Commission of Inquiry Into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney

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SUBMISSION OF DEMOCRACY WATCH FOR THE PART II: POLICY REVIEW OF THE COMMISSION OF INQUIRY

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PART I
POLICY REVIEW ISSUES

A. Position on Scope of Terms of Reference for Commission's Part II Policy Review

Subsection (a)14 of the Commission's Terms of Reference reads:

> 14. Are there ethical rules or guidelines which currently would have covered these business and financial dealings? Are they sufficient or should there be additional ethical rules or guidelines concerning the activities of politicians as they transition from office or after they leave office?

with "business and financial dealings" referring to the dealings specifically and factually between former Prime Minister Brian Mulroney and Karlheinz Schreiber, but as part of the Commission's Part II Policy Review it refers generally to dealings between a federal government politician or official ("public official") and a private citizen or entity ("private actor").

In addition, this term covers both rules while a public official is in office and after the official leaves their office, with some emphasis on the rules covering the transition from public official to private actor.

Subsection (a)17 of the Commission's Terms of Reference reads:

> 17. Should the Privy Council Office have adopted any different procedures in this case?

with specific reference (in subsections (a)15 and 16)) to the processing by the Privy Council Office (PCO) of Mr. Schreiber's correspondence of March 29, 2007 to Prime Minister Stephen Harper, but as part of the Commission's Part II Policy Review it refers generally to the processing of communications between a private actor and a public official.

Therefore, Democracy Watch's position is that these terms of reference encompass all of the ethics, political finance, open government, lobbying and document/communications processing laws, regulations, codes, policies and guidelines ("rules") for public officials, with an emphasis on their dealings with private actors, and their transition from being a public official to being a private actor.

And, of course, these terms of reference encompass all of the enforcement systems for all of these rules because rules are only vague words on paper that have no force until their specific meaning is defined by an enforcement entity. No, of course, do these rules have any force unless the enforcement entity, or some related entity, actually has the power to enforce them.

B. Special Note Concerning Term of Reference (a)16

It should be noted that Democracy Watch's position is that the wording of subsection (a)16 of the Terms of Reference (which states "16. Why was the correspondence not passed on to Prime Minister Harper?") violates administrative law principles because it states a conclusion that, at the time the Terms of Reference were issued, was not a proven fact.

To be clear, it was not proven, certainly not by evidence provided by any independent, impartial source or investigation, that Prime Minister Harper had not seen the correspondence. All the conclusion stated in term of reference (a)16 was based upon was information provided by the Privy Council Office (PCO) and the Office of the Prime Minister (PMO).

All of the staff of the PCO and the Prime Minister's Office (PMO) involved in investigating the processing of Mr. Schreiber's correspondence serve at the pleasure of Prime Minister Harper and can be dismissed from their jobs at any time for any reason (including concluding in an investigation that the Prime Minister had knowledge of information that he should have referred to the proper authorities for further investigation).

In other words, all of these people have every incentive to protect the Prime Minister because by doing so they protect themselves.

Further, the drafter of the Terms of Reference who reached the conclusion set out in (a)16, David Johnston, served at the pleasure of Prime Minister Harper and the Cabinet, had no investigative powers, and was only making recommendations to Cabinet and, therefore, despite claims to the contrary by the Prime Minister, was not independent nor empowered to reach such a conclusion.

Mr. Johnston's position had all of the same characteristics as the position of the federal Ethics Counsellor from 1994 to 2004, who was found by the Federal Court in a July 2004 ruling to be institutionally biased because of the lack of independence from the Prime Minister.

***Democracy Watch v. The Attorney General of Canada (Office of the Ethics Counsellor)* [2004 FC 969] and [2004] 4 F.C.R. 83**

Democracy Watch's position is that term of reference (a)16 was a deliberate attempt to fetter the discretion of the Commission to examine whether, in fact, Prime Minister Harper saw Mr. Schreiber's correspondence (or received any summary of the correspondence), and that in any case this term of reference is one among many pieces of evidence of the conflict of interest Democracy Watch believes Prime Minister Harper and at least some members of his Cabinet and Cabinet appointees were in, and continue to be in, when making decisions about the investigation of the situation involving Mr. Schreiber and Mr. Mulroney, in particular their own actions concerning that situation. Details concerning Democracy Watch's position on this issue can be seen at:

http://www.dwatch.ca/camp/RelsMar2709.html

Democracy Watch urges the Commissioner to take these points into account when reaching conclusions concerning matters covered by terms of reference (a)15 and 16.

