of Canada, and Telefilm Canada. The Canadian Tourism Commission was added by the Senate Committee. This change was accepted by the House.

(66) The following Crown corporations are included in these clauses: Canada Mortgage and Housing Corporation, Canada Post, Canadian Dairy Commission, Enterprise Cape Breton Corporation, Freshwater Fish Marketing Corporation, National Capital Commission, and Pilotage Authority.

(67) The following Crown corporations are included in these clauses: Canadian Dairy Commission, Enterprise Cape Breton Corporation, National Arts Centre, and National Capital Commission.

* Authors: Brian O'Neal and Alex Smith, Political and Social Affairs Division; Tara Gray, Economics Division.

capacity within the department. Section 16.2 requires the deputy head to establish an audit committee for the department. These sections transform similar provisions in the Treasury Board's *Policy on Internal Audit*(68) into statutory requirements.

Clause 268 requires Crown corporations to exclude officers or employees of the corporation from membership in the audit committee. This is intended to ensure the independence of the audit committee from management.

Clause 260 requires departments to conduct a review every five years of the relevance and effectiveness of their ongoing grants and contributions programs. This clause creates a legal obligation, whereas the requirement was formerly part of Treasury Board's *Policy on Transfer Payments*.(69)

B. Accounting Officers (Clause 259)

In May 2005, the House of Commons Standing Committee on Public Accounts recommended "that deputy ministers be designated as accounting officers with responsibilities similar to those held by accounting officers in the United Kingdom." As such, deputy ministers should be held to account before the Public Accounts Committee. Previously, the Government of Canada resisted calls to change the accountability of deputy ministers on the basis that only ministers should be accountable to Parliament.(70) Instead, the government insisted that deputy ministers appear before committees of Parliament on behalf of their minister to explain factual matters to parliamentarians.

The Senate Committee amended clause 259 to add new section 16.21 to the *Financial Administration Act*, providing the Governor in Council with the legal authority to appoint external members of audit committees. Such external members would hold office during pleasure for up to four years, renewable for one additional term, and their remuneration and expenses would be fixed by the Governor in Council. The House disagreed with the amendment

---

(68) Treasury Board Secretariat, *Policy on Internal Audit*, 1 April 2006; see sections 5.3.1 and 5.3.2, http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/ia-vi/ia-vi_e.asp. Further information on the audit committee can be found in the *Directive on Departmental Audit Committees*, http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/ia-vi/dac-cmv_e.asp.

(69) Treasury Board Secretariat, *Policy on Transfer Payments*, 1 June 2000; see section 7.3.7, http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/TBM_142/ptp1_e.asp#_Toc482671152.

(70) For more information about the accountability of deputy ministers and accounting officers in the United Kingdom, see Alex Smith, *The Accountability of Deputy Ministers Before Parliament*, PRB 05-48E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 2 February 2006.

by the Senate Committee, and proposed a further amendment to provide the Treasury Board with legal authority to appoint external auditors. The proposed amendment would also provide for the remuneration and expenses of external members of audit committees to be fixed by the Treasury Board.

Clause 259 also adds sections 16.3-16.5 to the *Financial Administration Act* to institute the position of the accounting officer. The accounting officer will be a department's deputy minister, or equivalent. Within the framework of ministerial responsibility and accountability to Parliament, the accounting officer will be accountable before the appropriate committees of the Senate and the House of Commons for:

- measures taken to deliver programs in compliance with policies and procedures;
- measures taken to maintain effective systems of internal control;
- signing the accounts prepared as part of the Public Accounts; and
- other specific duties assigned to him or her by legislation.

The accounting officer will be obligated to appear before the appropriate committees of the Senate and the House of Commons to answer questions on these responsibilities.

Under section 16.5, in the case of a disagreement with the minister over the interpretation or application of a policy, directive or standard issued by the Treasury Board, the accounting officer shall seek written guidance from the Secretary to the Treasury Board. If the matter remains unresolved, the issue shall be decided by the Treasury Board, whose written decision will be provided to the Auditor General. This procedure is quite different from the one used by accounting officers in the United Kingdom.

C. Fraud (Clauses 261, 269)

Clause 261 of Bill C-2 adds a new offence provision to the *Financial Administration Act* that makes it an indictable offence[(71)] for an employee who deals with public money to defraud the Crown of any money, securities, property or service. The wording of the new offence provision is very similar to that of the *Criminal Code* prohibition against fraud

(71) The French text of Bill C-2 here uses the more general term "infraction" (offence), whereas the English text refers specifically to an "indictable offence" (which would translate as "acte criminel").

