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Consideration of an Inquiry Report from the Senate Ethics Officer

Report of the Standing Committee on Ethics
and Conflict of Interest for Senators

The Honourable Judith G. Seidman, *Chair*
The Honourable Brent Cotter, *Deputy Chair*

NOVEMBER 2023

CONSIDERATION OF AN INQUIRY REPORT FROM THE SENATE ETHICS OFFICER



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THE COMMITTEE MEMBERSHIP

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Introduction

On July 18, 2023, in accordance with subsection 48(17) of the *Ethics and Conflict of Interest Code for Senators* (“Code”), the Senate Ethics Officer provided your committee with his *Inquiry Report concerning Senator Michael L. MacDonald* (“Inquiry Report”). The same day, the chair of the committee deposited a true copy of the Inquiry Report with the Clerk of the Senate, in accordance with subsection 48(18) of the Code. Under subsection 48(19), the report became a public document as soon as it was deposited, and it was then made available online on the Senate Ethics Officer’s website. The report can be found [here](#).

In his Inquiry Report, the Senate Ethics Officer found that Senator MacDonald breached subsections 7.1(1) and (2), section 7.2 and subsection 48(7) of the Code in relation to his conduct on the evening of February 16, 2022, and with his lack of cooperation in the inquiry conducted by the Senate Ethics Officer.

The Enforcement Process

The Code establishes a five-step enforcement process that is outlined in subsection 44(2). These steps are

1. Preventative Enforcement (sections 45 and 46);
2. The Senate Ethics Officer’s preliminary review (section 47);
3. The Senate Ethics Officer’s inquiry (section 48);
4. The committee study and report (section 49); and
5. The Senate decision (sections 50 and 51).

The first step is a preventive enforcement measure that requires all senators to file an annual written statement of compliance with the Code.¹

¹ *Ethics and Conflict of Interest Code for Senators*, August 3, 2021, section 45.

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The second step is the preliminary review, which must be initiated when the Senate Ethics Officer has reasonable grounds to believe a senator has not complied with their obligations under the Code or when the Senate Ethics Officer receives a request to conduct an inquiry from a senator who has reasonable grounds to believe another senator has not complied with their obligations under the Code.² A preliminary review determines if a full inquiry is warranted to determine whether a senator has breached their Code obligations.³ The Code also provides, in paragraph 47(12)(d), that the Senate Ethics Officer can resolve the matter at this stage when “the situation has been addressed and remedied to the satisfaction of the Senate Ethics Officer or the Senator has undertaken to address and remedy the situation to the satisfaction of the Senate Ethics Officer.”⁴

The third step is the Senate Ethics Officer’s inquiry. An inquiry “is conducted to determine if a Senator has breached his or her obligations under the Code.”⁵ The inquiry must be completed confidentially and promptly.⁶ The Senate Ethics Officer must report the inquiry’s findings, reasons, and recommendations. This report must be provided to your committee, which is then responsible for tabling it in the Senate. The Senate Ethics Officer alone determines whether a senator has breached their obligations under the Code. The Code does not provide for an appeal mechanism.

The fourth step of the process is your committee’s consideration of the Senate Ethics Officer’s inquiry report. When the Senate Ethics Officer finds that a senator has breached the Code, your committee’s role is to recommend appropriate remedial measures or sanctions and report these recommendations to the Senate. The Code includes an inexhaustive list of recommendations available.⁷ As part of its study, your committee must afford the senator who is the subject of the inquiry an opportunity to be heard.⁸ The Code emphasizes that your committee has, at this stage, the

² *Ibid.*, s.47(2).

³ *Ibid.*, s. 47(1).

⁴ *Ibid.*, s. 47(12)(d).

⁵ *Ibid.*, s. 48(1).

⁶ *Ibid.*, s. 48(6).

⁷ *Ibid.*, s. 49(4).

⁸ *Ibid.*, s. 49(2).

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powers of any other standing committee of the Senate.⁹ Your committee must act promptly in its consideration of an inquiry report from the Senate Ethics Officer.¹⁰

The final step of the process is for the Senate to consider your committee's report and recommendations and make a final decision. The Senate itself exercises final and exclusive authority over the appropriate remedial measures or sanctions. In its [Fifth Report](#) of the 1st Session of the 42nd Parliament (2019), your committee wrote:

In the Senate, the consideration of a report from your committee is also subject to special rules to ensure a timely disposal, but not before the senator who is the subject of the report has had an opportunity to speak to the report (rule 12-30). The senator is also afforded the right of final reply (rule 6-12(1)(d) and subsection 51(2) of the Code).¹¹

The Committee Study

a. Planning

Section 49 of the Code requires your committee to consider an inquiry report from the Senate Ethics Officer as promptly as circumstances permit. Accordingly, your committee met on August 4, 2023; September 20 and 27, 2023; October 4, 18, and 25, 2023; and November 8, 2023.

