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émocratie en surveillance

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Nancy Bélanger, Commissioner
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March 13, 2019

RE:

- 1. Proper interpretation and enforcement of the *Lobbying Act* and *Lobbyists' Code of Conduct*;**
- 2. Request for investigation into Kevin Lynch's lobbying for SNC-Lavalin;**
- 3. Request for investigation into SNC-Lavalin senior officer's compliance with *Lobbyists' Code of Conduct*;**
- 4. Request for investigation into all of SNC-Lavalin's lobbying, and;**
- 5. Request that you recuse yourself from conducting investigation and ruling on the above matters because you were chosen and appointed by the Trudeau Cabinet, and also because of your statements showing bias against effective enforcement**

Dear Commissioner Bélanger:

I am writing on behalf of Democracy Watch concerning enforcement of the federal *Lobbying Act* (the "*Act*") generally, and specifically requesting investigations under the *Act* and the *Lobbyists' Code of Conduct* ("*Lobbyists' Code*") into lobbying by Kevin Lynch and others on behalf of SNC-Lavalin, as well as concerning possible lack of compliance by the senior officer of SNC-Lavalin with the *Act* and the *Lobbyists' Code*.

1. Proper interpretation and enforcement of the *Lobbying Act* and *Lobbyists' Code*

As you know, the threshold in subsection 10.4(1) of the *Lobbying Act* <https://laws-lois.justice.gc.ca/eng/acts/l-12.4/page-5.html#h-17> for the Lobbying Commissioner to be required to initiate an investigation is low — all that is needed is reason to believe “that an investigation is necessary to ensure compliance with the Code or this Act...”

The wording of subsection 10.4(1) of the *Act* makes it clear that the Commissioner of Lobbying does not need evidence of a violation — that your investigations are also required when a situation simply raises questions concerning compliance with the *Lobbyists' Code* and the investigation is required to ensure compliance with the *Code* (or *Act*). In other words, you are required to investigate when you have a reasonable belief that an investigation will prevent a violation by ensuring compliance or discover a violation.

The Commissioner of Lobbying’s “Guiding principles and criteria for recommending compliance measures” document at:

<https://lobbycanada.gc.ca/eic/site/012.nsf/eng/00519.html>

states:

“It is the role of the Office of the Commissioner of Lobbying (OCL) to support this mandate by conducting administrative reviews of suspected, alleged, or known contraventions of the Act and Code, recommending appropriate enforcement measures and, where the Commissioner deems necessary, conducting formal investigations under subsection 10.4 of the Act.”

All that is needed is a suspected violation to trigger an administrative review and, it is Democracy Watch’s position, subsection 10.4(1) of the *Act* also requires an investigation of all suspected violations that raise questions concerning compliance.

The Introduction to the *Lobbyists' Code* states that its purpose is “to assure the Canadian public that when lobbying of public office holders takes place, it is done ethically and with the highest standards with a view to enhancing public confidence and trust in the integrity of government decision-making.” The Preamble to the *Code* states: “The *Lobbyists' Code of Conduct* is an important instrument for promoting public trust in the integrity of government decision making.”

The Preamble to the *Lobbyists' Code* also states:

“Public office holders, when they deal with the public and with lobbyists, are required to adhere to the standards set out for them in their own codes

of conduct. For their part, lobbyists communicating with public office holders must also abide by standards of conduct, which are set out below. These codes complement one another and together contribute to public confidence in the integrity of government decision making.”

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

As a result, the legally correct interpretation and enforcement approach that the Commissioner of Lobbying and the RCMP must take concerning the *Lobbying Act* and the *Lobbyists' Code* is that when there is even an appearance of lack of integrity in the actions of a lobbyist or someone directly connected to a lobbying organization or in the relationship between a lobbyist or a lobbying organization and public office holders, the threshold set out in subsection 10.4(1) has been crossed and an investigation "... is necessary to ensure compliance with the Code or this Act..."

As well, the results of any investigation must be that, whenever there is even an appearance of lack of integrity in the actions of a lobbyist or someone directly connected to a lobbying organization, the lobbyist or lobbying organization will be found in violation of the *Lobbyists' Code*.

In addition, the Preamble to the *Act* includes the statement that:

"it is desirable that public office holders and the public be able to know who is engaged in lobbying activities;..."

