

## CHAPTER 9

# PUBLIC OFFICIALS AND CONFLICTS OF INTEREST

*[This chapter, subject to some additions and deletions, was written and updated by Joseph Mooney as a directed research and writing paper under Professor Ferguson's supervision. Additional revisions were made by Connor Bildfell in 2017.]*

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### 1. INTRODUCTION

Public confidence in a state's legislature, executive branch, and public service is critical to the functioning of a healthy democratic state. Studies have demonstrated that where the public perceives a legislature to be corrupt, public confidence in the legislature is correspondingly diminished.<sup>1</sup> Corrupt acts or abuses of public office often originate with a public official taking action while in a conflict of interest. Although the definitions vary, generally speaking, a conflict of interest exists where a public official has private interests that could improperly influence the performance of his or her public duties and responsibilities. As conflicts of interest occupy a central position within the broader issue of corruption, the establishment of robust legislation, policies, and sanctions that address conflicts of interest—both before and after they arise—forms an essential part of the fight against corruption.

This chapter contains two major sections. The first section provides an overview of competing definitions of “conflict of interest,” how the concept has evolved, and some of the problems and tensions that remain in the effective implementation of regimes governing conflicts of interest in public office. The second section provides a brief discussion of international conventions and instruments pertaining to conflicts of interest, as well as a comparative study of the federal regimes in place in the US, UK, and Canada aimed at regulating and preventing conflicts of interest in public office. The scope of this chapter is largely limited to conflict of interest legislation that applies to senior public officials at the federal level, such as members of Parliament, senators, senior officials in the executive branch, and high-level bureaucrats. While many countries also have conflict of interest legislation governing public officials at the state, provincial, and municipal levels, such legislation is not discussed in this chapter.

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<sup>1</sup> Riccardo Pelizzo & Frederick Staphenurst, *Corruption and Legislatures* (Routledge, 2014) at 74.

## 2. AN OVERVIEW OF CONFLICTS OF INTEREST

### 2.1 Conceptualizing “Conflict of Interest”

An attempt to legally proscribe or regulate a certain type of behaviour, act, or occurrence must begin by defining the given act, behaviour, or occurrence. Recognizing the need to identify and monitor conflicts of interest in the public sector, the OECD in 2003 developed the first international benchmarking tool for reviewing member states’ public conflict of interest regimes.<sup>2</sup> In its report entitled *Managing Conflict of Interest in the Public Service*, the OECD developed a simple and pragmatic definition of conflict of interest. It states that a conflict of interest is “a conflict between the public duty and private interest of public officials, in which public officials have private-capacity interests which could improperly influence the performance of their official duties and responsibilities.”<sup>3</sup> Generally speaking, one can find similar definitions in official codes of conduct and conflict of interest legislation and policy instruments across the globe. Although the wording may vary, the general concept is widely recognized. In addition to the OECD’s benchmarking tool, there are a myriad of legal instruments that exist at the international and regional level with the purpose of preventing and dealing with, among other things, conflicts of interest.<sup>4</sup> Although many of these instruments may be regarded as “soft law” in that their enforcement may be difficult or even non-existent, they nonetheless serve an important role in setting standards of conduct and building consensus.

While the OECD’s definition of conflicts of interest is a helpful source of guidance, differing interpretations of the several elements of this definition exist, resulting in inconsistencies between national legal regimes. The OECD’s definition can be broken down into three main elements: (1) a public official, (2) with private-capacity interests, (3) that could improperly influence the performance of official duties and responsibilities. The OECD recognizes that there is no “one-size-fits-all” solution.<sup>5</sup> States’ political cultures vary widely across the globe, and a provision that is essential to a robust conflict of interest policy in one State may be overly cumbersome and unnecessary in another. Nonetheless, the scope and effectiveness of

<sup>2</sup> OECD, *Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences* (OECD, 2003), online: <<https://www.oecd.org/gov/ethics/48994419.pdf>>.

<sup>3</sup> *Ibid* at 15.

<sup>4</sup> See e.g. UN General Assembly, *United Nations Convention against Corruption*, 31 October 2003, UN Doc A/58/422 (entered into force 14 December 2005), online: <[https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf)>; Council of Europe, *Codes of Conduct for Public Officials*, Recommendation Rec(2000)10, adopted by the Committee of Ministers of the Council of Europe on 11 May 2000, online: <<workspace.unpan.org/sites/internet/Documents/UNPAN038306.pdf>>; African Union, *African Union Convention on Preventing and Combating Corruption*, adopted by the 2nd Ordinary Session of the Assembly of the Union, 11 July 2003, online: <[www.eods.eu/library/AU\\_Convention\\_on\\_Combating\\_Corruption\\_2003\\_EN.pdf](http://www.eods.eu/library/AU_Convention_on_Combating_Corruption_2003_EN.pdf)>; Organization of American States, *Inter-American Convention Against Corruption*, adopted at the third plenary session, 29 March 1996, online: <[www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_B-58\\_against\\_Corruption.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption.asp)>; to name only a few.

<sup>5</sup> OECD (2003) at 14.

conflict of interest laws or policies will necessarily vary depending on how one defines and interprets these three elements.

The first element determines who exactly will be subject to a given policy or legislative framework. As will be discussed in greater detail in the comparative section below, most States have multiple, often overlapping statutory and policy-based regimes that govern conflicts of interest in the public realm. The applicability of a given set of rules often depends on factors such as an official's seniority, discretion in decision making, and access to confidential State or political party information. Clearly identifying the persons to whom a given law or policy applies is always a fundamental aspect of the law-making process. As such, legislators tend to provide exhaustive definitions of the individuals who are subject to the requirements of a given conflict of interest law or policy. Consequently, this aspect of the definition tends to cause the least amount of interpretive difficulty.

However, "private-capacity interests," the second element in the OECD's definition, is much harder to define exhaustively. In the context of conflict of interest laws, what constitutes a "private interest" has shifted over time. Historically, a private-capacity interest was conceived of as something objective, almost invariably referring to financial interests such as shareholdings or a directorship position in a corporation. It has been argued, however, that the concept of "private interest" has expanded over time to recognize that subjective private interests informed by ideological, personal, and political matters may improperly influence public duties.<sup>6</sup>

For example, Canada's *Conflict of Interest Act* contains a "preferential treatment" provision that can capture situations in which an official's private interest is not objectively ascertainable, but it is nonetheless clear that an individual or organization has received preferential treatment from the official on the basis of their identity.<sup>7</sup> Implicit in this provision is the assumption that a public official may be improperly influenced by a private interest in relation to a person or organization because of subjective ideological or personal matters. For example, this provision would capture a situation in which an official responsible for reviewing applications for a filmmaking grant allowed a close friend's late application to be reviewed just because that person was a friend and despite the fact that considering late applications was contrary to official policy.<sup>8</sup>

However, it can be difficult to determine when, and to what extent, a private-capacity interest is present. While interests that are quantifiable in financial terms (e.g., the prospect

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<sup>6</sup> Susan Rose-Ackerman, "Corruption and Conflicts of Interest" in Jean-Bernard Auby, Emmanuel Breen & Thomas Perroud, eds, *Corruption and Conflicts of Interest: A Comparative Law Approach* (Edward Elgar, 2014) 3 at 6.

<sup>7</sup> *Conflict of Interest Act*, SC 2006, c 9, s 7.

<sup>8</sup> This scenario would be captured under the notion of "conflict of interest" outlined in section 4 of the *Conflict of Interest Act*, which provides that "a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests" [emphasis added].

of personally gaining a significant amount of money as a result of a project approval being made) are relatively clear-cut, more abstract interests may be more difficult to identify and measure. Furthermore, it can be difficult to distinguish between a private interest and an interest stemming from one's membership in a broader class of persons. For example, if a Member of Parliament who happens to be a veteran is voting on a bill that would increase the benefits provided to veterans, should that Member of Parliament abstain from voting due to the presence of a private interest? Differing approaches to this question are addressed in the comparative section of this chapter. Finally, there may be cases in which the presence of private-capacity interests is simply unavoidable. For example, a municipal public official in a very small, tight-knit community will inevitably find him or herself having to make decisions in a public capacity that inevitably directly affect his or her private interests. Does this mean we should relax the definition of what constitutes a "private interest" in order to account for the practical realities of public decision making in this context?

The third element in the OECD's definition of "conflict of interest" is engaged where a private interest has been identified; it asks whether a given private interest *could* improperly influence the performance of official duties and responsibilities. It is important to note that the wording of the definition captures not only *actual* conflicts of interest, but also *potential* conflicts of interest. This element presents some interpretive difficulty for two main reasons. First, it requires that we determine what constitutes the proper performance of an official's duties and responsibilities in the public interest. Although in some circumstances this determination will be black and white, there will be many cases in which the official finds him or herself in a grey area. Second, it requires that we make an assessment as to whether the private interest *could* influence the proper performance of those duties and responsibilities. This task may be considered speculative in certain circumstances where the potential influence of the private interest is not easily ascertained.

Generally speaking, these interpretive problems have been dealt with through the use of explicit pro-hibitions and aspirational, norm-generating provisions in legislation, policy instruments, codes of conduct and guidelines. Indeed, scholars have argued that in contrast to the increasingly subjective nature of the "interest" element, the conceptualization of a "conflict" has shifted from being understood as purely subjective to something that can be objectively ascertained, at least in law, through analysis based on a set of indicia.<sup>9</sup>

Although most states now explicitly prohibit public officials from engaging in decision making where a conflict of interest exists or may reasonably be perceived to exist, there are still certain situations that may be problematic from a conflict of interest perspective, but are not explicitly addressed by legislation. General purposive clauses that highlight the importance of maintaining public confidence in government institutions will ideally encourage public officials to recuse themselves from exercising their capacities in potential conflict situations. However, as with defining a "private interest," determining when an official is, or reasonably appears to be, in a conflict of interest can be difficult. This issue is compounded by the additional need to craft laws and policies capturing improper influence

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<sup>9</sup> Susan Rose-Ackerman (2014) 3 at 6.

resulting from the private interests of friends or family of a public official. Defining who falls within the scope of “family” or “friends” is no easy task, and reasonable people may disagree over how broadly these terms should be understood.

Another aspect of conflicts of interest that has become particularly relevant in today’s highly technical and sophisticated systems of government is the “revolving door” phenomenon. This describes a situation in which a public official leaves government and subsequently takes on private employment in a sector that her or she may have overseen, or had privileged information about, in his or her capacity as a public official.<sup>10</sup> Several concerns arise in this context, though two are particularly noteworthy:

- First, there are ethical concerns that public office holders might be receiving lucrative private-sector opportunities in exchange for having conferred benefits on the private-sector employer. Such an exchange constitutes a characteristic example of the abuse of public office for private gain. This was a favourite technique of one of the United States’ most prominent and later most infamous lobbyists, Jack Abramoff.<sup>11</sup> The prospect of gaining highly remunerative private-sector employment in the future may therefore distort the office holder’s decision making in ways that harm the public interest.
- Second, there are ethical concerns that former public office holders may be disclosing inside information about the inner workings of the government to private firms after their tenure. A related concern is that the former public office holders may use their knowledge concerning sensitive government information acquired during his or her tenure to their own advantage in the private sector.