These points relate directly to the Commission's Part II Policy Review because, as with all good government rules, the rules that govern the processes for handling documents submitted to the federal government are just vague words on paper that have no force unless an enforcement entity with powers to enforce them defines the lines drawn by the rules and enforces the rules.

As is detailed below, the fundamental need for all investigative and enforcement entities to be fully independent of the public officials and public institutions the entities are investigating, and fully empowered to investigate, is seen by Democracy Watch as one of the key policy issues to be considered by the Commission.

PART II
FRAMEWORK THAT MUST BE USED FOR REVIEW OF POLICY ISSUES

A. Overview of Proposed Review Framework

Although some commentators continue to argue some of the following points, there is a general recognition in Canadian politics (however reluctantly admitted) that in order to require effectively public officials and private actors to act ethically (which is the fundamental "bottom line" as dishonest, secretive, unrepresentative, or wasteful actions are also unethical in almost all cases), a system must exist that has the following characteristics:

- strict, comprehensive, well-defined rules with no loopholes;
- a fully independent, fully empowered and fully resourced enforcement entity that has an almost 100 per cent chance of catching violators, and the overall capacity to ensure that everyone covered by the rules fully understands the rules and their responsibility to comply with them, and;
- penalties (civil, not criminal) significant enough to discourage violations of the rules.

The evidence for this recognition of the need for a system with these characteristics is extensive, and can be seen especially in the parliamentary reviews of Bill C-4 in 2004 (which created a more independent Ethics Commissioner, laid the basis for the enactment of ethics codes for members of the House of Commons and Senate, and created the Senate Ethics Officer) and Bill C-2 (the *Federal Accountability Act* (*FAA*)) in 2006 (which strengthened limits on political donations and fundraising, extended the limitation period for violations of elections and lobbying

rules, created a more independent enforcement entity for lobbyists, increased the disclosure rules for lobbyists, increased the penalties for violations of the lobbying rules, increased the independence of the enforcement of restriction of post-employment rules for some public officials, created a more independent and empowered "whistleblower" protection enforcement entity, and increased the number of government institutions covered by open government rules).

While the recognition exists that a system with these characteristics is essential to have rules that will actually be followed, and the rhetoric supporting such a system during these parliamentary reviews has been strong from all political parties for decades, unfortunately the rhetoric does not match reality as federal politicians have continued to fail to act on this recognition.

As a result, 142 years after Canada became a country its federal government still does not have ethics, political finance, open government and communications/document processing rules and enforcement systems that have these characteristics.

In every area, either rules have loopholes and/or the enforcement entity lacks independence, powers or resources and/or penalties are not significant enough to discourage violations.

To give a brief overview of the main current problem areas:

- ethics rules for public officials are not well defined and have many loopholes (e.g. no requirement to be honest), and many people in federal politics are not subject to rules (including some staff and appointees of Cabinet, and all staff of MPs and senators);
- lobbying rules have loopholes that allow mainly secret lobbying by large corporations;
- many public officials (especially MPs and senators and their staff) are not subject to any post-employment rules;
- openness rules have key loopholes, and many government institutions are not subject to openness rules (including the offices of all federal politicians);
- political finance rules have key loopholes, and some people involved in federal politics are not subject to some key rules (including nomination race and political party leadership candidates, and riding associations and political parties);
- the bank accounts of Canadian public officials are not tracked for suspicious transactions, as required under the *UN Convention Against Corruption*;
- in many cases, there is no way to ensure that an independent investigation of violations of good government rules will actually occur;
- the Senate Ethics Officer lacks independence and key powers;
- all ethics and openness enforcement entities lack key powers, especially to penalize;
- all ethics, openness, political finance and communications/document processing rule enforcement entities lack the resources to ensure anywhere near a 100 per cent chance of catching violators;

- persons who work in the offices of politicians and political party organizations are not protected from retaliation if they report wrongdoing, and;
- in almost all cases, no penalty exists for violating ethics or openness rules.

Details concerning these, and many other problems with the federal government's accountability system, can be see at:
http://www.dwatch.ca/camp/SummaryOfLoopholes.html

and also in the 2008 Global Integrity Report on Canada, which is the most comprehensive assessment of the federal government's integrity and accountability enforcement systems ever completed, and which can be accessed through:
http://www.dwatch.ca/camp/RelsFeb1809.html

It is a sad fact that it is more likely that a citizen in any city or town across the country will be caught and penalized for parking illegally than it is likely that a Canadian public official will be caught and penalized for acting unethically. Why? Because the rules against parking illegally are stricter and more well-defined than government ethics rules, and the enforcement agencies for parking rules are more fully independent, empowered and resourced than the ethics enforcement agencies, and, most incredibly, the penalty for parking illegally is often more significant than the penalty for acting unethically.