As set out in section 14 of the *Act*, it is a violation of section 5 of the *Act* for a consultant lobbyist to be paid to lobby without registering their lobbying activities, and it is a violation of section 7 of the *Act* for an employee or officer of a corporation or organization to lobby without being listed in the registry (taking into account limitations set out in those sections, as well as the definitions in section 2 of the *Act*, and the scope of application of the *Act* set out in sections 3 and 4 (especially subsection 4(2)).

The Introduction to the *Lobbyists' Code* states: "Lobbyists, when engaging in lobbying activities, shall meet the standards set out in the principles and rules of the Code."

The "Integrity" Principle of the *Lobbyists' Code* states "Integrity and Honesty: Lobbyists should conduct with integrity and honesty all relations with public office holders." The "Professionalism" Principle in the *Lobbyists' Code* states:

"Professionalism

Lobbyists should observe the highest professional and ethical standards. In particular, lobbyists should conform fully with the letter and the spirit of the Lobbyists' Code of Conduct as well as with all relevant laws, including the Lobbying Act and its regulations."

As set out in the *Annotated Lobbyists' Code of Conduct (2015)* at:

https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_01185.html#principles

the Commissioner of Lobbying enforces the Professionalism principle, and the Code as a whole, even when a lobbyist who is required to register has not registered.

Given the broad objective of disclosure of lobbying activities set out in the Preamble of the *Act*, and based on the high compliance requirement set out in the Professional principle in the Lobbyists' Code, the Commissioner should never excuse lobbyists who lobby without registering when they are required to register. Even if a lobbying activity is brief, it can be effective, especially if it is lobbying by a former government official of his former colleagues in government. As a result, the Commissioner should always hold lobbyists strictly accountable for violating the *Act* and the *Lobbyists' Code*.

2. Request for investigation into Kevin Lynch lobbying for SNC-Lavalin

According to this article published yesterday in the *Hill Times*:

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

Kevin Lynch, chair of the Board of Directors of SNC-Lavalin, was very likely paid more than just his expenses as a board member by SNC-Lavalin at the time he lobbied Michael Wernick, Clerk of the Privy Council, in October 2018.

As set out in this *Globe and Mail* article

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

Michael Wernick, Clerk of the Privy Council, testified before the House of Commons Standing Committee on Justice on Wednesday, March 6, 2019 that Mr. Lynch contacted him by phone on October 15, 2018 or October 18, 2018. You can see Mr. Wernick's testimony at page 14 of the Committee hearing transcript at:

<http://www.ourcommons.ca/Content/Committee/421/JUST/Evidence/EV10364546/JUSTEV138-E.PDF>

According to Mr. Wernick, Mr. Lynch asked him “Isn’t there anything that can be done?” concerning the prosecution of SNC-Lavalin and the Director of Public Prosecutions decision not to offer a remediation agreement to SNC-Lavalin instead of proceeding with the prosecution. This statement is clearly not just a request for information but is, instead “in respect of” the federal government’s decision-making process concerning the prosecution.

As set out in your office’s Advisory Opinion entitled “Boards of Directors: Application of the Act to outside chairpersons and members” at:

<https://lobbycanada.gc.ca/eic/site/012.nsf/eng/00129.html>

an outside chair such as Kevin Lynch is required to register as a consultant lobbyist for the corporation on whose board they sit if the corporation pays them more than their expenses as a board member and they undertake any lobbying.

As the article notes, SNC-Lavalin has not yet disclosed its compensation for board members during 2018. However, given the payments made by SNC-Lavalin to Kevin Lynch in the past in his role as a board member, it is reasonable to believe that during 2018 SNC-Lavalin paid him more than just his expenses.

The definition of lobbying by a consultant lobbyist in clause 5(1)(a) of the *Act* is:

“if the individual, for payment, on behalf of any person or organization (in this section referred to as the “client”), undertakes to

(a) communicate with a public office holder in respect of...”

various listed decision-making processes.

One of the decision-making processes listed in sub-clause 5(1)(a)(iv) is:

“the development or amendment of any policy or program of the Government of Canada...”