(section 380). This amendment will increase the maximum penalty for fraud against the Crown under the *Financial Administration Act* from a $5,000 fine and 5 years' imprisonment, to a fine equal in value to the money or other goods taken and 14 years' imprisonment.

Clause 269 creates a similar offence for the directors, officers, and employees of Crown corporations. In addition, anyone found guilty of fraud under the new provisions will be ineligible to be an employee of that corporation. Further amendments to the *Financial Administration Act* through clauses 244, 262 and 295 of Bill C-2 will ensure that these provisions apply to several Crown corporations that are currently exempt from certain sections of the *Financial Administration Act*; these include the Bank of Canada, Canada Pension Plan Investment Board, Canada Council for the Arts, Canadian Broadcasting Corporation, International Development Research Centre, National Arts Centre Corporation,(72) Telefilm Canada, Canadian Race Relations Foundation and Public Sector Pension Investment Board.

PART 5 – PROCUREMENT AND CONTRACTING

Clauses 301-313 of Bill C-2 amend the *Auditor General Act*, the *Department of Public Works and Government Services Act* and the *Financial Administration Act*.

AMENDMENTS TO THE *AUDITOR GENERAL ACT* (CLAUSES 301-305) *

Clauses 301-305 of Bill C-2 give the Auditor General of Canada the authority to audit recipients of funding from the federal government.(73)

---

(72) The French text of the bill uses the previous name of this corporation, i.e., "Corporation du Centre national des Arts." The current French name, as stated in section 3 of the *National Arts Centre Act* (R.S., 1985, c. N-3), is the "Société du Centre national des Arts."

* Authors: Brian O'Neal and Alex Smith, Political and Social Affairs Division; Philippe Le Goff, Economics Division.

(73) In this regard, Bill C-2 responds to a recommendation made by the House of Commons Standing Committee on Public Accounts in its April 2005 report on the Sponsorship Program (9th Report, 1st Session, 38th Parliament). During its hearings on the Sponsorship Program, the Committee was frustrated by the inability of the Auditor General to audit the books of communications agencies working under contract with the government. The Committee noted that several provincial auditors general have legislative authority to audit entities outside government that are in receipt of public funds, and it recommended that the Auditor General of Canada be given a mandate similar to the one found in several provincial jurisdictions.

Due in part to concerns raised by the Auditor General, the *Budget Implementation Act 2005* amended the *Auditor General Act* to provide the Auditor General with the authority to audit "recipient corporations," more commonly referred to as foundations,(74) such as the Canada Foundation for Innovation. Clause 301 of Bill C-2 repeals the definitions of not-for-profit and recipient corporations and instead adds the definitions of funding agreement and recipient, as specified in clause 312 of the bill.

A "funding agreement" is a written agreement under which a recipient receives funding from the Crown, but excludes contracts for the performance of work, the supply of goods or the rendering of services. A "recipient" is an individual, body corporate, partnership or unincorporated organization that received a total of $1 million or more in any five consecutive years. This does not include a Crown corporation, a departmental corporation, the government of a foreign state, a provincial government, a municipality, a corporation controlled by a municipality or another government, or an international organization. Clause 312 of the bill was amended by the House Committee to exclude band councils under the *Indian Act*, members or agents of band councils, as well as Aboriginal bodies that are parties to self-government agreements given effect by an Act of Parliament, and their agents, from the definition of "recipients" and thus to exclude them from the expanded authority of the Auditor General.

A. New Duties for the Auditor General of Canada (Clause 304)

Clause 304 of the bill replaces section 7.1(1) of the *Auditor General Act* by granting the Auditor General the authority, with respect to any recipient, to inquire into its use of funds received from the Canadian government. In the wake of the irregularities that occurred under the Sponsorship Program and related advertising activities, this amendment significantly broadens the scope of the mandate of the Auditor General of Canada. For example, the Auditor General will have the authority to audit recipients of most federal grants and contributions to determine whether:

- obligations under the funding agreement have been complied with;
- money has been used with due regard to economy and efficiency;

---

(74) More information about foundations can be found in Jean Dupuis, *Foundations: An Update*, PRB 05-17E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 4 April 2005, http://lpintrabp.parl.gc.ca/lopimages2/prbpubs/bp1000/prb0517-e.asp.

- satisfactory procedures to measure and report on the effectiveness of activities are in place;
- accounts and essential records have been properly maintained; and
- due regard has been given to the environmental effects of expenditures.

It is not clear, however, whether *all* recipients of federal funds are expected to meet these criteria.

