

**FEDERAL COURT  
SIMPLIFIED ACTION**

**BETWEEN:**

**EDGAR SCHMIDT**

Plaintiff

-and-

**ATTORNEY GENERAL OF CANADA**

Defendant

**AFFIDAVIT OF M. DEBORAH MacNAIR**

I, M. Deborah MacNair, of the City of Ottawa, in the Province of Ontario, **MAKE OATH  
AND SAY:**

1. I am employed as Corporate Counsel with the Department of Justice of Canada ("Justice Canada"). As a result of my employment with Justice Canada, as further described below and therefore I have personal knowledge of the facts deposed to.

2. In this Affidavit, I describe the ethical dimensions of being employed as a government counsel. In that regard, I examine the issues of the identification of the client, the general duties of government counsel and, in particular, the role of legislative drafters.

**I. My background and experience in Legal Ethics and Professional Responsibility**

3. I received a B.A. (Honours) from Mount Allison University in 1974, an LL.B from the University of New Brunswick in 1977, a Diploma in Legislative Drafting from the University of Ottawa in 1983 and a Masters of Law (LL.M) from the University of

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Ottawa in 2000. In order to fulfill the requirements for my graduate studies, I wrote a thesis examining the role and ethical obligations of legislative drafters as government lawyers entitled "The Case for Introducing Specific Ethical Standards for Legislative Drafters."

4. As Corporate Counsel for Justice Canada, I provide legal advisory services to the Government of Canada and to Justice Canada management on various matters within the mandate of the Minister of Justice and Attorney General of Canada (the Minister") under the *Department of Justice Act* or that arise as part of regular government business. This includes providing legal advice and services related to issues concerning legal ethics and professional responsibilities for government counsel. I have performed these functions, which have varied in scope over time, since approximately 1993.

5. I have lectured and published widely on the role of government counsel, legal ethics, and professional responsibility. For example, I am the author of *Conflicts of Interest: Principles for the Legal Profession*, a book which I have updated at least once or twice a year since its first publication in 2005. I was also a part-time lecturer for the 2014 fall term at the Faculty of Law at the University of Ottawa for a course on Legal Ethics and Professional Responsibility for second and third year law students.

**II. The dual role of the Minister of Justice and Attorney General of Canada**

6. The *Department of Justice Act* entrusts a dual role to the Minister who presides over the Department created by the statute. The roles and responsibilities for the Minister are set out principally in sections 4 and 5. The duality of the roles is reflected in two ways which I describe further in paragraphs 7 and 8.

7. As Minister of Justice, under section 4 of the *Department of Justice Act*, the Minister is the official legal advisor of the Governor General and is a member of the Queen's Privy Council for Canada; he ensures the administration of public affairs

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conforms with the law; he oversees the administration of the system of justice; he acts as steward of federal statutes and shares responsibility for other statutes.

8. The Attorney General represents the Crown in all litigation that falls under his mandate described under section 5 as "for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada". Since 2006, the Attorney General has been responsible for a separate department created under the *Director of Public Prosecutions Act*, the Office of the Director of Public Prosecutions, which has the responsibility to conduct criminal prosecutions.

**III. The client of the Minister of Justice**

9. Sections 4 and 5 of the *Department of Justice Act* set out the powers, functions and duties of the Minister of Justice and Attorney General of Canada. The reference to Her Majesty the Queen in Right of Canada ("the Queen") must be understood in the broader context within which it arises, informed by the written text of the Constitution and unwritten constitutional principles.

10. When used in the context of the *Department of Justice Act*, the "Queen" refers to the legal concept of the executive branch of government. This is apparent from sections 9 to 13 of the *Constitution Act, 1867* which vests the executive government in the Queen, acting with the advice of Her Privy Council for Canada (referred to as the "Queen's Privy Council for Canada"). Those sections provide the legal foundation of the principle of responsible government, one of the tenets of Canada's democratic system.

11. There are two unwritten constitutional principles which provide additional context. The principle of separation of powers confirms that the client of the Minister is only the executive branch of government and does not include the judicial or legislative branches. The unwritten constitutional principle, and which is fundamental to democracy, provides that the executive branch is represented by the government of the day - in practice, the political party that holds the majority of the seats in the House of

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Commons, as elected by its citizens.

**IV. Government counsel**

12. To support the Minister in his dual role, Justice Canada employs as legal practitioners and managers members in good standing of a provincial or territorial law society or of the *Chambre des notaires du Québec*. For ease of reference, I refer herein to all such persons as "government counsel".

13. For a variety of reasons, including the need for independence of some tribunals and commissions, the potential for conflict of interest, and the need for Crown corporations to conduct of arms-length commercial operations, the Minister cannot be the single legal advisor to the entire executive branch of government. In regard to the remaining parts of government that do not use Justice Canada counsel, the legal advisors are hired separately as in-house counsel or the agencies affected retain legal agents.

14. Government counsel are accepted by tradition as the official lawyers representing the Minister of Justice and the Attorney General of Canada for the core administration of the public service which generally includes the main government departments. These counsel are employed by the Queen, as represented by Treasury Board, and appointed under the auspices of the Public Service Commission in accordance with the requirements of the *Public Service Employment Act* to positions within the public service. Those positions are generally classified as a distinct law group (LP – formerly LA – and LC). It is a condition of appointment that the government counsel hold an active practicing status with one of the 14 law societies in Canada.

15. Justice Canada has a labour-management regime in place. Some counsel, such as the plaintiff, are appointed as managers or are in excluded positions as they are in a confidential relationship to the employer, Treasury Board of Canada. Other counsel are members of a union, the Association of Justice Counsel, which was

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certified as their bargaining agent in 2006 and are covered by a collective agreement.

16. As stated in paragraph 12, Justice Canada is not the exclusive provider of legal services to all of government. There are other counsel employed within the federal public service, for separate employers and in Parliament. They perform counsel functions for a variety of agencies, commissions, boards or tribunals and the Senate and the House of Commons but these counsel do not represent the Minister of Justice and Attorney General of Canada.

17. As employees in the public service, government counsel have an important role to play in upholding the values of neutrality, independence, objectivity and integrity of the public service. Taken together, those values support the unwritten constitutional principles of democracy and the rule of law by ensuring that the public service provides loyal service to the government of the day and individually to Ministers who answer to the Canadian public.

**V. The instructing client of government counsel**

18. As instructions must be provided by the 'human' client, the authority to instruct is exercised by the public official who has the legal authority, generally under the authority of a statute, delegation instrument or appointment to a position in the public service, to decide the Crown's interest in the matter.

19. Section 10 of the *Constitution Act, 1867* as well as Article II of the *Letters Patent Constituting the Office of the Governor General of Canada* confirm that the powers of the Queen are delegated. Subsection 24(2) of the *Interpretation Act* further clarifies that delegation is to an official in a capacity appropriate to the doing of the act or thing. As a result, the ultimate 'human' client of governmental counsel varies according to the context.

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20. Government counsel's ethical duties must be looked at in this organizational and institutional context. Some confuse the status a government counsel as a public servant with their role as a lawyer and conclude that Canadians at large are the government counsel's client. They argue that the rule of law protects citizens and government counsel uphold the rule of law. While the Minister of Justice is politically accountable to the public, a direct relationship does not exist between government counsel and the public in Canada. The counsel's client is the Crown, as represented by government.

**VI. The duties of government counsel**

21. A government counsel must be both a loyal public servant and observe their professional duties as a member of a law society, to the extent that the law society obligations apply to a federal counsel. These obligations are sometimes improperly characterized as ethical ones, given the amorphous and diverse nature of public interest obligations for all public officials.

22. The duty to adhere to ethical standards is a fundamental tenet on which the professional standards of all lawyers are built. While government counsel may hold a variety of roles, including roles that are different than those of counsel in private practice, the legal ethical duties to which they are held to are the same as those of their counterparts in the private bar. These are found in the common law, employment standards and the law society codes of professional conduct.

23. As public servants, government counsel are governed by additional obligations. These obligations form part of their terms and conditions of employment. They implement the core elements of democratic values, ethical values, professionalism and people and they include the following:

- a. *An oath of office.* The *Public Service Employment Act* requires that persons hired outside of the public service shall take and subscribe an oath or solemn affirmation, and the Oath of Office and Secrecy on their

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appointment, before they take up their obligations. I attach, as Exhibit "1" of my Affidavit, a copy of the oath of office that the plaintiff took.

- b. *The Policy on Government Security.* This policy aims to ensure the continued protection of information which the Government believes warrants protection. The policy explains what type of information needs to be protected and the concomitant (corresponding) level of protection that information warrants. It lastly, requires that public servants cannot have access to government information unless they meet certain government security standards and that they need to know this information to do their work. This policy is supplemented by departmental directives, such as Justice Canada's *Information Classification and Protection Guide*. Combined, these policies establish the Government's assessment that unauthorized disclosure of information subject to the solicitor-client privilege or draft legislation will cause serious injury to a public interest. For that reason, legislative counsel undertake a demanding obligation to protect from unauthorized disclosure the information imparted to them in the course of their employment.
- c. *Public servants are governed by a specific ethical code.* Since joining Justice Canada as counsel, the plaintiff was subject to codes of conduct and post-employment obligations, in one form or another. These codes describe all the values governing the conduct of public servants and their obligations after leaving the federal public service. All versions of the code are built on the requirements of acknowledgement, disclosure and avoidance and apply to government counsel. Any breach of the obligations could be punishable with disciplinary action:
  - i. Between October 1985 and August 31, 2003, the plaintiff was subject to the Treasury Board *Conflict of Interest and Post-Employment Code for the Public Service*.

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- ii. From September 1, 2003, to April 1, 2012, the plaintiff was subject to the Treasury Board *Values and Ethics Code for the Public Service*. I attach as Exhibit "2" of my Affidavit a copy of this document.
- iii. From April 2, 2012 to the date of his retirement on May 15, 2013, the plaintiff was subject to the Treasury Board *Values and Ethics Code for the Public Sector*, both before and after his retirement, and to the Treasury Board Policy on *Conflict of Interest and Post-Employment*. I attach copies of these documents as Exhibits "3" and "4" to my Affidavit.
- iv. From February 26, 2013, to the date of his retirement, the plaintiff was subject to the *Values and Ethics Code of the Department of Justice*. I attach a copy of this document as Exhibit "5" of my Affidavit.

24. The secrecy demanded from public servants serves to enhance the process of democratic governance. It supports and promotes the values underlying the confidence demanded of members of Cabinet.

25. While acting under the authority of the Minister of Justice, the role of government counsel is to uphold the rule of law; to respect, and to encourage respect for, the law and the Constitution; to understand and respect their relationship with the Minister within the system for the administration of justice and to act in the public interest. While acting under the authority of the Attorney General, counsel perform a similar role in the context of litigation as they do for the Minister of Justice. Within this context, and like any counsel, litigators are expected to fearlessly and resolutely defend the interest of their client.

26. In fulfilling the obligations as described in paragraph 23, the 'public interest' informs the duties of government counsel: government counsel interpret and advise on



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the law and the Constitution objectively; they advise on the public interest from a lawyer's perspective while respecting the client's role and authority; they are expected to carry out their duties with integrity; and to act impartially and independently.

27. The 2013 *Values and Ethics Code of the Department of Justice* (Exhibit "5" to my Affidavit) and the 2003 *Values and Ethics Code for the Public Service* (Exhibit "2" to my Affidavit) both expressly recognize that professionals could be subject to different sets of professional requirements. As an example, in the section of the 2013 *Values and Ethics Code of the Department of Justice* entitled "Application" it is stated that "In addition to the requirements set out in the Code, public servants must comply with any applicable specific codes and standards of their profession".

28. Government counsel operate in unique forums and confront issues with public policy overtones. They are often called upon to play delicate roles dealing with significant issues of public import or where there may be significant consequences in light of the fact that the interpretation of public law involves the use of government power in a democratic setting. As a result, government counsel may be drawn into unique ethical dilemmas that involve the interplay of the law and questions of values and morals. For counsel directly involved in these situations, it may mean being prepared to say no to certain courses of action even though it may be difficult to do so; conversely, it may also mean to undertake a legal representation despite the unpopularity of the government's position.

29. Aside from legislation or policies, government counsel are still obliged to respect the law society codes of professional conduct to the extent these standards form part of their terms and conditions of employment, the constitutional division of power and the jurisdiction of the law society regarding governance.

30. It is recognized at common law that the law society of the appropriate jurisdiction supervises the ethical conduct of government counsel and has authority to discipline them. However, it is unclear where the exact boundaries are drawn over

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"ethical conduct" between the jurisdiction of the employer of the government counsel, in this case Treasury Board, and the law society.

**VII. The Role of Legislative Drafters**

31. Legislative drafters perform the role as independent advisors to the Crown on behalf of the Minister of Justice and Attorney General of Canada, rather than as corporate counsel to a specific government department. As a general rule, legislative drafters are members of the law group as described in paragraph 13 above and have similar ethical duties to those of other government counsel in Justice Canada.

32. Like other government counsel, legislative drafters owe a duty of loyalty to their client, which includes the duty to avoid conflicts of interest, the duty of candour and the duty of commitment to the client's cause. As is the case for other Justice Canada counsel, legislative drafters owe a duty of confidentiality and the duty to protect solicitor-client information. As public servants, legislative drafters owe a duty of loyalty to the government of the day as well as the duty to protect confidential information from disclosure.

33. In some respect, the capacity of loyal service to all Ministers is heightened for legislative drafters. Electors have voted the government of the day into power and elected governments shape policy and introduce legislation as they think best. Legislative drafters are at the forefront of the largely confidential process through which policy is translated into draft legislation, a task they must perform with professionalism, without regard to their own political opinions or personal views.

34. Legislative drafters do not play an active part in the policy process that precedes the approval of a policy, the Cabinet decision-making process or the parliamentary process that follows. If they are involved, it would normally be to clarify, suggest or explain. They should provide only factual explanations and they should not present policy positions or personal views.

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35. The legislative drafter does not control the final product that is tabled in Parliament. Before a statute or regulation becomes law, there will be many who will provide input, including officials in the government department that provided instructions, officials in Justice Canada, members of Parliament, consultants, and members of the public.

36. As legislative drafters, their first duty is to give effect to the instructions they have received from their client, the Crown, by way of meetings and consultations with government officials. An equally important part of their job is to ensure that the rule of law is maintained in the legislative drafting process.

37. Legislative drafters in Justice Canada report through a management chain of authority to the Deputy Minister and ultimately the Minister. It is the Minister of Justice who reports to Parliament that he has ascertained an inconsistency between a provision of a government bill and guaranteed rights and legislative drafters are part of the group of legal advisors who draw any legal problems to the attention of the Deputy Minister and the Minister before the Minister makes his own assessment.

38. If a legislative drafter cannot remain loyal to the client, and respect the instructions of public servants and public officials, the ultimate remedy is for counsel to withdraw from the employment relationship and resign. Where there is disagreement with the client, like other public servants or government counsel, legislative drafters have three options. First, they can strongly present their views and put forward other options for consideration. Second, if this does not resolve the matter to the employee's satisfaction, the next step is for the employee to ask to be assigned to different tasks. Lastly, in extreme cases, where these options have not worked, the employee can resign.

39. That is the only accepted ethical course of action for a counsel, as appears both from section 3.7 of the *Code of Professional Conduct* of the Manitoba Law Society, to which the plaintiff belongs, and from Chapter XII of the *Code of Professional Conduct*


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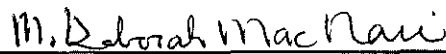
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adopted by the Canadian Bar Association in 2009. I attach, as Exhibit "6" of my Affidavit, a copy of the relevant excerpts of the *Code of Professional Conduct* of the Manitoba Law Society and as Exhibit "7" a copy of the relevant excerpts of the Canadian Bar Association *Code of Professional Conduct*.

40. Whatever course of action a legislative counsel elects to follow, the counsel still owes a duty of loyalty to the Crown both as a public servant and as a government counsel and must also respect the various obligations that flow from the counsel's terms and conditions of employment. That includes the obligation to keep confidential the information imparted by his client in the course of his employment.

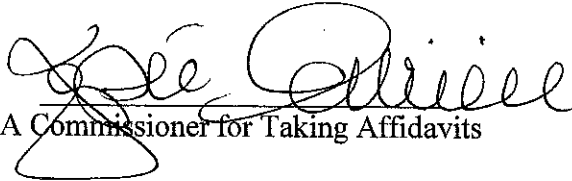
SWORN before me at the City of )  
Ottawa, in the Judicial District of )  
Ottawa-Carleton, in the Province of )  
Ontario, this 28<sup>th</sup> day of May, 2015 )

  
\_\_\_\_\_  
Commissioner for Taking Affidavits in )  
the Province of Ontario )

  
\_\_\_\_\_  
M. Deborah MacNair

Josée Carrière, a Commissioner, etc.,  
within or outside the Province of Ontario,  
for the Government of Canada,  
Department of Justice.  
Expires March 28, 2016.

This is Exhibit "1" referred to  
in the affidavit of Deborah MacNair  
sworn before me, this 28<sup>th</sup> day  
of May, 2015

  
A Commissioner for Taking Affidavits

Josée Carrière, a Commissioner, etc.,  
within or outside the Province of Ontario,  
for the Government of Canada,  
Department of Justice.  
Expires March 26, 2016.



Gouvernement  
of Canada

Gouvernement  
du Canada

SOLEMN AFFIRMATION

AFFIRMATION SOLENNELLE

Family Name - Nom de famille

*Schmidt*

Given Names - Prénoms

*Edgar H*



SOLEMN AFFIRMATION OF ALLEGIANCE

AFFIRMATION SOLENNELLE D'ALLÉGEANCE

I do affirm that I will be faithful and bear true allegiance  
to Her Majesty Queen Elizabeth the Second, Queen of Canada,  
Her Heirs and Successors.

J'affirme solennellement que je serai fidèle et porterai  
sincère allégeance à Sa Majesté la Reine Elizabeth Deux,  
Reine du Canada, à ses héritiers et successeurs.

Signature

SOLEMN AFFIRMATION OF OFFICE AND SECRECY

AFFIRMATION SOLENNELLE ET ENGAGEMENT AU  
SECRET PROFESSIONNEL

I solemnly and sincerely affirm that I will faithfully and  
honestly fulfill the duties that devolve on me by reason  
of my employment in the Public Service and that I will  
not, without due authority in that behalf, disclose or  
make known any matter that comes to my knowledge by  
reason of such employment.

J'affirme solennellement et sincèrement que je remplirai  
fidèlement et honnêtement les fonctions que me confère  
mon emploi dans la fonction publique et que, sauf  
autorisation expresse, je ne révélerai rien de ce qui sera  
parvenu à ma connaissance en conséquence de cet emploi.

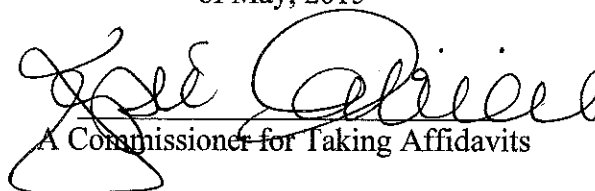
Signature

Affirmed and subscribed before me at the place  
and date mentioned below.

Affirmé et souscrit devant moi à l'endroit et à la date  
mentionnés ci-dessus

City - Ville <i>Ottawa</i>	Province <i>Ont</i>	Date <i>20/5/98</i>
Department - Ministère <i>Justice</i>	Signature of person administering affirmations Signature de la personne recevant les affirmations <i>Helene Cloutier</i>	

This is Exhibit "2" referred to  
in the affidavit of Deborah MacNair  
sworn before me, this 28<sup>th</sup> day  
of May, 2015



A Commissioner for Taking Affidavits

Josée Carrière, a Commissioner, etc.,  
within or outside the Province of Ontario,  
for the Government of Canada,  
Department of Justice.  
Expires March 26, 2016.



Treasury Board of Canada  
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du Canada

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# Values and Ethics Code for the Public Service

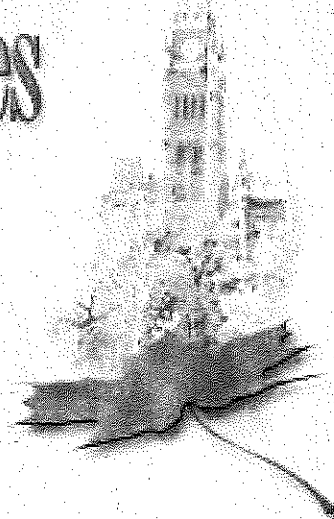


Canada



Democratic, Professional, Ethical and People Values

Values  
and  
Ethics  
Code  
for the  
Public Service



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# Statement of Public Service Values and Ethics

## 1

### **The Role of the Public Service of Canada**

The Public Service of Canada is an important national institution, part of the essential framework of Canadian parliamentary democracy. Through the support they provide to the duly constituted government, public servants contribute in a fundamental way to good government, to democracy and to Canadian society.



The role of the Public Service is to assist the Government of Canada to provide for peace, order and good government. The *Constitution of Canada* and the principles of responsible government provide the foundation for Public Service roles, responsibilities and values.

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## 6

The democratic mission of the Public Service is to assist Ministers, under law, to serve the public interest.

### **Objectives of this Code**

The *Values and Ethics Code for the Public Service* sets forth the values and ethics of public service to guide and support public servants in all their professional activities. It will serve to maintain and enhance public confidence in the integrity of the Public Service. The Code will also serve to strengthen respect for, and appreciation of, the role played by the Public Service within Canadian democracy.

The Code sets out Public Service values as well as Conflict of Interest and Post-Employment Measures.

The Code should be read in the context of the duties and responsibilities set out in *A Guide for Ministers and Secretaries of State*.

Ministers are responsible for preserving public confidence in the integrity of management and operations within their departments and for

maintaining the tradition of political neutrality of the Public Service and its continuing ability to provide professional, candid and frank advice.

### **Public Service Values**

Public servants shall be guided in their work and their professional conduct by a balanced framework of public service values: democratic, professional, ethical and people values.

These families of values are not distinct but overlap. They are perspectives from which to observe the universe of Public Service values.

**Democratic Values:** *Helping Ministers, under law, to serve the public interest.*

- Public servants shall give honest and impartial advice and make all information relevant to a decision available to Ministers.
- Public servants shall loyally implement ministerial decisions, lawfully taken.
- Public servants shall support both individual and collective ministerial accountability and provide Parliament and Canadians with information on the results of their work.



**Professional Values:** *Serving with competence, excellence, efficiency, objectivity and impartiality.*

- Public servants must work within the laws of Canada and maintain the tradition of the political neutrality of the Public Service.
- Public servants shall endeavour to ensure the proper, effective and efficient use of public money.
- In the Public Service, how ends are achieved should be as important as the achievements themselves.
- Public servants should constantly renew their commitment to serve Canadians by continually improving the quality of service, by adapting to changing needs through innovation, and by improving the efficiency and effectiveness of government programs and services offered in both official languages.
- Public servants should also strive to ensure that the value of transparency in government is upheld while respecting their duties of confidentiality under the law.

