



democracy Watch
émocratie en surveillance

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

Email: ciec-ccie@parl.gc.ca

October 25, 2017

RE:

- (a) Request that you recuse yourself from investigating and ruling on the matters addressed in this letter because you have made past decisions concerning Finance Minister Bill Morneau that relate to the violations of the *Conflict of Interest Act* alleged in this letter, and in another complaint;**
- (b) Request that you recuse yourself from ruling on the matters addressed in this letter also because you received 6-month possibly renewable contract worth approximately \$100,000 from the Trudeau Cabinet in June, and;**
- (c) Request for ruling by independent person on whether Finance Minister Bill Morneau violated section 25(1) of the *Conflict of Interest Act* by failing to issue a public declaration within 60 days after recusing himself from decisions because of a conflict of interest**

Dear Commissioner Dawson:

I am writing concerning your role in enforcement of the *Conflict of Interest Act* (“COIA”) generally, and also specifically concerning the actions of Finance Minister Bill Morneau.

(a) Request that you recuse yourself from investigating and ruling on the matters addressed in this letter because you have made past decisions concerning Finance Minister Bill Morneau that relate to the violations of the *Conflict of Interest Act* alleged in this letter, and in another complaint

You have made decisions that relate to the allegations of violations of the *Conflict of Interest Act* (“COIA”) by Minister Morneau set out in section (c) of this letter. You

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decided that Minister Morneau did not need to sell the shares he owned in his family's company, Morneau Shepell, or set up a blind trust. Subsection 27(1) of the *COIA* requires ministers, their staff, Cabinet appointees (including Deputy Ministers) and other senior government officials to either sell investments they control (such as shares in a family company) or place them in a blind trust. The section 20 definition of "controlled assets" in the *COIA* is clearly broad enough to cover the investment scheme that Morneau set up for his Morneau Shepell shares.

Instead of requiring Minister Morneau to sell the shares or put them in a blind trust, you allowed him to set up what you call a conflict of interest "screen" that, you claim, prevents him from taking part in discussions and decisions if he has a conflict of interest. It is important to note that you created the "screens" as an enforcement tool – there is no provision in the *COIA* that mandates, or even mentions, the use of screens by you or anyone else.

As you know, Democracy Watch has filed a court case challenging the legality of your use of screens for various public office holder, particularly your claim that the screens mean that public office holders do not have to issue the public declaration required under subsection 25(1) of the *COIA* each time they recuse themselves from discussions or decisions because of a conflict of interest.

The complaint Democracy Watch is filing today relates directly to your past decisions as it alleges that Minister Morneau has failed to issue the required public declaration under subsection 25(1) of the *COIA* when he has recused himself from discussions or decisions because of a conflict of interest.

Further, you have received another complaint from NDP MP Nathan Cullen alleging that Minister Morneau's participation in the development of Bill C-27 violated sections 4 and 6 of the *COIA*, given that the bill, if enacted, would help Minister Morneau's family company. A summary of this complaint, and the complaint letter, can be seen at: <http://www.ndp.ca/news/morneau-could-make-millions-profit-pension-bill-ndp>

It has also been revealed that Minister Morneau advocated for the changes that the bill makes when he was still working for his family's company.

Given the above, and given that if you found Minister Morneau guilty of violating sections 4 and 6 or subsection 25(1) of the *COIA* it would show clearly that your decision not to require Minister Morneau to sell his shares was the wrong decision, and that you're your screens don't work, and also that you are not effectively ensuring compliance with the *COIA*, there is a reasonable apprehension that you are biased:

1. in favour of your decision not to require Minister Morneau to set up a blind trust or sell his shares;
2. in favour of your "screens" and Minister Morneau's use of a screen;
3. in favour of finding that Minister Morneau properly followed his screen and did not violate subsection 25(1) of the *COIA*, and;
4. in favour of finding that Minister Morneau was not in violation of sections 4 and 6 of the *COIA* when he participated in developing Bill C-27.

As the famous precedent-setting British court ruling in *R. v. Sussex Justices* by Lord Chief Justice Hewart said with regard to justice, it should “not only be done, but should manifestly and undoubtedly be seen to be done. In that British criminal law case, the clerk for the justices was a member of a law firm that was acting for plaintiffs in a civil lawsuit against the defendant (who was being prosecuted for dangerous driving that caused an accident). The clerk left the court with the justices after the court hearing. Even though the justices filed affidavits that they did not consult the clerk, Justice Hewart articulated that the question was not “what actually was done but what *might appear* to be done. Nothing is to be done which creates *even a suspicion* that there has been an improper interference with the course of justice.”

