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January 7, 2008

Mr. Duff Conacher
Coordinator
Democracy Watch
1 Nicholas Street, Suite 420
P.O. Box 821, Station B
Ottawa, Ontario K1P 5P9

Dear Mr. Conacher:

Thank you for your letter of November 26, 2007. You have raised a number of interesting questions. Before I respond, I believe it would be useful to outline your four requests, your submission and the relevant legal provisions. Then I will proceed to deal with each of these requests under separate headings.

Your submission

In your letter, you asked me to take a number of actions pursuant to the *Conflict of Interest Act* (the Act) in relation to decision-making by the government in the Mulroney-Schreiber matter, and to issue an interpretation bulletin in relation to future decisions in what you describe as “similar situations”. In particular, you requested the following:

1. a subsection 45(1) examination on my own initiative of Mr. Harper’s decision-making and a compliance order issued under section 30 that he recuse himself from any future decision-making in the Mulroney-Schreiber matter.
2. a subsection 45(1) examination on my own initiative of Mr. Nicholson’s decision-making and a compliance order issued under section 30 that he recuse himself from any future decision-making in the Mulroney-Schreiber matter.
3. multiple subsection 45(1) examinations on my own initiative of the decision-making of all other Cabinet ministers, Cabinet staff and “at pleasure” senior officials subject to the Act, as well as multiple compliance orders issued under section 30 that each recuse himself or herself from any future decision-making in the Mulroney-Schreiber matter.

4. an interpretation bulletin that would apply to the Prime Minister, all Cabinet ministers, all Cabinet staff and all “at pleasure” senior officials and would prohibit them from making decisions under the *Inquiries Act* or in respect of prosecutions or extraditions “in similar situations in the future”.

Following a recital of relationships and actions in support of your request, which you listed under the heading “The Facts” on pages 1 and 2 of your letter, and which I note you have published on the Democracy Watch website, you have alleged that both Mr. Harper and Mr. Nicholson have contravened the Act, particularly subsection 6(1), section 7, section 9 and section 21, in respect of any decisions they have made concerning the Mulrone-Schreiber matter. In addition, by inference, you have alleged that all other Cabinet ministers, Cabinet staff and “at pleasure” senior government officials who are subject to the Act, are also similarly in contravention of it in respect of any decisions made concerning the Mulrone-Schreiber matter.

Provisions of the *Conflict of Interest Act* Relevant to the Allegations

2.(1) ‘private interest’ does not include an interest in a decision or matter

(a) that is of general application;

(b) that affects a public office holder as one of a broad class of persons; or

(c) that concerns the remuneration or benefits received by virtue of being a public office holder.

4. For purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another’s private interest.

6.(1) No public office holder shall make a decision related to the exercise of an official power, duty of function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest.

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.

9. No public office holder shall use his or her position as a public office holder to seek to influence a decision of another person so as to further the public office holder’s private interests or those of the public office holder’s relatives or friends or to improperly further another person’s private interest.

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.

In your letter, in addition to the provisions reproduced above, you have set out the purpose provisions of the Act from section 3. I note that section 3 does not contain substantive rules and that you do not allege a specific contravention of this section. You have also set out section 18 on anti-avoidance of the rules of the Act, as well as section 19 which makes compliance with the Act a condition of employment for a public office holder. You have not made any specific allegations in this regard either.

Provisions Relevant to Examinations and Orders

45.(1) If the Commissioner has reason to believe that a public office holder or former public office holder has contravened this Act, the Commissioner may examine the matter on his or her own initiative.

30. In addition to the specific compliance measures provided in this Part, the Commissioner may order a public office holder, in respect of any matter, to take any compliance measure, including divestment or recusal, that the Commissioner determines is necessary to comply with this Act.

In order to initiate an examination, the Act requires that I must have “reason to believe” that the Act has been contravened. On its own, a request that I initiate an examination is not sufficient. “Reason to believe” requires reasonable grounds to establish the belief. I must have sufficient credible evidence to give rise to a *bona fide* belief that the Act has been contravened in order for me to initiate an examination under subsection 45(1) of the Act.

Response

1. Request for a subsection 45(1) examination on my own initiative of Mr. Harper’s decision-making and a compliance order issued under section 30 that he recuse himself from any future decision-making in the Mulroney-Schreiber matter.

You have alleged that Mr. Harper has a conflict of interest and consequently has contravened both subsection 6(1) and section 21 when he made decisions with respect to the Mulroney-Schreiber matter and did not recuse himself.

