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December 11, 2019

RE: Request for investigation and ruling on Minister of Justice and Solicitor General Doug Schweitzer participating in appointment of his associate Steve Allen

Dear Commissioner Trussler:

I am writing requesting an investigation and ruling on Minister of Justice and Solicitor General Doug Schweitzer participating in the decision to appoint Steve Allan as an inquiry commissioner, as this raises questions concerning whether Minister Schweitzer has violated subsection 2(1) and/or 3 of the *Conflicts of Interest Act* ("*CofI Act*" – R.S.A. 2000, chapter C-23) by influencing or taking part in a decision when knowing that the decision might further the interests of a person directly associated with the Minister.

Please see the details of this request set out below.

1. The relevant provisions of the *Conflicts of Interest Act* ("*CofI Act*")

The *Conflict of Interest Act* ("*CofI Act*") can be seen at: http://www.qp.alberta.ca/documents/Acts/C23.pdf.

Subsection 2(1) of the *CofI Act* states:

> "**Decisions furthering private interests**
> 2(1) A Member breaches this Act if the Member takes part in a decision in the course of carrying out the Member's office or powers knowing that the decision might further a private interest of the Member, a person directly associated with the Member or the Member's minor or adult child."

Section 3 of the *CofI Act* states:

> "**Influence**
> 3 A Member breaches this Act if the Member uses the Member's office or powers to influence or to seek to influence a decision to be made by or on behalf of the Crown to further a private interest of the Member, a person directly associated with the Member or the Member's minor child or to improperly further another person's private interest."

Clause 1(5)(e) of the *CofI Act* states:

> "1(5) For the purposes of this Act, a person is directly associated with a Member if that person is
> …
> (e) a person or group of persons acting with the express or implied consent of the Member."

2. Steve Allan's role in Minister Schweitzer's election campaign

According to this article: https://www.cbc.ca/news/canada/edmonton/inquiry-allan-campaigned-schweitzer-1.5364265
Steve Allan:

a) Participated in the invitation for a nomination race campaign event for Minister Schweitzer in July 2018, which was distributed to invitees by Minister Schweitzer's assistant at Denton's law firm, where he was a lawyer at the time;
b) Sent an April 2019 email to several associates urging them to vote for Minister Schweitzer in the Alberta provincial election, an email that said, in part, "If the UCP wins, there is an excellent chance Doug will be in Cabinet"; and
c) Donated $1,000 to Minister Schweitzer's UCP leadership campaign.

This is clear evidence that Minister Schweitzer gave his express consent for Mr. Allan to take actions to support him in his election efforts. In other words, they are directly associated with each other.

3. Minister Schweitzer's appointment of Steve Allan

The July 4, 2019 Order in Council of the Jason Kenney Cabinet, which can be seen at:
http://www.qp.alberta.ca/documents/Orders/Orders_in_Council/2019/2019_125.html
states that Minister Schweitzer recommended the appointment of Steve Allan ("Jackson Stephens Allan") as an inquiry commissioner.

This is clear evidence that Minister Schweitzer participated in, and influenced, the decision to appoint Steve Allan.

According to this article:
https://www.cbc.ca/news/canada/edmonton/inquiry-allan-campaigned-schweitzer-1.5364265
Mr. Allan is being paid $290,000 by the Alberta Government as an inquiry commissioner. This salary, obviously, furthers the financial interests of Mr. Allan.

4. The proper interpretation of the provisions of the *CofI Act*

(a) Summary of Democracy Watch's position

Democracy Watch's position is that any person who has assisted a campaign for a politician or party by fundraising, helping organize an event, providing advice of any kind or other similar activities puts the politician the person assisted into the position where they are either directly associated with the person and/or that the assistance created a sense of obligation on the part of the politician that makes it improper for the politician (or their staff) to participate in making/influencing any decision that might further the private interest of the person.

The clause 1(1)(g) definition of "private interest" in the *CofI Act* create a huge loophole that allows all MPPs, including Premier Kenney and all Cabinet ministers, to make decisions that apply generally (for example, changing any law as essentially all laws apply generally) even if they are in a conflict of interest.

