FEDERAL COURT OF APPEAL

BETWEEN:

DEMOCRACY WATCH

Appellant

- and -

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

Respondents

MEMORANDUM OF FACT AND LAW

June 11, 2008

bakerlaw

672 Dupont Street, Suite 400 Toronto, Ontario M6G 1Z6

David Baker LSUC#: 17674M Tel: (416) 533-0040 ext. 222 Fax: (416) 533-0050

Solicitor for the Appellant Democracy Watch

TO: THE ATTORNEY GENERAL OF CANADA

Department of Justice Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, Ontario M5X 1K6

Sandra Nishikawa Michael H. Norris

Solicitors for the Respondent

AND TO: LENCZNER, SLAGHT, ROYCE, SMITH, GRIFFIN LLP

130 Adelaide Street West

Suite 2600

Toronto, Ontario

M5N 3P5

Peter H. Griffin Jordan Goldblatt

Solicitors for the Respondent

Barry Campbell

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PART I: THE FACTS

A. Overview

- 1. Can a professional lobbyist, registered to lobby a Department of the federal government, properly provide the service of operating a fundraising campaign on behalf of one of the Ministers of that Department? To answer the question it is necessary to understand the legal obligations of both the Minister and the lobbyist.
- 2. At all relevant times, lobbyists were subject to the federal Lobbyists' Code of Conduct, 1997 ("Lobbyists' Code") operating in conjunction with the Conflict of Interest and Post-Employment Code for Public Office Holders, 1994 ("Conflict of Interest Code") which governs the conduct of Cabinet Ministers and other public office holders. According to the preamble to the Lobbyists' Code, "[t]ogether these codes play an important role in safeguarding the public interest in the integrity of government decision-making".

Lobbyists' Code of Conduct, Affidavit of Duff Conacher, Tab 3, Exhibit B, ("Lobbyists' Code").

- 3. It is the Appellant's position that when a lobbyist is registered to be lobbying a Minister, the act of fundraising on behalf of that Minister places the Minister in a "conflict of interest" under the Conflict of Interest Code, and the lobbyist's act of putting the Minister in the conflict position constitutes "improper influence" under Rule 8 of the Lobbyists' Code.
- 4. The Appellant rejects the proposition that Rule 8 of the *Lobbyist Code* can only be violated when the Minister allows his or her public responsibilities to be overridden by the lobbyist's actions.

B. Facts

5. Democracy Watch, the Appellant, 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 for effective democracy, citizen participation in public affairs, government and corporate accountability and ethical behaviour in government and business in Canada.

Affidavit of Duff Conacher, Tab 3, paras. 9-10,

Democracy Watch v. Campbell and the Attorney General of Canada (Office of the Registrar for Lobbyists) [2008] No. 214 [Hereinafter "Democracy Watch II"], para. 2.

6. The Honourable Jim Peterson ("Minister Peterson") is a former Member of Parliament for the Liberal Party of Canada. In 1997, he was appointed by the Right Honourable Jean Chrétien to the federal Cabinet as the Department of Finance's Secretary of State (International Financial Institutions). He held that position until 2002.

Affidavit of Duff Conacher, Tab 3, para. 3.

7. At or around the time he was organizing the September 1999 fundraising event, Barry Campbell ("Mr. Campbell") was a lobbyist registered under the *Lobbyists' Registration Act* to lobby the Department of Finance on behalf of various companies. Specifically, he was registered at the time of the fundraising event to lobby the Department of Finance on behalf of State Street Trust Company on issues within Secretary of State Peterson's direct responsibility, and at the same time, he was also registered to lobby the Department of Finance on other issues on behalf of The Thomson Corporation, George Weston Ltd., CCL Industries Inc. and Moore Corporation Ltd.. Within a couple of weeks of the fundraising event, he registered to lobby the Department of Finance on other issues on behalf of the Royal Bank of Canada and Celestica Inc.

Affidavit of Duff Conacher, Tab 3, para. 3.

Print out of the Clients/Employers of Barry Campbell (Industry Canada's Lobbyists Registration Website) dated April 11, 2000, Affidavit of Duff Conacher, Tab 3, Exhibit A,

Democracy Watch II, para. 2,

Lobbyists' Registration Act, R.S. 1985, c.44 (4th supp.) (Hereinafter "L.R.A.").

8. There is no evidence that Minister Peterson sought the advice of the Ethics Counsellor, Howard Wilson ("Ethics Counsellor. Wilson"), on having a registered lobbyist chair a fundraising event for him. Minister Peterson sought the advice of Ethics Counsellor Wilson on his Ministerial responsibilities when engaging in political fundraising, but only in relation to who would be attending and personal interactions with those persons. On May 4, 1998, Ethics Counsellor Wilson advised Minister Peterson to avoid fundraising activities that would permit direct communication between him and those who were seeking to lobby him. According to Ethics Counsellor Wilson, he advised Minister Peterson:

On political fundraising generally, large fundraisers were safe but Ministers had to avoid more intimate gatherings with people who dealt with their Department.

Office of the Registrar of Lobbyists' Administrative Review of Democracy Watch's complaint against Barry Campbell dated September 21, 2006, Affidavit of Karen Shepherd, Tab 4, Exhibit P, p. 209-210.

9. Subsequently, Minister Peterson sought Mr. Campbell's services as an unpaid Chair of the *Friends of Jim Peterson* and to organize a fundraising event for him to be held September 27, 1999. Mr. Campbell accepted. At no time had Ethics Counsellor Wilson advised Mr. Campbell that organizing a fundraising event for Minister Peterson did not raise an issue under the *Lobbyist's Code of Conduct*.

Affidavit of Duff Conacher, Tab 3, para. 3,

Democracy Watch II, para. 2,

Office of the Registrar of Lobbyists' Administrative Review of Democracy Watch's complaint against Barry Campbell dated September 21, 2006, Affidavit of Karen Shepherd, Tab 4, Exhibit P, p. 213.

10. The invitation to attend the fundraising event was sent with a letter dated August 20, 1999 and signed by Mr. Campbell who was identified in the letter as the "Chair, Friends of Jim Peterson". The letter gave the address of the *Friends of Jim Peterson* as care of APCO Canada, the lobbying firm for which Mr. Campbell worked. The letter stated that the RSVP card and \$250 in payment for each ticket to the event was to be sent in an enclosed envelope to Mr. Campbell at APCO Canada's address. The letter stated:

"As Secretary of State (International Financial Institutions), Jim has played a major role on the Economic and Social Committees of Cabinet, in working with our domestic and international financial institutions, and in setting the federal government's budgeting policy."

Copy of Barry Campbell's invitation letter to the Friends of Jim Peterson fundraising event, Affidavit of Duff Conacher, Tab 3, Exhibit A.

11. Mr. Campbell and Minister Peterson worked together on the list of those to be invited. They attempted to leave off the list persons had dealings with the Department of Finance such as insurance brokers and individuals working in the financial services sector. They recognized inviting such persons could place Minister Peterson in a conflict of interest position, however appear to have differentiated between such persons and Mr. Campbell, a professional lobbyist who was throughout that time period registered to lobby on behalf of financial and other institutions having dealings with the Department of Finance.

Affidavit of Duff Conacher, Tab 3, para. 3.