Pursuant to its subsection 49(2) obligation to afford the senator who is the subject of an inquiry report an opportunity to be heard, your committee wrote to Senator MacDonald to invite him to appear before the committee. Accordingly, Senator MacDonald appeared before your committee with counsel on October 4, 2023. Senator MacDonald, through his counsel, also provided written submissions. Your committee has given due consideration to those submissions.

⁹ *Ibid.*, s. 49(3).

¹⁰ *Ibid.*, s. 49(1).

¹¹ Standing Committee on Ethics and Conflict of Interest for Senators, [Fifth Report](#), April 30, 2019, p. 4.

b. Senator MacDonald's Conduct on February 16, 2022

The Senate Ethics Officer found that Senator MacDonald's conduct on the evening of February 16, 2022, breached subsections 7.1(1) and (2) of the Code. Subsections 7.1(1) and (2) provide the following:

7.1 (1) A Senator's conduct shall uphold the highest standards of dignity inherent to the position of Senator.

(2) A Senator shall refrain from acting in a way that could reflect adversely on the position of Senator or the institution of the Senate.¹²

As noted in the Senate Ethics Officer's report, the conduct at issue was the commentary and language used by Senator MacDonald on the evening in question:

First, it is important to bear in mind that, in the case at hand, the issue does not concern Senator MacDonald expressing himself on public policy matters, a role which he is expected to play as a senator. Rather, the issue concerns certain comments he made and the language he used to make them.¹³

It is useful to recall the origin and purpose of these provisions. The origin and purpose are set out in the Committee's Fifth Report from 2019:¹⁴

The Code – Historical Background

Before the Code was adopted, the conduct of senators was governed by various rules found in legislation and in the *Rules of the Senate*. Senators were also expected to act in accordance with the "trust and confidence" placed in them when summoned to the Senate and the dignity inherent to the service in public office.

The first *Conflict of Interest Code for Senators*, as it was then entitled, was adopted on May 18, 2005, when the Senate concurred in the *Third Report* of the Standing Committee on Rules, Procedures and the Rights of Parliament. The Code in 2005

¹² Code, ss. 7.1(1) and (2).

¹³ Office of the Senate Ethics Officer, *Inquiry Report concerning Senator Michael L. MacDonald*, July 18, 2023, p. 22.

¹⁴ The Code has been amended since 2019, notably in relation to harassment and violence prevention. These amendments are not included in the discussion below since they are not pertinent to the matter before your committee.

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established “clear standards and a transparent system” to ensure accountability of all senators.

The Code constitutes an exercise of the Senate’s parliamentary privilege to govern its internal affairs and to discipline its members. Both privileges are inherent to the Senate as a legislative and deliberative body and have been explicitly conferred on the Senate by virtue of section 18 of the *Constitution Act, 1867* and section 4 of the *Parliament of Canada Act*.

The Code was adopted following the enactment of *An Act to Amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer)*, S.C. 2004, c. 7. That Act established an independent officer for each House of Parliament with the duties and functions assigned by his or her respective House to govern the conduct of its members. While the Act contemplated the adoption of a code of conduct by each House of Parliament, it did not constitute the enabling authority for such a code – an authority which rests on parliamentary privilege. The Act safeguarded all “powers, privileges, rights and immunities of the Senate or its members” (see *Parliament of Canada Act*, subsection 20.5(5)).

The introduction of a new Senate ethics regime in 2004 and 2005 was preceded by many years of studies. In this respect, the *Third Report* of the Standing Committee on Rules, Procedures and the Rights of Parliament, in referring to the Code, stated that “[r]arely has a document been as thoroughly examined and discussed as this Code.”

Since 2005, the Code has been amended on four occasions: 2008, 2012 and twice in 2014 (*Journals of the Senate*, May 29, 2008, May 1, 2012, April 1 and June 16, 2014). These amendments were aimed each time at improving the provisions of the Code and at reasserting the commitment of the Senate and of each individual senator to the highest standards of conduct. The 2008 amendments strengthened the independence of the Senate Ethics Officer; the 2012 amendments made changes particularly aimed at increasing transparency; the April 2014 amendments established a new enforcement process; and the June 2014 amendments established rules of general conduct and ethical behavior [*sic*]. Every senator is required to file a statement of compliance annually confirming that he or she has recently read the Code and that he or she complies with it (subsection 45(1)).

Rules of General Conduct

The June 2014 amendments to the Code resulted in new sections 7.1 and 7.2 of the Code... .

