



democracy Watch
émocratie en surveillance

P.O. Box 821, Str. 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

May 7, 2019

RE:

- 1. The law concerning former public office holders and improper activities**
- 2. Request for inquiry into Kevin Lynch, current Chair of SNC-Lavalin and former Clerk of the Privy Council**
- 3. Request for inquiry into Eric D. Siegel, current board member of SNC-Lavalin and Citibank Canada, and former President of Export Development Corporation (EDC)**
- 4. Request that you recuse yourself from conducting inquiry and ruling on the above matter because you were appointed by the Trudeau Cabinet, and also because of your statements showing bias against effective enforcement**
- 5. Request that you ensure this complaint will be investigated and ruled on, given the commitment you made before the House Ethics Committee in December 2017**

Dear Commissioner Dion:

I am writing concerning enforcement of the *Conflict of Interest Act* generally, and specifically requesting an inquiry into the activities of Kevin Lynch, current Chair of SNC-Lavalin and former Clerk of the Privy Council, and Eric D. Siegel, current board member of SNC-Lavalin and Citibank Canada, and former President and CEO of Export Development Corporation (EDC).

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Democracy Watch's position is that Mr. Lynch's and Mr. Siegel's positions raise questions concerning violations of section 34(2) of the *Conflict of Interest Act* (S.C. 2006, c. 9, s.2), which prohibits former public office holders from ever giving advice to people they work for or with using secret information they obtained while in public office and, as a result, also section 33 of that *Act*, which prohibits taking improper advantage of one's previous public office. The reasons for this position are set out below.

Democracy Watch's position is also that you should recuse yourself from investigating and ruling on this matter. The reasons for these positions are set out below.

1. The law concerning former public office holders and improper activities

a) Objective and proper interpretation of *Conflict of Interest Act*

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." That means the *Act* should be interpreted by the Conflict of Interest and Ethics Commissioner with this goal in mind.

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*, 1996] 2 SCR 876), 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*, [1996] 3 S.C.R. 1128).

As L'Heureux-Dubé, J. wrote for the majority in *Hinchey*: "The need to preserve the appearance of integrity..." requires that the statutory provisions at issue in *Hinchey* be interpreted so as to prohibit actions "...which can potentially compromise that appearance of integrity" (para. 16). Justice L'Heureux-Dubé also noted: "...it is not necessary for a corrupt practice to take place in order for the appearance of integrity to be harmed. Protecting these appearances is more than a trivial concern" (para. 17).

b) Proper interpretation of subsection 34(2) prohibition on using secret information to provide advice to people you work for or with

Subsection 34(2) of the *Act* prohibits former public office holders from ever giving “advice to his or her client, business associate or employer using information that was obtained in his or her capacity as a public office holder and is not available to the public.”

Despite being Ethics Commissioner from July 2007 to January 2018, Mary Dawson failed to issue a guideline or interpretation bulletin defining exactly what this key rule means. And while you posted a guideline on post-employment rules in the *Act* on your website on January 10, 2019 at:

<http://ciec-ccie.parl.gc.ca/EN/ReportsAndPublications/Pages/INPERules.aspx>
it says nothing concerning how you interpret and apply subsection 34(2).

Democracy Watch’s opinion, based on standard statutory interpretation rules, is that all a former public office holder has to do to violate this subsection is use confidential information as the basis for giving advice – they do not have to share the confidential information with anyone, they just have to use it as a basis for the advice they give.

For effective enforcement, your assumption must be that the former public office holder is using the confidential information they learned while in office, as they cannot un-learn what they learned. If you do not make this assumption, you are setting up a scheme whereby it could never be proven that the office holder used the information, given that what is happening in someone’s mind is essentially unknowable.

This assumption is the basis of all effective enforcement of conflict of interest and ethics rules – no one can know what is going on in someone’s mind when they make a decision or give advice to others, and so people must be prohibited in every case from participating in discussions and decisions when they have a private interest, and must be prohibited from giving advice to others when they know inside information that could give others there an advantage. Their claim that they didn’t think about their private interest when making a decision, or didn’t use what they know when giving advice, can never be believed because it can never be proven either way, and so to protect the public interest they must be prohibited from participating in the decision-making process, and from being in a position to give the advice.

