

Democracy Watch
émocratie en surveillance

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Conflict of Interest and Ethics Commissioner Mary Dawson
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Parliament of Canada
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October 21, 2009

RE: Petition for investigation of, and rulings on, situation involving Minister of Natural Resources Lisa Raitt and Cement Association of Canada lobbyist Michael McSweeney

Dear Commissioner Dawson:

Democracy Watch is filing this letter to request, under the provisions of the federal *Conflict of Interest Act (Act)* and the *Conflict of Interest Code for Members of the House of Commons (MPs Code)*, an investigation of and ruling on the actions of Minister of Natural Resources Lisa Raitt concerning the significant role Cement Association of Canada registered lobbyist Michael McSweeney played in a fundraising event for Minister Raitt held on September 24, 2009.

Given the significant role Mr. McSweeney played in the fundraising event for Minister Raitt, Democracy Watch is also requesting a recusal ruling for Minister Raitt for all matters that affect Mr. McSweeney and/or the Cement Association of Canada.

There was a statement in the House of Commons and one media report last Friday that you have decided already not to investigate the situation, but no details provided concerning why not, and no details either on your website. I hope the information set out below will cause you to re-consider your decision, as I believe the information shows clearly that there are reasonable grounds to believe that there have been contraventions of both the *Act* and the *MPs Code*.

The Situation

Lisa Raitt is the Minister of Natural Resources. Michael McSweeney is a registered lobbyist for the Cement Association of Canada (CAC), and the CAC is registered to lobby the Ministry of Natural Resources under the federal *Lobbying Act* (Registration number 781395-13913-5). And on March 3, 2009 (Communications registration number 13913-100475), and on September 24, 2009 (the same day as the event -- Communications registration number 13913-125034) representatives of the CAC communicated directly with Minister Raitt.

A fundraising event was held for Minister Raitt on September 24, 2009 at Kultura at 169 King St. E. in Toronto and, to attend, a person was required to make a donation of minimum \$250. The invitation suggests that the donation will go to Minister Raitt's does not state whether the donations were for Minister Raitt as a nomination contestant or candidate, or for her riding association, or for the Conservative Party of Canada, or to be divided in some way amongst all or some of the above.

While it is not known what role (if any) Michael McSweeney played in organizing the event, or designing or distributing invitations for the event, the invitation that was distributed stated "Come and support Lisa Raitt on September 24th" and "To RSVP, please fax this form to Michael McSweeney 1.613.563.4498" (SEE attached copy of invitation). This is the fax number for the Cement Association

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of Canada's office in Ottawa.

The invitation also stated: "Questions? Please e-mail michael_b_mcsweeney@yahoo.ca" and that "Cheques can be made payable to: Halton Conservative E.D.A."

The invitation that was distributed also had space for the invitee to fill out their name, credit card number and expiry date, and amount they were donating.

It is clear from the invitation that Mr. McSweeney played a significant role in the event for Minister Raitt.

It is not known whether Minister Raitt paid Mr. McSweeney for the services he provided to her.

The Law

(a) *Federal Conflict of Interest Act*

The main purposes of the *Conflict of Interest Act* (the *Act* - 2006, c. 9, s. 2), which applies to Cabinet ministers, their staff, Cabinet appointees (including senior government officials), are as follows:

"3.(1)(a) establish clear conflict of interest and post-employment rules for public office holders;

(b) 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;

(c) provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred. . . ."

With regard to gifts, the *Act* states that:

"Gifts and other advantages

11.(1) No public office holder or member of his or her family shall accept any gift or other advantage, including from a trust, that might reasonably be seen to have been given to influence the public office holder in the exercise of an official power, duty or function.

Exception

(2) Despite subsection (1), a public office holder or member of his or her family may accept a gift or other advantage

(a) that is permitted under the *Canada Elections Act*;

(b) that is given by a relative or friend; or

(c) that is received as a normal expression of courtesy or protocol, or is within the customary standards that normally accompany the public office holder's position."

