

Office of the Public Sector
Integrity Commissioner
of Canada




Commissariat à l'intégrité
du secteur public
du Canada

**Findings of the Office of the Public Sector
Integrity Commissioner in the
Matter of an Investigation
into a Disclosure of Wrongdoing**

Enterprise Cape Breton Corporation

Case Report
May 2014



The generic masculine has been used in this report to protect the identity of those concerned.

The Report is available on our Web site at: www.psic-ispcc.gc.ca

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The Honourable Noël A. Kinsella
Speaker of the Senate
The Senate
Ottawa, Ontario K1A 0A4

Dear Mr. Speaker:

I have the honour of presenting you with the Office of the Public Sector Integrity Commissioner of Canada's Case Report of Findings in the Matter of an Investigation into a Disclosure of Wrongdoing at Enterprise Cape Breton Corporation, which is to be laid before the Senate in accordance with the provisions of subsection 38 (3.3) of the *Public Servants Disclosure Protection Act*.

Yours sincerely,

A handwritten signature in black ink that reads "Mario Dion". The signature is written in a cursive style with a large, stylized "D" at the end.

Mario Dion
Public Sector Integrity Commissioner
OTTAWA, May 2014

The Honourable Andrew Scheer, M.P.
Speaker of the House of Commons
House of Commons
Ottawa, Ontario K1A 0A6

Dear Mr. Speaker:

I have the honour of presenting you with the Office of the Public Sector Integrity Commissioner of Canada's Case Report of Findings in the Matter of an Investigation into a Disclosure of Wrongdoing at Enterprise Cape Breton Corporation, which is to be laid before the House of Commons in accordance with the provisions of subsection 38 (3.3) of the *Public Servants Disclosure Protection Act*.

Yours sincerely,

A handwritten signature in black ink that reads "Mario Dion". The signature is written in a cursive, flowing style.

Mario Dion
Public Sector Integrity Commissioner
OTTAWA, May 2014

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Foreword

I present you with this case report of founded wrongdoing, which I have tabled in Parliament as required by the *Public Servants Disclosure Protection Act*, S.C., 2005, c.46 (the *Act*).

The *Act* was created to provide a confidential whistleblowing mechanism in the federal public sector to respond to the need to address and prevent cases of wrongdoing. The disclosure regime established under the *Act* is meant not only to stop these actions from continuing and to signal the need for corrective action, but also to act as a general deterrent throughout the federal public sector. This is the reason why founded cases of wrongdoing are required by the *Act* to be reported to Parliament, which is a powerful tool of transparency and public accountability.

From time to time, such as in this case, information related to disclosures that I receive is shared publicly by outside parties. My Office is bound by strict confidentiality obligations. It is important to protect the identity of all parties and to ensure that procedural fairness and natural justice are respected. As a result, no one from the Office can speak to any ongoing investigation or even confirm or deny the existence of a disclosure of wrongdoing, nor can we provide any information once an investigation has been closed and wrongdoing was not found.

The only time we can speak of an investigation is when I have determined (or the Deputy Commissioner in matters where I need to recuse myself) that wrongdoing has been committed and when a Case Report is tabled in Parliament.

In this matter, relating to Mr. John Lynn, the Chief Executive Officer of the Enterprise Cape Breton Corporation (ECBC), I found that although Mr. Lynn had the authority to appoint four individuals without a formal process that he nonetheless seriously breached ECBC's own code of conduct which resulted in my making this finding of wrongdoing.

Mario Dion, Public Sector Integrity Commissioner

Mandate

The Office of the Public Sector Integrity Commissioner of Canada is an independent organization created in 2007 to establish a safe and confidential mechanism for public servants or members of the public to disclose wrongdoing in, or relating to, the federal public sector. Specifically, my Office has the mandate to investigate disclosures of alleged wrongdoing and complaints of reprisal brought forward under the *Public Servants Disclosure Protection Act* (the *Act*).

Section 8 of the *Act*, defines wrongdoing as:

- (a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this *Act*;
- (b) a misuse of public funds or a public asset;
- (c) a gross mismanagement in the public sector;
- (d) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant;
- (e) a serious breach of a code of conduct established under section 5 or 6; and
- (f) knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs (a) to (e).

The purpose of investigations into disclosures is, according to the *Act*, to bring the findings of wrongdoing to the attention of the organization's chief executive and to make recommendations for corrective action.

