

Commissioner of Lobbying



Commissaire au lobbying

Ottawa, Canada K1A 0R5

AUG 22 2011

PERSONAL & CONFIDENTIAL

Mr. Duff Conacher
Democracy Watch
39 Chicora Ave, Upper Unit 2
Toronto, Ontario
M5R 1T7

Dear Mr. Conacher:

The purpose of this letter is to advise you that I have closed an administrative review of your allegation that nine lobbyists who worked for the benefit of Cabinet Ministers and other public office holders while engaged in lobbying activities were in breach of Rule 8 (Improper Influence) of the *Lobbyists' Code of Conduct* (the Code).

Your allegation was made in a letter to the former Ethics Counsellor dated June 17, 2002, and subsequently transferred to the Registrar of Lobbyists. In correspondence sent by counsel on behalf of the Registrar on July 22, 2005, and April 13, 2006, you were advised that the Registrar was prepared to reconsider this complaint, and other matters for which Democracy Watch had previously sought judicial review. I inherited the file on July 2, 2008, when responsibility for the administration and enforcement of the *Lobbying Act* and the Code was transferred to the Commissioner of Lobbying.

As you know, Rule 8 of the Code was the subject of review and analysis in the Federal Court and the Federal Court of appeal, beginning with an application for judicial review made by Democracy Watch in November 2006 following a decision taken by the Registrar in a matter relating to Mr. Barry Campbell. At that time, the former Registrar placed all files containing allegations that lobbyists were in breach of Rule 8 in abeyance. When I became Commissioner, I maintained that position.

.../2

On March 12, 2009, the Federal Court of Appeal held that guidance issued by the former Ethics Counsellor was unreasonable and that a new interpretation should be applied. In November 2009, I published new guidance on conflict of interest based on the Federal Court of Appeal decision in *Democracy Watch v. Barry Campbell and the Attorney General of Canada (Office of the Registrar of Lobbyists)*. In the annex to my guidance, I made reference to the fact that this interpretation of conflict of interest in the context of Rule 8 represented a shift in understanding from the Ethics Counsellor's guidelines issued in 2002, which the Federal Court of Appeal concluded were unreasonable. In August 2010, I provided further clarification about political activities in the context of Rule 8.

After reviewing the Investigations Directorate's report on your allegation concerning the nine lobbyists I have decided to close the administrative review, for the following reasons:

- The alleged breach occurred prior to the March 12, 2009 Federal Court of Appeal judgement in *Democracy Watch v. Campbell* which concluded that the Ethics Counsellor's interpretation of Rule 8 was unreasonable. Up until that point, the Ethics Counsellor's interpretation of Rule 8 had twice been upheld by the Federal Court (*Democracy Watch v. Attorney General of Canada (Office of the Ethics Counsellor)* in 2004, and *Democracy Watch v. Campbell* in 2008), and may have formed the basis of decisions made by lobbyists regarding their lobbying activities and their political activities. It would be unfair to apply the approach set out in the Federal Court of Appeal judgement to events that took place during that period in time (1997-2002).
- The decision to close would be consistent with the approach taken by the Federal Court of Appeal (*Democracy Watch v. Barry Campbell*) when considering whether to refer the matter back "for a continuance of the trial on the issues that remain to be determined in light of that declaration." In paragraph 56 of the decision, the FCA wrote:

“...given that the events underlying Democracy Watch's complaint are almost ten years old, it is doubtful that the interests of justice require that this complaint be returned for a new hearing and a fresh decision. Enough time has passed that this matter should be allowed to lapse.”
- The availability of evidence and the reliability of potential witnesses is limited due to the length of time that has elapsed since the alleged breaches occurred.

- In February 2011, I tabled two Reports on Investigation concerning breaches of Rule 8 by Mr. Michael McSweeney and Mr. Will Stewart. The Reports are precedent-setting and reflect my current guidance and approach to conflicts of interest and improper influence.

In view of this, a formal investigation pursuant to subsection 10.4(1) of the *Lobbyists' Code of Conduct* will not be undertaken and this file will be closed.

Sincerely yours,

A handwritten signature in black ink, appearing to be 'K. Shepherd', with a long horizontal line extending to the right.

Karen E. Shepherd
Commissioner of Lobbying