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December 9, 2013

**RE: Request for examination and ruling under *Conflict of Interest Code for Senators* with regard to interventions concerning audit of Senator Mike Duffy's expenses**

Dear Ms. Ricard:

Democracy Watch is writing you to request that you initiate inquiries into the actions of three senators involved in the Senate expense scandal based on the Code rules, and public evidence including the recently released [affidavit](#) of RCMP Corporal Greg Horton.

**(a) Re: Senator Mike Duffy**

First, you have already received complaints concerning Senator Mike Duffy's acceptance of the payment from Nigel Wright of more than \$90,000 (as has been admitted by Senator Duffy and Mr. Wright, and Democracy Watch has expressed in a few news releases that it's opinion is also that an inquiry is warranted into Senator Mike Duffy's actions as he seems to have violated subsection 17(1) of the [Conflict of Interest Code for Senators](#) (the "Code") by accepting that payment

In addition, Democracy Watch's opinion is that an inquiry is warranted into Senator Duffy's actions as he also seems to have violated subsection 17(1) of the Code by accepting from Arthur Hamilton payment of his legal fees (as described in Corporal Horton's affidavit at point "j" on page 61; points "k" and "l" on page 62; para. 51, sections "a" and "b" and "d" and "e" on pages 71-72).

Subsection 17(1) of the *Code* states:

"17. (1) Neither a Senator, nor a family member, shall accept, directly or indirectly, any gift or other benefit, except compensation authorized by law, that could reasonably be considered to relate to the Senator's position."

The acceptance by Senator Duffy of the payment from Mr. Hamilton seems, in Democracy Watch's opinion, to clearly violate subsection 17(1), given that the payment by Mr. Hamilton was, like the payment from Mr. Wright, conditional on Senator Duffy doing three things in his role as a senator (namely, repaying the amount that a Senate committee had determined he owed because expenses were improperly claimed; sending a letter to the committee containing agreed upon text, and; saying only agreed upon, prepared lines when speaking publicly about the situation).

**(b) Re: Senator Irving Gerstein**

Secondly, Democracy Watch's opinion is that an inquiry is warranted into Senator Irving Gerstein's actions as he seems to have violated sections 9 and 10 of the *Code* by intervening in Deloitte's audit of Senator Duffy's expenses and relaying information about the audit to Nigel Wright and others in the Prime Minister's office, as admitted by Senator Gerstein and his contact at Deloitte, Michael Runia, in points q and r on page 62 of Corporal Horton's affidavit, and as referred to also in points "bb" and "cc" on page 18, and in point "dd" on page 37; and in points "ff" and "hh" on page 38 and point "jj" on page 39 of the affidavit.

Sections 9 and 10 of the *Code* state:

Use of influence

9. A Senator shall not use or attempt to use his or her position as a Senator to influence a decision of another person so as to further the Senator's private interests, or those of a family member, or to improperly further another person's or entity's private interests.

Use of information

10. (1) If as a result of his or her position, a Senator obtains information that is not generally available to the public, the Senator shall not use or attempt to use the information to further the Senator's private interests, or those of a family member, or to improperly further another person's or entity's private interests.

Conveying information

(2) A Senator shall not convey or attempt to convey information referred to in subsection (1) to another person if the Senator knows, or reasonably ought to know, that the information may be used to further the Senator's private interests, or those of a family member, or to improperly further another person's or entity's private interests.

Under subsection 11(1) of the *Code*, furthering a private interest includes "actions taken by a Senator for the purpose of achieving, directly or indirectly" among other things, "(a) an increase in, or the preservation of, the value of the person's or entity's assets;" and "(b) the elimination, or reduction in the amount, of the person's or entity's liabilities".

Democracy Watch's opinion is that, by intervening in the Deloitte audit, Senator Gerstein attempted to use his position as a Senator to improperly further another person's private interests (namely Senator Duffy's interests), which seems to violate section 9 of the *Code*. Given that the audit was aimed at determining what Senator Duffy owed in improperly claimed expenses, the intervention seems to have been clearly related to Senator Duffy's assets and liabilities.

