

FEDERAL COURT – TRIAL DIVISION

BETWEEN:

DEMOCRACY WATCH

Applicant

- and -

**BARRY CAMPBELL and
THE ATTORNEY GENERAL OF CANADA
(OFFICE OF THE REGISTRAR FOR LOBBYISTS)**

Respondents

**AFFIDAVIT OF DUFF CONACHER
(sworn November 21, 2006)**

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I, Duff Conacher, of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Coordinator for the Applicant, Democracy Watch, and as such have personal knowledge of the matters to which I depose, unless expressly stated to be based on information, in which instances I believe such information to be true.

PART I - BACKGROUND TO THIS APPLICATION

SUMMARY OF THIS APPLICATION

2. This application challenges the recent decision by the Registrar of Lobbyists (the “Registrar”), on a complaint made by Democracy Watch.

3. On April 13, 2000, Democracy Watch made a complaint to the Ethics Counsellor about lobbyist Barry Campbell (“Campbell”) having actively raised funds for the re-election of Minister of Finance Jim Peterson at the same time that he acted for approximately ten

companies on whose behalf he lobbied the Ministry of Finance (the “Complaint”), a copy of which is attached as **Exhibit “A”**. Democracy Watch asserted that Campbell had contravened the *Lobbyists’ Code of Conduct* (the “Lobbyists’ Code”), a copy of which is attached as **Exhibit “B”**, made pursuant to the Lobbyists Registration Act (“LRA”). Specifically, Rule 8 of the *Lobbyists’ Code* precludes conduct which places “public office holders in a conflict of interest by proposing or undertaking any action that would constitute an improper influence on a public office holder”.

4. Following the making of the Complaint, Democracy Watch made further complaints to the then Ethics Counsellor, nine of which dealt with the contravention of Rule 8, for a total of eleven complaints in 2000, 2001 and 2002. The Ethics Counsellor made rulings on some of those complaints, but did not respond to others. The Ethics Counsellor never ruled on the Complaint.

5. In May 2003, Democracy Watch filed a judicial review application in Federal Court against the Ethics Counsellor’s rulings on four of the complaints made by Democracy Watch. The application was heard in May 2004 by Federal Court Justice Gibson, and a decision was rendered on July 9, 2004 (the “Federal Court Decision”) a copy of which is attached as **Exhibit “C”**. The Federal Court Decision held that those four complaints had to be reconsidered.

6. By agreement between counsel, the Federal Court’s Decision applied to a further two complaints filed by Democracy Watch for which the Ethics Counsellor had issued rulings just before the application was heard by the Federal Court, and the Registrar was also legally required to consider two other complaints filed by Democracy Watch on which the Ethics Counsellor had never ruled, one of which was the Complaint. Due to a statutory change in the ethics regime, the Registrar became responsible for enforcing the LRA and the Lobbyists’ Code, and accordingly, the Registrar had to consider or re-consider a total of eight complaints filed by Democracy Watch.

7. On October 10, 2006, the Registrar made a ruling in connection with the Complaint (the “Ruling”), a copy of which is attached as **Exhibit “D”**, holding that Rule 8 of the

Lobbyists' Code was not breached. To date, the Registrar has only issued the Ruling on the Complaint. The other seven complaints remain outstanding.

8. In my view, Democracy Watch showed that Campbell's conduct contravened the Lobbyists' Code of Conduct, especially violating Rule 8 of the Lobbyists' Code, yet the Registrar interpreted and applied Rule 8 in an unreasonable manner, essentially rendering Rule 8 meaningless and almost impossible to contravene. Accordingly, Democracy Watch seeks to judicially review the Ruling.

DEMOCRACY WATCH

9. Democracy Watch was founded in September 1993 and incorporated pursuant to federal law as a not-for-profit corporation. Democracy Watch is a non-partisan organization that advocates democratic reform, citizen participation in public affairs, government and corporate accountability, and ethical behaviour in government and business in Canada. In pursuit of its mandate, Democracy Watch has initiated various campaigns, including a campaign relating to government and lobbyist ethics.

10. Democracy Watch has an ongoing campaign to seek ethical conduct from federal politicians, public office holders and lobbyists. These individuals are subject to ethical obligations, as set out in codes of conduct which are administered by the Ethics Commissioner and the Registrar.