B. Immunity of the Auditor General (Clause 305)

Clause 305 of the bill provides immunities to the Auditor General, or people acting under his or her direction, for activities performed in the course of an audit. Officials of the Auditor General will not be compellable witnesses in any proceedings other than a prosecution for perjury. No criminal or civil proceedings can be launched against officials of the Auditor General for anything done in good faith. For the purposes of any law relating to defamation, anything said, information supplied or any document or thing produced in good faith by officials of the Auditor General is privileged, as is any report or accurate account of the report made in good faith in a newspaper, periodical publication or broadcast.

AMENDMENTS TO THE *DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES ACT* AND THE *FINANCIAL ADMINISTRATION ACT* (CLAUSES 246, 306-313)*

A. Establishment of the Position of Procurement Ombudsman (Clauses 306-307)

Clause 306 of the bill adds three new sections (22.1, 22.2 and 22.3) to the *Department of Public Works and Government Services Act* to establish the position of Procurement Ombudsman. The Procurement Ombudsman will review bidding practices, examine complaints from suppliers regarding the proposal process and the administration of government contracts, administer an alternative dispute resolution process and recommend measures designed to increase the effectiveness and transparency of business practices. The Governor in Council must appoint a Procurement Ombudsman for a term of not more than five years. These clauses were amended by the Senate Committee to re-name this officer, called the Procurement Auditor in the original bill, the Procurement Ombudsman. The new name of the officer was accepted by the House. Clause 306 was amended by the Senate Committee to

---

* Authors: Philippe Le Goff, Economics Division; Kristen Douglas, Law and Government Division.

make it mandatory that the Governor in Council appoint the Procurement Ombudsman. This amendment was rejected by the House. The Procurement Ombudsman will deliver an annual report on his or her activities and findings to the Minister of Public Works and Government Services, who will table it in both Houses of Parliament.

The establishment of this new position is one of the key provisions of the new government's procurement policy. The policy will also entail the adoption of a code of conduct for public servants and suppliers, and the embedding of integrity provisions in all contracts (see "New Provisions for Strengthening Integrity," below).

B. Contracts (Clauses 246, 309-313)

1. Condition to Be Included in All Public Opinion Research Contracts

Clause 309 of the bill slightly amends the French version of section 40 of the *Financial Administration Act* (by substituting "contrat" for "marché"), which then becomes section 40(1). The same clause also adds section 40(2), which provides that it is a term of every contract for public opinion research entered into by any person with Her Majesty that a written report will be provided by that person.

2. New Provisions for Strengthening Integrity

Clause 312 of the bill adds new section 42 to the *Financial Administration Act*. The Act will now require that contracts include integrity provisions that ensure action is taken to preclude corruption, collusion, and the payment of contingency fees (to anyone subject to the *Lobbyists Registration Act*) in the procurement process. Another provision establishes the right of the Auditor General of Canada to have access to information or records required in an inquiry into the use of funds provided under funding agreements.

Clause 246 of the bill makes a related amendment to the *Criminal Code*, to prevent those who have defrauded the federal government from benefiting under a contract with the government. As amended by this clause, section 750 of the Code provides that a person convicted of a fraud offence under the Code, or under the relevant sections[(75)] of the *Financial*

(75) The proposed new sections 80(2) and 154.01 of the *Financial Administration Act* (set out in clauses 263 and 271 of Bill C-2).

Administration Act, does not have capacity to contract with the federal government or to "hold office under Her Majesty."(76)

COMING INTO FORCE*

A. Part 1

Clause 108 of Bill C-2 sets out how Part 1 of the legislation will come into force. In its original form, this clause stated that: clauses 63-64 come into force upon Royal Assent; clauses 39 and 40, clauses 44(1) and (2) and clauses 56 and 58 enter into force six months after the bill receives Royal Assent; and clauses 3-34, 65-82, 84-88 and 89-98 come into force upon a day or days to be set by order of the Governor in Council. Clause 108 was amended by the Senate Committee to change the coming into force date for certain provisions of the bill: clauses 41-43, 44(3) and (4), 45-55, 57 and 60-64 will come into force on 1 January of the year following the year in which the bill receives Royal Assent. This date was rejected by the House, which proposed that it be changed to 1 January 2007. A further clarification applying to clauses 63 and 64 (*Income Tax Act* provisions related to political contributions) proposes that those sections be deemed in force as of 1 January 2007, but that they will not apply to contributions made before that date. The new coming into force dates affect the amendments to the *Canada Elections Act* and consequential amendments to the *Income Tax Act*, including the new political contribution limits and the ban on corporate and union contributions. Clause 2 (the proposed Conflict of Interest Act) also comes into force on a day or days to be set by order of the Governor in Council, but it does not apply in respect of the Canada Pension Plan Investment Board unless the lieutenant governor in council of each of at least two-thirds of the included provinces,(77) having in the aggregate not less than two-thirds of the population of all of the included provinces, has signified the consent of that province to those provisions. Clause 99

---

(76) For further information on contracting in the federal government, see Philippe Le Goff, *Procurement, Contracting and Advertising Management in the Federal Government: Latest Developments*, PRB 05-77E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 6 February 2006, http://lpintrabp.parl.gc.ca/lopimages2/prbpubs/bp1000/prb0577-e.asp.