B. Proposed Review Framework is Supported by Many Legal and Political Precedents

To highlight the importance of having a system that has all three of the characteristics set out above, Democracy Watch submits the following legal precedents:

- in *R. v. Hinchey*, [1996] 3 S.C.R. 1128, the majority of the Supreme Court of Canada stated:

  "Protecting the integrity of government is crucial to the proper functioning of a democratic system" (para. 15)

  "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." (para. 17)

  and

  "In my view, given the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe." (para.18)

  while the minority judgment, delivered by Justice Cory, stated:

  "The magnitude and importance of government business requires not only the complete

integrity of government employees and officers conducting government business but also that this integrity and trustworthiness be readily apparent to society as a whole."

- in its ruling on the conflict of interest situation involving former Cabinet minister Sinclair Stevens, the Federal Court of Canada ruled that Mr. Stevens was not guilty of violating the then-in-force *Conflict of Interest and Post-Employment Code for Public Office Holders* on the sole basis that the key provision of the *Code* (namely, the phrase "conflict of interest") was not defined in the *Code*, nor had it been defined through any other legally binding manner.

  ***Stevens v. Canada (Attorney General)* 2004 FC 1746, para. 47**

- in *Democracy Watch v. The Attorney General of Canada (Office of the Ethics Counsellor)* [2004 FC 969] and [2004] 4 F.C.R. 83, the Federal Court of Canada ruled concerning the Ethics Counsellor (who was the administrator of the *Conflict of Interest and Post-Employment Code for Public Office Holders* between June 1994 and May 2004 (the Prime Minister was the enforcement entity during that time period and had complete control over the Ethics Counsellor, all investigations, and all rulings), and who was the enforcement entity for the *Lobbyists' Code of Conduct* from March 1997 to May 2004) that:

  > "The dual role places the Ethics Counsellor, and through him his office, in a constant state of potential conflict of interest both in allocation of resources and in fully and effectively carrying out the dual mandate...." (para. 54)

  and, as a result of the Prime Minister's control of the Ethics Counsellor, and the Ethics Counsellor's biased actions in failing to properly consider and rule on complaints filed by Democracy Watch, the Federal Court ruled that there were "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 a breach of the principles of procedural fairness in arriving at the rulings or decisions. . . ." (para. 94).

In addition, arguments for effective enforcement actions such as education and training programs for those covered by the rules; requirements for detailed public disclosure of both activities and violations; regular, random audits/inspections, and; fairly applied civil penalties significant enough to encourage compliance, are set out in the following Canadian government documents:

- the Discussion Paper produced by the Government of Canada entitled "Strengthening and Modernizing Canada's Safety System for Food, Health and Consumer Products" (January 2008) -- available at: http://www.healthycanadians.ca/pr-rp/dpaper-papier_e.html

- the "Notes for a presentation by FINTRAC Director Jeanne M. Flemming to the Third

annual managing internal and regulatory investigations conference" (April 2009) -- available at: http://www.fintrac.gc.ca/publications/presentations/ps-pa/2009-04-20-eng.asp

• the Discussion Paper produced by the B.C. Ministry of the Attorney General entitled "Administrative Monetary Penalties: A Framework for Earlier and More Effective Regulatory Compliance" (2008) -- available at: http://www.gov.bc.ca/ajo/down/amps092008.pdf

• the research paper entitled "New compliance strategies: 'Hard law' approach" prepared for Human Resources and Skills Development Canada (October 2005) -- available at: http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/research/research20/page00.shtml

and

• the "Background Paper Seminar on Strengthening the Enforcement and Administration of Environmental law in North America" prepared for the Commission for Environmental Cooperation of North America -- available at: http://www.cec.org/files/PDF/ECONOMY/Panel2fUS_en.pdf

What all of these documents reflect is the general conclusion revealed by the history of regulation of human behaviour, especially of people in large institutions such as governments -- that people considering whether to violate any rule take into account the chance of getting caught, and the penalty that will result if they are caught, when deciding whether to comply with the rule.