In SNC-Lavalin’s three registrations in the Registry of Lobbyists during 2018 from December 14, 2017 to July 12, 2018:

<https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/vwRg?cno=4995®Id=875502>

and from July 12, 2018 to November 20, 2018:

<https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/vwRg?cno=4995®Id=880850>

and from November 20, 2018 on:

<https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/vwRg?cno=4995®Id=884560>

the company discloses as one of its lobbying “Subject Matter Details” under the heading “Policies or Program”:

“The introduction of Deferred Prosecution Agreement (DPA) legislation/regulation/program or policies.”

As well, as was reported in the initial *Globe and Mail* article on Feb. 7, 2019:

<https://www.theglobeandmail.com/politics/article-pmo-pressed-justice-minister-to-abandon-prosecution-of-snc-lavalin/>

several of SNC-Lavalin's monthly communications reports in 2018 filed in the Registry of Lobbyists are about "Justice and Law Enforcement" – including this one on September 18, 2018 in which Michael Wernick was lobbied about the prosecution of SNC-Lavalin:

<https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/cmmLgPblcVw?comlogId=436088>

as summarized in this March 8, 2019 *Globe and Mail* article concerning a document Mr. Wernick disclosed to the Justice Committee on March 6, 2019: <https://www.theglobeandmail.com/politics/article-wernick-raised-prospect-of-taking-public-interest-argument-to/>

Given SNC-Lavalin registered its lobbying about the prosecution as part of its lobbying on "Policies and Program" matters, clearly the Chair of its Board Kevin Lynch should have also registered his lobbying of Mr. Wernick – if he was paid by SNC-Lavalin more than his expenses in 2018.

A search of the Registry for "Kevin Lynch" turns up only his registrations as Vice-Chair of Bank of Montreal, a senior executive position:

<https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/vwRg?cno=14868®Id=886609>

which is described on the bank's website at:

<https://www.bmo.com/home/about/banking/corporate-information/executive-bios/kevin-lynch>

As a result of the above, and the requirements and interpretation and enforcement standards set out in section 1 above, there is clearly reason to believe that an investigation of Mr. Lynch's lobbying "... is necessary to ensure compliance" with the *Lobbying Act* and the *Lobbyists' Code* – which is the threshold in subsection 10.4(1) of the *Act* for initiating an investigation.

For these reasons, Democracy Watch requests that you ensure an independent investigation of Kevin Lynch's lobbying for SNC-Lavalin, not only his phone call to Michael Wernick but also any communications he may have had "in respect of" the decision-making of any public office holder since he became a board member and Vice-Chair of SNC-Lavalin on May 3, 2017, paid for more than his expenses:

<http://www.snclavalin.com/en/news/2017/snc-lavalin-announces-results-vote-election-directors>

Also for the above reasons, and the requirements and interpretation and enforcement standards set out in section 1 above, and also because Mr. Lynch and Mr. Wernick were formerly colleagues in the federal government, if the conclusion is that Mr. Lynch was required to register his lobbying for SNC-Lavalin, Democracy Watch requests that the matter not only be referred to the RCMP for consideration for prosecution for violating the *Act* but also that Mr. Lynch be found guilty of violating the *Lobbyists' Code* with a public report issued under subsection 10.5(1) of the *Act*.

3. Request for investigation into SNC-Lavalin senior officer's compliance with *Lobbyists' Code*

The Introduction to the *Lobbyists' Code* states: "Lobbyists, when engaging in lobbying activities, shall meet the standards set out in the principles and rules of the Code."

The "Integrity" Principle of the *Lobbyists' Code* states "Integrity and Honesty: Lobbyists should conduct with integrity and honesty all relations with public office holders." The "Professionalism" Principle in the *Lobbyists' Code* states:

"Professionalism

Lobbyists should observe the highest professional and ethical standards. In particular, lobbyists should conform fully with the letter and the spirit of the Lobbyists' Code of Conduct as well as with all relevant laws, including the Lobbying Act and its regulations."

These principles apply to anyone who is required to register .

These principles also apply to any registered lobbyist who is the senior officer of a corporation or organization registered to lobby the government. Under section 7 of the *Lobbying Act*, the senior officer of any corporation or organization is responsible for the compliance of everyone in the organization with the registration requirements under the *Act*. By extension, it is reasonable to conclude that the senior officer is also responsible for the compliance of everyone in the corporation or organization with the requirements of the *Lobbyists' Code*.