11. Democracy Watch is concerned about the low level of knowledge of ethical requirements often displayed by politicians, public office holders and lobbyists, and worse, the apparent willingness to disregard those requirements. Accordingly, Democracy Watch has and will continue to make complaints to bring these issues forward to those who are charged with the responsibility of upholding these ethical standards. This exercise is pointless, however, if the ethical watchdogs themselves do not responsibly discharge their obligations.

UNDERSTANDING THE CONTEXT

12. As noted above, Democracy Watch has pursued a series of complaints related to, *inter alia*, Rule 8 of the Lobbyists' Code, since 2000. Democracy Watch's efforts have included making complaints, pursuing a mandamus application in connection with the failure of the Ethics Counsellor to respond to those complaints, moving from a mandamus application once certain of those complaints were answered to pursuing a judicial review application, and proceeding through a hearing of that application, and then ultimately making efforts to see that the remedies arising from the Federal Court Decision were carried out. At the same time, Democracy Watch has had to contend with a changing ethics regime. To understand my frustration at this stage, it is necessary to understand some of this history. Accordingly, by way of background, before I focus on the Ruling, I address the following issues below:

- (a) The Ethics Regime – Then and Now;
- (b) Summary of Democracy Watch's Complaints;
- (c) The First Judicial Review Application;
- (d) The Federal Court Decision; and
- (e) Events following the Federal Court Decision.

13. I will then expand on the issues more specifically related to the Ruling, including:

- (a) Rule 8 of the Lobbyists' Code;
- (b) The process behind the Ruling;
- (c) The Registrar's appearance of bias; and
- (d) Problems with the Ruling.

THE ETHICS REGIME – THEN AND NOW

The Changes in the Regime

14. Until the Spring of 2004, the Ethics Counsellor held two positions, one under a statute, and the other under a Code. Under the LRA, the Ethics Counsellor was responsible for administering and enforcing the Lobbyists' Code. Under the *Conflict of Interest and Post-Employment Code for Public Office Holders* (the "Public Office Holders Code"), which was created and published by the Prime Minister, the Ethics Counsellor was administrator and advisor to the Prime Minister. The situation changed in May 2004 with the enactment of Bill C-4, *An Act to Amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer)* and other Acts in consequence, assented to on March 31st, 2004 and proclaimed into law on May 10, 2004 ("Bill C-4"). Bill C-4 eliminated the position and Office of the Ethics Counsellor only days before Democracy Watch's judicial review application was set to be heard.

15. Before the proclamation of Bill C-4, the Registrar worked within the Office of the Ethics Counsellor and was responsible only for the administration of the LRA, while the Ethics Counsellor enforced the Lobbyists' Code. Bill C-4 added the duty of enforcing the Lobbyists' Code to the responsibilities of the Registrar of Lobbyists. Following the enactment of Bill C-4, the Minister of Industry, in his position of Registrar General, appointed Michael Nelson as the Registrar and created the Lobbyists Registration Branch within Industry Canada as the office for the Registrar and his staff.

16. The new legislation changed the reporting structure under the LRA, so that the Registrar reported to Parliament through the Registrar General (the Minister of Industry) and operated as a branch of the Industry Ministry, rather than through the Ethics Counsellor.

17. Further changes have been made more recently, according to the Registrar's webpage, which indicates that:

- (a) in October 2005, the Registrar's office was moved outside of the Industry Ministry offices; and
- (b) in February 2006, responsibility for the Registrar was switched to the Treasury Board minister (whose ministry is twelfth out of the twenty federal government ministries most frequently lobbied).

18. Still today, the Registrar has no security of tenure in his position as Registrar, and the Treasury Board minister has the legal power to control his office budget and staffing.

Overview of the Current Lobbyists Regime

19. The LRA sets out the framework within which federal lobbying is permitted to take place in Canada. The LRA begins by indicating that free and open access to government is an important matter of public interest and that lobbying public office holders is a legitimate activity, but it goes on to indicate that it is desirable to know who is engaged in lobbying activities.

20. According to the LRA (s. 5(1) and s. 7) a lobbyist is a person who is paid to communicate with a public office holder in respect of:

- (i) The development of any legislative proposal by the government of Canada or by a member of the Senate or the House of Commons;
- (ii) The introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament;
- (iii) The making or amendment of any Regulation as defined in Subsection 2(1) of the *Statutory Instruments Act*;
- (iv) The development or amendment of any policy or program of the Government of Canada;
- (v) The awarding of any grant, contribution or other financial benefit by or on behalf of the federal government;
- (vi) The awarding of any contract by or on behalf of the federal government; or
- (vii) Arranging a meeting between a public office holder or any other person.