The *Act* defines "gift or other advantage" as:

"2.(1)(a) an amount of money if there is no obligation to repay it; and

(b) a service or property, or the use of property or money that is provided without charge or at less than its commercial value."

In the *Guideline on Gifts (including Invitations, Fundraisers and Business Lunches)* that you issued in 2008, you stated that your enforcement policy concerning section 11 of the *Act* is that federal Cabinet ministers and other senior government officials (and their family members) cannot accept any gifts or favours from anyone who is trying to influence, or will be trying to influence, or has or will have dealings with, the minister or government official, even if the lobbyist is a friend or a relative.

Specifically, you stated the following in the *Guideline*:

- "The purpose of prohibiting public office holders or their family members from receiving gifts is to preserve confidence in the integrity of public decision-making. The determining factor is whether the gift might reasonably be seen to have been given to influence the public office holder's decision-making." (pp. 4-5)
- "It is important to consider who is offering the gift and why it is being offered. The donor's existing, or future relationship to the public office holder is of particular relevance." (p. 5);

- "A public office holder or family member should consider why a gift is being offered. If a gift is being offered by someone whose interests could be affected by a decision the public office holder may be called upon to make, then the *Act* will likely apply and prohibit its acceptance." (p. 5);
- "If a friend is offering a gift in a context not normally associated with gift-giving and the friend is also doing or likely to do business directly or indirectly with the public service entity of the public office holder, then the gift should not be accepted." (p. 7), and;
- "The Office considers a normal expression of "courtesy or protocol" to be a token expression of appreciation in the context of some official interaction." (p. 7)

On page 5 of the *Guideline*, you list five situations in which a gift likely is prohibited, including: "The donor or the donor's firm is a registered lobbyist or has hired a registered lobbyist to lobby the public office holder or the public sector entity of the public office holder."

Strangely, your *Guideline on Gifts* is essentially silent on the issue of the exemption for gifts or other advantages that are permitted under the *Canada Elections Act*. All your *Guideline* says about this exemption is "Gifts that are permitted under the Canada Elections Act are acceptable under the Conflict of Interest Act. The Canada Elections Act applies to electoral candidates during an election period. Click [here](#) to link to the Canada Elections Act."

The *Canada Elections Act* defines "contribution" as "2.(1) a monetary contribution or a non-monetary contribution" and, therefore, contributions include money, property and services, with "monetary contribution" defined as "an amount of money provided that is not repayable" and "non-monetary contribution defined as "the commercial value of a service, other than volunteer labour, or of property or of the use of property or money to the extent that they are provided without charge or at less than their commercial value."

The *Canada Elections Act* defines "commercial value" as follows:

- "2.(1) "commercial value", in relation to property or a service, means the lowest amount charged at the time that it was provided for the same kind and quantity of property or service or for the same usage of property or money, by
- (a) the person who provided it, if the person is in the business of providing that property or service; or
 - (b) another person who provides that property or service on a commercial basis in the area where it was provided, if the person who provided the property or service is not in that business."

Only individuals are permitted to make contributions under the *Canada Elections Act* and the limits on contributions are as follows:

"Contribution limits

405. (1) No individual shall make contributions that exceed
- (a) \$1,000 in total in any calendar year to a particular registered party;
 - (a.1) \$1,000 in total in any calendar year to the registered associations, nomination contestants and candidates of a particular registered party;
 - (b) \$1,000 in total to a candidate for a particular election who is not the candidate of a registered party; and
 - (c) \$1,000 in total to the leadership contestants in a particular leadership contest."

With regard to clause 405(1)(a.1) set out above, total contribution limit applies to the combined total contributions made to a registered associations, nomination contestants and candidates of a given registered party during a calendar year and, with regard to clause 405(1)(c), to the combined total contributions made to the leadership contestants in a specific leadership race.

Under section 405.1 of the *Canada Elections Act*, these limits are adjusted for inflation annually. As a result, the actual limit on each type of contribution of money, property or services listed above during 2009 is \$1,100.