Despite these concerns, it remains a common practice for former politicians or public servants after leaving office to seek out and succeed in finding private employment with companies that commonly interact with the government. To respond to the concerns arising in this context, many jurisdictions have enacted legislation mandating a “cooling off” period between government work and certain types of private work.<sup>12</sup> Although the revolving door phenomenon has important ethical implications for both the public and the private sector, a

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<sup>10</sup> Daniel I Gordon, “Protecting the Integrity of the U.S. Federal Procurement System: Conflict of Interest Rules and Aspects of the System That Help Reduce Corruption” in Auby, Breen & Perroud, eds, (2014) 39 at 48-49.

<sup>11</sup> For a brief account, see Chapter 1, Section 8. If you google Jack Abramoff, you will find movies, documentaries, books and articles describing the man and his lobbying methods.

<sup>12</sup> For example, Canada’s *Conflict of Interest Act* stipulates that, for a one-year “cooling off” period following their last day in office, certain public office holders must not accept an offer of employment with an entity with which the office holder had “direct and significant official dealings” during the period of one year immediately before the officer holder’s last day in office: *Conflict of Interest Act*, SC 2006, c 9, ss 35(1), 36(1).

discussion of current legal regimes and con-temporary issues around “cooling-off” periods is beyond the scope of this chapter.<sup>13</sup>

Finally, it is worth highlighting the key concerns associated with conflicts of interest in the public sphere. A proper understanding of the reasons why conflicts of interest are harmful and why they ought to be avoided will serve as a foundation for the discussion to follow. In this respect, Canadian courts have had occasion to issue pronouncements on the concept of conflicts of interest and the key concerns arising from such conflicts. As stated by the Ontario High Court of Justice in the 1979 case of *Moll v Fisher*:

[All conflict of interest rules are] based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well meaning men and women may be impaired where their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose.<sup>14</sup>

The core concerns over conflicts of interest were concisely summarized by Commissioner Madam Justice Denise Bellamy in her 2005 report on the *Toronto Computer Leasing Inquiry and Toronto External Contracts Inquiry*:<sup>15</sup>

The driving consideration behind conflict of interest rules is the public good. In this context, a conflict of interest is essentially a conflict between public and private interests. ... The core concern in a conflict is the presumption that bias and a lack of impartial judgment will lead a decision-maker in public service to prefer his or her own personal interests over the public good.

...

Conflict of interest should be considered in its broadest possible sense. It is about much more than money. Obviously, a conflict of interest exists when a decision-maker in public service has a personal financial interest in a decision. But conflicts of interest extend to any interest, loyalty, concern, emotion or other feature of a situation tending to make the individual’s judgment less reliable than it would normally be.

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<sup>13</sup> For more on the “revolving door” phenomenon as well as contemporary debates on the issue, see Wentong Zheng, “The Revolving Door” (2015) 90:3 Notre Dame L Rev 1265.

<sup>14</sup> *Moll v Fisher* (1979), 23 OR (2d) 609 at para 6, 96 DLR (3d) 506 (H Ct J (Div Ct)).

<sup>15</sup> Madam Justice Denise Bellamy, *Toronto Computer Leasing Inquiry and Toronto External Contracts Inquiry*, vol 2 (*Good Government*) (City of Toronto, 2005) at 38-40, online:

[www1.toronto.ca/inquiry/inquiry\\_site/report/pdf/TCLI\\_TECI\\_Report\\_Good\\_Government.pdf](http://www1.toronto.ca/inquiry/inquiry_site/report/pdf/TCLI_TECI_Report_Good_Government.pdf).

Public perceptions of the ethics of public servants are critically important. If the public perceives, even wrongly, that public servants are unethical, democratic institutions will suffer from the erosion of public confidence.

In *Democracy Watch v Campbell*, the Canadian Federal Court of Appeal further addressed the concept of conflicts of interest and the key concerns associated with such conflicts:

The common element in the various definitions of conflict of interest is ... the presence of competing loyalties ... the idea of conflict of interest is intimately bound to the problem of divided loyalties or conflicting obligations ... Any conflict of interest impairs public confidence in government decision-making. Beyond that, the rule against conflicts of interest is a rule against the possibility that a public office holder may prefer his or her private interests to the public interest.<sup>16</sup>

Thus, the primary concern with conflicts of interest is that public officials, who are tasked with exercising their duties and responsibilities in furtherance of the public interest, should not be placed in a position where their private interests might interfere with the fair and impartial judgment rightly expected of them. In order to uphold public confidence in the government, the public must reasonably be satisfied that public decision makers are exercising their duties with undivided loyalty to the public interest. It is this concept—undivided loyalty to the public—that makes conflicts of interest problematic and demands that policy makers construct a robust regime aimed at preventing and managing such conflicts.

## 2.2 Enforcement Mechanisms: Historical Foundations and Contemporary Tensions

The legal mechanisms used to stem corruption developed in conjunction with the shifting values and needs of modern society. With few exceptions, most Western societies of the 17<sup>th</sup> century would have simply accepted the idea that leaders in power would use their office for personal gain. With the spread of democratic ideals and the need for a well-organized and efficient civil service with the coming of the industrial era, the notion that leaders and public servants should not act in their own personal interest, but solely in the public interest, began to gain wider acceptance.<sup>17</sup> With time, conflict of interest situations came to be understood as a form of corruption.

Even with a growing recognition of the problems created by corruption, conflict of interest situations were primarily dealt with by criminal sanctions only after an action had been

<sup>16</sup> *Democracy Watch v Campbell*, 2009 FCA 79 at paras 40-51, [2010] 2 FCR 139.

<sup>17</sup> Tim Lankester, "Conflict of Interest: A Historical and Comparative Perspective" in Asian Development Bank & OECD, *Managing Conflict of Interest: Frameworks, Tools and Instruments for Preventing, Detecting, and Managing Conflict of Interest* (2008) 11 at 11, online: <https://www.oecd.org/site/adboecdanti-corruptioninitiative/40838870.pdf>.

undertaken by an official in a conflict of interest position. The focus tended to be on deterrence through *ex-post* criminal sanction rather than prevention through *ex-ante* compliance mechanisms. In the US, for example, conflicts of interest were dealt with primarily through criminal law until the early 1960s, when the Kennedy administration instituted a code of conduct for officials in the executive branch as part of a general trend towards the creation and use of preventative and aspirational laws and policies relating to corruption.<sup>18</sup>

Today, most states have mechanisms that operate *ex-ante* to prevent conflicts from arising, such as financial disclosure requirements, as well as mechanisms that operate *ex-post* to punish and deter, such as criminal sanctions and regulatory penalties. However, all countries that implement legislation to prevent conflicts of interest in the public realm are faced with the need to create a regime that operates effectively but is not so prohibitive that it deters citizens from entering the public service. This is an issue that is widely recognized within academic literature on public corruption, and has even been explicitly acknowledged through purposive provisions in conflict of interest legislation.<sup>19</sup>

Within the broad class of preventative mechanisms, Mattarella has identified three major processes by which conflicts of interest can be addressed.<sup>20</sup> The first is complete removal, consisting of either removal of the individual from public office or removal of the private interest (which can occur through arms-length transactions or by placing assets in a blind trust). The second involves requiring the public official to recuse him- or herself from taking action (such as debating, advocating, or voting) on matters that bear upon a private interest of the official. Finally, the third is simple exhibition, entailing the disclosure of privately held interests. It can help to conceptualize these mechanisms as existing on a spectrum, with complete removal and simple disclosure occupying opposite ends of the spectrum and recusal falling somewhere in the middle.

The strictest response, that of removal, would in theory be the most effective at curbing corruption, assuming individuals are more likely to respond to stronger disincentives. However, this mechanism is the most prohibitive in terms of attracting citizenry to positions in government. Conversely, while simple disclosure would likely be inadequate to deal with many forms of conflicts of interest, this mechanism would make a position in government more attractive to citizens who might otherwise remain in the private sector. While recusal provides a satisfactory middle ground in many cases, it becomes impractical at higher levels of public office where public officials enjoy broader discretionary powers. Senior officials

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<sup>18</sup> Jane S Ley, “Managing Conflict of Interest in the Executive Branch: The Experience of the United States” in OECD, (2003), 231 at 233.

<sup>19</sup> See e.g. Rose-Ackerman (2014) 3; *Conflict of Interest Act*, SC 2006, c 9, s 3(d) (stating that one of the purposes of the *Act* is to “encourage experienced and competent persons to seek and accept public office”); OECD (2003) at 40, (noting that over 1,000 public officials in Romania quit after new conflict of interest laws were enacted).

<sup>20</sup> Bernardo Giorgio Mattarella, “The Conflicts of Interests of Public Officers: Rules, Checks and Penalties” in Auby, Breen & Perroud, eds, (2014) at 30.

who make discretionary decisions on a wide range of issues could be rendered incapable of performing their duties if they were continually required to recuse themselves.

In practice, most States aim to strike a balance between the need to avoid conflicts of interest and the need to attract high-quality candidates by applying different preventative mechanisms in different circumstances and to different levels of seniority. In cases where the influence of a private interest is questionable or remote, the use of criminal law or recusal requirements can be counterproductive. Instead, a State may rely on disclosure requirements in order to create transparency and thereby bring greater public scrutiny to bear on the actions of a given official. However, the precise balance which ought to be struck in any given situation is subject to debate.

Another important aspect of effective enforcement of conflict of interest rules is the delegation of authority to investigate and remedy conflicts of interest. Investigating potential conflicts of interest can require the compulsion of testimony and the gathering of evidence, as well as a significant amount of human and financial capital. As such, the scope of authority and the budget granted to the relevant bodies and officials can drastically alter the effectiveness of regimes that seek to minimize conflicts of interest in the public sphere. A State may have robust legislation, but without a powerful and well-funded enforcement entity, the system as a whole will not be effective. The comparative section of this chapter provides greater detail on enforcement bodies in the US, UK, and Canada.

In addition to preventative mechanisms such as disclosure and recusal requirements, criminal sanctions operate to punish corrupt practices *ex-post* and provide a degree of *ex-ante* prevention through deterrence. Criminal sanctions tend to apply to actions taken in a conflict of interest situation, rather than to the mere existence of the conflictual relationship itself. The close connection between conflicts of interest and offences such as bribery, fraud, and misuse of public office demonstrates that criminal sanctions are very much a part of managing, preventing, and sanctioning conflicts of interest.

### 2.3 Political Culture and Conflicts of Interest

Legislation and policy do not exist in a vacuum. Culture can have a profound effect on how a given legislative regime is interpreted and, more importantly, on how closely public officials actually adhere to certain laws and rules. Political culture is a highly complex concept, but, broadly defined, it consists of a set of shared political attitudes, values, and standards. One of the four core principles that inform the OECD guidelines on managing conflicts of interest is “engendering an organizational culture which is intolerant of conflict

of interest.”<sup>21</sup> Similarly, UNCAC recognizes the need to “foster a culture of rejection of corruption.”<sup>22</sup>

Research suggests that anti-corruption measures are more effective where political actors share a common political culture. Indeed, some researchers have argued that cultural values and “informal expectations” may be more influential than formal laws or policies.<sup>23</sup> Although the dynamic nature of culture makes defining a given political culture a challenging exercise, Skelcher and Snape suggest that determining the commonality of views in three specific areas can help predict the effectiveness of a given conflict of interest regime. These three questions are:

1. To what extent do the individuals the regime is supposed to govern share similar attitudes and values?
2. Do said individuals have a shared understanding of the problems the regime is designed to address? and
3. Do these individuals have a shared understanding of how these problems can be addressed and resolved?<sup>24</sup>

Although the Skelcher and Snape study focused on government at the local level, the effect of culture in governing conflicts of interest and corruption is just as significant at the national level. This is demonstrated by the importance many states place on training, educating, and consulting with public officials on conflicts of interest.<sup>25</sup> Indeed, a formal conflict of interest regime would be of little use if public officials had widely differing interpretations of a given rule or widely divergent views on what is acceptable behaviour. Laws and regulations can help foster a shared understanding of conflicts of interest, but it is important to remember the significant role that cultural predispositions have on the effectiveness of conflict of interest management.