In addition, Senator Gerstein intervened in Deloitte's audit because he obtained information that was not generally available to the public, and he also obtained information during his intervention that was not publicly available, and he conveyed that information – all in what seems to be an attempt to improperly further Senator Duffy's private interests by Senator Gerstein, and by others which he ought reasonably to have known, and all of which therefore seems to violate sections 10(1) and (2) of the *Code*.

It was improper for Senator Gerstein to intervene in the Deloitte audit and obtain and convey information about it simply because it is improper for anyone who is not involved in an audit to attempt to influence auditors. A spokesperson for Deloitte has stated publicly that it is improper for any information about an audit to be given to anyone other than the people involved in the audit – therefore it was, by definition, improper to seek information about the audit, and to try to influence the audit.

According to the [webpage](#) describing the Senate's Standing Committee on Internal Economy, Budgets and Administration:

“In 2008-09, the committee moved to strengthen the internal audit capacity of the Senate by approving a reallocation of financial resources to fund the formalization of an internal audit function. It was agreed that the overall goal would be that the audit function would be as professional as similar operations in the public, private or legislative sectors, and that activities and practices would be in line with the professional standards set by the Institute of Internal Auditors.”

**(c) Re: Senator Marjorie LeBreton**

Thirdly, Democracy Watch's opinion is that an inquiry is also warranted into Senator Marjorie LeBreton's actions as she seems to have also violated section 9 and 10 of the *Code*, as well as section 8. Section 8 of the *Code* states:

“Furthering private interests

8. When performing parliamentary duties and functions, a Senator shall not act or attempt to act in any way to further his or her private interests, or those of a family member, or to improperly further another person's or entity's private interests.”

Senator LeBreton is an ex officio member of the Senate's Standing Committee on Internal Economy, Budgets and Administration. However, she did not attend any of the Committee's 25 meetings from March 8, 2012 to March 7, 2013.

Senator LeBreton was not a member of the subcommittee (known as the “Steering Committee”) that oversaw the audit of Senator Duffy – only Senator Carolyn Stewart Olsen, Senator David Tkachuk and Senator George Furey were members.

According to the webpage of the Committee cited above, the Committee was committed to maintaining professional standards for audits. Essentially, the Committee, and the subcommittee, determine as a court or tribunal does whether rules have been followed. As the recent suspensions of senators has shown, the determinations of the Committee and subcommittee have consequences as serious as those levied by the courts.

As a result, participation in the audit process by anyone, including any senator, other than the senators on the audit subcommittee is clearly improper. It is analogous to that person or senator contacting a judge of a court or a tribunal concerning the judge's ruling.

In fact, according to point "ww" on pages 43-44 in Corporal Horton's affidavit, and point "o" and "p" on page 59, Senator LeBreton's then-staffperson Christopher Montgomery, Director of Parliamentary Affairs in the Senate, was advising senators on the subcommittee that they would be improperly "compromising" themselves if they made changes to their audit report based on influence from people not on the committee (specifically from staff of the Office of the Prime Minister and from Senator LeBreton).

Senator LeBreton's intervention in the subcommittee's investigation and ruling concerning Senator Duffy are detailed in point "jj" on page 19 of Corporal Horton's affidavit, point "cc" on pages 36-37; point "kk" on page 40; point "qq" on page 41; point "rr" on pages 41-42; points "ss" and "tt" on page 42; point "ww" on pages 43-44; under #37 points "a" to "j" on pages 47-49; point "j" on page 51; point "n" on page 53; point "p" on page 59; point "b" on pages 69-70; point "c" on page 70; point "f" on page 72;

In point "f" on page 48 of the affidavit, Senator LeBreton is quoted (in a paraphrased statement) as stating that "she did not want to involve the government in the work of the Internal Economy Committee" which points to how even she recognized how improper it is for anyone outside the committee (or subcommittee) to be involved in its deliberations.