However, as set out above, “volunteer labour” is not included in the definition of “non-monetary contribution.” Subsection 2(1) of the *Canada Elections Act* defines “volunteer labour” as: “any service provided free of charge by a person outside their working hours, but does not include such a service provided by a person who is self-employed if the service is one that is normally charged for by that person.”

Therefore, Democracy Watch’s opinion is that the only gifts that are permitted under the *Canada Elections Act* exemption in clause 11(2)(a) of the *Conflict of Interest Act* are money, property or the use of property or services provided by an individual up to the contribution limit of \$1,100 (or equivalent commercial value) annually, and volunteer labour provided by an individual outside of their area of work and outside of their working hours.

(b) *Conflict of Interest Code for Members of the House of Commons (MPs Code)* purposes and “gifts” measures

With regard to the *Conflict of Interest Code for Members of the House of Commons* (the *MPs Code*), which you also enforce, among the purposes are the following, to:

- “1.(a) maintain and enhance public confidence and trust in the integrity of Members as well as the respect and confidence that society places in the House of Commons as an institution;
- (b) demonstrate to the public that Members are held to standards that place the public interest ahead of their private interests and to provide a transparent system by which the public may judge this to be the case; . . .”

And, in section 2, Principles are set out that, under section 3.1 you “may have regard to” when “interpreting and applying Members’ obligations under” the *MPs Code*. Among the Principles are the following, that MPs are expected:

- “2. (b) to fulfill their public duties with honesty and uphold the highest standards so as to avoid real or apparent conflicts of interests, and maintain and enhance public confidence and trust in the integrity of each Member and in the House of Commons;
- (c) to perform their official duties and functions and arrange their private affairs in a manner that bears the closest public scrutiny, an obligation that may not be fully discharged by simply acting within the law;
- (d) to arrange their private affairs so that foreseeable real or apparent conflicts of interest may be prevented from arising, but if such a conflict does arise, to resolve it in a way that protects the public interest; . . .”

Concerning gifts and benefits, subsection 14(1) of the *MPs Code* states that:

“14.(1) Neither a Member nor any member of a Member’s family shall accept, directly or indirectly, any gift or other benefit, except compensation authorized by law, that might reasonably be seen to have been given to influence the Member in the exercise of a duty or function of his or her office.”

And while there are definitions of “gift” and “benefits” in the *MPs Code* that are not relevant to the matter addressed in this petition, in June 2009 MPs voted to change the *MPs Code* to define “benefit” as:

- (a) an amount of money if there is no obligation to repay it; and

- (b) a service or property, or the use of property or money that is provided without charge or at less than its commercial value, other than a service provided by a volunteer working on behalf of a Member;
but does not include a benefit received from a riding association or a political party.”

However, during your testimony to the Oliphant Commission of Inquiry on June 17, 2009, you stated that, despite this definition, you would consider a gift from a lobbyist of volunteer services to an MP as a prohibited gift/benefit under the *MPs Code* (page 5504 of the Commission’s official transcript).

Therefore, Democracy Watch’s opinion is that it is a violation of the *MPs Code* for an MP to accept any gift of money, property or the use of property or services (volunteer or otherwise, such as fundraising) from a registered lobbyist, as such a gift can reasonably be seen to be given to influence the MP’s exercise of their public duties.

Application of the law to the situation involving Minister Raitt and Mr. McSweeney

(a) Concerning the gift-acceptance provisions in the *Conflict of Interest Act*

It is clear that Mr. McSweeney provided a service to Minister Raitt in the role he played in the fundraising event for her.

It is not known whether Mr. McSweeney is a friend of Minister Raitt, but according to your stated enforcement policy for section 11 of the *Act*, whether or not he is a friend is irrelevant because the service Mr. McSweeney provided to Minister Raitt was not offered in a context normally associated with gift-giving (ie. the event was a fundraising event for Ms. Raitt, not her birthday party) and Mr. McSweeney is a person who works for an association that is doing business directly with the public office holder and the public service entity of the public office holder, an association whose interests could be affected by a decision the public office holder.

