GRIC
Government Relations Institute of Canada

Presentation to the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) re: study of the *Conflict of Interest Act*
Check Against Delivery
Ottawa, March 4, 2013

The Government Relations Institute of Canada (GRIC) is pleased to be here today to speak to the Committee's review of the *Conflict of Interest Act.*

My name is Jim Patrick, Senior Vice President of the Canadian Wireless Telecommunications Association, and President of GRIC this year.

Joining me is Scott Thurlow, President and CEO of the Canadian Renewable Fuels Association, and Chair of GRIC's Legislative Affairs Committee.

GRIC was founded in 1994 by government relations professionals in response to the growth and maturing of the industry over the past several decades. GRIC fosters high standards of practice through professional development and adherence to a code of business conduct.

GRIC also speaks on behalf of Canada's government relations community on matters pertaining to the relationship between the lobbying industry and government.

GRIC's membership includes consultant and in-house lobbyists from nongovernmental organizations, national trade associations, crown corporations and private companies (both domestic and multinational), extending across the breadth and depth of the Canadian economy.

Given that much of the day-to-day working life of lobbyists and public office holders involves interaction between the two groups, it should be expected that the *Lobbying Act* (which by and large governs activities of lobbyists) and the *Conflict of Interest Act* (which by and large governs activities of public office holders) would intersect and overlap in key areas.

This Committee completed its five year review of the *Lobbying Act* in 2012. It will soon examine legislative amendments to the *Lobbying Act* stemming from that study. Your 2013

study of the *Conflict of Interest Act* therefore gives you an excellent opportunity to ensure that the two statutes are as aligned as possible, and that existing gaps and overlaps between them do not work against the objectives of either statute.

Specifically, GRIC submits that:

1. The standard for determining whether a lobbyist has placed a public office holder in a conflict of interest should be the same as the standard for determining whether a public office holder was placed in a conflict of interest by a lobbyist.

2. The rules on what types of gifts a lobbyist can offer a public office holder should be the same as the rules on what types of gifts a public office holder can accept from a lobbyist.

3. Post employment restrictions on public office holders should be streamlined, and administered and interpreted by a single authority namely, the Conflict of Interest and Ethics Commissioner.

The standard for determining whether a lobbyist has placed a public office holder in a conflict of interest should be the same as the standard for determining whether a public office holder was placed in a conflict of interest by a lobbyist.

GRIC notes that for public office holders, the *Conflict of Interest Act* arguably sets the criteria and meaning for a "real" conflict of interest only (I say "arguably" because the Committee has heard evidence that the test for "apparent" conflict of interest is implicit in the Act). The Lobbyists' *Code of Conduct*, on the other hand, explicitly targets both "real and apparent" conflicts – creating a situation where the ethical bar could be seen as higher for lobbyists than public office holders, and a situation where lobbyists can be guilty of placing public office holders in conflicts of interest that they were never actually in.

As GRIC noted in its last appearance before this Committee, in February 2011, the Commissioner of Lobbying tabled a report in Parliament finding that a lobbyist had breached Rule 8 of the Lobbyists' Code of Conduct, and had therefore placed a public office holder in a conflict of interest.[i] This ruling pertained to actions that took place in 2004, five years before the current rules were put in place. The retroactive application of 2009 rules to 2004 events was never addressed or explained by the Office of the Commissioner of Lobbying (OCL).

Moreover, the Conflict of Interest and Ethics Commissioner had already concluded, based on the exact same set of facts, that the actions in question did not constitute a conflict of interest on the part of the public office holder.

In other words, one officer of Parliament examined the facts and concluded that a public office holder was not in a conflict of interest. Another officer of Parliament examined the same set of facts, and concluded that a lobbyist had placed the public officer in a conflict of interest (that the public office holder was, apparently, never "really" in).

Logic, due process and the fundamental tenets of natural justice dictate that once a public office holder is found by a quasi-judicial body not to have been in a conflict of interest, no individual can then reasonably be found by another quasi-judicial body to have to have placed that public office holder in a conflict of interest, based on the same set of facts.

For these reasons, GRIC recommended to ETHI in 2012 that the Commissioner of Lobbying's standard for determining whether a lobbyist has placed a public office holder in a conflict of interest be consistent with the Conflict of Interest and Ethics Commissioner's standard for determining whether a public office holder has been placed in a conflict of interest by a lobbyist: whether the test is for "real," "apparent" or "potential," it should be same under both Acts. Nobody should ever be found to have placed a public office holder in a conflict of interest that the public office holder was never in.

The rules on what types of gifts a lobbyist can offer a public office holder should be the same as the rules on what types of gifts a public office holder can accept from a lobbyist.

The *Conflict of Interest Act* defines "gift or other advantage" (s.2(1)) as "an amount of money if there is no obligation to repay it; and a service of property, or the use of property or money that is provided without charge or at less than commercial value."

The Act further states that "no public office holder or member of his or her family shall accept any gift or other advantage, including from a trust, that might reasonably be seen to have been given to influence the public office holder in the exercise of an official power, duty or function" (s.11(1)).

The Act further requires disclosure (including "sufficient detail to identify the gift or other advantage accepted, the donor, and the circumstances under which it was accepted"), of any gifts or gifts exceeding $200 from any one source in a 12-month period (s. 23, and s. 25(5)). Gifts over $1000 are to be forfeited to the Crown (s. 11(3)).