21. The LRA further sets out ongoing registration and disclosure obligations for those individuals who are identified under the LRA as lobbyists.

22. The requirement to create the Lobbyists' Code is established by s. 10.2(1) of the LRA. The Lobbyists' Code entered into force on March 1, 1997, and has not been amended since that time.

23. The Registrar's duties under the LRA include

- (a) establishing and maintaining the lobbyists' registry with information on all registered lobbyists and their activities;
- (b) overseeing compliance with the Lobbyists' Code;
- (c) investigating alleged breaches of the Lobbyists' Code, and preparing a report of the investigation (including findings, conclusions and reasons for conclusions) to be tabled by the Registrar General before Parliament; and
- (d) if, while conducting an investigation into an allegation that the Lobbyists' Code has been violated, the Registrar of Lobbyists comes across evidence and reasonably believes that a violation of any law has been committed, the Registrar must notify police or other enforcement agencies.

24. According to the Registrar's webpage, the Investigations Directorate was formally established during the 2005-2006 reporting year under the leadership of the new position of Director of Investigations and Deputy Registrar. Responsibilities include

- (a) enforcing the LRA by conducting administrative reviews, referring cases to the RCMP for investigation, and providing the Registrar with the information necessary to make decisions;
- (b) conducting investigations under the Code;
- (c) preparing the final report for tabling in Parliament;
- (d) carrying out a monitoring program to identify lobbying activities that may involve non-compliance with the LRA and the Lobbyists' Code; and

- (e) providing overall strategic policy advice to the Registrar, including developing proposals for changes to the Act and issuing interpretation bulletins.

25. The changes made by the government to the ORL, as outlined above, constitute a tacit admission that the Registrar does not have the institutional independence to properly carry out his duties. Nevertheless, despite these changes, even now neither the Registrar or the ORL enjoy the institutional independence granted to the Ethics Commissioner in 2004, or as is proposed under the FAA for the “Commissioner of Lobbyists”. The Registrar does not have financial independence or security of tenure, and must continue to report to the head of one of Canada’s most lobbied entities.

SUMMARY OF DEMOCRACY WATCH’S COMPLAINTS

26. Between April 2000 and October 2002, Democracy Watch filed the following eleven complaints with the Ethics Counsellor:

	COMPLAINT	DATE OF COMPLAINT	RESPONSE DATE	ELAPSED TIME
1.	Campbell fundraising for Peterson	April 13, 2000	October 10, 2006	6 years, 6 months
2.	Industry Canada belonging to BIOTECCanada	September 25, 2000	April 16, 2004	7 months
3.	Transitional Job Fund advisors and Minister Gagliano	November 9, 2000	Never Ruled	—
4.	Finance Canada/ Morgan Stanley	December 5, 2000	January 22, 2001	7 weeks
5.	Fugère lobbying Prime Minister Chrétien	March 27, 2001	March 21, 2003	24 months
6.	Matthew Johnston/ CANPRRI	March 27, 2001	August 28, 2001	5 months
7.	Ministerial aide John Dossetor becomes a lobbyist	April 12, 2001	March 27, 2003	23 months
8.	BCE Inc. gift to Chrétien	September 6, 2001	November 6, 2001	2 months

9.	Nine lobbyists working for politicians	June 17, 2002	March 21, 2003	9 months
10.	Donating for access to public office holders	September 26, 2002	May 13, 2004	20 months
11.	Secret donations by lobbyists to ministers	October 17, 2002	March 31, 2003	5 months

27. Subsequent to the filing of the eleven complaints, in January 2004, Democracy Watch filed a further complaint relating to Paul Martin, Sheila Copps and John Manley. Following the Federal Court Decision, Democracy Watch pursued eight complaints with the Registrar, consisting of the four which were the subject of the judicial review (Fugère, Dossetor, Secret donations to ministers, and nine lobbyists), the two complaints which were affected by the Federal Court Decision based on the agreement of counsel due to the finding of bias, and two complaints which remained outstanding. Those eight complaints are summarized below:

