

Court File No.:

T-216-08

FEDERAL COURT

DEMOCRACY WATCH

Applicant

- and -

CONFLICT OF INTEREST AND ETHICS COMMISSIONER

Respondent

---

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

---

**TO THE RESPONDENT:**

**A PROCEEDING HAS BEEN COMMENCED** by the Applicant. The claim made by the applicant appears on the following pages.

**THIS APPLICATION** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The Applicant requests that this application be heard at Toronto.

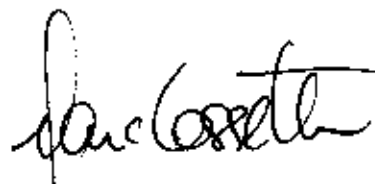
**IF YOU WISH TO OPPOSE THIS APPLICATION**, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a Notice of Appearance in Form 305 prescribed by the *Federal Court Rules*, 1998 and serve it on the applicant's solicitor or, where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the *Federal Court Rules*, 1998, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613.992.4238) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT NOTICE TO YOU.**

Date: February 6, 2008

Issued by:



Federal Court of Canada  
90 Elgin Street  
Ottawa, Ontario  
K1A 0H9  
Tel: 613-992-4238  
Fax: 613-947-2141

**MARC COSSETTE**  
**Registry Officer**  
**Agent du Greffe**

TO:

**Conflict of Interest and Ethics Commissioner Mary Dawson**  
Office of the Conflict of Interest and Ethics Commissioner  
Parliament of Canada  
P.O. Box 16, Centre Block  
22nd Floor, 66 Slater  
Ottawa, Ontario  
K1A 0A6

## APPLICATION

**THIS IS AN APPLICATION FOR JUDICIAL REVIEW** in respect of a decision made by the Conflict of Interest and Ethics Commissioner Mary Dawson (the "Commissioner") dated January 7, 2008 (the "Decision").

### **DEMOCRACY WATCH MAKES APPLICATION FOR:**

1. An order quashing the Decision issued by the Commissioner under the *Conflict of Interest Act* (2006, c. 9, s. 2 - the "Act") arising from a complaint (the "Complaint") made by Democracy Watch on November 26, 2007 with regard to the past and future conduct of The Rt. Hon. Prime Minister Stephen Harper (the "Prime Minister"), The Hon. Minister of Justice and Attorney General of Canada Robert Nicholson (the "Attorney General of Canada"), and other members of the federal Governor-in-Council ("Cabinet ministers"), and substituting therefore its own decision directing that the Commissioner proceed with a full investigation into the Complaint pursuant to s.45(1) of the Act and directing that the Commissioner issue an order of recusal to the Prime Minister, the Attorney General of Canada, and, as appropriate, other members of the federal Governor-in-Council ("Cabinet ministers") pursuant to s.30 of the Act;
2. In the alternative, an order quashing the Decision and sending the Complaint back to the Commissioner for reconsideration with directions regarding the definition of the jurisdiction of, and proper exercise of jurisdiction by, the Commissioner under the Act;
3. A declaration that Democracy Watch was deprived of its right to a fair hearing by the Registrar in accordance with the principles of fundamental justice in connection with its Complaint, in contravention of common law requirements and the principles of fundamental justice under s. 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44;
4. A declaration that sections 44(1) to 44(6) of the Act violate sections 2(b) "freedom of expression" and 2(d) "freedom of association" of the *Canadian Charter of Rights and Freedoms* (the "Charter");
5. Costs; and
6. Such further and other relief as to this Honourable Court seems just.