Office of the Registrar of Lobbyists' Administrative Review of Democracy Watch's complaint against Barry Campbell dated September 21, 2006, Affidavit of Karen Shepherd, Tab 4, Exhibit P, p. 213.

12. After the event was held, Mr. Campbell and Minister Peterson agreed that monies received from identifiable representatives of financial institutions should be returned and refunded to donors.

Democracy Watch II, para. 2,

Office of the Registrar of Lobbyists' Administrative Review of Democracy Watch's complaint against Barry Campbell dated September 21, 2006, Affidavit of Karen Shepherd, Tab 4, Exhibit P, p. 215.

13. After this money was returned, Minister Peterson retained \$70,000 as a direct result of Mr. Campbell's and APCO Canada's unpaid fundraising services on his behalf.

Democracy Watch's Request to the Ethics Counsellor, Affidavit of Duff Conacher, Tab 3, Exhibit A,

Democracy II, para. 2.

C. Democracy Watch's Complaints to the Ethics Counsellor

14. On April 13, 2000, Democracy Watch filed a request for an investigation with Ethics Counsellor Wilson, alleging a violation of Rule 8 of the *Lobbyists' Code* in the case of Mr. Campbell and three violations of the *Conflict of Interest Code* in the case of Minister Peterson. No decision has been publicly issued concerning Democracy Watch's request for investigation concerning Minister Peterson by either the Ethics Counsellor or his successor the Ethics Commissioner.

Democracy Watch's Request to the Ethics Counsellor, Affidavit of Duff Conacher, Tab 3, Exhibit A,

Democracy Watch II, para. 2.

15. From April 2000 to February 2004, Democracy Watch filed another seven complaints with Ethics Counsellor Wilson about violations of the *Lobbyists' Code*, for a total of eight complaints, seven of which alleged a violation of Rule 8 of the *Lobbyists' Code* which states that:

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.

Lobbyists' Code, Rule 8.

16. In March 2003, Ethics Counsellor Wilson issued rulings on four of Democracy Watch's complaints about violations of the *Lobbyists' Code*. Even though it was Democracy Watch's first complaint, a ruling on the complaint about Mr. Campbell was not issued at that time, and was never issued by Ethics Counsellor Wilson. Democracy Watch applied for judicial review of the four rulings. On July 9, 2004, Justice Gibson guashed all four rulings on the basis that:

"there existed grounds for a reasonable apprehension of bias, on the part of the Ethics Counsellor and his office, both specific against Democracy Watch and institutional or structural, and that such bias resulted in breach of the principles of procedural fairness in arriving at the ruling or decisions under review."

Democracy Watch v. Canada (Attorney General), [2004] F.C.J. No. 1195, ["Democracy Watch I"], para. 94.

17. Just prior to the issuance of Justice Gibson's judgment, changes were made to the administration of the *Lobbyists' Code* and the *Conflict of Interest Code*. Responsibility for enforcement of the *Conflict of Interest Code* was now within the jurisdiction of the Ethics Commissioner, and the Registrar of Lobbyists was now responsible for the *Lobbyists' Code*. The substantive provisions of the *Codes* remained unchanged.

Affidavit of Duff Conacher, Tab 3, para. 14.

D. The Decision of the Registrar

18. The Registrar, by a letter dated October 10, 2006, issued his first ruling on Democracy Watch's eight outstanding requests for investigations of Lobbyists' Code violations. The ruling was on the complaint about Mr. Campbell's fundraising activity on behalf of Minister Peterson. Applying the September 2002 Advisory Opinion issued by the former Ethics Counsellor, which remains still today on his Office's website, the Registrar ruled that Mr. Campbell's action of serving as Minister Peterson's fundraising chair did not have what the former Ethics Counsellor would have deemed the requisite effect on Minister Peterson's actions. Specifically, he ruled that Mr. Campbell did not breach Rule 8 because:

Based on the evidence gathered, the Office of the Registrar of Lobbyists has determined that Mr. Campbell did not interfere with Secretary of State Peterson's action on decisions and that his accepting to take on the *Chair of the Friends of Jim Peterson* did not cause Secretary of State Peterson to treat his client (or ask his staff to treat his client) favourably.

Ruling of the Registrar, Affidavit of Duff Conacher, Tab 3, Exhibit D, Advisory Opinion of the Office of the Registrar of Lobbyists on "Improper Influence", Affidavit of Duff Conacher, Tab 3, Exhibit J.

19. In so doing, the Registrar ruled that for there to be "improper influence" it must be demonstrated that the action of the lobbyist had the effect of actually influencing the public office holder. The position in which the action of the lobbyist placed the public office holder could therefore not, in and of itself, constitute a violation of Rule 8 according to the Registrar.

Ruling of the Registrar, Affidavit of Duff Conacher, Tab 3, Exhibit D.

20. This being said, the Registrar made it clear that he interpreted Rule 8 differently from his predecessor, but felt he should apply his predecessor's interpretation of the Rule to this case:

That said, I take a view of the *Lobbyist Code of Conduct* that is more broad than that of the former Ethics Counsellor. It would be unfair to retroactively impose my approach to enforcement of the *Lobbyists' Code of Conduct* upon lobbyists who operated under the previous approach to enforcing the Code.

Ruling of the Registrar, Affidavit of Duff Conacher, Tab 3, Exhibit D.

E. Decision Under Appeal

- 21. On November 7, 2006, Democracy Watch applied for judicial review of the Registrar's ruling on its Complaint, alleging bias and that the Registrar's interpretation of Rule 8 represented an error of law.
- 22. Justice Frenette on February 19, 2008:
 - a) declined to vacate the decision of the Registrar for bias;
 - b) declined to find that the Registrar's interpretation of Rule 8 was unreasonable; and
 - declined to find Democracy Watch was a public interest litigant and made an award of costs in favour of the respondents.
- 23. With respect to Rule 8, Justice Frenette adopted the reasoning of Justice Gibson in Democracy Watch 1 that the term "conflict of interest" in Rule 8 of the Lobbyists' Code meant an "actual conflict of interest" rather than a "conflict of interest" as that term is defined in the "Conflict of Interest Code".

Democracy Watch II, para. 49 and 59.

PART II: POINTS ON ISSUE

- A. What is the appropriate standard of review of the Registrar's decision in this matter?
- B. What is the correct interpretation of Rule 8 of the Lobbyists' Code?
- C. Did the Registrar err in applying the "doctrine of legitimate expectations" to the facts of this case?
- D. Is Democracy Watch a public interest litigant before this Court?

PART III: SUBMISSIONS

A. The Appropriate Standard of Review

- 24. The Appellant submits that the appropriate standard of review for assessing the Registrar's decision is that of correctness.
- 25. The "standard of review analysis" to be applied when determining which standard of review to apply involves consideration of four factors: (1) the presence or absence of a privative clause, (2) the purpose of the tribunal, as determined by interpretation of the enabling legislation, (3) the nature of the question at issue, and (4) the expertise of the tribunal.

Dunsmuir v. New Brunswick, 2008 SCC 9, para. 51-55 and 64 [Hereinafter "Dunsmuir"].