This means a former public office holder must be prohibited from being an advisor to any client, business associate or employer that has an interest in federal government operations and/or decisions, including decisions made jointly with provincial, territorial or municipal governments or with other entities.

The prohibition in subsection 34(2) of the *Act* on giving advice using confidential information has no time limit, as stated on page 18 of *The Sullivan Report* of October 17, 2012 by former Ethics Commissioner Dawson:

“Obligations set out in sections 33 and 34 apply for an indefinite period of time...”

The real danger that subsection 34(2) is aimed at preventing is the sharing of secret, inside information that will give someone or some entity an advantage over others in influencing the government and winning the decision they want. After all the key top decision-makers and other key top officials (who deal with the most confidential information) whom the former public office holder knows have left office, this danger is reduced significantly.

However, if the decision-making process on an issue drags on for several years, or government officials that the former public office holder knows are involved in a decision-making process about which the former public office holder is advising, the prohibition on being an advisor on that issue should continue whenever the Ethics Commissioner determines that there is key confidential information that could still be shared by the former public office holder.

c) Proper interpretation of section 33 prohibition on taking improper advantage of

Section 33 of the *Act* prohibits former public office holders from *ever* acting “in such a manner as to take improper advantage of his or her previous public office.”

Despite being Ethics Commissioner from July 2007 to January 2018, Mary Dawson failed to issue a guideline or interpretation bulletin defining exactly what this key rule means. And while you posted a guideline on post-employment rules in the *Act* on your website on January 10, 2019 at:

<http://ciec-ccie.parl.gc.ca/EN/ReportsAndPublications/Pages/INPERules.aspx>

it says nothing concerning how you interpret and apply section 33.

However, in her March 6, 2013 report on the post-employment actions of former Cabinet minister and MP Jay Hill, who left public office on August 6, 2010, former Ethics Commissioner Mary Dawson found that Mr. Hill violated section 33 by making made phone calls to three Cabinet ministers in May and June 2011 to assist his spouse who, at the time, was a lobbyist for a company that was subject to decisions and actions by the ministers Mr. Hill called. He also met with officials of the company to help them prepare for meeting with federal government officials, including one of the ministers he had called. For details, see pages 6-15 of the report at:

<http://ciec-ccie.parl.gc.ca/Documents/English/Public%20Reports/Examination%20Reports/The%20Hill%20Report.pdf>.

Mr. Hill claimed (on pages 16-17):

- (i) he made the calls not to assist his spouse but instead to assist the Cabinet ministers, solely by providing information, and;
- (ii) he didn't reach the ministers based on his past relationship to them;

Ethics Commissioner Dawson concluded (on pages 19-21):

That the meaning of the “Taking improper advantage” phrase:

“must be determined in accordance with an objective standard. I must consider whether a reasonable person, aware of all the circumstances, would view the conduct as inappropriate and falling short of the standard of ethical conduct that could reasonably be expected of the particular former public office holder in question”;

and

“Central to many of the provisions of the Act is the prohibition on furthering private interests”;

and

Mr. Hill made the calls to assist his spouse, and “would have expected the three ministers to take his calls because of the relationships he had established with them while in public office and because of his high profile role in cabinet as Leader of the Government in the House of Commons”;

and, therefore

“Mr. Hill took advantage of his former status to facilitate access to the ministers for his spouse and her employer and client”;

because

“I am of the view that a reasonable person would find that Mr. Hill’s conduct was, in the circumstances, inappropriate and fell short of the standard of ethical conduct that could reasonably be expected of him. I find that Mr. Hill acted in such a manner as to take improper advantage of his previous public office as a cabinet minister, including most recently as Leader of the Government in the House of Commons and therefore that he contravened section 33 of the Act.”

2. Request for inquiry into Kevin Lynch, current Chair of SNC-Lavalin and former Clerk of the Privy Council

Kevin Lynch was Clerk of the Privy Council from March 2006 to July 2009. He has been a board member of SNC-Lavalin since May 2017, as you can see in this company news release:

<https://www.snclavalin.com/en/media/press-releases/2017/04-05-2017>

and he became Vice-Chair soon after, as you can see in this announcement from the company:

<https://www.snclavalin.com/en/media/press-releases/2017/03-08-2017>

and he became Chair of the Board of Directors in December 2017, as you can see in this company news release:

<https://www.snclavalin.com/en/media/press-releases/2017/19-12-2017>.