According to media reports, in addition to the past decisions you have made concerning Minister Morneau that cause a reasonable apprehension of bias, you are also meeting with him behind closed doors today concerning him selling his shares in his family’s company, and setting up a blind trust for his other assets. That meeting, and your conflicting roles as adviser, investigator, and judge of Minister Morneau’s past and present actions, also cause a reasonable apprehension of bias.

The test for a reasonable apprehension of bias was set out by the Supreme Court of Canada in *Committee for Justice and Liberty v. Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at p 394:

“...what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

That test has been affirmed by the Supreme Court of Canada and British Columbia courts in numerous subsequent decisions, including *Wewaykum Indian Band v. Canada*, 2003 SCC 45; *R v. S (RD)*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484.

Based on these rulings, and in addition to the reasons set out below in section (b), you must therefore also recuse yourself from ruling on the matters addressed in this letter.

To ensure the integrity that is legally required in the investigation and ruling on the complaints, you must refer the complaints to someone who is fully independent of yourself, and independent, of the Cabinet, and independent of all political parties.

(b) Recusal because you received six-month contract from the Trudeau Cabinet (and may be reappointed)

Your second six-month interim term as Ethics Commissioner ended in early July but it was renewed for a third six-month, renewable term by the Trudeau Cabinet in mid-June. Under subsection 82(2) of the *Parliament of Canada Act*, the Trudeau Cabinet (“Governor in Council”) may have full discretion to reappoint you for as many

consecutive six-month terms as it wants (I qualify this statement as Democracy Watch's position is that the legally correct interpretation of subsection 82(2) is that any one person is only allowed to serve one six-month term as interim Conflict of Interest and Ethics Commissioner).

As you are aware, Democracy Watch has challenged the federal Cabinet's decision to give you that contract in Federal Court.

In any case, because the Trudeau Cabinet appointed you for six months, for a salary worth approximately \$100,000, and you are now essentially serving at the pleasure of the Cabinet, you are therefore in a financial conflict of interest currently concerning making rulings that affect Prime Minister Trudeau and members of his Cabinet or Liberal Party caucus.

And Democracy Watch's position is that you are in a conflict of interest when ruling on any matters that affect any MP or former MP, as the Liberals also have an interest in having opposition party MPs found guilty of violating the *COIA* or the *Conflict of Interest Code for Members of the House of Commons* ("MP Code") as those rulings would hurt the opposition parties' profile and standing with the public.

As well, section 10 of the *COIA* states:

"Offers of outside employment

10. No public office holder shall allow himself or herself to be influenced in the exercise of an official power, duty or function by plans for, or offers of, outside employment."

Democracy Watch's position is that you are in an analogous situation – only it is your short-term appointment for six months and possible continuation as Commissioner for another six-month term that creates the conflict of interest.

Clause 3(b) of the *COIA* states:

"Purpose

...

3.(b) 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;

To fulfill this main purpose of the *COIA*, and as a result of your conflict of interest, and what in Democracy Watch's opinion your current illegal position, Democracy Watch's position is that you there is a reasonable apprehension that you are biased in favour of the Trudeau Cabinet.

I set out the Supreme Court of Canada rulings on reasonable apprehension of bias at the end of section (a) above. Based on these rulings, and in addition to the reasons set out above in section (a), you must therefore also recuse yourself from ruling on the matters addressed in this letter, and any other matters concerning the *COIA* and the *MP Code*, especially concerning the Trudeau Cabinet, because of the terms of your current renewable contract handed to you by the Trudeau Cabinet.

To ensure the integrity that is legally required in the investigation and ruling on the complaints, you must refer the complaints to someone who is fully independent of yourself, and independent, of the Cabinet, and independent of all political parties.