And, in fact, Rule 4 of the *Lobbyists Code* states:

"The responsible officer (the most senior paid employee) of an organization or corporation shall ensure that employees who lobby on the organization's or corporation's behalf are informed of their obligations under the *Lobbying Act* and the *Lobbyists' Code of Conduct*."

Therefore, if someone in the organization or directly connected to a corporation or organization (as a board member, employee or retired executive – whether or not they are listed in the organization's lobbying registration under the *Act*) does something that violates the *Act* or a principle or rule in the *Lobbyists' Code*, Democracy Watch's position is that the conclusion of the Commissioner of Lobbying should be that the senior officer of the corporation or organization violated the Integrity and Professionalism principles of the *Code* by allowing the person to do whatever they did.

Failing to hold a senior officer accountable for allowing a board member of a corporation or organization that is lobbying the federal government to lobby without registering (if the board member is required to register) would be contrary to the fundamental purposes of the *Act* and *Lobbyists' Code* to ensure transparent, ethical lobbying and government integrity.

The only justifiable excuse that a senior officer could have if a person in or directly connected to their corporation or organization was involved in activities that violate the *Act* or *Code* is if they could show that they did their due diligence by establishing, and taking clear, effective steps to enforce, an internal code of conduct applying to everyone in the corporation or organization that effectively prohibits everyone from doing anything that violates the *Act* or *Code*.

If the senior officer could demonstrate this due diligence, then the senior officer could be found not guilty of violating the Integrity principle, and Professionalism principle, of the *Lobbyists' Code*. The only person held accountable would then be the board member or other person who lobbied without registering.

Set out above in section 2 is detailed information concerning Kevin Lynch, Chair of the Board of SNC-Lavalin, possibly lobbying for SNC-Lavalin without registering as required by the *Act*.

As a result of the above, and the requirements and interpretation and enforcement standards set out in section 1 above, there is clearly reason to believe that an investigation of Neil Bruce, the senior officer of SNC-Lavalin, "... is necessary to ensure compliance" with the Integrity principle, and Professionalism principle, of the *Lobbyists' Code* – which is the threshold in subsection 10.4(1) of the *Act* for initiating an investigation.

For these reasons, Democracy Watch requests that you ensure an independent investigation of Mr. Bruce.

Also for the above reasons, and the requirements and interpretation and enforcement standards set out in section 1 above, if the conclusion is that Mr. Lynch was required to register his lobbying for SNC-Lavalin, and that Mr. Bruce did not undertake due diligence actions to ensure Mr. Lynch did not lobby without registering, Democracy Watch requests that that Mr. Bruce be found guilty of violating the Integrity principle, and the Professionalism principle, of the *Lobbyists' Code* with a public report issued under subsection 10.5(1) of the *Act*.

4. Request for investigation into all of SNC-Lavalin's lobbying

Set out above in section 2 is evidence of Kevin Lynch, Chair of the Board of SNC-Lavalin, possibly lobbying for SNC-Lavalin without registering.

SNC-Lavalin and its executives and employees have a past record of convictions and charges for bribery in various countries, including Canada. Bribery is an action directly related to lobbying, and is committed in secret, and is an action that undermines government integrity.

As a result:

- if the conclusion of the investigation requested above in section 2 of Kevin Lynch is that he lobbied and was required to register his lobbying for SNC-Lavalin in the Registry of Lobbying, and;
- if the conclusion of the investigation requested above in section 3 of Neil Bruce is that he did not undertake due diligence actions to ensure everyone connected to SNC-Lavalin (including Kevin Lynch) complied with the *Lobbying Act* and *Lobbyists' Code*, or;
- if either of the above two investigations reveal that anyone else connected to SNC-Lavalin lobbied without registering or was involved in any action that violated any provision in the *Act* or *Lobbyists' Code*;

then Democracy Watch's position is, also based on the requirements and interpretation and enforcement standards set out above in section 1, that there will clearly be reason to believe that a broad investigation of all of the lobbying activities of everyone connected to SNC-Lavalin "... is necessary to ensure compliance" with the *Act* and the *Lobbyists' Code* – which is the threshold in subsection 10.4(1) of the *Act* for initiating an investigation.

