



democracy Watch
émocratie en surveillance

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Office of the Public Sector Integrity Commissioner
ATTN: Joe Friday, Integrity Commissioner
60 Queen Street, 7th Floor
Ottawa, Ontario
K1P 5Y7

April 15, 2019

RE:

- 1. Request for investigation into whether Martine Richard, Senior General Counsel for the Conflict of Interest and Ethics Commissioner, has recused herself from all investigations in which she has an apparent conflict of interest, and ruling on whether she can remain in her position, and;**
- 2. Request that you recuse yourself from conducting inquiry and ruling on the above matter because you were Deputy Commissioner to Mario Dion, current Ethics Commissioner, when he was Public Sector Integrity Commissioner**

Dear Commissioner Friday:

I am writing concerning fair, impartial enforcement of the *Conflict of Interest Act* (the “Act”) and the *Conflict of Interest Code for Members of the House of Commons* (“MP Code”), specifically to request an investigation into whether Martine Richard, Senior Counsel for the Conflict of Interest and Ethics Commissioner (“Ethics Commissioner”), whose sister Jolène Richard is married to Trudeau Cabinet minister Daniel LeBlanc, has recused herself from investigations and decisions concerning the Trudeau Liberals since she began her position in fall 2013, and a ruling concerning whether she can remain in her position given her family relationship.

Democracy Watch also calls on you to delegate this investigation to a provincial ethics commissioner who has no ties to any political party, given you were

Canada’s leading democratic reform and corporate responsibility organization

Deputy Commissioner to Mario Dion, current Ethics Commissioner, when he was Public Sector Integrity Commissioner.

Please see the details of these requests set out below.

1. Request for investigation into whether Martine Richard, Senior General Counsel for the Conflict of Interest and Ethics Commissioner, has recused herself from all investigations in which she has an apparent conflict of interest, and ruling on whether she can remain in her position

(a) Martine Richard's position and family connection to a Cabinet minister

Martine Richard is Senior General Counsel for the Conflict of Interest and Ethics Commissioner, as you can see in this Government of Canada directory listing:

<https://geds-sage.gc.ca/en/GEDS?pgid=015&dn=cn%3DRichard%5C%2C+Martine%2Cou%3DCIECILS-CCIEESL%2Cou%3DCIEC-CCIE%2Co%3DGGC%2Cc%3DCA>

Ms. Richard began her position at the Ethics Commissioner office sometime in September-October 2013, as you can see announced in this newsletter from her former employer:

<https://www.pmprb-cepmb.gc.ca/view.asp?ccid=998&lang=en#1721>.

Ms. Richard heads the Investigations and Legal Services Division, as you can see in this Government of Canada directory listing:

<https://geds-sage.gc.ca/en/GEDS?pgid=014&dn=ou%3DCIECILS-CCIEESL%2C+ou%3DCIEC-CCIE%2C+o%3DGGC%2C+c%3DCA>

of the Ethics Commissioner's office. You can see the organizational chart for the office at:

<http://ciec-ccie.parl.gc.ca/EN/AboutUs/WhoWeAre/Pages/OrganizationalChart.aspx>.

Ms. Richard's sister, Jolène Richard, is married to The Hon. Dominic LeBlanc, Minister of Intergovernmental and Northern Affairs and Internal Trade, as you can see at:

<https://pm.gc.ca/eng/minister/honourable-dominic-leblanc>.

Since she began her position in 2013, this family relationship has created an ongoing appearance of a conflict of interest on the part of Ms. Richard during investigations of, and decisions concerning, situations involving both Conservative and Liberal Cabinet ministers, staff and appointees, and both Liberal MPs and opposition parties' MPs.

As a result, an investigation is required to determine whether Ms. Richard has, since she started in this position, fully recused herself from all investigations in which she had even an appearance of a conflict of interest, and whether she has ever provided preferential treatment to anyone given her conflict of interest.

As well, a ruling is required concerning whether Ms. Richard can remain in her position given her ongoing appearance of a conflict of interest in so many of the situations the Investigations and Legal Services Division addresses.

(b) Federal laws and codes that apply to this situation

The initial determination that needs to be made is whether employees in the Ethics Commissioner's office are exempt from the federal, government-wide *Values and Ethics Code for the Public Sector* ("Code") which can be seen at:

<http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25049>

and the *Policy on Conflict of Interest and Post-Employment* ("Policy") which can be seen at:

<http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25178>

and whether the Ethics Commissioner's office is exempt from the requirement to have an internal ethics code set out in section 6 of the *Public Servants Disclosure Protection Act* ("PSDPA").

I have reviewed the *Code* and *Policy* and *PSDPA*, and related statutes, and it is unclear from the schedules in the statutes whether the Ethics Commissioner's office and its employees are covered by the *PSDPA*. The office does have an internal ethics code which can be seen at:

<http://ciec->

[ccie.parl.gc.ca/Documents/English/About%20the%20Office/Values%20and%20Conduct%20Code%20-%20E.pdf](http://ciec-ccie.parl.gc.ca/Documents/English/About%20the%20Office/Values%20and%20Conduct%20Code%20-%20E.pdf)

that came into effect on the same date as the *Code* and *Policy* came into effect, and this is an indication that the office is covered by the *PSDPA*.