Under subsection 38 (3.3) of the *Act*, I must report to Parliament founded cases of wrongdoing within sixty days after the conclusion of an investigation. This Case Report addresses one such investigation and the findings related to the allegations of wrongdoing brought forward to my Office.

The Disclosure

On January 3, 2013, I received a disclosure of wrongdoing alleging that Enterprise Cape Breton Corporation's (ECBC) Chief Executive Officer, Mr. John Lynn, improperly appointed four individuals to ECBC positions in 2009/2010. It was alleged that these appointments were made under political influence and not based on merit or following a competitive process, and further depicted as "patronage appointments". It was also alleged that under political influence, Mr. Lynn improperly contracted the consulting services of another individual at ECBC. Finally, it was claimed that Mr. Lynn did not manage an ECBC-funded Ben Eoin marina project in accordance with its intended purpose; specifically, that he reserved most of the marina's berths for his own usage as well as that of his associates, which was considered to be incompatible with ECBC's obligations under section 33 of the *Enterprise Cape Breton Corporation Act* to broaden the base of the region's economy.

After a detailed analysis of the information provided, I ordered the commencement of an investigation, on June 7, 2013, to determine whether these alleged actions constituted a gross mismanagement and/or a serious breach of a code of conduct; wrongdoings as defined at paragraphs 8(c) and (e) of the *Act*.

About the Organization

Enterprise Cape Breton Corporation is a federal Crown corporation that was created to promote and assist the financing and development of Cape Breton Island and the Mulgrave area. Its mission statement reads: *In partnership with all levels of government, the private sector and other community stakeholders, ECBC will use its broad and flexible powers to assist, promote and co-ordinate efforts that foster an environment supportive of the generation of wealth to effect sustainable job creation throughout Cape Breton Island and Mulgrave.*

Crown corporations are established by an act of Parliament and report to Parliament via a minister. While Crown corporations operate at arm's length from the government, as public institutions, they are ultimately accountable to the government. ECBC is still subject to the control and accountability regime set out in the *Financial Administration Act* and reports to Parliament through the Minister responsible for the Atlantic Canada Opportunities Agency (ACOA).

On March 28, 2014, the Government of Canada introduced legislation that, once passed, would authorize ACOA to assume responsibility for the economic and community development activities of ECBC.

Results of the Investigation

The investigation found that:

- **Mr. Lynn committed a serious breach of ECBC's Employment Conduct and Discipline Policy, which was ECBC's own code of conduct at the time. This finding is as a result of the appointment of four individuals with ties to the Conservative Party of Canada or the Progressive Conservative Party of Nova Scotia into executive positions at ECBC with little or no documented justifications and without demonstrating that the appointments were merit-based. These appointments leave the appearance that they were partisan appointments.**
- **Although Mr. Lynn's appointment decisions were inconsistent with good governance standards, it was determined that the circumstances did not amount to a gross mismanagement because the investigation did not demonstrate that his decisions affected ECBC's ability to carry out its mandate.**

The information gathered during this investigation *did not* substantiate the following allegations:

- **That Mr. Lynn committed a wrongdoing with respect to the contracting of the consulting services of another individual at ECBC and**
- **That he committed a wrongdoing with respect to the management of the Ben Eoin marina project.**

Overview of the Investigation

The investigation, carried out by Stefanie Dumas and Raynald Lampron, both of my Office, included a collection and analysis of information as well as information obtained from witnesses which also included written representation made by Mr. Lynn or on his behalf.

Following the careful analysis of all the information obtained, I determined that there could be sufficient grounds to make a finding of wrongdoing that could adversely affect Mr. Lynn. Consequently, and in keeping with our obligations under the *Act*, my Office provided both Mr. Lynn and ECBC's Acting Chief Executive Officer, Ms. Marlene Usher, with a copy of a preliminary investigation report on February 4, 2014. They were provided full and ample opportunity to comment on the allegations and the preliminary results.

At that time, I was of the view that the Clerk of the Privy Council should also be given an opportunity to comment because the allegations concerned ECBC's Chief Executive, a Governor in Council appointee, and so, a copy of these findings was also provided to Mr. Wayne G. Wouters.

In arriving at these findings, I have given due consideration to all of the information received throughout the course of this investigation, including comments on the preliminary findings provided by Mr. Lynn or his representative and Ms. Usher, the current Acting Chief Executive Officer of ECBC.

