Should the Federal Ethics Counsellor Become an Independent Officer of Parliament?

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Cet article examine la validité des arguments en faveur et contre la création d'un "chien de garde" de l'éthique à Ottawa en comparant l'expérience d'autres juridictions dans la régulation de l'éthique en politique. Cet exercice montre que ni le modèle du procureur indépendant, ni le Vérificateur général, ne fournissent des exemples adéquats pour décrire le fonctionnement des institutions de surveillance de l'éthique dans les démocraties de type Westminster. Le Bureau du conseiller en éthique constitue un cas de structure institutionnelle défectueuse, de même que le nouveau poste de commissaire que le projet de loi sur l'éthique déposé en octobre 2002 projette de créer.

This paper tests the validity of arguments in favour, and against, the establishment of an independent ethics "watchdog" in Ottawa by comparing the experience of other jurisdictions with the regulation of ethics in politics. This suggests that neither the independent prosecutor model, nor the Auditor General, provide accurate examples to describe attempts at designing institutions for enforcing ethics in Westminster democracies. The Office of the Ethics Counsellor is a case of flawed institutional design, as is the new commissioner that the ethics bill tabled in October 2002 proposes to create.

The question of whether the ethics counsellor should become a parliamentary officer has been at the centre of recent political debates in Canada. The controversy emerged following news that in 1996 and 1997 the prime minister had made representations to the Federal Business Development Bank (FBDB) on behalf of the Auberge Grand-mère — a hotel in his riding located next to a golf course formerly owned by Jean Chrétien and his business partners. The prime minister said that he sold his shares in the golf course shortly after taking office in 1993. But he was not paid until 1999. The issue at the heart of the debate is whether the prime minister still had an "interest" in the golf course in 1996 and 1997 when he lobbied the FBDB to provide a loan to the Auberge. Opposition MPs argued that the prime minister effectively was in a conflict-of-interest position. The MPs insisted Chrétien was in conflict because he would be more likely to collect the money owed to him for the golf course if the adjacent hotel was not in financial difficulty. Chrétien said that he was merely working for his constituents when he approached the FBDB for the Auberge. After investigation, the ethics counsellor

ruled that the prime minister's phone calls to the president of the bank did not breach the federal ethics code. Since November 2000, opposition parties, journalists, and a number of academic observers have repeatedly asked for the creation of a parliamentary ethics "watchdog," arguing that the ethics counsellor was not objective because of the reporting arrangements governing his links to the executive. They argue that the counsellor, who is appointed by the prime minister, may have a conflict of interest of his own.

In support of the government's position against the establishment of an independent ethics watchdog, the example of Kenneth Starr (former US independent prosecutor) has been raised as a spectre to underline the various accountability and constitutional problems that the creation of such an office might produce. On the other side of the debate, pundits claim that establishing an ethics commission similar to the Auditor General would help restore confidence in politics.

This debate takes place in a highly partisan context. So far, arguments against and in support of the creation of an independent ethics watchdog who would report to Parliament are more based on faith than on empirical evidence. The goal of this paper is to test the validity of these arguments by comparing the experience of other jurisdictions with the regulation of ethics in politics.

The paper is divided into four sections. The first part compares the mandates and roles of ethics commissions, beginning in the United States where this type of institution has its origins, then moving to the Canadian provinces and to Australia and Britain. This comparative overview provides the empirical material for subsequently assessing in the following sections the arguments made by the two opposing sides in the debate over the creation of an independent ethics watchdog. The paper concludes that there is much confusion and exaggeration surrounding the fears and promises linked to independent ethics watchdogs. Neither Ken Starr nor the Auditor General provide accurate examples or models to describe recent attempts at designing institutions for enforcing political ethics in Westminster democracies. However, the inadequacy of these two models does not justify the status quo. Current arrangements governing the Office of the Ethics Counsellor need to be reviewed because it is unethical for the government to use Howard Wilson, publicly, *as if he were* an ethics investigator and enforcer. The same person cannot at the same time play the role of a counsellor advising the government on ethical matters and a parliamentary ethics watchdog. Finally, in a postscript addressing recent developments, I ask whether this problem will be solved by the new ethics package presented by the government in October 2002. The answer is "no." The proposed ethics bill also creates confusion regarding the constitutional position of the ethics commissioner. The new commissioner will be an officer of the House, but will also play the role of an adviser to the prime minister regarding the ethical conduct of ministers. The commissioner will thus serve two different political masters: the executive and the legislature. This is likely to create not only a problem of divided loyalty for the commissioner, but will also undermine its credibility.

The Watergate Effect

Nowadays, there are close to 50 jurisdictions across the globe, from the United States to Britain to New South Wales in Australia with some kind of agency with specific responsibilities for enforcing ethical standards in political institutions (UK. Committee on Standards in Public Life 2002). In the United States alone, the most recent research found that in 1993 at least 36 states had boards, commissions, or offices dedicated to overseeing ethics regulations (Lewis 1993). The term "board" or "commission" specifically refers to ethics watchdog agencies enjoying stature as independent bodies (Rosenson 2003). Of the 36 ethics commissions or boards found at the state level, only four were created before the Watergate scandal (Lewis 1993, 139). As one study indicates, the fact that most state ethics commissions

are "post-Watergate era commissions points to a linkage to public concern about fraud, waste and abuse in government as a basis for the creation of the commission" (Smith 1998, 22).

