



democracy Watch
émocratie en surveillance

P.O. Box 821, Stn. B, Ottawa K1P 5P9
Tel: 613-241-5179 Fax: 613-241-4758
Email: info@democracywatch.ca Internet: <http://democracywatch.ca>

Office of the Conflict of Interest and Ethics Commissioner
ATTN: Mario Dion, Commissioner
Parliament of Canada
Centre Block, P.O. Box 16
Ottawa, Ontario
K1A 0A6

Email: ciec-ccie@parl.gc.ca

September 17, 2018

RE:

- 1. Request for inquiry into Liberal Party of Canada fundraising events that raise serious questions concerning violations of sections 5, 7 and 16 of the *Conflict of Interest Act* (the “Act”) by Cabinet ministers and their staff, and;**
- 2. Request that you recuse yourself from conducting inquiry and ruling on the above matters because you were appointed by the Trudeau Cabinet, and also because of your statements showing bias against effective enforcement**

Dear Commissioner Dion:

I am writing concerning enforcement of the *Conflict of Interest Act* generally, and specifically requesting an inquiry into 162-plus Liberal Party of Canada fundraising events. Democracy Watch’s position is that the events raise serious questions concerning violations of sections 5, 7 and 16 of the *Conflict of Interest Act* by Cabinet ministers and/or their staff.

As you will see detailed below, the problem with the events, and the reason Democracy Watch is requesting an inquiry, is that several of the events are high-priced, exclusive (invite-only) events at which the Prime Minister or a Cabinet minister speaks. Such events offer access to the minister for payment – and this is clearly prohibited by the *Act*.

Democracy Watch is only requesting an inquiry into those events that are exclusive in some way (price, invite-only) or that offer exclusive access to a minister or other public office holder.

Large public events attended by hundreds of people that have a low ticket price (\$100-\$200 per person) and that are open to anyone to attend do not raise questions concerning violations of the *Act* even if the Prime Minister or a Cabinet minister speaks at such an event, as long as they or their staff do not issue invitations to the event to people or organizations that lobby the government, and as long as they offer no opportunities for lobbying at the event.

1. Background on *Conflict of Interest Act's* purpose, and history of Liberal Party of Canada fundraising events since January 2016, and Ethics Commissioner's position on such fundraising events

(a) The purpose of the *Act* and its required enforcement standard that former Commissioner Dawson ignored

The primary purpose of the *Conflict of Interest Act* (the "*Act*") in section 3 is to "minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise." The *Act* should be interpreted by the Conflict of Interest and Ethics Commissioner ("Ethics Commissioner") with this goal in mind. The *Act* is remedial legislation. The *Interpretation Act* requires that the *Act* be "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."¹ This was the approach adopted by the Oliphant Commission.²

The Supreme Court of Canada ruled in two cases in 1996 that "If democracies are to survive, they must insist upon the integrity of those who seek and hold public office" (*Harvey v. New Brunswick*), and; "given the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe" and; "[t]he magnitude and importance of government business requires not only the complete integrity of government employees and officers conducting government business but also that this integrity and trustworthiness be readily apparent to society as a whole." (*R. v. Hinchey*).

As L'Heureux-Dubé, J. wrote in *Hinchey*: "The need to preserve the appearance of integrity..." requires that the statutory provisions such as the *Act* be interpreted so as to prohibit actions "...which can potentially compromise that appearance of integrity" (para. 16). As she also noted at para. 17, "...it is not necessary for a

¹ *Interpretation Act*, R.S.C., 1985, c. I-21, section 12, Applicant's Book of Authorities, Tab A4.

² Canada, *Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney*, 2010, Vol. 3, Policy and Consolidated Findings and Recommendations, pp. 484-485.

corrupt practice to take place in order for the appearance of integrity to be harmed. Protecting these appearances is more than a trivial concern.”

In many cases since 2007 former Ethics Commissioner Mary Dawson did not interpret or enforce the *Act* with its main purpose in mind, nor did she uphold the Supreme Court’s standard.

Concerning fundraising events organized and/or attended by lobbyists which were also attended by Cabinet ministers or their staff (all of whom are covered by the *Act*), Ethics Commissioner Dawson maintained a position from spring 2009 on that none of the sections in the *Act* apply to fundraising event situations, and that “preferential treatment” by a public office holder would have to come after a fundraising event in order to violate the prohibition in section 7 of the *Act* on giving preferential treatment.

From spring 2016 on, Ethics Commissioner Dawson made several public statements that maintained that same position concerning fundraising events that Prime Minister Trudeau and several Cabinet ministers were involved in as guests or hosts, some of which were organized by and/or attended by lobbyists.

As a result of her very flawed position, Ethics Commissioner Dawson refused to investigate any of the events.

