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émocratie en surveillance

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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](mailto:ciec-ccie@parl.gc.ca)

April 17, 2019

**RE:**

- 1. Request for inquiry into Clerk of the Privy Council Michael Wernick giving preferential treatment to Kevin Lynch, current Chair of SNC-Lavalin, and Mr. Wernick's former boss**
- 2. 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**
- 3. 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 Clerk of the Privy Council Michael Wernick giving preferential treatment to Kevin Lynch, current Chair of SNC-Lavalin, and Mr. Wernick's former boss.

Democracy Watch's position is that, by taking the phone call from Mr. Lynch, Mr. Wernick's former boss, on October 15, 2019, Mr. Wernick violated section 7 of the *Conflict of Interest Act* by giving preferential treatment to Mr. Lynch.

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. Request for inquiry into Clerk of the Privy Council Michael Wernick giving preferential treatment to Kevin Lynch, current Chair of SNC-Lavalin, and Mr. Wernick's former boss**

The primary purpose of the *Conflict of Interest 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).

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."

Section 7 of the *Act* sets out 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 or give access to themselves or to others whom the federal government has access to, to 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, section 7 means that Cabinet ministers and their staff, and senior government officials such as Mr. Wernick, can't meet or communicate with, or help or give access to themselves or to others in the federal government, anyone or any business or organization they have a past or current relationship with more than they give those things to anyone else or to any other organization.

In former Ethics Commissioner Mary Dawson's 2012 ruling on Conservative Minister Paradis giving preferential treatment to former Conservative MP Rahim Jaffer, Commissioner Dawson wrote (on page 21), that "preferential treatment" means:

"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.""

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>.

Former Ethics Commissioner Dawson ruled in the Paradis ruling cited above (at 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 Mr. Wernick taking the call from Mr. Lynch on October 15, 2019, the ruling should be:

"Michael Wernick took the phone call from Mr. Lynch because Mr. Lynch was his former boss. This preferential treatment was therefore based on the identity of Mr. Lynch."

Being a former boss of Mr. Wernick is analogous to being a former caucus colleague -- they are both identifiers of a person based on roles and relationships.

Therefore, unless Mr. Wernick can show that he takes calls from average Canadians and other business executives when they have a concern about a government decision as readily as he took Mr. Lynch's call, taking Mr. Lynch's call amounts to a violation of section 7 of the *Act* because it was "treatment more favourable than might be accorded to anyone else in similar circumstances."

**2. 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>.

### **3. 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 phone call between Mr. Wernick and Mr. Lynch. Given that much of the information concerning the phone call has already been made public, we expect to receive a ruling very soon.

Democracy Watch looks forward to hearing from you soon concerning whether you will recuse yourself, and will ensure this situation is 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