The 1978 *Ethics in Government Act*

In the United States, the adoption of the *Ethics in Government Act* of 1978 was a "direct result" of Watergate (Harriger 2000, vi). Title VI of the Act established a codified structure for the appointment of an independent officer — first called a "special prosecutor" and later renamed "independent counsel." The process is triggered in the first instance when the Attorney General "receives information sufficient to constitute grounds to investigate" allegations of wrongdoing (section 591 (a)). After receiving the information, the Attorney General has 30 days to determine whether to proceed further. If the information is either not credible or not specific, the Attorney General "shall close the matter" (section 591 (d) 2). If, on the other hand, the Attorney General finds that the information is credible, it then becomes necessary to file an application with the Special Division of the US Court of Appeals for the District of Columbia for appointing an independent counsel. The Division is responsible for selecting a special prosecutor, defining his/her jurisdiction, receiving the reports of the Attorney General and the special prosecutor, and determining whether or not the reports are to be made public.

A sunset provision was included in the ethics Act requiring re-authorization by Congress five years after its adoption. The Act was re-authorized in 1983, 1987, and 1994. But in 1999, Congress chose not to re-authorize the Act. In the end, the statute expired because of declining public support following the controversy over the Monica Lewinsky's scandal. After 1999, it became difficult to argue persuasively that appointment by the judiciary ensured independence and that politics was removed from the special prosecutor's investigations. Now, many believe that the independent counsel statute might "never be re-enacted" (Priester, Rozelle and Horowitz 1999, 109).

While in the US a number of legal experts claim that the independent counsel statute is "an idea whose time has passed" (Miller and Elwood 1999), in Canada, the controversy over the presumed conflict of interest involving the prime minister in connection with the Auberge Grand-mère, has led a number of politicians to call for the creation of a special prosecutor to investigate allegations of criminal behaviour by senior government officials.[1] But such calls have been limited and most opposition MPs involved in trying to make this affair a major political scandal — a *Shawinigate* as termed by the media — have primarily focused their demands on transforming the ethics counsellor into an independent legislative watchdog like the Auditor General (Saint-Martin 2000).

Before 1993, the ethics counsellor position was known as the Assistant Deputy Registrar General (ADRG). This position was created in 1974 to manage the federal government's guidelines on conflict of interest and to process the disclosure of Cabinet ministers' assets. The ADRG was located in the Department of Consumer and Corporate Affairs, and its main role was to advise ministers about how to avoid conflict of interest. However, the ADRG was never intended to have an independent role or function in the conflict-of-interest area. In 1986, the Parker Commission on the allegations of conflict of interest regarding Sinclair Stevens suggested that the ADRG be re-designed and "given a separate and more visible status" (1986, 359). In 1984, the Starr-Sharp report had made a similar recommendation (Starr and Sharp 1984). It suggested the establishment of an "Office of Public Sector Ethics" headed by an "ethics counsellor" (ibid., 201). But the Starr-Sharp report, like the Parker Commission, never recommended the creation of an ethics watchdog that would report to Parliament. In the aftermath of the Sinclair Stevens affair, the Mulroney government introduced a bill to create a three-person independent ethics commission, but the legislation died on the order paper. Following the 1993 election, the ADRG's position was given a higher profile and the title was changed to "ethics counsellor." The

counsellor has jurisdiction over ensuring compliance with the *Lobbyists Registration Act* and is responsible for administering the prime minister's Code of Conflict of Interest, which covers Cabinet ministers and senior bureaucrats — about 1,300 individuals (Office of the Ethics Counsellor 1999, 3). The counsellor reports directly to the prime minister for his duties in managing the conflict-of-interest guidelines and reports to Parliament on matters related to lobbying.

Ethics Commissions in the Canadian Provinces

Unlike the federal ethics counsellor who oversees the ethical conduct of senior officials in the *executive* branch, ethics commissioners in the provinces are responsible for regulating ethics in the *legislative* arena (Greene and Shugarman 1997). There are currently eight provinces with independent ethics commissions: Ontario, British Columbia, Alberta, Newfoundland, New Brunswick, Saskatchewan, Nova Scotia, and Prince Edward Island. In 1988, Ontario became the first province to establish an independent ethics commissioner. The commissioner is an officer of the Assembly appointed for a five-year renewable term by vote of the legislature. The Ontario commissioner has no power to initiate, autonomously, an inquiry into an alleged breach of the Act by a member. The commissioner can only undertake such an inquiry when a request is made by a member, the government, or the Assembly (article 30). The commissioner has the power to refuse any request for inquiry that seems "frivolous" or based on "insufficient grounds" (article 31.5). When, after investigation, a member is found to have contravened the Act, the commissioner can recommend that the member be reprimanded; that the member's right to sit and vote be suspended for a specified period or until a condition is fulfilled; or that the member's seat be declared vacant (article 34).

British Columbia was the second province to create an independent ethics commissioner — in 1990. The responsibilities of the BC conflict-of-interest commissioner are very similar to those of its Ontario counterpart. But there are at least two important differences. First, the BC legislation prohibits *apparent* conflicts of interest as well as real ones (article 2). The second difference with Ontario's is that the conflict-of-interest commissioner in BC is empowered to receive complaints and requests for inquiry from the public at large, like an ombudsman.