26. First, under the *Lobbyists' Code*, there is neither a full nor partial privative clause. This indicates that Parliament did not intend for courts to show deference to the Registrar's decision. As reiterated by the Supreme Court in *Dunsmuir*, "judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context". This factor suggests that the decisions of the Registrar are to be given considerable scrutiny, and reviewed on the standard of correctness.

Dunsmuir, para. 52,

Pushpanathan v. Canada (Minister of Citizenship and Immigration) [1998] 1 S.C.R. 982, [Hereinafter "Pushpanathan"], paras. 30-31.

27. The second factor that the court must consider when determining the appropriate standard of review is the purpose of the legislative scheme in question. The determination of Mr. Campbell's compliance with Rule 8 of the *Lobbyists' Code* is not a "polycentric issue" involving "a large number of interlocking and interacting interests and considerations". Rather, it involves and requires the proper interpretation of the *Lobbyists' Code* and other relevant legislation, including the *Conflict of Interest Code* over which the Registrar does not have jurisdiction. Questions of statutory interpretation are best resolved through the judicial process premised on a bipolar opposition of parties. This also supports a standard of correctness.

National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324 [Hereinafter "National Corn Growers Assn."], para. 30, Dunsmuir, para. 61.

28. The third factor to take into account is the nature of the question. In this case there are three: Firstly the case concerns the Registrar's interpretation of the *Lobbyists' Code* and the *L.R.A.*. This is purely a question of law. It involves a question of law of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise. This indicates that this court should be less deferential to the Registrar's ruling. As will be noted below, on this issue the Registrar's own interpretation of Rule 8 [i.e. as opposed to his application of the Advisory Code interpretation] is in accord with that of the Appellant. The Appellant and the Registrar differ in their application of the "doctrine of legitimate expectations", which is an issue of general law, where uniform and consistent decisions must come from the court and no deference ought be shown the Registrar. Finally the issue of public interest costs was not addressed by the Registrar.

Dunsmuir v. New Brunswick, para. 60, National Corn Growers Assn., paras. 18, 24 and 31, Pushpanathan, paras. 32-35. 29. As mentioned in *Pushpanathan*, the fourth factor: the expertise of a tribunal, must be evaluated in context of the issue in question and the relative expertise of the court reviewing the decision. In this case, the expertise of the tribunal to interpret the *Lobbyists' Code* and to apply the administrative law doctrine of legitimate expectations, strongly favours a correctness standard. While the Office of the Registrar may issue Advisory Opinion's regarding the *L.R.A.*, subsection 10(1) of the *L.R.A.* explicitly prohibits the Registrar from issuing Advisory Opinions about the *Lobbyists' Code*. In light of this, it cannot be said that the Registrar has any special knowledge of the proper interpretation of Rule 8 of the *Lobbyists' Code*. This supports the application of a standard of correctness.

Pushpanathan, paras. 32-35.

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557.

30. The Registrar of Lobbyists is a former public servant who has no legal training nor any experience in interpreting laws. He was appointed by Minister of Industry (in his role as Registrar General of Canada) from his former position as Senior Financial Officer of the Department of Industry.

Affidavit of Duff Conacher, Tab 3, para. 15.

- 31. In addition, the Ruling on Democracy Watch's Complaint was the first ruling by Michael Nelson as Registrar, and was issued just after he had been in the position for two years. The basis of the Ruling was the September 2002 Advisory Opinion issued by the former Ethics Counsellor who was found to be institutionally biased, and specifically biased against Democracy Watch, by the Federal Court ruling in Democracy Watch I. For all these reasons, there is no evidence within Registrar Nelson's Ruling of any expertise in ruling on allegations made about violations of the Lobbyists' Code.
- 32. All four factors suggest that a low standard of review should be applied when reviewing the Registrar's decision. For these reasons, the Appellant submits that the appropriate standard of review in this matter is that of correctness.

Dunsmuir v. New Brunswick, para. 60.

B. Interpretation of Rule 8

33. Rule 8 of the *Lobbyist's Code of Conduct* reads as follows:

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.

Lobbyists' Code, Rule 8.

- 34. Democracy Watch submits that the issues for consideration are as follows:
 - (1) whether the term "conflict of interest" in Rule 8 the Lobbyists' Code means a public office holder's "conflict of interest" as defined in the Conflict of Interest Code or a narrower range of "actual" conflicts as stated by Justice Gibson in Democracy Watch I and Deputy Judge Frennette in Democracy Watch II;

Democracy Watch I, para. 85, Democracy Watch II, paras. 49 and 59.

(2) whether the term "action that would constitute an improper influence" in the same rule refers to the action of the lobbyist or the effect of the lobbyist's action on the public office holder, as stated by the former Ethics Counsellor in his 2002 Advisory Opinion as applied by the Registrar; and

Advisory Opinion of the Office of the Registrar of Lobbyists on "Improper Influence", Affidavit of Duff Conacher, Tab 3, Exhibit J.

(3) whether it would be unfair for the Registrar of Lobbyists to apply a correct interpretation of Rule 8 to actions of lobbyists operating under his predecessor, or whether some administrative law principle requires that a different standard be applied.

(i) Legislative History of the L.R.A. and the Lobbyists' Code

35. The *L.R.A.* has been in effect since 1988. The *L.R.A.* sets out the framework within which federal lobbying is permitted to take place in Canada. The authority of the Ethics Counsellor in his role as Registrar of Lobbyists to enact and enforce the *Lobbyists' Code* was added by amendments to the *L.R.A.* in 1995 and proclaimed on January 31, 1996.

Affidavit of Duff Conacher, Tab 3, para 19, *L.R.A.*, s. 5(1) and s. 7.

36. Beginning in late September 1994, and ending with its report back to the House of Commons in March 1995, a sub-committee of the House of Commons Standing Committee on Industry, the Sub-Committee on Bill C-43, An Act to amend the Lobbyists Registration Act and to make related amendments to other Acts, held hearings. On September 27, 1994, the minister responsible for Bill C-43, The Hon. John Manley, Minister of Industry, testified before the Sub-Committee and stated, among other things, that a key concern is "improper influences" by lobbyists with connections to the government in power, and that the proposed code of conduct for lobbyists is to ensure that what is "appropriate conduct" and "what kinds of contacts are appropriate" between lobbyists and public office holders is "made clear" to all involved. He explained:

"A fundamental part of our justice system is that people going to court have a right to counsel. There is an analogy that says if people wish to use a representative agent in making their views known to government, there should be nothing fundamentally wrong with that. Concern arises when there can be a perception that improper influences are exercised on government because of the identity of the representative agent, perhaps because they have had a political affiliation with the government in power. . ."

House of Commons, Proceedings and Evidence of the Sub-Committee on Bill C-43, An Act to amend the Lobbyists Registration Act and to make related amendments to other Acts, 1st Session, 35th Parliament, September 27, 1994, p. 2:14, per the Honourable John Manley, Tab 20 of Appellant's Book of Authorities.

37. At the time of the fundraising event, the *L.R.A.* defined a lobbyist as a person who is paid to communicate with a public office holder in an attempt to influence him or her. In 2003, the definition in the *L.R.A.* broadened to define a lobbyist as a person who is paid to communicate with a public office holder with respect to a wide range of matters.