* Author: Peter Niemczak, Law and Government Division.

(77) "Included province" is defined in section 114(1) of the *Canada Pension Plan*. It is "a province other than Yukon, the Northwest Territories or Nunavut, except a province providing a comprehensive pension plan" (i.e., Quebec).

comes into force on the day that section 81 of the *Parliament of Canada Act*, as enacted by clause 28 of the bill, comes into force. The provisions in this Part of the bill not enumerated in clause 108 come into force on the day that the Act receives Royal Assent.

B. Part 2

The provisions in Part 2 of the bill come into force on the day that the Act receives Royal Assent.

C. Part 3

Clause 228 of the bill sets out how Part 3 of the legislation will come into force. This clause states that clauses 141(2), 143-149, 154, 157-160, 163(1), 164-179, 181(2), 183, 184, and 186-193 come into force upon a day or days to be set by order of the Governor in Council. An amendment adding clause 227 to this list was rejected by the House. Sections 3.01 and 3.1 of the *Access to Information Act*, as enacted by clause 142 of the bill, and section 3.01 of the *Privacy Act*, as enacted by clause 182 of the bill, come into force on a day or days to be set by order of the Governor in Council. A new clause 228(2) was added by the House Committee that provides that the definitions of "government institution" in the *Access to Information Act*, as enacted by clause 141(2), and in the *Privacy Act*, as enacted by clause 181(2), do not apply in respect of the Canada Pension Plan Investment Board unless the lieutenant governor in council of each of at least two-thirds of the included provinces,[(78)] having in the aggregate not less than two-thirds of the population of all of the included provinces, has signified the consent of that province to those provisions. The provisions in this Part of the bill not enumerated in clause 228 come into force on the day that the Act receives Royal Assent.

D. Part 4

Clause 300 of the bill sets out how Part 4 of the legislation will come into force. This clause states that clauses 239-242, 244, 246-253, 261, 262(1), 262(3), 263-266, 269, 283-289 and 295 come into force upon a day or days to be set by order of the Governor in Council. The provisions in this Part of the bill not enumerated in clause 300 come into force on the day that the Act receives Royal Assent.

---

(78) *Ibid.*

E. Part 5

Clause 314 of the bill sets out how Part 5 of the legislation will come into force. It states that clauses 306 and 307 come into force upon a day or days to be set by order of the Governor in Council. Clause 312 comes into force on the day that the Act receives Royal Assent but does not apply in respect of the Canada Pension Plan Investment Board unless the lieutenant governor in council of each of at least two-thirds of the included provinces,(79) having in the aggregate not less than two-thirds of the population of all of the included provinces, has signified the consent of that province to the amendment made by that clause. The provisions in this Part of the bill not enumerated in clause 314 come into force on the day that the Act receives Royal Assent.

CONCLUSION

Accountability was one of the key themes of the 2006 election campaign, having increasingly captured the attention of the Canadian public in recent years as a result of a series of controversies over the management of government programs and their costs. The November 2003 report of the Auditor General (tabled in February 2004), which identified issues raised by the Sponsorship Program, and the release of the reports of the Gomery Commission in November 2005 and February 2006, played an important role in identifying accountability processes and the information needed to make them effective as a central focus for reform initiatives.

All five major political parties made accountability-related campaign commitments. The Conservative Party of Canada made its proposed "Federal Accountability Act" its first priority upon election to government.(80) That campaign commitment was described by Prime Minister Harper as having been fulfilled with the April 2006 introduction of a "comprehensive Action Plan"(81) including Bill C-2, a number of supporting policy and other non-legislative measures, and a draft bill to amend the *Access to Information Act*.

---

(79) *Ibid*.

(80) Conservative Party of Canada, *The Federal Accountability Act: Stephen Harper's Commitment to Canadians to Clean Up Government*, 4 November 2005, http://www.conservative.ca/media/20051104-Policy-Accountability3.pdf.

(81) Government of Canada, *Canada's New Government: Federal Accountability Action Plan – Turning a New Leaf*, http://www.faa-lfi.gc.ca/docs/ap-pa/ap-pa_e.pdf.