All other provincial ethics commissions have very similar function and reporting arrangements. For instance, all are responsible for managing the filing of private disclosure statements by members. But they differ mostly in relation to their ability to launch — at their own initiative — inquiries into allegations of conflict of interest by elected officials, and in terms of whether they can receive complaints and requests for inquiry from the public. Only the case of Nova Scotia and PEI stands out. In PEI, the ethics commissioner is empowered to oversee the ethical conduct of ministers (and not only MLAs as in the other provinces), and in Nova Scotia the ethics watchdog is a judge.

Manitoba has conflict-of-interest legislation, and the clerk of the Assembly handles the compliance paperwork. But there is no parliamentary ethics commissioner. Quebec is the only province without conflict-of-interest legislation and, consequently, has no officer to oversee its application. But in February 2002, following a series of allegations of conflicts of interest reported in the media, the premier announced the adoption of a new law to regulate lobbying activities and the appointment of a legislative ethics commissioner (Saint-Martin 2002*a*).

Ethics Watchdogs Abroad

If geographical proximity to the US is to be blamed for the spread of ethics commissions in Canada, the same cannot be said for Australia and Britain, two countries where watchdog agencies to regulate ethics in politics have also been created in recent years. In Australia, the Independent Commission Against Corruption (ICAC) was established in 1988 in the state of New South Wales. The ICAC is an

independent body that reports to Parliament, like the Auditor General or the Ombudsman. The head of the commission is appointed for five years by the government on the address of the two houses of Parliament. Its main function is to investigate allegations and complaints of corrupt conduct by public officials. The term "public officials" includes members of Parliament, judges, ministers, police officers, and all employees in government departments and local authorities. The ICAC has wide discretionary powers to investigate a complaint. It is empowered to act on complaints of corrupt conduct brought to its attention by the public, Parliament, and public sector employees, or it can act on its own initiative. In terms of its authority and discretionary powers, the ICAC is to a large extent similar to the independent prosecutor in the US — except that it cannot prosecute people.

In Britain, the Committee on Standards in Public Life, known as the Nolan Committee, was appointed in 1994 by Prime Minister John Major "to examine current concerns about standards of all holders of public office, including arrangements relating to financial and commercial activities, and make recommendations as to any changes in present arrangements which might be required to ensure the highest standards of propriety in public life." The Nolan Committee was set up in the wake of the "cash for questions" scandal. Allegations had been made in the press that a number of MPs had accepted £1,000 for tabling a parliamentary question (Smith 1995). In 1995, the Nolan Committee issued its first report. The committee recommended that a new *Code of Conduct for Members* be introduced, and called for the appointment of a Parliamentary Commissioner for Standards and for the establishment of a new procedure for investigating complaints about MPs (UK. Committee on Standards in Public Life 1995).

In the following months the House adopted its new Code of Conduct, which takes the form of a Standing Order — and not of legislation as in most Canadian provinces. To advise MPs on the Code, the House established a new Parliamentary Commissioner for Standards in November 1995. The parliamentary commissioner is responsible for maintaining and monitoring the operations of the Register of Members' Interests, whose main purpose is "to provide information of any pecuniary interest or other material benefit which a Member receives which might reasonably be thought by others to influence his or her actions, speeches or votes in Parliament, or actions taken in his or her capacity as a Member of Parliament." The Parliamentary Commissioner for Standards is also responsible for receiving and investigating complaints about the conduct of MPs (UK. Parliament 2001). As set out in Standing Order No. 121B, the authority of the Parliamentary Commissioner for Standards is "to receive and, if he or she thinks fit, to investigate specific complaints from Members and from members of the public in respect of: (a) the registration and declaration of interests, or (b) other aspects of the propriety of a Member's conduct, (c) and to report to the Committee on Standards and Privileges or to an appropriate sub-committee thereof" (UK. Parliament 1997).

The Committee on Standards and Privileges is a new parliamentary committee created to oversee the work of the Parliamentary Commissioner for Standards. The committee consists of at least seven senior MPs. It is responsible for taking forward individual cases recommended by the parliamentary commissioner for further consideration. After having assessed the validity of a complaint against an MP, and if the commissioner finds that there is a *prima facie* case or that the complaint raises issues of wider importance, he (the position is currently held by Philip Mawer) reports the facts and his conclusions to the Committee on Standards and Privileges. At that stage, the Committee on Standards and Privileges "takes over" from the parliamentary commissioner in further pursuing the investigation, because the commissioner does not have the power to demand the attendance of witnesses and the production of papers. Only the committee has the power to send for persons, papers, and records; to order

the attendance of any member before it; and to require that specific documents in the possession of a member relating to its inquiries or to the inquiries of the commissioner be laid before it. The committee can recommend penalties where appropriate (to be voted by the House).

The Parliamentary Commissioner for Standards derives its existence from a Standing Order of the House of Commons. It is a parliamentary creature. It has no legal existence of its own. It is not comparable to other "officers of the House" in Britain. It is not a statutory officer like the Comptroller and Auditor General or like the Parliamentary Commissioner for Administration (Ombudsman), both appointed by the Crown by letters patent (Oliver 1995, 597). The commissioner is appointed on the recommendation of the Speaker and the House is involved in the appointment by ratifying the suggestion made by the Speaker.