**Ethical Values:** *Acting at all times in such a way as to uphold the public trust.*

- Public servants shall perform their duties and arrange their private affairs so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced.
- Public servants shall act at all times in a manner that will bear the closest public scrutiny; an obligation that is not fully discharged by simply acting within the law.
- Public servants, in fulfilling their official duties and responsibilities, shall make decisions in the public interest.
- If a conflict should arise between the private interests and the official duties of a public servant, the conflict shall be resolved in favour of the public interest.

**People Values:** *Demonstrating respect, fairness and courtesy in their dealings with both citizens and fellow public servants.*

- Respect for human dignity and the value of every person should always inspire the exercise of authority and responsibility.
- People values should reinforce the wider range of Public Service values. Those who are treated with fairness and civility will be motivated to display these values in their own conduct.
- Public Service organizations should be led through participation, openness and communication and with respect for diversity and for the official languages of Canada.
- Appointment decisions in the Public Service shall be based on merit.
- Public Service values should play a key role in recruitment, evaluation and promotion.

**Application**

This Code applies to all public servants working in departments, agencies and other public institutions listed in Part I, Schedule I, of the *Public Service Staff Relations Act*.

This Code is a policy of the Government of Canada. Public service institutions not covered by this Code should respect its spirit and should adopt similar provisions for their organizations.

**Responsibilities, Authorities  
and Accountabilities****Overall Responsibility of all Public Servants**

All public service activities should be consistent with the *Values and Ethics Code for the Public Service*. Where questions arise about its application, see Chapter 4, "Avenues of Resolution."

In addition to the stipulations outlined in this Code, public servants are also required to observe any specific conduct requirements contained in the statutes governing their particular department or organization and

their profession, where applicable. They are also required to observe the relevant provisions of more general application including the following:

- *Access to Information Act*;
- *Criminal Code of Canada*;
- *Financial Administration Act*;
- *Official Languages Act* and Regulations;
- *Privacy Act*;
- *Public Service Employment Act*;
- *Public Service Staff Relations Act*.

Related Treasury Board policies:

- *Contracting Policy*;
- *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*;
- *Policy on the Prevention and Resolution of Harassment in the Workplace*.

### **Public Servants**

This Code forms part of the conditions of employment in the Public Service of Canada.

At the time of signing their letter of offer, public servants acknowledge that the *Values and Ethics Code for the Public Service* is a condition of employment. All public servants are responsible for ensuring that they comply with this Code

and that they exemplify, in all their actions and behaviours, the values of public service. In particular, they have the following obligations:

- a) Public servants must report, within 60 days of their first appointment or any subsequent appointment, transfer or deployment, all outside activities, assets, and direct and contingent liabilities that might give rise to a conflict of interest with respect to their official duties. To this end, a Confidential Report must be filed with their Deputy Head.
- b) Every time a major change occurs in the personal affairs or official duties of public servants, they must review their obligations under this Code. If a real, apparent or potential conflict of interest exists, they must file a new Confidential Report with their Deputy Head.
- c) When negotiating financial arrangements with outside parties, public servants must assure compliance with the Conflict of Interest and Post-Employment Measures in accordance with directives on this matter issued by Treasury Board. When in doubt, public servants must immediately report the situation to their supervisors in order to seek advice or direction on how to proceed.

When faced with an ethical dilemma, public servants are encouraged to use the opportunities and mechanisms established by their Deputy Head to raise, discuss and resolve issues of concern related to this Code.

Public servants who feel they are being asked to act in a way that is inconsistent with the values and ethics set out in Chapter 1 of this Code should first attempt to raise the matter using the usual reporting relationship. Further avenues for resolution are contained in Chapter 4 of this Code.

**Deputy Heads**

Deputy Heads and senior managers have a particular responsibility to exemplify, in their actions and behaviours, the values of public service. They have a duty to infuse these values into all aspects of the work of their organizations. It is expected that they will take special care to ensure that they comply at all times with both the spirit and the specific requirements of this Code.

In particular, Deputy Heads have the following obligations:

- a) To ensure that the letter of offer, for an initial appointment, includes the following: "You will find enclosed a copy of the *Values and Ethics Code for the Public Service*. This Code is a key policy for the management of human resources and is part of your conditions of employment." Deputy Heads must ensure that public servants are provided with a copy of the Code on any subsequent appointment. They must ensure that public servants in their organization are informed of the requirements of this Code on an annual basis.
- b) To encourage and maintain an ongoing dialogue on public service values and ethics within their organizations, in a manner that is relevant to the specific issues and challenges encountered by their organizations.
- c) To ensure that mechanisms and assistance are in place to help public servants raise, discuss and resolve issues of concern related to this Code. This includes designating a senior official to assist public servants to resolve issues arising from the application of the Code.



- d) To determine the appropriate method for a public servant to comply with the Code, as set out in Chapters 2 and 3, in order to avoid conflicts of interest. In doing so, the Deputy Head will try to achieve mutual agreement with the public servant.
- e) To ensure that the personal information in Confidential Reports is secured in a central repository and treated in complete confidence, in accordance with the *Privacy Act*.

Deputy Heads may add compliance measures beyond those specified in this Code to reflect their department's particular responsibilities or the statutes governing its operations. They must consult with the Treasury Board of Canada Secretariat and ensure that bargaining agents are consulted at the departmental level in advance of implementing new measures. The Deputy Head will inform the Treasury Board of Canada Secretariat, in writing, of any additional measures and their effective dates.

Deputy Heads may delegate responsibilities and authorities for the implementation of the Code, but they may not delegate their accountability

for ensuring that the Code is fully upheld and advanced within their organization or for the specific matters outlined in this section.

#### **Treasury Board**

Treasury Board will ensure through its Secretariat that information and educational materials related to the *Values and Ethics Code for the Public Service* are widely available. It will also maintain an advisory support service for Deputy Heads and for designated departmental officials on the interpretation and promotion of the Code.

Treasury Board, through its Secretariat, will monitor the implementation of the Code in departments and agencies. On a regular basis, Treasury Board, through its Secretariat, will review the performance of departments in the implementation of the Code through its modern management accountability framework.

The *Values and Ethics Code for the Public Service* will be subject to a review five years after it comes into effect.

**Public Service Integrity Officer**

The role of the Public Service Integrity Officer is to receive, record and review disclosures of wrongdoing in the workplace, including breaches to the Code, and to make recommendations where warranted to Deputy Heads for resolution. Further, the Public Service Integrity Officer may report on any cases dealing with breaches of the Code as part of his or her annual report to the President of the Privy Council that is tabled in Parliament.

**Effective Date**

The effective date of the *Values and Ethics Code for the Public Service* is September 1, 2003.

## Conflict of Interest Measures

2

### **Objective**

The objective of these measures is to establish rules of conduct respecting conflict of interest and to minimize the possibility of conflicts arising between private interests and public service duties of public servants. These measures serve to uphold the Public Service Values set out in Chapter 1, as well as the Post-Employment Measures in Chapter 3.



### **Measures to Prevent Conflict of Interest**

Avoiding and preventing situations that could give rise to a conflict of interest, or the appearance of a conflict of interest, is one of the primary means by which a public servant maintains public confidence in the impartiality and objectivity of the Public Service.

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These Conflict of Interest Measures are adopted both to protect public servants from conflict of interest allegations and to help them avoid situations of risk. Conflict of interest does not relate exclusively to matters concerning financial transactions and the transfer of economic benefit. While financial activity is important, it is not the sole source of potential conflict of interest situations.

It is impossible to prescribe a remedy for every situation that could give rise to a real, apparent or potential conflict. When in doubt, public servants should seek guidance from their manager, from the senior official designated by the Deputy Head, or from the Deputy Head, and refer to the Public Service Values stated in Chapter 1 as well as the following measures as benchmarks against which to gauge appropriate action.

Public servants have the following overall responsibilities:

- a) In carrying out their official duties, public servants should arrange their private affairs in a manner that will prevent real, apparent or potential conflicts of interest from arising.

- b) If a conflict does arise between the private interests and the official duties of a public servant, the conflict should be resolved in favour of the public interest.

Public servants also have the following specific duties:

- a) They should not have private interests, other than those permitted pursuant to these measures, that would be affected particularly or significantly by government actions in which they participate.
- b) They should not solicit or accept transfers of economic benefit.
- c) They should not step out of their official roles to assist private entities or persons in their dealings with the government where this would result in preferential treatment to the entities or persons.
- d) They should not knowingly take advantage of, or benefit from, information that is obtained in the course of their official duties and that is not generally available to the public.

- e) They should not directly or indirectly use, or allow the use of, government property of any kind, including property leased to the government, for anything other than officially approved activities.

### **Methods of Compliance**

For a public servant to comply with these measures, it will usually be sufficient to submit a Confidential Report to the Deputy Head. The Confidential Report outlines the public servant's ownership of assets, receipt of gifts, hospitality or other benefits, or participation in any outside employment or activities that could give rise to a conflict of interest.

There will be instances, however, where other measures will be necessary. These include the following:

- a) avoiding or withdrawing from activities or situations that would place the public servant in real, potential or apparent conflict of interest with his or her official duties; and

- b) having an asset sold at arm's length or placed in a blind trust where continued ownership would constitute a real, apparent or potential conflict of interest with the public servant's official duties.

In such cases, the Deputy Head will make the decision and communicate it to the public servant. In determining appropriate action, the Deputy Head will try to achieve mutual agreement with the public servant in question and will take into account such factors as:

- a) the public servant's specific responsibilities;
- b) the value and types of assets and interests involved; and
- c) the actual costs to be incurred by divesting the assets and interests, as opposed to the potential that the assets and interests represent for a conflict of interest.

#### **Assets**

The types of assets and interests that should be included in a Confidential Report, those that need not be declared, as well as procedures for divesting assets are all set out in Appendix A.



It is to be noted that a public servant may not sell or transfer assets to family members or others for purposes of circumventing the compliance measures.

**Outside Employment or Activities**

Public servants may engage in employment outside the Public Service and take part in outside activities unless the employment or activities are likely to give rise to a conflict of interest or in any way undermine the neutrality of the Public Service.

Where outside employment or activities might subject public servants to demands incompatible with their official duties, or cast doubt on their ability to perform their duties in a completely objective manner, they shall submit a Confidential Report to their Deputy Head. The Deputy Head may require that the outside activities be curtailed, modified or terminated if it is determined that real, apparent or potential conflict of interest exists.

**Gifts, Hospitality and Other Benefits**

Public servants are called upon to use their best judgment to avoid situations of real or perceived conflict. In doing so, public servants should consider the following criteria on gifts, hospitality and other benefits, keeping in mind the full context of this Code.

Public servants shall not accept or solicit any gifts, hospitality or other benefits that may have a real or apparent influence on their objectivity in carrying out their official duties or that may place them under obligation to the donor. This includes free or discounted admission to sporting and cultural events arising out of an actual or potential business relationship directly related to the public servant's official duties.

The acceptance of gifts, hospitality and other benefits is permissible if they

- a) are infrequent and of minimal value (low-cost promotional objects, simple meals, souvenirs with no cash value);
- b) arise out of activities or events related to the official duties of the public servant concerned;

- c) are within the normal standards of courtesy, hospitality or protocol; and
- d) do not compromise or appear to compromise in any way the integrity of the public servant concerned or his or her organization.

Where it is impossible to decline gifts, hospitality and other benefits that do not meet the principles set out above, or where it is believed that there is sufficient benefit to the organization to warrant acceptance of certain types of hospitality, a public servant shall seek written direction from their Deputy Head. The Deputy Head will then notify the public servant in writing whether the gifts, hospitality and other benefits are to be declined or retained by the department, donated to charity, disposed of, or retained by the public servant concerned.

#### **Solicitation**

At no time should public servants solicit gifts, hospitality, other benefits or transfers of economic value from a person, group or organization in the private sector who has dealings with the government.

In the case of fundraising for charitable organizations, public servants should ensure that they have prior authorization from their Deputy Head to solicit donations, prizes or contributions in kind from external organizations or individuals. The Deputy Head may require that the activities be curtailed, modified or terminated where it is determined that there is a real or apparent conflict of interest or an obligation to the donor.

#### Legal framework

The above provisions are designed to ensure the *Values and Ethics Code for the Public Service* is consistent with paragraph 121(1)(c) of the *Criminal Code*, which states the following:

*... every one commits an offence who, being an official or employee of the government, demands, accepts, or offers or agrees to accept, from a person who has dealings with the government, a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through any one for his benefit, unless he has the consent in writing of the head of the branch of government that employs him or of which he is an official, the proof of which lies on him.*

**Avoidance of Preferential Treatment**

When participating in any decision making related to a staffing process, public servants shall ensure that they do not grant preferential treatment or assistance to family or friends.

When making decisions that will result in a financial award to an external party, public servants shall not grant preferential treatment or assistance to family or friends.

Public servants should not offer any assistance to entities or persons that have dealings with the government, where this assistance is not part of their official duties, without obtaining prior authorization from their designated superior and complying with the conditions for that authorization.

Providing information that is easily accessible to the public to relatives or friends or to entities in which public servants or their family members or friends have interests is not considered preferential treatment.

## Post-Employment Measures

3

### **Objective**

The objective of these measures is to establish rules of conduct respecting post-employment. These measures complement the Public Service Values set out in Chapter 1, as well as the Conflict of Interest Measures in Chapter 2.

### **Overall Responsibility**

Without unduly restricting their ability to seek other employment, former public servants should undertake to minimize the possibility of real, apparent or potential conflicts of interest between their new employment and their most recent responsibilities within the federal public service. Before leaving employment, public servants should disclose their intention of future employment and discuss potential conflicts with their Deputy Head.

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### **Application**

The overall responsibility cited above applies to all public servants covered by the Code. The measures that follow apply specifically to those public servants staffed in executive positions (EX) or their equivalent as well as EX minus 1 and EX minus 2 positions and their equivalent (e.g., PM-06, IS-05, AS-07).

A Deputy Head may designate other positions as being subject to these measures (where the position involves official duties that raise post-employment concerns), or exclude positions from the application of the post-employment measures (when the official duties of these positions do not raise concerns for post-employment). Before doing this, the Deputy Head must consult the Treasury Board of Canada Secretariat as well as appropriate bargaining agents when applicable.

### **Before Leaving Office**

Public servants must disclose, in a Confidential Report to their Deputy Head, all firm offers of employment that could place them in a real,

apparent or potential conflict of interest situation. They must also disclose immediately the acceptance of any such offer.

**Limitation Period**

Former public servants shall not, within a period of one year after leaving office

- a) accept appointment to a board of directors of, or employment with, entities with which they personally, or through their subordinates, had significant official dealings during the period of one year immediately prior to the termination of their service;
- b) make representations for, or on behalf of, persons to any department or organization with which they personally, or through their subordinates, had significant official dealings during the period of one year immediately prior to the termination of their service; or
- c) give advice to their clients using information that is not available to the public concerning the programs or policies of the departments or organizations with which they were employed or with which they had a direct and substantial relationship.



**Reduction of Limitation Period**

A Deputy Head has the authority to reduce or waive the limitation period of employment for a public servant or former public servant. Such a decision should take into consideration the following:

- a) the circumstances under which the termination of their service occurred;
- b) the general employment prospects of the public servant or former public servant;
- c) the significance to the government of information possessed by the public servant or former public servant by virtue of that individual's position in the Public Service;
- d) the desirability of a rapid transfer of the public servant's or former public servant's knowledge and skills from the government to private, other governmental or non-governmental sectors;
- e) the degree to which the new employer might gain unfair commercial or private advantage by hiring the public servant or former public servant; and

- f) the authority and influence possessed while in the Public Service, and the disposition of other cases.

A decision by a Deputy Head to waive or reduce the limitation period will be recorded in writing.

### **Exit Arrangements**

A Deputy Head must ensure that a public servant who is intending to leave the Public Service is aware of these post-employment measures.

### **Reconsideration**

A public servant or former public servant may apply to the Deputy Head for reconsideration of any determination respecting his or her compliance with the post-employment measures.

## Avenues of Resolution

### **Public Service Values and Ethics**

Any public servant who wants to raise, discuss and clarify issues related to this Code should first talk with his or her manager or contact the senior official designated by the Deputy Head under the provisions of this Code, according to the procedures and conditions established by the Deputy Head.

Any public servant who witnesses or has knowledge of wrongdoing in the workplace may refer the matter for resolution, in confidence and without fear of reprisal, to the Senior Officer designated for the purpose by the Deputy Head under the provisions of the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*.

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Furthermore, any public servant who believes that he or she is being asked to act in a way that is inconsistent with the values and ethics set out in Chapter 1 of this Code can report the matter in confidence and without fear of reprisal to the Senior Officer, as described above.

If the matter is not appropriately addressed at this level, or the public servant has reason to believe it could not be disclosed in confidence within the organization, it may then be referred to the Public Service Integrity Officer, in accordance with the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*.

It is expected that most matters arising from the application of this Code can and should be resolved at the organizational level.

### **Measures on Conflict of Interest and Post-employment**

With respect to the appropriate arrangements necessary to prevent conflict of interest or to comply with the post-employment measures described in Chapters 2 and 3 of this Code, it is expected that most situations will be addressed

by discussing the matter with the public servant, identifying avenues of resolution and taking appropriate action. When a public servant and the Deputy Head disagree on the appropriate arrangements to prevent conflict of interest or to comply with the post-employment measures in this Code, the disagreement shall be resolved through the established grievance procedures.

**Failure to Comply**

A public servant who does not comply with the requirements of this Code is subject to appropriate disciplinary action, up to and including termination of employment.

**Enquiries**

Enquiries about this Code should be referred to the responsible departmental officer who, in turn, may direct questions regarding policy interpretation to the following:

Office of Values and Ethics  
Policy and Planning Sector  
Human Resources Management Office (HRMO)  
Treasury Board of Canada Secretariat

**Form**

**Confidential Report**

This form can be accessed through the Treasury Board of Canada Secretariat Web site at the following address: [www.tbs-sct.gc.ca](http://www.tbs-sct.gc.ca).

## Appendix A

### Assets, Liabilities and Trusts

#### Assets and Liabilities Subject to a Confidential Report

Public servants must carefully evaluate on a regular basis whether their assets and liabilities need to be included in a Confidential Report. In doing so, they must take into consideration the nature of their official duties and the characteristics of their assets and liabilities. If there is any real, apparent or potential conflict between the carrying out of their official duties and their assets and liabilities, a Confidential Report must be filed. If there is no relationship, no report is required.

The following is a list of examples of assets and liabilities that must be reported in a Confidential Report if they do, or could, constitute a conflict of interest. **This list is not exhaustive.**

- a) publicly traded securities of corporations and foreign governments, and self-administered Registered Retirement Savings Plans (RRSPs), and self-administered Registered Education Savings Plans (RESPs) that are composed of these securities, where these securities are held directly and not through units in mutual funds;
- b) interests in partnerships, proprietorships, joint ventures, private companies and family businesses, in particular those that own or control shares of public companies or that do business with the government;
- c) commercially operated farm businesses;
- d) real property that is not for the private use of public servants or their family members;
- e) commodities, futures and foreign currencies held or traded for speculative purposes;
- f) assets placed in trust or resulting from an estate of which the public servant is a beneficiary;
- g) secured or unsecured loans granted to persons other than to members of the public servant's immediate family;



- h) any other assets or liabilities that could give rise to a real, apparent or potential conflict of interest due to the particular nature of the public servant's official duties; and
- i) direct and contingent liabilities in respect of any of the assets described in this section.

**Assets Not Requiring a Confidential Report**

Assets and interests for the private use of public servants and of their family members, as well as non-commercial assets, are **not** subject to the compliance measures.

For example, such assets include the following:

- a) residences, recreational properties and farms used or intended for use by public servants or their families;
- b) household goods and personal effects;
- c) works of art, antiques and collectibles;
- d) automobiles and other personal means of transportation;
- e) cash and deposits;

- f) Canada Saving Bonds and other similar investments in securities of fixed value issued or guaranteed by any level of government in Canada or agencies of those governments;
- g) Registered Retirement Savings Plans and Registered Education Saving Plans that are not self-administered;
- h) investments in open-ended mutual funds;
- i) guaranteed investment certificates and similar financial instruments;
- j) annuities and life insurance policies;
- k) pension rights;
- l) money owed by a previous employer, client or partnership; and
- m) personal loans receivable from members of public servants' immediate families and small personal loans receivable from other persons where public servants have loaned the moneys receivable.

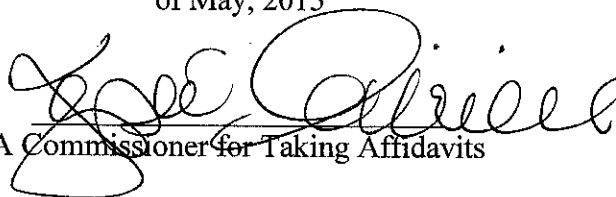
**Divestment of Assets**

Public servants must divest assets where their Deputy Head determines that such assets constitute a real, apparent or potential conflict of interest in relation to their duties and responsibilities. Divestment, where required, must take place within 120 days of appointment, transfer or deployment. Divestment of assets is usually achieved by selling them through an arm's-length transaction or by making them subject to a blind trust arrangement.

Where divestment is by means of sale, confirmation of the sale, such as a broker's sales receipt, shall be provided to the Deputy Head.

Where divestment is by means of a blind trust, the Office of the Ethics Counsellor will assist the Deputy Head and the public servant to set up a blind trust and to determine whether a specific blind trust meets the requirements of the Conflict of Interest Measures. The Ethics Counsellor will also make recommendations to the Deputy Head on the reimbursement of certain trust costs to the public servant by the home organization.

This is Exhibit "3" referred to  
in the affidavit of Deborah MacNair  
sworn before me, this 28<sup>th</sup> day  
of May, 2015

  
A Commissioner for Taking Affidavits

Josée Carrière, a Commissioner, etc.,  
within or outside the Province of Ontario,  
for the Government of Canada,  
Department of Justice.  
Expires March 26, 2016.

Government  
of CanadaGouvernement  
du Canada

Canada

Treasury Board of Canada Secretariat (<http://www.tbs-sct.gc.ca/index-eng.asp>)

# Values and Ethics Code for the Public Sector

## The Role of Federal Public Servants

Federal public servants have a fundamental role to play in serving Canadians, their communities and the public interest under the direction of the elected government and in accordance with the law. As professionals whose work is essential to Canada's well-being and the enduring strength of the Canadian democracy, public servants uphold the public trust.