### **THE GROUNDS FOR THE APPLICATION ARE AS FOLLOWS:**

#### **BACKGROUND**

1. The Commissioner administers and oversees compliance with the *Conflict of Interest Act*;

2. On November 26, 2007, Democracy Watch petitioned the Commissioner to review, investigate and act on the Complaint, consisting of an alleged violation of the Act by the Prime Minister, a request for an investigation of the actions of the Attorney General of Canada with regard to a possible alleged violation of the Act, and a request that an order of recusal be issued by the Commissioner to the Prime Minister and, as appropriate, other Cabinet ministers;
3. The Complaint alleges that the Prime Minister violated the Act by making decisions or participating in making decisions as part of the exercise of his official powers, duties and functions that provided an opportunity to further the Prime Minister's private interest, and to further the private interests of his friend the Rt. Hon. Brian Mulroney ("Mr. Mulroney"), or in the alternative to improperly further the private interests of Mr. Mulroney, with regard to the federal government's response to the affidavit filed in court by Karlheinz Schreiber ("Mr. Schreiber") in November 2008 that contained allegations about Mr. Mulroney and the Prime Minister and the Attorney General of Canada;
4. The Complaint also alleges that, if the Prime Minister made decisions or participated in making decisions as part of the exercise of his official powers, duties and functions, or sought to influence any decisions, with regard to the extradition of Mr. Schreiber to Germany, then he violated the Act as those decisions provided an opportunity to further his private interests, and the private interests of his friend Mr. Mulroney, or in the alternative to improperly further the private interests of Mr. Mulroney;
5. The Complaint also alleges that the Prime Minister will violate the Act by making any future decisions or participating in making any future decisions as part of the exercise of his official powers, duties and functions, or seeking to influence any future decisions, with regard to the federal government's response to Mr. Schreiber's affidavit, or with regard to the extradition of Mr. Schreiber to Germany, because those decisions will provide an opportunity to further the Prime Minister's private interests, and to further the private interests of his friend the Rt. Hon. Brian Mulroney ("Mr. Mulroney"), or in the alternative to improperly further the private interests of Mr. Mulroney;
6. The Complaint also alleges that if the Attorney General of Canada made decisions or participated in making decisions as part of the exercise of his official powers, duties and functions, or sought to influence any decisions, with regard to the extradition of Mr. Schreiber to Germany, or with regard to the federal government's response to Mr. Schreiber's affidavit, then he violated the Act as those decisions provided an opportunity to further his private interests, and the private interests of his friend the Prime Minister, and the private interests of his friend Mr. Mulroney, or in the alternative to improperly further the private interests of the Prime Minister and Mr. Mulroney;
7. The Complaint also alleges that the Attorney General of Canada will violate the Act by making any future decisions or participating in making decisions as part of the exercise of his official powers, duties and functions, or seeking to influence any future decisions, with regard to the extradition of Mr. Schreiber to Germany, or with regard to the federal government's response to Mr. Schreiber's affidavit, then he will violate the

Act as those decisions will provide an opportunity to further his private interests, and the private interests of his friend the Prime Minister, and the private interests of his friend Mr. Mulroney, or in the alternative to improperly further the private interests of the Prime Minister and Mr. Mulroney;

8. The Complaint also alleges that if The Hon. Marjory LeBreton ("Secretary of State LeBreton"), Leader of the Government in the Senate and Secretary of State (Seniors) made decisions or participated in making decisions as part of the exercise of her official powers, duties and functions, or sought to influence decisions, with regard to the federal government's response to Mr. Schreiber's affidavit or with regard to the extradition of Mr. Schreiber to Germany, then she violated the Act as those decisions provided an opportunity to further the private interests of her friend the Prime Minister, her friend Mr. Mulroney, or in the alternative to improperly further the private interests of the Prime Minister and Mr. Mulroney;

9. The Complaint also alleges that Secretary of State LeBreton will violate the Act by making any future decisions or participating in making any future decisions as part of the exercise of her official powers, duties and functions, or seeking to influence any future decisions, with regard to the federal government's response to Mr. Schreiber's affidavit or with regard to the extradition of Mr. Schreiber to Germany, because those decisions will provide an opportunity to further the private interests of her friend the Prime Minister, her friend Mr. Mulroney, or in the alternative to improperly further the private interests of the Prime Minister and Mr. Mulroney;

10. The Complaint also alleges that if other Cabinet ministers have made decisions or participated in making decisions as part of the exercise of their official powers, duties and functions, or have sought to influence decisions, with regard to the federal government's response to Mr. Schreiber's affidavit, or with regard to the extradition of Mr. Schreiber to Germany, or if they make future decisions or participate in making future decisions or seek to influence future decisions concerning these matters (for example, delegated by the Prime Minister to make the decisions), their decision-making is in violation of the Act because it provides an opportunity to further the private interests of their friend the Prime Minister, and also (given that the Prime Minister has full discretion to dismiss them from Cabinet for any reason) their own private interest in remaining a Cabinet minister;