You can see the list and profiles of board members of SNC-Lavalin at:

<https://www.snclavalin.com/en/about/leadership-and-governance/board-of-directors>.

On October 15, 2019, Mr. Lynch called then-Clerk of the Privy Council Michael Wernick concerning the decision by the Director of Public Prosecutions to prosecute SNC-Lavalin. Mr. Wernick worked at the Privy Council from 2003 until May 2006 (and so overlapped with Mr. Lynch's tenure there), and then as Deputy Minister at the then-Department of Indian and Northern Affairs until July 2014 (where he would have continued to have interactions with Mr. Lynch until July 2009), before he returned to the Privy Council Office where he served as Deputy Clerk under his predecessor Janice Charette until he became Clerk in January 2016.

You can see reference to the Kevin Lynch's phone call to Mr. Wernick in his testimony before the House of Commons Standing Committee on Justice on March 6, 2019, on page 14-15 of the Hansard of his testimony, at: <https://www.ourcommons.ca/Content/Committee/421/JUST/Evidence/EV10364546/JUSTEV138-E.PDF>

and you can see the *Globe and Mail's* article about his testimony and the phone call at:

<https://www.theglobeandmail.com/politics/article-snc-lavalin-chair-kevin-lynch-sought-michael-wernicks-help-to-secure/>

and the *Hill Times* article about the call at:

<https://www.hilltimes.com/2019/03/12/snc-lavalin-board-chair-a-former-top-bureaucrat-may-have-run-afoul-of-federal-lobbying-rules/191972>.

As well, Mr. Lynch has been listed as a lobbyist as Vice-Chair of the Bank of Montreal since spring 2010, less than one year after he left the position of Clerk of the Privy Council. You can see the first registration in the federal Registry of Lobbyists for the Bank of Montreal dated April 21, 2010 that mentions Mr. Lynch at:

<https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/vwRg?cno=14868®Id=623287>.

In both these roles, Mr. Lynch it is reasonable to conclude that Mr. Lynch must be giving advice, and in giving that advice that he is using secret information he learned while he was Clerk of the Privy Council. He cannot unlearn information he learned about Mr. Wernick and other government officials while he was Clerk, information that the public does not have access to, and so his advice must be based on that secret information. Based on this, and the proper interpretation of subsection 34(2) of the *Conflict of Interest Act* summarized above in subsection 1(b), Democracy Watch's opinion is that there is enough evidence to form a reasonable belief that Mr. Lynch has violated subsection 34(2) of the *Act*.

As well, Mr. Lynch's call to Mr. Wernick is a very similar situation to Mr. Hill's calls to Cabinet ministers that Ethics Commissioner Dawson concluded violated section 33 of the *Act* (taking improper advantage of one's former office) Mr. Lynch would have expected Mr. Wernick to take his call given he knew him from his time in public office and given Mr. Lynch's former top-level role as Clerk of the Privy Council (he was essentially Mr. Wernick's former boss), and he was advancing the private interests of SNC-Lavalin by making the call and, therefore,

a reasonable person would find that Mr. Lynch's conduct was, in the circumstances, inappropriate and fell short of the standard of ethical conduct that could reasonably be expected of him.

In addition, by violating subsection 34(2), Mr. Lynch by definition also violates section 33. Based on this and the proper interpretation of section 33 of the *Conflict of Interest Act* set out above in subsection 1(c), Democracy Watch's opinion is that there is enough evidence to form a reasonable belief that Mr. Lynch has violated section 33 of the *Act*.