Mr. McSweeney’s service to Minister Raitt cannot be regarded as a normal expression of courtesy or protocol that customarily accompanies the Minister’s position (as those type of gifts are clearly limited to things such as a gift from a visiting head of state or minister).

If Mr. McSweeney provided his services for free to Minister Raitt, given that the RSVP directions on the invitation listed the fax number of the Cement Association of Canada, Democracy Watch’s opinion is that it is reasonable for you to conclude that Mr. McSweeney provided his services during work hours. Therefore, the *Act*’s exemption for a gift or other benefit to be given if it is a contribution allowed under the *Canada Elections Act* does not apply, because the exemption is only for “volunteer labour” provided outside of working hours.

As a result, in Democracy Watch’s opinion, it seems clear that the only way in which Minister Raitt could accept the gift of the services Mr. McSweeney provided to her in a way that is exempt under clause 11.(2)(a) of the *Act* is if the services have a commercial value of less than \$1,100 (which is the annual dollar limit for contributions permitted under the *Canada Elections Act*), and possibly less if Mr. McSweeney has made a donation to support Ms. Raitt or any Conservative riding association in 2009.

According to Elections Canada’s records, Mr. McSweeney had not made a donation of money, property or services to the Conservative Party of Canada in 2009 as of June 30, 2009 (the quarterly donations report for the Party from July 1, 2009 to September 30, 2009 has not yet been made public by Elections Canada). Donations of money, property or services to riding associations are disclosed annually in the months after the end of the calendar year, and donations to a nomination contestant or candidate for election are disclosed in the months following the nomination race or election.

In any case, Democracy Watch contacted several members of the Canadian Society of Professional Event Planners and was told that the services that we know Mr. McSweeney provided to Ms. Raitt have a commercial value of \$1,500 to \$2,000, and if Mr. McSweeney was involved in overall organization of the event (including the services we know he provided) then the commercial value is \$4,000 to \$5,000.

As a result, Democracy Watch's opinion is that it seems clear the services Mr. McSweeney provided to Ms. Raitt exceed the donation limits set out in the *Canada Elections Act*.

Therefore, it also seems clear that none of the exemptions to the prohibition on accepting gifts apply to the services provided by Mr. McSweeney to Minister Raitt.

If Minister Raitt paid Mr. McSweeney for his services, then Democracy Watch's conclusion is that Minister Raitt did not accept a gift in violation of the *Act*.

However, Democracy Watch submits that whether or not Minister Raitt paid Mr. McSweeney for his services, she was in a relationship with Mr. McSweeney through his involvement in this fundraising event that puts her in a conflict of interest when dealing with matters that specifically affect the Cement Association of Canada.

(b) Concerning the conflict of interest and recusal provisions in the *Conflict of Interest Act* (the *Act*) and the *MPs Code* and court rulings that inform their interpretation

With regard to conflicts of interest, the *Act* states that:

“6.(1) No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or 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.”

The *Act* defines key terms in the above cited sections as follows:

“Conflict of interest

4. For the 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 person's private interests.”

and

“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.”

With regard to recusal of a public office holder from a decision-making process, the *Act* states:

“Duty to recuse

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.”

this integrity and trustworthiness be readily apparent to society as a whole.”

The *Act* also states that:

“Anti-avoidance

18. No public office holder shall take any action that has as its purpose the circumvention of the public office holder's obligations under this *Act*.”

“Condition of appointment or employment

19. Compliance with this *Act* is a condition of a person's appointment or employment as a public office holder.”

In contrast, the *MPs Code* does not contain a definition of “conflict of interest” but states that:
“8. When performing parliamentary duties and functions, a Member shall not act in any way to further his or her private interests or those of a member of the Member’s family, or to improperly further another person’s or entity’s private interests.”

and the *MPs Code* defines “furthering a private interest” as, among several other ways:

- “3.(2) Subject to subsection (3), a Member is considered to further a person’s private interests, including his or her own private interests, when the Member’s actions result, directly or indirectly, in any of the following
(c) the acquisition of a financial interest by the person;

Not furthering private interests.