11. The Complaint also alleges that if ministerial staff person or "at pleasure" senior government officials have made decisions or participated in making decisions as part of the exercise of their official powers, duties and functions, or have sought to influence decisions, with regard to the federal government's response to Mr. Schreiber's affidavit, or with regard to the extradition of Mr. Schreiber to Germany, or if they make future decisions or participate in making future decisions or seek to influence future decisions concerning these matters (for example, delegated by the Prime Minister to make the decisions), their decision-making is in violation of the Act because it provides an opportunity to further the private interests of their friend the Prime Minister, and also (given that the Prime Minister has full discretion to dismiss them as a ministerial staff

person or "at pleasure" senior government official for any reason) their own private interest in remaining a staff person or senior government official;

## THE CONFLICT OF INTEREST ACT

12. The main purposes of the *Conflict of Interest Act* (the "Act") are to: "establish clear conflict of interest and post-employment rules for public office holders" (s.3.(1)(a) – with public office holders including ministers and senior ministerial staff and senior government officials; to "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" (s.3.(1)(b)), and; to "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. . ." (s.3.(1)(c));

13. With regard to conflicts of interest, the Act states that: "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" (s.6.(1)) with "conflict of interest" defined as "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" (s.4) and with "private interest" defined only as not including (s.2.(1)) "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.";

14. In addition, the Act states that: "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 interests." (s.9);

15. With regard to recusal of a public office holder from a decision-making process, the Act states that: "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." (s.21);

16. The Act also has an "anti-avoidance" provision that states "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." (s.18);

17. With regard to the Commissioner's powers under the Act, the Act states that: "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.” (45. (1)) and that “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.” (s.30);

## **THE COMMISSIONER’S DECISION AND ITS DEFECTS**

18. On or about January 7, 2008, Democracy Watch received the Commissioner’s Decision on the Complaint. The Commissioner refused to exercise her jurisdiction to examine the Complaint, and refused to exercise her jurisdiction to issue any orders of recusal, because she defined her jurisdiction as not including the private interests of a public office holder in a specific, legal matter in which allegations have been made about the conduct of the public office holder (in the Complaint, Democracy Watch alleged that the Prime Minister and the Attorney General of Canada had such a private interest given that allegations had been made about them in Mr. Schreiber’s affidavit), and instead decided in an improperly vague manner that her jurisdiction only included private interests that involved “Another interest, whether a financial or business or some other interest.”

19. The Commissioner also refused to exercise her jurisdiction because she defined her jurisdiction as not including public office holders who have an opportunity to take part in or influence decisions that further the private interest of a friend, or improperly further the private interest of another person (in the Complaint, Democracy Watch alleged that the Prime Minister had and has such an opportunity with regard to his friend Mr. Mulroney, the Attorney General of Canada may have had, and may have, such an opportunity with regard to his friends the Prime Minister and Mr. Mulroney, Secretary of State LeBreton may have had, and may have, such an opportunity with regard to her friends the Prime Minister and Mr. Mulroney, and other Cabinet ministers, ministerial staff, and “at pleasure” senior government officials may have had, or may have, such an opportunity with regard to their friend the Prime Minister).

### ***Failures to observe principles of Natural Justice:***

20. The Commissioner’s Decision is procedurally defective insofar as the Commissioner did not contact Democracy Watch or give it an opportunity to present its Complaint to the Commissioner, and as such failed to accord Democracy Watch the participatory rights consistent with procedural fairness;

### ***The Commissioner Improperly Refused to Exercise Her Jurisdiction***

21. In making the Decision, the Commissioner improperly refused to exercise her jurisdiction to examine the Complaint, and to issue orders of recusal, and therefore failed to fulfill her mandate properly, in the following ways:

(a) the Commissioner failed to fulfill two of the main purposes of the Act, namely to: "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" (s.3.(1)(b)) and "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. . ." (s.3.(1)(c));

(b) the Decision was a first-level administrative review decision, with no consequences for any public office holder except that the Commissioner would examine the complaint to determine the extent of the private interests of the public office holders, the relationships between public office holders and Mr. Mulroney, and the opportunities the public office holders had or may have to further their interests, the interests of any of their friends, or to improperly further anyone's interests, and to determine whether any violations of the Act had occurred, and whether and what future actions (including recusal) would be necessary to prevent violations of the Act by minimizing the possibility of conflicts of interest arising between the private interests and public duties of the public office holders involved in the situation described in the Complaint, by avoiding such conflicts of interest, and by resolving such conflicts of interest in the public interest;

(c) the Act does not contain any provision limiting the definition of "private interest" in any way that means that the Commissioner did not have jurisdiction to examine the Complaint;