Table 1 provides some key indicators to evaluate the powers of ethics watchdogs. It shows that for all indicators, only the ICAC obtains a perfect series of "yes." And it also has, by far, the largest budget of all ethics watchdog agencies ($15 million Australian). Budget size obviously reflects the scope of the mandate. In New South Wales, all public institutions under the jurisdiction of the state government are covered by the ICAC mandate. In the Canadian provinces, budget size essentially varies according to the number of elected officials covered by the ethics legislation. In the case of Alberta, budget size is affected by the fact that the ethics commissioner is also responsible for applying the province's *Freedom of Information and Privacy Act*. The same thing applies to the federal ethics counsellor who is also responsible for managing the *Lobbyists Registration Act* (LRA).

One key difference between ethics commissions in the US and those in Westminster systems is that the former only cover officials in the executive branch. But in Westminster systems, we find the opposite situation: most commissions focus on the legislative branch and exclude the appointed part of the executive, the civil service. These differences, of course, are caused by the separation of powers in the US and the fusion of powers in the Westminster systems (Stark 1992). In Westminster systems, when a government decides to establish an ethics watchdog that reports to Parliament, its authority applies to all elected officials. Also, in such systems, the decision to create an ethics watchdog is a government decision, but in the US this has often been the result of a decision more or less imposed by an autonomous legislature facing an executive weakened by scandals and allegations of wrongdoing (Garment 1992).

The consequence of this is that ethics commissions in the US are generally more powerful than in the Canadian provinces and in Britain. Their mandate is broader and covers thousands of government employees. And as a rule, they have the power to conduct investigations at their own instigation. In the Westminster systems, this seems to be more the exception than the rule. Of all the ethics commissions found in the Canadian provinces, only three have the power to launch inquiries on their own initiative (Alberta, Saskatchewan, Newfoundland). But in Westminster systems, even if the legislature has no real autonomous powers of its own, this does not mean that the government will refuse to create a powerful American-type ethics commission. This is exactly what happened in New South Wales, for instance, where the ICAC was created in response to a series of scandals.

An Ethics Watchdog Who Could Undermine Ministerial Responsibility?

During the 1993 electoral campaign, the Liberals promised that if elected they would "appoint an independent ethics counsellor to advise both public officials and lobbyists in the day-to-day application of the Code of Conduct for Public Officials. The Ethics Counsellor will be appointed after consultation with the leaders of all parties in the House of Commons and

TABLE 1
Ethics Watchdogs in Comparative Perspective

Jurisdictions	Is an Officer of	Functions		Can Initiate Inquiries When Referred by					Can Inquire About the Ethical Conduct of			Budget	The Legislature Can Reject the Commissioner's Recommendations
		Advisory	Enforcement	Members	Cabinet	Assembly	Public	On His/Her Own	Senior Bureaucrats	Ministers	MPs		
Ottawa	Executive	Yes	No	No	Yes	No	No	No	Yes	Yes	No	1,935,538	No
Ontario	Legislature	Yes	Yes	Yes	Yes	Yes	No	No	No	Yes	Yes	323,800	Yes
British Columbia	Legislature	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes	185,292	Yes
Alberta	Legislature	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	197,732	Yes
Prince Edward Island	Legislature	Yes	Yes	Yes	Yes	Yes	No	No	No	Yes	Yes	30,000	Yes
Saskatchewan	Legislature	Yes	Yes	Yes	Yes[a]	Yes	No	Yes	No	Yes	Yes	Unknown	Yes
New Brunswick	Legislature	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes	85,775	Yes
Newfoundland	Legislature	Yes	Yes	Yes	Yes	Yes	No	Yes	No	Yes	Yes	Unknown	Yes
Nova Scotia	Judiciary	No	Yes	Yes	Yes	Yes[b]	No	No	Yes	Yes	Yes	Unknown	No
OGE (US federal)[c]	Executive	Yes	No			n/a			Yes	Yes	No	7,576,000	n/a
State ethics commissions	Legislatures	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Unknown	Unknown
ICAC (New South Wales)	Legislature	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	15,000,000	No
Britain	Legislature	Yes	No	Yes	Yes	Yes	Yes	No	No	Yes	Yes	Unknown	Yes

Notes: [a]In Saskatchewan, the commissioner inquiries can be referred by civil servants; [b]in Nova Scotia, the designated judge acting as ethics commissioner can receive requests for inquiry from elected officials and civil servants, but such requests must be made under oath. Also, the inquiry is limited to matters dealing with the financial disclosure statements that all members have to fill out; [c]the OGE's role in pursuing inquiries or investigations seems to be very limited, this being more the role of Inspectors General. In one of the OGE's annual reports, one can read that only "in limited circumstances, the OGE can investigate possible ethics violations and order corrective action" (1998, 8).

will report directly to Parliament" (Liberal Party of Canada 1993, 84). These are the exact words that the Opposition used in a motion in the House of Commons (in February 2001) blaming the Liberal government for having failed to implement its own electoral promise. In the eyes of most observers, the ethics counsellor is not independent because he reports directly to the prime minister rather than to the House. And as the *Grand-mère* affair suggests, such reporting arrangements raise questions about the ability of the counsellor to appear to be fully impartial when he investigates matters regarding the ethical conduct of the prime minister.