C. Rules and Enforcement Systems Used in Many Areas of Society Must Be Used in Federal Government If Public Trust is Ever to be Established

All of the documents cited immediately above concerning effective laws and law enforcement practices address areas other than politics. Democracy Watch cites them specifically to make the point that Canadian public officials have argued strongly in favour of these effective laws and enforcement practices, and have implemented them, for many areas of society, while many of those same public officials have continued to pretend that such strong laws and enforcement practices are not needed, and have continued to resist their implementation, in the political sphere.

To give two other examples of the double standard public officials maintain between the enforcement of laws that apply to private actors compared to the laws that apply to public officials, any lobbyist who violates the disclosure requirements of the federal *Lobbying Act* is subject to a fine of up to $200,000 and a two-year prison sentence, and when introducing a bill to establish lengthy minimum prison sentences for specific crimes on February 26, 2009, Prime Minister Harper stated "It is essential, for deterrence, to have strong penalties that we know will be enforced." A video news report of Mr. Harper's statement can be seen at: http://watch.ctv.ca/news/clip144359#clip144359

In direct contrast to the penalties for violating the *Lobbying Act,* and the statement from Prime Minister Harper about his "tough-on-crime" bill, his federal Conservatives promised during the 2006 election to change the ethics enforcement system to "Give the Ethics Commissioner the power to fine violators" but then introduced and passed a bill (Bill C-2, the *Federal Accountability Act* (*FAA*)) that only gave the Ethics Commissioner the power to fine violators of only a couple of the ethics rules that apply only to Cabinet ministers, their staff and Cabinet appointees, with the maximum fine being the insignificant, ridiculously low sum of $500.

The hypocrisy of such inconsistent actions by public officials, setting strong rules and high penalties and effective enforcement practices for private actors while maintaining weak rules and penalties and enforcement practices for public officials, does not go unrecognized by the public. Beyond the many polls over the past 15 years that have shown that voters believe that most public officials are self-interested and dedicated mainly to protecting themselves and their colleagues and government from accountability, the 2007 poll conducted by Transparency International found that almost two-thirds of Canadians believe that Canadian governments have not been effective at stopping government corruption, and almost one-half believe corruption is increasing.

Poll at: http://www.transparency.org/news_room/latest_news/press_releases/2007/2007_12_06_gcb_2007_en

D. Prime Minister and Legislatures Do Not Have Capacity to Enforce Good Government Rules

It should be noted that almost all of the commentators who argue against independently enforced ethics rules believe that in a parliamentary government the Prime Minister (concerning his or her appointees) and members of the legislature (and its committees, concerning members of Cabinet and appointees and members of the legislature) must be the enforcement entity for such rules because of the sovereignty of Parliament set out in the *Constitution of Canada.*

Democracy Watch's position is that there is no evidence that the legislature has the capacity or ability to enforce any rule effectively, for the following reasons:

- overall, the legislature has no investigative procedures that are aimed at producing impartial, evidence-based results;
- the legislature is either dominated by one party (in a majority government) and therefore incapable of impartially investigating the ruling party's/government's/public officials' actions, or dominated by opposition parties (in a minority government) and therefore incapable of impartially investigating the ruling party's/government's/public officials' actions;
- very few of the members of the legislature have any expertise in investigating situations, let alone reaching conclusions based on legal standards of evidence and legal principles

(and the impartiality of those who do have this expertise are incapacitated by their partisanship), and;

- all of the above flaws apply to the capacity of members of the legislature to apply penalties after the findings of an investigation have been made, and;
- overall, all members of the legislature are in a conflict of interest when addressing alleged violations of the rules because the rules either apply to them, or may apply to them if and when their party forms the government.

In fact, prime ministers and members of the House of Commons and Senate of Canada have consistently proven in the past 20 years that they have the fundamental flaws set out above, and are therefore clearly incapable of enforcing good government rules.

Although three prime ministers, and approximately 30 Cabinet ministers, 10 Cabinet staff, 20 Cabinet appointees, and 20 members of the House of Commons and Senate of Canada were alleged to have violated good government rules during the Conservative majority government of 1988-1993 and Liberal majority governments of 1993-1997, 1997-2000, 2000-2004, the prime ministers consistently resisted calls for independent investigations into the alleged violations, allowed only two such inquiries (into the actions of Sinclair Stevens, and into the "Adscam" sponsorship scandal), and penalized very few of their appointees (usually making the decision concerning any penalty not on the basis of evidence available to the public or the significance of the alleged violation, but instead on the basis of that amount of media and public attention paid to the allegations).