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As explained in your committee's *Fifth Report* [of the 2nd Session of the 41st Parliament (2014)], the purpose of these provisions is to "reassert the commitment of the Senate and each senator to the highest standards of conduct." At the same time as these sections were added, the Code was renamed the *Ethics and Conflict of Interest Code for Senators*.

On July 27, 2015, pursuant to subsection 37(2) of the Code, the committee gave Directive 2015-02 to the Senate Ethics Officer in respect of these rules of general conduct:

These rules of general conduct are applicable to all conduct of a Senator, whether directly related to parliamentary duties and functions or not, which would be contrary to the highest standards of dignity inherent to the position of Senator and/or would reflect adversely on the position of Senator or the institution of the Senate. A breach of the rules of general conduct provided under section 7.1 of the Code, as any other breach of the Code, is subject to the enforcement process established under the Code and, in particular, to the Senate Ethics Officer's responsibilities therein.

Pursuant to subsection 37(2) of the Code, the Senate Ethics Officer is to interpret, apply and administer the Code in accordance with this Directive.¹⁵

A more complete explanation of the evolution of the Code is provided by Senators A. Raynell Andreychuk and Serge Joyal in the June 14, 2014, *Debates of the Senate*.¹⁶ Your committee agrees with and endorses their statements.

Two points are useful to note. First, the Code was amended by the Senate in 2014 to include provisions related to ethics — that is, the highest standards of conduct befitting senators — and the title of the Code was amended to emphasize this amendment and expansion. Second, the committee, in its 2015 directive to the Senate Ethics Officer, made it clear that the Code, particularly subsections 7.1(1) and 7.1(2), is applicable to the conduct of a senator whether they are engaged in Senate business or in the conduct of their personal life.

These points are relevant to Senator MacDonald's situation. That is, the issues relevant to this inquiry relate to the senator's ethics, including behaviour in his

¹⁵ Standing Committee on Ethics and Conflict of Interest for Senators, *Fifth Report*, April 30, 2019.

¹⁶ *Debates of the Senate*, June 16, 2014 (Hon. Raynell Andreychuk and Hon. Serge Joyal).

personal life and non-Senate activities. This is what led to the finding that Senator MacDonald's conduct breached the ethics provisions of the Code.

c. Senator MacDonald's Failure to Cooperate with the Senate Ethics Officer's Inquiry

The Senate Ethics Officer found that Senator MacDonald breached subsections 7.1(1) and (2), section 7.2 and subsection 48(7) of the Code by failing to cooperate with the inquiry. Subsections 7.1(1) and 7.1(2) were referenced above. Section 7.2 and subsection 48(7) provide as follows:

7.2 A Senator shall perform his or her parliamentary duties and functions with dignity, honour and integrity.¹⁷

...

[48] (7) Senators shall cooperate without delay with the Senate Ethics Officer in respect of any inquiry.¹⁸

It is useful to point out once again that the development of sections 7.1 and 7.2, as amended by your committee and adopted by the Senate in June 2014, was serious, careful work done within the spirit of the Code as a living document in which amendments rest on principles already embodied in the Code. Upon undertaking an inquiry that the Senate Ethics Officer determines to be necessary, the Senate Ethics Officer has the responsibility to investigate and make a non-reviewable determination in relation to the senator's conduct in question. All aspects of the inquiry process must be "clear, fair and balanced"¹⁹ and in accordance with principles of natural justice.

Senator MacDonald acknowledged that, as a result of his initial misunderstanding of the process established for Senate Ethics Officer inquiries, he did not cooperate with the investigation. While the committee's view is that the process is clearly set out in the Code, we accept that, at least initially, Senator MacDonald genuinely misunderstood his obligations under the inquiry process. Nevertheless, we note that,

¹⁷ Code, s. 7.2.

¹⁸ *Ibid.*, s. 48(7).

¹⁹ Standing Committee on Ethics and Conflict of Interest for Senators, [Third Report](#), March 2014.

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despite repeated explanations of the process provided to Senator MacDonald by the Senate Ethics Officer, Senator MacDonald maintained his position and declined to cooperate.

All senators are expected to be familiar with the Code. Indeed, every senator is required under section 45 to confirm annually that they have read the Code. This includes the Code-mandated process by which senators may be investigated by the Senate Ethics Officer in inquiries. A lack of awareness of this process does not excuse senators from meeting their obligations under the Code, including the duty to cooperate in an inquiry.

Senator MacDonald took issue with some aspects of the Senate Ethics Officer's inquiry into his conduct. However, this did not entitle him to decline either to cooperate or to propose an alternative process for resolving the complaints against him. Indeed, the Senate itself has approved the process set out in the Code, making it problematic when a senator feels justified in disregarding that process.