3. Request for inquiry into Eric D. Siegel, current board member of SNC-Lavalin and former President of Export Development Corporation (EDC)

Eric D. Siegel worked at the Export Development Corporation (EDC) from 1979 to December 2010, and was appointed in December 2006 as President and CEO of the EDC by the federal Cabinet under section 8 of the *Export Development Act* (R.S.C., 1985, c. E-20), which can be seen at:

<https://laws.justice.gc.ca/eng/acts/E-20/page-1.html#h-5>.

which means he is covered by the definition of "public office holder"

Mr. Siegel has been a board member of SNC-Lavalin since January 1, 2012, as you can see on this Bloomberg webpage:

<https://www.bloomberg.com/research/stocks/people/person.asp?personId=26167862&privcapId=875120>

and confirmed by the "Chairman's Commentary" section in SNC-Lavalin's 2011 Annual Report at:

<https://www.snclavalin.com/~media/Files/S/SNC-Lavalin/investor-briefcase/en/2011/2011-annual-chairmans-commentary-302.pdf>

Mr. Siegel is still a board member of SNC-Lavalin, as well as being a board member of Citibank Canada, according to his profile on this SNC-Lavalin webpage:

<https://www.snclavalin.com/en/about/leadership-and-governance/board-of-directors#eric-d-siegel>

According to this CBC article, EDC has funded 26 SNC-Lavalin projects since 1995:

<https://www.cbc.ca/news/investigates/former-snc-lavalin-ceo-rejects-allegations-firm-paid-bribes-with-edc-money-1.5085710>

and this article:

<https://www.cbc.ca/news/business/snc-lavalin-export-development-canada-loans-1.5079922>

including projects while Mr. Siegel was President and CEO of EDC, such as on July 2, 2009 for the U.S. Astoria Energy II Power Project, as set out in this chart on EDC's website:

<https://www.edc.ca/en/about-us/corporate/disclosure/reporting-transactions/signed-category-b.html>.

In 2013 and 2014, after Mr. Siegel became a board member of SNC-Lavalin, EDC provided two financings that benefited SNC-Lavalin, according to this Globe and Mail article:

<https://www.theglobeandmail.com/canada/article-export-development-canada-reviewing-insurance-policy-in-wake-of-snc/>

and, while EDC suspended support for SNC-Lavalin in late 2014 until spring 2017. On July 13, 2017 it announced new export financing for SNC-Lavalin, as summarized on this webpage:

<https://www.globaltradealert.org/intervention/69867/trade-finance/canada-edc-financing-for-snc-lavalin-group-inc-salalah-methanol-company-llc-sfz-project>

which is one of at least three cases of EDC funding SNC-Lavalin since 2017.

The other two, on May 15, 2017, and on March 21, 2018, are listed in the chart on this EDC webpage:

<https://www19.edc.ca/edcsecure/disclosure/DisclosureView.aspx?lang=EN>

I have not been able to confirm exactly how long Mr. Siegel has been a board member of Citibank Canada. Citibank Canada has been registered to lobby the federal government since at least September 2005 with a consultant lobbyist representing the company:

<https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/vwRg?cno=5845®Id=482836>

and the company has continued to employ consultant lobbyists since then, as well as having a in-house corporation registration since May 2006:

<https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/vwRg?cno=13020®Id=499368>

which was updated and continued in November 2007 and since then:

<https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/vwRg?cno=16219®Id=509718#regStart>.

EDC has provided funding to Citibank at least twice in the past few years, in March 2015 to the Government of Barbados as insurance on financing provided by Citibank and other lenders, as detailed in this resolution of the Barbados Parliament:

https://www.barbadosparliament.com/uploads/bill_resolution/400611e2813791c84e75a0b5c3d32419.pdf

and on October 17, 2018, as set out in the chart on this EDC webpage:

<https://www19.edc.ca/edcsecure/disclosure/DisclosureView.aspx?lang=EN>.

In both of his roles at SNC-Lavalin and Citibank Canada, it is reasonable to conclude that Mr. Siegel must be giving advice, and in giving that advice that he is using secret information he learned while he was President and CEO of EDC. He cannot unlearn information he learned about EDC, information that the public does not have access to, and so his advice must be based on that secret information. Based on this, and the proper interpretation of subsection 34(2) of the *Conflict of Interest Act* summarized above in subsection 1(b), Democracy

Watch's opinion is that there is enough evidence to form a reasonable belief that Mr. Siegel has violated subsection 34(2) of the *Act*.

