Submission to the House of Commons Standing Committee on Finance on Bill C-4, *Economic Action Plan 2013 Act No. 2*

Submitted by
Guy W. Giorno[1]

A. INTRODUCTION[2]

I welcome the opportunity to comment on Division 15 of Part 3 of Bill C-4 (clauses 288 and 289 of the Bill). These provisions would amend the *Conflict of Interest* (Act).[3]

The Act applies to some 3000 federal public office holders. These include Cabinet Ministers, Parliamentary Secretaries, employees in Ministers' offices, most appointees[4] of the Cabinet (including Deputy Ministers), and appointees of Ministers whose appointments are approved by the Cabinet. It also governs former occupants of these offices.

Approximately 1100 of the public office holders are reporting public officer holders. Reporting public office holders are subject to greater disclosure obligations and more severe restraints on their activities. They include Cabinet Ministers, Parliamentary Secretaries, Deputy Ministers and employees in Ministers' offices.

Under the Act, all public office holders are required to avoid conflicts of interest, to recuse themselves from decisions and discussions that create a conflict of interest, and to abide by other, specified ethical rules. Reporting public office holders are subject to additional obligations and restrictions, including: public disclosure of gifts received, reporting assets and debts to the Conflict of Interest and Ethics Commissioner, a ban on owning publicly-traded securities; prohibition against holding outside employment or positions; and constraints on activities in the first year[5] after leaving office.

---

1 I am a partner in the law firm of Fasken Martineau DuMoulin LLP, where I head the firm's Government Ethics, Transparency and Political Law practice. I also chair the "Law of Lobbying and Ethics" committee of the National Administrative Law Section of the Canadian Bar Association, and serve on the Steering Committee of the Council on Governmental Ethics Laws. This submission is made in my personal capacity. I do not represent any organization or person and the responsibility for the content rests with me alone.

2 The introduction to this submission relies heavily on the first section of the Canadian Bar Association's Feb. 2013 submission on the "Statutory Review of the *Conflict of Interest Act*," which I was honoured to present to the Standing Committee on Access to Information, Privacy and Ethics on behalf of the CBA.

3 S.C. 2006, c. 9, s. 2.

4 Appointees of the Cabinet who are not subject to the *Conflict of Interest Act* are: (i) the lieutenant governors of the provinces; (ii) officers and staff members of the Senate, House of Commons and Library of Parliament; (iii) Ambassadors and other heads of mission who are employees in the public service; (iv) judges and (v) military judges; and (vi) RCMP officers excluding the RCMP Commissioner.

5 In the case of former Cabinet Ministers, the constraints last for two years.

B. EFFECT OF CLAUSES 288 AND 289 OF BILL C-4

Currently, with one exception in each case, the boundaries of the "public office holder" and "reporting public office holder" groups are fixed by the Act. Parliament has specified who is, and by exclusion who is not, to be considered a public office holder and/or a reporting public office holder.

The current exception is narrow and applies to full-time ministerial appointees. Parliament has left to each appropriate Minister (that is, the Minister who made the appointment) the determination of whether an individual full-time ministerial appointee will be designated as a public office holder and/or a reporting public office holder.[6] This is presently the only instance in which the composition of the "public office holder" and "reporting public office holder" groups is fluid. Even then, there are limits on a Minister's discretion: the power to designate an individual as a "public office holder" and/or a "reporting public office holder" can only be exercised in respect of a full-time ministerial appointee.

Clauses 288 and 289 of the bill would add an additional, open-ended category of membership in the "public office holder" and "reporting public office holder" groups: specifically, any person or class of persons designated by Cabinet.

Cabinet's power to designated new public office holders and reporting public office holders would be unlimited and far-reaching. The bill would place no restrictions on Cabinet's power to designate individuals and classes of individuals as subject to the Act. Virtually anyone could be designated as subject to the *Conflict of Interest Act*,[7] at any point during his her or employment or tenure in office.

The Government has not indicated who, if anyone, might be designated if these provisions are passed and come into force. The Budget is silent on this point. In fact, the Budget Plan did not even suggest that the *Conflict of Interest Act* should be amended. On the contrary, the Budget Plan said that other financial sector statutes should be amended to bring them in line with the *Conflict of Interest Act*.[8]

---

6 Act, note 3, subs. 2(1), "public office holder" definition, para. (e), and "reporting public office holder definition," para. (f).

7 I say "virtually" anyone, because according to the *ejusdem generis* principle of statutory interpretation, Cabinet's designation power is probably limited to like kinds of persons as those listed in the other paragraphs of the "public office holder" and "reporting public office holder" definitions.

8 Economic Action Plan 2013, p. 144: "The Government will examine whether the conflict of interest provisions contained in the financial sector statutes remain consistent with the overall Government policy as outlined in the *Conflict of Interest Act*. To ensure the continued strong governance and oversight of federally regulated financial institutions, the Government will examine whether the conflict of interest provisions contained in the financial sector statutes remain consistent with overall Government policy as outlined in the *Conflict of Interest Act*."

C. THE BETTER APPROACH: A CLEAR AND PRECISE ADDITION TO THE DEFINITIONS OF "PUBLIC OFFICE HOLDER" AND "REPORTING PUBLIC OFFICE HOLDER"

In February 2013, the CBA called for the definitions of "public office holder" and "reporting public office holder" to be expanded. However, it did so by endorsing an amendment to the definitions that is clear, certain and precise.

In my personal opinion, this is the better approach, and is far superior to Bill C-4's imprecise, open-ended and potentially wide-ranging expansion of the definitions.