However, despite this loophole, if a politician participates in a decision-making process (section 2 of the *CofI Act)* and/or tries to influence (section 3) a decision-making process, or shares inside information (section 4) with someone involved in a decision-making process of the legislature or government that concerns a

specific thing that affects the person's private interests (such as an appointment as an inquiry commissioner), Democracy Watch's position is that the politician would then violate those sections because the politician would be "improperly furthering another person's private interest" (which is prohibited in section 3). Participating in, and thereby influencing, the decision would be improper because the politician had been assisted by the person.

(b) Democracy Watch's position is well-established in Canadian law

Democracy Watch's position concerning the legal lines that these sections of the *CofI Act* and related sections draw is well-established in Canadian law.

In 1993, former B.C. Conflict of Interest Commissioner Ted Hughes issued the *Blencoe* ruling concerning donations and campaign assistance given by a Mr. Tait and Mr. Milne to election candidate Robin Blencoe, who subsequently became a Cabinet minister who, two years later, had some decision-making power concerning a proposal made by Mr. Tait and Mr. Milne's company. Commissioner Hughes' ruling can be seen at: https://coibc.ca/wp-content/uploads/2018/05/opinion_blencoe_1993.pdf.

B.C. Commissioner Hughes ruled in the *Blencoe* case that donations and other assistance alone can be a personal benefit that can cause a conflict of interest. As he stated on page 29 of his ruling:

> "Campaign contributions and assistance, whether financial or otherwise, can, in my opinion, in some circumstances, be a "private interest". I am conscious of the very real purpose and difference between these kinds of contributions and other kinds of pecuniary or non-pecuniary benefits that could pass to a Member. Indeed in our system of parliamentary democracy, campaign contributions and assistance are to be encouraged and fostered and must be seen in a positive light as an interest accruing not only to a political party but also to the public generally; it is thus an interest clothed with the public interest. Nevertheless, it would be wrong to deny that in some circumstances it is also an interest that accrues to individual candidates and is thus also a private interest. This is particularly the case where the financial contribution is specifically directed to the candidate even though it is payable to the party. It is also the case where the non-financial contribution or assistance is of particular benefit to the candidate. The non-financial contribution on behalf of a specific candidate (notwithstanding that it is also on behalf of the party that the candidate represents) can include an array of activities from distributing leaflets, knocking on doors, developing campaign strategies, public endorsements and fundraising."

Commissioner Hughes continues on page 30:

> "I want to emphasize that I do not intend that anything that I have said or will say hereafter to be interpreted as in any way discouraging or disapproving of campaign contributions or assistance. Indeed, I wish to

> express my complete support for those who choose to participate in the democratic process in this way. Political parties are essential to properly functioning parliamentary democracies. To be effective they require membership and resources. I start from the premise that those who contribute to political party viability through contributions of time or resources or both, to either the party or one of its candidates, should not be prejudiced in subsequent dealings with government as private citizens, regardless of whether the political party they support does or does not form the government of the day. Similarly, those who choose not to participate in the political process should not be, nor be seen to be, prejudiced in their dealings with government as a result of their non-participation in the political process. It is to be emphasized, however, that a Member who has received a campaign contribution, financial or otherwise, must not, at least in some circumstances, discussed in more detail below, thereafter put him or herself in a position to confer an advantage or a benefit on the person who made that contribution."

As a result, Commissioner Hughes, as Commissioner Dawson did with Minister Raitt, concluded that Milne's and Tait's assistance caused a conflict of interest for Blencoe and, therefore, Minister Blencoe was prohibited from taking part in decisions affecting Milne's and Tait's interests (pages 34-39). As Commissioner Hughes stated:

> "I am of the view that Blencoe's private interest was advanced by virtue of the cumulative effect of both Milne's and Tait's financial and other support and particularly during the most recent provincial election campaign." (page 31)

In other words, Commissioner Hughes found that if Minister Blencoe took part in decisions affecting Milne and Tait, he would be improperly furthering their interests (and, given that Minister Blencoe did take part in some decisions that affecting Milne and Tait, Commissioner Hughes found that Minister Blencoe did violate the B.C. conflict of interest law).

It would, of course, also be improper for the staff of the Premier or a Cabinet minister to participate in decision-making affecting a person who had assisted the Premier or a Cabinet minister's election efforts, as ministerial staff serve at the pleasure of the politician and so they share any conflict of interest that the politician has. As a result, it would completely undermine the conflict of interest rules to allow the Premier or a Cabinet minister to use their staff as proxies to participate in or influence decisions that they are not allowed to participate in or influence.