The Constitution of Canada and the principles of responsible government provide the foundation for the role, responsibilities and values of the federal public sector.<sup>[1]</sup>

Constitutional conventions of ministerial responsibility prescribe the appropriate relationships among ministers, parliamentarians, public servants<sup>[2]</sup> and the public. A professional and non-partisan federal public sector is integral to our democracy.

## The Role of Ministers

Ministers are also responsible for preserving public trust and confidence in the integrity of public sector organizations and for upholding the tradition and practice of a professional non-partisan federal public sector. Furthermore, ministers play a critical role in supporting public servants' responsibility to provide professional and frank advice.<sup>[3]</sup>

## Objectives

This Code outlines the values and expected behaviours that guide public servants in all activities related to their professional duties. By committing to these values and adhering to the expected behaviours, public servants strengthen the ethical culture of the public sector and contribute to public confidence in the integrity of all public institutions.

As established by the Treasury Board, this Code fulfills the requirement of section 5 of the *Public Servants Disclosure Protection Act* (PSDPA). It was developed in consultation with public servants, public sector organizations and bargaining agents. This Code should be read in conjunction with organizational codes of conduct.

## Statement of Values

These values are a compass to guide public servants in everything they do. They cannot be considered in isolation from each other as they will often overlap. This Code and respective organizational codes of conduct are important sources of guidance for public servants. Organizations are expected to take steps to integrate these values into their decisions, actions, policies, processes, and systems. Similarly, public servants can expect to be treated in accordance with these values by their organization.

## **Respect for Democracy**

The system of Canadian parliamentary democracy and its institutions are fundamental to serving the public interest. Public servants recognize that elected officials are accountable to Parliament, and ultimately to the Canadian people, and that a non-partisan public sector is essential to our democratic system.

## **Respect for People**

Treating all people with respect, dignity and fairness is fundamental to our relationship with the Canadian public and contributes to a safe and healthy work environment that promotes engagement, openness and transparency. The diversity of our people and the ideas they generate are the source of our innovation.

## **Integrity**

Integrity is the cornerstone of good governance and democracy. By upholding the highest ethical standards, public servants conserve and enhance public confidence in the honesty, fairness and impartiality of the federal public sector.

## **Stewardship**

Federal public servants are entrusted to use and care for public resources responsibly, for both the short term and long term.

## **Excellence**

Excellence in the design and delivery of public sector policy, programs and services is beneficial to every aspect of Canadian public life. Engagement, collaboration, effective teamwork and professional development are all essential to a high-performing organization.

## Expected Behaviours

Federal public servants are expected to conduct themselves in accordance with the values of the public sector and these expected behaviours.

### 1. Respect For Democracy

- *Public servants shall uphold the Canadian parliamentary democracy and its institutions by:*
  - 1.1 Respecting the rule of law and carrying out their duties in accordance with legislation, policies and directives in a non-partisan and impartial manner.
  - 1.2 Loyal carrying out the lawful decisions of their leaders and supporting ministers in their accountability to Parliament and Canadians.
  - 1.3 Providing decision makers with all the information, analysis and advice they need, always striving to be open, candid and impartial.

### 2. Respect For People

- *Public servants shall respect human dignity and the value of every person by:*
  - 2.1 Treating every person with respect and fairness.
  - 2.2 Valuing diversity and the benefit of combining the unique qualities and strengths inherent in a diverse workforce.
  - 2.3 Helping to create and maintain safe and healthy workplaces that are free from harassment and discrimination.
  - 2.4 Working together in a spirit of openness, honesty and transparency that encourages engagement, collaboration and respectful communication.

### 3. Integrity

- *Public servants shall serve the public interest by:*
  - 3.1 Acting at all times with integrity and in a manner that will bear the closest public scrutiny, an obligation that may not be fully satisfied by simply acting within the law.
  - 3.2 Never using their official roles to inappropriately obtain an advantage for themselves or to advantage or disadvantage others.
  - 3.3 Taking all possible steps to prevent and resolve any real, apparent or potential conflicts of interest between their official responsibilities and their private affairs in favour of the public interest.
  - 3.4 Acting in such a way as to maintain their employer's trust.

### 4. Stewardship

- *Public servants shall use resources responsibly by:*
- 4.1 Effectively and efficiently using the public money, property and resources managed by them.
- 4.2 Considering the present and long-term effects that their actions have on people and the environment.
- 4.3 Acquiring, preserving and sharing knowledge and information as appropriate.

## 5. Excellence

- *Public servants shall demonstrate professional excellence by:*
- 5.1 Providing fair, timely, efficient and effective services that respect Canada's official languages.
- 5.2 Continually improving the quality of policies, programs and services they provide.
- 5.3 Fostering a work environment that promotes teamwork, learning and innovation.

# Application

Acceptance of these values and adherence to the expected behaviours is a condition of employment for every public servant in the federal public sector, regardless of their level or position. A breach of these values or behaviours may result in disciplinary measures being taken, up to and including termination of employment.

The PSDPA defines the "public sector" as: (a) the departments named in Schedule I to the *Financial Administration Act* and the other portions of the federal public administration named in Schedules I.1 to V to that Act; and (b) the Crown corporations and other public bodies set out in Schedule I of the PSDPA. However, "the public sector" does not include the Canadian Forces, the Canadian Security Intelligence Service or the Communications Security Establishment, which are subject to separate requirements under the Act.

The *Values and Ethics Code for the Public Sector* came into force on April 2, 2012.

# Avenues for Resolution

The expected behaviours are not intended to respond to every possible ethical issue that might arise in the course of a public servant's daily work. When ethical issues arise, public servants are encouraged to discuss and resolve these matters with their immediate supervisor. They can also seek advice and support from other appropriate sources within their organization.

Public servants at all levels are expected to resolve issues in a fair and respectful manner



and consider informal processes such as dialogue or mediation.

As provided by sections 12 and 13 of the PSDPA, if public servants have information that could indicate a serious breach of this Code, they can bring the matter, in confidence and without fear of reprisal, to the attention of their immediate supervisor, their senior officer for disclosure or the Public Sector Integrity Commissioner.

Senior officers for disclosure are responsible for supporting the chief executive in meeting the requirements of the PSDPA. They help promote a positive environment for disclosing wrongdoing, and deal with disclosures of wrongdoing made by employees of the organization. Further information on the duties and powers of senior officers for disclosure can be found in the attached Appendix.

Members of the public who have reason to believe that a public servant has not acted in accordance with this Code can bring the matter to an organizational point of contact that has been designated for the handling of such concerns or to the Public Sector Integrity Commissioner to disclose a serious breach of this Code.

## Appendix

### Duties and Obligations

#### Public Servants

Public servants are expected to abide by this Code and demonstrate the values of the public sector in their actions and behaviour. Furthermore, public servants must also adhere to the behavioural expectations set out in their respective organizational codes of conduct. If a public servant does not abide by these values and expectations, he or she may be subject to administrative or disciplinary measures up to and including termination of employment.

Public servants who are also managers are in a position of influence and authority that gives them a particular responsibility to exemplify the values of the public sector.

As provided by sections 12 and 13 of the *Public Servants Disclosure Protection Act* (PSDPA), if public servants have information that could indicate a serious breach of this Code they can bring this matter, in confidence and without fear of reprisal, to the attention of their immediate supervisor, their senior officer for disclosure or the Public Sector Integrity Commissioner.

## **Chief Executives<sup>[4]</sup>**

Chief executives of public sector organizations have specific responsibilities under the PSDPA, including establishing a code of conduct for their organization and an overall responsibility for fostering a positive culture of values and ethics in their organization. They ensure that employees are aware of their obligations under this Code and their specific organizational code of conduct. They also ensure that employees can obtain appropriate advice within their organization on ethical issues, including possible conflicts of interest.

Chief executives ensure that this Code, their organizational code of conduct, and their internal disclosure procedures are implemented effectively in their organization, and that they are regularly monitored and evaluated. Chief executives of Crown corporations may rely on their boards of directors for support in this duty.

Chief executives are responsible for ensuring the non-partisan provision of programs and services by their organizations.

Chief executives are subject to this Code and to the *Conflict of Interest Act*.

## **Senior Officers for Disclosure**

The senior officer for disclosure helps promote a positive environment for disclosing wrongdoing and deals with disclosures of wrongdoing made by public servants of their organization. Senior officers are responsible for supporting the chief executive in meeting the requirements of the PSDPA.

The senior officer's duties and powers within his or her organization also include the following, in accordance with the internal disclosure procedures established under the PSDPA:

1. Provide information, advice and guidance to public servants regarding the organization's internal disclosure procedures, including the making of disclosures, the conduct of investigations into disclosures, and the handling of disclosures made to supervisors.
2. Receive and record disclosures and review them to establish whether there are sufficient grounds for further action under the PSDPA.
3. Manage investigations into disclosures, including determining whether to deal with a disclosure under the PSDPA, initiate an investigation or cease an investigation.
4. Coordinate handling of a disclosure with the senior officer of another federal public sector organization, if a disclosure or an investigation into a disclosure involves that other organization.

5. Notify the person(s) who made a disclosure in writing of the outcome of any review and/or investigation into the disclosure and on the status of actions taken on the disclosure, as appropriate.
6. Report the findings of investigations, as well as any systemic problems that may give rise to wrongdoing, directly to his or her chief executive, with recommendations for corrective action, if any.

## **Treasury Board of Canada Secretariat-Office of the Chief Human Resources Officer**

In support of the Treasury Board President's responsibilities under section 4 of the PSDPA, the Office of the Chief Human Resources Officer (OCHRO) is responsible for promoting ethical practices in the public sector.<sup>[5]</sup> The OCHRO will work with all relevant partner organizations to implement and promote this Code, and will provide advice to chief executives and designated departmental officials with respect to its interpretation.

The Chief Human Resources Officer may issue directives, standards and guidelines related to this Code.

OCHRO will monitor the implementation of this Code in organizations with a view to assessing whether the stated objectives have been achieved.

## **Public Service Commission**

The Public Service Commission is responsible for conducting staffing investigations and audits to safeguard the integrity of the public service staffing system and administering certain provisions related to political activities to maintain the non-partisanship of the public service in accordance with the *Public Service Employment Act*.

<sup>1</sup> This Code is intended to clarify the role and expectations of public servants within the framework of Canadian parliamentary democracy as laid out in the *Constitution Act* and the basic principle of responsible government, which holds that the powers of the Crown are exercised by ministers who are in turn accountable to Parliament.

<sup>2</sup> The *Public Servants Disclosure Protection Act* (PSDPA) defines "public servant" as every person employed in the public sector (this includes the core public administration, Crown corporations and separate agencies). Every member of the Royal Canadian Mounted Police and every chief executive (including deputy ministers and chief executive officers) are also included in the definition of public servant for the purpose of the PSDPA and this Code.

<sup>3</sup> This text reflects the duties and responsibilities set out in *Accountable Government: A Guide for Ministers and Ministers of State*, the *Conflict of Interest Act*, the *Lobbying Act* and the PSDPA.

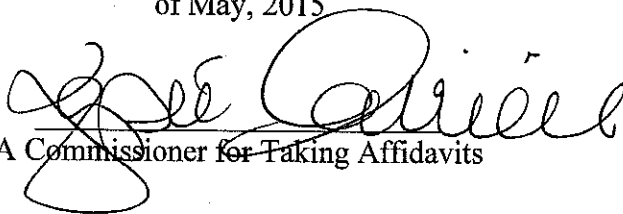
<sup>4</sup> "Chief executive" means the deputy head or chief executive officer of any portion of the public sector, or the person who occupies any other similar position, however called, in the public sector (PSDPA, 2005).

<sup>5</sup> Section 4 of the PSDPA assigns this responsibility to the Minister responsible for the Public Service Human Resources Management Agency of Canada (subsequently the Canada Public Service Agency (CPSA)). With the creation of the Office of the Chief Human Resources Officer within Treasury Board of Canada Secretariat on February 6, 2009, the functions of the CPSA were transferred to the OCHRO.

**Date Modified:**

2011-12-15

This is Exhibit "4" referred to  
in the affidavit of Deborah MacNair  
sworn before me, this 28<sup>th</sup> day  
of May, 2015



A Commissioner for Taking Affidavits

Josée Carrière, a Commissioner, etc.,  
within or outside the Province of Ontario,  
for the Government of Canada,  
Department of Justice.  
Expires March 26, 2016.

Government  
of CanadaGouvernement  
du Canada

Canada

Treasury Board of Canada Secretariat (<http://www.tbs-sct.gc.ca/index-eng.asp>)

# Policy on Conflict of Interest and Post-Employment

## 1. Effective date

1.1 This policy takes effect on April 2, 2012.

1.2 This policy and the *Values and Ethics Code for the Public Sector* ([/pol/doc-eng.aspx?section=text&id=25049](http://pol/doc-eng.aspx?section=text&id=25049)) replace the 2003 *Values and Ethics Code for the Public Service* ([/pubs\\_pol/hrpubs/TB\\_851/vec-cve-eng.asp](http://pubs_pol/hrpubs/TB_851/vec-cve-eng.asp)).

## 2. Application

This policy applies to the core public administration, for which Treasury Board is the employer, as defined in section 11(1) of the *Financial Administration Act* (<http://laws-lois.justice.gc.ca/eng/acts/F-11/>), unless excluded through specific acts, regulations or Orders in Council.

Sections 6.2, Monitoring and Reporting, and 7.2, Consequences, do not apply with respect to the Office of the Privacy Commissioner, the Office of the Information Commissioner, the Office of the Chief Electoral Officer, the Office of the Commissioner of Official Languages, the Office of the Commissioner of Lobbying, and the Office of the Public Sector Integrity Commissioner. The deputy heads of these organizations are solely responsible for monitoring and ensuring compliance with this policy within their organizations, as well as for responding to cases of non-compliance in accordance with any Treasury Board instruments that address the management of compliance.

## 3. Context

3.1. Public servants contribute in a fundamental way to good government, democracy and Canadian society through the loyal, impartial, and non-partisan support they provide to the elected government and through the service they provide to Canadians. As dedicated professionals, they serve the public interest and uphold the public trust.

3.2. This policy elaborates on the *Values and Ethics Code for the Public Sector*, and is aligned with its content. It provides direction and measures to assist organizations and public servants in effectively dealing with real, potential and apparent conflict of interest situations which may arise during and after employment in the public service. Preventing,

managing or resolving conflict of interest situations is one of the principal means of maintaining public trust and confidence in the impartiality and integrity of the public service.

**3.3.** This policy is to be read in conjunction with the *Values and Ethics Code for the Public Sector*. The *Values and Ethics Code for the Public Sector* and the requirements for public servants in Appendix B of this policy form part of the conditions of employment for every public servant.

**3.4.** This policy is issued pursuant to sections 7 and 11.1(1) of the *Financial Administration Act* (<http://laws-lois.justice.gc.ca/eng/acts/F-11/>).

## 4. Definitions

See Appendix A.

## 5. Policy statement

### 5.1 Objectives

The objectives of this policy are to:

- ensure that, in situations of real, apparent or potential conflict of interest and situations where there is a conflict of duties, decisions are made in a manner which upholds the public interest;
- facilitate ethical decision-making within organizations and by public servants to resolve conflicts between private and public interests; and
- establish measures to help public servants prevent, manage and resolve conflict of interest and post-employment situations that could impair either the integrity of the public service or the public's perception of its integrity.

### 5.2 Expected results

The expected results of this policy are that:

- organizations have the appropriate mechanisms in place to assist public servants to report and effectively manage real, apparent or potential conflict of interest situations when performing their duties and after employment; and

- public servants take appropriate action to avoid, reduce or manage situations of real, potential or apparent conflict of interest in the performance of their duties and after employment in the public service.

## 6. Policy requirements

### 6.1. Deputy heads are responsible for:

#### 6.1.1. Education and oversight:

- a. Ensuring that public servants in their organization, and anyone considering joining their organization, are informed that the requirements listed in Appendix B, are a condition of employment. This obligation is fulfilled by having individuals acknowledge these requirements in their initial acceptance of an offer of employment to the public service and on any subsequent appointment or deployment within the public service;
- b. Ensuring that public servants in their organization are informed on a regular basis of the requirements of this policy, and that public servants who have indicated an intention to leave their employment are reminded of the requirements of this policy;
- c. Ensuring that the operational risks of conflicts of interest related to their organization's specific mandate are identified and managed; and
- d. Ensuring that the delegation of the responsibilities and authorities for the implementation of this policy are clearly communicated to all public servants in their organization.

#### 6.1.2. Managing conflict of interest and post-employment situations:

- a. Ensuring that public servants have access to advice and assistance when they are unsure of whether they are in a conflict of interest, and when they are considering undertaking any political activity;
- b. Ensuring that procedures are in place in their organization for public servants to file a report of all situations, assets, liabilities or interests that might give rise to a real, apparent or potential conflict of interest with respect to their official duties. These reports are to be administered in accordance with the *Privacy Act*; (<http://laws-lois.justice.gc.ca/eng/acts/P-21/>)
- c. Ensuring that any conflict arising between the private interests and the official duties of a public servant is resolved in favour of the public interest, by considering the nature and risk of the conflict of interest in relation to the feasibility and practicality of the measures required to resolve the conflict, and communicating the decision and



the reasons for the decision to the public servant. While a declaration of a possible conflict of interest to the deputy head may often be sufficient, additional requirements may be necessary, as outlined in Appendix B

- d. Ensuring that benefits provided or offered to the organization by outside entities or individuals with whom the organization has past, present or potential official dealings are managed appropriately and that any resulting organizational conflict of interest is resolved in the public interest;
- e. Ensuring that concurrent outside appointments that are part of a public servant's official duties, such as to a board of directors, are managed appropriately and that any resulting conflicts of duties are resolved in the public interest;
- f. Without unduly restricting public servants' ability to seek other employment, reviewing their operations and organizational structure for post-employment situations:
  - i. Determining which positions in their organizations may be at risk for post-employment concerns and designating them as subject to the requirements in Appendix B, section 3.2 (normally including all positions in the executive (EX) category); and
  - ii. When appropriate, reducing or waiving the one-year limitation period, in consideration of the criteria set out in section 3.3 of Appendix B.
- g. Ensuring that decisions taken to resolve conflicts of interest and post-employment situations are, where practicable, made in mutual agreement with the public servant in question, using fair and effective means to resolve disagreements regarding the decisions.

## 6.2 Monitoring and reporting requirements

**6.2.1.** Deputy heads are responsible for monitoring the performance of their organization with respect to the application and administration of this policy as follows:

- a. assessing the organization's service delivery structure, resource allocation, human resources competencies, performance indicators, as well as the systems, processes and procedures to prevent and effectively manage real, apparent or potential conflicts of interest in favour of the public interest;
- b. informing the Treasury Board Secretariat (Office of the Chief Human Resources Officer) of any major concerns or problems regarding the administration of this policy in a timely manner; and
- c. providing the Treasury Board Secretariat (Office of the Chief Human Resources Officer) with information that is considered necessary for assessing compliance with this policy, its related directive and other policy instruments, as required.

**6.2.2.** The Treasury Board Secretariat (Office of the Chief Human Resources Officer) is responsible for assessing departmental performance with respect to the implementation of this policy, as well as compliance with its related directive, through such instruments as employee surveys, the Values and Ethics Component of the Management Accountability Framework (MAF) or audits as required.

**6.2.3.** The Treasury Board Secretariat (Office of the Chief Human Resources Officer) will review this policy five years after the date of implementation.

## **7. Consequences**

**7.1** A public servant who has not complied with the requirements in Appendix B may be subject to disciplinary measures, up to and including termination of employment.

**7.2** Organizational consequences of non-compliance with this policy may include any measures allowed by the *Financial Administration Act* (<http://laws-lois.justice.gc.ca/eng/acts/F-11/>) that the Treasury Board may determine appropriate.

## **8. Roles and responsibilities of government organizations**

### **8.1 Treasury Board Secretariat**

Treasury Board Secretariat (Office of the Chief Human Resources Officer) will promote this policy and provide guidance to support its implementation.

### **8.2 Public Service Commission**

The Public Service Commission is responsible for ensuring that appointments in the Public Service are made on the basis of merit and are free from political influence. The Public Service Commission is also responsible for administering the provisions of Part 7, Political Activities, of the Public Service Employment Act (PSEA) (<http://laws-lois.justice.gc.ca/eng/acts/P-33.01/page-25.html#h-31>)), including:

- Granting permission to an employee seeking nomination for or being a candidate in a federal, provincial, municipal or territorial election;
- Authorizing leave without pay to an employee who is a candidate in a federal, provincial, or territorial election; and

- Receiving and investigating allegations of inappropriate political activity as defined in the PSEA, and taking corrective action when the allegations are founded.

## 9. References

### Legislation:

- *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/>)
- *Financial Administration Act* (<http://laws-lois.justice.gc.ca/eng/acts/F-11/>)
- *Lobbying Act* (<http://laws-lois.justice.gc.ca/eng/acts/L-12.4/>)
- *Public Servants Disclosure Protection Act* (<http://laws-lois.justice.gc.ca/eng/acts/P-31.9/>)
- *Public Service Employment Act* (<http://laws-lois.justice.gc.ca/eng/acts/P-33.01/>)
- *Privacy Act* (<http://laws-lois.justice.gc.ca/eng/acts/P-21/>)

### Related policies/publications:

- *Values and Ethics Code for the Public Sector* (</pol/doc-eng.aspx?section=text&id=25049>)
- *Foundation Framework for Treasury Board Policies* (</pol/doc-eng.aspx?id=13616>)
- *Policy Framework for People Management* (</pol/doc-eng.aspx?section=text&id=19134>)
- *Management Accountability Framework* (</maf-crg/index-eng.asp>)
- *Policy on Interchange Canada* (</pol/doc-eng.aspx?id=12552>)
- *Policy on Privacy Protection* (</pol/doc-eng.aspx?id=12510&section=text>)
- *Framework for the Management of Compliance* (</pol/doc-eng.aspx?id=17151>)
- *Directive on Reporting and Managing Financial Conflicts of Interest* (yet to be published)

## 10. Enquiries

Please direct enquiries about this policy to your responsible departmental official. For interpretation of this policy, departmental officials should contact TBS Public Enquiries (</tbs-sct/cmn/contact-eng.asp#enquiries>).

## Appendix A: Definitions

### Deputy head:

a) in relation to a department named in Schedule I of the Financial Administration Act, its deputy minister; and b) in relation to any portion of the federal public administration named in Schedule IV of the Financial Administration Act, its chief executive officer or, if there is no chief executive officer, its statutory deputy head or, if there is neither, the person who occupies the position designated by the Governor in Council in respect of that portion. For the purposes of this policy the term "deputy head" means deputy heads or their delegated alternates.