- (a) #1 - Re: Campbell/Peterson – the details of this Complaint, which are the subject of this judicial review, have been set out above;
- (b) #2 – Transitional Job Fund – On November 9, 2000, Democracy Watch petitioned the Ethics Counsellor to investigate the Liberal’s Transitional Jobs Fund grant approval process in Quebec, which involved ministers, Liberal party officials and members and related to serious questions about infringements of the Public Office Holders Code and the Lobbyists’ Code under Rule 8;
- (c) #3 - Re: Rene Fugère - On March 27, 2001, Democracy Watch petitioned the Ethics Counsellor to investigate René Fugère for failing to register as a lobbyist, and for placing the then Prime Minister in a conflict of interest, as Rene Fugère was an unpaid aide to the Prime Minister. The Ethics Counsellor ruled on this complaint on March 21, 2003, refusing to investigate;
- (d) #4 - Dossetor - On April 12, 2001, Democracy Watch petitioned the Ethics Counsellor to investigate possible violations of the Public Office Holders Code

and the Lobbyists' Code arising from the employment of John Dossetor, former Senior Policy Advisor to the Minister of Health, by Monsanto Canada as its Vice-President, Government Affairs. The Ethics Counsellor ruled on this complaint on March 27, 2003, refusing to investigate;

- (e) #5 – Re: Nine Lobbyists - On June 17, 2002, Democracy Watch petitioned the Ethics Counsellor to investigate possible violations of the Public Office Holders Code and the Lobbyists' Code arising from activities of nine particular lobbyists who had worked with either the Prime Minister, a Cabinet minister or opposition MPs while also lobbying the federal government. Specifically, Democracy Watch alleged that Rule 8 of the Lobbyists' Code had been violated. The Ethics Counsellor ruled on this complaint on March 21, 2003, refusing to investigate;
- (f) #6 – Donating for access to public office holders - On September 26, 2002, Democracy Watch petitioned the Ethics Counsellor to investigate possible violations of the Public Office Holders Code and the Lobbyists' Code, under Rule 8, arising from the activities of numerous lobbyists paying to attend and golf with Cabinet ministers at a federal Liberal Party golf tournament held on August 19, 2002 in Chicoutimi, Quebec. The Ethics Counsellor ruled on this complaint on May 13, 2004, refusing to investigate;
- (g) #7 – Secret donations to ministers - On October 17, 2002, Democracy Watch petitioned the Ethics Counsellor to investigate possible violations of the Public Office Holders Code and the Lobbyists' Code arising from certain donations of lobbyists to the leadership campaigns of John Manley, Sheila Copps and Allan Rock. Democracy Watch alleged that Rule 8 of the Lobbyists' Code had been violated. The Ethics Counsellor ruled on this complaint on March 31, 2003, refusing to investigate; and
- (h) #8 – Paul Martin, Sheila Copps and John Manley – On January 30, 2004, Democracy Watch petitioned the Ethics Counsellor to investigate potential violations by Paul Martin, Sheila Copps and John Manley of the Public Office

Holders Code in connection with donations made by various corporations registered to lobby them and the federal government, and potential violations by those corporations of the Lobbyists' Code, Rule 8. The complaint was responded to by the Ethics Counsellor on March 31, 2004, whereby the Ethics Counsellor refused to investigate.

28. Of the above eight complaints, the Registrar has ruled only on the Complaint (Campbell/Peterson), and has not provided Democracy Watch with any information about the status of his consideration or re-consideration of the other seven complaints.

THE FIRST JUDICIAL REVIEW APPLICATION

29. As a result of the delay in receiving rulings from the Ethics Counsellor, Democracy Watch initially pursued a mandamus application, however as rulings were made, we moved instead to obtain judicial review. The four complaints in which a judicial review was sought were in respect of: Fugère, Dossetor, the nine Lobbyists, and the Donations. Those applications were filed in April and May 2003.

30. On Thursday, May 13, 2004, with the hearing of Democracy Watch's applications scheduled for Monday, May 17th, the federal government filed a motion with the Federal Court for dismissal of Democracy Watch's applications, on the basis that the federal Cabinet proclaimed Bill C-4 into law on May 10, 2004, which ushered in the ethics regime change discussed above. The federal government's argument was that since the Ethics Counsellor position had ceased to exist, the issues raised by the judicial review applications were moot.

31. On May 17th, the Federal Court dismissed the federal government's motion, ruling that the applications were not moot, and that even if the issues raised in the applications were moot, there were still issues raised by the treatment of Democracy Watch's complaints by the Ethics Counsellor, and there were still issues of national importance that warranted rulings by the court, all of which is set out in paragraphs 25-31 of the Federal Court Decision.