Affidavit of Karen Shepherd, Tab 4, para. 15.

38. The *L.R.A.* sets out registration and disclosure obligations for those individuals who are identified under the *L.R.A.* as lobbyists.

Affidavit of Duff Conacher, Tab 4, para. 21, *L.R.A.*, s. 10.2(1).

- 39. The Conflict of Interest Code was a code issued by the Prime Minister to establish ethical rules for the Prime Minister, Cabinet ministers, their senior staff, Cabinet appointees, and senior (appointed) government officials. The Conflict of Interest Code was first issued by Prime Minister Brian Mulroney, and first came into force on January 1, 1986. It was updated by Prime Minister Jean Chrétien on June 17,1994. The Conflict of Interest Code contains the following sections:
 - 3(5) ...arrange their private affairs in a manner that will prevent real, potential or apparent conflict of interest from arising but if such a conflict does arise between the private interests of the public office holder and the official duties and responsibilities of that public office holder, the conflict shall be resolved in favor of the public interest.
 - 20 Gifts, hospitality or other benefits including those described in section 21 that **could influence public office holders** in their judgment and performance of official duties and responsibilities shall be declined.
 - a public office holder shall take care to avoid being **placed or the** appearance of being placed under an obligation to any person or organization, or the representative of a person or organization, that might profit from special consideration on the part of the office holder.

Conflict of Interest and Post-Employment Code, s. 3(5), 20, 23(1)

- 40. The *Conflict of Interest Code* was further amended in December 2003 by Prime Minister Martin, and in February 2006 by Prime Minister Stephen Harper. However, all of the above provisions remained essentially unchanged.
- 41. Following the implementation of the 1994 amendments to the *Conflict of Interest Code*, the 1996 amendments of the *L.R.A.*, extensive public consultation and review by the House of Commons Standing Committee on Procedure and House Affairs, the *Lobbyists' Code* was published in the *Canada Gazette* on February 8, 1997. It came into force on March 1, 1997 and has not been amended since.

Affidavit of Duff Conacher, Tab 3, para. 22, *L.R.A.*, s. 10.1(1).

42. During the hearings before the Standing Committee Howard Wilson, the Ethics Counsellor of Canada stated the following concerning what is now Rule 8;

This rule clarifies that lobbyists cannot place public office holders in a conflict of interest. This obligation affects public office holders and ministers as well as lobbyists.

House of Commons, Standing Committee on Procedure and House Affairs, 35th, 2nd Session, Minutes, November 19, 1996, p. 1145, Tab 19 of Appellant's Book of Authorities.

43. The Ethics Counsellor also made it clear during the same hearings that it was the action of the lobbyist that gave rise to the violation of the *Lobbyists' Code* rather than the effect of that action of the public office holder.

House of Commons, Standing Committee on Procedure and House Affairs, 35th, 2nd Session, Minutes, November 19, 1996, p. 1145, Tab 19 of Appellant's Book of Authorities.

44. The purpose of the *Lobbyists' Code*, as set out in its preamble, is to promote "public trust in the integrity of government decision-making". After noting that both public office holders and lobbyists are subject to codes of conduct, the preamble concludes that: "together, these codes play an important role in safeguarding the public interest in the integrity of government decision making".

Lobbyists' Code, Preamble.

45. Principles set out in the *Lobbyists' Code* require that all lobbyists follow not only the letter but the spirit of the *Lobbyists' Code* and all other relevant laws. The *Lobbyists' Code* also requires that lobbyists conduct themselves with "integrity and honesty" and "observe the highest professional and ethical standards."

Lobbyists' Code, principles.

After receiving the four complaints filed by Democracy Watch, alleging violations of Rule 8, the Ethics Counsellor (who was at the time the designated Registrar (i.e. administrator) of the *L.R.A.* and enforcer of the *Lobbyists' Code*) issued his September 2002 Advisory Opinion entitled, "Rule 8-Improper Influence-Lobbyists and Leadership Campaigns". In it, he expressly contradicts the statement ["This rule clarifies that lobbyists cannot place public office holders in a conflict of interest."] that he made to the Standing Committee in 1996. With respect to the term "conflict of interest" in Rule 8, he makes it clear that having lobbyists engaged as "fundraisers, organizers or strategists" would place a minister in contravention of section 3(5) of the *Conflict of Interest Code*, but states this alone is insufficient to violate Rule 8:

This rule does not simply state that lobbyists shall not place a public office holder in a conflict of interest by their actions. Rather it states that they shall not place a public office holder in a conflict of interest by proposing or undertaking any action that would constitute an **improper influence** on a public office holder.

Advisory Opinion of the Office of the Registrar of Lobbyists on "Improper Influence", Affidavit of Duff Conacher, Tab 3, Exhibit J.

- 47. The Advisory Opinion then continues on to state that for a lobbyist's action to constitute an "improper influence", it must not only place the public office holder in a conflict of interest position, but additionally must have the effect of changing the public office holder's decision or action. Factors to be considered in assessing whether a lobbyist has proposed or undertaken any action that would constitute an improper influence on a public office holder include but are not limited to:
 - whether there has been interference with the decision, judgment or action of the public office holder;
 - whether there has been a wrongful constraint whereby the will of the public office holder was overpowered and whether the public office holder was induced to do or forbear an act which he or she would not do if left to act freely; and

whether there has been a misuse of position of confidence or whether the lobbyist took advantage of a public office holder's weakness, infirmity or distress to alter that public office holder's actions or decisions.

Advisory Opinion of the Office of the Registrar of Lobbyists on "Improper Influence", Affidavit of Duff Conacher, Tab 3, Exhibit J.

48. He acknowledges in the Advisory Opinion that the standard he has set is "very high".

Advisory Opinion of the Office of the Registrar of Lobbyists on "Improper Influence", Affidavit of Duff Conacher, Tab 3, Exhibit J.

49. The Registrar of Lobbyists issued an Advisory Opinion to lobbyists in December 2005 in which he outlined a different interpretation of Rule 8, in which he clearly indicates the action of placing a public office holder in a conflict of interest position means the action could represent "improper influence". It provides that:

Lobbyists who participate in political activities must ensure that they comply with the disclosure requirements of the Act in relation to any lobbying activity which could arise during or on the margins of such political activities. In addition, subsection 10.3 of the Act states that lobbyists are required to comply with the requirements of the Lobbyists' Code of Conduct. To this end, lobbyists should take all necessary measures to avoid any real or apparent conflict of interest involving themselves and their clients, as well as with public office holders whom they may meet, help or otherwise communicate with as they participate in political activities. In particular, lobbyists should ensure that they do not put public office holders in a position where they could themselves be in breach of their own code of conduct.

Registrar of Lobbyists, Opinion to Lobbyists, December 2005, Tab 24 of Appellant's Book of Authorities.

(ii) The Contextual Analysis Rule

50. The Appellant submits that Rule 8 of the *Lobbyists' Code* should be interpreted in the context of the *L.R.A.*, as well as the *Conflict of Interest Code* for public office holders, and the code of conduct that applies to Members of the House of Commons, and the code of conduct that applied to members of the Senate of Canada, the code of conduct that covers federal public servants, and relevant statutes (given that the *L.R.A.* defines "public office holder" as including all of these people).

i. Legislative Context

51. Courts have often said that the meaning of a word or expressions can only be fully understood if read in their legislative context. Where statutes are closely related, it is appropriate to rely on definitions or other interpretive provisions found in one statute to help interpret the other.