### Public servant:

a person employed in organizations defined in section 2 of this policy. This includes indeterminate and term employees, employees on leave without pay, students participating in Student Employment Programs, casual, seasonal and part-time workers. Although they are not public servants, individuals on incoming Interchange Canada assignments are expected to comply with, and volunteers are expected to respect, the requirements in Appendix B of this policy. Order-in-council appointees, such as deputy heads, are subject to the *Conflict of Interest Act* (<http://laws-lois.justice.gc.ca/eng/acts/C-36.65/>), and are not subject to this policy.

### Conflict of Interest (COI (Conflict of Interest)):

a situation in which the public servant has private interests that could improperly influence the performance of his or her official duties and responsibilities or in which the public servant uses his or her office for personal gain. A *real* conflict of interest exists at the present time, an *apparent* conflict of interest could be perceived by a reasonable observer to exist, whether or not it is the case, and a *potential* conflict of interest could reasonably be foreseen to exist in the future.

### Conflict of Duties

a conflict that arises, not because of a public servant's private interests, but as a result of one or more concurrent or competing official responsibilities. For example, these roles could include his or her primary public service employment and his or her responsibilities in an outside role that forms part of his or her official duties, such as an appointment to a board of directors, or other outside function.

## Appendix B: Requirements for public servants to prevent and deal with

# conflict of interest and post-employment situations

Following are the conflict of interest and post-employment requirements that are a condition of employment for public servants in all organizations subject to this policy. These requirements are grounded in and serve to uphold the values contained in the *Values and Ethics Code for the Public Sector*. By upholding these ethical standards, public servants conserve and enhance public confidence in the honesty, fairness and integrity of the public service. These requirements also form part of Canada's commitments as a signatory to international agreements on values and ethics (<http://www.dfait-maeci.gc.ca/crime/corruption.aspx?lang=eng&view=d>).

## Prevention of conflict of interest

A public servant maintains public confidence in the objectivity of the public service by preventing and avoiding situations that could give the appearance of a conflict of interest, result in a potential for a conflict of interest or result in an actual conflict of interest. Conflict of interest does not relate exclusively to matters concerning financial transactions and the transfer of economic benefit. While financial activity is important, conflicts of interest in any area of activity can have a negative impact on the perceived objectivity of the public service. With the permanent and pervasive nature of information technology, public servants should be particularly sensitive to real, apparent or potential conflicts of interest that may arise from messages and information transmitted via the Internet and other media.

It is impossible to foresee every situation that could give rise to a real, apparent or potential conflict of interest. When in doubt, public servants should refer to the requirements found in this appendix, the *Values and Ethics Code for the Public Sector* and their organization's code of conduct to guide appropriate action. Public servants can also seek guidance from their manager, from their deputy head or his/her delegate.

In addition to the requirements outlined in this appendix, public servants are also required to observe any specific conduct requirements contained in the statutes governing their particular department or organization and their profession, where applicable.

### 1. A public servant's general responsibilities and duties include:

- a. Taking all possible steps to recognize, prevent, report, and resolve any real, apparent or potential conflicts of interest between their official responsibilities and any of their private affairs;
- b. Unless otherwise permitted in this appendix, refraining from having private interests, which would be unduly affected by government actions in which they participate, or of which they have knowledge or information;
- c. Not knowingly taking advantage of, or benefiting from, information that is obtained in the course of their duties that is not available to the public;
- d. Refraining from the direct or indirect use of, or allowing the direct or indirect use of government property of any kind, including property leased to the government, for anything other than officially approved activities;
- e. Not assisting private entities or persons in their dealings with the government where this would result in preferential treatment of the entities or persons;
- f. Not interfering in the dealings of private entities or persons with the government in order to inappropriately influence the outcome;
- g. Maintaining the impartiality of the public service and not engaging in any outside or political activities that impair or could be seen to impair their ability to perform their duties in an objective or impartial manner; and
- h. Ensuring that any real, apparent or potential conflict that arises between their private activities and their official responsibilities as a public servant is resolved in the public interest.

## **2. Requirements for preventing and dealing with situations of conflict of interest during employment:**

Public servants are required to report in writing to the deputy head, in accordance with their organization's procedures, all outside activities, assets, liabilities and interests that might give rise to a real, apparent or potential conflict of interest in relation to their official duties. Such a report is to be made within 60 days of their initial appointment or any subsequent appointment, transfer or deployment.

On a regular basis thereafter, and every time a major change occurs in their personal affairs or official duties, every public servant is required to review his or her obligations under this policy, the *Values and Ethics Code for the Public Sector* and their organizational code of conduct. If a real, apparent or potential conflict of interest exists, he or she is to file a report in a timely manner.

When negotiating financial arrangements with outside parties, public servants are to comply with the requirements listed in this appendix as well as other related directives or policies issued by the Treasury Board. When in doubt, public servants are to immediately report the situation to their managers in order to seek advice or direction on how to proceed.

## **2.1 Assets and Liabilities**

Public servants are required to evaluate their assets and liabilities, taking into consideration the nature of their official duties and the characteristics of their assets. If there is any real, apparent or potential conflict of interest between the carrying out of their official duties and their assets or liabilities, they are to report this matter to their deputy head in a timely manner.

Where their deputy head determines that any of these assets or liabilities results in a real, apparent or potential conflict of interest in relation to their official duties, public servants may be required to divest those assets, or to take other measures to resolve the conflict. Public servants may not sell or transfer assets to family members or anyone else for the purpose of circumventing the compliance requirements.

The types of assets and liabilities that should be reported and the procedures for reporting and managing such assets and liabilities are set out in the *Directive on Reporting and Managing Financial Conflicts of Interest*.

## **2.2 Outside employment or activities**

Public servants may engage in employment outside the public service and take part in outside activities unless the employment or activities are likely to give rise to a real, apparent or potential conflict of interest or would undermine the impartiality of the public service or the objectivity of the public servant.

Public servants are required to provide a report to their deputy head when their outside employment or activities might subject them to demands incompatible with their official duties, or cast doubt on their ability to perform their duties or responsibilities in a completely objective manner. The deputy head may require that the outside activities be modified or terminated if it is determined that a real, apparent or potential conflict of interest exists.

Public servants who receive a benefit or income either directly or indirectly from a contract with the Government of Canada are required to report to their deputy head on such contractual or other arrangements. The deputy head will determine whether the arrangement presents a real, apparent or potential conflict of interest, and may require that the contract be modified or terminated.

### Political Activities

Any public servant considering involvement in political activity should seek the advice of their manager, a designated departmental official, the Public Service Commission (PSC) or a human resources advisor before acting.

Public servants are required to seek and obtain permission from the PSC to seek nomination for or be a candidate in a federal, provincial, territorial, or municipal election, in accordance with Part 7 of the *Public Service Employment Act* (<http://laws-lois.justice.gc.ca/eng/acts/P-33.01/>) (PSEA).

"Political activities" are defined in Part 7 of the PSEA (<http://laws-lois.justice.gc.ca/eng/acts/P-33.01/page-25.html#h-31>) as "any activity in support of, within or in opposition to a political party; carrying on any activity in support of or in opposition to a candidate before or during an election period; or, seeking nomination as or being a candidate in an election before or during the election period."

Any public servant who wishes to engage in a political activity not covered by Part 7 of the PSEA that could constitute a conflict of interest is required to report the proposed activity to their deputy head.

Similarly, any public servant who is subject to this policy but who is not subject to Part 7 of the PSEA, including casual and part-time workers, who wishes to engage in any political activity that could constitute a conflict of interest, is to report the proposed activity to the deputy head.

### 2.3 Gifts, hospitality and other benefits

Public servants are expected to use their best judgment to avoid situations of real, apparent or potential conflict of interest by considering the following criteria on gifts, hospitality and other benefits and in keeping with the *Values and Ethics Code for the Public Sector*, their organization's code of conduct and this policy.

Public servants are not to accept any gifts, hospitality or other benefits that may have a real, apparent or potential influence on their objectivity in carrying out their official duties and responsibilities or that may place them under obligation to the donor. This includes activities such as free or discounted admission to sporting and cultural events, travel or conferences.

The acceptance of gifts, hospitality and other benefits is permissible if they are infrequent and of minimal value, within the normal standards of courtesy or protocol, arise out of activities or events related to the official duties of the public servant concerned, and do not compromise or appear to compromise the integrity of the public servant concerned or of his or her organization.



Public servants are to seek written direction from their deputy head where it is impossible to decline gifts, hospitality or other benefits that do not meet the principles set out above, or where it is believed that there is sufficient benefit to the organization to warrant acceptance of certain types of hospitality.

## **2.4 Solicitation**

With the exception of fundraising for such officially supported activities as the Government of Canada Workplace Charitable Campaign (GCWCC), public servants may not solicit gifts, hospitality, other benefits or transfers of economic value from a person, group or organization in the private sector who has dealings with the government. When fundraising for such official activities, public servants should ensure that they have prior written authorization from their deputy head in order to solicit donations, prizes or contributions in kind from external organizations or individuals.

Similarly, if an outside individual or entity, with whom the organization has past, present or potential official dealings, offers a benefit to the organization such as funding for an event or a donation of equipment, public servants are to consider whether any real, apparent or potential conflict of interest exists, and obtain the consent in writing of the deputy head prior to accepting any such benefit.

The deputy head may require that the activities be modified or terminated where it is determined that there is a real, potential or apparent conflict of interest or an obligation to the donor. These provisions are designed to ensure that this policy is consistent with paragraph 121(1) (c) of the *Criminal Code* (<http://laws-lois.justice.gc.ca/eng/acts/C-46/page-61.html#h-52>).

## **2.5 Avoidance of preferential treatment**

Public servants are responsible for demonstrating objectivity and impartiality in the exercise of their duties and in their decision-making, whether related to staffing, financial awards or penalties to external parties, transfer payments, program operations or any other exercise of responsibility.

This means that they are prohibited from granting preferential treatment or advantages to family, friends or any other person or entity. They are not to offer extraordinary assistance to any entity or persons already dealing with the government without the knowledge and support of their supervisor. They also are not to disadvantage any entity or persons dealing with the government because of personal antagonism or bias.

Providing information that is publicly accessible is not considered preferential treatment.

### **3. Requirements for preventing post-employment conflict of interest situations before and after leaving office:**

All public servants have a responsibility to minimize the possibility of real, apparent or potential conflict of interest between their most recent responsibilities within the federal public service and their subsequent employment outside the public service.

#### **3.1 Before leaving employment**

Before leaving their employment with the public service, all public servants are to disclose their intentions regarding any future outside employment or activities that may pose a risk of real, apparent or potential conflict of interest with their current responsibilities and discuss potential conflicts with their manager or their deputy head or his/her delegate.

#### **3.2 Post-employment limitation period for public servants in designated positions**

Deputy heads are responsible for designating positions of risk for post-employment conflict of interest situations as per section 6.1.2.(f)(i). of this policy.

Public servants in these designated positions are subject to a one-year limitation period after leaving office. Before leaving office and during this one-year limitation period, these public servants are to report to their deputy head all firm offers of employment or proposed activity outside the public service that could place them in a real, apparent or potential conflict of interest with their public service employment. They are also to disclose immediately the acceptance of any such offer. In addition, these public servants may not, during this one-year period, without their deputy head's authorization:

- a. accept appointment to a board of directors of, or employment with, private entities with which they had significant official dealings during the period of one year immediately prior to the termination of their service. The official dealings in question may either be directly on the part of the public servant or through their subordinates;
- b. make representations on behalf of persons or entities outside of the public service to any government organization with which they had significant official dealings, during the period of one year immediately prior to the termination of their service.<sup>[1]</sup> The official dealings in question may either be directly on the part of the public servant or through their subordinates; or
- c. give advice to their clients or employer using information that is not publicly available concerning the programs or policies of the departments or organizations with which they were employed or with which they had a direct and substantial relationship.

#### **3.3 Waiver or reduction of limitation period**

A public servant or former public servant may apply to the deputy head for a written waiver or reduction of the limitation period. The public servant is to provide sufficient information to assist the deputy head in making a determination as to whether to grant the waiver taking into consideration the following criteria:

- a. the circumstances under which the termination of their service occurred;
- b. the general employment prospects of the public servant or former public servant;
- c. the significance to the government of information possessed by the public servant or former public servant by virtue of that individual's position in the public service;
- d. the desirability of a rapid transfer of the public servant's or former public servant's knowledge and skills from the government to private, other governmental or non-governmental sectors;
- e. the degree to which the new employer might gain unfair commercial or private advantage by hiring the public servant or former public servant;
- f. the authority and influence possessed by that individual while in the public service; and/or
- g. any other consideration at the discretion of the deputy head.

#### **4. Resolution**

With respect to the arrangements necessary to prevent real, apparent or potential conflict of interest, or to comply with the requirements set out above, it is expected that situations will be resolved through discussion and agreement between the public servant and the deputy head or delegate. When a public servant and the deputy head or delegate disagree on the appropriate arrangements to resolve a real, apparent or potential conflict of interest, the disagreement will be resolved through the resolution procedures established by the deputy head.

#### **5. Consequences**

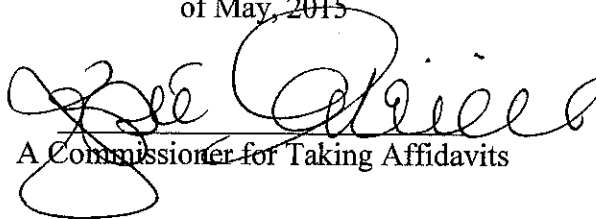
A public servant who does not comply with the requirements set out in this appendix may be subject to disciplinary measures, up to and including termination of employment.

<sup>1</sup> Assistant deputy ministers and their equivalents are subject to the *Lobbying Act* (<http://laws-lois.justice.gc.ca/eng/acts/L-12.4/>). In the case of any conflict between this policy and the Act, the Act takes precedence.

#### **Date Modified:**

2014-03-11

This is Exhibit "5" referred to  
in the affidavit of Deborah MacNair  
sworn before me, this 28<sup>th</sup> day  
of May, 2015



A Commissioner for Taking Affidavits

Josée Carrière, a Commissioner, etc.,  
within or outside the Province of Ontario,  
for the Government of Canada,  
Department of Justice.  
Expires March 26, 2016.



# VALUES and ETHICS CODE

of the DEPARTMENT  
of JUSTICE



**DEPARTMENT OF JUSTICE**  
**VALUES AND ETHICS CODE**

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## THE DEPARTMENT OF JUSTICE

### A Unique Role

The Department of Justice (the Department) works to ensure that Canada's justice system is as fair, accessible and efficient as possible. It helps the federal government to develop policy, as well as to draft and reform laws as needed. It acts as legal advisor to the Government of Canada by providing legal advice and support, prosecuting civil cases of federal law on behalf of the government, and representing the government in court.

The Department's responsibilities reflect the dual role of the Minister of Justice, who is also, by law, the Attorney General of Canada. In general terms, the Minister is concerned with the administration of justice, including policy in such areas as criminal law, family law, human rights law and Aboriginal justice; as Attorney General, the Minister is the chief law officer of the Crown, and is responsible for the conduct of all litigation for the federal government.

### A Diverse Community

The Department's support for this dual role of Minister and Attorney General of Canada is reflected in the makeup of our personnel, a team of professionals who work closely with federal government departments and agencies, in regional offices and Headquarters. This team includes a large number of counsel whose roles vary according to their responsibilities: to draft bills to be tabled in Parliament, whether these originate with the Department of Justice or with another department; to help ministries of state in developing, reforming and interpreting laws and regulations; to support departments and other federal bodies in developing policies and programs of the Government of Canada; to develop options based on the law; to help mitigate and manage legal risks posed by policies and programs; and to defend the decisions of public authorities before courts, tribunals and international bodies.

Counsel in the Department work in tandem with a large number of employees with varied skills in other professional groups, and their contributions are vital to the efficient implementation of the mandate of the Department.



## CHAPTER I - VALUES

### INTRODUCTION

The Government of Canada is committed to ensuring that the federal public sector<sup>1</sup> remains professional, non-partisan and ethical, and worthy of the trust and respect of Canadians. As public servants, we contribute to good governance, to democracy and to the well-being of Canadian society. We are committed to respecting the law and to upholding the highest standards of integrity and fairness.

In accordance with section 6 of the *Public Servants Disclosure Protection Act* (PSDPA), the *Values and Ethics Code of the Department of Justice* (the Code) sets out the values and ethics that guide public servants at the Department in all their professional activities. It also provides a set of guidelines and principles to support ethical behaviour and decision making for all public servants. Established in consultation with the Department's employees and bargaining agents, it is our common guide.

The public servants at the Department are proud to work together, drawing on the richness of its diverse staff. As a group, we are conscious of the fact that Canadians expect transparency and respect for the principle of accountability from public authorities at all levels and that this has an impact on their work.

This firm commitment to the values and ethics enshrined in the Code will allow us to carry out the mandate of the Department and build a healthy and productive work environment that fosters innovation, while at the same time meeting the high expectations of Canadians. This is our collective commitment, and it is our individual responsibility.

### OBJECTIVES

The Code outlines the values and expected behaviours that guide public servants in the Department in all activities related to their professional duties. By committing to these values and adhering to the expected behaviours, public servants strengthen the ethical culture of the public sector and contribute to public confidence in the integrity of all public institutions.

The Code provides guidance for common situations involving our work at the Department. In all circumstances, each employee is expected to adhere to the highest ethical standards that are to be expected from a public servant.

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<sup>1</sup> The *Public Servants Disclosure Protection Act* (PSDPA) defines the "public sector" as: (a) the departments named in Schedule I to the *Financial Administration Act* and the other portions of the federal public administration named in Schedules I.1 to V to that Act; and (b) the Crown corporations and other public bodies set out in Schedule I of the PSDPA. However, "the public sector" does not include the Canadian Forces, the Canadian Security Intelligence Service or the Communications Security Establishment, which are subject to separate requirements under the Act.

### **APPLICATION**

The Code is inspired by the *Values and Ethics Code for the Public Sector* and by the Treasury Board's *Policy on Conflict of Interest and Post-Employment*. These two documents have been adapted to reflect the distinct culture and procedures of the Department and to provide its public servants with an integrated reference document that will guide them in matters of values and ethics. By respecting the Code, employees will be respecting the two public sector documents that it was based upon.

The Code applies to all public servants at the Department. Acceptance of the values and adherence to the expected behaviours contained within the Code is a condition of employment for every public servant, regardless of their level or position. A breach of these values or behaviours may result in disciplinary measures being taken, up to and including termination of employment.

In addition to the requirements set out in the Code, public servants must comply with any applicable specific codes and standards of their profession.

The Code came into effect on February 26, 2013.

### **THE ROLE OF PUBLIC SERVANTS**

Public servants<sup>2</sup> have a fundamental role to play in serving Canadians, their communities and the public interest under the direction of the elected government and in accordance with the law. As professionals whose work is essential to Canada's well-being and the enduring strength of the Canadian democracy, public servants uphold the public trust.

The Constitution of Canada and the principles of responsible government provide the foundation for the role, responsibilities and values of the federal public sector<sup>3</sup>. Constitutional conventions of ministerial responsibility prescribe the appropriate relationships among ministers, parliamentarians, public servants and the public. A professional and non-partisan federal public sector is integral to our democracy.

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<sup>2</sup> The *Public Servants Disclosure Protection Act* (PSDPA) defines "public servant" as every person employed in the public sector (this includes the core public administration, Crown corporations and separate agencies). Every member of the Royal Canadian Mounted Police and every chief executive (including deputy ministers and chief executive officers) are also included in the definition of public servant for the purpose of the PSDPA and the *Values and Ethics Code for the Public Sector*.

<sup>3</sup> The *Values and Ethics Code for the Public Sector* is intended to clarify the role and expectations of public servants within the framework of Canadian parliamentary democracy as laid out in the *Constitution Act* and the basic principle of responsible government, which holds that the powers of the Crown are exercised by ministers who are in turn accountable to Parliament.

## **THE ROLE OF MINISTERS**

Ministers are also responsible for preserving public trust and confidence in the integrity of public sector organizations and for upholding the tradition and practice of a professional non-partisan federal public sector. Furthermore, ministers play a critical role in supporting public servants' responsibility to provide professional and frank advice.<sup>4</sup>

## **STATEMENT OF VALUES AND EXPECTED BEHAVIOURS**

The following values guide public servants at the Department in everything they do. They cannot be considered in isolation from each other as they will often overlap. The Code is an important source of guidance for public servants. Its values will guide us in our decisions, actions, policies, processes and systems. Similarly, public servants can expect to be treated in accordance with these values:

1. Respect for Democracy
2. Respect for People
3. Integrity
4. Stewardship
5. Excellence

The Code also describes clearly, though not exhaustively, specific behaviours that allow public servants to respect these five values.

### **1. RESPECT FOR DEMOCRACY**

The system of Canadian parliamentary democracy and its institutions are fundamental to serving the public interest. Public servants recognize that elected officials are accountable to Parliament, and ultimately to the Canadian people, and that a non-partisan public sector is essential to our democratic system.

#### **Expected Behaviours**

Public servants shall uphold the Canadian parliamentary democracy and its institutions by:

- 1.1 Respecting the rule of law and carrying out their duties in accordance with legislation, policies and directives in a non-partisan and impartial manner.
- 1.2 Loyally carrying out the lawful decisions of their leaders and supporting ministers in their accountability to Parliament and Canadians.
- 1.3 Providing decision makers with all the information, analysis and advice they need, always striving to be open, candid and impartial.

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<sup>4</sup> This text reflects the duties and responsibilities set out in *Accountable Government: A Guide for Ministers and Ministers of State*, the *Conflict of Interest Act*, the *Lobbying Act* and the *Public Servants Disclosure Protection Act* (PSDPA).

At the Department, we support democracy by helping to ensure that Canada's justice system is accessible, fair and efficient as possible, and that the public sector institutions we advise are acting in compliance with the law and the Constitution.

### **2. RESPECT FOR PEOPLE**

Treating all people with respect, dignity and fairness is fundamental to our relationship with the Canadian public and contributes to a safe and healthy work environment that promotes engagement, openness and transparency. The diversity of our people and the ideas they generate are the source of our innovation.

#### **Expected Behaviours**

Public servants shall respect human dignity and the value of every person by:

- 2.1 Treating every person with respect and fairness.
- 2.2 Valuing diversity and the benefit of combining the unique qualities and strengths inherent in a diverse workforce.
- 2.3 Helping to create and maintain safe and healthy workplaces that are free from harassment and discrimination.
- 2.4 Working together in a spirit of openness, honesty and transparency that encourages engagement, collaboration and respectful communication.
- 2.5 Contributing to create a culture within the workplace in which all employees, in all positions, work together to prevent conflicts or resolve them as early as possible in a constructive and creative manner.

At the Department, we recognize that our greatest asset is employees who are determined to work in an atmosphere of confidence, cooperation and mutual respect. We also recognize that each person we deal with deserves to be treated in that same spirit.