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<sup>21</sup> OECD (2003) at 27.

<sup>22</sup> *United Nations Convention against Corruption*, UNODC, GA Res 58/4, Annex, A/AC.261/L.5 (2003), Preamble.

<sup>23</sup> Richard Mulgan & John Wanna, “Developing Cultures of Integrity in the Public and Private Sectors” in Adam Graycar & Russell G Smith, eds, *Handbook of Global Research and Practice in Corruption* (Edward Elgar, 2011) 416 at 416.

<sup>24</sup> Chris Skelcher & Stephanie Snape, “Ethics and Local Councilors: Modernising Standards of Conduct” cited in Pelizzo & Stapenhurst, (2014) at 79.

<sup>25</sup> There is a significant amount of education and training provided to government officials in Canada, the US and the UK. For Canada, see Office of the Conflict of Interest and Ethics Commissioner, online: <[ciec-ccie.parl.gc.ca/](http://ciec-ccie.parl.gc.ca/)> (especially the “Information for ...” section). For the US, see United States Office of Government Ethics, “Education”, online: <<https://www.oge.gov/web/oge.nsf/Education/>>. For the UK, see UK Parliament, Parliamentary Commissioner for Standards, “Publications”, online: <[www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliamentary-commissioner-for-standards/publications/](http://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliamentary-commissioner-for-standards/publications/)>.

### 3. A COMPARISON OF INTERNATIONAL STANDARDS AND NATIONAL REGIMES IN THE US, THE UK, AND CANADA

Based on the information presented above, one can see that conflicts of interest have a very localized dimension. Differences in the structure of government and political culture require conflict of interest regimes to be tailored to the needs of different states, different levels of government, and different bodies within the same level of government. The remainder of this chapter provides an overview of international conflict of interest standards and guidelines, followed by a comparative analysis of conflict of interest regimes at the federal level in three comparator States: the US, UK, and Canada. Within the national regime comparative section, the analysis is organized on the basis of three major aspects of conflict of interest regimes: (1) general structure of laws, (2) general structure and powers of authorities, and (3) interpretation and compliance mechanisms.

#### 3.1 International Law, Standards and Guidelines

An increased understanding of the global impact that conflict of interest issues bring to bear on economic development and ethical governance has resulted in myriad international organizations taking steps to study, monitor and provide guidance on effectively managing conflicts of interest. Two of the most widely recognized of these bodies are the OECD and the UN, although numerous other international and regional bodies also provide conflict of interest guidance to states.<sup>26</sup> In addition, non-governmental organizations such as Transparency International play a significant role in monitoring and evaluating the effectiveness of anti-corruption regimes.

##### 3.1.1 UNCAC

A number of UNCAC's provisions relate directly to conflicts of interest. The provisions that deal most explicitly with conflicts of interest can be found in Articles 7 and 8.<sup>27</sup> Article 7 focuses on the establishment and maintenance of systems relating to public officials and specifically mentions the promotion of education and training programs for the ethical

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<sup>26</sup> The UNODC has compiled a number of international instruments in its *Compendium of International Legal Instruments on Corruption*, 2nd ed (2005), online: <[https://www.unodc.org/documents/corruption/publications\\_compendium\\_e.pdf](https://www.unodc.org/documents/corruption/publications_compendium_e.pdf)>. For an interesting study on ethical standards compliance and monitoring within international bodies themselves, see Elisa D'Alterio "'Global Integrity': National Administrations versus Global Regimes" in Auby, Breen & Perroud, eds, (2014), 198. D'Alterio concludes that international bodies such as the UN and the IMF generally "practice what they preach" when it comes to internal ethics compliance.

<sup>27</sup> UN General Assembly, *United Nations Convention against Corruption*, 31 October 2003, UN Doc A/58/422 (entered into force 14 December 2005), Arts 7-8, online: <[https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf)>.

performance of official functions.<sup>28</sup> Article 8, entitled “Codes of Conduct for Public Officials,” encourages the promotion of ethical behaviour and the implementation of codes of conduct, as well as the establishment of disclosure requirements, complaints processes, and disciplinary measures for breaches of codes of conduct.<sup>29</sup>

With respect to Articles 7 and 8, the discussion in the *Legislative Guide* to UNCAC is relatively brief, but suggests avoiding a “top-down” approach to creating codes of conduct. Instead, the guide suggests a process of consultation with public officials in order to achieve wider understanding of the code among officials.<sup>30</sup> In addition, the “private interests” to be disclosed under Article 8, paragraph 5 (outside activities, employment, assets, substantial gifts, and benefits) constitute a minimum disclosure requirement.<sup>31</sup>

### 3.1.2 OECD Conflict of Interest Guidelines

As noted above, the OECD published a set of conflict of interest guidelines as well as reports from several member States entitled *Managing Conflict of Interest in the Public Service*.<sup>32</sup> The OECD guidelines promote the “desirability of establishing and maintaining a set of core principles, policy frameworks, institutional strategies and practical management tools for managing conflict-of-interest matters in the public service.”<sup>33</sup> The OECD explicitly recognizes the need to tailor conflict of interest policies to the specific “political, administrative and legal context” of each State, and as such, the guidelines largely function as generalized minimum standards for States to follow.<sup>34</sup>

There are a number of suggestions in the OECD guidelines worth noting. In terms of specific legislative initiatives, the guidelines highlight the importance of drafting legislation or policies with clear definitions, specific examples of conflicts of interest, and, at a more general level, an emphasis on the overall aim of a given law or policy.<sup>35</sup> The guidelines also suggest coordinating and integrating conflict of interest policies and laws into a “coherent institutional framework,” such that laws and policies are consistent with each other and enforcement functions are centralized.

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<sup>28</sup> *Ibid*, Art 7, para 1(d).

<sup>29</sup> *Ibid*, Art 8, paras 1-6.

<sup>30</sup> United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd revised ed (United Nations, 2012) at 32, para 91, online: <[https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC\\_Legislative\\_Guide\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf)>.

<sup>31</sup> *Ibid* at 33, para 96.

<sup>32</sup> OECD (2003).

<sup>33</sup> *Ibid* at 38.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid* at 28-29.

On a more operational level, the OECD guidelines emphasize the importance of disclosure of private interests and indicate that it is appropriate to place the responsibility of disclosure on the public officials themselves. Ideally, disclosure should occur upon the assumption of a role in government or the public service. Once established, disclosure should recur annually, as well as on an ongoing basis as new potential sources of conflict emerge. It is imperative that the disclosed information be detailed enough to allow for educated judgements on the potential for conflict.<sup>36</sup> The guidelines note that private interest disclosure does not necessarily have to be made public. Internal and limited-access disclosure may satisfy policy objectives, particularly where the public official occupies a more junior position.<sup>37</sup> The guidelines also note the need for institutional ability to gather and assess such information as a corollary to disclosure requirements.<sup>38</sup>

In addition to disclosure requirements, the OECD guidelines suggest an array of options for managing and resolving conflicts of interest. These include direct mechanisms such as recusal, divestment of interests, placing investments into genuinely blind trusts, restricting access to confidential information and resignation options.<sup>39</sup> The guidelines note that in order to achieve transparency one must clearly identify and record conflicts and how they are resolved or managed in decision making, and suggests the establishment of effective complaint-handling mechanisms.

The OECD also explicitly recognizes the importance of culture with respect to defining conflict of interest. As such, the guidelines suggest open consultation between persons who are governed by the rules and those who enforce them in order to develop a more homogenous culture. Part and parcel of developing a unified culture is the wide publication of conflict of interest rules, the provision of assistance with identifying conflicts and guidance with respect to managing them.<sup>40</sup>

### 3.2 General Structure of National Conflict of Interest Regimes: Statutes, Policies and Guidelines

Just as every State has its own unique governmental structure, so too does each State have its own unique structure for monitoring and preventing conflicts of interest. Over the past ten years, most States have seen considerable growth in the number of legislative provisions, policies, commissions, committees and offices related to conflicts of interest in public office. Indeed, in the US there are over 5,000 ethics employees in the executive branch alone, and each federal agency has its own code of ethics with unique regulations.<sup>41</sup> The scope of this section is therefore largely limited to laws and regulations directed at elected officials in the

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<sup>36</sup> *Ibid* at 28-30.

<sup>37</sup> *Ibid* at 29.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid* at 30.

<sup>40</sup> *Ibid* at 32, 35, 36.

<sup>41</sup> See United States Office of Government Ethics, "About", online: <https://www.oge.gov/web/oge.nsf/About+OGE/>.

executive and legislative branches, as well as senior government officials, either in Cabinet positions or within the highest levels of the civil service. The US, UK and Canada are similar to the extent that their legislative bodies have both a lower and an upper house.

### 3.2.1 US

In the US, the House of Representatives is the body most analogous to Canada and the UK's lower house. Members of the House of Representatives are governed by the *Rules of the House of Representatives* (the *Rules*), which are similar to Canada's *Standing Orders of the House of Commons*. There are provisions that relate to conflicts of interest throughout the *Rules*, but the main chapters pertaining to ethics are chapters XXIII to XXVI, which contain a code of conduct, financial disclosure requirements and limitations on accepting gifts and outside funds. The *Rules* are supplemented by the lengthy *House Ethics Manual*, which provides greater detail on the *Rules* and presents examples from the House's precedents. In contrast to Canada and the UK, the most senior officials in the US federal government (particularly secretaries that make up the Cabinet) do not concurrently sit in the House of Representatives and are therefore not subject to concurrent conflict of interest jurisdiction like many ministers in Canada and the UK.

In the US, the executive branch is governed by a multiplicity of criminal and civil statutes, as well as codes of conduct and executive orders. The most significant of these include the *Ethics in Government Act* (which covers financial disclosure for high-ranking officials) and the *Standards of Ethical Conduct for Employees of the Executive Branch* (the *Standards*).<sup>42</sup> The *Ethics in Government Act* is incorporated into the rules of both the House of Representatives and the Senate. The *Standards* apply, in varying degrees, to all employees in the executive branch (over four million people), including senior cabinet officials, such as the Secretary of Agriculture.<sup>43</sup> The disparate sources of law that govern conflicts of interest in the US can be overwhelming. However, despite some technical language, the *Standards* contain a vast array of interpretive aids and examples that would likely provide sufficient guidance to an official

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<sup>42</sup> *Ethics in Government Act of 1978*, Pub L No 95-521, 92 Stat 1824 (codified as amended in various sections of Titles 2, 5, 18, and 28 of the United States Code); *Standards of Ethical Conduct for Employees of the Executive Branch*, Codified in 5 CFR Part 2635 as amended at 81 FR 48687 (effective 25 August 2016), online: <[https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/\\$FILE/SOC as of 81 FR 48687.pdf](https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/$FILE/SOC%20as%20of%2081%20FR%2048687.pdf)>.