- (3) For the purpose of this Code, a Member is not considered to further his or her own private interests or the interests of another person if the matter in question
(a) is of general application;
(b) affects the Member or the other person as one of a broad class of the public;
(b.1) consists of being a party to a legal action relating to actions of the Member as a Member of Parliament; or
(c) concerns the remuneration or benefits of the Member as provided under an Act of Parliament.”

Finally, the *MPs Code* states that:

“13. A Member shall not participate in debate on or vote on a question in which he or she has a private interest.”

In *R. v. Hinchey*, [1996] 3 S.C.R. 1128, Supreme Court of Canada Justice L'Heureux-Dube wrote the majority judgment including that:

At paragraph 17:

“For a government, actual integrity is achieved when its employees remain free of any type of corruption. On the other hand, 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.”

And at paragraph 18:

“In my view, 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.”

The minority judgment in *R v. Hinchey*, delivered by Justice Peter Cory, did not dissent on any of the above points. In fact, Justice Cory agreed with the need for an “appearance of integrity” standard for public officials, stating at paragraph 94:

“The 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.”

The July 9, 2004 ruling by Honourable Justice Frederick E. Gibson in *Democracy Watch v. The Attorney General of Canada (Office of the Ethics Counsellor)* [2004 FC 969] and [2004] 4 F.C.R. 83 echoed the Supreme Court of Canada’s ruling in *R v. Hinchey*.

In addition, in *Democracy Watch v. Campbell* (2009 FCA 79), the Federal Court of Appeal (FCA) considered a situation of a lobbyist who had organized a fundraising event for a Cabinet minister the lobbyist was registered to lobby at the time of the event.

The FCA quoted passages from three previous leading court rulings on the issue of conflict of interest in paragraph 49 and then stated at paragraph 52:

“Since a public office holder has, by definition, a public duty, one can only place a public office holder in a conflict of interest by creating a competing private interest.”

and at paragraph 53 that:

“A lobbyist's stock in trade is his or her ability to gain access to decision makers, so as to attempt to influence them directly by persuasion and facts. Where the lobbyist's effectiveness depends upon the decision maker's personal sense of obligation to the lobbyist, or on some other private interest created or facilitated by the lobbyist, the line between legitimate lobbying and illegitimate lobbying has been crossed.”

and at paragraph 48 that:

“It can hardly advance public confidence in the integrity and transparency of government decision-making to condone certain conflicts of interest, while prohibiting others. Any conflict of interest impairs public confidence in government decision-making.”

Taking into account the above measures in the *Act* and the *MPs Code*, and the court rulings, concerning the private interest created by the situation of Mr. McSweeney of the Cement Association of Canada assisting with the fundraising event for Minister Raitt (whom the Association lobbies), Democracy Watch's opinion is that Minister Raitt has created a specific, personal private interest for herself by accepting this gift and/or being in this relationship with Mr. McSweeney (an interest that causes her to have a “personal sense of obligation” to Mr. McSweeney).

It is also Democracy Watch's opinion that Minister Raitt also has a specific, personal private interest in having Mr. McSweeney continue to help raise money for her, and that both these private interests are clearly financial interests which fall under the definition of “private interest” in the *Act* and the *MPs Code*.

To be clear, the “private interest” created is not Mr. McSweeney's and the Cement Association's interest in a beneficial result from the decisions and actions of Minister Raitt (although Rogers obviously also has this private interest constantly), the private interest is the personal sense of obligation Minister Raitt has to Mr. McSweeney because of the services given to her by Mr. McSweeney, and the interest of Minister Raitt in having Mr. McSweeney continue to assist her with her and her riding association's and/or political party's fundraising efforts.

