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

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March 7, 2018

Mr. Bob Zimmer, M.P.
Chair
Standing Committee on Access to Information, Privacy and Ethics
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, Ontario K1A 0A6

Dear Mr. Zimmer,

During my appearance before the Standing Committee on Access to Information, Privacy and Ethics on February 8, 2018, regarding the review of the *Conflict of Interest Act,* I indicated that I would provide the Committee with responses to several questions that were asked of me by Members.

I hope that the discussion in the attached document, organized according to the subject areas where the Committee was seeking additional information, will go some way to answering those questions more fully.

Please contact my Office at 613-995-0721 if you would like to discuss this further.

Sincerely,

Mario Dion
Conflict of Interest and Ethics Commissioner

Encl.

c.c. Jean-Denis Kusion, Clerk of the Committee

Submission to the Standing Committee on Access to Information, Privacy and Ethics in response to questions posed to the Conflict of Interest and Ethics Commissioner on February 8, 2018

1. Fundraising by Members of Parliament, Ministers and Parliamentary Secretaries

Mr. Michel Picard, M.P., asked for my position on the obligation of Members of Parliament to fundraise for their election campaign as opposed to using their own money to pay for their campaign. He also asked for my position on the potential, particularly for parliamentary secretaries and ministers, for an actual or perceived conflict of interest when raising funds from corporations and individuals. I committed to providing a written response to the Committee.

In terms of the practical necessity for Members of Parliament to fundraise and the prohibition against individuals using their own funds to finance their campaign, it is the *Canada Elections Act* that regulates the financing of political campaigns. The Committee will understand that it would be inappropriate for me to comment on a regime that falls outside the mandate of my Office.

In terms of the potential for an actual or perceived conflict of interest when raising funds from companies or individuals, the rules are different for Members of Parliament who are subject only to the *Conflict of Interest Code for Members of the House of Commons* (Code) and for ministers and parliamentary secretaries who are subject to both the Code and to the *Conflict of Interest Act* (Act).

Members of Parliament and the Code

The Code includes a number of provisions that extend to fundraising activities, despite the absence of a provision that explicitly governs such activities. The principle enunciated in subparagraphs 2(a) and (d) is that Members are expected:

> ***2.*** *(a) to serve the public interest and represent constituents to the best of their abilities;*
>
> *(d) to arrange their private affairs so that foreseeable real or apparent conflicts of interest may be prevented from arising (…)*

There are also general rules of conduct that would apply in Members' future dealings with donors solicited in the context of these fundraising activities:

> ***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.*
>
> ***9.*** *A Member shall not use his or her position as a Member to influence a decision of another person so as to further the Member's private interests or those of a member of his or her family, or to improperly further another person's or entity's private interests.*
>
> ***11.*** *A Member shall not attempt to engage in any of the activities prohibited under sections 8 to 10.*

An advisory opinion on Fundraising and the Members' Code, available on my Office's website, contains the following advice:

> When fundraising, you should not target any organizations or individuals with which you anticipate having official dealings in your capacity as a Member of Parliament, including

in the context of committee work. This would avoid the potential for furthering a person's private interest as prohibited by section 8.

When organizations or individuals such as lobbyists or other stakeholders are involved in fundraising activities for your electoral district association, care should be taken as they may approach you to discuss matters under study before the House of Commons that may affect their private interests. You should be mindful of your obligation under section 8 of the Members' Code.

Ministers and Parliamentary Secretaries and the Act

Ministers and parliamentary secretaries are subject to the Code and to the Act. The *Conflict of Interest Act* contains only one provision that deals directly with fundraising, section 16, which does not distinguish between political and charitable fundraising. It states:

> ***16.*** *No public office holder shall personally solicit funds from any person or organization if it would place the public office holder in a conflict of interest.*

The Act does not prevent public office holders from engaging in political activities, including fundraising for political purposes, as long as they continue to fulfil their obligations under the Act. My Office has produced a guideline on *Fundraising and the Conflict of Interest Act* to guide public office holders on how they can conduct fundraising activities and remain in compliance with the Act.

Ministers and parliamentary secretaries engaging in fundraising for political purposes are advised not to:

- Solicit funds from a company or organization with which the public office holder, their office or their department has had official dealings or anticipates doing so.
- Solicit or accept funds from a person or organization who has lobbied or is likely to lobby the public office holder or their office, department or committee.