(d) the Commissioner ignored the provisions in the Act that give her jurisdiction to examine a situation, and to issue an order of recusal to a public office holder, even if the situation only "provides an opportunity" for a public office holder to further his or her or another person's private interests, and instead the Commissioner decided that her jurisdiction only extends to examining situations in which a public office holder had already furthered his or her or another person's private interests;

(e) the Commissioner improperly ignored credible evidence that the private interests of the Prime Minister, the Attorney General of Canada, and Mr. Mulroney were affected by the situation, and evidence that there were, in the situation described in the Complaint, opportunities to further the Prime Minister's and other Cabinet ministers private interests, and the interests of Mr. Mulroney, including ignoring the Prime Minister's clear, public statement that "it's impossible, frankly, for the government to make an impartial judgment on how to proceed" in responding to the allegations made in Mr. Schreiber's affidavit;

(f) in effect, the Commissioner incorrectly required that, to exercise her jurisdiction and make the administrative review level decision to examine the complaint, she be presented with clear, comprehensive, incontrovertible evidence that a contravention of the Act had occurred;



(g) the Commissioner failed to uphold another of the main purposes of the Act, namely to “establish clear conflict of interest and post-employment rules for public office holders”, by deciding in an incorrectly vague manner that her jurisdiction only included examining complaints in which the private interest of the public office holder included “Another interest, whether a financial or business or some other interest” (without providing any clear definition of what “financial”, “business” and “some other interest” mean);

(h) the Commissioner’s Decision also failed to mention, let alone incorporate, the document “Accountable Government: A Guide for Ministers and Secretaries of State – 2007” which contains several rules and guidelines that clearly define the limits of the Commissioner’s jurisdiction as being much broader than the Commissioner established in the Decision, including establishing how strictly and strongly the ethical standards must be interpreted and applied to the Prime Minister and Cabinet ministers, and including establishing how clearly a Prime Minister’s conflict of interest is automatically shared by other Cabinet ministers, Cabinet staff, and senior government officials, through such rules and guidelines as the following: the guidelines in sections V.Standards of Conduct (which require Cabinet ministers to act in “strict conformity with” and “with regard to the spirit and intent of” all standards of conduct set out in laws, codes, rules or guidelines), and in sections V.1.Ministerial Conduct and V.2.Conflict of Interest and the directly related Annex G-Ethical Guidelines for Public Office Holders which requires, among other things, that public office holders “uphold the highest ethical standards so that public confidence and trust in the integrity, objectivity and impartiality of the government are conserved and enhanced” and “to perform their official duties and arrange their private affairs in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged by simply acting within the law”, and; Part A.2.The Prime Minister’s Functions and Powers, which along with other annexes (e.g. Annex C–Appointments) and sections (e.g. I.3.Ministerial Accountability and Answerability; II.8.Acting Ministers; IV.2.The Prime Minister’s Office. and; II.5.Deputy Ministers) makes it clear that the Prime Minister has full control and discretion over the selection, mandate, demotion and removal of all Cabinet ministers, Secretaries of State, Parliamentary Secretaries, the Clerk of the Privy Council, the Prime Minister’s political staff, and Deputy Ministers.

22. The Commissioner’s Decision is, therefore, patently unreasonable;

## **SECTIONS 44(1) TO 44(6) OF THE ACT IN VIOLATION OF THE CHARTER**

### ***Violations of sections 2(b) “freedom of expression” and 2(d) “freedom of association”***

23. Sections 44(1) to 44(3) of the Act state that if a member of the Senate or the House of Commons sets out in writing to the Commissioner a request to examine a matter involving a public office holder or former public office holder, and sets out reasonable grounds for believing specified provisions of the Act have been contravened, the

Commissioner shall either dismiss the request as frivolous or vexatious or shall examine the matter;

24. Section 44(4) of the Act states that the Commissioner's examination may consider information from the public if it is brought to the Commissioner's attention by a member of the Senate or the House of Commons;

25. Under section 44(5) of the Act, a member of the Senate or the House of Commons may not disclose the information submitted to the Commissioner under section 44(4) to anyone, nor disclose that the member has submitted the information to the Commissioner, until the Commissioner issues a report after examining the matter. If a member of the Senate or the House of Commons violates section 44(5), under section 44(6) the Commissioner has the power to refer the matter, in confidence, to the Speaker of the Senate or the House of Commons;

26. As a result of these sections of the Act, a member of the public, such as Democracy Watch, is required to associate with a member of the Senate or the House of Commons in order to file a complaint with the Commissioner that the Commissioner is required by the Act to examine. If a member of the public files a request with the Commissioner directly, the Commissioner has the discretion (which must be properly exercised) to refuse to examine the request;