In addition, no parliamentary committee investigated any of these allegations simply because members of the ruling party constituted the majority of members of every committee during these governments and they blocked all attempts by opposition members on the committees to undertake such investigations.

Details about most of the situations that occurred between 1993 and 2004 (a time period during which clear evidence was made public that raised serious questions concerning whether two prime ministers, and approximately 20 Cabinet ministers, five Cabinet staff, and 10 Cabinet appointees had violated various ethics and other good government rules) can be seen at: http://www.dwatch.ca/camp/RelsNov0707.html

In contrast, during the Liberal minority government of 2004-2006, and the Conservative minority governments of 2006-2008 and 2008 to present, almost every alleged violation of good government rules by Cabinet ministers, Cabinet staff or Cabinet appointees has been the subject of hearings by a parliamentary committee and, at times, members of the ruling party and two of the three opposition parties have even agreed to investigate a member of the other opposition party.

While some useful information has been revealed by the investigations conducted by these committees since 2004, they have in most cases also provided ample evidence for the charge that they are "kangaroo courts" as their procedures and basis for reaching conclusions has largely been driven by the interests of the political parties represented by committee members, as opposed to the interests of justice.

As well, throughout the past 20 years, all members of the legislature have avoided investigations of allegations of violations of good government rules in which all of them are involved, most specifically the relationships of political parties and members of the legislature with lobbyists, openness about those relationships, political fundraising activities, and the business activities of members of the legislature outside of their public duties (ironically, but not surprisingly, the areas that are the focus of the Commission, and areas that all raise significant conflict of interest issues).

This consistent pattern by prime ministers and members of the House of Commons and Senate of Canada over the past 20 years of investigation and enforcement of good government rules based on partisanship and whim and self-interest, without due regard to rules of evidence and proper investigative procedure, has made it very clear that in order to have a rule of law in the area of good government, enforcement of good government rules by fully independent entities is necessary.

However, as set out in Part III below, many changes are needed to ensure not only that good government rules are effective, but also that the enforcement entities are fully independent, fully empowered and fully resourced, and to ensure that they act in legally correct and effective ways, and make legally correct rulings.

E. Problems are Impossible to Solve -- Strong Rules and Enforcement Can Discourage Many Violations

Democracy Watch's position is that the corrupting influences of money and secrecy in government will never be fully checked no matter how strong the rules and enforcement system.

It is simply impossible, and will remain so, to stop a person giving a public official a bag of cash that the official spends slowly over the rest of his or her life. Even if the mostly small countries that allow secret banking, and that refuse the request of police forces to disclose details about accounts held in the country's banks, are somehow convinced to end these practices, a public official receiving a bag of cash that is spent slowly over years and years will escape detection.

It will also remain impossible to stop anyone from making a secret offer of a job or other benefits to a public official in return for a favourable decision or action from the official, and it will remain impossible to stop anyone from claiming they did not see specific documents.

No set of rules and enforcement systems should offer to the public the promise that it will make government "clean" because that will always be offering a false hope.

As in all other areas of law, the best that can be achieved is a set of rules and enforcement systems that realistically takes into account predominant patterns of human behaviour, and establishes standards and incentives and disincentives that will discourage the most number of people from violating the rules.

F. Framework is the Basis of Detailed Recommendations in Part III of Submission

Given the ample evidence set out above and elsewhere of the need for an effective system to ensure compliance with good government rules, a system with the three key characteristics set out at the beginning of this section, the rest of this submission applies the framework set out above to the issues of the Commission's Part II Policy Review, with the aim of closing the loopholes in good government rules, giving good government enforcement entities the independence, powers and resources they need for effective enforcement of those rules, and increasing penalties so that violations of those are effectively discouraged.

As will be seen in the sections below, the establishment and enforcement of good government rules are, like so many other areas of law and standard-setting, areas in which the "devil is in the details". Ruling party after ruling party after ruling party in Canada's federal government have pretended to "clean up" the federal government in the past 40 years, and in every case an examination of the details of the changes they have made leads to the clear conclusion that the changes have been usually ineffective, or at best partial solutions.

For this reason, Democracy Watch urges the Commissioner to make very specific recommendations for changes, and to highlight the connections between each recommended change, to send a very clear message to federal public officials and the public that partial implementation of the recommendations will not solve any of the clear, wide-ranging and interconnected problems that need to be solved.