THE FEDERAL COURT DECISION

32. On July 9, 2004, the Federal Court ruled that the Ethics Counsellor was institutionally biased, in part because of his lack of security of tenure and the fact that decisions concerning his office budget and staffing were under the control of the Industry Minister, like the Registrar. The Ethics Counsellor was also found to be specifically biased against Democracy Watch because of his delay and failure to adhere to principles of natural justice in dealing with Democracy Watch's complaints. The Federal Court in effect ordered that Democracy Watch's complaints must be re-considered.

33. In the Federal Court Decision, the following observations were made:

- (a) The mode of appointment of the Ethics Counsellor is "informal in the extreme". With respect to the functions under the *LRA*, the Ethics Counsellor was "designated"; however the *LRA* reflects no particular qualifications which would warrant designation and the Governor in Council is authorized to designate "any person". There was no statutory or equivalent base for the Ethics Counsellor's role as administrator and adviser under the Conflict of Interest and Post-Employment Code for Public Office Holders. This role existed only at the will of the Prime Minister (paras 42 and 54).
- (b) While the Ethics Counsellor was a long standing public servant, the Court concluded that there was no evidence to demonstrate that the Ethics Counsellor had any security of tenure *qua* Ethics Counsellor, as opposed to as a public servant (para 45);
- (c) No investigation under s. 10.4 of the Lobbyists' Code had ever been undertaken, notwithstanding that a belief of breach of the Lobbyists' Code "on reasonable grounds" was not a "particularly high threshold or standard". In particular, as at the date of filing the application materials for the Federal Court Decision, seven of Democracy Watch's eleven complaints had been responded to, and in each case a request for a formal investigation was rejected (para 46);

- (d) The Ethics Counsellor failed to respond to three complaints made by Democracy Watch after 31, 33 and 39 months respectively, as at the time of hearing. Of the complaints that did receive a response, response times ranged from one to twenty-four months (para 47);
- (e) The LRA, the Public Office Holders Code and the Lobbyists' Code, as they then were, did not contain any provisions that might counter negative institutional characteristics (para 53);
- (f) The dual role of the Ethics Counsellor in relation to applying and upholding the LRA, Lobbyists' Code and the Public Office Holders Code, together with the Counsellor's lack of independence, gives rise to questions of impartiality of the office as a whole, and places a conflict of interest in allocating resources and fully and effectively carrying out both mandates (para 54); and
- (g) The evidence showed that the Office of the Ethics Counsellor was under-resourced and was accordingly unable to respond in a timely manner to the range of issues presenting themselves (para 54);

34. Ultimately, the Court concluded in paragraph 55 of the Federal Court Decision that, "a well-informed person, viewing the matter realistically and practically – and having thought the matter through – would have a reasonable apprehension of bias on the part of the institution, the office of the Ethics Counsellor, in a substantial number of cases". A finding that the Ethics Counsellor was specifically biased against Democracy Watch was also made at paragraph 49 of the Federal Court Decision.

35. In the result, each of the four rulings by the Ethics Counsellor which were under judicial review, were quashed by the Federal Court. That result was confirmed following a motion for reconsideration October 19, 2004. A copy of the order following that motion, dated October 26, 2004, is attached as **Exhibit "E"**.

EVENTS FOLLOWING THE FEDERAL COURT DECISION

Democracy Watch's 2005 Application

36. The changes to the ethics regime effected by Bill C-4 in spring 2004 did not address Democracy Watch's concerns about the Lobbyists' Code enforcement regime. The Registrar still lacks security of tenure and a Cabinet minister still has the legal power to control his office budget and staffing. In addition, the Registrar's resources were not increased and as a result delays in enforcement continued.

37. With regard to the Public Office Holders Code, by the end of his first year of service as the new Ethics Commissioner, Bernard Shapiro had a substantial record of lax enforcement of that Code. These issues with respect to both the Registrar and Ethics Commissioner were raised by way of application made by Democracy Watch, filed on September 20, 2005, a copy of which is attached as **Exhibit "F"**

38. Subsequent to the filing of that application, the federal government introduced proposed legislation to change the ethics regime yet again, by way of the draft Bill C-2, the *Federal Accountability Act* ("FAA"). As a result, Democracy Watch agreed to adjourn its application pending the passage of that proposed legislation.