Summary of Findings

Serious Breach of a Code of Conduct

The factors that my Office takes into consideration when determining whether an action or omission comprises a serious breach of a code of conduct include:

- the breach represents a significant departure from generally accepted practices within the federal public sector;
- the impact or potential impact of the breach on the organization's employees, clients and the public trust is significant;
- the alleged wrongdoer occupies a position that is of a high level of seniority or trust within the organization;
- there are serious errors which are not debatable among reasonable people;
- the breach of the applicable code(s) of conduct is systemic or endemic;
- there is a repetitive nature to the breaches of the applicable code(s) of conduct or they have occurred over a significant period of time; and
- there is a significant degree of wilfulness or recklessness related to the breach of the applicable code(s) of conduct.

In determining that the conduct and actions of Mr. Lynn were sufficient to constitute a serious breach of a code of conduct, the following factors were taken into account:

- There was an element of deliberateness to Mr. Lynn's actions. The four individuals appointed to ECBC positions had publicly known ties to the Conservative Party of Canada and the Progressive Conservative Party of Nova Scotia. Three of them came from outside of the federal public sector, and all were selected with little or no documented justification, without formal process and devoid of any demonstration that they were merit-based, leaving the appearance that they were partisan appointments.
- In January 2009 Mr. Lynn directed the appointment of an individual to a newly-created position without following a competitive process or advertising this position. He directed another similar appointment in September 2009.
- In January 2010, Mr. Lynn directed the hiring of an individual who he promoted, in July 2010, to an executive position. These appointments had not been made following a competitive process, nor were they part of an advertised posting.

- In April 2010, Mr. Lynn directed the appointment of a fourth individual into a position previously occupied by the individual appointed in January 2009 (mentioned above) and this again, without following a competitive process or advertising the position.
- ECBC's Selection Process Policy, in effect at the time, states that positions will normally be staffed following a competitive process. The fact that there were four individuals appointed into executive positions without competitive processes demonstrates that there was a pattern to Mr. Lynn's actions and that it deviated from the norm, considering that all non-executive positions were staffed via competitive processes during Mr. Lynn's tenure while all executive positions were staffed without.
- ECBC Selection Process Policy states that employees deserve to be considered for promotional opportunities and there was no indication that Mr. Lynn considered this or conducted an assessment in that regard.
- Although Mr. Lynn, as Chief Executive Officer, had the final authority in selection processes as per ECBC's Selection Process Policy, and while ECBC appointments are not made under the *Public Service Employment Act*, good governance still requires transparency and accountability. Mr. Lynn's actions were incompatible with the trust that the Government of Canada and the public has placed in him as Chief Executive Officer.
- These four ECBC executive positions were staffed with individuals who were supporters of the Conservative Party of Canada or of the Progressive Conservative Party of Nova Scotia without a competitive process, which is not in the public interest and weakens the legitimacy of the public sector and leaves the appearance of "patronage appointments".
- With regard to the partisan staffing allegations, Mr. Lynn responded that he felt they were consistent with corporate policy; with the knowledge and approval of the Board; and was consistent with his executive discretion as CEO of ECBC.

Conclusion

The allegation was that four individuals were appointed to ECBC positions based on patronage. Federal organizations are required to be impartial and politically neutral and ECBC possesses limited information to show how the four individuals, with publicly demonstrated ties to the Conservative Party of Canada or the Progressive Conservative Party of Nova Scotia, were selected and unilaterally hired by Mr. Lynn. The reasons for Mr. Lynn's actions are therefore a relevant consideration, above and beyond his response that the appointments "were made within and consistent with the executive discretion of the Chief Executive

Officer". Mr. Lynn did not act, in the words of ECBC's own code of conduct, in a manner so scrupulous that it bears the closest public scrutiny.

Accordingly, Mr. Lynn's actions, with respect to the four appointments, constitute a serious breach of ECBC's code of conduct, and therefore, amount to a contravention of paragraph 8(e) of the *Act*, a serious breach of a code of conduct.

In response to the ongoing investigation by my Office, on November 21, 2013, ECBC's Board of Directors approved a new Recruitment and Selection Process Policy. This new Policy was shared with the investigator on this file on December 3, 2013. I feel that this Policy is a more comprehensive recruitment and selection guide that more clearly incorporates fairness and transparency into ECBC's staffing processes.

Since the main institutional shortcomings identified in this case were ECBC's ambiguous recruitment and selection guidelines, and given that there is now a new Recruitment and Selection Process Policy in place, I will not recommend that the a new staffing Policy be developed and implemented.