### **3. INTEGRITY**

Integrity is the cornerstone of good governance and democracy. By upholding the highest ethical standards, public servants conserve and enhance public confidence in the honesty, fairness and impartiality of the federal public sector.

#### **Expected Behaviours**

Public servants shall serve the public interest by:

- 3.1 Acting at all times with integrity and in a manner that will bear the closest public scrutiny, an obligation that may not be fully satisfied by simply acting within the law.

- 3.2 Never using their official roles to inappropriately obtain an advantage for themselves or to advantage or disadvantage others.
- 3.3 Taking all possible steps to prevent and resolve any real, apparent or potential conflicts of interest between their official responsibilities and their private affairs in favour of the public interest.
- 3.4 Acting in such a way as to maintain their employer's trust.
- 3.5 Maintaining the confidentiality of information obtained through their position and respecting the rules governing information management.
- 3.6 Conducting themselves in a manner that does not harm the reputation of the Department, the Government of Canada, or the departments and agencies they support.
- 3.7 Exercising caution when using social media or other collaborative tools facilitated by information technology so that their professionalism and their ability to perform their duties in a non-partisan way are not called into question.
- 3.8 Limiting themselves to authorized and lawful uses of the Department's systems and electronic networks.

At the Department, we are committed to respecting the law and maintaining the strictest rules of integrity and fairness.

#### **4. STEWARDSHIP**

Federal public servants are entrusted to use and care for public resources responsibly, for both the short term and long term.

##### **Expected Behaviours**

Public servants shall use resources responsibly by:

- 4.1 Effectively and efficiently using the public money, property and resources managed by them.
- 4.2 Considering the present and long-term effects that their actions have on people and the environment.
- 4.3 Acquiring, preserving and sharing knowledge and information as appropriate.

At the Department, we recognize that the responsible use of resources is a duty of every public servant, and we are committed to ensuring that this is reflected in our daily activities.

#### **5. EXCELLENCE**

Excellence in the design and delivery of public sector policy, programs and services is beneficial to every aspect of Canadian public life. Engagement, collaboration, effective teamwork and professional development are all essential to a high-performing organization.

### **Expected Behaviours**

Public servants shall demonstrate professional excellence by:

- 5.1 Providing fair, timely, efficient and effective services that respect Canada's official languages.
- 5.2 Continually improving the quality of policies, programs and services they provide.
- 5.3 Fostering a work environment that promotes teamwork, learning and innovation.
- 5.4 Consistently applying the policies and directives of the Department and central agencies.

At the Department, we strive to create a workplace where public servants at all levels work toward common goals, and are committed in particular to providing high-quality legal services.

### **AVENUES FOR RESOLUTION**

The expected behaviours identified above are not intended to respond to every possible ethical issue that might arise in the course of a public servant's daily work. When ethical issues arise, public servants are encouraged to discuss and resolve these matters with their manager. They can also seek advice and support from other appropriate sources within the Department, including the Human Resources Division and the office responsible for values and ethics, or their union representative.

Public servants at all levels are expected to resolve issues in a fair and respectful manner and consider informal processes such as dialogue or mediation.

As provided by sections 12 and 13 of the *Public Servants Disclosure Protection Act* (PSDPA), if public servants have information that could indicate a serious breach of the Code, they can bring the matter, in confidence and without fear of reprisal, to the attention of their immediate supervisor, the senior officer for disclosure or the Public Sector Integrity Commissioner.

The senior officer for disclosure is responsible for supporting the Deputy Minister in meeting the requirements of the PSDPA. He or she helps promote a positive environment for disclosing wrongdoing, and deals with disclosures of wrongdoing made by employees of the organization. Further information on the duties and powers of the senior officer for disclosure can be found under Annex A.

Members of the public who have reason to believe that a public servant has not acted in accordance with the Code can bring the matter to the senior officer for disclosure or to the Public Sector Integrity Commissioner to disclose a serious breach of this Code.

## REFERENCE DOCUMENTS

The following is a list of laws, policies and guides that further elaborate on the expected behaviours described in this Code. This list includes the most pertinent resources and reference materials available, but does not necessarily include all available documents. Employees are encouraged to access other research material, and to seek the advice of their manager when questions or a need for clarification arise.

### Acts

Access to Information Act  
Canadian Charter of Rights and Freedoms  
Canadian Human Rights Act  
Canada Labour Code  
Conflict of Interest Act  
Constitution Act  
Copyright Act  
Criminal Code  
Department of Justice Act  
Employment Equity Act  
Financial Administration Act  
Lobbying Act  
Official Languages Act  
Public Servants Disclosure Protection Act  
Public Service Employment Act  
Public Service Labour Relations Act  
Privacy Act

### Policies, Publications of Central Agencies

Communications Policy of the Government of Canada  
Collective Agreements  
Contracting Policy  
Duty of Loyalty  
Employment Equity Policy  
Policy on Government Security Policy  
Guidelines for Discipline  
Guideline for External Use of Web 2.0  
Policy on Information Management  
Occupational Health and Safety Directive  
Official Languages Policy  
Policy on Conflict of Interest and Post-Employment  
Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service  
Policy on Interchange Canada  
Policy on the Use of Electronic Networks  
Political Activities

Policy on Prevention and Resolution of Harassment in the Workplace  
Values and Ethics Code for the Public Sector

**Department of Justice Policies and Guidelines**

Departmental Health and Safety  
Departmental Employment Equity Policy  
Informal Conflict Management System Policy  
Information Management Policy  
Information Technology Security Policy  
Grievance Procedure  
Guidelines on Solicitation  
Official Languages Policy and Directives  
Policy on Accommodating Differences in the Workplace

N.B. Please note that public servants are also required to observe any specific conduct requirements contained in the statutes governing the Department and their profession, where applicable.



## CHAPTER II – CONFLIT OF INTEREST AND POST-EMPLOYMENT

### PURPOSE

This chapter of the Code is based on the *Policy on Conflict of Interest and Post-Employment* of the Treasury Board, the objectives of which are to:

- Ensure that, in situations of real, apparent or potential conflict of interest and situations where there is a conflict of duties, decisions are made in a manner which upholds the public interest;
- Facilitate ethical decision-making within organizations and by public servants to resolve conflicts between private and public interests; and
- Establish measures to help public servants prevent, manage and resolve conflict of interest and post-employment situations that could impair either the integrity of the public service or the public's perception of its integrity.

This chapter must be read in tandem with Chapter I of the Code.

### DEFINITIONS

**Public servant:** a person employed in organizations defined in section 2 of the *Policy on Conflict of Interest and Post-Employment*. This includes indeterminate and term employees, employees on leave without pay, students participating in Student Employment Programs, casual, seasonal and part-time workers.

Although they are not public servants, individuals on incoming Interchange Canada assignments are expected to comply with, and volunteers are expected to respect, the requirements of the *Policy on Conflict of Interest and Post-Employment*. Order-in-Council appointees, such as Deputy Ministers, are subject to the *Conflict of Interest Act*, and are not subject to the *Policy on Conflict of Interest and Post-Employment*.

**Conflict of interest:** a situation in which the public servant has private interests that could improperly influence the performance of his or her official duties and responsibilities or in which the public servant uses his or her office for personal gain. A *real* conflict of interest exists at the present time, an *apparent* conflict of interest could be perceived by a reasonable observer to exist, whether or not it is the case, and a *potential* conflict of interest could reasonably be foreseen to exist in the future.

**Conflict of duties:** a conflict that arises, not because of a public servant's private interests, but as a result of one or more concurrent or competing official responsibilities. For example, these roles could include his or her primary public service employment and his or her responsibilities in an outside role that forms part of his or her official duties, such as an appointment to a board of directors, or other outside function.

## **REQUIREMENTS FOR PREVENTING AND DEALING WITH CONFLICT OF INTEREST AND POST-EMPLOYMENT SITUATIONS**

The following are the conflict of interest and post-employment requirements that are a condition of employment for public servants at the Department. These requirements are grounded in and serve to uphold the values contained in the *Values and Ethics Code for the Public Sector*, and repeated in this Code. By upholding these ethical standards, public servants conserve and enhance public confidence in the honesty, fairness and integrity of the public service. These requirements also form part of Canada's commitments as a signatory to international agreements on values and ethics.

### **PREVENTION OF CONFLICT OF INTEREST**

A public servant maintains public confidence in the objectivity of the public service by preventing and avoiding situations that could give the appearance of a conflict of interest, result in a potential for a conflict of interest or result in an actual conflict of interest. Conflict of interest does not relate exclusively to matters concerning financial transactions and the transfer of economic benefit. While financial activity is important, conflicts of interest in any area of activity can have a negative impact on the perceived objectivity of the public service. With the permanent and pervasive nature of information technology, public servants should be particularly sensitive to real, apparent or potential conflicts of interest that may arise from messages and information transmitted via the Internet and other media.

It is impossible to foresee every situation that could give rise to a real, apparent or potential conflict of interest. When in doubt, public servants should refer to the requirements found in this Code to guide appropriate action. Public servants can also seek guidance from their manager and, if necessary, from another senior manager in their reporting structure. If after this step there is still doubt as to whether the activity or situation raises a conflict of interest, the public servant must consult the office responsible for values and ethics.

In addition to the requirements outlined in this chapter, public servants are also required to observe any specific conduct requirements contained in the statutes governing the Department and their profession, where applicable.

### **1. GENERAL RESPONSIBILITIES AND DUTIES OF A PUBLIC SERVANT**

Public servants have general responsibilities and duties, which include the following:

- a) Taking all possible steps to recognize, prevent, report, and resolve any real, apparent or potential conflicts of interest between their official responsibilities and any of their private affairs;
- b) Unless otherwise permitted in this chapter, refraining from having private interests, which would be unduly affected by government actions in which they participate, or of which they have knowledge or information;

- c) Not knowingly taking advantage of, or benefiting from, information that is obtained in the course of their duties that is not available to the public;
- d) Refraining from the direct or indirect use of, or allowing the direct or indirect use of government property of any kind, including property leased to the government, for anything other than officially approved activities;
- e) Not assisting private entities or persons in their dealings with the government where this would result in preferential treatment of the entities or persons;
- f) Not interfering in the dealings of private entities or persons with the government in order to inappropriately influence the outcome;
- g) Maintaining the impartiality of the public service and not engaging in any outside or political activities that impair or could be seen to impair their ability to perform their duties in an objective or impartial manner; and
- h) Ensuring that any real, apparent or potential conflict that arises between their private activities and their official responsibilities as a public servant is resolved in the public interest.

**2. REQUIREMENTS FOR PREVENTING AND DEALING WITH SITUATIONS OF CONFLICT OF INTEREST DURING EMPLOYMENT**

Public servants are required to report in writing to the Deputy Minister, via the office responsible for values and ethics, all outside activities, assets and interests that might give rise to a real, apparent or potential conflict of interest in relation to their official duties. Such a report is to be made within 60 days of their initial appointment or any subsequent appointment, transfer or deployment.

On a regular basis thereafter, and every time a change occurs in their personal affairs or official duties, every public servant is required to review his or her obligations under the Code. If a real, apparent or potential conflict of interest exists, he or she is to file a report in a timely manner.

When negotiating financial arrangements with outside parties, public servants are to comply with the requirements listed in this chapter as well as other related directives or policies issued by the Treasury Board. When in doubt, public servants are to immediately report the situation to their manager in order to seek advice or direction on how to proceed.

The Department encourages employees to participate in outreach activities and personal and professional development promoted by their respective professional associations or relevant to their areas of private interest. No matter what form these outside activities might take, however, the public servant must ensure beforehand that they are not likely to result in a real, apparent or potential conflict of interest.

In general, conflicts of interest may arise in relation to the following:

- owning assets
- receiving gifts, hospitality and other benefits
- participating in outside activities, such as:
  - speaking at a conference;
  - offering legal services outside the federal public service;
  - volunteer work;
  - other paid employment;
  - participation on a board;
  - political activities;
  - teaching;
  - publishing documents; and,
  - other educational activities;
- organizing fundraising activities or solicitation
- owning or operating a business

The above list is not exhaustive, but these are some of the more common examples of situations that could give rise to a real, apparent or potential conflict of interest. In such situations, if there is any doubt, it is recommended that the public servant discuss the matter with their manager and, if necessary, with another senior manager in their reporting structure. If doubt persists as to whether the activity or situation raises a conflict of interest, the public servant must consult the office responsible for values and ethics to obtain advice or a formal decision.

Furthermore, if an outside individual or entity with whom the Department has past, present or potential official dealings offers a commission, reward, advantage or benefit of any kind to an employee or the Department, public servants are to consider whether any real, apparent or potential conflict of interest exists, and obtain the consent in writing of the Deputy Minister or his or her delegate prior to accepting any such offers. This provision is designed to ensure that this chapter, which is based on the *Policy on Conflict of Interest and Post-Employment*, is consistent with paragraph 121(1) (c) of the *Criminal Code*.

### 2.1 Assets

Public servants are required to evaluate their assets, taking into consideration the nature of their official duties and the characteristics of their assets. If there is any real, apparent or potential conflict of interest between the carrying out of their official duties and their assets, they are to report this matter to the Deputy Minister, via the office responsible for values and ethics, in a timely manner.

Where the Deputy Minister or his or her delegate determines that any of these assets result in a real, apparent or potential conflict of interest in relation to their official duties, public servants may be required to divest those assets, or to take other measures to resolve the conflict. Public

servants may not sell or transfer assets to family members or anyone else for the purpose of circumventing the compliance requirements.

The types of assets that should be reported and the procedures for reporting and managing such assets are set out in Annex B, Assets, Liabilities and Trusts.

## **2.2 Outside employment or activities**

Public servants may engage in employment outside the public service and take part in outside activities unless the employment or activities are likely to give rise to a real, apparent or potential conflict of interest or would undermine the impartiality of the public service or the objectivity of the public servant.

Public servants are required to provide a report to the Deputy Minister, via the office responsible for values and ethics, when their outside employment or activities might subject them to demands incompatible with their official duties, or cast doubt on their ability to perform their duties or responsibilities in a completely objective manner. The Deputy Minister or his or her delegate may require that the outside activities be modified or terminated if it is determined that a real, apparent or potential conflict of interest exists.

Public servants who receive a benefit or income either directly or indirectly from a contract with the Government of Canada are required to report to the Deputy Minister, via the office responsible for values and ethics, on such contractual or other arrangements. The Deputy Minister or his or her delegate will determine whether the arrangement presents a real, apparent or potential conflict of interest, and may require that the contract be modified or terminated.

### **Political Activities**

Any public servant considering involvement in a political activity should seek the advice of their manager, the designated departmental official within the Department, the Public Service Commission (PSC) or a human resources advisor before acting.

Public servants are required to seek and obtain permission from the PSC to seek nomination for or be a candidate in a federal, provincial, territorial, or municipal election, in accordance with Part 7 of the Public Service Employment Act (PSEA). The public servant must contact the designated official in the Department, who will seek the input of the Deputy Minister and work closely with the person making the request and the PSC to process the request.

“Political activities” are defined in Part 7 of the PSEA as “any activity in support of, within or in opposition to a political party; carrying on any activity in support of or in opposition to a candidate before or during an election period; or, seeking nomination as or being a candidate in an election before or during the election period.”

Any public servant who wishes to engage in a political activity not covered by Part 7 of the PSEA that could constitute a conflict of interest is required to report the proposed activity to the Deputy Minister via the office responsible for values and ethics.

Similarly, any public servant who is subject to the Treasury Board's Policy on Conflict of Interest and Post-Employment but who is not subject to Part 7 of the PSEA, including casual and part-time workers, who wishes to engage in any political activity that could constitute a conflict of interest, is to report the proposed activity to the Deputy Minister via the office responsible for values and ethics.

### **2.3 Gifts, hospitality and other benefits**

Public servants are expected to use their best judgment to avoid situations of real, apparent or potential conflict of interest by considering the following criteria on gifts, hospitality and other benefits and in keeping with the Values and Ethics Code for the Public Sector and the Policy on Conflict of Interest and Post-Employment, which are reflected in this Code.

Public servants are not to accept any gifts, hospitality or other benefits that may have a real, apparent or potential influence on their objectivity in carrying out their official duties and responsibilities or that may place them under obligation to the donor. This includes activities such as free or discounted admission to sporting and cultural events, travel or conferences.

The acceptance of gifts, hospitality and other benefits is permissible if they are infrequent and of minimal value, within the normal standards of courtesy or protocol, arise out of activities or events related to the official duties of the public servant concerned, and do not compromise or appear to compromise the integrity of the public servant concerned or that of the Department.

Public servants are to seek written direction from the Deputy Minister, via the office responsible for values and ethics, where it is impossible to decline gifts, hospitality or other benefits that do not meet the principles set out above, or where it is believed that there is sufficient benefit to the Department to warrant acceptance of certain types of hospitality.

### **2.4 Solicitation**

With the exception of fundraising for such officially supported activities as the Government of Canada Workplace Charitable Campaign (GCWCC), public servants may not solicit gifts, hospitality, other benefits or transfers of economic value from a person, group or organization in the private sector who has dealings with the government. When fundraising for such official activities, public servants should ensure that they have prior written authorization from the Deputy Minister in order to solicit donations, prizes or contributions in kind from external organizations or individuals.

The Deputy Minister or his or her delegate may require that the activities be modified or terminated where it is determined that there is a real, potential or apparent conflict of interest or an obligation to the donor.

### **2.5 Avoidance of preferential treatment**

Public servants are responsible for demonstrating objectivity and impartiality in the exercise of their duties and in their decision-making, whether related to staffing, financial awards or penalties to external parties, transfer payments, program operations or any other exercise of responsibility.

This means that they are prohibited from granting preferential treatment or advantages to family, friends or any other person or entity. They are not to offer extraordinary assistance to any entity or person already dealing with the government without the knowledge and support of their supervisor. They also are not to disadvantage any entity or person dealing with the government because of personal antagonism or bias.

Providing information that is publicly accessible is not considered preferential treatment.

## **3. REQUIREMENTS FOR PREVENTING POST-EMPLOYMENT CONFLICT OF INTEREST SITUATIONS BEFORE AND AFTER LEAVING OFFICE**

All public servants have a responsibility to minimize the possibility of a real, apparent or potential conflict of interest between their most recent responsibilities within the federal public service and their subsequent employment outside the public service.

### **3.1 Before leaving employment**

Before leaving their employment with the public service, all public servants are to disclose their intentions regarding any future outside employment or activities that may pose a risk of a real, apparent or potential conflict of interest with their current responsibilities and discuss potential conflicts with their manager, or the Deputy Minister or his or her delegate.

### **3.2 Post-employment limitation period for public servants in designated positions**

The Deputy Minister is responsible for designating positions of risk for post-employment conflict of interest situations in accordance with the Policy on Conflict of Interest and Post-Employment.

The positions that have been designated as positions of risk in the Department of Justice are: EX, LC, LA-3A and LA-3B positions.

Public servants in these designated positions are subject to a one-year limitation period after leaving office. Before leaving office and during this one-year limitation period, these public servants are to report to the Deputy Minister in writing, via the office responsible for values and ethics, all firm offers of employment or proposed activity outside the public service that could place them in a real, apparent or potential conflict of interest with their public service employment. They are also to disclose immediately the acceptance of any such offer. In addition, these public servants may not, during this one-year period, without the authorization of the Deputy Minister:

- a) Accept appointment to a board of directors of, or employment with, private entities with which they had significant official dealings during the period of one year immediately prior to the termination of their service. The official dealings in question may either be directly on the part of the public servant or through their subordinates;
- b) Make representations to any government organization on behalf of persons or entities outside of the public service with which they had significant official dealings, during the period of one year immediately prior to the termination of their service<sup>5</sup>. The official dealings in question may either be directly on the part of the public servant or through their subordinates; or
- c) Give advice to their clients or employer using information that is not publicly available concerning the programs or policies of the Department or organizations with which they had a direct and substantial relationship.

### **3.3 Waiver or reduction of limitation period**

A public servant or former public servant may apply to the Deputy Minister, via the office responsible for values and ethics, for a written waiver or reduction of the limitation period. The public servant is to provide sufficient information to assist the Deputy Minister or his or her delegate in making a determination as to whether to grant the waiver taking into consideration the following criteria:

- a) the circumstances under which the termination of their service occurred;
- b) the general employment prospects of the public servant or former public servant;
- c) the significance to the government of information possessed by the public servant or former public servant by virtue of that individual's position in the public service;
- d) the desirability of a rapid transfer of the public servant's or former public servant's knowledge and skills from the government to private, other governmental or non-governmental sectors;
- e) the degree to which the new employer might gain unfair commercial or private advantage by hiring the public servant or former public servant;
- f) the authority and influence possessed by that individual while in the public service; and/or
- g) any other consideration at the discretion of the Deputy Minister.

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<sup>5</sup> Assistant deputy ministers and their equivalents are subject to the Lobbying Act. In the case of any conflict between this Policy and the Act, the Act takes precedence.



#### **4. RESOLUTION**

With respect to the arrangements necessary to prevent a real, apparent or potential conflict of interest, or to comply with the requirements set out above, it is expected that situations will be resolved through discussion and agreement between the public servant and the Deputy Minister or his or her delegate. When a public servant and the Deputy Minister or delegate, disagree on the appropriate arrangements to resolve a real, apparent or potential conflict of interest, the disagreement will be resolved through the grievance procedures established by the Department.

#### **5. CONSEQUENCES**

The Department fully trusts public servants in the exercise of their professional duties and expects that each public servant will comply with the Code and the related policies and guidelines.

A public servant who does not comply with the requirements set out in this Code may be subject to disciplinary measures, up to and including termination of employment. Any disciplinary measures will be based on the seriousness of the breach.

## **ANNEX A**

### **DUTIES AND OBLIGATIONS**

#### **Public Servants**

Public servants are expected to abide by this Code and demonstrate the values of the Department in their actions and behaviour. If a public servant does not abide by these values and expectations, he or she may be subject to administrative or disciplinary measures up to and including termination of employment.

As provided by sections 12 and 13 of the *Public Servants Disclosure Protection Act* (PSDPA), if public servants have information that could indicate a serious breach of this Code, they can bring this matter, in confidence and without fear of reprisal, to the attention of their immediate supervisor, the senior officer for disclosure or the Public Sector Integrity Commissioner.

It is the responsibility of every public servant to review the Code regularly – at least once a year and more often if there is a change in their circumstances (e.g. when changing positions or undertaking a new activity) – and to be familiar with their duties and obligations.