Efforts to have the Eight Complaints Heard

39. Democracy Watch's efforts to implement the Federal Court Decision and have all eight complaints addressed began following the Federal Court Decision and have continued to date. Given that the 2004 regime change meant that enforcement responsibilities were then split between the Registrar and the Ethics Commissioner, it was necessary to pursue enforcement with both entities. While the Registrar did agree to carry out a review of the eight complaints as they related to the Lobbyists Code, the Ethics Commissioner refused. The refusal was communicated to Democracy Watch through statements made by the Ethics Commissioner to a news reporter. Those articles are attached as **Exhibit "G"**. In a letter to Ed Broadbent dated May 12, 2005, the Ethics Commissioner set out his reasons for his refusal, attached as **Exhibit "H"**

40. More than two years have passed since the Federal Court Decision, when the Registrar took on the responsibility of reviewing the eight complaints, and as noted, to date no determinations have been provided to Democracy Watch apart from the Ruling on the

Complaint. Efforts to seek information about the status of the complaints have been met with a response that the complaint investigation process is private. Copies of correspondence passing between Democracy Watch and the Registrar and their counsel over the last two years are attached in chronological order as **Exhibits “I1-I25”**.

41. In my view, the delay in addressing the eight complaints is inexcusable. I am not persuaded that much effort was required to complete the necessary factual investigations, particularly as in almost all of the complaints almost all the facts were known, and the required factual investigations were, in most cases, straightforward. For reasons which I will set out below, I fear that the Registrar is simply continuing the same pattern of conduct as the former Ethics Counsellor, delaying and avoiding proper enforcement of key ethics rules. The FAA, if passed in its current form, would grant the new “Commissioner of Lobbyists” the discretion to determine which complaints to continue to pursue, thereby essentially ensuring that the Federal Court Decision would not be complied with.

RULE 8

42. Rule 8 is as follows:

8. Improper Influence

Lobbyists shall not place public office holders in a conflict of interest by proposing or undertaking any action that would constitute an improper influence on a public office holder.

43. In response to Democracy Watch's June 17, 2002 “Nine Lobbyists” complaint, the Ethics Counsellor, in September 2002, published an advisory opinion that interpreted Rule 8 of the Lobbyists' Code. That opinion states that in order to violate Rule 8 a lobbyist would, among other things which are not specified, have to "interfere with the decision, judgment or action" of a public official in a way that amounts to "a wrongful constraint whereby the will of the public office holder was overpowered . . . and induced to do or forbear an act which he or she would not do if left to act freely" involving "a misuse of position of confidence" or taking "advantage of a public office holder's weakness, infirmity or distress". A copy of that

advisory opinion is attached as **Exhibit “J”**. It continues to be posted on the web page of the Registrar to provide interpretive guidance to lobbyists.

44. The Ethics Counsellor’s advisory opinion on Rule 8 is extremely unreasonable because it essentially states that a lobbyist only violates Rule 8 if the lobbyist enslaves a politician or other public office holder or extorts them (thereby forcing them to do something they would not do if they had a free will) in combination with misusing a relationship of confidence with a public office holder in a way that very likely would involve influence-peddling. In other words, it is very likely that a lobbyist would have to violate the Criminal Code in order to violate Rule 8. At the same time, contradictorily, the advisory opinion on Rule 8 does not mention any actions resembling bribery of a public office holder, and therefore a lobbyist could violate one of the fundamental prohibitions in the section entitled “Offences Against the Administration of Law and Justice” of the Criminal Code (a prohibition that makes it a crime to improperly influence a public office holder by giving them money or any other type of benefit in return for an action or omission) apparently without violating Rule 8 of the Lobbyists’ Code.

45. The Ethics Counsellor’s advisory opinion on Rule 8 is also extremely unreasonable because it contradicts the preventive purpose of the Lobbyists’ Code as a whole, and specifically because it does not mention the Conflict of Interest and Post-Employment Code for Public Office Holders nor any of the many rules in this Code of conduct that specify what types of influence on public office holders are improper, even though:

a. the Preamble to the Lobbyists’ Code states that “The Lobbyists’ code of Conduct is an important initiative for promoting public trust in the integrity of government decision-making. The trust that Canadians place in public office holders to make decisions in the public interest is vital to a free and democratic society”;

b. the Preamble to the Lobbyists’ code states that “public office holders, when they deal with the public and with lobbyists, are required to honour the standards set out for them in their own codes of conduct”;

c. the Preamble to the Lobbyists' Code states, in reference to the Public Office Holders Code and the Lobbyists' Code that "Together, these codes play an important role in safeguarding the public interest in the integrity of government decision-making", and;

d. Rule 8 prohibits placing "public office holders in a conflict of interest" by using "improper influence."