In its *Guidelines on Gifts (including Invitations, Fundraisers and Business Lunches)*, the Office of the Conflict of Interest and Ethics Commissioner notes that it has interpreted the definition of gifts to include such things as money, loans, property, memberships, services, meals, invitations to events, and invitations to galas and fundraisers.

The Guideline document goes on to explain that " . . . no specific rule exists as to which gifts can be accepted by public office holders. The value of a gift is NOT a criterion of acceptability: it is a threshold for the purpose of the disclosure to the Office and the public." [ii]

In its April 2012 *Report on the Statutory Review of the Lobbying Act*, this Committee recommended that an amended *Lobbying Act* "Impose an explicit ban on the receipt of gifts from lobbyists." In its September 2012 response to this Committee's report, the Government committed to pursuing a prohibition on lobbyists giving gifts to public office holders (and to rules specifying the value and nature of what types of gifts would be permitted and prohibited).

As it is this Committee that will review upcoming changes to the *Lobbying Act* (which the Government has signalled may include some additional restrictions on gifts from lobbyists to public office holders), you will have an opportunity as to ensure that the rules on what a lobbyist can offer a public office holder are aligned with the rules on what a public office holder can accept from a lobbyist.

GRIC takes no position at this time on what definitions under the *Lobbying Act* should be when it comes to the value and nature of gifts that lobbyists can offer to public office holders.

But we strongly recommend that you take the opportunity to ensure that the *Conflict of Interest Act* reflects the same definitions on the value and nature and "acceptability" of gifts that public office holders can accept from lobbyists, to avoid any confusion and conflict between the two statutes.

One major consideration you will have to address is the impact on charitable fundraisers and other not-for-profit events if you are unable to accept, for any reason, tickets to the dinners or receptions that are the lifeblood of many important charities and foundations and organizations across the country.

Post employment restrictions on public office holders should be administered and interpreted by a single authority – the Conflict of Interest and Ethics Commissioner.

Sections 35 and 36 of the *Conflict of Interest Act* describe restrictions and prohibitions on public office holders, and separately, on *reporting* public office holders, generally one or two year bans on dealings with former departments with which the public office holder had "significant official dealings" during a one or two year period prior to his or her last day of office.

In addition, the *Lobbying Act* creates a five year ban on former designated public office holders registering as a consultant lobbyist or in-house organization lobbyist. Former *designated* public office holders may however register as in-house corporate lobbyists, provided they self-determine that they lobby no more than 19% of their time.

These multiple and overlapping definitions have already caused some confusion in the current examination of the *Conflict of Interest Act*, with some witnesses and members citing definitions found in one Act when meaning to cite definitions found under another Act.

In its submission to your review of the *Lobbying Act*, the Canadian Bar Association stated that:

> The CBA believes that post-employment restrictions on public office holders should be consistently applied and enforced. To this end, the CBA believes that to the greatest extent possible post-employment restrictions on public office holders should be interpreted and administered by a single authority [i.e. the Commissioner of Lobbying or the Conflict of Interest and Ethics Commissioner].

In this Committee's April 2012 *Report on the Statutory Review of the Lobbying Act*, you recommended that " . . . post-employment restrictions on public office holders should be interpreted and administered by a single authority." In its September 2012 response to your report, the Government endorsed the recommendation.

There is a clear consensus that these post-employment functions should be consolidated under one Officer of Parliament.

GRIC recommends that the appropriate body for administering post-employment guidelines for public servants should be the Conflict of Interest and Ethics Commissioner (tasked,

broadly speaking, with regulating the activities public office holders) as opposed to the Commissioner of Lobbying (tasked, broadly speaking, with regulating activities of lobbyists).

We further recommend that definitions be streamlined and consolidated under the *Conflict of Interest Act*, and that a sliding-scale "cooling off" period for all categories of public office holder be strongly considered.

Conclusion

In conclusion, GRIC reiterates that by virtue of this Committee's ongoing review of the *Conflict of Interest Act*, and your upcoming review of legislative amendments to the *Lobbying Act*, you have an excellent opportunity to ensure that the two statutes work together, and not at cross-purposes.

Specifically, GRIC recommends that:

1. The standard for determining whether a lobbyist has placed a public office holder in a conflict of interest should the same as the standard for determining whether a public office holder was placed in a conflict of interest by a lobbyist.

2. The rules on what types of gifts a lobbyist can offer a public office holder should be the same as the rules on what types of gifts a public office holder can accept from a lobbyist.

3. Post employment restrictions on public office holders should be administered and interpreted by a single authority namely, the Conflict of Interest and Ethics Commissioner. Relevant definitions should be consolidated in the *Conflict of Interest Act*, and a sliding-scale cooling off period should be strongly considered.

GRIC appreciates the opportunity to provide its views in this important proceeding, and would be pleased to answer any questions the Committee may have.

***End ***

[i] http://www.ocl-cal.gc.ca/eic/site/012.nsf/eng/h_00265.html

[ii] http://ciec-ccie.gc.ca/resources/Files/English/Public%20Office%20Holders/Guidelines%20and%20Information%20Notices/Guideline%20on%20gifts.pdf