In its reply to the Opposition's motion that the Liberals had not respected the promise made in the 1993 Red Book, government members offered a two-dimensional response: first, "yes," we respected our promise; and second, it is constitutionally impossible to have an ethics counsellor that would report directly to Parliament. Let us now look at each of these two responses in turn. But before beginning, a crucial point needs to be made. The current debate in Ottawa is more about transforming the ethics counsellor into an independent officer of Parliament than about creating an ethics commission such as those found at the provincial level. As we have seen, most ethics commissions in the provinces are responsible for overseeing ethics in the legislative arena, whereas the ethics counsellor in Ottawa is responsible for administering the Code of Ethics covering senior officials in the executive branch. The two types of institutions are very different. But in the current debate, they are confused with one another. And this confusion is partly the result of the Liberals' decision to use the idea of "independent ethics counsellor" in their Red Book which, as we shall see, has its origins in the 1984 Starr-Sharp report on ethical conduct in the public sector.

Two Jobs with Different Reporting Relationships

The ethics counsellor is a bicephalic institution serving two different political masters. The counsellor is responsible for overseeing the application of both the prime minister's ethics code and the LRA. Regarding his duties for the LRA, the counsellor reports to Parliament. His authority is derived under the LRA from a Governor-in-Council appointment (section 10.1). In 1995, the Act was amended to create the Office of the Ethics Counsellor and at that time the counsellor was also given the mandate to draft a Lobbyists Code of Conduct. The counsellor is responsible for investigating possible violations of the Code. In that capacity, the counsellor is both an enforcer and an investigator reporting to the House of Commons. Accordingly, the government claims that it has respected its 1993 promise to the extent that the ethics counsellor provides reports to Parliament on his duties regarding the LRA, as other legislative watchdogs would normally do. But when pressed to go further and establish a similar reporting relationship with regard to the counsellor's duties in advising the prime minister over ethical matters, the government argues that this "would undermine the prime minister's responsibility for ministerial conduct." According to (then) House leader Don Boudria:

> The prime minister cannot answer members of the House, or anyone else for that matter, and say "I have an ethics counsellor, therefore nothing is my fault and nothing is my responsibility." None of us would ever accept that kind of answer ... The prime minister, and he alone, is responsible to parliament for the conduct of ministers, and he will not shirk this duty (Boudria 2001).

Boudria was not wrong in arguing that the prime minister alone is responsible for disciplining Cabinet ministers. This is a power that is formally part of the Crown's prerogative, but one that prime ministers have co-opted over the years (Smith 1995, 31). There could be some confusion in the parliamentary lines of control and accountability if the ethics counsellor were to become a legislative watchdog regarding his role in the management of the Code of Ethics for senior government officials. This would mean having an officer of the House intervening directly in the affairs of the executive. Regulating

the conduct of Cabinet ministers is an executive matter. "This is within the Crown loop rather than the legislative loop" (Peter Henessy, as quoted in UK. Committee on Standards in Public Life 2000, 46).

Ethics commissioners such as those found in the provinces play no role in advising Cabinet on ethics matters (except in PEI). The creation of a parliamentary ethics watchdog whose mandate would also include regulating the conduct of ministers "could usurp the accountability of the prime minister" as Howard Wilson once said. He explained:

> I report to the prime minister, not to Parliament. Some have asked why, especially academics, some journalists and the opposition parties. There are two main reasons. The first, and most important, is constitutional. In Westminster democracies, the prime minister is responsible to Parliament for the performance of his ministers and the government ... The second reason is based on a contrast between my role and that of the officers who do report to Parliament. I am thinking of people such as our Auditor General and the Commissioners of Information, of Privacy and of Official Languages. The role of the Auditor General is clear and traditional; to ensure that government expenditures are legal and effective. But in ethics we are dealing with many grey areas. We are dealing with the appearance of conflict. We are dealing with issues that go beyond what the law requires. What would be the result of having a non-elected official, with full investigatory powers, responsible only to Parliament? And let me simply reply with a two-word answer: Ken Starr (Wilson 1999).

There are a couple of problems with Wilson's comments. First, the role of the Auditor General is not "clear and traditional" — at least, certainly not when he or she ventures into the troubled-waters of "value-for-money" auditing (Saint-Martin 2002*b*). And second, unlike the independent counsel in the US, ethics watchdogs do not have the power to prosecute. But the "Ken Starr argument" put forward by Wilson is not wholly implausible — it is, however, plausible *only* in relation to proposals calling for the creation of an ethics counsellor who would report directly to Parliament.

Accordingly, and somewhat paradoxically, the Ken Starr argument has some theoretical force when confronted with the Liberals' own promise to create an "independent ethics counsellor." It is an argument, however, that has much less force with regard to ethics commissions. As the comparative overview in the first section of the paper shows, of the ethics watchdogs found either in the Canadian provinces, or in Britain and Australia, none has as much power as the independent counsel in the United States. Of all the non-US cases discussed, the ICAC, in Australia is, by far, the most powerful. But unlike the independent counsel in the US, it does not have the power to prosecute people.

For the Opposition, although it may have been interesting, politically, to use the 1993 Red Book promise as a way to force the government to vote against one of its own electoral commitments, one unintended consequence of this has been to "freeze" the public debate around the idea of transforming the ethics counsellor into an independent officer of Parliament. Other options or models, like the ethics commissions in the provinces, for instance, are seldom discussed. And when they are discussed, they are often surrounded with much confusion, to the extent that many critics of current arrangements for regulating ethics in Ottawa talk about the creation of an independent ethics counsellor and independent parliamentary commissioner as if the two meant the same thing, or as if the commissioner model provided an adequate response to the lack of independence of the counsellor model (Bellavance 2001; Laghi 2001; *Toronto Star* 2001).