As a result, the exemptions in the definition of “private interest” in the *Act* do not apply, as the private interest of Minister Raitt is not a matter of general application or that affects her as one of a broad class of persons (because it applies specifically and directly only to her, not others), and is not part of the pay or benefits she receives as a federal politician.

Therefore, in Democracy Watch's opinion, such a situation creates a conflict of interest under the *Conflict of Interest Act* and the *MPs Code* respectively for Minister Raitt (and, by extension under the convention of ministerial responsibility, her staff), and because of this conflict of interest it is reasonably to conclude that they should recuse themselves from participating in decisions that affect Mr. McSweeney and the Cement Association of Canada directly or indirectly -- any kind of decisions -- because they have a personal, private interest in making decisions that will benefit Mr. McSweeney and the Cement Association, and this interest conflicts with their public duty to make decisions in the public interest based only on the merits.

Request for investigation and rulings on situation, a recusal ruling

Under the *Conflict of Interest Act* (the *Act*) you as Commissioner have the power to initiate an examination of a matter if you have reason to believe that a public office holder has contravened the *Act*.

“Examination on own initiative

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.”

Democracy Watch believes that the information set out above gives you much more than adequate evidence upon which to form the reasonable belief that a contravention has occurred.

And beyond finding those people covered by the *Act* in violation of the *Act*, you also have under the *Act* the power to make orders as follows:

“Compliance order

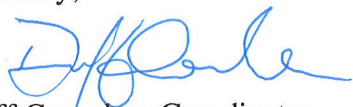
30. In addition to the specific compliance measures provided for in this Part, the Commissioner may order a public office holder, in respect of any matter, to take any compliance measure, including divestment or recusal, that the Commissioner determines is necessary to comply with this *Act*.”

Again, based on the facts set out above about the situation of the fundraising event for Minister of Natural Resources Lisa Raitt, and the law (which the *Conflict of Interest Act*, the *Canada Elections Act*, your *Guideline on Gifts*, the *MPs Code* and the courts define quite clearly), Democracy Watch’s conclusion is that Minister of Natural Resources Lisa Raitt accepted a gift in violation of the *Conflict of Interest Act* and the *MPs Code* because the gift can reasonably be seen to have been given to influence the exercise of their official duties, and Democracy Watch’s opinion is that it is reasonable to conclude that she (and, by extension, her staff) are therefore in a conflict of interest, and will be in a situation in which she will have an opportunity to make at least some decisions that will affect the private interests of her friend Michael McSweeney and his association, the Cement Association of Canada.

As a result, Democracy Watch’s opinion is that it is reasonable for you to believe that that a public office holder and MP has contravened the *Conflict of Interest Act* and *MPs Code* (respectively), and therefore it is reasonable, if you are going to act in a legally correct manner, for you to examine the matter addressed in this petition, and issue a ruling that finds the public office holder and MP in contravention of the *Act* and *MPs Code*, and issue a recusal orders to that minister and MP.

Democracy Watch looks forward to your prompt response to the above information and requests.

Sincerely,



Duff Conacher, Coordinator
on behalf of the Board of Directors of Democracy Watch

Original to follow by mail

ATTACHMENT:

Copy of 1-page invitation to the September 24th fundraising event for Minister Raitt



Lisa Raitt



**Come and support
Lisa Raitt on September 24th**

JOIN US ON
SEPTEMBER 24, 2009 6:00–8:00PM



KULTURA
169 KING EAST
TORONTO, ON M5A 1J4

A minimum of \$250 per person.

No corporate sponsorships, please.

To RSVP, please fax this form to:

**Michael McSweeney
1.613.563.4498**

Questions?

Please e-mail

michael_b_mcsweeney@yahoo.ca

Cheques can be made payable to:

Halton Conservative E.D.A.

YES I will attend.
Here's my information:

I am donating \$ _____

Name: _____

MasterCard #: _____

Visa# _____

Expiry Date: _____

Home Address:

X

Signature