#### **Managers**

Public servants who are also managers are in a position of influence and authority that gives them a particular responsibility to exemplify the values of the public sector and the Department. Managers are expected to:

- promote a culture based on the values of the public sector and of the Department, and encourage dialogue on related issues;
- provide advice and guidance as needed to public servants under their supervision on issues related to values and ethics, including occasions where public servants find themselves faced with a situation that could give rise to a conflict of interest;
- review submissions from public servants and provide input as requested by the office responsible for values and ethics for the purpose of making a decision relating to conflict of interest and post-employment;
- monitor public servants' compliance with decisions or other measures established to prevent or minimize risks related to conflict of interest;
- notify the office responsible for values and ethics of breaches under this Code and non-compliance with established measures to prevent conflict of interest; and,
- advise employees departing from the public service of their post-employment obligations. Discuss their intentions for future outside employment or activities that may give rise to a real, apparent or potential conflict of interest situation.

### **Deputy Minister**

The Deputy Minister has specific responsibilities under the PSDPA, including establishing a code of conduct for the Department and an overall responsibility for fostering a positive culture of values and ethics. The Deputy Minister ensures that employees are aware of their obligations under this Code. The Deputy Minister also ensures that employees can obtain appropriate advice within the Department on ethical issues, including possible conflicts of interest.

The Deputy Minister ensures that this Code and the internal disclosure procedures are implemented effectively within the Department, and that they are regularly monitored and evaluated.

The Deputy Minister is responsible for ensuring the non-partisan provision of programs and services by the Department.

The Deputy Minister is subject to the Values and Ethics Code for the Public Sector and to the Conflict of Interest Act.

### **Assistant Deputy Minister, Management Sector**

The Deputy Minister has delegated responsibility for overseeing activities relating to values and ethics at the Department to the Assistant Deputy Minister of the Management Sector, who in turn supports the Deputy Minister as part of his or her functions by playing a central role in leading the Department in matters of values and ethics.

In particular, the Assistant Deputy Minister of the Management Sector is responsible for managing the office responsible for values and ethics and, in accordance with the authority delegated to him or her, for reviewing and dealing with requests for advice and submissions related to conflict of interest and post-employment on behalf of the Deputy Minister.

### **Centre for Ethics, Conflict Management and Wellness**

The Centre for Ethics, Conflict Management and Wellness is responsible for values and ethics and supports the Deputy Minister, the Assistant Deputy Minister of the Management Sector, managers and all public servants in the Department. It is responsible for:

- providing advice to public servants and managers on issues related to this Code and values and ethics in general;
- processing and providing recommendations on submissions under this Code related to conflict of interest, post-employment and political activities;
- providing information, tools and training to ensure that public servants understand their duties and obligations; and

- working in partnership with key stakeholders and partners on issues related to values and ethics.

### **Senior Officer for Disclosure**

The senior officer for disclosure helps promote a positive environment for disclosing wrongdoing and deals with disclosures of wrongdoing made by public servants in the Department. He or she is responsible for supporting the Deputy Minister in meeting the requirements of the *Public Servants Disclosure Protection Act* (PSDPA).

The senior officer's duties and powers also include the following, in accordance with the internal disclosure procedures established under the PSDPA:

1. Provide information, advice and guidance to public servants regarding the Department's internal disclosure procedures, including the making of disclosures, the conduct of investigations into disclosures, and the handling of disclosures made to supervisors.
2. Receive and record disclosures and review them to establish whether there are sufficient grounds for further action under the PSDPA.
3. Manage investigations into disclosures, including determining whether to deal with a disclosure under the PSDPA, initiate an investigation or cease an investigation.
4. Coordinate handling of a disclosure with the senior officer of another federal public sector organization, if a disclosure or an investigation into a disclosure involves that other organization.
5. Notify the person(s) who made a disclosure in writing of the outcome of any review and/or investigation into the disclosure and on the status of actions taken on the disclosure, as appropriate.
6. Report the findings of investigations, as well as any systemic problems that may give rise to wrongdoing, directly to the Deputy Minister, with recommendations for corrective action, if any.

### **Treasury Board of Canada Secretariat – Office of the Chief Human Resources Officer**

In support of the Treasury Board President's responsibilities under section 4 of the PSDPA, the Office of the Chief Human Resources Officer (OCHRO) is responsible for promoting ethical practices in the public sector<sup>6</sup>. The OCHRO will work with all relevant partner organizations to implement and promote the *Values and Ethics Code for the Public Sector* (VECPS), and will

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<sup>6</sup> Section 4 of the PSDPA assigns this responsibility to the Minister responsible for the Public Service Human Resources Management Agency of Canada (subsequently the Canada Public Service Agency (CPSA)). With the creation of the Office of the Chief Human Resources Officer within Treasury Board of Canada Secretariat on February 6, 2009, the functions of the CPSA were transferred to the OCHRO.

provide advice to Deputy Ministers and designated departmental officials with respect to its interpretation.

The Chief Human Resources Officer may issue directives, standards and guidelines related to the VECPS.

The OCHRO will monitor the implementation of the VECPS in organizations with a view to assessing whether the stated objectives have been achieved.

### **Public Service Commission**

The Public Service Commission is responsible for conducting staffing investigations and audits to safeguard the integrity of the public service staffing system and administering certain provisions related to political activities to maintain the non-partisanship of the public service in accordance with the *Public Service Employment Act*.

## ANNEX B

### ASSETS, LIABILITIES AND TRUSTS

#### Reportable Assets and Liabilities

Public servants must carefully evaluate on a regular basis whether their assets and liabilities need to be reported. In doing so, they must take into consideration the nature of their official duties and the characteristics of their assets and liabilities. If there is any real, apparent or potential conflict between the carrying out of their official duties and their assets and liabilities, a submission to the office responsible for values and ethics must be made. If there is no relationship, no report is required.

Any assets and or direct and contingent liabilities that might give rise to a conflict of interest must be reported within 60 days of the public servants first appointment or any subsequent appointment, transfer or deployment. Any measures required to manage or resolve a conflict of interest will normally be completed or in place within 120 calendar days, or such other appropriate time period as determined by the Department after a determination that a real, apparent or potential conflict of interest exists.

The following is a list of examples of assets and liabilities that must be reported if they do, or could, constitute a conflict of interest. **This list is not exhaustive.**

- a. publicly traded securities of corporations and foreign governments, and self-administered Registered Retirement Savings Plans (RRSPs), self-administered Registered Education Savings Plans (RESPs), tax free savings accounts, and Registered Disability Savings Plans (RDSPs), or similar tax-related saving vehicles, that are composed of these securities, where these securities are held directly and not through units in mutual funds;
- b. interests in partnerships, proprietorships, joint ventures, private companies and family businesses, in particular those that own or control shares of public companies or that do business with the government;
- c. interests in labour-sponsored venture capital corporations or similar entities;
- d. commercially operated farm businesses;
- e. real property that is not for the private use of public servants or their family members;
- f. commodities, futures and foreign currencies held or traded for speculative purposes;
- g. assets placed in trust or resulting from an estate of which the public servant is a beneficiary;
- h. secured or unsecured loans granted to persons other than to members of the public servant's immediate family;
- i. any other assets or liabilities that could give rise to a real, apparent or potential conflict of interest due to the particular nature of the public servant's official duties or the non-public information to which he or she has access; and
- j. direct and contingent liabilities in respect of any of the assets described in this section.

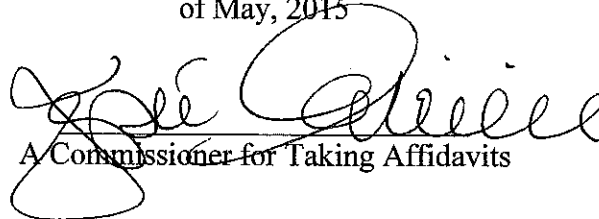
### Non-reportable Assets

Assets and interests for the private use of public servants and of their family members, as well as non-commercial assets, are **not** subject to the compliance measures.

For example, such assets include the following:

- a. residences, recreational properties and farms used or intended for use by public servants or their families;
- b. household goods and personal effects;
- c. works of art, antiques and collectibles;
- d. automobiles and other personal means of transportation;
- e. cash and deposits;
- f. Canada Saving Bonds and other similar investments in securities of fixed value issued or guaranteed by any level of government in Canada or agencies of those governments;
- g. Registered Retirement Savings Plans and Registered Education Saving Plans that are not self-administered;
- h. investments in open-ended mutual funds;
- i. guaranteed investment certificates and similar financial instruments;
- j. annuities and life insurance policies;
- k. pension rights;
- l. money owed by a previous employer, client or partnership;
- m. personal loans receivable from members of public servants' immediate families and small personal loans receivable from other persons where public servants have loaned the moneys receivable; and
- n. any liability, such as a car loan, home renovation loan or credit card account, from a financial institution or business entity granted on terms available to the general public.

This is Exhibit "6" referred to  
in the affidavit of Deborah MacNair  
sworn before me, this 28<sup>th</sup> day  
of May, 2015



A Commissioner for Taking Affidavits

Josée Carrière, a Commissioner, etc.,  
within or outside the Province of Ontario,  
for the Government of Canada,  
Department of Justice.  
Expires March 26, 2016.





# **Code of Professional Conduct**

## **The Law Society of Manitoba**

Adopted by the Benchers of the  
Law Society of Manitoba on June 17, 2010  
Effective January 1, 2011

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## **CHAPTER 3 – RELATIONSHIP TO CLIENTS**

capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

[14] A lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's partners and associates.

[15] **Incompetence, Negligence and Mistakes** - This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. However, evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure regardless of tort liability. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

## 3.2 QUALITY OF SERVICE

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### Quality of Service

**3.2-1** A lawyer has a duty to provide courteous, thorough and prompt service to the client. The quality of service required of a lawyer is service which is competent, timely, conscientious, diligent, efficient and civil.

#### Commentary

[1] This rule should be read and applied in conjunction with Section 3.1 regarding competence.

[2] A lawyer has a duty to provide a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation. An ordinarily or otherwise competent lawyer may still occasionally fail to provide an adequate quality of service.

[3] A lawyer has a duty to communicate effectively with the client. What is effective will vary depending on the nature of the retainer, the needs and sophistication of the client, and the need for the client to make fully informed decisions and provide instructions.

[4] A lawyer should ensure that matters are attended to within a reasonable time frame. If the lawyer can reasonably foresee undue delay in providing advice or services, the lawyer has a duty to so inform the client, so that the client can make an informed choice about his or her options, such as whether to retain new counsel.

#### Examples of expected practices

[5] The quality of service to a client may be measured by the extent to which a lawyer maintains certain standards in practice. The following list, which is illustrative and not exhaustive, provides key examples of expected practices in this area:

- (a) keeping a client reasonably informed;
- (b) answering reasonable requests from a client for information;
- (c) responding to a client's telephone calls;
- (d) keeping appointments with a client, or providing a timely explanation or apology in circumstances when unable to keep such an appointment;
- (e) taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so;
- (f) ensuring, where appropriate, that all instructions are in writing or confirmed in writing;
- (g) answering within a reasonable time any communication that requires a reply;
- (h) ensuring that work is done in a timely manner so that its value to the client is

maintained;

- (i) providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;
- (j) maintaining office staff, facilities and equipment adequate to the lawyer's practice;
- (k) informing a client of a proposal of settlement, and explaining the proposal properly;
- (l) providing a client with relevant information about a matter and never withholding information from a client or misleading the client about the position of a matter in order to cover up neglect or a mistake;
- (m) making a prompt and complete report when the work is finished or, if a final report cannot be made, providing an interim report where one might reasonably be expected;
- (n) avoidance of self-induced disability, for example from the use of intoxicants or drugs, that interferes with or prejudices the lawyer's services to the client;
- (o) being civil.

[6] A lawyer should meet deadlines, unless the lawyer is able to offer a reasonable explanation and ensure that no prejudice to the client will result. Whether or not a specific deadline applies, a lawyer should be prompt in prosecuting a matter, responding to communications and reporting developments to the client. In the absence of developments, contact with the client should be maintained to the extent reasonably expected by the client.

[7] In providing short-term limited legal services under Rules 3.4-2A – 3.4-2D, a lawyer should disclose to the client the limited nature of the services provided and determine whether any additional legal services beyond the short-term limited legal services may be required or are advisable, and encourage the client to seek such further assistance.

### **Limited Scope Retainers**

**3.2-1A** Before undertaking a limited scope retainer the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and must confirm in writing to the client as soon as practicable what services will be provided.

#### **Commentary**

[1] Reducing to writing the discussions and agreement with the client about the limited scope retainer assists the lawyer and client in understanding the limitations of the service to be provided and any risks of the retainer.

[2] A lawyer who is providing legal services under a limited scope retainer should be careful to avoid acting in a way that suggests that the lawyer is providing full services to the client.



[3] Where the limited services being provided include an appearance before a tribunal a lawyer must be careful not to mislead the tribunal as to the scope of the retainer and should consider whether disclosure of the limited nature of the retainer is required by the rules of practice or the circumstances.

[4] A lawyer who is providing legal services under a limited scope retainer should consider how communications from opposing counsel in a matter should be managed (See rule 7.2-6A)

[5] This rule does not apply to situations in which a lawyer is providing summary advice, for example over a telephone hotline or as duty counsel, or to initial consultations that may result in the client retaining the lawyer.

### **Honesty and Candour**

**3.2-2** When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.

#### **Commentary**

[1] A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the matter, if any, that might influence whether the client selects or continues to retain the lawyer.

[2] A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

[3] Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the rule. In communicating with the client, the lawyer may disagree with the client's perspective, or may have concerns about the client's position on a matter, and may give advice that will not please the client. This may legitimately require firm and animated discussion with the client.

### **Language Rights**

**3.2-2A** A lawyer must, when appropriate, advise a client of the client's language rights, including the right to proceed in the official language of the client's choice.

**3.2-2B** Where a client wishes to retain a lawyer for representation in the official language of the client's choice, the lawyer must not undertake the matter unless the lawyer is competent to provide the required services in that language.

#### **Commentary**

- [1] The lawyer should advise the client of the client's language rights as soon as possible.
- [2] The choice of official language is that of the client not the lawyer. The lawyer should be aware of relevant statutory and Constitutional law relating to language rights including the Canadian Charter of Rights and Freedoms, s.19(1) and Part XVII of the Criminal Code regarding language rights in courts under federal jurisdiction and in criminal proceedings. The lawyer should also be aware that provincial or territorial legislation may provide additional language rights, including in relation to aboriginal languages.
- [3] When a lawyer considers whether to provide the required services in the official language chosen by the client, the lawyer should carefully consider whether it is possible to render those services in a competent manner as required by Rule 3.1-2 and related Commentary.

### **Advising Clients**

**3.2-2C** A lawyer must obtain the client's instructions and in doing so, provide informed and independent advice.

#### **Commentary**

- [1] Lawyers provide legal services based upon the client's instructions. In order to provide appropriate instructions, the client should be fully and fairly informed. There may not be a need for the lawyer to obtain explicit instructions for every single step on a matter. Before taking steps, a lawyer should consider whether and to what extent the client should be consulted or informed. Fundamental decisions such as how to plead and what witnesses to call almost always require prior consultations. The same may not be so with less fundamental decisions. When in doubt, the lawyer should consult with the client. A lawyer should obtain instructions from the client on all matters not falling within the express or implied authority of the lawyer.
- [2] A lawyer should clearly specify the facts, circumstances and assumptions upon which an opinion is based. If it is apparent that the client has misunderstood or misconceived the lawyer's advice, matters concerning the position taken or what is really involved in the matter, the lawyer should explain the matter further to the client to a sufficient degree so that the client does understand.
- [3] A lawyer should not provide advice if the lawyer's personal views of the client, others involved or the issue will affect the lawyer's independence on the matter. For example, a lawyer's relationship (personal, financial, or previously strained with the client, opposing counsel or the opposing party) could affect the lawyer's ability to objectively assess a matter.
- [4] When a lawyer is requested to provide independent legal advice or independent representation, the lawyer should treat the client as if he or she were the lawyer's own client for those purposes. The client is not the referring party. The lawyer should not treat the task as one that can be taken lightly.
- [5] If requested by a client to do so, a lawyer should assist the client in obtaining a second opinion by cooperating with the second lawyer. A lawyer is not obliged, however, to assist a client who is really attempting to coerce the formulation of a favourable opinion or is acting unreasonably in some other respect.

[6] If a lawyer has difficulty contacting a client to obtain instructions, the lawyer ought to take reasonable steps to locate the client. If those efforts fail, the lawyer should consider withdrawing in accordance with section 3.7 (Withdrawal from Representation).

### **When the Client is an Organization**

**3.2-3** Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer must act for the organization in exercising his or her duties and in providing professional services.

#### **Commentary**

[1] A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees. While the organization or corporation acts and gives instructions through its officers, directors, employees, members, agents or representatives, the lawyer should ensure that it is the interests of the organization that are served and protected. Further, given that an organization depends on persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

[2] In addition to acting for the organization, the lawyer may also accept a joint retainer and act for a person associated with the organization. For example, a lawyer may advise an officer of an organization about liability insurance. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interests and should comply with the rules about the avoidance of conflicts of interests (section 3.4).

### **Encouraging Compromise or Settlement**

**3.2-4** A lawyer must advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings.

#### **Commentary**

[1] The lawyer should consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options and, if so instructed, take steps to pursue those options.

### **Threatening Criminal or Regulatory Proceedings**

**3.2-5** A lawyer must not, in an attempt to gain a benefit for the client, threaten, or advise a client to threaten:

- (a) to initiate or proceed with a criminal or quasi-criminal charge; or
- (b) to make a complaint to a regulatory authority.

### Commentary

[1] It is an abuse of the court or regulatory authority's process to threaten to bring action in order to secure the satisfaction of a private grievance. Even if a client has a legitimate entitlement to be paid monies, threats to take criminal or quasi-criminal action are not appropriate.

[2] It is not improper, however, to notify the appropriate authority of criminal or quasi-criminal activities while also taking steps through the civil system. Nor is it improper for a lawyer to request that another lawyer comply with an undertaking or trust condition or other professional obligation or face being reported to the Society. The impropriety stems from threatening to, or actually using, criminal or quasi-criminal proceedings to gain a civil advantage.

### Inducement for Withdrawal of Criminal or Regulatory Proceedings

**3.2-6** A lawyer must not:

- (a) give or offer to give, or advise an accused or any other person to give or offer to give, any valuable consideration to another person in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint unless the lawyer obtains the consent of the Crown or the regulatory authority to enter into such discussions;
- (b) accept or offer to accept, or advise a person to accept, any valuable consideration in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or regulatory authority to enter such discussions; or
- (c) wrongfully influence any person to prevent the Crown or regulatory authority from proceeding with charges or a complaint or to cause the Crown or regulatory authority to withdraw the complaint or stay charges in a criminal or quasi-criminal proceeding.

### Commentary

[1] "Regulatory authority" includes professional and other regulatory bodies.

[2] A lawyer for an accused or potential accused must never influence a complainant or potential complainant not to communicate or cooperate with the Crown. However, this rule does not prevent a lawyer for an accused or potential accused from communicating with a complainant or potential complainant to obtain factual information, arrange for restitution or an apology from an accused, or defend or settle any civil matters between the accused and the complainant. When a proposed resolution involves valuable consideration being exchanged in return for influencing the Crown or regulatory authority not to proceed with a charge or to seek a reduced sentence or penalty, the lawyer for the accused must obtain the consent of the Crown or regulatory authority prior to discussing such proposal with the complainant or potential complainant. Similarly, lawyers advising a complainant or potential complainant with respect to any such negotiations can do so only with the consent of the Crown or regulatory authority.

[3] A lawyer cannot provide an assurance that the settlement of a related civil matter will result in the withdrawal of criminal or quasi-criminal charges, absent the consent of the Crown or regulatory authority.

[4] Where the complainant or potential complainant is unrepresented, the lawyer should have regard to the rules respecting unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused or potential accused. If the complainant or potential complainant is vulnerable, the lawyer should take care not to take unfair or improper advantage of the circumstances. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

### **Dishonesty, Fraud by Client**

**3.2-7** When acting for a client, or in acting on instructions, a lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment.

#### **Commentary**

[1] A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

[2] A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.

[3] Before accepting a retainer or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.

[4] A bona fide test case is not necessarily precluded by this rule and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.

### **Dishonesty, Fraud when Client an Organization**

**3.2-8** A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally must do the following, in addition to his or her obligations under rule 3.2-7:

- (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;
- (b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed wrongful conduct to be stopped, advise progressively the next highest persons or groups including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and
- (c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with the rules in section 3.7.

#### **Commentary**

[1] The past, present, or proposed misconduct of an organization may have harmful and serious consequences, not only for the organization and its constituency, but also for the public who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences to the public at large. This subrule addresses some of the professional responsibilities of a lawyer acting for an organization, including a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is dishonest, fraudulent, criminal or illegal. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (section 3.3).

[2] This rule speaks of conduct that is dishonest, fraudulent, criminal or illegal. Such conduct includes acts of omission.

[3] Indeed, often it is the omissions of an organization, such as failing to make required disclosure or to correct inaccurate disclosures that constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, invokes these rules.

[4] In considering his or her responsibilities under this section, a lawyer should consider whether it is feasible and appropriate to give any advice in writing.

[5] A lawyer acting for an organization who learns that the organization has acted, is acting, or intends to act in a wrongful manner, may advise the chief executive officer and must advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, the lawyer must report the matter "up the ladder" of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer's advice, continues with the wrongful conduct, the lawyer must withdraw from acting in the particular matter in accordance with rule 3.7-1. In some but not all cases, withdrawal means resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.

[6] This rule recognizes that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the

organization's and the public's interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization, not only about the technicalities of the law, but also about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable, and consistent with the organization's responsibilities to its constituents and to the public.

### **Clients with Diminished Capacity**

**3.2-9** When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.

#### **Commentary**

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

[2] A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of the person lacking capacity only to the extent necessary to protect the person until a legal representative can be appointed. A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client.

[3] If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, a lawyer should act to preserve and protect the client's interests.

[4] In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative's assessment of what is in the best interests of the client under a disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those

interests. This may require reporting the misconduct to a person or institution such as a family member, the Public Trustee or another appropriate agency.

[5] Where a lawyer takes protective action on behalf of a person or client lacking in capacity the authority to disclose necessary confidential information may be implied in some circumstances: See Commentary under rule 3.3-1 (Confidentiality) for a discussion of the relevant factors. If the court or other counsel become involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.



### 3.3 CONFIDENTIALITY

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#### Confidential Information

**3.3-1** A lawyer at all times must hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and must not divulge any such information unless:

- (a) expressly or impliedly authorized by the client;
- (b) required by law or a court to do so;
- (c) required to deliver the information to the Law Society, or
- (d) otherwise permitted by this rule.