Such an investigation should include examining, since 2014 (to cover the shorter, five-year limitation period for prosecutions set out under subsection 14(3) of the *Act*):

- all communications between SNC-Lavalin and government departments it has registered to lobby through that five-year period through detailed audits of those communications (most of which can be found through email searches of historical email server databases);
- whether anyone lobbying for SNC-Lavalin failed to register in the Registry in violation of section 5 or section 7 of the *Act* and the Integrity principle, and Professionalism principle, in the *Lobbyists' Code*, and;
- whether anyone connected to SNC-Lavalin did any favours for or gave anything to any federal public office holder that created an apparent conflict of interest, as prohibited by rules 6-10 of the *Lobbyists' Code*.

5. Request that you recuse yourself from investigating and ruling on the above matters

On January 25, 2018, and again on April 20, 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 Commissioner of Lobbying by Prime Minister Trudeau after a process that was controlled by the Prime Minister's Office (PMO) and Cabinet and involved officials from the PMO, the Privy Council Office and the Treasury Board, including the Director of Public Appointments in the PMO and 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 4.1(1) of the *Lobbying Act* as the opposition parties made clear in public statements. 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 4.1(1) of the *Lobbying 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 25, 2018 can be seen at:

<https://democracywatch.ca/wp-content/uploads/LettToLobbyCommReApptBiasComplaintsJan252018-1.pdf>

Democracy Watch's letter to you of April 20, 2018 can be seen at:

<https://democracywatch.ca/wp-content/uploads/LettToLobbyCommReRecusal4ComplaintsApr202018-1.pdf>

As well, Democracy Watch's position is that you made statements when testifying on December 6, 2017 before the House of Commons Standing Committee on Access to Information, Privacy and Ethics, and when testifying in the Senate, concerning your nomination that show a bias toward weak and incorrect enforcement of the *Act*. While her nomination as Lobbying Commissioner was being reviewed by the House and Senate and after her appointment, Nancy Bélanger made several public statements that show bias in favour of lobbyists and public office holders, including:

- a) that you see your goal to "leave [your] mark" by increasing Canadians' "trust in those who make the decisions, that is to say public office holders";
- b) that "Canadians need to understand that lobbying is okay; it's a good thing";
- c) that you see your mandate as "collaborating" with lobbyists as "That is the only way to ensure that I have credibility";
- d) that when asked by a senator what you would do "...to combat this public cynicism about those who have privileged access to power and influence?" you said "My perspective is that lobbying is an activity that all Canadians should understand is in their best interest" and;
- e) that you have "confidence in lobbyists' willingness to work in compliance with the established rules. I will work collaboratively with lobbyists..." and that the tenth anniversary of the Office in June 2018 is an opportunity to "renew our commitment to working with lobbyists, [and] public office holders..."

Your mandate under subsection 4.2(2) of the *Lobbying Act* does include "programs to foster public awareness" – but not to foster public belief that lobbying is "a good thing" or that Canadians should "trust" public office holders. Instead, subsection 4.2(2) mandates you to foster public awareness "of the

requirements of this Act, particularly on the part of lobbyists, their clients and public office holders.”

Neither subsection 4.2(2) nor any other section in the *Act* mentions that your mandate, duties or functions are to “work collaboratively with lobbyists.” Your role is therefore clearly focused on enforcement of the *Act*, and you have quasi-judicial powers of enforcement.

Therefore, your statement that you have “confidence in lobbyists’ willingness to work in compliance with the established rules” creates a reasonable apprehension of bias against effective enforcement of the *Act*. You have no basis for such confidence – no one can know in advance of examining any situation that the lobbyists involved are willing to comply with the rules.

For the above reasons, and also in the interest of ensuring the requirements and interpretation and enforcement standards set out above in section 1 are strictly and strongly upheld, Democracy Watch requests that you do not investigate or rule on the matters addressed in this letter, and that instead you delegate the investigations and rulings to a provincial ethics or lobbying commissioner who has no ties to any federal or provincial political party.

Please contact Democracy Watch at the address above if you need any more information to initiate and delegate the above requested investigations.

We hopefully look forward to seeing your decision considering recusing yourself from these investigations very soon.

As well, given the information already publicly available concerning Kevin Lynch’s actions, we expect that the first two requested investigations can proceed and conclude in a timely fashion. The third requested investigation would, of course, take longer as it would cover many more lobbying activities spanning several years.

Sincerely,



Duff Conacher, Co-founder of Democracy Watch
on behalf of the Board of Directors of Democracy Watch