<sup>43</sup> *Standards of Ethical Conduct for Employees of the Executive Branch*, Codified in 5 CFR Part 2635, as amended at 81 FR 48687, at § 2635.102(h), online: <[https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/\\$FILE/SOC as of 81 FR 48687.pdf](https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/$FILE/SOC%20as%20of%2081%20FR%2048687.pdf)>.

before a statute is violated. In addition, the US has very detailed ethics manuals for both the House and the Senate.<sup>44</sup>

The upper house, the US Senate, is subject to a separate code called the *Senate Official Code of Conduct*. However, US senators are also subject to ethics-related rules found in the *Rules of the Senate*, which, as mentioned above, incorporate statutes that mandate requirements such as financial disclosure.<sup>45</sup>

### 3.2.2 UK

Britain's lower house is governed by the very brief *Code of Conduct for Members of Parliament*, which applies to all members of Parliament.<sup>46</sup> The UK's code for MPs is supplemented by an official guide that provides greater detail on the rules and requirements in the code.<sup>47</sup> As members of Parliament, the prime minister and most Cabinet ministers in the UK are subject to the code for MPs. In both Canada and the UK, these codes forbid making decisions in conflict of interest positions and set out financial disclosure requirements (which are detailed further in the "Compliance Mechanisms" section below).

MPs in the UK who are also ministers are subject to the overlapping jurisdiction of the *Ministerial Code*.<sup>48</sup> The UK's *Ministerial Code* is a creation of the Cabinet, much like Canada's *Federal Accountability Act*. However, the *Ministerial Code* contains far more substantive conflict of interest provisions (such as financial disclosure requirements) that are covered in Canada in the *Conflict of Interest Act*. Another major difference is that Canada's *Conflict of Interest Act* applies to ministers as well as to many other public officials. Conversely, in the UK, ministerial and parliamentary staff are subject to the *Civil Service Code*. As such, the UK's

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<sup>44</sup> US House of Representatives, Committee on Standards of Official Conduct, *House Ethics Manual* (2008) 110th Congress, 2nd Session, online: <[ethics.house.gov/sites/ethics.house.gov/files/documents/2008\\_House\\_Ethics\\_Manual.pdf](http://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf)>; US Senate, Select Committee on Ethics, *Senate Ethics Manual* (2003) 108th Congress, 1st Session, online: <[www.ethics.senate.gov/downloads/pdffiles/manual.pdf](http://www.ethics.senate.gov/downloads/pdffiles/manual.pdf)>.

<sup>45</sup> US Senate, Committee on Rules and Administration, *Rules of the Senate*, chapters XXXIV to XXXIX, online: <[www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome](http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome)>.

<sup>46</sup> UK House of Commons, *Code of Conduct for Members of Parliament* (adopted 17 March 2015), online: <[www.publications.parliament.uk/pa/cm201516/cmcode/1076/107601.htm](http://www.publications.parliament.uk/pa/cm201516/cmcode/1076/107601.htm)>.

<sup>47</sup> UK House of Commons, *Guide to the Rules Relating to the Conduct of Members* (approved 17 March 2015), online: <[www.publications.parliament.uk/pa/cm201516/cmcode/1076/107601.htm](http://www.publications.parliament.uk/pa/cm201516/cmcode/1076/107601.htm)>.

<sup>48</sup> UK, Cabinet Office, *Ministerial Code* (December 2016), online: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/579752/ministerial\\_code\\_december\\_2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/579752/ministerial_code_december_2016.pdf)>.

conflict of interest regime is based on more disparate sources, particularly with regard to senior civil servants.<sup>49</sup>

The UK's upper house, the House of Lords, is governed by the *House of Lords Code of Conduct*.

### 3.2.3 Canada

In Canada, the *Conflict of Interest Code for Members of Parliament* applies to all 338 elected members of the largest and most significant legislative organ in Canada, the House of Commons.<sup>50</sup> This code is an appendix to the *Standing Orders of the House of Commons*, which essentially operates as a rule book for proceedings in the lower house. The most senior officials in Canada's executive branch, the prime minister and most Cabinet ministers, are elected officials who occupy positions in the House of Commons. As such, these ministers are also subject to the requirements set out in the code.

With respect to Canada's executive branch, the prime minister and all other ministers of the Crown are subject to the *Conflict of Interest Act*. The Act has the most significant scope of all Canadian conflict of interest laws in terms of application to senior public officials, with approximately 3,000 public office holders being subject to at least some of its provisions.<sup>51</sup> This includes public office holders such as ministerial advisors and staff, officers and staff of the House and Senate, judges, and Governor-in-Council appointees (such as the heads of Crown corporations).

Like many other States, the Canadian government often issues a policy guideline for ministers and their staff, in addition to the legislative rules. The current policy guideline of the Trudeau government, issued November 27, 2015, is entitled *Open and Accountable Government*.<sup>52</sup> Although conflicts of interest are not the central focus of the guidelines, they are nonetheless addressed through substantive as well as aspirational provisions.

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<sup>49</sup> See also UK, Cabinet Office, *Code of Conduct for Special Advisers* (December 2016), online: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/579768/code-of-conduct-special-advisers-dec-2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/579768/code-of-conduct-special-advisers-dec-2016.pdf)>. The *Code of Conduct for Special Advisers*, in conjunction with the UK *Civil Service Code* (online: <<https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code>>) imposes additional rules on temporary ministerial advisers in the UK. Canada's most analogous advisers are subject only to the *Conflict of Interest Act*.

<sup>50</sup> *Conflict of Interest Code for Members of the House of Commons*, being appendix I of *Standing Orders of the House of Commons*, online: <[www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm](http://www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm)>.

<sup>51</sup> See Office of the Conflict of Interest and Ethics Commissioner, "Information for Members of the House of Commons", online: <[ciec-ccie.parl.gc.ca/EN/InformationFor/Pages/MembersOfTheHouseOfCommons.aspx](http://ciec-ccie.parl.gc.ca/EN/InformationFor/Pages/MembersOfTheHouseOfCommons.aspx)>.

<sup>52</sup> Privy Counsel Office, *Open and Accountable Government* (2015), online: <[pm.gc.ca/sites/pm/files/docs/OAG\\_2015\\_English.pdf](http://pm.gc.ca/sites/pm/files/docs/OAG_2015_English.pdf)>.

Canada's 105 senators are subject to a separate regime entitled the *Ethics and Conflict of Interest Code for Senators*.<sup>53</sup>

### 3.3 General Structure of National Conflict of Interest Regimes: Bodies of Authority

As mentioned in the first section, a major aspect of any conflict of interest regime is the structure and delegation of authority to oversee and prevent conflicts of interest, as well as to provide education and guidance to officials with respect to the ethical performance of their duties. As such, this section details the main authorities in the US, UK, and Canada regarding conflict of interest prevention. Generally speaking, prevention and enforcement of ethical standards are overseen by a combination of independent offices (i.e., created by government, but staffed by private citizens), government offices, and parliamentary committees in the upper and lower houses. As such, these entities are the main focus of this section. It does not contain significant detail about the relevant enforcement agencies that take charge of matters when a criminal violation is alleged.

#### 3.3.1 US

The structure of conflict of interest oversight in the US operates through delegation and diffusion of authority over ethics-related matters, particularly in the immense executive branch. The main body overseeing the executive branch is the US Office of Government Ethics (OGE). The OGE's role is purely a preventative one, as it has no authority to hear or investigate complaints. As such, the OGE's role is focused around interpreting and advising on various ethics laws, especially the *Standards of Ethical Conduct for Employees of the Executive Branch*, which governs all employees of the executive branch including the most senior officers in the executive branch, but not the president and vice president.<sup>54</sup> The OGE is headed by a director, but each federal agency has a designated agency ethics official (DAEO) who is responsible for oversight of ethics in a given agency and is vested with a number of powers under the *Ethics in Government Act*. A DAEO is empowered, for example, to advise individuals within his or her agency or to waive financial disclosure requirements for a part-time employee.<sup>55</sup>

Complaint hearings and investigations into federal agencies are handled by the Inspector General (IG) for the relevant agency. The IGs are members of an independent body called

<sup>53</sup> Canada, Office of the Senate Ethics Officer, *Ethics and Conflict of Interest Code for Senators* (adopted 16 June 2014), online: <[sen.parl.gc.ca/seocse/PDF/CodeJune2014.pdf](http://sen.parl.gc.ca/seocse/PDF/CodeJune2014.pdf)>.

<sup>54</sup> See generally 5 USC App § 402. For a compilation of federal ethics statutes in the US, see US Office of Government Ethics, *Compilation of Federal Ethics Laws* (current to end of 113th Congress), online: <[https://www.oge.gov/web/oge.nsf/All Statutes/0BC1FF0EB760D84A85257E96006A9256/\\$FILE/Compilation of Federal Ethics Laws \(2015\).pdf?open](https://www.oge.gov/web/oge.nsf/All%20Statutes/0BC1FF0EB760D84A85257E96006A9256/$FILE/Compilation%20of%20Federal%20Ethics%20Laws%20(2015).pdf?open)>.

<sup>55</sup> *Ethics in Government Act*, 5 USC App § 101(i).

the Council of Inspectors General on Integrity and Efficiency, which plays a part in prevention as well as enforcement of ethics violations. The head of a federal agency has very little power over its respective IG; however, there are exceptions to this autonomy in some of the most significant agencies in the US.<sup>56</sup> IGs wield a considerable amount of investigative authority, and the IGs' role in advising Congress and reviewing legislation overlaps in part with the role of the OGE.<sup>57</sup>

Generally speaking, punitive measures for violations of the *Standards of Ethical Conduct for Employees of the Executive Branch* are determined by the relevant agency, although the director of the OGE does have the ability to recommend a particular penalty for a violation of the employee code.<sup>58</sup> The sheer scope of the OGE's jurisdiction and the unique nature of each of the vast number of federal agencies would likely make significant centralization of authority impractical, hence the considerable delegation of powers and the reliance on IGs to investigate complaints.

Conflict of interest matters in the House of Representatives are primarily overseen by two bodies. The first is the independent investigatory Office of Congressional Ethics (OCE). The OCE is the primary body charged with hearing and investigating complaints relating to any alleged violation of "law, rule, regulation or other standard of conduct" by any member, officer, or employee of the House. The OCE was created in 2008 following a string of bribery and corruption scandals.<sup>59</sup> The OCE's powers include the power to compel witnesses and obtain evidence. Members of the OCE vote on whether to continue an investigation after an initial stage, and subsequently vote on whether to refer the matter to the Committee on Ethics.<sup>60</sup> The second is the House Committee on Ethics (HCE), which is charged with providing advice to members, officers, and staff of the lower house; collecting financial disclosure and outside employment information; and in some cases performing

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<sup>56</sup> The heads of seven very powerful agencies (including the Departments of Defense, Treasury, Justice, and Homeland Security) can prevent the initiation of an investigation by an IG where particular matters are concerned, including national security and significant financial information that would have a serious impact on the economy, though the agency head must provide Congress with reasons. See US, Council of the Inspectors General on Integrity and Efficiency, *The Inspectors General* (14 July 2014) at 4, online: <[https://www.ignet.gov/sites/default/files/files/IG\\_Authorities\\_Paper\\_-\\_Final\\_6-11-14.pdf](https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf)>.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Standards of Ethical Conduct for Employees of the Executive Branch*, Codified in 5 CFR Part 2635, as amended at 81 FR 48687, at § 2635.106(b), online: <[https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/\\$FILE/SOC\\_as\\_of\\_81\\_FR\\_48687.pdf](https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/$FILE/SOC_as_of_81_FR_48687.pdf)>.