#### Commentary

[1] A lawyer cannot render effective professional service to a client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

[2] This rule must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

[3] A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

[4] A lawyer also owes a duty of confidentiality to anyone seeking advice or assistance on a matter invoking a lawyer's professional knowledge, although the lawyer may not render an account or agree to represent that person. A solicitor and client relationship is often established without formality. A lawyer should be cautious in accepting confidential information on an informal or preliminary basis since possession of the information may prevent the lawyer from subsequently acting for another party in the same or a related matter. (See rule 3.4-1 Conflicts.)

[5] Generally, unless the nature of the matter requires such disclosure, the lawyer should not disclose having been:

- (a) retained by a person about a particular matter; or
- (b) consulted by a person about a particular matter, whether or not the lawyer-client relationship has been established between them.

[6] A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require

such disclosure.

[7] Sole practitioners who practise in association with other lawyers in cost-sharing, space-sharing or other arrangements should be mindful of the risk of advertent or inadvertent disclosure of confidential information, even if the lawyers institute systems and procedures that are designed to insulate their respective practices. The issue may be heightened if a lawyer in the association represents a client on the other side of a dispute with the client of another lawyer in the association. Apart from conflict of interest issues such a situation may raise, the risk of such disclosure may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

[8] A lawyer should avoid indiscreet conversations and other communications, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shop-talk among lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened. Although the rule may not apply to facts that are public knowledge, a lawyer should guard against participating in or commenting on speculation concerning the client's affairs or business.

[9] In some situations, the authority of the client to disclose may be implied. For example, in court proceedings some disclosure may be necessary in a pleading or other court document. Also, it is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to non-legal staff, such as secretaries and filing clerks and to others whose services are used by the lawyer. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees, students and other lawyers engaged under contract with the lawyer or with the firm of the lawyer the importance of non-disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent their disclosing or using any information that the lawyer is bound to keep in confidence.

[10] The client's authority for the lawyer to disclose confidential information to the extent necessary to protect the client's interest may also be implied in some situations where the lawyer is taking action on behalf of the person lacking capacity to protect the person until a legal representative can be appointed. In determining whether a lawyer may disclose such information, the lawyer should consider all circumstances, including the reasonableness of the lawyer's belief the person lacks capacity, the potential harm that may come to the client if no action is taken, and any instructions the client may have given the lawyer when capable of giving instructions about the authority to disclose information. Similar considerations apply to confidential information given to the lawyer by a person who lacks the capacity to become a client but nevertheless requires protection.

[11] A lawyer may have an obligation to disclose information under rules 5.5-2, 5.5-3 and 5.6-3. If client information is involved in those situations, the lawyer should be guided by the provisions of this rule.

## Use of Confidential Information

**3.3-2** The lawyer must not use or disclose a client's or former client's confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.

### Commentary

[1] The fiduciary relationship between a lawyer and a client forbids the lawyer or a third person from benefiting from the lawyer's use of a client's confidential information. If a lawyer engages in literary works, such as a memoir or autobiography, the lawyer is required to obtain the client's or former client's consent before disclosing confidential information.

## Mandatory Disclosure

**3.3-3** When required by law, by order of a tribunal of competent jurisdiction, or pursuant to *The Legal Profession Act* and the regulations/by-laws/rules thereunder a lawyer must disclose confidential information, but the lawyer must not disclose more information than is required.

**3.3-3A** A lawyer must disclose confidential information, but only to the extent necessary:

- (a) if the lawyer has reasonable grounds for believing that an identifiable person or group is in imminent danger of death or serious bodily harm and believes disclosure is necessary to prevent the death or harm; and
- (b) the lawyer does not reasonably believe that such disclosure will cause harm to the lawyer or to the lawyer's family or to the lawyer's associates.

### Commentary

[1] While a lawyer is generally justified in obeying a court order to disclose confidential information, this may not be the case where a lawyer believes in good faith that the order is in error. In these circumstances, provided that an appeal from the order is taken, the lawyer has an obligation to withhold disclosure pending final adjudication of the matter.

[2] A decision to disclose the confidential information of a client cannot be taken lightly. In making that decision the lawyer should be guided by the commentary to rule 3.3-3B. In the case of mandatory disclosure a significant factor to be considered is the imminence of the perceived danger. In the absence of an imminent danger, there may be other alternatives available to the lawyer short of disclosure.

[3] Mandatory disclosure of imminent danger of death or bodily harm is not conditional on a crime occurring. Accordingly, this rule could apply in circumstances such as a threatened suicide or self-mutilation.

[4] A lawyer will be relieved from the mandatory obligation to disclose information arising from a reasonable belief that a person is in imminent danger of death or serious bodily harm if the lawyer reasonably believes that disclosure will bring harm upon the lawyer or the lawyer's

family or colleagues. This might occur where the lawyer expects that the client is likely to retaliate or has threatened retaliation.

### **Permitted Disclosure**

**3.3-3B** A lawyer may divulge confidential information, but only to the extent necessary:

- (a) with the express or implied authority of the client concerned;
- (b) in order to establish or collect a fee;
- (c) in order to secure legal or ethical advice about the lawyer's proposed conduct;
- (d) if the lawyer has reasonable grounds for believing that a crime is likely to be committed and believes disclosure could prevent the crime; or
- (e) if the lawyer has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility.

### **Commentary**

[1] When a client undermines the lawyer and client relationship by impugning the lawyer's conduct or refusing to pay the lawyer's account, fairness dictates that there is a waiver of confidentiality to such an extent so as to allow a lawyer to defend the allegations or prosecute the claim for fees.

[2] Clients are entitled to have information with respect to past conduct held in confidence but the same rationale does not apply with respect to a prospective crime. While the principles relating to solicitor-client confidentiality warrant special protection in our judicial system, disclosure may be permissible in limited circumstances in the interests of protecting the public.

[3] A decision to disclose pursuant to rules 3.3-3B(d) and (e) should be made only in exceptional circumstances. The decision to do so can be based on a number of factors including:

- Are there reasonable grounds for believing that a crime will be carried out?
- What is the nature of the crime and its impact? How serious is the crime? For example, is it a petty crime without a victim, or a crime that can potentially harm one or more persons or their property? Is it a crime that is likely to involve violence?
- Is the information, if disclosed, likely to prevent the crime?
- Will the information be disclosed through other means in any event, or does urgency dictate more immediate action?
- Does the client envision involving the lawyer in the events relating to the crime? Is the lawyer being duped into participating in a fraud, for example?
- Is the communication part of a conspiracy to commit a crime or in furtherance of a

crime? If so, no (evidentiary) privilege attaches to it as it cannot be said to be a legitimate communication for the purpose of obtaining legal advice.

- Is there reliance on the lawyer by a victim?
- What is the impact of disclosure on the client? Will disclosure make a difference to the client? For example, could the client be subject to a reduced charge if the crime is not carried out?
- What is the impact on the lawyer's practice?
- What is the impact on the lawyer? Are there concerns about the personal safety of either the lawyer or the lawyer's family?
- What will disclosure mean to the administration of justice and our legal system?
- What does the lawyer's conscience say?

[4] Once a decision to disclose is made, the lawyer will then need to consider how to disclose, to whom, and how to ensure that the disclosure is no more than is necessary to prevent the crime or dangerous situation at the court facility from occurring. Furthermore, the lawyer must also be mindful of the obligations under Rule 2.02 (2) to be honest and candid with the client and to inform the client of the disclosure where appropriate.

**3.3-4** If it is alleged that a lawyer or the lawyer's associates or employees:

- (a) have committed a criminal offence involving a client's affairs;
- (b) are civilly liable with respect to a matter involving a client's affairs;
- (c) have committed acts of professional negligence; or
- (d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,

the lawyer may disclose confidential information in order to defend against the allegations but the lawyer must not disclose more information than is required.

**3.3-5** Intentionally left blank.

**3.3-6** Intentionally left blank.

**3.3-7** A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a law firm, but only if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client.

#### **Commentary**

[1] As a matter related to clients' interests in maintaining a relationship with counsel of choice and protecting client confidences, lawyers in different firms may need to disclose limited

information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice.

[2] In these situations (see Rules 3.4-17 to 3.4-23 on Conflicts From Transfer Between Law Firms), rule 3.3-7 permits lawyers and law firms to disclose limited information. This type of disclosure would only be made once substantive discussions regarding the new relationship have occurred.

[3] This exchange of information between the firms needs to be done in a manner consistent with the transferring lawyer's and new firm's obligations to protect client confidentiality and privileged information and avoid any prejudice to the client. It ordinarily would include no more than the names of the persons and entities involved in a matter. Depending on the circumstances, it may include a brief summary of the general issues involved, and information about whether the representation has come to an end.

[4] The disclosure should be made to as few lawyers at the new law firm as possible, ideally to one lawyer of the new firm, such as a designated conflicts lawyer. The information should always be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship.

[5] As the disclosure is made on the basis that it is solely for the use of checking conflicts where lawyers are transferring between firms and for establishing screens, the disclosure should be coupled with an undertaking by the new law firm to the former law firm that it will:

- (a) limit access to the disclosed information;
- (b) not use the information for any purpose other than detecting and resolving conflicts; and
- (c) return, destroy, or store in a secure and confidential manner the information provided once appropriate confidentiality screens are established.

[6] The client's consent to disclosure of such information may be specifically addressed in a retainer agreement between the lawyer and client. In some circumstances, however, because of the nature of the retainer, the transferring lawyer and the new law firm may be required to obtain the consent of clients to such disclosure or the disclosure of any further information about the clients. This is especially the case where disclosure would compromise solicitor-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge).

### 3.4 CONFLICTS

#### Duty to Avoid Conflicts of Interest

**3.4-1** A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

##### Commentary

[1] Lawyers have an ethical duty to avoid conflicts of interest. Some cases involving conflicts of interest will fall within the scope of the bright line rule as articulated by the Supreme Court of Canada. The bright line rule prohibits a lawyer or law firm from representing one client whose legal interests are directly adverse to the immediate legal interests of another client even if the matters are unrelated unless the clients consent. However, the bright line rule cannot be used to support tactical abuses and will not apply in the exceptional cases where it is unreasonable for the client to expect that the lawyer or law firm will not act against it in unrelated matters. See also rule 3.4-2 and commentary [6].

[2] In cases where the bright line rule is inapplicable, the lawyer or law firm will still be prevented from acting if representation of the client would create a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.

[3] This rule applies to a lawyer's representation of a client in all circumstances in which the lawyer acts for, provides advice to or exercises judgment on behalf of a client. Effective representation may be threatened where a lawyer is tempted to prefer other interests over those of his or her own client: the lawyer's own interests, those of a current client, a former client, or a third party.

##### The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests

[4] The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is based on trust. It is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty to avoid conflicting interests.

[5] A client must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship. The relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate legal interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client.

##### Other Duties Arising from the Duty of Loyalty

[6] The lawyer's duty of confidentiality is owed to both current and former clients, with the

related duty not to attack the legal work done during a retainer or to undermine the former client's position on a matter that was central to the retainer.

[7] The lawyer's duty of commitment to the client's cause prevents the lawyer from summarily and unexpectedly dropping a client to circumvent conflict of interest rules. The client may legitimately feel betrayed if the lawyer ceases to act for the client to avoid a conflict of interest.

[8] The duty of candour requires a lawyer or law firm to advise an existing client of all matters relevant to the retainer.

### **Identifying Conflicts**

[9] A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest. Factors for the lawyer's consideration in determining whether a conflict of interest exists include:

- (a) the immediacy of the legal interests;
- (b) whether the legal interests are directly adverse;
- (c) whether the issue is substantive or procedural;
- (d) the temporal relationship between the matters;
- (e) the significance of the issue to the immediate and long-term interests of the clients involved; and
- (f) the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

### **Examples of Areas where Conflicts of Interest May Occur**

[10] Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest. The examples are not exhaustive.

- (a) A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.
- (b) A lawyer provides legal advice on a series of commercial transactions to the owner of a small business and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse.
- (c) A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.
  - i. A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the



corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

- (d) A lawyer has a sexual or close personal relationship with a client.
  - i. Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.
- (e) A lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation.
  - i. These two roles may result in a conflict of interest or other problems because they may
    - A. affect the lawyer's independent judgment and fiduciary obligations in either or both roles,
    - B. obscure legal advice from business and practical advice,
    - C. jeopardize the protection of lawyer and client privilege, and
    - D. disqualify the lawyer or the law firm from acting for the organization.
- (f) Sole practitioners who practise with other lawyers in cost-sharing or other arrangements represent clients on opposite sides of a dispute.
  - i. The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

### **The Role of the Court and Law Societies**

[11] These rules set out ethical standards to which all members of the profession must adhere. The courts have a separate supervisory role over court proceedings. In that role, the courts apply fiduciary principles developed by the courts to govern lawyers' relationships with their clients, to ensure the proper administration of justice. A breach of the rules on conflicts of interest may lead to sanction by a law society even where a court dealing with the case may decline to order disqualification as a remedy.

### **Consent**

**3.4-2** A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all affected clients and the lawyer reasonably

believes that he or she is able to represent the client without having a material adverse effect upon the representation of or loyalty to the client or another client.

- (a) Express consent must be fully informed and voluntary after disclosure.
- (b) Consent may be inferred and need not be in writing where all of the following apply:
  - i. the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;
  - ii. the matters are unrelated;
  - iii. the lawyer has no relevant confidential information from one client that might reasonably affect the other; and
  - iv. the client has commonly consented to lawyers acting for and against it in unrelated matters.

## **Commentary**

### **Disclosure and Consent**

[1] Disclosure is an essential requirement to obtaining a client's consent and arises from the duty of candour owed to the client. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

[2] Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. The lawyer therefore should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

[2A] While this rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest, in some cases the lawyer should recommend such advice. This is to ensure that the client's consent is informed, genuine and uncoerced, especially if the client is vulnerable or not sophisticated.

[3] Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

### **Consent in Advance**

[4] A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

[5] While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

### **Implied Consent**

[6] In limited circumstances consent may be implied, rather than expressly granted. In some cases it may be unreasonable for a client to claim that it expected that the loyalty of the lawyer or law firm would be undivided and that the lawyer or law firm would refrain from acting against the client in unrelated matters. In considering whether the client's expectation is reasonable, the nature of the relationship between the lawyer and client, the terms of the retainer and the matters involved must be considered. Governments, chartered banks and entities that might be considered sophisticated consumers of legal services may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information. The more sophisticated the client is as a consumer of legal services, the more likely it will be that an inference of consent can be drawn. The mere nature of the client is not, however, a sufficient basis upon which to assume implied consent; the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the other client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances.

### **Short-term Summary Legal Services**

**3.4-2A** In rules 3.4-2B to 3.4-2D "Short-term summary legal services" means advice or representation to a client under the auspices of a pro bono or not-for-profit legal services provider with the expectation by the lawyer and the client that the lawyer will not provide continuing legal services in the matter.

**3.4-2B** A lawyer may provide short-term summary legal services without taking steps to determine whether there is a conflict of interest.

**3.4-2C** Except with consent of the clients as provided in rule 3.4-2, a lawyer must not provide, or must cease providing short-term summary legal services to a client where the lawyer knows or becomes aware that there is a conflict of interest.

**3.4-2D** A lawyer who provides short-term summary legal services must take reasonable measures to ensure that no disclosure of the client's confidential information is made to another lawyer in the lawyer's firm.

### Commentary

[1] Short-term summary legal service and duty counsel programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures of the not-for-profit legal services provider and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the short-term summary services described in these rules are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided.

[2] Intentionally left blank.

[3] Confidential information obtained by a lawyer providing the services described in Rule 3.4-2A-2D will not be imputed to the lawyers in the lawyer's firm or to non-lawyer partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the client who is obtaining or has obtained short-term summary legal services, and may act in future for another client adverse in interest to the client who is obtaining or has obtained short-term summary legal services.

[4] In the provision of short-term summary legal services, the lawyer's knowledge about possible conflicts of interest is based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of consulting with the *pro bono* or not-for-profit legal services provider to receive its services.

### Dispute

**3.4-3** Despite rule 3.4-2, a lawyer must not represent opposing parties in a dispute.

### Commentary

[1] A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending these rules.

### Concurrent Representation with Protection of Confidential Client Information

**3.4-4** Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:

- (a) disclosure of the risks of the lawyers so acting has been made to each client;
- (b) the lawyer recommends each client receive independent legal advice, including on the risks of concurrent representation;

- (c) the clients each determine that it is in their best interests that the lawyers so act and consent to the concurrent representation;
- (d) each client is represented by a different lawyer in the firm;
- (e) appropriate screening mechanisms are in place to protect confidential information; and
- (f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

#### **Commentary**

[1] This rule provides guidance on concurrent representation, which is permitted in limited circumstances. Concurrent representation is not contrary to the rule prohibiting representation where there is a conflict of interest provided that the clients are fully informed of the risks and understand that if a dispute arises among the clients that cannot be resolved the lawyers may have to withdraw, resulting in potential additional costs.

[2] An example is a law firm acting for a number of sophisticated clients in a matter such as competing bids in a corporate acquisition in which, although the clients' interests are divergent and may conflict, the clients are not in a dispute. Provided that each client is represented by a different lawyer in the firm and there is no real risk that the firm will not be able to properly represent the legal interests of each client, the firm may represent both even though the subject matter of the retainers is the same. Whether or not a risk of impairment of representation exists is a question of fact.

[3] The basis for the advice described in the rule from both the lawyers involved in the concurrent representation and those giving the required independent legal advice is whether concurrent representation is in the best interests of the clients. Even where all clients consent, the lawyers should not accept a concurrent retainer if the matter is one in which one of the clients is less sophisticated or more vulnerable than the other.

[4] In cases of concurrent representation lawyers should employ, as applicable, the reasonable screening measures to ensure non-disclosure of confidential information within the firm set out in the rule on conflicts from transfer between law firms (see Rule 3.4-26).

#### **Joint Retainers**

**3.4-5** Before a lawyer acts in a matter or transaction for more than one client, the lawyer must advise each of the clients that:

- (a) the lawyer has been asked to act for both or all of them;
- (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
- (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

### Commentary

[1] Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other.

[2] A lawyer who receives instructions from spouses or partners to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with rule 3.4-5. Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will:

- (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
- (b) in accordance with Rule 3.3-1, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and
- (c) the lawyer would have a duty to decline the new retainer, unless:
  - i. the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;
  - ii. the other spouse or partner had died; or
  - iii. the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

[3] After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with rule 3.4-7.

**3.4-6** If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

**3.4-7** When a lawyer has advised the clients as provided under rules 3.4-5 and 3.4-6 and the parties are content that the lawyer act, the lawyer must obtain their consent.

### Commentary

[1] Consent in writing, or a record of the consent in a separate written communication to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that a contentious issue will arise between them or their interests, rights or obligations will diverge as the matter progresses.

**3.4-8** Except as provided by rule 3.4-9, if a contentious issue arises between clients who have consented to a joint retainer:

- (a) the lawyer must not advise them on the contentious issue and must:
  - i. refer the clients to other lawyers; or
  - ii. advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:
    - A. no legal advice is required; and
    - B. the clients are sophisticated.
- (b) if the contentious issue is not resolved, the lawyer must withdraw from the joint representation.

**Commentary**

[1] This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

[2] If, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

**3.4-9** Subject to this rule, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

**Commentary**

[1] This rule does not relieve the lawyer of the obligation when the contentious issue arises to obtain the consent of the clients when there is or is likely to be a conflict of interest, or if the representation on the contentious issue requires the lawyer to act against one of the clients.

[2] When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.

**Acting Against Former Clients**

**3.4-10** Unless the former client consents, a lawyer must not act against a former client in:

- (a) the same matter;
- (b) any related matter; or

- (c) any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

**Commentary**

[1] This rule guards against the misuse of confidential information from a previous retainer and ensures that a lawyer does not attack the legal work done during a previous retainer, or undermine the client's position on a matter that was central to a previous retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client if previously obtained confidential information is irrelevant to that matter.

**3.4-11** When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer ("the other lawyer") in the lawyer's firm may act in the new matter against the former client if:

- (a) the former client consents to the other lawyer acting; or
- (b) the law firm has:
  - i. taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the lawyer to any other lawyer, any other member or employee of the law firm, or any other person whose services the lawyer or the law firm has retained in the new matter; and
  - ii. advised the lawyer's former client, if requested by the client, of the measures taken.

**Commentary**

[1] The Commentary to rules 3.4-17 to 3.4-23 regarding conflicts from transfer between law firms provide valuable guidance for the protection of confidential information in the rare cases in which it is appropriate for another lawyer in the lawyer's firm to act against the former client.

**Acting for Borrower and Lender**

**3.4-12** Subject to rule 3.4-14, a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

**3.4-13** In rules 3.4-14 to 3.4-16 "**lending client**" means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

**3.4-14** Provided there is compliance with this rule, and in particular rules 3.4-5 to 3.4-9, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction in any of the following situations:

- (a) the lender is a lending client;



- (b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;
- (c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction; or
- (d) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act* (Canada).

**3.4-15** Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

#### **Commentary**

[1] What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

**3.4-16** If a lawyer is jointly retained by a client and a lending client in respect of a mortgage or loan from the lending client to the other client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to:

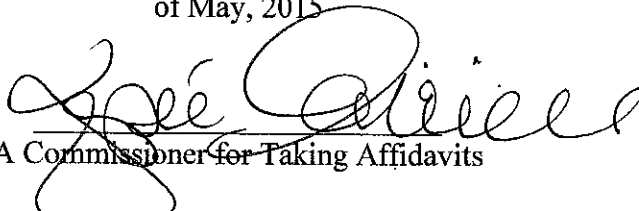
- (a) provide the advice described in rule 3.4-5 to the lending client before accepting the retainer;
- (b) provide the advice described in rule 3.4-6; or
- (c) obtain the consent of the lending client as described in rule 3.4-7, including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

#### **Commentary**

[1] Rules 3.4-15 and 3.4-16 are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g. mortgage loan instructions) and the consent is generally deemed by such clients to exist when the lawyer is requested to act.

[2] Rule 3.4-16 applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

This is Exhibit "7" referred to  
in the affidavit of Deborah MacNair  
sworn before me, this 28<sup>th</sup> day  
of May, 2015

  
A Commissioner for Taking Affidavits

Josée Carrière, a Commissioner, etc.,  
within or outside the Province of Ontario,  
for the Government of Canada,  
Department of Justice.  
Expires March 26, 2016.



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# CODE OF PROFESSIONAL CONDUCT

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THE CANADIAN  
BAR ASSOCIATION

**CODE OF  
PROFESSIONAL  
CONDUCT**

ADOPTED BY COUNCIL, AUGUST 2004 AND FEBRUARY 2006

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## CHAPTER III

# ADVISING CLIENTS

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### RULE

**The lawyer must be both honest and candid when advising clients.<sup>1</sup>**

### COMMENTARIES

#### Scope of Advice

1. The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised, clearly disclosing what the lawyer honestly thinks about the merits and probable results.<sup>2</sup>

2. Whenever it becomes apparent that the client has misunderstood or misconceived what is really involved, the lawyer should explain as well as advise, so that the client is informed of the true position and fairly advised about the real issues or questions involved.<sup>3</sup>

3. The lawyer should clearly indicate the facts, circumstances and assumptions upon which the lawyer's opinion is based, particularly where the circumstances do not justify an exhaustive investigation with resultant expense to the client.