While many of the items included in the campaign platform are reflected, at least to some degree, in the provisions of Bill C-2, several of its proposals did not require legislative implementation, or for other reasons are not found in the bill. In some areas, the platform committed the Party to specific legislative measures that have not been proposed in Bill C-2. For example, in the access to information area, the campaign document entitled the *Federal Accountability Act* indicated that a series of amendments proposed in 2005 by the Information Commissioner, the Hon. John Reid, would be implemented by the government. Instead, Bill C-2 adds a number of entities to the list of government institutions covered by the *Access to Information Act*, and makes a number of related amendments much more limited in scope than the major overhaul the Commissioner had proposed. The government announced when Bill C-2 was released that rather than advance the full slate of legislative amendments that had been endorsed during the election campaign, a discussion paper and the Commissioner's proposed bill would be forwarded to a parliamentary committee for study.

As amended by the House of Commons, Bill C-2 has been changed in several key areas to respond to concerns raised by witnesses. At least 70 clauses of the bill were affected by committee and report stage amendments. Some of the most significant included amendments that: expanded the scope of the *Access to Information Act* to cover all Crown corporations; removed the $1,000 reward that had been proposed for whistleblowers; removed the requirement for secret ballot votes in the Senate and the House of Commons in the case of appointment processes for Officers of Parliament, and safeguarded parliamentary privilege in some other respects by a general non-derogation clause; and removed band councils under the *Indian Act* from the expanded audit powers of the Auditor General. While there continue to be areas of disagreement among parliamentarians and observers about many of the provisions of Bill C-2, the majority of these changes reflected areas in which a consensus developed over the course of the House Committee's hearings.

As predicted, controversy followed Bill C-2 throughout its study in the Senate Committee and in the Senate. The Senate Committee's hearings were lengthy, and over 150 amendments were made to the bill. Senators were concerned about all aspects of the proposed legislation and made amendments affecting many parts of it, including political financing, ethics, access to information, whistleblower protection, and the new officers created by the bill, including the PBO and the DPP. Some of the amendments were technical adjustments proposed by the government. Other amendments were more substantive.

The Senate Committee's amendments retain the role of the Senate Ethics Officer with respect to the conflict of interest code that applies to Senators, rather than placing that code under the auspices of the new Conflict of Interest and Ethics Commissioner. **The series of amendments necessary for the retention of the Senate Ethics Officer were virtually the only ones with which the House had disagreed that were insisted upon when the Senate replied to the message from the House on 7 December 2006. One other technical amendment was also insisted upon, which excludes the Senate and the House of Commons from the definition of "public sector entity" in the Conflict of Interest Act.**

Among the Senate proposals that are not found in the final version of the bill are amendments to the proposed Conflict of Interest Act, **such as** its extension to cover apparent and potential conflicts of interest, and amendments to limitation periods and reporting requirements.

The Senate Committee had made numerous changes to the provisions applying to the *Access to Information Act*, some of which affect the exclusions provided for the agencies being added to the Act by the bill. Of particular interest was the Committee's addition of a general public interest test. The provision adding the Canadian Wheat Board to the ATIA, which had been inserted by the House of Commons at report stage, would have been deleted by the Senate Committee.

A series of amendments to the political financing provisions of the bill included the addition of: a provision to clarify that fees paid for political conventions are contributions to the political party. Amendments were also made to increase the proposed contribution limits under section 405 of the *Canada Elections Act* from $1,000 to $2,000 in a calendar year to each of a political party; a registered association, nomination contestant or candidate of**:** a political party; a candidate who is not the candidate of a party; and a leadership contestant. The coming into force date for some of these amendments, including the new political contribution limits, was extended by the Senate Committee to 1 January of the year following the year in which the bill receives Royal Assent.

Many of the Senate Committee's most significant amendments, including those discussed in this conclusion, were rejected by the House of Commons in its message to the Senate sent on 21 November 2006. **Upon receipt of that message, the Senate again referred the bill to the Senate Committee, and that Committee heard from several witnesses before deciding to accept the House's position on most of the amendments that the Senate had sought to make to the bill.**

LIST OF ACRONYMS

ATIA – *Access to Information Act* (in force)

CEA – *Canada Elections Act* (in force)

CIA – Conflict of Interest Act (proposed)

DPP – Director of Public Prosecutions

DPPA – Director of Public Prosecutions Act (proposed)

LA – Lobbying Act (proposed new name for the LRA)

LRA – *Lobbyists Registration Act* (in force)

PBO – Parliamentary Budget Officer

POCA – *Parliament of Canada Act* (in force)

POH – public office holder

PSDPA – *Public Servants Disclosure Protection Act* (in force)

PSEA – *Public Service Employment Act* (in force)