Addressing a situation of a lobbyist providing fundraising assistance to a politician, the Federal Court of Appeal unanimously ruled on March 12, 2009 in the case *Democracy Watch v. Barry Campbell, the Attorney General of Canada and the Office of the Registrar of Lobbyists* [2010] 2 F.C.R. 139, 2009 FCA 79:

> "Where the lobbyist's effectiveness depends upon the decision maker's personal sense of obligation to the lobbyist, or on some other private interest

> created or facilitated by the lobbyist, the line between legitimate lobbying and illegitimate lobbying has been crossed. The conduct proscribed by Rule 8 is the cultivation of such a sense of personal obligation, or the creation of such private interests." (para. 53)

That case concerned a federal consultant lobbyist, Barry Campbell, who organized a fundraising event for the riding association of a minister whom he was registered to lobby, and was actively lobbying, around the same time as the event. The Federal Court of Appeal ruling made it clear that lobbying and fundraising around the same time violates Rule 8 (now Rule 6) of the federal *Lobbyists' Code of Conduct*. Rule 8 stated:

> "8. Improper influence
> Lobbyists shall not place public office holders in a conflict of interest by proposing or undertaking any action that would constitute an improper influence on a public office holder."

While the situation is somewhat different from what Steve Allan did to assist in Minister Schweitzer's election efforts, the common elements are an action that causes an "improper" relationship between the person assisting the public office holder and that creates a "conflict interest" for the office holder that makes it "improper" for the office holder to take part in a decision that affects the private interests of the person.

As the Federal Court of Appeal unanimously ruled in the 2009 *Democracy Watch* case (at para. 52):

> "Improper influence has to be assessed in the context of conflict of interest, where the issue is divided loyalties. Since a public office holder has, by definition, a public duty, one can only place a public office holder in a conflict of interest by creating a competing private interest. That private interest, which claims or could claim the public office holder's loyalty, is the improper influence to which the Rule [8] refers."

Subsequent to the Federal Court of Appeal's 2009 ruling in the Democracy Watch case, the federal Commissioner of Lobbying ruled in the cases of lobbyist Will Stewart
https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00265.html
and lobbyist Michael McSweeney
https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00292.html
that their lobbying of a Cabinet minister while helping to organize and sell tickets for a fundraising event for the minister's riding created a sense of obligation that amounted to improper influence.

Federal Conflict of Interest and Ethics Commissioner Mary Dawson subsequently required the Cabinet minister involved, The Hon. Lisa Raitt, to recuse herself from any decisions concerning the association Mr. McSweeney represented, to avoid the conflict of interest his fundraising assistance to her riding association

had created. You can see this decision of Ethics Commissioner Dawson on p. 25 and in Schedule B of her report on the fundraising at: http://ciec-ccie.parl.gc.ca/Documents/English/Public%20Reports/Examination%20Reports/The%20Raitt%20Report%20-%20Act.pdf

Rule 8 of the federal *Lobbyists' Code* was replaced on December 1, 2015 in part and by Rule 9 (and also Rule 6, and Rules 7, 8 and 10). New Rule 9 states:

> "Political activities
> 9. When a lobbyist undertakes political activities on behalf of a person which could reasonably be seen to create a sense of obligation, they may not lobby that person for a specified period if that person is or becomes a public office holder. If that person is an elected official, the lobbyist shall also not lobby staff in their office(s)."

You can see a guidance document concerning Rule 9 by the federal Commissioner of Lobbying at: https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01479.html. In that document, the Commissioner lists the following as "higher risk" political activities that very likely violate Rule 9:

- Serving as a campaign chair or in another strategic role on a campaign team
- Serving in a named position on behalf of a registered party as set out in the Canada Elections Act;
- Serving as an electoral district association officer within the meaning of the Canada Elections Act, such as chief executive officer, financial agent, appointed auditor, or any other officer;
- Organizing a political fundraising event;
- Gathering or soliciting donations that you then provide to a registered party or electoral district association;
- Working in a war room for a registered party in a strategic role;
- Preparing candidates for debates; or
- Acting as a designated spokesperson for a political candidate, campaign, registered party, electoral district association, or other organization.