Ruth Sullivan, Statutory Interpretation (Concord, Ont. : Irwin Law, 1997), p. 124-125, Tab 23 of Appellant's Book of Authorities.

52. This practice has been codified in section 15 of the *Interpretation Act* which provides that:

Application of definitions and interpretation rules

15. (1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.

Interpretation sections subject to exceptions

- 15(2) Where an enactment contains an interpretation section or provision, it shall be read and construed
 - (a) as being applicable only if a contrary intention does not appear; and
 - (b) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.

Interpretation Act, R.S., 1985, c. I-21, s. 15

53. Public office holders are themselves subject to ethical codes, such as the Conflict of Interest Code, and the Conflict of Interest Code for Members of the House of Commons (the "MP's Code"). These codes closely relate to the Lobbyists' Code because their objectives are to establish ethical rules and to maintain and enhance public trust and confidence in the integrity of government and the democratic process.

Conflict of Interest Code, s. 3(5), 20, 23(1).

Conflict of Interest Code for Members of the House of Commons, s. 2.

54. Both the *Conflict of Interest Code* and the *MP's Code* expressly require those subject to them to avoid real and apparent conflicts and to resolve any conflicts that may arise in a manner which protects the public interest. As well, both conflict of interest codes prohibit public office holders from receiving gifts or other benefits (defined as transfers of money or property, or the provision of services) that could influence their judgment in making decisions in the public interest.

Conflict of Interest Code, s. 3(5), 20, 23(1), Conflict of Interest Code for Members of the House of Commons, s. 2.

- 55. The Appellant submits that the interpretation of the words in Rule 8: "Lobbyists shall not place public office holders in a conflict of interest.." in *Democracy Watch II* and *Democracy Watch II* is unreasonable and incorrect because it conflicts with relevant legislation and the *Conflict of Interest Code* to which it expressly refers.
- 56. The Appellant submits that a reasonable and correct interpretation of the *L.R.A.*, and the *Lobbyists' Code* is one that is harmonious with other legislation governing the ethics of public office holders, including sections 3(5), 20 and 23(1) of the *Conflict of Interest Code* and *MP's Code*, which prohibit apparent as well as actual conflicts of interest.

(iii) The Ordinary Meaning Rule

57. In the absence of a clear reason for rejecting it, the first consideration to take into account when interpreting statutes is the ordinary meaning of the legislative text.

Ruth Sullivan, Statutory Interpretation (Concord, Ont. : Irwin Law, 1997) p. 41-42, Tab 23 of Appellant's Book of Authorities.

58. Rule 8 of the *Lobbyists' Code* focuses on actions or proposed actions which "would" constitute an "improper influence". It makes it expressly clear that it is the action or proposed action of the lobbyist, rather than whether the lobbyist's action actually influenced the public office holder to change his or her decision or order,

which gives rise to a violation of the Rule. Were this not the case, the legality of a lobbyist's action would be outside the lobbyist's control and hinge entirely on how a public office holder responds to the lobbyist's action.

- 59. "Proposed" actions can violate the Rule, providing further support for a conclusion that actual effects on the public office holder's actions are not essential to a finding that a lobbyist has violated the Rule.
- 60. At the time of the fundraising event, a lobbyist was, by definition, a "person who is paid to communicate with a public office holder in an attempt to influence him or her". Since lobbying is recognized in the law as a legitimate activity, when performed in compliance with the *L.R.A.* and the *Lobbyists' Code*, it follows that the mere act of attempting to influence or actually influencing a public office holder cannot constitute a violation of the Rule. That is why the Rule contains words of limitation.
- 61. Those words are "place public office holders in a conflict of interest" and "improper". Absent a "real, potential or apparent conflict", the bestowal of benefits that "could influence" or the "appearance of being placed under an obligation" under the *Conflict of Interest Code*, a lobbyist's attempt to influence a public office holder will not run afoul of Rule 8. There is no serious issue but that the service of fundraising confers a benefit that could give rise to a "conflict of interest".

Affidavit of Duff Conacher, Tab 3, Exhibit J,

Organization for Economic Cooperation and Development, Policy Brief, OECD Guidelines for Managing Conflict of Interest in the Public Sector (September 2005), s. 5, 10-15, Tab 21 of Appellant's Book of Authorities,

The Honourable E.N. (Ted) Hughes, British Columbia Conflict of Interest Commissioner, "Opinion Pursuant to Section 19(3) of the *Members' Conflict of Interest Act* by the Honourable Robin Blencoe, Minister of Municipal Affairs, Recreation and Housing" (August 16, 1993), Tab 26 of Appellant's Book of Authorities.

62. The issue therefore is the extent to which the word "improper" further limits the Rule's application. The word "improperly" appears in 3 sections of the Ontario Members' Integrity Act, which governs the ethical behaviour of elected representatives not lobbyists. The word is interpreted by The Honourable Coulter

A. Osbourne, Integrity Commissioner of Ontario in his February 8, 2002 decision Report Re: The Honourable James M. Flaherty, Deputy Premier and Minister of Finance:

The meaning to be given to the pejorative and limiting reference, "improperly" in s.s.2 to 4 of the Members' Integrity Act will of course depend on the context in which the word appears in the Act, having regard to the provisions of the Act as a whole. Unless in the particular circumstances there is some reason to do otherwise, the word "improperly" should be given its plain ordinary meaning.

In the statutory context in which it appears, and consistent with the general notion of what is improper, it appears to me that the qualification "improperly" is intended to convey a sense that the decision made (section 2) or influence exercised (section 4) was objectionable, unsuitable or otherwise wrong (see Black's Law Dictionary definition of "improper").

Report of the Honourable Coulter A. Osborne, Integrity Commissioner, "Re: The Honourable James M. Flaherty, Deputy Premier and Minister of Finance, Office of the Integrity Commissioner, Legislative Assembly of Ontario, February 8, 2002, Tab 25 of Appellant's Book of Authorities.

63. Commissioner Osborne correctly interprets the word with reference to the ordinary meaning of the word and the ethical purposes of the legislation, as do the OECD Guidelines, and Commissioner Hughes. In direct contrast the interpretation set out in the Ethics Counsellor's Advisory Opinion does neither.

(iv) The Purposive Analysis Rule

- 64. The Appellant submits that the Registrar's interpretation of Rule 8 is unreasonable and incorrect as it conflicts with its legislative purposive. The Appellant submits that a reasonable and correct interpretation of Rule 8 is one that considers the intent of Parliament as well as the "mischief" it was meant to cure.
- 65. Parliamentary debates regarding Canada's first lobbying registration legislation (Bill C-82) indicate that the central purpose of the legislation was to help public office holder comply with codes of ethics relating to their own conduct.

House of Commons, Legislative Committee on Bill C-82, Minutes, April 12, 1988, p. 1:18, Tab 18 of Appellant's Book of Authorities,

Senate, Debates, July 26, 1988, p. 4126, Tab 22 of Appellant's Book of Authorities.