<sup>59</sup> See Donna Cassata, "House Republicans Vote to Eviscerate Independent Ethics Office", *The Star* (2 January 2016), online: <<https://www.thestar.com/news/world/2017/01/02/house-republicans-vote-to-eviscerate-independent-ethics-office.html>>.

<sup>60</sup> For a summary of the jurisdiction of the OCE, see US, Office of Congressional Ethics, "FAQ", online: <<https://oce.house.gov/learn/faq/>>.

investigations.<sup>61</sup> In addition, the HCE drafts the *House Ethics Manual*.<sup>62</sup> Finally, the HCE is responsible for recommending administrative actions for violations of the *Rules of the House of Representatives*; the House then votes on whether to enforce the HCE's recommendation. Even if the HCE dismisses a potential ethics violation as unfounded, it is required to produce a report detailing the alleged wrongdoing; this is said to create an added deterrent to questionable behaviour by lawmakers.<sup>63</sup>

The independence of the OCE, its future role, and its relationship to the HCE are all subject to considerable uncertainty. House Republicans in the US voted on January 2, 2017 to both curtail the powers and remove the independence of the OCE by preventing it from pursuing investigations that might result in criminal charges, and by bringing it under the control of the HCE.<sup>64</sup> The proposal would have resulted in the creation of a new "Office of Congressional Complaint Review," in place of the OCE, that would report to and be overseen by the HCE, which is composed of lawmakers who answer to their own party. The motivating reason behind the proposed change was that some lawmakers viewed the OCE as being overzealous in its investigative efforts.<sup>65</sup> The proposal attracted strong criticism from a range of stakeholders, including Democrat leaders, dissenting Republicans, president-elect Donald Trump, and ethics commentators.<sup>66</sup> Some have accused the HCE of being lax in its approach to investigating member misconduct, and many expressed concern over the fact that the new regime would lack independent oversight. Further, commentators criticized the fact that the new proposed office would lack the ability to take anonymous complaints and the fact that staff would be prohibited from speaking to news media. As a result of this backlash, House Republicans quickly backtracked on January 3, abandoning the proposal. Although the proposal was dropped, the future of the OCE remains uncertain. After their reversal on January 3, House Republicans agreed to ask the HCE to examine the OCE and recommend possible changes by summer 2017 to address the concerns that some members have raised.<sup>67</sup>

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<sup>61</sup> For more information on the jurisdiction of the House Committee on Ethics, see US House Committee on Ethics, "Jurisdiction", online: <[ethics.house.gov/jurisdiction](http://ethics.house.gov/jurisdiction)>.

<sup>62</sup> *House Ethics Manual* (2008). The most recent manual was created in 2008, when the House Committee on Ethics was still named the Committee on Standards of Official Conduct.

<sup>63</sup> See Eric Lipton, "With No Warning, House Republicans Vote to Gut Independent Ethics Office", *The New York Times* (2 January 2017), online: <[www.nytimes.com/2017/01/02/us/politics/with-no-warning-house-republicans-vote-to-hobble-independent-ethics-office.html](http://www.nytimes.com/2017/01/02/us/politics/with-no-warning-house-republicans-vote-to-hobble-independent-ethics-office.html)>.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.* The comments of House Republican Steve King aptly capture this sentiment: "[The OCE] has damaged or destroyed a lot of political careers in this place, and it's cost members of Congress millions of dollars to defend themselves against anonymous allegations": Eric Lipton & Matt Flegenheimer, "House Republicans, Under Fire, Back Down on Gutting Ethics Office", *The New York Times* (3 January 2017), online: <[www.nytimes.com/2017/01/03/us/politics/trump-house-ethics-office.html](http://www.nytimes.com/2017/01/03/us/politics/trump-house-ethics-office.html)>

<sup>66</sup> See Lipton & Flegenheimer, *ibid.*

<sup>67</sup> *Ibid.*

In contrast to the House, there is no independent body that oversees ethics in the US Senate. In the US Senate, it is the Select Committee on Ethics (SCE) that drafts, oversees, and investigates complaints and provides training relating to the *Senate Code of Official Conduct*.<sup>68</sup> The SCE, under the *Ethics in Government Act* and *Senate Code of Official Conduct*, is also tasked with duties and responsibilities respecting financial and private interest disclosure.<sup>69</sup> After an investigation, the Senate as a whole is tasked with determining appropriate sanctions for its members for violations of the code or rules.<sup>70</sup>

### 3.3.2 UK

The administration of the main conflict of interest regimes in Britain falls on a wider variety of individuals and bodies than, for example, those in Canada. In 1994, following a number of high-profile political scandals, the UK established the independent Committee on Standards in Public Life (CSPL).<sup>71</sup> The CSPL has a broad mandate to examine and advise on concerns related to political ethics across all branches of the UK government, including the civil service. The CSPL does not, however, perform investigations into individual cases. Rather, it serves a broader role, reviewing the overall implementation of codes of conduct and ethical practices across government.<sup>72</sup>

In terms of more direct authority, the Office of the Parliamentary Commissioner for Standards (OPCS) is the independent agency charged with implementing and enforcing the *Code of Conduct for Members of Parliament*. The OPCS's duties include: providing education and guidance to members of Parliament (which includes most Cabinet ministers); maintaining the register of members' financial interests; hearing complaints; and performing investigations, whether based on a complaint or the OPCS's own initiative.<sup>73</sup> The OPCS is overseen by the lower house's Standards and Privileges Committee, to which the OPCS submits its investigations, annual reports, and recommendations for amendments or interpretations of the *Code of Conduct for Members of Parliament*. In 2016, the OPCS began a comprehensive review of the *Code of Conduct for Members of Parliament*. As of April 2017, the

<sup>68</sup> US Senate, Select Committee on Ethics, *Senate Code of Official Conduct* (March 2015), online: <[www.ethics.senate.gov/public/index.cfm/files/serve](http://www.ethics.senate.gov/public/index.cfm/files/serve)>.

<sup>69</sup> 5 USC App 4 § 101 et seq. For a summary of the SCE's jurisdiction, see US Senate, Select Committee on Ethics, "Jurisdiction", online: <[www.ethics.senate.gov/public/index.cfm/jurisdiction](http://www.ethics.senate.gov/public/index.cfm/jurisdiction)>.

<sup>70</sup> US Constitution, Art I, § 5, cl 2.

<sup>71</sup> See UK, Committee on Standards in Public Life, "Terms of Reference", online: <<https://www.gov.uk/government/organisations/the-committee-on-standards-in-public-life/about/terms-of-reference>>.

<sup>72</sup> UK, Committee on Standards in Public Life, *Ethics in Practice: Promoting Ethical Conduct in Public Life* (July 2014), Appendix A, online: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/336976/2902536\\_CS\\_PL\\_EthicsInPractice\\_acc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336976/2902536_CS_PL_EthicsInPractice_acc.pdf)>.

<sup>73</sup> For a summary of the OPCS's duties, see UK Parliament, "Parliamentary Commissioner for Standards", online: <[www.parliament.uk/pcs](http://www.parliament.uk/pcs)>.

Commissioner had completed and sent her proposals for revisions to the Committee on Standards. The new Committee of the next Parliament will decide in the Fall of 2017, or sometime thereafter, how the review should proceed.<sup>74</sup>

The UK's *Ministerial Code* governs the activities of Cabinet ministers and is administered by the Director General of the Propriety and Ethics Team, which exists within the Cabinet. The Director General is charged with overseeing compliance and providing ministers with advice regarding the *Ministerial Code*. The fact that the *Ministerial Code* is drafted and implemented by Cabinet has raised concerns surrounding a lack of impartiality and prompted calls for the creation of an independent body to oversee ministerial ethics.<sup>75</sup> This contrasts significantly with Canada's regime, in which the oversight of ministers ultimately falls within the jurisdiction of an independent commissioner (although the role of internal policing within the Canadian Cabinet by persons such as the party whip should not be understated).

With respect to the civil service, the UK's *Civil Service Code* is overseen by the Civil Service Commission (CSC), an independent parliamentary body that has existed for over a hundred years, but whose existence was only codified in statute as part of a significant constitutional reform in 2010.<sup>76</sup> Although it is the Minister for the Civil Service that creates the code, its administration is overseen by the CSC and there are a number of minimum requirements that must be in the code.<sup>77</sup> The CSC has the authority to hear complaints regarding alleged breaches of the code, as well as the ability to investigate these complaints and make determinations on how a potential conflict of interest would best be resolved.<sup>78</sup>

Authority over conflicts of interest in the UK's House of Lords is rather diffuse. The *House of Lords Code of Conduct* is overseen by the Sub-Committee on Lord's Standards and administered by the House of Lords Commissioner for Standards. This commissioner is appointed to hear and investigate alleged breaches of the *House of Lords Code of Conduct*. While the Commissioner for Standards in the House of Lords can initiate an investigation, it may do so only in "exceptional circumstances" and with the approval of the Sub-Committee on Lord's Conduct.<sup>79</sup> So, generally speaking, a complaint is required before an investigation is initiated. Interestingly, financial disclosure in the UK's upper house is not handled by its Commissioner for Standards as in the lower house. Instead, Lords' interests are collected

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<sup>74</sup> For updates on the process, see UK Parliament, "Code of Conduct and Rules of the House", online: <<https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliamentary-commissioner-for-standards/code-of-conduct-and-rules-of-the-house/>>.

<sup>75</sup> Robert Rogers & Rhodri Walters, *How Parliament Works*, 6th ed (Routledge, 2006) at 128.

<sup>76</sup> *Constitutional Reform and Governance Act 2010* (UK), c 25, Part 1, s 2(1).

<sup>77</sup> *Ibid*, s 5(1); on minimum requirements, see s 7.

<sup>78</sup> *Ibid*, s 9.

<sup>79</sup> UK, House of Lords, *Code of Conduct for Members of the House of Lords*, 4th ed (May 2015), s 107, online: <<https://www.parliament.uk/documents/WIS-news/Code-of-Conduct-for-Members-of-the-House-of-Lords.pdf>>.

and maintained by the separate Lord's Registrar. In addition, the Lord's Registrar provides guidance to Lords regarding the Code, which in the lower house is formally the responsibility of the Parliamentary Commissioner for Standards for Members (although the House's registrar provides day-to-day ethics advice as well).<sup>80</sup>

### 3.3.3 Canada

At the centre of the Canadian conflict of interest regime is the Office of the Conflict of Interest and Ethics Commissioner. As the name suggests, this office is headed by the Conflict of Interest and Ethics Commissioner, who is an independent parliamentary officer. This office is responsible for implementing, interpreting, and offering guidance on both the *Conflict of Interest Act* and the *Conflict of Interest Code for Members of Parliament*.<sup>81</sup> This authority includes the power to determine what a public official is required to do in order to maintain compliance.<sup>82</sup> In addition to implementation and interpretation of Canada's main conflict of interest legislation, the Commissioner wields considerable power to hear and investigate complaints, and can do so on his/her own initiative.<sup>83</sup> In his/her investigatory capacity, the Commissioner may compel witness testimony and the production of documents with the same power as a court of record in civil proceedings.<sup>84</sup> As part of the Commissioner's implementation duties, the office also handles the collection, storage, and, where required, publication of all disclosure documents required under the relevant statutes and codes.<sup>85</sup>

Canada's Office of the Conflict of Interest and Ethics Commissioner represents a very strong centralization of power with respect to conflict of interest prevention, overseeing conflict of interest prevention in the legislature, the executive branch and senior positions in the public

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<sup>80</sup> *Ibid*, s 24.