The Commissioner also states in that guidance document that:

> "If you engage in higher-risk political activities then you should not lobby any public office holder who benefited from them, nor their staff, for a period equivalent to a full election cycle."

(c) Improperly furthering another person's private interests is a very broad standard

As noted above, the part of the rule set out in section 3 of the *CofI Act* that prohibit a member from influencing a decision (including, of course, by

participating in the decision) to "improperly to further another person's private interests" set a very broad standard.

On page 8 of his February 8, 2002 ruling on the actions of then-Deputy Premier and Minister of Finance Jim Flaherty, then-Integrity Commissioner Coulter A. Osborne stated concerning the word "improperly":

> "that the qualification "improperly" is intended to convey a sense that the decision made (section 2) or influence exercised (section 4) was objectionable, unsuitable or otherwise wrong (see Black's Law Dictionary definition of "improper")."

You can see that ruling at:
https://www.oico.on.ca/docs/default-source/commissioner%27s-reports/re-flaherty-minister-of-finance-feb-8-2002.pdf?sfvrsn=8

As federal Conflict of Interest and Ethics Commissioner Mary Dawson stated in a June 2015 speech:

> "The concept of "improper" by its very nature allows more latitude and discretion in interpreting it."

That speech can be viewed at:
http://ciec-ccie.parl.gc.ca/Documents/English/About%20the%20Commissioner/Presentations/Speaking%20Notes%20Annual%20General%20Meeting%204%20juin%202015%20EN.pdf
with the above statement at the top of page 4.

As a result, in addition to the common law standard of the meaning of "improper" set out by the Federal Court of Appeal in its 2009 unanimous ruling in the Democracy Watch case (summarized above), and the subsequent rulings by the federal Lobbying Commissioner and Ethics Commissioner that confirm that a person assisting a politician in their election efforts creates a conflict of interest for the politician, other legal standards concerning propriety in the *CofI Act* that apply to provincial politicians must be taken into account in determining whether a person assisting a politician creates a situation in which it would then be "improper" for the politician to further the person's interest by participating in or influencing a government decision or sharing inside information.

The third part of the Preamble to the *CofI Act* is one of those standards, as it states:

> "WHEREAS Members are expected to perform their duties of office and arrange their private affairs in a manner that promotes public confidence in the integrity of each Member, that maintains the Assembly's dignity and that justifies the respect in which society holds the Assembly and its Members;"

and the fourth part is another standard as it states:

> "WHEREAS Members of the Legislative Assembly, in reconciling their duties of office and their private interests, are expected to act with integrity and impartiality;"

As a result, the words "improperly further" should be defined and applied by you as meaning any action that furthers another person's private interests in a way that fails to promote public confidence in the integrity of the politician involved, or that undermines the Assembly's dignity or the public's respect for the politician involved, or that is in any way partial to that person's private interests.

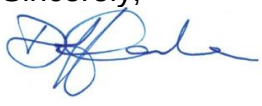
5. Conclusion and request for investigation into Minister Schweitzer's actions

Applying all of the legal standards set out above, in the common law, in lobbying and ethics commissioners' rulings, and in the *CofI Act*, to the situation of Mr. Allan's assistance to Minister Schweitzer's election campaign, Democracy Watch's conclusion is that the assistance made Mr. Allan a person directly associated with Minister Schweitzer, and made it clearly improper for Minister Schweitzer to participate in any specific decision that might further Mr. Allan's private interests, including the decision to appoint him to a $290,000 position as an inquiry commissioner.

For all of the above reasons, Democracy Watch requests that you initiate an investigation under subsection 24(1) and section 25 of the *CofI Act* into Minister Schweitzer recommending that Mr. Allan be appointed as an inquiry commissioner, as that recommendation seems to violate sections 2 and 3 of the *CofI Act*. Democracy Watch also requests that you issue a public ruling under section 27 and 28 of the *Act*.

You have an opportunity to uphold key measures in a key democratic good government law, the *Conflict of Interest Act*. Given that this request for an investigation contains most of the evidence needed to issue a ruling, we look forward to seeing your public ruling issued very soon.

Sincerely,



Duff Conacher, Co-founder of Democracy Watch
on behalf of the Board of Directors of Democracy Watch