You have suggested that Mr. Harper has a conflict of interest because he has a private interest in protecting his personal reputation and position as Prime Minister under the circumstances set out in your recital of relationships and actions. More specifically, you alleged that:

Mr. Harper has a private, personal interest in the situation (an interest that is not shared with anyone else except Mr. Nicholson), namely protecting his personal reputation and position as Prime Minister, given that Mr. Mulroney has advised him, and that he is named in Mr. Schreiber’s court affidavit, and that there are questions about what he knew about the situation, and the new information sent by Mr. Schreiber to him several months ago, and when he knew about it, and what he did when he became informed about it.

It is a novel and interesting suggestion that "private interest" would go so far as to include the interest of protecting one's personal reputation and position. I note that the *Conflict of Interest Code for Members of the House of Commons*, for which I have responsibility in respect of compliance by Members of Parliament, limits the notion of private interest to one that is either financial in nature or related to professional or business status. I would agree with you that the Act, on the other hand, does not limit "private interest" in a similar way. However, you will see in the discussion below that I do not agree that the interpretation can be so broad as to include, by itself, personal reputation and position.

With respect to your allegation of conflict of interest on the part of Mr. Harper, in order for me to initiate an examination on my own initiative under the Act, I must have reasonable grounds, on the basis of credible evidence, to support a belief that Mr. Harper is in a conflict of interest. Section 4 provides that a public office holder is in a conflict of interest when he or she

"exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her family or friends or to improperly further another person's private interests."

The first thing to be determined is whether the interest of protecting one's "personal reputation and position" can in fact amount to a "private interest" as envisioned by the Act. Most people have an interest in protecting their personal reputations and positions, including during the exercise or performance of their functions. To argue that the interest in protecting one's reputation or position could be characterized, on its own, as furthering one's private interests, would mean that every time a public office holder exercises or performs his or her functions, he or she contravenes the Act. This would result in an impossible conclusion as it would prevent anyone from ever fulfilling his or her functions. Something else would have to be involved to engage section 4. Another interest, whether a financial or business interest or some other interest, would be necessary along with the general desire to protect one's personal reputation and position.

You have implied that Mr. Harper has an interest in avoiding any revelations of past associations with either Mr. Mulroney or Mr. Schreiber. However, I am not aware of any evidence to suggest any impropriety in any association of Mr. Harper with either of those individuals that would lead to a need for him to dissociate himself from any of their actions, in particular from any impropriety that relates to the Mulroney-Schreiber matter. Mr. Harper's association with Mr. Mulroney is already publicly known, and the fact that Mr. Mulroney has advised Mr. Harper in the past does not in itself suggest any impropriety. As well, the naming of Mr. Harper in Mr. Schreiber's court affidavit does not amount to sufficient credible evidence of any impropriety that would support a belief that Mr. Harper's private interests were or are being furthered. Further, the questions you have raised about what Mr. Harper knew and when, and what actions Mr. Harper took when he became informed, do not provide for me any evidence of impropriety that would support a belief that Mr. Harper's private interests were or are being furthered.

You have also raised the statement quoted by the media as having been made by Mr. Harper on November 9, in which he said "it's impossible, frankly, for the government to make an impartial judgment on how to proceed". In my view, Mr. Harper's statement does not necessarily lead to a conclusion that any of his actions provided an opportunity to further his private interests, and so does not lead to reasonable grounds to believe there was a conflict of interest as defined in section 4.

From your description of the relationships, of the sequence of events and of the decisions taken, including Mr. Harper's decision to bring in an outsider, Mr. David Johnston, to advise on how to proceed, there is nothing to suggest that Mr. Harper was furthering a private interest, either his own or any others, in the discharge of his duties. Consequently, I have no reason to believe that Mr. Harper may have a conflict of interest or may have contravened subsection 6(1) or section 21.

With respect to section 7, you have requested that I investigate whether Mr. Harper has given preferential treatment to Mr. Mulroney. You have not provided any evidence for your suspicions. Again, I must have a reason to believe that there has been a contravention of the Act in order to proceed.

With respect to section 9, you have also requested an investigation as to whether Mr. Harper has used his office to seek to influence the decisions of others in order to improperly further the interests of Mr. Mulroney. Again, you have not provided any evidence for your suspicions. I have no reason to believe that such a use of office has occurred.

Finally, as there is not sufficient evidence to initiate an examination into Mr. Harper's actions and to conclude that he may have contravened that Act, there is no need to consider an order of recusal for future actions to bring Mr. Harper into compliance.

2. Request for a subsection 45(1) examination on my own initiative of Mr. Nicholson's decision-making and a compliance order issued under section 30 that he recuse himself from any future decision-making in the Mulroney-Schreiber matter.