As well, if Mr. Siegel has contacted EDC or other government officials he knows on behalf of SNC-Lavalin or Citibank Canada, that would be a very similar situation to Mr. Hill's calls to Cabinet ministers that Ethics Commissioner Dawson concluded violated section 33 of the *Act* (taking improper advantage of one's former office) Mr. Siegel would expect the EDC and other government officials to take his call given he knew them from his time in public office and given his former top-level role as President and CEO of EDC, and he would be advancing the private interests of SNC-Lavalin or Citibank through the communications and, therefore, a reasonable person would find that Mr. Siegel's conduct was, in the circumstances, inappropriate and fell short of the standard of ethical conduct that could reasonably be expected of him.

In any case, whether Mr. Siegel communicated with EDC or government officials he knows on behalf of SNC-Lavalin or Citibank (which you should investigate to determine), by violating subsection 34(2), Mr. Siegel by definition also violates section 33. Based on this and the proper interpretation of section 33 of the *Conflict of Interest Act* as set out above in subsection 1(c), Democracy Watch's opinion is that there is enough evidence to form a reasonable belief that Mr. Siegel has violated section 33 of the *Act*.

4. Request that you recuse yourself from conducting inquiry and ruling on the above matter because you were appointed by the Trudeau Cabinet, and also because of your statements showing bias against effective enforcement

On January 30, 2018, Democracy Watch sent you a letter that can be seen at: <https://democracywatch.ca/wp-content/uploads/LettToEthicsCommReApptBiasComplaintsJan302018.pdf> 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 secretive process that was controlled by the Prime Minister's Office (PMO) and Cabinet and involved officials from the PMO, Privy Council Office and the Treasury Board.

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 this Cabinet-controlled process. Your

appointment was approved in the House of Commons only on division, as several MPs voted against your appointment.

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*.

For the above reasons, Democracy Watch requests that you recuse yourself from investigating and ruling on this matter, and that you refer the investigation and ruling to someone qualified and independent from all federal political parties, such as a provincial ethics commissioner who has no ties to any federal political party or the provincial wing of any federal political party.

A similar investigation delegation process has been used at the provincial level by ethics commissioners. For example, in 2016 Marguerite Trussler, Alberta's Ethics Commissioner, recused herself from investigating and ruling on a complaint because she was friends with two people involved in the matter. You can see details about this situation at:

<http://calgaryherald.com/news/politics/albertas-ethics-commissioner-cites-conflict-of-interest-removes-herself-from-review-of-tobacco-litigation-contract>.

5. Request that you ensure this complaint will be investigated and ruled on, given the commitment you made before the House Ethics Committee in December 2017

During your testimony referred to above before the House of Commons Standing Committee on Access, Privacy and Ethics on December 12, 2017, you stated the following (at page 11):

“The common point that comes to mind is accessibility, the need for a truly accessible office to make sure that people who want to make a complaint know that the office exists and know the parameters of filing a complaint. That’s what the Office of the Public Sector Integrity Commissioner did. It promoted the office and the parameters of what it regulates and what it does. This is one of the things I would like to do.

The philosophy focuses on accessibility, giving full force to the act and providing every opportunity for the spirit of this legislation to be upheld. There are not many complaints. At her last appearance in 2014, Commissioner Dawson said she was surprised to find that only one-quarter to one-third of the files she was studying were complaints. The other files were about issues she had decided to investigate on her own.

Complaints are a way of self-regulation. A truly accessible office is another way of ensuring that MPs and public office holders remain honest, as a complaint might be filed at any time.”

Democracy Watch’s position is that these statements give rise to a legitimate expectation that you will ensure that this, and all, complaints filed by Democracy Watch will be properly reviewed, and that a public ruling will be issued for each complaint.

Please contact Democracy Watch at the address above if you need any more information to delegate an inquiry into the activities of Mr. Lynch and Mr. Siegel.

Democracy Watch looks forward to hearing from you soon concerning whether you will recuse yourself, and will ensure their activities are investigated and ruled on in an impartial, legally correct manner, and that the high ethical and legal standards established for government officials by the Supreme Court of Canada are upheld.

Sincerely,



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