(b) Liberal Party fundraising events since January 2016

In late October 2016, the *Globe and Mail* revealed that the Liberal Party of Canada (“Liberal Party”) had held approximately 90 high-priced, exclusive fundraising events since January 1, 2016. You can see the list of events at: <https://democracywatch.ca/wp-content/uploads/Fundraising-Events-2016.pdf>

The Liberal Party reacted to questions about these events – labelled “cash-for-access” or “pay-to-play” events – during subsequent months by establishing new internal party rules in early April 2017 that required disclosure of details about any events that “feature” Prime Minister Trudeau or a Cabinet Minister. You can see the Liberal Party’s news release concerning these rules at:

<https://www.liberal.ca/liberals-to-make-political-fundraising-events-more-open-and-transparent-than-ever-before/>

and you can see the list of events disclosed on the Liberal Party website at:

<https://www.liberal.ca/fundraising-events/>

It is important to note that events attended by senior staff of the Prime Minister or a minister, and events attended by a Parliamentary Secretary who liaises with the Prime Minister or a minister, are not included in the above list.

Subsequently, the Liberal Party pledged to prohibit registered lobbyists from attending such events if the Cabinet minister they were registered to lobby was speaking at the event. It is important to note that the Liberal Party’s prohibition only applied to registered individual consultant lobbyists – the prohibition does

not apply to board members or others who may direct or work for organizations that are registered to lobby the government, the Prime Minister or the minister.

As the list of events on the above Liberal Party website shows, several of the events since April 2017 have been high-priced. Many have also been invite-only – meaning few people have attended. With high-priced events, the price of admission makes the event exclusive and amounts to selling access for payment. With many invite-only exclusive events, usually few people attend and, therefore, attendees have had a direct opportunity to lobby the Prime Minister or the minister (or senior staff person) in attendance at the event. As a result, these events also amount to selling access for payment.

Today, the *Globe and Mail* reported that even for the limited number of fundraising events that the Liberal Party has been disclosing since April 2017 (72 in total), the party has not been following its own rules as the newspaper found that lobbyists attended nearly a dozen fundraising events attended by ministers they were registered to lobby. You can see the article at:

<https://www.theglobeandmail.com/politics/article-lobbyists-still-attending-liberal-fundraisers-despite-promised-reform/>

It is important to note that the total number of events at issue is not known as only events the Prime Minister or ministers attended have been disclosed (not events that a Parliamentary Secretary or senior staff person may have attended), and events that were held between October 21, 2016 and April 2017 have also not been disclosed.

However, what is clear is that the Liberal Party's and Trudeau Cabinet's cash-for-access system continues to operate.

2. Request for legally correct ruling on these fundraising events

Ethics Commissioner Dawson's position that none of the rules in the *Act* apply to these fundraising events was clearly legally incorrect, and contradicted other rulings issued by her, as detailed below.

For the reasons set out below, Democracy Watch requests that you investigate these events and issue a legally correct ruling concerning the events.

(a) Application of section 7 of the *Act* to these fundraising events

First, section 7 of the *Act* states:

"Preferential treatment

7. No public office holder shall, in the exercise of an official power, duty or function, give preferential treatment to any person or organization based on the identity of the person or organization that represents the first-mentioned person or organization."

This is essentially the same wording as the rule in the Prime Minister's *Open and Accountable Government* code that former Ethics Commissioner Dawson and others claimed does apply to the fundraising events (and that Ethics Commissioner Dawson advocated be added to the *Conflict of Interest Act*). That rule, in Annex B Fundraising and Dealing with Lobbyists: Best Practices for Ministers and Parliamentary Secretaries, states:

"There should be no preferential access to government, or appearance of preferential access, accorded to individuals or organizations because they have made financial contributions to politicians and political parties."

There is no need to add this rule to the *Act* – it is already in section 7 of the *Act* (minus the appearance part of the rule).

Ethics Commissioner Dawson claimed that attending a fundraising event is not an "exercise of official power, duty or function" but it clearly is because the Liberals themselves have said that they are at the events as ministers. For example, Finance Minister Bill Morneau stated publicly that the fundraising event he attended in Halifax on October 13, 2016 was part of his pre-budget consultation process). You can see the *Globe and Mail* article in which Minister Morneau is quoted making this statement about the Halifax event, attended by representatives at:

<https://www.theglobeandmail.com/news/politics/morneau-fundraiser-one-in-list-of-liberal-cash-for-access-events/article32450347/>

In Ethics Commissioner Dawson's 2012 ruling on Conservative Minister Paradis giving preferential treatment to former Conservative MP Rahim Jaffer, she wrote (on page 21), with regard to the meaning of "preferential treatment" that:

"The expression "preferential treatment" is not defined in the Act and was not defined in the predecessor 2006 Conflict of Interest and Post Employment Code for Public Office Holders. I believe, however, that its meaning is quite clear. I take note of the 1984 Report of the Task Force on Conflict of Interest, co-chaired by the Honourable Michael Starr and the Honourable Mitchell Sharp, entitled Ethical Conduct in the Public Sector, in which "preferential treatment" is defined as "treatment more favourable than might be accorded to anyone else in similar circumstances.""