46. It is not clear why the five complaints alleging violations of Rule 8 that Democracy Watch filed from April 2000 to September 2002 are being adjudicated by the Registrar with reference to an advisory opinion on Rule 8 written by the former Ethics Counsellor (whom the Federal Court ruled was institutionally biased and specifically biased against Democracy Watch) and released in September 2002, especially given that the advisory opinion was written in response to the specific situation of lobbyists working on the party leadership campaigns of Cabinet ministers.

THE PROCESS BEHIND THE RULING

47. From the date of the Complaint to date, neither the Ethics Counsellor nor the Registrar has contacted me, directly or indirectly, to address the content of the Complaint. I have not been informed of the identity of the individuals who were interviewed or who gave information, nor the content of that information, nor have I received any of the materials which were made available to the Ethics Counsellor or Registrar. Apart from my initial Complaint, I have not had the opportunity to make submissions. The process was treated as totally confidential and private, and Democracy Watch was excluded.

THE REGISTRAR'S APPEARANCE OF BIAS

Publicly available Information about the Registrar

48. The Registrar appeared before the parliamentary standing Committee on Access to Information, Privacy and Ethics (the "Committee"), on Thursday, February 3, 2005, and provided significant background information about his office. I attach as **Exhibit "K"**, a copy of the transcript of that Committee session taken from the Parliamentary Committee's

website. Many changes have occurred since the Registrar spoke with the Committee, but certain of his comments, which I believe continue to be relevant, are as follows:

- (a) He was appointed Registrar on July 29, 2004;
- (b) The Lobbyists Registration Branch budget is an appropriated budget, which comes from the budget of Industry Canada. The Registrar is expected to spend approximately \$550,000.00 to operate the office for the fiscal year;
- (c) The Registrar's priorities were to:
 - (i) ensure he could administer the LRA, and to hire the staff to do that;
 - (ii) get ready for the amendments relating to registration, including getting the computer system ready, since almost all registrations are online; and
 - (iii) clean up any cases that had been inherited from his predecessor.

49. According to the Registrar's 2005-2006 Annual Reports on the LRA, attached as **Exhibit "L"**, and the Lobbyists' Code, the following changes were made in September 2005, in connection with the administration of the LRA and the Lobbyists' Code:

- (a) the Lobbyists Registration Branch, which had been part of the Comptrollership and Administration sector of Industry Canada, was made a separate organization within Industry Canada and renamed the Office of the Registrar of Lobbyists ("ORL") and was moved physically out of the Industry Ministry premises;
- (b) the Registrar began acting full time, giving up his designation as ADM; and
- (c) the ORL was reorganized to establish separate groups for Operations and for Investigations.

50. According to the annual reports, further changes were made in February 2006 as follows:

- (a) the ORL was moved to the portfolio of the President of the Treasury Board as an independent entity;
- (b) the ORL was made a separate and independent department; and
- (c) the Registrar was given the authority of a deputy head, for the purpose of the Financial Administration Act and other Acts.

51. While I believe that these changes were made, in part, to address issues raised in Democracy Watch's application of 2005 which alleged bias against the Registrar, some important problems with the Registrar and the ORL continue to exist: namely that the Registrar lacks financial and staffing independence and security of tenure.

Interpretation Bulletin

52. In June 2005, the Registrar posted a new interpretation bulletin on the Lobbyists' website relating to "communicating" for the purpose of lobbying. A copy of that interpretation bulletin is attached to this affidavit as **Exhibit "M"**.

53. In this interpretation bulletin, the Registrar has taken the lobbying exemption found in s.4(2)(c) of the LRA, and significantly expanded it beyond the ambit of the legislation. That section states that the LRA does not apply in respect of "any oral or written communication made to a public office holder by an individual on behalf of any person or organization if the communication is restricted to a request for information". The interpretation bulletin cites that exclusion and goes on to list examples of exclusions which would not normally require registration, including "participation in consultations, hearings, roundtables, or like activities when the name of the participants, the government participating organizations and the subject matters are readily available publicly".

54. I am alarmed by this interpretation. This interpretation significantly widens the scope of the exemption found in s. 4(2)(c) of the LRA. There is no basis in the LRA to support this interpretation. This interpretation amply demonstrates the Registrar's disinclination to properly enforce the LRA and Lobbyists' Code.