This is more than a mere disagreement between Senator MacDonald and the Senate Ethics Officer. The Senate of Canada has a public-interest obligation to oversee senators' conduct. Indeed, failure to do so would bring disrepute upon the Senate. The Senate has adopted a meaningful *Ethics and Conflict of Interest Code for Senators* that includes a detailed process for examining and adjudicating complaints against senators. When a senator takes issue with a Senate-mandated process and their actions could potentially prevent that process — in this case the Senate Ethics Officer's inquiry — from being fully and adequately performed, it has the potential to bring the Senate itself into the spotlight and call into question its ability to effectively oversee the conduct of its members.

Fortunately, in this case the Senate Ethics Officer was able to finalize his inquiry despite Senator MacDonald's lack of cooperation. Senator MacDonald's lack of cooperation was more than a "procedural disagreement". It was a direct challenge to the integrity and mandate of the Senate-approved process by which senators — and the Senate itself — are to be held accountable.

d. Appropriate Remedial Measures and Sanctions

In making its recommendations, your committee considered the Senate Ethics Officer's findings and observations about Senator MacDonald's breaches of the Code, as well as his conduct throughout the inquiry and the effect of his actions on the Senate as an institution and on the public's perception of the Senate. Your committee also gave due consideration to Senator MacDonald's submissions to the committee.

The criteria to be applied in considering remedial measures or sanctions were set out in your Committee's Fifth Report (2019):

In identifying an appropriate remedial measure or sanction in this and any circumstance, your committee must take into account:

- the seriousness of the breach and its impact on the Senator's ability to continue to perform their parliamentary duties and functions;
- the effect of the breach on other Senators and on the respect, dignity and integrity of the Senate as an institution; and
- public confidence and trust in the Senate.²⁰

We have applied these criteria in our consideration of the remedial measures or sanctions that we recommend in relation to Senator MacDonald.

Subsection 49(4) of the Code provides an inexhaustive list of recommendations available to your committee, including an invitation or order for a senator to apologize.²¹ Your committee has made this recommendation in the past.²² Your committee believes an apology is an appropriate recommendation in Senator MacDonald's case, both for his conduct on the evening of February 16, 2022, and for his failure to cooperate with the Senate Ethics Officer's inquiry.

In addition, your committee recommends censure as a sanction for Senator MacDonald's conduct. Censure is a recognized formal expression of a legislative body's disapproval of the conduct in which one of its members has engaged, and it

²⁰ Standing Committee on Ethics and Conflict of Interest for Senators, [Fifth Report](#), April 30, 2019, p. 7.

²¹ *Code*, s. 49(4)(f).

²² Standing Committee on Ethics and Conflict of Interest for Senators, [Fifth Report](#), April 30, 2019.

has also been recommended by your committee in the past.²³ Indeed, your committee recommended censure in relation to a recent inquiry report that also involved a failure to cooperate by the senator at issue — a recommendation that the Senate adopted.²⁴

Censure holds an important role as a visible mark on the parliamentary record by denoting the shared values of senators, denouncing specific conduct, and aiming to deter others from engaging in similar conduct in the future. Adopting this sanction would mean that the Senate agrees with the committee's view that Senator MacDonald's conduct fell short of what is expected of senators. It would also serve as a reminder of the importance of abiding by the Code that each senator pledged to uphold, as well as of cooperating fully with the Senate Ethics Officer's inquiry process.

Recommendations

Your committee therefore recommends the following:

Recommendation 1:

That Senator MacDonald provide a sincere, unqualified apology in the Senate for his breach of subsections 7.1(1) and (2) of the Code in relation to his conduct on Wellington Street on February 16, 2022, and for his breach of subsections 48(7), 7.1(1) and (2), and section 7.2 of the Code in relation to his lack of cooperation in the inquiry conducted by the Senate Ethics Officer; and

That Senator MacDonald post this apology on his Senate and personal websites, as well as on his Senate and personal social medial accounts.

²³ See, for example: *Minutes of Proceedings of the Senate of Canada*, March 9, 1885, p. 255; and *Journals of the Senate*, May 3, 1888, p. 176.

²⁴ Standing Committee on Ethics and Conflict of Interest for Senators, *Consideration of an Inquiry Report from the Senate Ethics Officer*, June 2020.

Recommendation 2:

That the Senate censure Senator MacDonald for his breach of subsections 7.1(1) and (2) of the Code in relation to his conduct on Wellington Street on February 16, 2022, and for his breach of subsections 48(7), 7.1(1) and (2), and section 7.2 of the Code in relation to his lack of cooperation in the inquiry conducted by the Senate Ethics Officer; and

That the censure be printed in the *Journals of the Senate* for the day on which this report is adopted by the Senate.

Further Consideration by the Committee

If the recommendations are adopted by the Senate, your committee urges Senator MacDonald to comply promptly with Recommendation 1 of this report.

Your committee reserves the right to revisit this matter at a future date.



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