To continue using Finance Minister Morneau's October 13, 2016 Halifax event as an example, who did Morneau giving preferential treatment in the situation "based on the identity of the person"? The answer is each company that had a representative at the event because they (the person, or the person using the company's money) donated \$1,500 to attend, or each person at the event who donated \$1,500 to attend.

Ethics Commissioner Dawson ruled in the Paradis ruling (p.22):

"I believe that Mr. Paradis assisted Mr. Jaffer because he wanted to help a former caucus colleague. This preferential treatment was therefore based on the identity of Mr. Jaffer."

With regard to Minister Morneau's fundraising event (and all the other fundraising events involving Prime Minister Trudeau, Cabinet ministers or ministerial staff since the last election), you should rule:

"I believe that Mr. Morneau gave access to himself to the companies who had representatives at the event because they were top-level Liberal Party donors. The preferential treatment was therefore based on the identity of those donors."

Being a top-level donor is the same as being a former caucus colleague – they are both identifiers of a person based on actions they took and roles they have.

Rule 7 is a very important rule – it means that Cabinet ministers and their staff (and senior government officials who are appointed by Cabinet) can't meet or communicate with, or help, anyone more (or more responsively) than anyone else based on the identity of the person or organization that is asking for help or contacting them. More specifically, it means that Liberal Cabinet ministers and their staff, and senior government officials, can't meet or communicate with, or help, Liberal Party members/donors/supporters/affiliated organizations more (or more responsively) than anyone else or any other organization.

(b) Application of section 5 of the Act to these fundraising events

If you actually believe that Minister Morneau, Prime Minister Trudeau or the other ministers attend the events not as a Cabinet minister but instead (somehow) as a private individual, then section 5 of the *Conflict of Interest Act* ("Act") applies:

"General duty

5. Every public office holder shall arrange his or her private affairs in a manner that will prevent the public office holder from being in a conflict of interest."

As with sections 4 and 6 of the *Act*, section 5 applies to even the appearance of a conflict of interest. Section 3 of the *Act* articulates among its purposes prevention and avoidance of "conflicts of interest" generally, without any limiting language that would confine it to "real" conflicts of interest. As well, the Federal Court of Appeal has ruled unanimously that the phrase "a conflict of interest" means a situation in which a public office holder has "competing loyalties" or "a real or seeming incompatibility between one's private interests and one's public or fiduciary duties" that "might reasonably be apprehended to give rise to a danger of actually influencing the exercise of a professional duty."³

Again using Minister Morneau's October 13, 2016 Halifax event as the example, Minister Morneau attending an exclusive, high-priced event attended by a representative of at least one stakeholder (there was a representative from RBC Securities there) of his department creates at least an appearance of a conflict of interest (and very likely a real conflict of interest), it doesn't prevent it.

³ *Democracy Watch v. Campbell*, [2010] 2 F.C.R. 139, 2009 FCA 79, para. 49, quoting from *Cox v. College of Optometrists of Ontario* (1988), 65 O.R. (2d) 461 (Div. Ct.).

As a result, Minister Morneau violated section 5 of the *Act* by attending that event. The same conclusion applies to the Prime Minister, other minister, Parliamentary Secretary or senior staff person who attends an event where stakeholders are paying a high price or are offered exclusive access for payment.

(c) Application of section 16 of the *Act* to these fundraising events

It also violates the purpose of the *Act*, and its required enforcement standard as articulated by the Supreme Court of Canada, and reality, to pretend that Prime Minister Trudeau or other ministers are not soliciting these donations personally - which is prohibited under section 16 of the *Act*.

"Fundraising

16 No public office holder shall personally solicit funds from any person or organization if it would place the public office holder in a conflict of interest."

The ministers are named on the invitations and are the reason people attend the events. The Liberal Party or a riding association or the minister's staff may send out the invitations – however obviously not without the approval of the minister who is featured in the invitation.

It is a charade to claim, as Ethics Commissioner Dawson did, that this invitation process does not amount to the minister acting to "personally solicit funds."

And it creates a conflict of interest if the solicitation featuring the minister is sent to anyone who is a stakeholder of, or directly connected to a stakeholder of, the minister's department whether they are personally registered to lobby or are a board member or employee of an organization that lobbies the minister (whether or not the lobbying is registered in the Lobbyists' Registry).