66. In the 1996-1997 Annual Report on the Lobbyists' Code of Conduct, the Ethics Counsellor acknowledged that one of the objectives of the Lobbyists' Code is to help public officer holders comply with codes of ethics applicable to them. It stated that:

The Code establishes standards of conduct for all lobbyists communicating with federal public office holders and forms a counterpart to the obligations that federal officials must honour in their codes of conduct when they interact with the public and with lobbyists

1996-1997 Annual Report of the Lobbyists' Code of Conduct, Ethics Counsellor Howard Wilson, Tab 17 of Appellant's Book of Authorities.

67. The Lobbyists' Code's purpose is set out in its preamble: to promote "public trust in the integrity of government decision-making". After noting that both public office holders and lobbyists are subject to codes of conduct, the preamble concludes that: "together, these codes play an important role in safeguarding the public interest in the integrity of government decision making".

Lobbyists' Code, Preamble.

68. In *R. v. Hinchey*, the Supreme Court of Canada's leading authority on ethical government behaviour, considers how conflict of interest legislation goes beyond the anti-corruption provisions of the *Criminal Code*. As it repeatedly notes:

For a government, actual integrity is achieved when its employees remain free of any type of corruption. On the other hand, it is not necessary for a corrupt practice to take place in order for the appearance of integrity to be harmed. Protecting these appearances is more than a trivial concern.

R. v. Hinchey, [1996] 3 S.C.R. 1128, para. 13-18 and 74.

69. The Appellant submits that an interpretation of Rule 8 that prohibits lobbyists from causing public office holders to be in violation of the conflict of interest codes governing their conduct is a reasonable and correct interpretation of Rule 8 because it takes into account the intent that public trust in the integrity of government be fostered. In light of these purposes, the scope for a lobbyist to

place a public office holder in a conflict of interest position in a way that is not "improper" must be extremely narrow.

House of Commons, Proceedings and Evidence of the Sub-Committee on Bill C-43, An Act to amend the Lobbyists Registration Act and to make related amendments to other Acts, 1st Session, 35th Parliament, September 27, 1994, p. 2:14, per the Honourable John Manley, Tab 20 of Appellant's Book of Authorities.

70. The Appellant submits that the 2002 Advisory Opinion interpretation of Rule 8 is incorrect and unreasonable as it is patently at odds with the preventative purpose that Parliament had intended it to have. The *L.R.A.* and the *Lobbyists' Code* were implemented by Parliament in order to assist public officer holders to comply with their codes of ethics, not to close the stable door after the horse has bolted.

C. Doctrine of Legitimate Expectations

(i) The Scope of the Legitimate Expectations Doctrine

71. The legitimate expectations doctrine is part of the doctrine of fairness or natural justice in administrative law. When a legitimate expectation is found to exist in a given situation, this will affect the content of the duty of fairness owed to the individual or individuals affected by a decision. For example, if an individual has a legitimate expectation that a certain procedure will be followed, this procedure may be required by the duty of fairness. However, the doctrine of legitimate expectations cannot produce substantive rights outside the procedural domain.

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, at. para. 26,

Reference re Canada Assistance Plan (BC) [1991] 2 SCR 525 at paras, 58-64.

(ii) The Legitimate Expectation Doctrine and the Interpretation of Rule 8

72. The Registrar, supported by Justice Frenette, adopted a "that was then, and this is now" interpretation of Rule 8 of the *Lobbyists' Code*. Registrar Nelson clearly disagreed with the interpretation adopted by Ethics Counsellor Wilson, but felt "it would be unfair to retroactively impose my approach to [Rule 8 of the *Lobbyists' Code*]". While no reference is expressly made to the doctrine in the Registrar's

ruling, no other legal principle could justify reaching different outcomes based on who is responsible for enforcing the *Lobbyists' Code*.

73. Rule 8 of the *Lobbyists' Code* had not been amended. Nothing has changed but the person charged with the *Lobbyists' Code's* enforcement. The doctrine of legitimate expectations is an application of the duty of fairness. Basically, it is deemed unfair to allow representations to be made concerning administrative procedure and then to renege on those representations. Such representations, however, cannot be used to defeat or alter the substantive requirements of Rule 8.

Baker, para. 26,

Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 SCR 1170, paras. 73-75.

(iii) Actual Advice

74. There is no evidence on the record that in 1999, at the time or before Mr. Campbell was acting as fundraising chair for Mr. Peterson, that the Ethics Counsellor Wilson had issued an Advisory Opinion providing general guidance concerning the application of Rule 8. Likewise, there is no evidence on the record that in 1999, at the time or before Mr. Campbell was acting as fundraising chair for Minister Peterson, that he had provided either Minister Peterson or Mr. Campbell with an advisory opinion that either or both would not be in a conflict of interest if Mr. Campbell provided Minister Peterson with these services. On the contrary, the evidence from the former Ethics Counsellor was that he had not provided any such advice. Any finding to the contrary is both incorrect and unreasonable.

Memorandum of Stéphanie Grassi to Karen Shepherd dated September 21, 2006, Affidavit of Karen Shepherd, Tab 4, Exhibit Q,

Osmond v. Newfoundland, [2001] N.J. No. 111 (Nfld. S.C.), para. 85.

(iv) Advisory Opinion

75. The Ethics Counsellor issued an Advisory Opinion concerning Rule 8 after he received the complaints from Democracy Watch, but before he issued any decisions on any of those complaints. The Registrar applied the Advisory Opinion literally and prescriptively to decide its application concerning Mr. Campbell.

76. Section 10(1) of the *L.R.A.* provides that:

Interpretation bulletins

10. (1) The Registrar may issue advisory opinions and interpretation bulletins with respect to the enforcement, interpretation or application of this Act other than under sections 10.2 to 10.5.

L.R.A., s. 10(1)

77. Section 10.2 provides that

Lobbyists' Code of Conduct

10.2 (1) The registrar shall develop a Lobbyists' Code of Conduct respecting the activities described in subsections 5(1) and 7(1).

L.R.A, s. 10.2(1)

- 78. While the Registrar may issue advisory opinions relating to the interpretation of the *L.R.A*, it does not have jurisdiction to issue opinions relating to the *Lobbyists' Code*. The Appellant submits that the Advisory Opinion issued on Rule 8 of the *Lobbyists' Code* is therefore *ultra vires*. The Appellant also submits that the Registrar's interpretation of Rule 8 was unreasonable and incorrect because it was based on an *ultra vires* "Advisory Opinion".
- 79. Even if the Court concludes, despite the Registrar's application of a September 2002 Advisory Opinion to a situation that occurred in September 1999, and even if the Court concludes that the Advisory Opinion was not *ultra vires*, the fact remains that, for the reasons given in paragraphs 70-72 above, the representations cannot create positive rights that have the effect of temporarily altering the meaning of Rule 8 of the *Lobbyists' Code*.