However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than merely make comments with many qualifications.<sup>4</sup>

4. The lawyer should be wary of bold and confident assurances to the client, especially when the lawyer's employment may depend upon advising in a particular way.<sup>5</sup>

### **Second Opinion**

5. If the client so desires, the lawyer should assist in obtaining a second opinion.<sup>6</sup>

### **Compromise or Settlement**

6. The lawyer should advise and encourage the client to compromise or settle a dispute whenever possible on a reasonable basis and should discourage the client from commencing or continuing useless legal proceedings.<sup>7</sup>

### **Dishonesty or Fraud by Client**

7. When advising a client the lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment. The lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or of persons associated with such a client.<sup>8</sup>

### **Test Cases**

8. A *bona fide* test case is not necessarily precluded by commentary 7 above, and, so long as no injury to the person or violence is involved, the lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law, and this can most



effectively be done by means of a technical breach giving rise to a test case. In all such situations the lawyer should ensure that the client appreciates the consequences of bringing a test case.<sup>9</sup>

### **Threatening Criminal or Disciplinary Proceedings**

9. Apart from the substantive law on the subject, it is improper for the lawyer to advise, threaten or bring a criminal, quasi-criminal or disciplinary proceeding in order to secure some civil advantage for the client, or to advise, seek or procure the withdrawal of such a proceeding in consideration of the payment of money, or transfer of property, to or for the benefit of the client.<sup>10</sup>

### **Advice on Non-Legal Matters**

10. In addition to opinions on legal questions, the lawyer may be asked for or expected to give advice on non-legal matters such as the business, policy or social implications involved in a question, or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who advises on such matters should, where and to the extent necessary, point out the lawyer's lack of experience or other qualification in the particular field and should clearly distinguish legal advice from such other advice.<sup>11</sup>

### **Errors and Omissions**

11. The duty to give honest and candid advice requires the lawyer to inform the client promptly of the facts, but without admitting liability, upon discovering that an error or omission has occurred in a matter for which the lawyer was engaged and that is or may be damaging to the client and cannot readily be rectified. When so informing the client, the lawyer should be careful not to prejudice any rights of indemnity that either of

them may have under any insurance, client's protection or indemnity plan, or otherwise. At the same time, the lawyer should recommend that the client obtain legal advice elsewhere about any rights the client may have arising from such error or omission and whether it is appropriate for the lawyer to continue to act in the matter. The lawyer should also give prompt notice of any potential claim to the lawyer's insurer and any other indemnitor so that any protection from that source will not be prejudiced and, unless the client objects, should assist and cooperate with the insurer or other indemnitor to the extent necessary to enable any claim that is made to be dealt with promptly. If the lawyer is not so indemnified, or to the extent that the indemnity may not fully cover the claim, the lawyer should expeditiously deal with any claim that may be made and must not, under any circumstances, take unfair advantage that might defeat or impair the client's claim. In cases where liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim, the lawyer is under a duty to arrange for payment of the balance.<sup>12</sup>

### **Giving Independent Advice**

12. Where the lawyer is asked to provide independent advice or independent representation to another lawyer's client in a situation where a conflict exists, the provision of such advice or representation is an undertaking to be taken seriously and not lightly assumed or perfunctorily discharged. It involves a duty to the client for whom the independent advice or representation is provided that is the same as in any other lawyer and client relationship and ordinarily extends to the nature and result of the transaction.<sup>13</sup>

### **Engagement Letters**

13. Lawyers are encouraged to use engagement letters to define and determine the nature and scope of the lawyer-client

relationship and to clarify the expectations that lawyers and clients have regarding this relationship. Clarity regarding the identity of the client, the scope of the retainer, the lawyer's fees and anticipated costs, expectations as to subsequent adverse retainers and other relevant matters helps to ensure effective client representation and to protect the lawyer-client relationship. Where ambiguity or lack of clarity is present, the client, the lawyer and the relationship between them are put at risk.

<sup>1</sup> Alta. 9-S.0.P; B.C. 1(3); N.B. 4-R; N.S. 4; Ont. 2.02(1); Que. 3.00.01; M.M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Jane, 1957) at 78-79.

<sup>2</sup> N.B. 4-C.1; Ont. 2.02(1) Commentary; N.S. 4 Guiding Principle. "The lawyer should not remain silent when it is plain that the client is rushing into an "unwise, not to say disastrous adventure," *per* Lord Danckwerts in *Neushal v. Mellish & Harkavy* (1967), 111 Sol. Jo. 399 (C.A.).

<sup>3</sup> Alta. 9-R.12; N.B. 4-C.3; N.S. 4.1; Ont. 2.01(1) Commentary; Que. 3.02.10.

<sup>4</sup> N.S. 4.2, 4.3; Ont. 2.01(1) Commentary.

<sup>5</sup> N.B. 4-C.4; N.S. 4.4; Ont. 2.01(1) Commentary.

<sup>6</sup> Alta. 9-R.17; N.B. 4-C.5; N.S. 4.5.

<sup>7</sup> Alta. 9-R.16; N.B. 4-C.6; N.S. 4.6; Ont. 2.02(2).

<sup>8</sup> Alta. 9-R.11; N.B. 4-C.7; N.S. 4.7, 4.8; Ont. 2.02(5) and Commentary. *Cf.* ABA EC 7-3, 7-5: "Where the bounds of law are uncertain...the two roles [of advocate and adviser] are essentially different. In asserting a position on behalf of his client, an *advocate* for the most part *deals with past conduct* and must take the facts as he finds them. By contrast, a lawyer serving as *adviser* primarily *assists* his client *in determining* the course of future *conduct* and relationships.... A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment..." [emphasis added].

<sup>9</sup> N.S. 4.9; Ont. 2.02(5) Commentary. For example, to challenge the jurisdiction for or the applicability of a shop-closing by-law or a licensing measure, or to determine the rights of a class or group having some common interest.

<sup>10</sup> B.C. 4(2); N.B. 4-C.9; N.S. 4.10; Ont. 2.02(4). See "Criminal Law May Not be Used to Collect Civil Debts" (1968) 2:4 L. Soc'y Gaz. 36.

<sup>11</sup> N.B. 4-C.14; N.S. 4.11-4.13; Ont. 2.01(1) Commentary.

<sup>12</sup> Alta. 9-R.18; B.C. 4(5), 4(5.1); N.B. 4-C.16; N.S. 4.14-4.17.

<sup>13</sup> N.B. 4-C.13; N.S. 4.18, 4.19.

## **CHAPTER IV**

# **CONFIDENTIAL INFORMATION**

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### **RULE**

#### **Maintaining Information in Confidence**

1. The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and shall not divulge any such information except as expressly or impliedly authorized by the client, required by law or otherwise required by this Code.<sup>1</sup>

#### **Public Safety Exception**

2. Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that would substantially interfere with health or well-being, the lawyer shall disclose confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required.<sup>2</sup>

3. The lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court or tribunal facility shall inform the person having

**responsibility for security at the facility and give particulars, being careful not to disclose confidential information except as required by paragraph 2 of this Rule. Where possible the lawyer should suggest solutions to the anticipated problem such as:**

- (a) the need for further security;**
- (b) that judgment be reserved;**
- (c) such other measure as may seem advisable.<sup>3</sup>**

#### **Disclosure Where Lawyer's Conduct in Issue**

**4. Disclosure may also be justified in order to establish or collect a fee, or to defend the lawyer or the lawyer's associates or employees against any allegation of malpractice or misconduct, but only to the extent necessary for such purposes.<sup>4</sup>**

### **COMMENTARIES**

#### **Guiding Principles**

1. The lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time the client must feel completely secure and entitled to proceed on the basis that, without an express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held secret and confidential.<sup>5</sup>

2. This Rule must be distinguished from the evidentiary rule of solicitor-client privilege with respect to oral or written communications passing between the client and the lawyer. The Rule is wider and applies without regard to the nature or source of the information or to the fact that others may share the knowledge.<sup>6</sup>

3. The importance of this broader Rule regarding confidential information is illustrated by the Supreme Court of Canada's approach to solicitor-client privilege. The Court has held that solicitor-client privilege must remain as close to absolute as possible if it is to retain its relevance. Solicitor-client privilege is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law. The public has a compelling interest in maintaining the integrity of the solicitor-client relationship. Confidential communications to a lawyer represent an important exercise of the right to privacy, and they are central to the administration of justice in an adversarial system.

4. Generally, the lawyer should not disclose having been consulted or retained by a person except to the extent that the nature of the matter requires such disclosure.<sup>7</sup>

5. The lawyer owes a duty of confidentiality to every client without exception, regardless of whether it is a continuing or casual client.

6. The duty of confidentiality survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.<sup>8</sup>

7. The lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client.<sup>9</sup>

8. The lawyer should decline employment that might require disclosure of confidential information concerning or received from another client.

9. The lawyer should avoid indiscreet conversations, even with the lawyer's spouse or family, about a client's business or affairs and should shun gossip about such things even though

the client is not named or otherwise identified. Likewise the lawyer should not repeat any gossip or information about the client's business or affairs that may be overheard by or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shop-talk between lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for the lawyers concerned and the legal profession generally will probably be lessened.<sup>10</sup>

10. Although the Rule may not apply to facts that are public knowledge, the lawyer should guard against participating in or commenting upon speculation concerning the client's affairs or business.<sup>11</sup>

11. Whether or not the lawyer is ultimately retained, the Rule applies to protect confidential information disclosed by a prospective client to a lawyer while the prospective client decides whether to retain the lawyer and the lawyer decides whether to accept the retainer. However, this application of the Rule does not result in the prospective client being treated as a client for other purposes and other rules, including the duty of loyalty owed to clients.

12. A duty of confidence, similar to the duty of confidentiality owed to clients, may extend to near-clients and to other non-clients when they have disclosed confidential information to the lawyer in the course of a retainer reasonably expecting that the information would be protected and the lawyer knows or ought to know that the information is confidential. However, this obligation should not be confused with the duty to clients set out in the Rule and the fiduciary obligations owed by lawyers to clients. Nor does this commentary result in the near- or non-client being treated as a client for other purposes and other commentaries and Rules, including the duty of loyalty owed only to clients.<sup>12</sup>

**Disclosure Authorized by Client**

13. Confidential information may be divulged with the express authority of the client and, in some situations, that authority may be implied. For example, some disclosure may be necessary in a pleading or other document delivered in litigation being conducted for the client. Again, the lawyer may (unless the client directs otherwise) disclose the client's affairs to partners and associates in the firm and, to the extent necessary, to non-legal staff such as secretaries and filing clerks. This authority to disclose, whether express or implied, places on the lawyer a duty to impress upon partners, associates, students and employees the importance of non-disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent their disclosing or using information that the lawyer is bound to keep in confidence.<sup>13</sup>

**Confidential Information Not to be Used**

14. The fiduciary relationship between lawyer and client forbids the lawyer to use any confidential information covered by the Rule for the benefit of the lawyer or a third person, or to the disadvantage of the client. The lawyer who engages in literary work, such as an autobiography, should avoid unauthorized disclosure of information covered by the Rule.<sup>14</sup>

**Requests for Proposals and Other Enquiries**

15. Prospective clients often interview or seek proposals from several firms about potential retainers. During the course of such a process, a prospective client may provide confidential information about the potential retainer. As a result, there is a risk that it will be suggested that a lawyer who unsuccessfully participates in such a process should be disqualified from acting for another party to the matter. Discussing a potential retainer with a prospective client or participating in a request



for proposals process does not itself preclude a lawyer from acting in the matter for another party. Where the prospective client wishes to disclose confidential information as part of such a process, the lawyer and the prospective client should expressly agree whether the disclosure will prevent the lawyer from acting for another party in the matter if the lawyer is not retained by the prospective client. If the prospective client and the lawyer are unable to agree, the lawyer should insist that the prospective client not disclose confidential information unless and until the lawyer is retained.

### **Confidential Information from Government Sources**

16. A lawyer who has information known to be confidential information about a person from government sources, acquired when the lawyer was a public officer or employee, shall not represent a client (other than the agency of which the lawyer was a public officer or employee) whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage.

### **Disclosure Required by Law**

17. When disclosure is required by law or by order of a court of competent jurisdiction, the lawyer should be careful not to divulge more than is required. Legislation in certain jurisdictions imposes a duty on persons to report sexual or physical abuse in specified circumstances. Careful consideration of the wording of such legislation is necessary to determine whether, in such circumstances, communications that are subject to solicitor-client privilege must be disclosed.<sup>15</sup>

### **Whistleblowing**

18. A lawyer employed or retained to act for an organization, including a corporation, confronts a difficult problem about confidentiality when the lawyer becomes aware that the

organization may commit a dishonest, fraudulent, criminal, or illegal act. This problem is sometimes described as the problem of whether the lawyer should “blow the whistle” on the employer or client. Although this Code makes it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (*Chapter III, commentary 7*), it does not follow that the lawyer should disclose to the appropriate authorities an employer’s or client’s proposed misconduct. Rather, the Rule as set out above is that the lawyer shall hold the client’s information in strict confidence, and this general Rule is subject to only a few exceptions. If the exceptions do not apply there are, however, several steps that a lawyer should take when confronted with this problem of proposed misconduct by an organization. The lawyer should recognize that the lawyer’s duties are owed to the organization and not to its officers, employees, or agents. The lawyer should therefore ask that the matter be reconsidered, and should, if necessary, bring the proposed misconduct to the attention of a higher (and ultimately the highest) authority in the organization despite any direction from anyone in the organization to the contrary. If these measures fail, then it may be appropriate for the lawyer to resign in accordance with the rules for withdrawal from representation (*Chapter XII*).<sup>16</sup>

<sup>1</sup> Alta. 7-S.0.P; 7-R.1; ABA-MC Canon 4, DR 4-101(A), (B), (C); ABA-MR 1.6(a); B.C. 5(1); N.B. 5-R; N.S. 5; Ont. 2.03(1); Que. 3.06.01, 3.06.02.

<sup>2</sup> Alta. 7-R.8(c); ABA-MC DR 4-101(c)(3); ABA-MR 1.6(b); B.C. 5(12); N.B. 5-C.8(b); N.S. 5.12; Ont. 2.03(3); Que. 3.06.01.

<sup>3</sup> N.B. 5-C.11; Ont. 2.03(1) Commentary, 4.06(3).

<sup>4</sup> Alta. 7-R.8 (e.1); ABA-MC DR4-101(c)(4); N.S. 5.11; Ont. 2.03(5).

<sup>5</sup> N.S. 5; Ont. 2.03(1) Commentary. “[I]t is absolutely necessary that a man, in order to prosecute his rights or defend himself...should have recourse to lawyers and...equally necessary...that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege and not the privilege of the confidential agent)...” per Jessell M.R. in *Anderson v. Bank of British Columbia* (1876), L.R. 2 Ch.D. 644 at 649 (C.A.). In *Maranda v. Richer*, [2003]

3 S.C.R. 193 the Supreme Court of Canada held that a lawyer's account for fees and disbursements is protected by solicitor-client privilege.

<sup>6</sup> N.B. 5-C.2; N.S. 5.1; Ont. 2.03(1) Commentary. The Supreme Court of Canada has affirmed that solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance: *Lavallee, Rackel & Heintz v. Attorney General of Canada*, 2002 SCC 61, [2002] 3 S.C.R. 209 at 229. In the same case at 234 the Court observed that lawyers are the gatekeepers who protect the privileged information provided by their clients.

<sup>7</sup> N.B. 5-C.3; N.S. 5.2; Ont. 2.03(1) Commentary.

<sup>8</sup> N.S. 5.3; Ont. 2.03(1) Commentary. "...a fundamental rule, namely the duty of a solicitor to refrain from disclosing confidential information unless his client waives the privilege.... Because the solicitor owes to his former client a duty to claim the privilege when applicable, it is improper for him not to claim it without showing that it has been properly waived," *per* Spence J. in *Bell et al. v. Smith et al.*, [1968] S.C.R. 644 at 671. To waive the privilege, the client must know of his rights and show a clear intention to forgo them: *Kulchar v. March & Benkert* (1950), 1 W.W.R. 272 (Sask. K.B.).

<sup>9</sup> N.B. 5-C.5; N.S. 5.6; Ont. 2.03(1) Commentary.

<sup>10</sup> N.B. 5-C.6; N.S. 5.7, 5.8; Ont. 2.03(1) Commentary.

<sup>11</sup> N.S. 5.9; Ont. 2.03(1) Commentary.

<sup>12</sup> *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142.

<sup>13</sup> Alta. 7-R.8(e); ABA-MC EC 4-2, DR 4-101(C)(1), (D); ABA-MR 1.6[5]; B.C. 5(11); N.B. 5-C.9(a); N.S. 5.10; Ont. 2.03(1) Commentary. "When a solicitor files an affidavit on behalf of his client...it should be assumed, until the contrary is proved, or at least until the solicitor's authority to do so is disputed by the client, that the solicitor has the authority to make the disclosure," *per* LeBel J. in *Kennedy v. Diversified* (1949), 1 D.L.R. 59 at 61 (Ont. H.C.).

<sup>14</sup> Alta. 7-R.6(a); ABA-MC EC4-5; B.C. 5(5) - (8); N.S. 5.4, 5.5; Ont. 2.03(6) and Commentary. Misuse by a lawyer for his own benefit of his client's confidential information may render the lawyer liable to account: *McMaster v. Byrne* (1952), 3 D.L.R. 337 (P.C.); *Bailey v. Ornheim* (1962), 40 W.W.R. (N.S.) 129 (B.C.S.C.).

<sup>15</sup> Alta. 7-R.8(b); ABA-MC DR 4-101(C)(2); ABA-MR 1.6 [13], [14]; B.C. 5(13), 5(14); Ont. 2.03(2).

<sup>16</sup> Ont. 2.02 (5.2) Commentary, 2.03(3) Commentary, 2.09.

## **CHAPTER XIX**

# **AVOIDING QUESTIONABLE CONDUCT**

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**The lawyer should observe the rules of professional conduct set out in the Code in the spirit as well as in the letter.<sup>1</sup>**

## **COMMENTARIES**

### **Guiding Principles**

1. Public confidence in the administration of justice and the legal profession may be eroded by irresponsible conduct on the part of the individual lawyer. For that reason, even the appearance of impropriety should be avoided.<sup>2</sup>
2. Our justice system is designed to try issues in an impartial manner and decide them upon the merits. Statements or suggestions that the lawyer could or would try to circumvent the system should be avoided because they might bring the lawyer, the legal profession and the administration of justice into disrepute.<sup>3</sup>

### **Duty after Leaving Public Employment**

3. After leaving public employment, the lawyer should not accept employment in connection with any matter in which the lawyer had substantial responsibility or confidential information prior to leaving because to do so would give the

appearance of impropriety even if none existed. However, it would not be improper for the lawyer to act professionally in such a matter on behalf of the particular public body or authority by which the lawyer had formerly been employed. With reference to confidential government information acquired when the lawyer was a public officer or employee, see commentary 14 of the Rule relating to confidential information (*Chapter IV*).<sup>4</sup>

### **Retired Judges**

4. A judge who returns to practice after retiring or resigning from the bench should not (without the approval of the governing body) appear as a lawyer before the court of which the former judge was a member or before courts of inferior jurisdiction thereto in the province where the judge exercised judicial functions. If in a given case the former judge should be in a preferred position by reason of having held judicial office, the administration of justice would suffer; if the reverse were true, the client might suffer. There may, however, be cases where a governing body would consider that no preference or appearance of preference would result, for example, where the judge resigned for good reason after only a very short time on the bench. In this commentary, "judge" refers to one who was appointed as such under provincial legislation or section 96 of the *Constitution Act, 1867* and "courts" include chambers and administrative boards and tribunals.<sup>5</sup>

5. Conversely, although it may be unavoidable in some circumstances or areas, generally speaking the lawyer should not appear before a judge if by reason of relationship or past association, the lawyer would appear to be in a preferred position.<sup>6</sup>

### **Inserting Retainer in Client's Will**

6. Without express instructions from the client, it is improper for the lawyer to insert in the client's will a clause directing the executor to retain the lawyer's services in the administration of the estate.<sup>7</sup>

### **Duty to Meet Financial Obligations**

7. The lawyer has a professional duty, apart from any legal liability, to meet financial obligations incurred or assumed in the course of practice when called upon to do so. Examples are agency accounts, obligations to members of the profession, fees or charges of witnesses, sheriffs, special examiners, registrars, reporters and public officials, as well as the deductible under a governing body's errors and omissions insurance policy.<sup>8</sup>

### **Dealings with Unrepresented Persons**

8. The lawyer should not undertake to advise an unrepresented person but should urge such a person to obtain independent legal advice and, if the unrepresented person does not do so, the lawyer must take care to see that such person is not proceeding under the impression that the lawyer is protecting such person's interests. If the unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in the Rule relating to impartiality and conflict of interest between clients (*Chapter V*). The lawyer may have an obligation to a person whom the lawyer does not represent, whether or not such person is represented by a lawyer.<sup>9</sup>

**Bail**

9. The lawyer shall not stand bail for an accused person for whom the lawyer or a partner or associate is acting, except where there is a family relationship with the accused, in which case the person should not be represented by the lawyer but may be represented by a partner or associate.

**Standard of Conduct**

10. The lawyer should try at all times to observe a standard of conduct that reflects credit on the legal profession and the administration of justice generally and inspires the confidence, respect and trust of both clients and the community.<sup>10</sup>

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<sup>1</sup> *R. v. Sussex Justices, Ex parte McCarthy* (1924), K.B. 256 at 259 (K.B.D.): "[It] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

<sup>2</sup> ABA-MC EC 9-1, DR 9-101; N.B. 23-C.1; N.S. C-23.1.

<sup>3</sup> ABA-MC EC 9-4; N.B. 23-C.2; N.S. C-23.2.

<sup>4</sup> ABA-MC EC 9-3, DR 9-101(B); N.S. C-16.10.

<sup>5</sup> Ont. 6.08(4); N.S. C-16.11.

<sup>6</sup> Alta. 10-R.9.

<sup>7</sup> N.S. C-7.3.

<sup>8</sup> Alta. 8-R.2, R.3; B.C. 2(2); N.B. 23-C.4; Ont. 6.01(2); N.S. C-18.7.

<sup>9</sup> ABA-MR 4.3; Alta. 11-R.5; B.C. 4(1); Ont. 2.04(14); N.S. C-4.20.

<sup>10</sup> Alta. 15-R.2.