The Roots of the Confusion

The Starr-Sharp report, once described as "the Talmud of public sector conflict of interest regulation in Canada" (Stark 1993, 61) was released in 1984 and prepared at the request of Prime Minister

Trudeau to develop various approaches for regulating ethics in politics and government. One of the major recommendations of the Starr-Sharp report was the formation of an Office of Public Sector Ethics which would be headed by an ethics counsellor. The new office was to replace the office of the ADRG created in 1974 to administer the conflict-of-interest guidelines applicable to ministers and Governor-in-Council appointees. The Starr-Sharp report believed that in managing the guidelines for conflict of interest, the ADRG had handled matters "efficiently but quietly," in "a low profile" way (Starr and Sharp 1984, 207). In the eyes of the two task force chairmen, "it became clear to us from the inquiries that this [low profile] approach has not been successful: many people are unaware of the nature of the role of the ADRG" (ibid.). Starr and Sharp recommended the elevation of the ARDG's function into a new entity with "higher public profile.... An important advantage of such an elevated office lies in its actual and perceived impartiality and freedom from political or bureaucratic bias. Its creation would be seen as emphasizing the government's willingness to air its problems in public" (ibid., 207-08).

As the above citations make clear, the Starr-Sharp report's idea of creating a new ethics counsellor position with higher public profile was essentially driven by political more than by efficiency factors. As Starr and Sharp recognized, the ADRG was indeed efficient but too low profile.

In deciding to follow the recommendations of the Starr-Sharp report and create an ethics counsellor's office with "higher public profile," the Liberals planted the seeds of their current problems. Unlike his predecessor, the ethics counsellor is indeed more publicly visible, but this greater visibility has not led to "increased credibility and impartiality" as the Starr-Sharp report assumed (ibid., 208). It has led, instead, to increased politicization, as Wilson is variously described in the media as an "impotent prime ministerial sidekick" (*National Post* 2001) or as a "lapdog" rather than a watchdog and depicted in editorial cartoons "as a robot dog who obeys his master's every command" (Mcintosh 2001). As an advisor to the prime minister, the ethics counsellor is in the position of a civil servant but without the anonymity and protection from political attacks generally conferred by this function. The government may well invoke ministerial responsibility for refusing to transform the ethics counsellor into an independent officer of Parliament. But ministerial responsibility also implies protecting the anonymity of hierarchical subordinates providing advice to ministers (Tait 2000, 11).

An Independent Ethics Watchdog Like the Auditor General?

"The ethics counsellor should have a position much like that of the Auditor General" (*Winnipeg Free Press* 2001). "The ethics counsellor should become an officer of Parliament like the Auditor General" (Mills 2000). The counsellor should be "an independent officer of Parliament like the Auditor General" (MacCharles 2001). The list of similar declarations by MPs, journalists, and scholars (Boisvert and Roy 2001) in the debate over the ethics counsellor could go on and on. But the point here is just to underline that, of all independent officers of Parliament, the Auditor General is most often cited as a model for redesigning the ethics counsellor's office. There is no big surprise in this, because the Auditor General is probably the most widely known among all parliamentary officers. The public hears about the work of the Chief Electoral Officer every four to five years when there is an election. But this is not the case for the Auditor General, especially now that she can mobilize media attention more often as a result of changes allowing the office to report more than once a year and publish studies "on any matter" that is, "in the opinion of the Auditor General" of "pressing importance or urgency" (*Auditor General Act,* article 8.1).

But does the Auditor General constitute a workable or suitable model on which to build an independent ethics watchdog? On the basis of the

evidence reviewed in the first section of the paper, the answer is certainly not as clear as critics of the federal ethics counsellor might wish. There are at least two types of power that most state audit bodies have at their disposal to fulfill their mandate: the power to initiate an inquiry or audit at will, and the power to issue public reports (Pollitt and Summa 1997).

Reporting Powers and Initiating Inquiries at Will

Most ethics commissions in the US possess these two types of power (Dobel 1993). But this is not the case in Westminster systems. Of the ten Westminster cases reviewed in the first part of the paper, only four (Alberta, Saskatchewan, Newfoundland, and the ICAC in Australia) have the power to inquire into allegations of conflict of interest on their own initiative. In the remaining six cases, the ethics watchdog can inquire into allegations of misconduct, but only after a request has been made by a member, the government, the legislature and in some instances, by a member of the public.

Thus, although the power to launch an inquiry at will is common to *all* audit watchdogs, this is not the case for ethics commissions. To the extent that this type of power can be seen as an indicator to measure independence — and to the extent that ethics commissions do not always possess this power — it is clear then, that such commissions in Westminster systems are generally less independent than audit watchdogs. Why? The difference relates partly to the different nature of the investigations they undertake. The Auditor Generals inquire into departmental administration where the "naming and blaming" of individual officials is rare; it is the unit of administration that is under scrutiny. Of course, this is not the case with inquiries by ethics commissioners. They investigate allegations of unethical conduct by named individuals and their conclusions are about them (Woodhouse 1998, 54).

The reporting powers of state audit bodies and ethics commissioners are also very different except, again, for the Independent Commission Against Corruption in Australia. Like the Auditor General, the ICAC is empowered to make special reports. It "may at any time, make a special report to each House of Parliament on any matter relating to the functions of the Commission" (ICAC Act, article 75).