(c) Request for ruling by independent person on whether Finance Minister Bill Morneau violated section 25(1) of the *Conflict of Interest Act* by failing to issue a public declaration within 60 days after recusing himself from decisions because of a conflict of interest

As mentioned above in section (a), you established a conflict of interest screen for Minister Morneau instead of requiring him to sell his shares in his family's company or to set up a blind trust. The terms of the screen are set out at:

<http://ciec-ccie.parl.gc.ca/EN/PublicRegistries/Pages/Declaration.aspx?DeclarationID=23d802ea-70c4-e511-aefb-002655368060>

As mentioned above in section (a), and as you know, Democracy Watch has filed a court case challenging the legality of your use of screens for various public office holder, particularly your claim that the screens mean that public office holders do not have to issue the public declaration required under subsection 25(1) of the *COIA* each time they recuse themselves from discussions or decisions because of a conflict of interest.

Minister Morneau's screen states that it:

“has been established and will be administered by my Chief of Staff to ensure that I will abstain from any participation in any discussions or decision-making processes and any communication with government officials in relation to any matter or issue forming part of the subject matter of the conflict of interest screen.”

Even though you believe that the screen means public office holders do not have to issue a public declaration every time they abstain from participation in discussions or decisions in which they have a conflict of interest, the screen you established for Minister Morneau (and many other public office holders) states:

“In the event that any issue or matter subject to the conflict of interest screen is not caught by that screen and comes before me, I undertake to recuse myself from that issue or matter as required by Section 21 of the Conflict of Interest Act and inform the Conflict of Interest and Ethics Commissioner.”

Minister Morneau has stated to the media that “at least two times” he has been taken out of meetings that were in progress because there were discussions of matters about which he had a conflict of interest. You can see this quotation in the ninth paragraph of the following article:

<https://www.thestar.com/news/canada/2017/10/24/bill-morneau-dismisses-objections-to-his-participation-in-bombardier-loan-discussions.html>

Minister Morneau was, therefore, not prevented from attending the meeting, and the matter was not “caught” by the screen. It is clear that he recused himself from the meeting. He did exactly what is described in section 21 of the *COIA*:

“Recusal

Duty to recuse

21. A public office holder shall recuse himself or herself from any discussion, decision, debate or vote on any matter in respect of which he or she would be in a conflict of interest.”

Therefore, Minister Morneau was required to issue a public declaration under subsection 25(1) of the *COIA* for these two occasions that he recused himself from the discussion at those meetings, and any other time he similarly recused himself:

“Public Declaration

Public declaration — recusal

25 (1) If a reporting public office holder has recused himself or herself to avoid a conflict of interest, the reporting public office holder shall, within 60 days after the day on which the recusal took place, make a public declaration of the recusal that provides sufficient detail to identify the conflict of interest that was avoided.”

There are no public declarations of recusals in Minister Morneau’s filings in the Public Registry at:

<http://ciec-ccie.parl.gc.ca/EN/PublicRegistries/Pages/Client.aspx#k=bfce2194-fe77-e511-bec6-002655368060>

Therefore, Minister Morneau violated subsection 25(1) of the *COIA*.

The primary purpose of the *Conflict of Interest Act* (“*COIA*”) 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 *COIA* should be interpreted by the Conflict of Interest and Ethics Commissioner (and any substitute decision-maker, given that you should recuse yourself from ruling on such matters) 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*), 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*).

In many cases since 2007, most recently concerning fundraising events involving Cabinet ministers and/or their staff, you have not been interpreting or enforcing the *COIA* or the *MP Code* with its main purpose in mind, nor have you been upholding the Supreme Court's standard.

(d) Conclusion

Democracy Watch's position is that the evidence set out above in section (c) presents reasonable grounds to believe that Finance Minister Bill Morneau violated subsection 25(1) of the *Conflict of Interest Act*. An inquiry is therefore needed, and is required under the *COIA*, to determine whether Minister Morneau violated the *COIA*.

Democracy Watch's position, as set out in sections (a) and (b) above, is that there is a reasonable apprehension that you are biased when examining this matter, and also the matter raised in the complaint filed by MP Nathan Cullen.

We look forward to hearing back from you very soon concerning whether you will recuse yourself from investigating and ruling on these situations and delegate the matters to someone who is independent of yourself, the Trudeau Cabinet, and all political parties.

Please contact Democracy Watch at the address above if your office needs any more information concerning the matters raised above.

Given that the facts of these situations are mostly on the public record already, and are not difficult to investigate and confirm in any case, we hopefully look forward to seeing rulings very soon concerning everyone involved in this situation.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Duff Conacher', written in a cursive style.

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