<sup>81</sup> See *Conflict of Interest Act*, SC 2006, c 9, s 3(6); *Conflict of Interest Code for Members of the House of Commons*, being appendix I of *Standing Orders of the House of Commons*, s 28(8), online: <[www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm](http://www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm)>. Under the *Code*, unlike under the *Act*, the Commissioner may make recommendations for interpretations, but the final determination rests with the responsible committee.

<sup>82</sup> *Conflict of Interest Act*, SC 2006, c 9, s 19. In accordance with the recommendations of UNCAC, this provision suggests reaching an agreement through consultation with the official in question, though this is not required.

<sup>83</sup> *Ibid*, ss 44-45; *Conflict of Interest Code for Members of the House of Commons*, being appendix I of *Standing Orders of the House of Commons*, s 27, online: <[www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm](http://www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm)>.

<sup>84</sup> *Conflict of Interest Act*, SC 2006, c 9, s 48.

<sup>85</sup> *Ibid*, s 51; *Conflict of Interest Code for Members of the House of Commons*, being appendix I of *Standing Orders of the House of Commons*, ss 23-24, online: <[www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm](http://www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm)>.

service.<sup>86</sup> This is further evidenced by the myriad functions of the office, which include an advisory and educational role, an administrative role, investigative and adjudicative powers, financial disclosure collection, and the ability to impose financial penalties for violations.<sup>87</sup> The commissioner's work is overseen by the House of Commons Standing Committee on Procedures and House Affairs, as well as the Standing Committee on Access to Information, Privacy and Ethics. As such, investigative and annual reports are submitted to these committees when completed.

Conflict of interest prevention in Canada's Senate is overseen by an independent Senate Ethics Officer. The Senate Ethics Officer administers, interprets and applies the *Conflict of Interest Code for Senators*, and also collects and interprets the financial disclosure forms of senators. In addition, the Senate Ethics Officer has the ability to hear and investigate complaints. The Standing Committee on Conflict of Interest for Senators receives reports from the Senate Ethics Officer and makes the ultimate determination with respect to interpretation of the *Conflict of Interest Code for Senators*.<sup>88</sup>

### 3.4 The Substance and Interpretation of National Conflict of Interest Rules

This section is not a provision-by-provision analysis of each country's legal instruments relating to conflicts of interest. Although specific provisions are analyzed in detail, the broader purpose of this section is to draw out the major themes and values that inform these instruments. Like judicial interpretations, differing approaches to compliance mechanisms, such as financial disclosure or mandated divestiture, can be illustrative when determining how conflict of interest is defined and in understanding where a State perceives the greatest risks. As previously mentioned, all conflict of interest regimes attempt to balance the use of restrictive rules with the need to attract personnel to government service. In addition, there are, generally speaking, two approaches to drafting provisions aimed at preventing and managing conflicts of interest:

- The first is the **principles-based approach** (or the "descriptive" approach), pursuant to which policy makers use general, abstract language to indicate in broad strokes the sorts of values and principles that ought to guide decision

<sup>86</sup> All members of the public service in Canada are governed by the *Value and Ethics Code for the Public Sector* (2003), online: <[https://www.tbs-sct.gc.ca/pubs\\_pol/hrpubs/tb\\_851/vec-cve-eng.pdf](https://www.tbs-sct.gc.ca/pubs_pol/hrpubs/tb_851/vec-cve-eng.pdf)>, which is the relevant code for more junior members of the service. Oversight, investigation, and administration of this code are performed by the Public Service Commission.

<sup>87</sup> Subsection 53(3) of the *Conflict of Interest Act* states that the goal of financial penalties in this context is compliance, not punishment. The maximum is therefore relatively small (\$500). There is currently no penalty for failing to provide timely disclosure under the code applicable to MPs, an issue that the Commissioner recommended addressing in her review of the code.

<sup>88</sup> Canada, Office of the Senate Ethics Officer, *Ethics and Conflict of Interest Code for Senators* (adopted 16 June 2014), s 44(1), online: <[sen.parl.gc.ca/seocse/PDF/CodeJune2014.pdf](http://sen.parl.gc.ca/seocse/PDF/CodeJune2014.pdf)>. For the mandate of the Senate Ethics Officer, see Office of the Senate Ethics Officer, "About the Office", online: <[sen.parl.gc.ca/seocse/eng/Office-e.html](http://sen.parl.gc.ca/seocse/eng/Office-e.html)>.

makers. For example, a provision stating that public office holders should “act solely in the public interest and demonstrate integrity, honesty, and fairness when exercising their respective duties” would fall into the class of principles-based legislation.

- The second is the **rules-based approach**, pursuant to which policy makers outline specific, concrete situations and types of conduct that ought to be avoided. For example, a provision stating that public office holders “must recuse themselves from voting on a matter in which they stand to make a personal profit of over C\$1,000” would fall into the class of rules-based legislation.

Each approach has its own advantages and disadvantages:

- The **principles-based approach** offers flexibility and adaptability; it avoids the need to attempt to envision all possible situations in which an objectionable conflict of interest might arise. Yet, the principles-based approach’s flexibility is also its main weakness. Without precise and specific guidance, decision makers may find themselves struggling to determine where the line is between proper and improper conduct. Principles are inherently subjective and require a significant degree of interpretation—who is doing the interpreting can have a significant impact on the ultimate determination. Moreover, whether a given principle has been properly observed is a highly contextual determination, which invites uncertainty and results in a lack of predictability.
- By contrast, the **rules-based approach** clearly distinguishes between acceptable conduct and unacceptable conduct, thereby providing a much higher degree of certainty and predictability. However, rules-based provisions can be both over-inclusive and under-inclusive. On the one hand, rules-based provisions may be over-inclusive in that they may capture situations that fall within the letter, but not the spirit of the rule. For example, a public office holder may happen to breach specific financial interest disclosure requirements by no fault of their own and without having actually been in a conflict of interest. Nonetheless, a sanction would be imposed, resulting in significant adverse consequences for the individual. On the other hand, rules-based provisions may be under-inclusive in that they may fail to capture situations that were meant to be captured when the rule was drafted. For example, a public office holder may have a significant financial interest in a matter that puts him or her in a conflict of interest, but does not meet the monetary threshold for disclosure. Such a situation might be captured by a broader, more abstract principle of guidance, but may “slip through the cracks” under the rules-based approach. Furthermore, over-reliance on rules alone risks turning public decision makers into mere “rule followers” who do not reflect more deeply on whether they are exercising their duties in the public interest.

The challenge for policy makers is to create a conflict of interest regime that balances the flexibility and adaptability of principles-based provisions with the certainty and predictability of rules-based provisions. Each state must determine for itself the appropriate

ratio between these two approaches. Scholars have noted that the US tends to create lengthy, technical codes, whereas European states lean towards more aspirational mandates, with Canada tending to fall somewhere in the middle.<sup>89</sup>

The OECD Guidelines recommend that a conflict of interest regime should include broad descriptive provisions that emphasize the aim and principles of a given policy in a descriptive manner.<sup>90</sup> Such provisions can be helpful in guiding the interpretation of certain provisions where a narrow construction risks failing to capture unethical conduct due to technical compliance. Canada's *Conflict of Interest Code for Members of the House of Commons* (COIC) contains a significant number of these provisions. For example, section 1(a) states that part of the purpose of the COIC is to "maintain and enhance public confidence and trust" in members.<sup>91</sup> Similarly, the UK's *Code of Conduct for Members of Parliament* (COC), which is very principle-based, states that part of the purpose of the COC is to "ensure public confidence" in the members.<sup>92</sup> In the US, the *Code of Ethics for US Government Service* is a document consisting of 10 principles to which every office holder and employee must adhere. The first provision states that one must "put loyalty to the highest moral principles and to country above loyalty to Government persons, party or department."<sup>93</sup> Most statutes and branch-specific codes in the US do not contain purposive provisions as extensive as those in Canada and the UK. However, the *House Ethics Manual* does go into considerable detail on the relationship between ethics in politics and public confidence.<sup>94</sup>

The following analysis provides greater clarity with respect to how each State defines "conflicts of interest." Following this, there is further analysis of peripheral provisions that inform the meaning of "conflict of interest" to a significant extent.

### 3.4.1 Description of Conflict of Interest: US

According to the US *House Ethics Manual*, a "conflict of interest" denotes a situation in which "an official's conduct of his office conflicts with his private economic affairs," with the primary concern being a "risk of impairment of impartial judgement" that arises whenever there is a "temptation to serve personal interests."<sup>95</sup> The *House Ethics Manual* notes that some conflicts of interest are inherent in a representative democracy and that situations between the extremes of a very broad interest on the one hand and clear cases of bribery on the other

<sup>89</sup> Mulgan & Wanna (2011) 416 at 423.

<sup>90</sup> OECD (2003).

<sup>91</sup> *Conflict of Interest Code for Members of the House of Commons*, being appendix I of *Standing Orders of the House of Commons*, s 1(a), online: <[www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm](http://www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm)>.

<sup>92</sup> *Code of Conduct for Members of Parliament* (adopted 17 March 2015), s 1(c).

<sup>93</sup> US, *Code of Ethics for Government Service*, 34 CFR Part 73, Appendix to Part 73.

<sup>94</sup> *House Ethics Manual* (2008), at 2-16.

<sup>95</sup> *Ibid* at 187.

will be reviewed on a case-by-case basis.<sup>96</sup> The US *Standards of Ethical Conduct for Employees of the Executive Branch* contain a significant amount of guidance with regard to defining conflict of interest situations. Subpart D deals exclusively with financial interests and states that an employee is prohibited from:

participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.<sup>97</sup>

A “direct” effect requires a “close causal link” between the action and the effect, and a “predictable” effect requires a “real,” not speculative, possibility of effect.<sup>98</sup> Imputed interests in this provision include the interests of an employee’s spouse, partner, minor child, or an organization to which the employee belongs or with which the employee has been negotiating employment arrangements. The term “particular matter” encompasses matters that involve “deliberation, decision or action that is focused upon the interests of specific persons” or a small and identifiable class of persons. However, legislation or policy making that is narrowly focused on a specific person or small class may also qualify.<sup>99</sup> The code for federal employees also covers situations in which relationships with individuals or organizations could lead to perceptions of a loss of impartiality, and it also includes a lengthy provision regarding the use of public office for private gain, which extends to the private gains of friends, relatives, and associations to which the employee is connected, including corporations and nonprofit organizations.<sup>100</sup> Overall, the federal employees’ code is an extremely robust document that covers a wide range of situations, provides examples, and defines terms in extreme detail. In this sense, the employees’ code is very much in line with the OECD’s recommendations around providing definitions and examples. However, the document is quite long and dense, risking the possibility of putting technical compliance above broad ethical practice.