Unlike most audit watchdogs, ethics commissioners in the Canadian provinces can only make one report a year. But in Nova Scotia, where a designated judge occupies the ethics commissioner's position, there is no annual report. Of the seven other provincial cases, the only exception is Alberta, where the *Conflict of Interest Act* states that "the Ethics Commissioner shall, at any times s/he considers appropriate, and at least annually, report in writing to the Speaker" (article 44.1). The "at least" seems to imply that the commissioner can issue more than one report. In Britain, the Parliamentary Commissioner for Standards has no reporting powers at all: information on the commissioner's work can be made public only through the Select Committee on Standards that oversees the work of the commissioner.

Because ethics watchdogs investigate the conduct of individuals, they cannot, in their annual report to the legislature, disclose confidential information or information that could identify a person. In Canada, the practice used by all provincial commissioners is to summarize a sample of responses to inquiries received during the year. The following is an example drawn from the 2000 report of the Ontario Integrity Commissioner:

> A Ministry stakeholder organization extended to the [Conservative] caucus an invitation to a Blue Jays baseball game, with the intent that they would discuss business during the game ... It is the Commissioner's opinion that it would not be appropriate to accept the invitation. If a Ministry stakeholder wishes to discuss business, the appropriate forum for such a discussion is within Ministry offices (Ontario. Office of the Integrity Commissioner 2000, 8).

In cases where ethics commissioners conduct investigations against allegations of wrongdoing (whether such investigations were referred to the commission or initiated on their own) they generally have to file their report with the Speaker, who subsequently lays the report before the Assembly. As seen earlier, if the commissioner finds that the allegations were founded, he or she can recommend various disciplinary measures, from suspending an MLA's right to vote or sit, to declaring a member's seat vacant. But in most instances, the legislature can simply reject the commissioner's recommendations and decide not to impose any sanction. This is the case in New Brunswick (article 43), British Columbia (article 22.3), Ontario (article 34.3), Alberta (article 27), Saskatchewan (article 31.3c), PEI (article 32.2), and Newfoundland (article 46.1). For instance, in New Brunswick the ethics legislation states that "the Assembly may either accept or reject the findings of the Commissioner or substitute its own findings and may vary the recommended sanction or impose no sanction."

In Britain, it was seen earlier that one of the parliamentary commissioner's key functions is to assess the validity of complaints against MPs. Once the commissioner judges that the complaint is serious, the Committee on Standards and Privileges then "takes over" from the commissioner in pursuing the investigation (because the commissioner does not have the power to demand the attendance of witnesses and the production of papers). The commissioner's investigations are thus essentially preliminary and part of a larger process, which may include further investigation by parliamentarians. As a result of this process, publication of the results of inquiries into allegations of misconduct by MPs remains within the remit of the select committee.

The Auditor General, a Useful Model?

Except for Australia, in all other cases ethics commissions are much less independent and powerful than state audit institutions. In Canada, when the federal government asks the Auditor General to audit a department or agency (as allowed by article 11 of the *Auditor General Act*), the audit findings are laid before Parliament. But this is not so for ethics commissions. In all provinces where there is an ethics watchdog (except Nova Scotia), inquiries into the conduct of ministers can be referred to the commissioner by the government. Once the inquiry is completed, the commissioner reports directly to the clerk of the executive council or the premier, as in Newfoundland (article 44.2). In all cases, the legislation does not say whether such reports are to be made public or not. This, apparently, remains a political decision.

For any parliamentary officer, the capacity to lay reports before the legislature — especially when this includes special reports that can be released at any time — is an extremely powerful weapon to build credibility, legitimacy, and to convey to the public a strong impression of "independence" toward the executive (Friedberg 1991). But in the case of ethics commissions, this capacity is severely restricted. The annual reports they produce are generally quite short (18 pages for Ontario and three pages for PEI) and all have been "purged," in the sense that they contain no names and the examples of inquiries that they present usually do not provide the kind of material that the media like to use for their headlines. If, for instance, the Office of the Auditor General had to follow the same rules, and was unable to name the department that it was auditing, its reports would probably not attract as much media attention as they usually do.

As well, it is not unusual for the Auditor General to announce in advance that her office is in the process of auditing a department or agency, and that the findings of the audit will be released at a given date. This would not be possible for ethics commissions because they are dealing with named individuals, not bureaucracies. Unlike the Auditor General, ethics commissioners cannot say that their office is inquiring into the conduct of Ms. Smith or Mr. Brown, because if the investigation subsequently finds no evidence of misconduct, the reputation and career of the individual will probably

have already been seriously damaged. There is no presumption of innocence in politics. None of the rules of natural justice applies in the partisan sphere.

And finally, there is a key difference between having the Auditor General auditing the use of money by ministers, and having an Auditor General-like body auditing their compliance with an ethics code. Control of the public purse is something that belongs to Parliament and therefore, auditing the use of money is within the legislative loop. But this is not the case with regulating the ethical conduct of ministers. This is part of the executive loop.

Conclusion

So should the federal ethics counsellor become an independent officer of Parliament? My answer is "no" because transferring the job of regulating the conduct of ministers, which is an executive matter, to an officer of the legislature would create a problem of accountability in a system of responsible government. As all the cases reviewed in this paper clearly indicate, as a rule there is no independent officer of Parliament to oversee Cabinet ethics guidelines. PEI is the only exception, and this is probably related to its size and to the fact that, more than anywhere else, ethics guidelines for ministers cover a larger proportion of members of the legislature (11 out of 27).