The guideline also reminds public office holders to recuse themselves from any discussion, decision, debate or vote concerning donors' private interests, and advises them that a conflict of interest screen may be necessary in some instances.

2. Assets Held Directly and Indirectly

The Vice-Chair, Mr. Nathaniel Erskine-Smith, M.P., referring to a statement that I made to the media that I would not be bound by the precedents set by former Commissioner Dawson, asked whether I would interpret section 17 on holding controlled assets differently. I committed to provide a written response to the Committee.

While it is true that I have said that I will not be bound by the precedents set by my predecessor, this does not mean at all that I intend to begin with a clean slate. My intention is to consider each new case on its merits. I will study the rationale followed by my predecessor in making her interpretation and balance this against an evaluation of the new circumstances, context and environment to determine if a new

interpretation is warranted. As requested by Mr. Erskine-Smith, I have considered section 17 of the Act.

Section 17 prohibits reporting public office holders from holding or acquiring controlled assets. It reads as follows:

> ***17.*** *No reporting public office holder shall, unless otherwise provided in Part 2, hold controlled assets as defined in that Part.*

Unlike other legislation, section 17 of the Act makes no distinction between assets that are held "directly or indirectly." There are other examples of legislation, however, where such a distinction is made explicitly. For example:

- *Income Tax Act* (s. 212.3, s. 248, s. 256)
- *Bank Act* (s. 271)
- *Insurance Companies Act* (s. 294, s. 528.3)
- *Trust and Loan Companies Act* (s. 11.1, s. 276)

I note as well that the drafters of the Act chose to specify "directly or indirectly" elsewhere in the Act when they felt that it was important to do so. For example, controlled assets are defined in section 20 of the Act as "assets whose value could be directly or indirectly affected by government decisions or policy (…)"

Moreover, Section 17 provides that a reporting public office holder must not "hold controlled assets." An individual who hold assets indirectly through a privately owned corporation do not actually hold the assets. Because corporations are legal entities, the corporation holds the assets, not the individual.

My predecessor, Ms. Dawson, in her January 30, 2013, submission to this Committee in respect of its five-year review of the Act, raised this matter with the Committee. She described the prohibition against holding controlled assets as being too narrow and told the Committee: "There have been instances where a reporting public office holder does not hold controlled assets directly, but holds them indirectly through a holding company or other similar mechanisms." She recommended that "section 17 be amended to cover cases where controlled assets are held indirectly as well as directly."

The Committee's report on its five-year review of the Act did not address this recommendation. Former Commissioner Dawson concluded that the Committee's silence on the matter was an indication that it was not concerned with the narrowness of the prohibition and did not see the need for an amendment. Having reviewed the rationale for my predecessor's interpretation, I see no reason to change it.

As Commissioner, I must apply the Act as it is written. However, section 29 of the Act gives me the power to determine appropriate measures by which public office holders shall comply with the Act. I have asked my Office to develop additional measures that may be taken under the Act in this area that are in line with the spirit of the Act.

3. The Power to Require the Repayment of the Value of an Improper Gift

The Honourable Peter Kent, P.C., M.P., asked for my views of whether the Commissioner should have the power to require the repayment of the value of an improper gift. Later in the meeting, the Vice-Chair, Mr. Erskine-Smith, also asked whether the power to require that the reasonable value of an improper gift be repaid is one that the Commissioner ought to have.

As it stands, I have no power to make recommendations in my examination reports, including the power to recommend that an improper gift be repaid.

As suggested during my appearance before the Committee, I believe that the Committee should consider giving me the power to make relevant recommendations in my reports. Such recommendations would be specific to each situation, including recommending that individuals reimburse the value of gifts improperly accepted.

Committee members may be interested in the precedent that exists for the Public Sector Integrity Commissioner, a position I occupied from 2010 to 2014. That Commissioner was given the power to make recommendations in the *Public Servants Disclosure Protection Act*, adopted as part of the same bill as the *Conflict of Interest Act*:

> ***22*** *The duties of the Commissioner under this Act are to*
>
> *[…]*
>
> ***h)*** *make recommendations to chief executives concerning the measures to be taken to correct wrongdoings and review reports on measures taken by chief executives in response to those recommendations; and*
>
> *[…]*
>
> ***26 (1)*** *Investigations into disclosures and investigations commenced under section 33 are for the purpose of bringing the existence of wrongdoings to the attention of chief executives and making recommendations concerning corrective measures to be taken by them.*

4. Strengthening the Fundraising Provisions of the Act

The Committee Vice-Chair, Mr. Erskine-Smith, also asked that I provide examples of ways in which the fundraising provisions of the Act could be strengthened.