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<sup>96</sup> *Ibid* at 250. One example of an inherent conflict of interest would be where an individual who was previously involved in the corn-growing industry is elected, in part due to his or her involvement in the industry, in a riding where corn fields abound. Compelling such an individual to recuse him or herself from matters related to corn growing or to sell his or her farm is viewed as stripping the member of qualities that led constituents to elect the individual in the first place.

<sup>97</sup> *Standards of Ethical Conduct for Employees of the Executive Branch*, codified in 5 CFR Part 2635, as amended at 81 FR 48687, § 2635.402(a), online:

<[https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/\\$FILE/SOC\\_as\\_of\\_81\\_FR\\_48687.pdf](https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/$FILE/SOC_as_of_81_FR_48687.pdf)>.

<sup>98</sup> *Ibid*, § 2635.402(b)(1).

<sup>99</sup> *Ibid*, § 2635.402(b)(3).

<sup>100</sup> *Ibid*, §§ 2635.501, 2635.702.

### 3.4.2 Description of Conflict of Interest: UK

The UK's *Code of Conduct (COC)* governing MPs is quite brief and decidedly more aspirational than its Canadian counterpart. The *COC* proper is just over four pages long. It is supplemented by a guide that provides greater detail on disclosure requirements, but offers very little in the way of interpretive aids. The main conflict of interest provision in the *COC* is found in Part V, section 10. It states:

Members shall base their conduct on a consideration of the public interest, avoid conflict between personal interest and the public interest and resolve any conflict between the two, at once, and in favour of the public interest.<sup>101</sup>

When compared to the conflict of interest provision that regulates ministers in the UK, this provision is extremely sparse. The *Ministerial Code*, section 7.1 states, "Ministers must ensure that no conflict arises, or could reasonably be perceived to arise, between their public duties and their private interests, financial or otherwise."<sup>102</sup> This is only the first provision of a 25-provision chapter of the *Ministerial Code* that relates in part to conflicts of interest. While it is understandable that Ministers are subject to more stringent rules, the *COC* is greatly lacking in that it uses the term "personal interest," implying that a conflict may not arise in the furtherance of a family member's interests. In addition, it is implicitly focused on actual and not perceived conflicts of interest. However, the *COC* does include the "7 Principles of Public Life," a set of principles created by the Committee on Standards in Public Life (CSPL). The first of these principles, "selflessness," states that public office holders should not act or take decisions "in order to gain financial or other material benefits for themselves, their family, or their friends" and should "take decisions solely in terms of the public interest."<sup>103</sup> These principles are said to be "taken into account" when determinations are made about a breach of the code. While this does appear to expand the scope of section 10, the lack of concreteness leaves much to be desired in the *COC*. This is a matter that the UK's Committee on Standards has explicitly addressed in a review of the *COC*, noting that the CSPL has recommended more specific rules, but at the time of writing there had not been any significant developments in this regard. As of April 2017, the Commissioner had completed and sent her proposals for revisions to the *COC* to the Committee on Standards. The new Committee of the next Parliament will decide how the review should proceed.<sup>104</sup>

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<sup>101</sup> *Code of Conduct for Members of Parliament* (adopted 17 March 2015), s 10.

<sup>102</sup> *Ministerial Code* (December 2016), s 7.1.

<sup>103</sup> *Code of Conduct for Members of Parliament* (adopted 17 March 2015), s 8.

<sup>104</sup> UK Parliament, House of Commons Committee on Standards, *The Standards System in the House of Commons: Sixth Report of Session 2014-15* (4 February 2015) at paras 51-58, online: <<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmstandards/383/383.pdf>>.

### 3.4.3 Description of Conflict of Interest: Canada

In Canada, the instrument that deals with conflicts of interest most directly is the *Conflict of Interest Act (COIA)*. In the *COIA*, “conflict of interest” is defined in section 4. It states that for the purposes of the Act:

A public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person’s private interests.<sup>105</sup>

Note that this provision only requires that the exercise of an official power provides the “opportunity” to further a private interest, which effectively covers situations of potential conflicts. This provision is definitional only, however.<sup>106</sup> Section 6(1) is the actual rule-based provision that prohibits public officials from making a decision or participating in making a decision where they “know or reasonably should know” that in doing so they would be in a conflict of interest. “Private interest” is defined only negatively in the *Act*.<sup>107</sup> However, the Commissioner of Conflicts of Interest has provided guidance in this regard, stating that she considers the meaning of “private interest” to be informed in large part, but not exhaustively, by the interests that must be disclosed in part 2 of the *Act* (these requirements are detailed below).<sup>108</sup>

Canada’s Commissioner of Conflicts of Interest has given the term “improper” in section 4 broad scope. For example, a 2015 investigation under the *Act* involved a minister who oversaw funding proposals for certain projects. The minister had been informed that one application was deficient, but allowed the application to be amended past the deadline, receive consideration in the later stages of the process despite noticeable flaws and eventually be awarded funds.<sup>109</sup> The Commissioner interpreted the *Act*’s preferential treatment provision in section 7 narrowly and found that because the minister’s treatment was not based on the “identity” of the individual who was advocating for the project (it was unclear whether the minister had even met the advocate), the actions were not captured by

<sup>105</sup> *Conflict of Interest Act*, SC 2006, c 9, s 4.

<sup>106</sup> See Office of the Conflict of Interest and Ethics Commissioner, *The Finley Report* (Ottawa: Office of the Conflict of Interest Commissioner, 2015) at 32, online: <[ciec-ccie.parl.gc.ca/Documents/English/PublicReports/ExaminationReports/TheFinleyReport.pdf](http://ciec-ccie.parl.gc.ca/Documents/English/PublicReports/ExaminationReports/TheFinleyReport.pdf)>.

<sup>107</sup> A “private interest” does not include an interest in a decision or matter “(a) that is of general application; (b) that affects a public office holder as one of a broad class of persons; or (c) that concerns the remuneration or benefits received by virtue of being a public office holder”: *Conflict of Interest Act*, SC 2006, c 9, s 2(1).

<sup>108</sup> Office of the Conflict of Interest and Ethics Commissioner, *The Conflict of Interest Act: Five-Year Review* (30 January 2013) at 10, online: <[ciec-ccie.parl.gc.ca/Documents/English/PublicReports/SpecialPublications/Five-YearReviewAct.pdf](http://ciec-ccie.parl.gc.ca/Documents/English/PublicReports/SpecialPublications/Five-YearReviewAct.pdf)>.

<sup>109</sup> *The Finley Report* (2015) at 2.

that narrow provision. Instead, the minister appears to have been influenced in this decision by other officials. The Commissioner found that the preferential treatment given to the project made the minister's decisions to extend deadlines and eventually award the funds "improper" within the wider net cast by section 4 and therefore a breach of section 6(1).<sup>110</sup>

In Canada's lower house, "conflict of interest" is less rigorously defined, and the code governing the conduct of MPs is decidedly less strict. This is not uncommon, as ministers and senior officials tend to be most at risk of conflict given their oversight and discretion with respect to policy implementation. Generally speaking, at just under 20 pages, Canada's *Conflict of Interest Code (COIC)* is not overly technical and contains a largely satisfactory mixture of aspirational as well as substantive provisions. In terms of general principles regarding conflicts of interest, the *COIC* contains provisions stating that MPs are "expected" to "avoid real or apparent" conflicts of interest and "arrange their affairs" as such.<sup>111</sup> Beyond this, there are no substantive provisions that refer directly to conflicts of interest. Instead, most of the rules are based around the language of "furthering private interests." The main substantive conflict of interest provision in Canada's *COIC* is found in section 8. It states:

When performing parliamentary duties and functions, a Member shall not act in any way to further his or her private interests or those of a member of the Member's family, or to improperly further another person's or entity's private interests.<sup>112</sup>

The *Code* defines the circumstances in which a Member is considered to be furthering private interests. This includes any action that results directly or indirectly in the increase or preservation of assets, reductions in liabilities, or the acquisition of a financial interest.<sup>113</sup> For the purposes of the *COIC*, a family member includes a spouse or common law partner as well as children who are under 18 or who are still dependent on the financial support of their parents. Canada's Commissioner of Conflicts of Interest and Ethics has pointed out that the definition of "family member" is lacking, as it does not cover parents and siblings, and has suggested a revision in this regard to bring the *COIC* more in line with the *COIA*, which includes relatives and friends.<sup>114</sup>

### 3.4.4 Financial Disclosure and Restraint on Participation: US

As mentioned above, laws that mandate financial disclosure and restraint in participation, as well as limitations on holding certain interests, can be illustrative when it comes to

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<sup>110</sup> *Ibid* at 34-35.

<sup>111</sup> *Conflict of Interest Act*, SC 2006, c 9, s 2(b) and (d).

<sup>112</sup> *Ibid*, s 8.

<sup>113</sup> *Ibid*, s 1.

<sup>114</sup> Office of the Conflict of Interest and Ethics Commissioner, *The 2015 Review of the Conflict of Interest Code for Members of the House of Commons* (19 February 2015) at 2, online: <[ciec-ccie.parl.gc.ca/Documents/English/Public Reports/Special Publications/2015 Review of the Code.pdf](http://ciec-ccie.parl.gc.ca/Documents/English/Public%20Reports/Special%20Publications/2015%20Review%20of%20the%20Code.pdf)>.

determining where a State perceives the greatest risks and how far a State will go in restricting the liberties of its officials and representatives in their private lives.

Recusal from voting and refraining from influencing matters in which an official has a private interest is a hallmark of conflict of interest laws. In the US, the provisions of House Rule III, clause I stipulate that a member must vote on a question put, except where he or she has a “direct personal or pecuniary interest” in the matter at hand.<sup>115</sup> The narrow scope of this clause can be attributed to the heavy importance the House places on members’ voting rights. Remarkably, the *House Ethics Manual* states that “historical precedence” suggests there is no authority to deprive a member of his or her right to vote, instead leaving it up to the member to determine what is appropriate. This rule only applies to voting, however, not to other activities that involve advocacy on certain matters such as earmarking funds for entities in which the member has a private interest.<sup>116</sup>

Provisions requiring public officials to refuse gifts or otherwise declare them constitute another major aspect of all conflict of interest regimes. The US, UK and Canada all have broad prohibitions, with specific exceptions, on gifts. When a gift falls into one of the exceptions, each State has a threshold for value above which the gift must be reported. In the US the general threshold for officials and members is \$250.<sup>117</sup>

Disclosure of private interests is a central feature of most conflict of interest regimes, and one that is stressed by both the OECD and the UN. As a mechanism of compliance, public financial disclosure allows the public, especially the press, to scrutinize potential conflict of interest situations. In the US, UK and Canada, the relevant laws and policies typically require the disclosure of financial assets and holdings; gifts that have been received; real property holdings that are not the principal residence; outside sources of income; and positions in corporations, non-profits and other organizations.

In the US, the *Ethics in Government Act* mandates broad disclosures of personal interests for members of Congress, the president, the vice-president, and senior-level officials.<sup>118</sup> The US has had serious problems with members of Congress receiving large payments for “personal

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<sup>115</sup> US, *Rules of the House of Representatives*, Ch III, c 1. Guidance on this provision is given in the *House Ethics Manual*, which indicates a very high threshold for an interest to be a “direct personal” one. For instance, a member who was a bar owner was permitted to vote on prohibition. Even where the interest is clearly direct, it may be determined that it is not sufficiently substantial. For instance, a member was found not to have violated the rule when the member voted to authorize the provision of funds to a defence contractor of whom the member owned 1,000 common shares, as the contractor was a large company with over four million outstanding shares. To demonstrate traditional procedure, the *House Ethics Manual* also mentions an instance where there was a very clear financial conflict of interest, yet the Speaker only suggested the member be recused instead of ordering recusal.