You have alleged that Mr. Nicholson has a conflict of interest and consequently has contravened both subsection 6(1) and section 21 when he made decisions with respect to the Mulroney-Schreiber matter and did not recuse himself. More specifically, you alleged that:

Mr. Nicholson has a private, personal interest in the situation (an interest that is not shared with anyone else except Mr. Harper), namely protecting his personal reputation and position as a Cabinet minister, given that Mr. Harper appointed him to Cabinet and could dismiss him from Cabinet at any time for any reason, and that there are questions about his role in the review of the settlement of Mr. Mulroney's libel lawsuit, and his role in possible prosecution decisions, and about what he knew about the new information sent by Mr. Schreiber to him several months ago, and when he knew about it, and what he did when he came informed about it.

For the same reasons as set out in relation to Mr. Harper, I do not have enough credible evidence to conclude that Mr. Nicholson may have a conflict of interest by reason of having a general interest in protecting his reputation and position. Something else would have to be involved to establish a private interest. You have suggested that a Cabinet appointment gives rise to a personal interest that Mr. Nicholson would wish to protect. The questions you have raised about what Mr. Nicholson's role was in the settlement review, in possible prosecution decisions, and what he knew and did with the new information of Mr. Schreiber do not provide for me any evidence of impropriety that would support a belief that Mr. Nicholson's private interests were or are being furthered.

Mr. Harper's November 9, 2007 statement, imputing lack of impartiality on the part of the government, which would include Mr. Nicholson, does not provide sufficient credible evidence of a conflict of interest. Consequently, I have concluded that I have no reason to believe that Mr. Nicholson may have contravened subsection 6(1) or section 21 of the Act.

With respect to section 7, you have requested that I investigate whether Mr. Nicholson has given preferential treatment to Mr. Mulroney. You have not provided any evidence for your suspicions. Again, I must have a reason to believe that there has been a contravention of the Act in order to proceed.

With respect to section 9, you have also requested an investigation as to whether Mr. Nicholson has used his office to seek to influence the decisions of others in order to improperly further the interests of Mr. Mulroney. Again, you have not provided any evidence for your suspicions. I have no reason to believe that such a use of office has occurred.

As there is not sufficient evidence to initiate an examination into Mr. Nicholson's actions and to conclude that he may have contravened that Act, there is no need to consider an order of recusal for future actions to bring Mr. Nicholson into compliance.

3. Request for multiple subsection 45(1) examinations on my own initiative of the decision-making of all other Cabinet ministers, Cabinet staff and "at pleasure" senior officials subject to the Act as well as multiple compliance orders issued under section 30 that each recuse him or herself from any future decision-making in the Mulroney-Schreiber matter.

You have not provided any evidence and I have no reason to believe that there has been any contravention of the Act by these individuals. You have not identified which individuals you are concerned about except that they may have been appointed by Mr. Mulroney or Mr. Harper. This fact alone, which in no way taints those individuals, is not sufficient to support a claim that they have an opportunity to further their private interests and hence may be in a conflict of interest situation. Each case would require its own examination. Consequently, the requirements of subsection 45(1) mean that I cannot proceed. There is no basis for section 30 orders.

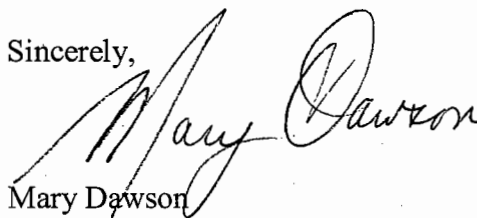
4. Request for an interpretation bulletin that would apply to the Prime Minister, all Cabinet ministers, all Cabinet staff and all "at pleasure" senior officials and would prohibit them from making decisions under the Inquiries Act or prosecutions or extraditions "in similar situations in the future".

You have raised a number of interesting issues and I have considered them carefully. Because I have concluded that examinations are not warranted on the basis of your submissions, I would not issue an interpretation bulletin on this particular matter. However, I will consider issuing an interpretation bulletin in the future when any situation arises where an interpretation bulletin would appear to be useful. I thank you for your suggestion.

Conclusion

In conclusion, I have reviewed your letter as a whole and have not found sufficient credible evidence to suggest that Mr. Harper or Mr. Nicholson or any other class of individuals mentioned in your letter were in a conflict of interest.

Sincerely,

A handwritten signature in cursive script that reads "Mary Dawson". The signature is written in black ink and is positioned above the printed name and title.

Mary Dawson
Conflict of Interest and Ethics
Commissioner