D. Costs

- 80. It is submitted that Justice Frenette misapplied the principles applicable when determining whether Democracy Watch is a public interest litigant in these proceedings. In particular, he erred in concluding that an *obiter* statement by Justice Gibson in *Democracy Watch I*, which could not be appealed, constituted a previous determination in proceedings against the same defendant.
- 81. The Appellant is a non-profit organization that has initiated this proceeding in the interest of the public. The Appellant submits that the Court should have considered Democracy Watch's public interest mandate when awarding costs in this matter.
- 82. Rule 400(3) of the *Federal Court Rules* sets out the scope of the Court's discretion when awarding costs. It provides that:
 - 400(3) In exercising its discretion under subsection (1), the Court may consider
 - (h) whether the public interest in having the proceeding litigated justifies a particular award of costs;

Federal Court Rules, SOR/98-106, Rule 400(3).

83. As noted by Justice Dawson in *Harris v. Canada*, while costs awards are discretionary, they are to be awarded on a principled basis, in light of the factors listed in *Rule 400(3)*.

Harris v. Canada [2001] F.C.J. No 1876 (T.D.), [Hereinafter "Harris"] para. 219.

84. Rule 400(3)(h) provides that the Court may consider the public interest in having the matter before it litigated when determining costs awards. This has been described as "the most significant factor" to consider when awarding costs. As such, even when an applicant is unsuccessful in obtaining the relief claimed, it may still be awarded costs if the public interest was served through the litigation.

Harris, para. 219,

Shepherd v. Canada (Solicitors General) (1990), 36 F.C.T. 222 (T.D.).

- 85. In its Report on Standing, the Ontario Law Reform Commission proposed criteria to determine the circumstances in which costs should not be awarded against a person or organizations commencing public interest litigation. Those criteria were:
 - a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.
 - b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.
 - c) The issues have not been previously determined by a court in a proceeding against the same defendant.
 - d) The defendant has a clearly superior capacity to bear the costs of the proceeding.
 - e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.

Ontario Law Reform Commission, *Report on Standing* (Toronto: Minister of the Attorney General, 1989), cited in *Harris v. Canada* [2001] F.C.J. No 1876 (T.D.), para. 222.

86. The criteria proposed by the Ontario Law Commission have been applied by the Federal Court to determine whether a public interest matter is being litigated for the purposes of *Rule 400(3)(h)*.

Harris, para. 222.

87. The Appellant submits that this matter is one of public interest litigation as provided in *Rule 400(3)*. In fact, Democracy Watch meets all of the criteria proposed by the Ontario Law Report Commission to determine the circumstances in which costs should not be awarded against a person or organization commencing public interest litigation. For this reason, the Appellant submits that it is entitled to costs awards, regardless of the outcome of this case.

(i) Issue of national importance

88. This case involves issues of national importance. Its significance extends well beyond the immediate interests of the parties involved. Rather, it involves the interpretation and enforcement of ethics codes enacted specifically to promote

accountability and transparency in government in order to ensure that the public maintains its confidence in government and in the democratic process.

89. In *R. v. Hinchey*, the Supreme Court of Canada acknowledged the importance of promoting integrity in government. Justice L'Heureux-Dubé explained :

It is hardly necessary for me to expand on the importance of having a government which demonstrates integrity. Suffice it to say that our democratic system would have great difficulty functioning efficiently if its integrity was constantly in question.

R. v. Hinchey, [1996] 3 S.C.R. 1128, para. 14.

90. The Supreme Court went on to explain that government transparency and accountability is a matter of public interest. It stated:

I would merely add that the importance of preserving integrity in the government has arguably increased given the need to maintain the public's confidence in government in an age where it continues to play an ever increasing role in the quality of everyday people's lives.

R. v. Hinchey, [1996] 3 S.C.R. 1128, para. 14.

- 91. The Appellant has no pecuniary interest in this case. The Appellant's mandate is to promote ethics in government. It initiated this litigation in order to obtain clarification with regard to the meaning of Rule 8 of the *Lobbyists' Code*.
- 92. This is the first time that the Federal Court of Appeal will have the opportunity to interpret Rule 8 of the *Lobbyists' Code*.
- 93. The *Lobbyists' Code* and the *L.R.A.* are intended to help maintain and encourage the public's trust and confidence in government and in the democratic process. They help prevent conflicts of interests from occurring that could cause the public to believe that their elected officials are not acting in the best interests of the electorate. Litigation involving the interpretation of the rules under the *Lobbyists' Code* and related ethical codes should therefore be considered as public interest litigation.

PART IV: ORDERED REQUESTED

- 94. Democracy Watch requests the following order:
 - (a) An order quashing the Ruling and sending the complaint back to the Registrar, or any entity which may succeed the Registrar and take on the responsibilities of the Registrar, for a fresh ruling, with direction regarding the appropriate interpretation of Rule 8 of the Lobbyists' Code and the doctrine of legitimate expectations;
 - (b) Its costs of this Appeal on a substantial indemnity basis, inclusive of G.S.T., and such other relief as this Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th DAY OF JUNE, 2008

June 11, 2008

bakerlaw

672 Dupont Street

Suite 400

Toronto, Ontario M6G 1Z6

David Baker LSUC#: 17674M Tel: (416) 533-0040, ext. 222

Solicitors for the Appellant Democracy Watch

SCHEDULE "A"

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817

Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748

Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689

Democracy Watch v. Campbell and the Attorney General of Canada (Office of the Registrar for Lobbyists), [2008] No. 214

Democracy Watch v. Canada (Attorney General), [2004] F.C.J. No. 1195, 85

Dunsmuir v. New Brunswick, (2008) SCC 9

Harris v. Canada, [2001] F.C.J. No 1876 (T.D.)

Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247

National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324

Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 SCR 1170

Osmond v. Newfoundland, [2001] N.J. No. 111 (Nfld. S.C.)

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982

R. v. Hinchey, [1996] 3 S.C.R. 1128

Reference re Canada Assistance Plan (BC), [1991] 2 SCR 525

Shepherd v. Canada (Solicitors General), (1990), 36 F.C.T. 222 (T.D.)

Other:

1996-1997 Annual Report of the Lobbyists' Code of Conduct, Ethics Counsellor Howard Wilson.

House of Commons, Legislative Committee on Bill C-82, Minutes, April 12, 1988.

House of Commons, Standing Committee on Procedure and House Affairs, 35th, 2nd Session, Minutes, November 19, 1996.

House of Commons, Proceedings and Evidence of the Sub-Committee on Bill C-43, An Act to amend the Lobbyists Registration Act and to make related amendments to other Acts, 1st Session, 35th Parliament, September 27, 1994.

Organization for Economic Cooperation and Development, Policy Brief, OECD Guidelines for Managing Conflict of Interest in the Public Sector (September 2005).

Senate, Debates, July 26, 1988, 4126.

Ruth Sullivan, Statutory Interpretation (Concord, Ont.: Irwin Law, 1997).

Registrar of Lobbyists, Opinion to Lobbyists, December 2005.

Report of the Honourable Coulter A. Osborne, Integrity Commissioner, "Re: The Honourable James M. Flaherty, Deputy Premier and Minister of Finance, Office of the Integrity Commissioner, Legislative Assembly of Ontario, February 8, 2002.

The Honourable E.N. (Ted) Hughes, British Columbia Conflict of Interest Commissioner, "Opinion Pursuant to Section 19(3) of the *Members' Conflict of Interest Act* by the Honourable Robin Blencoe, Minister of Municipal Affairs, Recreation and Housing" (August 16, 1993).