As stated earlier in this document, the Act contains only one provision, section 16, that directly addresses participation in fundraising activities, and that provision does not distinguish between political and charitable fundraising. Section 16 applies to both reporting and non-reporting public office holders.

> ***16.*** *No public office holder shall personally solicit funds from any person or organization if it would place the public office holder in a conflict of interest.*

Two elements must exist to establish a contravention of section 16 of the Act. First, a public office holder must have personally solicited funds from a person or organization or have asked someone else to do so. Second, it must be established that the solicitation

would place the public office holder in a conflict of interest. If the first element is not found to exist, the second element is not engaged.

As I indicated during my appearance before the Committee, the potential for a conflict of interest related to political fundraising is higher for ministers and parliamentary secretaries than for other public office holders. I agree with the recommendation made by my predecessor in her January 2013 submission to this committee in the context of its review of the Act that consideration should be given to amending the Act to include provisions dealing with political fundraising.

Examples might include prohibitions against the personal solicitation of funds when to do so could raise concerns related to furthering private interests. An amendment could also be made to include a contravention in the case of a minister or a parliamentary secretary who knew or should have known that funds were being solicited by others in circumstances that would place him or her in a conflict of interest and failed to take appropriate action. Broader recusal obligations and provisions for the establishment of conflict of interest screens might also be included.

The Committee might also consider including some of the rules that exist currently in the Prime Minister's guidance on fundraising in Open and Accountable Government.

5. Sanctions and Discretion in their Application

In reference to my suggestion that the Committee amend the Act to provide for sanctions for substantive contraventions of the Act, Mr. Erskine-Smith also asked that I follow up in writing with the Committee on whether I would differentiate between good-faith mistakes and intentional ones, or willful blindness, and whether there should be a difference in discretion with regard to those sanctions.

As indicated during my appearance, I believe that the Committee may wish to consider recommending sanctions for substantive breaches as this would provide Canadians with the assurance that there are more serious consequences for breaching the Act than the current regime of "naming and shaming," and this would help to build trust with the Canadian public.

If the Committee decides to proceed as I have suggested, it may wish to recommend that criteria be developed to guide the Commissioner when imposing a sanction. The administrative monetary penalty regime provides a useful example. The existing regime allows the imposition of an administrative monetary penalty of up to $500 on a reporting public office holder who fails to meet certain reporting requirement of the Act. Subsection 53(3) includes a list of criteria that the Commissioner must weigh when imposing a penalty. The Committee might consider adding criteria for sanctions that could include the severity of the breach and whether the person in question was a repeat violator of the rules.

6. <u>De minimis</u>

The Vice-Chair, Mr. Erskine-Smith, said that he agreed with the point made by Mr. Baylis, M.P., earlier in the Committee meeting that there should be a *de minimis* amount established in the Act under which gifts could not be seen to have been given to influence a public office holder.

Currently, the Act does not provide for a *de minimis*. The previous Commissioner, in her January 2013 submission to this Committee in the context of its review of the Act, recommended reducing the threshold for disclosing gifts or other advantages to a minimal amount such as $30. The intent was to set an amount under which gifts could not reasonably be seen to have been given to influence a public office holder. In Ms. Dawson's recommendations, such gifts would not need to be declared, but all gifts valued over the *de minimis* amount would be subject to declaration.

I agree that setting a minimal amount under which any gift or other advantage could not reasonably be seen to have been given to influence is a reasonable step to take. The Committee might consider recommending the addition of a *de minimis* amount for gifts or benefits. I disagree, however, with my predecessor on the matter of lowering the reporting threshold; my view is that the requirement to declare all gifts valued above $30 would represent an unreasonable administrative burden for reporting public office holders.

I also acknowledge that the reporting threshold of $200 has not changed for many years to keep pace with inflation. It was the reporting threshold in the 1994 *Conflict of interest and Post-employment Code for Public Office Holders*. The value of the threshold is something that the Committee may wish to examine further.