As the CBA stated in February, the Act presently:

> "does not cover an individual whose appointment is approved by the federal Cabinet but who was not appointed by a minister. Officials thereby excluded from the Act are the Governor and Deputy Governor of the Bank of Canada, Directors of national museums and the CEO of the Canadian Centre on Substance Abuse. It is unclear why an office as important as the Governor of the Bank of Canada would be excluded from the Act.
>
> "The [Conflict of Interest and Ethics] Commissioner has recommended broadening the Act's scope to cover any individual whose appointment is approved by the federal Cabinet.[9] We agree. These individuals should be both 'public office holders' and 'reporting public office holders' under the Act."

I agree with this position. There is no legitimate reason to exclude from the Act an office as significant as that of the Governor of the Bank of Canada.

The definitions of "public office holder" and "reporting public office holder" in the *Conflict of Interest Act* should include any individual (such as the Governor of the Bank of Canada) who is appointed to an office with Cabinet approval.

RECOMMENDATION

Clause 288 of the Bill should be amended by adding after line 20 on page 223 (paragraph (e) of the definition of "public office holder") the following:

> (f) a person who is appointed to an office with the approval of the Governor in Council.

Clause 288 of the Bill should be further amended by adding after line 26 on page 223 (paragraph (f) of the definition of "reporting public office holder") the following:

> (g) a person who is appointed to an office with the approval of the Governor in Council.

---

[9] Office of the Conflict of Interest and Ethics Commissioner. *The Conflict of Interest Act: Five-Year Review Submission to the Standing Committee on Access to Information, Privacy and Ethics* (January 30, 2013), recommendation 2-10.

Clause 289 of the Bill should be amended by deleting lines 7 through 18 on page 224 (proposed section 62.2 of the Act):

~~62.2 (1) The Governor in Council may, by order, designate any person or class of persons as public office holders for the purpose of paragraph (e) of the definition "public office holder" in subsection 2(1).~~

~~(2) The Governor in Council may, by order, designate any person who is a public office holder or any class of persons who are public office holders as reporting public office holders for the purpose of paragraph (f) of the definition "reporting public office holder" in subsection 2(1).~~

My proposal would make certain that the Governor and Deputy Governor of the Bank of Canada are subject to the *Conflict of Interest Act*.

Bill C-4, as presently drafted, provides no such certainty. There is no requirement that the Cabinet use its power to designate the Governor and Deputy Governor, or anyone else for that matter.

If specific officials have been identified as missing from the *Conflict of Interest Act*, then Parliament should specifically add them to the definitions, so that the officials know with certainty that they fall under the Act, and Canadians know with certainty who is covered by the Act.

D. THE SHORTCOMINGS OF A VAGUE, IMPRECISE AND OPEN-ENDED APPROACH TO BRINGING PEOPLE UNDER THE *CONFLICT OF INTEREST ACT*

The rule of law is best served by ethical standards that are clear, consistent and fairly and transparently enforced.

Bill C-4's approach is unclear, is not transparent, could be exercised unfairly, and does not guarantee consistent outcomes.

While the restrictions and obligations imposed by the *Conflict of Interest Act* are appropriate and necessary, they are also very onerous. These burdens significantly impact officials' lives, their families' freedom, their household decisions, their privacy, and their future employment. Consistent with the rule of law, only Parliament should be able to specify, clearly and precisely, the categories of officials on whom these onerous but necessary obligations should be placed.

The imposition of these heavy burdens based on Cabinet's unfettered discretion, with no rules, principles or framework to guide the designation, and with no requirement of consistency, is incompatible with the certainty, transparency, fairness and predictability required by the rule of law.

The parliamentary process is open and transparent. By constitutional convention, the Cabinet process is secretive and closed. The imposition of these weighty, but essential, burdens should

only occur through the parliamentary process. Decisions of such momentous import ─ both grave public import, and significant personal impact on the individuals affected ─ should not be relegated to a process that is a "black box."

As previously stated, if there is an argument to include the Governor and Deputy Governor of the Bank of Canada under the Act ─ indeed, the Conflict of Interest and Ethics Commissioner has advanced such an argument, and it is compelling ─ then Parliament should bring the Governor and Deputy Governor under the Act, not leave the matter to Cabinet's discretion.

In fact, there are compelling grounds to bring under the Act all individuals who are appointed to offices with the approval of the Governor in Council. Parliament should clearly and definitely bring these individuals under the Act, not leave the matter to Cabinet's discretion.

E. RECOMMENDATION

The definitions of "public office holder" and "reporting public office holder" in the *Conflict of Interest Act* should include any individual (such as the Governor of the Bank of Canada) who is appointed to an office with Cabinet approval.

Clause 288 of the Bill should be amended by adding after line 20 on page 223 (paragraph (e) of the definition of "public office holder") the following:

(f) a person who is appointed to an office with the approval of the Governor in Council.

Clause 288 of the Bill should be further amended by adding after line 26 on page 223 (paragraph (f) of the definition of "reporting public office holder") the following:

(g) a person who is appointed to an office with the approval of the Governor in Council.

Clause 289 of the Bill should be amended by deleting lines 7 through 18 on page 224 (proposed section 62.2 of the Act):

~~62.2 (1) The Governor in Council may, by order, designate any person or class of persons as public office holders for the purpose of paragraph (e) of the definition "public office holder" in subsection 2(1).~~

~~(2) The Governor in Council may, by order, designate any person who is a public office holder or any class of persons who are public office holders as reporting public office holders for the purpose of paragraph (f) of the definition "reporting public office holder" in subsection 2(1).~~