SCHEDULE "B"

Conflict of Interest and Post-Employment Code, s. 3(5), 23(1)

- **3(5)** On appointment to office, and thereafter, public office holders shall arrange their private affairs in a manner that will prevent real, potential or apparent conflicts of interest from arising but if such a conflict does arise between the private interests of a public office holder and the official duties and responsibilities of that public office holder, the conflict shall be resolved in favour of the public interest.
- **20.** Gifts, hospitality or other benefits including those described in section 21 that **could influence public office holders** in their judgment and performance of official duties and responsibilities should be declined.
- **22(1)** A public office holder shall take care to avoid being placed or the appearance of being placed under an obligation to any person or organization that might profit from special consideration on the part of the public office holder.

Code régissant la conduite des titulaires de charge publique en ce qui concerne les conflits d'intérêts et l'après-mandat, art. 3(5), 23(1)

- **3(5)** Dès sa nomination, il doit organiser ses affaires personnelles de manière à éviter les conflits d'intérêts réels, potentiels ou apparents; l'intérêt public doit toujours prévaloir dans les cas où les intérêts du titulaire entrent en conflit avec ses fonctions officielles.
- 20. Le titulaire d'une charge publique doit refuser tout cadeau, y compris ceux décrit à l'article 21, marque d'hospitalité ou autre avantage qui risque d'avoir une influence sur son jugement et sur l'exercice de ses fonction officielles.
- **22(1)** Le titulaire d'une charge publique doit éviter de se placer ou de sembler se placer dans des situations où il serait redevable à une personne ou à un organisme, ou encore au représentant d'une personne ou d'un organisme, qui pourrait tirer parti d'un traitement de faveur de sa part.

Conflict of Interest Code for Members of the House of Commons

3(5) On appointment to office, and thereafter, public office holders shall arrange their private affairs in a manner that will prevent real, potential or apparent conflicts of interest from arising but if such a conflict does arise between the private interests of a public office holder and the official duties and responsibilities of that public office holder, the conflict shall be resolved in favour of the public interest.

Code régissant les conflits d'intérêts des députés, art. 3(5)

3(5) Dès sa nomination, il doit organiser ses affaires personnelles de manière à éviter les conflits d'intérêts réels, potentiels ou apparents; l'intérêt public doit toujours prévaloir dans les cas où les intérêts du titulaire entrent en conflit avec ses fonctions officielles.

Federal Court Rules, SOR/98-106, Rule 400(3)

- **400(3)** In exercising its discretion under subsection (1), the Court may consider
- (a) the result of the proceeding;
- (b) the amounts claimed and the amounts recovered;
- (c) the importance and complexity of the issues;
- (d) the apportionment of liability;
- (e) any written offer to settle;
- (f) any offer to contribute made under rule 421;
- (g) the amount of work;
- (h) whether the public interest in having the proceeding litigated justifies a particular award of costs;
- (i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
- (j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;
- (k) whether any step in the proceeding was
- (i) improper, vexatious or unnecessary, or
- (ii) taken through negligence, mistake or excessive caution;
- (*I*) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;
- (m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;
- (n) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299; and
- (o) any other matter that it considers relevant.

Règles des Cours fédérales (DORS/98-106), art. 400(3)

- **400(3)** Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants:
- (a) le résultat de l'instance;
- (b) les sommes réclamées et les sommes recouvrées;
- (c) l'importance et la complexité des questions en litige;
- (d) le partage de la responsabilité;
- (e) toute offre écrite de règlement;
- (f) toute offre de contribution faite en vertu de la règle 421;
- (g) la charge de travail;
- (h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;
- (i) la conduite d'une partie qui a eu pour effet d'abréger ou de prolonger inutilement la durée de l'instance;
- (j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;
- (k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :
- (i) était inappropriée, vexatoire ou inutile,
- (ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;
- (/) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;
- (m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;
- (n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;
- (o) toute autre question qu'elle juge pertinente.

Interpretation Act, R.S., 1985, c. I-21, s. 15

15(1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.

Loi d'interprétation, L.R., 1985, ch. I-21, art. 15

15(1) Les définitions ou les règles d'interprétation d'un texte s'appliquent tant aux dispositions où elles figurent qu'au reste du texte.

Lobbyists' Registration Act, R.S. 1985, c.44 (4th supp.), 10.1(1), 10.2(1)

Interpretation bulletins

10(1) The Registrar may issue advisory opinions and interpretation bulletins with respect to the enforcement, interpretation or application of this Act other than under sections 10.2 to 10.5.

Lobbyists' Code of Conduct

10.2(1) The registrar shall develop a Lobbyists' Code of Conduct respecting the activities described in subsections 5(1) and 7(1).

Loi sur l'enregistrement des lobbyistes, 1985, ch. 44 (4e suppl.), art. 10(1) et 10.2(1)

Bulletins d'interprétation

10(1) Le directeur peut publier des bulletins d'interprétation et fournir des avis portant sur l'exécution, l'interprétation ou l'application de la présente loi, à l'exception des articles 10.2 à 10.6.

Code de déontologie

10.2(1) Le directeur élabore un code de déontologie des lobbyistes portant sur toutes les activités visées aux paragraphes 5(1) et 7(1).

Members' Integrity Act, S.O. 1994, ch. 38, s. 2, 3(1), 4

- 2. A member of the Assembly shall not make a decision or participate in making a decision in the execution of his or her office if the member knows or reasonably should know that in the making of the decision there is an opportunity to further the member's private interest or improperly to further another person's private interest.
- **3(1)** A member of the Assembly shall not use information that is obtained in his or her capacity as a member and that is not available to the general public to further or seek to further the member's private interest or improperly to further or seek to further another person's private interest.
- **4.** A member of the Assembly shall not use his or her office to seek to influence a decision made or to be made by another person so as to further the member's private interest or improperly to further another person's private interest.

Loi de 1994 sur l'intégrité des députés, L.O. 1994, ch. 38, 2, 3(1), 4

- 2. Le député ne doit pas prendre une décision ni participer à celle-ci dans l'exercice de sa charge s'il sait ou devrait raisonnablement savoir, en prenant cette décision, qu'existe la possibilité de favoriser son intérêt personnel ou de favoriser de façon irrégulière celui d'une autre personne. 1994, chap. 38, art. 2.
- **3(1)** Le député ne doit pas utiliser les renseignements qu'il obtient en sa qualité de député et qui ne sont pas accessibles au public en général, afin de favoriser ou chercher à favoriser son intérêt personnel ou de favoriser ou chercher à favoriser de façon irrégulière celui d'une autre personne.
- **4.** Le député ne doit pas user de sa charge pour chercher à influencer une décision qu'une autre personne a prise ou doit prendre, dans le but de favoriser son intérêt personnel ou de favoriser de façon irrégulière celui d'une autre personne

FEDERAL COURT OF APPEAL

BETWEEN:

DEMOCRACY WATCH

Appeallant

- and -

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

Respondents

MEMORANDUM OF FACT AND LAW

bakerlaw

672 Dupont Street, Suite 400 Toronto, Ontario M6G 1Z6

David Baker LSUC#: 17674M Tel: (416) 533-0040 ext. 222

Fax: (416) 533-0050

Solicitor for the Appellant Democracy Watch