As a result, it is a violation of section 16 of the *Act* for the Prime Minister, a Cabinet minister, a Parliamentary Secretary or one of their senior staff, all of whom are covered by the *Act*, to be a featured speaker at a fundraising event to which stakeholders of the government or their department are invited.

3. Request that you recuse yourself from investigating and ruling on these fundraising events

On January 30, 2018, I sent you a letter on behalf of Democracy Watch requesting that you recuse yourself from investigating and ruling on all matters concerning the Trudeau Cabinet and Liberal MPs because you were nominated for the position of Ethics Commissioner after a process that was controlled by the Prime Minister's Office (PMO) and Cabinet and involved officials from the Privy Council Office and the Treasury Board, including the Chief of Staff for Treasury Board Minister Scott Brison.

The PMO- and Cabinet-controlled appointment process did not include consultation with opposition parties as required under subsection 81(1) of the

Parliament of Canada Act as the opposition parties made clear in several statements in the House of Commons. As you know, Democracy Watch filed an application for judicial review of your appointment in Federal Court based on the reasonable apprehension of bias and conflict of interest on the part of the Trudeau Cabinet when appointing you.

Democracy Watch's position is that you share this reasonable apprehension of bias because you were chosen through a process controlled by the Trudeau Cabinet, a process that failed to consult with opposition parties as required by subsection 81(1) of the *Parliament of Canada Act*. Your appointment was approved in the House of Commons only on division, as several MPs voted against your appointment.

Democracy Watch's letter to you of January 30, 2018 can be seen at:
<https://democracywatch.ca/wp-content/uploads/LettToEthicsCommReApptBiasComplaintsJan302018.pdf>

As well, Democracy Watch's position is that you made statements when testifying on December 12, 2017 before the House of Commons Standing Committee on Access to Information, Privacy and Ethics that show a bias toward weak and incorrect enforcement of the *Act*. During the hearing, the transcript of which you can see at:

<http://www.ourcommons.ca/Content/Committee/421/ETHI/Evidence/EV9337990/ETHIEV84-E.PDF>

you stated that:

"I believe that people are fundamentally honest, that people do not get up in the morning with the intent of breaching the law." (p. 2)

and that: "People are fundamentally honest." (p. 10)

It is impossible for anyone to know whether everyone is fundamentally honest, and your assumption that everyone is honest means you have created a reasonable apprehension that, when faced with someone claiming to have made an honest mistake while the evidence shows that they violated the *Act*, you will favour finding them not guilty because they did not "intend" to violate the *Act*.

Given that the intent of an alleged violator is irrelevant to a legally correct assessment of whether they violated the *Act*, your statement creates a reasonable apprehension of bias against legally correct enforcement of the *Act*.

4. Request for investigation of all the Liberal Party events, and new rulings

Given everything set out above in sections 1 and 2, there is reason to believe that sections 5, 7 or 16 of the *Conflict of Interest Act* have been violated by Prime Minister Trudeau and several Cabinet ministers as the Liberal Party has held several high-priced, exclusive events since January 1, 2016 involving Prime

Minister Trudeau and/or other Cabinet ministers, events that were also attended by lobbyists.

I therefore request, on behalf of Democracy Watch, that you delegate to someone independent of your office to conduct an investigation of all 162 Liberal Party fundraising events since January 2016 that we know about to determine which events were exclusive (high-priced, invite-only) and/or offered an opportunity to lobby the public office holder who was featured in the event invitation or who attended the event.

As well, the investigation should also cover events that a Parliamentary Secretary or senior staff person may have attended (as those events have not been disclosed by the Liberal Party), and events that were held between October 21, 2016 and April 2017 that the Liberal Party has also not been disclosed.

I also request that you pass on this letter to that person so that they apply the legally correct interpretation of sections 5, 7 and 16 of the *Act* in reaching their conclusions concerning violations of these sections, an interpretation that fulfills the purpose of the *Act* and the legal standard set out in the two Supreme Court of Canada rulings from 1996.

This investigation is an opportunity to hold public office holders accountable for violations of the *Conflict of Interest Act*, and to stop fundraising activities that Ethics Commissioner Dawson refused to stop even though the purpose of the *Act*, and sections 5, 7 and 16, make it clear that such activities are prohibited.

Please contact Democracy Watch at the address above if you need any more information to initiate the inquiry into these events.

We hopefully look forward to seeing your decision considering recusing yourself from this investigation very soon.

As well, given that almost all of the facts and figures concerning the events are on the public record, we hope that the investigation into the event can proceed and conclude in a timely fashion.

Sincerely,



Duff Conacher, Board member of Democracy Watch
On behalf of the Board of Directors of Democracy Watch