<sup>116</sup> US, *Rules of the House of Representatives*, Ch XXIII, c 16 and 17.

<sup>117</sup> *Ethics in Government Act*, 5 USC App § 102.

<sup>118</sup> *Ibid*, § 102(a).

services,” and consequently the relevant statute requires disclosure of any sources of income over \$200. The relevant Ethics Committee also sets firm caps on how much a member may earn from outside sources (in 2016 this limit was \$27,495).<sup>119</sup>

In the US, there is no blanket prohibition that prevents officials from holding or acquiring certain interests.<sup>120</sup> In keeping with the US’s general theme of delegation of powers to create context-specific rules, prohibitions on ownership are created within each federal agency. So while there is no blanket prohibition on owning the securities of public companies, an officer or employee of the Securities and Exchange Commission, for example, is subject to extremely prohibitive restrictions on owning such assets. Prohibitions in this context can also extend to bank loans where the recipient of the loan works for a federal agency that insures bank deposits, even though such work would not operate to reduce the loan recipient’s liabilities.<sup>121</sup> This approach has the advantage of providing flexibility while narrowing the deterrent effect that restrictions can have. However, this approach could also create complexity and result in confusion, particularly for an employee who moves from one agency to another.

Under the US *Ethics in Government Act*, officials subject to the *Act* are not required to disclose assets held in a “blind trust.” However, the US, similarly to Canada, sets out narrow requirements for a trust to be considered blind. This includes restrictions on the level of control an official can exercise over the assets, the information an official can receive from a trustee and the instructions an official can give to a trustee.<sup>122</sup>

### 3.4.5 Financial Disclosure and Restraint on Participation: UK

The UK’s approach to recusal in the lower house is based on general principles with very little in the way of specific prescriptive laws. Similar to the situation in the US and Canada,

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<sup>119</sup> *Ethics in Government Act*, 5 USC App § 102(a)(1)(A). For a discussion of historical issues, see US Senate, Select Committee on Ethics, *Senate Ethics Manual* (2003) 108th Congress, 1st Session, at 64, online: <[www.ethics.senate.gov/downloads/pdf/files/manual.pdf](http://www.ethics.senate.gov/downloads/pdf/files/manual.pdf)>. For “highlights” of the *House Ethics Rules* and 2015 cap figures, see <[ethics.house.gov/sites/ethics.house.gov/files/documents/Final Version of the Highlights Overview Booklet 2015.pdf](http://ethics.house.gov/sites/ethics.house.gov/files/documents/Final%20Version%20of%20the%20Highlights%20Overview%20Booklet%202015.pdf)> (as of December 2016 the 2016 “highlights” were not available on the Committee on Ethics’ website). The 2016 “Outside Earned Income Pink Sheet” is available online: <[ethics.house.gov/sites/ethics.house.gov/files/Outside Earned Income Pink Sheet.pdf](http://ethics.house.gov/sites/ethics.house.gov/files/Outside%20Earned%20Income%20Pink%20Sheet.pdf)>.

<sup>120</sup> *Standards of Ethical Conduct for Employees of the Executive Branch*, Codified in 5 CFR Part 2635, as amended at 81 FR 48687, § 2635.403, online: <[https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/\\$FILE/SOC as of 81 FR 48687.pdf](https://www.oge.gov/Web/oge.nsf/0/076ABBBFC3B026A785257F14006929A2/$FILE/SOC%20as%20of%2081%20FR%2048687.pdf)>.

<sup>121</sup> *Ibid*, § 2635.403(c)(1) (see example 2).

<sup>122</sup> *Ethics in Government Act*, 5 USC App § 102(f)(1)(2).

MPs and ministers in the UK must report allowable gifts once they reach a threshold value. The threshold for MPs is £300, but £140 for ministers.<sup>123</sup>

In the UK, MPs, ministers, and senior officials must disclose private interests under their respective policies and applicable laws. MPs in the UK must also disclose the source and reason for any payment in excess of £100 they receive for employment outside of government.<sup>124</sup>

The *Ministerial Code* in the UK does not have a set of explicitly prohibited financial assets. Rather, it is up to the individual minister, in consultation with the Permanent Secretary of Cabinet, to determine which financial interests may create a conflict of interest.<sup>125</sup> In similar fashion to the analogous code applicable in the US, the *Ministerial Code* provides flexibility and favours a case-by-case approach rather than blanket prohibitions.

The UK's *Ministerial Code* also requires divestment regarding assets that might create a conflict of interest, or alternative arrangements to avoid the conflict.<sup>126</sup> Although not explicitly stated, based on the UK's financial disclosure requirements, which do not require that assets in a blind trust be listed, setting up such a trust would likely be an acceptable alternative to divestment.<sup>127</sup> Direction on what makes a trust "blind" is less detailed than in Canadian law, and members are allowed to give "general direction" to trustees, leaving it unclear whether this includes sector-specific advice or instead limits direction to specifying acceptable risk levels.

### 3.4.6 Financial Disclosure and Restraint on Participation: Canada

The main recusal provision for Canadian MPs is found in section 13 of the *Conflict of Interest Code*, which explicitly prohibits debate or voting on a matter in which the member has a private interest.<sup>128</sup> For the purposes of this section, a "private interest" is defined as the interests that "can be furthered" under section 3(2).<sup>129</sup> This is somewhat similar to the US approach in that members still have a significant responsibility to remain conscious of the situations in which they must recuse themselves, but Canada's approach to recusal in the

<sup>123</sup> *Code of Conduct for Members of Parliament* (adopted 17 March 2015), Chapter 1, s 22; *Ministerial Code* (December 2016), s 7.22.

<sup>124</sup> *Code of Conduct for Members of Parliament* (adopted 17 March 2015), Chapter 1, s 6.

<sup>125</sup> *Ministerial Code* (December 2016), s 7.2.

<sup>126</sup> *Ibid*, s 7.7.

<sup>127</sup> *Code of Conduct for Members of Parliament* (adopted 17 March 2015), Chapter 1, s 53(b).

<sup>128</sup> *Conflict of Interest Code for Members of the House of Commons*, being appendix I of *Standing Orders of the House of Commons*, s 13, online: <[www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm](http://www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm)>.

<sup>129</sup> *Ibid*. Subsection 3(2) includes things such as increasing or preserving the value of an asset, receiving remuneration from a listed source, and acquiring new financial interests. This extends to the Code's narrow definition of family members outlined in s 3(4).

lower house is arguably stricter than the US's approach, particularly with respect to abstention from voting.

The Commissioner of Conflict of Interest and Ethics in Canada has noted that one of the most common subjects of inquiry to her office is gifts.<sup>130</sup> The threshold for reporting gifts is \$200 for ministers and officials who are not also MPs and \$500 for all MPs, but the Commissioner has recommended making this figure consistent across branches and lowering it considerably (to around \$30).<sup>131</sup>

MPs, ministers, and senior officials in Canada are required to disclose private interests. Within 60 days of being elected, and annually during their term, MPs must disclose any assets and liabilities greater than \$10,000 and the source and reason for any income in excess of \$1,000 that they or their family members receive or expect to receive in the 12 months preceding and following the disclosure statement.<sup>132</sup> The statement must also disclose any trusts that the MP or the MP's family expect to derive a benefit from, as well as any benefits from contracts with the Government of Canada that are received by the MP, the MP's family or a private corporation in which they have an interest.<sup>133</sup> A summary of each MP's statement is available for public inspection.<sup>134</sup> In Canada, there are no blanket rules that prohibit an MP from owning shares in a company, although the Commissioner does have the ability to deem the size of a given holding as so substantial it could affect impartiality.<sup>135</sup> Under the *Conflict of Interest Act*, however, there are very strict rules imposed on ministers, senior officials, and even full-time ministerial staff. The *Act* places a general prohibition on "controlled assets," which are broadly defined as assets that could directly or indirectly be affected by government policies and includes the securities of public companies whether held individually or in a portfolio.<sup>136</sup> It is important to note that this definition refers to an interest being affected by "government policies" rather than specific policies within the given official's purview. This approach suggests a greater focus on wholesale risk mitigation rather than flexibility. As such, Canada's regime might be said to have a greater deterrent effect on recruitment, with the key advantages being greater certainty and avoidance of conflicts of interest.

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<sup>130</sup> *The 2015 Review of the Conflict of Interest Code for Members of the House of Commons* (19 February 2015) at 3.

<sup>131</sup> *Conflict of Interest Code for Members of the House of Commons*, being appendix I of *Standing Orders of the House of Commons*, s 14(3), online: <[www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm](http://www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm)>; *Conflict of Interest Act*, SC 2006, c 9, s 23; Office of the Conflict of Interest and Ethics Commissioner, *The Conflict of Interest Act: Five-Year Review* (30 January 2013) at 48, online: <[ciec-ccie.parl.gc.ca/Documents/English/PublicReports/SpecialPublications/Five-YearReviewAct.pdf](http://ciec-ccie.parl.gc.ca/Documents/English/PublicReports/SpecialPublications/Five-YearReviewAct.pdf)>.

<sup>132</sup> *Conflict of Interest Code for Members of the House of Commons*, s 21(1)(a) and (b).

<sup>133</sup> *Ibid*, s 21(1)(b.1) and (c).

<sup>134</sup> *Ibid*, s 23(2).

<sup>135</sup> *Ibid*, s 17.

<sup>136</sup> *Conflict of Interest Act*, SC 2006, c 9, s 20.

In Canada, section 27 of the *Conflict of Interest Act* requires relevant officials to either divest controlled assets through an arm's length transaction or otherwise place the assets in an acceptable blind trust.<sup>137</sup> There are very strict rules around what makes a blind trust acceptable. These rules require that the official have no power of control or management of the assets, limit the information the official can receive from a trustee and limit the instructions the official can give to the trustee to the narrow category of written instruction regarding risk levels, not sector-specific instruction.<sup>138</sup>

#### 4. CONCLUSION

It is clear that most States and individuals can agree on the general concept of a “conflict of interest.” However, as this chapter has sought to demonstrate, the vast range of possible circumstances that could give rise to a conflict of interest make it very difficult to fashion a single definition that provides significant clarity and can apply universally. As such, the space in which a conflict of interest exists is defined largely by a variety of factors such as culture, broad principles and proscriptive rules around disclosure and ownership, with rules that actually include the phrase “conflict of interest” being one factor among many.

In part, this has to do with the nature of conflicts of interest, as the phrase tends to describe a position from which a range of possible actions may be undertaken rather than an action *per se*. As such, prevention of conflicts of interest cannot rely on fact-specific judicial interpretations. While legal interpretations are important, so too are broad statements of principles and mechanisms such as disclosure requirements, which both serve to influence political culture and are illustrative of how a State defines the conceptual space in which real, potential, or perceived conflicts of interest exist.

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<sup>137</sup> *Ibid*, s 27.

<sup>138</sup> *Ibid*, s 27(4)(a-k), 27(5).