G. Format of Recommendations and Sub-recommendations in Part III of Submission

Given the focus and scope of the Commission's Terms of Reference, and given that in order to have good government it is most important to ensure those with the most decision-making power concerning government actions act honestly, ethically, openly and representatively, the recommendations set out in the Part III below mainly address federal "public office holders" who are essentially defined in the *Conflict of Interest Act* and other key statutes as the people in government with actual decision-making power (ie. Cabinet ministers, their senior staff, and Cabinet

appointees (including deputy and associate deputy ministers)).

For ease of reference, and to avoid redundancy, in each section and subsection below in Part III the heading "Sub-recommendations" is used followed by a summary statement about how Recommendation proposed to apply to public office holders should be extended to members of the House of Commons and Senate, their staff, and public servants. These summary statements usually include brief references to the provisions in the laws, regulations, codes, guidelines, policies or rules that apply to these other public officials, but these provisions are not set out in detail.

It should be noted that in almost every case the sub-recommendations propose that the rules contained in the *Conflict of Interest Code for Members of the House of Commons* ("MPs Code") and the *Conflict of Interest Code for Senators* ("Senators Code") be changed in similar ways as the rules in the *Conflict of Interest Act* and other key statutes must be changed. This is necessary to avoid fiascos similar to that which occurred in 1999 when the highly questionable actions of then-Prime Minister Chrétien were excused by Ethics Counsellor Howard Wilson (who, as noted above, was completely under the control of the Prime Minister) on the basis that the Prime Minister was acting only in his capacity as a member of the House of Commons, and at the time no rules of the House of Commons prohibited the Prime Minister's actions.

In only a few sections in Part III are the rules and rule enforcement systems for public servants (employees of the government, as opposed to public office holders, political staff or appointees) addressed, again because of the focus of the Commission's Terms of Reference.

Democracy Watch can provide more details about any of the sub-recommendations if needed by the Commissioner.

PART III
DEMOCRACY WATCH'S POSITIONS ON POLICY REVIEW ISSUES

A. Enforcement of Good Government Provisions in the *Criminal Code of Canada* Must Be Strengthened

Democracy Watch's position is that there are no loopholes in the bribery etc. provisions (sections 119 to 128) that apply to public officials that are contained in Part IV of the *Criminal Code of Canada*.

However, the effective enforcement of those provisions is very much in question, both because of the structure and operations of the RCMP, and the structure and operations of the

Crown prosecutors.

Democracy Watch submits that the Commissioner should recommend that the RCMP be changed as follows to increase the effectiveness of enforcement of these provisions:

> **Recommendation 1:** The Commissioner of the RCMP should be nominated by a commission (such as the Public Appointments Commission that "may" be established by Cabinet under the *Salaries Act*), and approved by the leaders of all parties in the House of Commons, instead of hand-picked by the federal Cabinet, to help ensure the independence of the Commissioner.
>
> **Recommendation 2:** The RCMP should be required to maintain an adequate number of staff with an adequate budget to investigate all allegations of violations of the Criminal Code by federal public officials.
>
> **Recommendation 3:** The "whistleblower" protection measures of the *Public Servants Disclosure Protection Act* should be extended to members of the RCMP, and members of the public.

While the *Federal Accountability Act* (*FAA*) also included the new *Director of Public Prosecutions Act* ("DPPA"), the *DPPA* is flawed and Democracy Watch submits that the Commissioner should recommend that these flaws be corrected in the following ways:

> **Recommendation 4:** The Director of Public Prosecutions should be nominated by a commission (such as the Public Appointments Commission that "may" be established by Cabinet under the *Salaries Act*), and approved by the leaders of all parties in the House of Commons, instead of hand-picked by the federal Cabinet, to help ensure the independence of the Director.
>
> **Recommendation 5:** The *Criminal Code of Canada* should be changed to give the Director of Public Prosecutions control over all prosecutions of federal public officials under sections 119 to 128, to ensure independence of prosecution decisions. (NOTE: it is also recommended that the Director of Public Prosecutions be given control over prosecutions under the Lobbying Act, the *Financial Administration Act*, and if recommended changes are made to establish significant fines and jail terms as penalties for violations, also the *Conflict of Interest Act*, *MPs Code*, *Senate Ethics Code*, and *Values and Ethics Code for the Public Service*).
>
> **Recommendation 6:** Section 15 of the *Director of Public Prosecutions Act* must be deleted because it gives the Attorney General of Canada the power to take over any prosecution from the Director which undermines the whole purpose of the having a Director as a prosecutor independent of Cabinet.
>
> **Recommendation 7:** A new section should be added to the *Director of Public Prosecutions Act* requiring the Director to issue a document explaining the reasons for not prosecuting a public official if such a decision is made, so that the public can scrutinize the Director's prosecution policy (or, if the Director is not given the power to make prosecution decisions concerning all public

officials, any Crown prosecutor with this power should be required to issue such a document).