PROBLEMS WITH THE RULING

55. I have dedicated my career to the pursuit of ethics in government and business, and I agree with the Preamble of the Lobbyists' Code that it is an important part of the underpinning of a democratic government in which the electorate must have faith for the democratic system to function properly. I believe that the interest surrounding the Gomery Commission of Inquiry (in particular the Commission's recommendations for changes to prevent corruption in the federal government), and in the government accountability parts of the 2006 federal election platforms of the political parties, and in the development and parliamentary review of draft Bill C-2, the "Federal Accountability Act" (FAA), clearly shows that issues of ethics in government are important to the Canadian public. The Lobbyists' Code is one of the checks which have been put in place to enforce ethical conduct in government, and if it is not enforced properly, it is damaging to Canada's democratic system and Canadians' faith in government.

56. I believe that the advisory opinion on Rule 8 written by the former Ethics Counsellor (whom the Federal Court ruled was institutionally biased and specifically biased against Democracy Watch), and the use of this advisory opinion by the Registrar in the ruling on the Complaint, is incorrect and extremely unreasonable for the reasons I have already explained.

57. I believe that the Ruling is also wrong in that it focuses on whether Jim Peterson gave favourable treatment (or asked his staff to give favourable treatment) to the corporations on whose behalf Campbell was lobbying him and his department. In other words, the Registrar appears to be looking for proof of actual undue influence, which would, I believe amount to a violation of the Criminal Code. In the circumstances, proving actual undue influence would be very difficult. What politician would acknowledge that in exchange for a favour from a lobbyist, he or she was persuaded to accord favourable treatment?

58. I am also concerned that a Minister or his or her staff could give favourable treatment to a corporation by not doing anything, such as by not regulating a corporation in a way it did not want to be regulated. It would be difficult to find any evidence of this inaction. That is one of the reasons which situations of apparent conflict of interest are resolved through the recusal process (Federal Cabinet ministers have done this in several cases).

59. The Registrar also suggests in his Ruling that he favours a broader interpretation of the Lobbyists' Code, and yet he applied an interpretation of the Lobbyists' Code which was developed by the Ethics Counsellor, notably after the actions complained about by Democracy Watch in the Complaint.

60. I question whether the Ruling is the decision of the Registrar, or whether some other individual was responsible for making that decision, given the Registrar's words in the Ruling that "we have concluded", rather than "I" have concluded.

61. The Registrar's ruling makes no sense in light of the overall scheme of the LRA and the Lobbyists' Code and the Conflict of Interest and Post-Employment Code for Public Office Holders, and the legitimate concerns of the Canadian public about the lack of ethical conduct in government. In my view, the narrow interpretation of Rule 8 renders the rule itself meaningless.

CONCLUSIONS

62. I am very concerned that more than eight years have passed since the Lobbyists' Code came into effect and still none of the rules in the Lobbyists' code (including especially Rule 8) have been interpreted in a fair, effective manner by an impartial, independent decision-maker, and that this completely unjustifiable delay will continue as the federal government moves toward once again changing the ethics regime through draft Bill C-2 (the FAA).

63. Democracy Watch seeks the court's interpretation of Rule 8 to end, finally, the unjustifiable delay in the effective enforcement of the Lobbyists' Code and, to summarize the reasons set out above, because Democracy Watch lacks faith in the Registrar as:

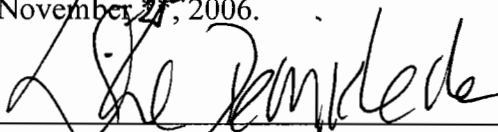
- (a) he is institutionally biased because he lacks security of tenure and a Cabinet minister has legal control over his budget and office staffing;
- (b) he has continued to delay action on Democracy Watch's eight complaints in ways very similar to the former Ethics Counsellor;

64. In summary, Democracy Watch lacks faith in the Ruling because, *inter alia*,

- (a) it uses an interpretation of Rule 8 written by the former Ethics Counsellor whom the Federal Court found to be biased;
- (b) the interpretation does not restrict the activities of lobbyists in a significantly different way than existing prohibitions in the Criminal Code;
- (c) the interpretation makes it extremely unlikely that any lobbyist will ever be found to violate Rule 8;
- (d) the interpretation is inconsistent with the Public Office Holders Code; and
- (e) the Registrar has applied the interpretation in a way that ignores the reasoning behind the usual preventive measures taken in situations of conflict of interest.

65. I make this affidavit in support of this application and for no other purpose.

SWORN BEFORE ME at the City of
Ottawa, Province of Ontario on
November 21, 2006.



Commissioner for Taking Affidavits



Duff Conacher