As the affidavit details, Senator LeBreton attempted to influence the results of the subcommittee's audit of Senator Duffy, and she did so in her role as a senator, and she also obtained information not generally available to the public and used and conveyed that information, all to further Senator Duffy's private interests (namely, to affect decisions that would affect his assets and liabilities). As a result, it is Democracy Watch's opinion that Senator LeBreton seems to have violated rules 8, 9 and 10(1) and (2) of the *Code*.

**(d) Your lack of independence, and hope that you will still initiate inquiries**

The Senate Ethics Officer is, structurally, a lapdog not a watchdog. The *Code* claims that you have independent status because you are "independent in interpreting and applying this Code as it relates to an individual Senator's particular circumstances" (ss. 41(2)). However, in fact you are under the control of a [committee of senators](#) (ss. 35 and 41(1)) that operates in secret (s. 36), currently has a majority of Conservative members, and (among other powers) has the power to decide what the *Code*'s rules mean, how the rules will be applied, whether an inquiry can even happen, and (along with the whole Senate) what the final ruling, and penalties, will be. The Committee's powers are as follows:

- defines what the rules in the *Code* mean, and how they are applied by the Ethics Officer (ss. 37(2));
- controls whether the Ethics Officer can initiate an inquiry into a situation (ss. 44(1) and 44(8));
- if an inquiry is approved, controls (along with the whole Senate) whether the Ethics Officer has access to "persons, papers, things and records" (ss. 44(13));

- can overrule the ruling of the Ethics Officer (s. 46), although the Ethics Officer's ruling must be made public (ss. 45(2) to (3)), and;
- along with the whole Senate, decides whether a senator is guilty, and whether there will be any penalty (s. 48).

The Senate Ethics Officer can only initiate an inquiry into a situation if the committee decides on its own that the Ethics Officer should investigate (ss. 44(1) and 44(8)) or decides that the Ethics Officer should investigate a complaint filed by a senator (ss. 44(2) and (3)). The Ethics Officer can also abandon the investigation without issuing a public ruling if the Ethics Officer's conclusion is that no *Code* violations occurred (ss. 45(4)).

Despite all these barriers to independent thought and action by you, Democracy Watch still hopes that you will initiate an inquiry into Senator Duffy's acceptance of the payment from Arthur Hamilton, and Senator Gerstein's intervention in the Deloitte audit, and Senator LeBreton's intervention in the audit report on Senator Duffy's expenses by the Steering Committee of the Senate's Internal Economy Committee.

Democracy Watch also hopes that you will initiate these inquiries immediately. Contrary to some recent media reports, you as Ethics Officer (or the Committee that controls you) are *not* required to suspend an investigation and refer the situation to other authorities if you have reasonable evidence that a law has been violated or you discover that a police investigation is underway into the situation (you may suspend the inquiry, but you are not required to do so under s. 47 of the *Code*).

There is no likelihood at all that you will affect the RCMP's investigation of Senator Duffy by completing an inquiry into his acceptance of both the payments from Nigel Wright and Arthur Hamilton, as all the facts have been publicly disclosed and admitted.

And no police investigation has been confirmed into either Senator Gerstein's actions or Senator LeBreton's actions, so there is no good reason for you to refuse to initiate an inquiry into their actions.

Please take one step, finally, to exercise some independence and effective enforcement by initiating all of these inquiries now. The Office of the Senate Ethics Officer has been in existence for 8 years and has a long-confirmed reputation as a lapdog – if you fail to initiate these inquiries you will only provide further evidence that there is, in fact, almost zero enforcement of the *Conflict of Interest Code for Senators*. Failing to initiate these inquiries right now will, as well, add yet another reason to the long list of reasons to abolish the Senate.

Please contact Democracy Watch at the address above if you need any more information to initiate the inquiries. We hopefully look forward to seeing your ruling very soon.

Sincerely,

Duff Conacher, Board member of Democracy Watch

On behalf of the Board of Directors of Democracy Watch