Recommendation 8: The sections in the *Criminal Code of Canada* and court procedures that allow for a citizen to file private prosecutions with a justice of the peace should be changed to prohibit the Attorney General of Canada, or the Director of Public Prosecutions, or any other attorney general or Crown prosecutor, from intervening and taking over such prosecutions, to ensure that citizens can pursue these processes fully and cannot be thwarted by a politician or Crown prosecutor stopping the prosecution.

B. General Ethics Rules Loopholes Must Be Closed

Democracy Watch submits that in order to have strict, strong, loophole-free conflict of interest and ethics rules for federal public officials, the Commissioner should recommend that the following changes be made:

1. Key ethics rules must be extended to the staff of public officials

Recommendation 9: Subsection (b) of the definition of "reporting public office holder" in section 2 the *Conflict of Interest Act*, SC 2006, c. 9, s. 2, must be changed to ensure that the rules apply to all ministerial staff (not just those who work more than 15 hours per week) and all appointees (not just those who work full-time and are designated by a Cabinet minister), and the definition of "public office holder" must be changed to apply to all appointees, not just those whose appointment is approved by the Governor-in-Council.

Currently, the rules that apply to "reporting public office holders" are more strict than those that apply to "public office holders" but ministerial staff who work less than 15 hours per week are not covered by the "reporting" definition, nor are ministerial appointees who work less than full-time and/or are not designated as a "reporting" official by a Cabinet minister.

In addition, in an incredible development disclosed in the 2007-2008 Annual Report of federal Conflict of Interest and Ethics Commissioner Mary Dawson ("Ethics Commissioner"), the Ethics Commissioner stated that she had decided that because subsection (d.1) of the definition of "public office holder" in the *Act* includes "a ministerial appointee whose appointment is approved by the Governor in Council" she would not consider appointees whose appointment is approved by a single Cabinet minister to be covered by the *Act*.

As is obvious from the above, the loopholes in the current definitions are so ridiculously numerous as to undermine the entire ethics enforcement system for most powerful decision-makers in the federal government.

As a result of these loopholes, along with loopholes in the *Lobbying Act*'s definition of lobbyist, it is actually legal for a Cabinet minister to hire or appoint, as a part-time ministerial staff person or part-time ministerial appointee:

- an in-house, part-time corporate lobbyist (who is not required to register under the *Lobbying Act* if s/he does not spend more than 20% of his or her time as a corporate employee lobbying);
- a person who has acted as a lobbyist on an unpaid basis or;
- a person who has lobbied only with regard to the enforcement of federal laws

and then it is legal for that lobbyist to leave the part-time staff or appointee position and, the next day, lobby the minister who hired them or appointed them.

In other words, such a lobbyist/part-time ministerial staff person/appointee is not covered by either the *Conflict of Interest Act* or the *Lobbying Act*.

The recommended changes set out above will close these loopholes (NOTE: See below in the section on post-employment rules a set of recommendations and sub-recommendations concerning new rules needed to close loopholes in the *Lobbying Act* and establish effective "cooling-off periods" for all public officials).

Sub-recommendations: For the same reasons set out above, new sections must be added to the *MPs Code* and the *Senators Code* to cover the staff of MPs and senators (who are currently not subject to any ethics rules). The rules should apply to staff on a sliding scale based on the decision-making power of the MP or senator who employs them, and their responsibilities concerning policy-making (ie. opposition party leaders and their staff should face the most strict and strong restrictions, followed by opposition critics, chairs of committees, members of committees and members who do not sit on any committee). The names of the codes should also be changed to reflect that staff of MPs and senators are covered by the codes.

2. General "conflict of interest" definition and standard must be strengthened and made clearly comprehensive

Recommendation 10: The *Conflict of Interest Act* must be changed by adding to the section 2 definition of "private interest" the statement "a private interest includes any interest, not limited to financial or pecuniary interests or those interests which generate a direct personal benefit to the public office holder's interests, that could reasonably be considered likely to influence improperly the office holder's performance of their duties" and by adding to the section 4 definition of "conflict of interest" the statement that "a conflict of interest may involve otherwise legitimate private-capacity activity, personal affiliations and associations, and family interests, if the private interests involved could reasonably be considered likely to influence improperly the office holder's performance of their duties".