If the Ethics Commissioner's office and its employees are covered by the *PSDPA*, you are empowered under section 33 to investigate alleged violations of the office's internal code when provided information from a non-public servant. Democracy Watch's position is that none of conditions set out in section 24 of the *PSDPA* apply to this situation, and as a result it would be improper for you to refuse to investigate this situation.

At issue is the Ethics Commissioner office's internal code requirement (also contained in the government-wide *Code* and *Policy* (Appendix B)) that all employees to avoid even the appearance of a conflict of interest, and to resolve any conflict of interest in the public interest (for example, by not participating in a decision-making process when they have a conflict – p. 9). The code also prohibits employees from "granting preferential treatment or advantages to

family, friends or any other person or entity” (p. 10). All federal ethics rules define “family” as including family by marriage.

The primary purpose of the government-wide *Code and Policy*, and the Ethics Commissioner’s internal ethics code, is to prevent even the appearance of a conflict of interest in order to maintain and enhance public trust and confidence in the impartiality and integrity of the public service. As a result, you must interpret and apply the rules with in line with these objectives.

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*, [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).

In articulating the concept of an apparent conflict of interest, the *Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens* (“Parker Commission”) emphasized the underlying objectives of conflict of interest rules as maintaining and enhancing trust and confidence in government and the importance of public perception that government business is being conducted in an “impartial and even-handed manner” (p. 31). To this end, the Parker Commission adopted this definition of an apparent conflict of interest:

“An apparent conflict of interest exists where there is a reasonable apprehension, which reasonably well-informed persons could properly have, that a conflict of interest exists.” (p. 35)

This definition drew upon the definitions set out in Supreme Court of Canada rulings, such as *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369, and *Old St. Boniface Residents Association Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170.

In a similar vein, 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" (*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.)).

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.""

Finally, in addition to the Canadian court rulings that set high ethical standards requiring government officials to avoid even apparent conflicts of interest, the landmark 1924 British court ruling *R. v. Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256, [1923] All ER Rep 233, established the principle that "*Not only must justice be done, it must also be seen to be done.*" The court ruled that a court clerk who worked for justices who were deciding a case, and had ties to the defendant in the case, created an appearance of bias for the justices just by being their clerk. Even though the justices swore they didn't talk to the clerk about the case, the clerk's presence in the justices' office was enough for the appeal court to rule that the judges had an appearance of bias, and so their ruling was tainted.

Ms. Richard is in a similar position at the Ethics Commissioner's office as the clerk in that case – even more so because her senior position gives her power over others involved in investigations and decisions concerning violations of federal ethics rules. It may be true that she has recused herself from all investigations in which she has an appearance of a conflict of interest. However, just being at the Ethics Commissioner's office, with the possibility of contact with investigators and lawyers there, creates an appearance of bias that means justice in those investigations is not "seen to be done."

(c) Required investigation and ruling if PSDPA applies to Ms. Richard

Again, If the Ethics Commissioner's office and its employees are covered by the PSDPA, given the above laws and legal standards, and Ms. Richard's family relationship with Cabinet minister The Hon. Dominic LeBlanc since November 2015, and with a Liberal MP (also Mr. LeBlanc) since she joined the Ethics

Commissioner's office in September-October 2013, Democracy Watch's position is that Ms. Richard has been required to recuse herself during investigations of, and decisions concerning, situations involving both Conservative (pre-November 2015) and Liberal (post-November 2015) Cabinet ministers, staff and appointees, and from investigations and decisions concerning situations involving both Liberal MPs and opposition parties' MPs since she joined the office.

As a result, Democracy Watch's position is that you would be required to conduct an investigation required to determine whether Ms. Richard has, since she started in this position, fully recused herself from all investigations in which she had even an appearance of a conflict of interest, and whether she has ever provided preferential treatment to anyone given her conflict of interest.

Also given the above, Democracy Watch's position is also that you would be required by legal standards articulated by the courts to conclude that Ms. Richard cannot remain in her position. It would be simply untenable for her to continue to recuse herself from so many of the situations addressed by the Investigations and Legal Services division of the Ethics Commissioner's office. As well, her senior position gives her power over the other people in the division who would investigate situations when she recuses herself, and as a result their actions would continue to be tainted by her appearance of bias.

Again, If the Ethics Commissioner's office and its employees are covered by the *PSDPA*, you are empowered under section 33 to investigate alleged violations of the office's internal code when provided information from a non-public servant. Democracy Watch's position is that none of conditions set out in section 24 of the *PSDPA* apply to this situation, and as a result it would be improper for you to refuse to investigate this situation.

2. Request that you recuse yourself from conducting inquiry and ruling on the above matter because you were Deputy Commissioner to Mario Dion, current Ethics Commissioner, when he was Public Sector Integrity Commissioner

Ethics Commissioner Mario Dion was Integrity Commissioner while you were his Deputy Commissioner. The investigation requested in this letter would not reflect well on him or his management of his office if you concluded that Ms. Richard did not recuse herself in a situation in which she had an apparent conflict of interest or a real conflict of interest.

As a result, and given the legal standards set out above in section 1(b), you also have an appearance of bias that prohibits you from investigating this situation.

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>

For this reason, we request 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 party, especially any federal political party or the provincial wing of any federal political party.

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,

A handwritten signature in blue ink, appearing to read 'Duff Conacher', with a stylized flourish at the end.

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