On the other hand, however, the federal government could, if it wanted, create a parliamentary ethics watchdog. But like its counterparts in the provinces (again, except PEI), such a parliamentary watchdog would have no role in overseeing ethics guidelines for senior government officials. The confusion in the current debate regarding the independence of Howard Wilson is that in establishing the Office of the Ethics Counsellor as a separate bureaucratic entity in 1993, the Liberals more or less designed it *as if it were* a parliamentary ethics commissioner. But the problem is that the ethics counsellor is an institution strictly meant to serve the executive, not the legislature. At the level of rhetoric, it may be politically convenient for the Liberals to present the office of the ethics counsellor as if it were an independent officer of Parliament, but institutionally, it is, like any government department or agency, an executive-based bureaucratic entity.

If the *Grand-mère* affair has produced a scandal, it is not the one currently debated in the public sphere. It is less about *Shawinigate* than *Wilsongate*: the political manipulation of a career civil servant (Howard Wilson) whose anonymity and perceived neutrality and impartiality have been destroyed to protect the partisan interests of the government and the prime minister. The Office of the Ethics Counsellor is a case of flawed institutional design that needs to be reformed. Either the government has an ethics counsellor who advises ministers and senior officials how they can avoid conflicts of interest, or an ethics commissioner, who is expected to be an investigator and an enforcer with some independent authority. But the same person cannot at the same time play the role of a civil servant advising government and a legislative ethics watchdog.

Post Script: Creating More Confusion?

As the final touches to this paper are being made (winter 2003), the House of Commons is examining the ethics package put forward by the government in October 2002. The package proposes to create an ethics commissioner. But this has nothing to do with the fulfillment of the promise to establish an "independent ethics counsellor" that the Liberals made in their 1993 Red Book. The draft bill on ethics released on 23 October 2002 is not about making Wilson's office more independent, it is about terminating that office. As indicated in the government's press release, the draft ethics bill, if adopted, means that "the current position of ethics counsellor will cease to exist" (PMO 2002, 5).

The new commissioner will be an officer of the House, like the Auditor General. But he or she will

also play the role of an adviser to the prime minister, the same role currently performed by the ethics counsellor — a role associated to an officer of the Crown. And when the commissioner acts as an adviser to the prime minister, the advice will be confidential. But in the role of the "ethics police," investigations of allegations of MP misconduct, the commissioner's work will be public. The commissioner will thus serve two different political masters: the executive and the legislature. One will be served in a transparent manner, the other behind closed doors. This is likely to create not only a problem of divided loyalty for the ethics commissioner, but also undermine credibility.

What are going to be the objective criteria determining at what moment the commissioner plays the role of an officer of the House or the Crown? If, in a pre-emptive move, the prime minister is the first to call the commissioner to ask for guidance regarding rumours that a minister may have behaved unethically, then nobody will know the content of that advice. But if an MP is the first to contact the commissioner to ask for an investigation in the conduct of that same minister, then the results of the inquiry would be public. So, here it seems that timing will be a key factor that will determine whether the commissioner is an officer of the Crown or the House, and whether its work is publicly available or not. This seems to be a fragile and subjective criteria for a function that many believe is central to helping rebuild public confidence in government.

The ethics commissioner proposed by Ottawa is a constitutional hybrid: part officer of the House when enforcing the Code of Conduct for MPs, and part officer of the Crown when advising the prime minister. The problem with such a hybrid is that the line dividing the powers of the executive and the legislature will become blurred. Such a line is always thin in a Westminster system of government. The fusion of powers exists only from the point of view of the executive, because the executive dominates the House with its majority. But when looked at from the legislature's point of view, there is no fusion of powers in the sense that MPs who are not ministers, as well as the various offices that are attached to the legislature, cannot be involved in the exercise of executive powers. If they were, it would undermine the practice of responsible government.

Regulating the ethical conduct of ministers is an executive matter. And to the extent that the proposed ethics commissioner, an officer of the House, will be involved in providing advice to the prime minister, this individual will assume an executive function. Of course, the prime minister can claim to be in charge, that he is the final arbiter as to whether he will listen or not to the ethics commissioner's advice (and here it is important to underline that the proposed bill does not draw a distinction between advice and inquiry). But recent evidence suggests that because of public opinion (the Eggleton and the MacAulay cases for instance), it has been politically difficult for the prime minister to do anything other than merely rubber-stamp the decisions of the ethics counsellor. If his arbitrary power to fire or retain his ministers has been partially eroded by what has been called a "lapdog rather than a watchdog," this is not likely to stop when the function of advising the prime minister on ethical issues is transferred to an independent officer of the House. And this is the key issue involved in the current debate regarding the capacities of the prime minister to regulate the ethical conduct of his ministers: the exercise of an arbitrary power that goes back almost to the Middle Ages and has its origins in the Crown's prerogative powers. Do citizens want this arbitrary power to be abolished or curtailed? It would be difficult to answer "no" to this question in a modern democracy. But if this is what policymakers want, they should say it clearly and they should also carefully think through the consequences of such a change on the process of governance.

Note

[1]See, in *Hansard*, the interventions made, for instance, by MPs Peter MacKay, Lorne Nystrom, and Joe Clark on

8 February 2001, "Allotted Day — the Ethics Counsellor." At <http://www.parl.gc.ca/37/1/parlbus/chambus/house/debates/009_2001-02-08/HAN009-E.htm#LINK30>.

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