27. In addition, the member of the public, although forced to associate with a member of the Senate or the House of Commons in order to file a complaint with the Commissioner that the Commissioner is required by the Act to examine, has no right to know whether the member of the Senate or the House of Commons has filed the complaint with the Commissioner;

28. By requiring a member of the public to associate with a member of the Senate or the House of Commons, in particular to require Democracy Watch which is a strictly non-partisan organization to associate with a partisan member of the Senate or the House of Commons, in order to file a complaint with the Commissioner that the Commissioner is required by the Act to examine, the public's right to freedom of association, and in this case specifically Democracy Watch's right to freedom of association under the Charter, is violated;

29. The right to freedom of association in the Charter includes the right not to be forced to associate with anyone unless the forced association is reasonable in a free and democratic society;

30. It is not reasonable in a free and democratic society to force a member of the public to associate with a member of the Senate or the House of Commons in order to have a complaint about another member of the Senator or the House of Commons examined fully, especially a complaint about the member of the Senate or the House of Commons violating the Act which plays a fundamental role in Canada being a free and democratic society;

31. The right to freedom of expression encompasses the right to express oneself about the actions of the Prime Minister, Cabinet ministers, ministerial staff, senior government officials and other public office holders, and can only be limited under the Charter if the limits are reasonable in a free and democratic society (for example, expression that is libel or slander is not protected);

32. It is not reasonable in a free and democratic society to, in any way, limit the right of anyone to express themselves about the actions of public office holders in cases where those actions, a reasonable person would conclude, violate the Act which plays a fundamental role in Canada being a free and democratic society;

#### **LEGISLATION AND RELATED GROUNDS**

33. *The Conflict of Interest Act* (2006, c. 9, s. 2) and the directly related the document "Accountable Government: A Guide for Ministers and Secretaries of State – 2007;

34. *Canadian Bill of Rights*, S.C. 1960, c.44;

35. *Canadian Charter of Rights and Freedoms* (1982);

36. *Federal Court Act*, R.S.C. 1985, c.F-7, as amended;

37. *Federal Court Rules*, 1998, SORJ98-106; and

38. Such further and other grounds as Democracy Watch may submit and this Honourable Court may accept.

#### **THE APPLICATION WILL BE SUPPORTED BY THE FOLLOWING:**

1. The Application Record of Democracy Watch, including the Affidavit of Duff Conacher, to be filed;

2. The January 7, 2008 Decision by the Conflict of Interest and Ethics Commissioner, and;

3. Such further material as counsel may advise and this Honourable Court may permit.

**DEMOCRACY WATCH REQUESTS** the Office of the Conflict of Interest and Ethics Commissioner to send a certified copy of all documents relating to the Ruling that are not in the possession of Democracy Watch but are in the possession of the Office of the Conflict of Interest and Ethics Commissioner, to Democracy Watch's counsel and to the Registry.

February 6, 2008

**HAMEED FARROKHZAD ST-PIERRE**

Barristers & Solicitors  
43 Florence Street  
Ottawa, ON K2P 0W6

**Per: Yavar Hameed (LSUC # 44763A)**

Tel: 613-232-2688 ext.228

Fax: 613-232-2680

Solicitor for the Applicant, Democracy  
Watch

**Court No.**

**FEDERAL COURT**

**BETWEEN:**

DEMOCRACY WATCH  
Applicant

-and-

CONFLICT OF INTEREST AND ETHICS COMMISSIONER  
Respondent

**NOTICE OF APPLICATION FOR JUDICIAL REVIEW**

**HAMEED FARROKHZAD ST-PIERRE**  
Barristers & Solicitors  
43 Florence Street  
Ottawa, ON K2P 0W6

**Per: Yavar Hameed (LSUC #44763A)**  
Tel: 613-232-2688 ext.228  
Fax: 613-232-2680

Solicitor for the Applicant, Democracy Watch.



Office of the Conflict of Interest and Ethics Commissioner  
Commissariat aux conflits d'intérêts et à l'éthique

66, rue Slater Street  
22<sup>nd</sup> Floor / 22<sup>e</sup> étage  
OTTAWA, ONTARIO  
CANADA  
K1A 0A6

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 Mulroney-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 Mulroney-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 dark ink and is positioned above the printed name and title.

Mary Dawson  
Conflict of Interest and Ethics  
Commissioner