These recommended changes to the definitions in the *Act* are taken in part from the 2003 Canadian federal *Value and Ethics Code for the Public Service* which does not define "private interest" but states in Chapter 2 that "Conflict of interest does not relate exclusively to matters concerning financial transactions and the transfer of economic benefit." And are also taken from one of the Supreme Court of Canada's first rulings on conflict of interest in Canadian government, which established that a "private interest" of a public official is any interest that a reasonably well-informed person would consider "might have an influence on the exercise of the official's public duty".

***Values and Ethics Code for the Public Service* (2003), Chapter 2**

***Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170**

These recommended changes to the definitions are also taken from the cases cited in *Democracy Watch v. Barry Campbell and the Attorney General of Canada (Registrar of Lobbyists)* 2009 FCA 79, and from page 4 of the OECD's September 2005 "Guidelines for Managing Conflict of Interest in the Public Service" which can be seen at: http://www.oecd.org/dataoecd/13/22/2957360.pdf

These changes are needed to create a comprehensive standard that includes all private interests (because technical, restrictive, definitions of financial and business interests can create significant, unintended loopholes in the *Act*), and that prohibits the appearance of a conflict of interest.

As noted above in Part II in reference to the Sinclair Stevens case, these changes are also needed to ensure that public officials know more clearly the standard set by the *Act*, otherwise they will have a legal basis to claim that they did not have notice of the *Act*'s standard, and that therefore they cannot be held accountable to the standard.

***Stevens v. Canada (Attorney General)* 2004 FC 1746, para. 47**

It is unfortunate that this recommendation is necessary, but it is because the current Conflict of Interest and Ethics Commissioner Mary Dawson (the "Ethics Commissioner") issued a ridiculous, highly questionable ruling (which was her first public ruling since her appointment in July 2007) in January 2008 on a complaint filed by Democracy Watch that claimed, without any citations, that "private interest" under the *Act* only includes financial, business and some other interests (which other interests the Ethics Commissioner did not define). The Ethics Commissioner's ruling and related documents can be seen at: http://www.dwatch.ca/camp/RelsMar2709.html

The Ethics Commissioner's ruling is ridiculous for the following reasons:

- as summarized above, legal precedents and domestic and international standards that have discussed similar rules have concluded that a conflict of interest exists when a public official has *any* interest that *could* affect their decisions;

- no provision in the *Act* restricts the definition of "private interest" to financial or business matters;
- the *Act* was passed after the *Conflict of Interest Code for Members of the House of Commons* ("MPs Code") was established and the definition of "private interest" in the *MPs Code* is restricted to financial interests (which clearly points to the conclusion that the definition in the *Act* was intended to include other non-financial interests);
- the Ethics Commissioner admitted in her ruling that interests other than financial or business interests can be private interests but she did not define which interests, and;
- the Ethics Commissioner followed the ruling on Democracy Watch's complaint with a contradictory ruling in response to a separate complaint in which she used the "an interest that could influence" standard to define what constitutes a "private interest".

***The Thibault Inquiry Pursuant to the Conflict of Interest Code for Members of the House of Commons*, Conflict of Interest and Ethics Commissioner (May 2008), pp. 20 and 22**

While it is possible that Democracy Watch will be granted leave to appeal to the Supreme Court of Canada (SCC) the ruling of the Federal Court of Appeal on its judicial review application of the Ethics Commissioner's ruling (NOTE: the Federal Court of Appeal made the highly questionable decision that the Ethics Commissioner's ruling was not reviewable), and possible that the SCC will quash the Ethics Commissioner's definition of private interest and substitute a meaningful, comprehensive definition, the *Act* should still be changed in this way to make it clear to everyone what standard is set by the *Act*. Details about Democracy Watch's court challenge can be seen at:
http://www.dwatch.ca/camp/RelsMar2709.html

Sub-recommendations: The definitions of "private interest" in subsection 3(2) of the *MPs Code* and subsection 11(1) of the *Senators Code* should also be changed so that *any* interest, not just a financial or business interest, that *could* influence an MP or Senator is covered.

> **Recommendation 11:** The definition of "private interest" in section 2 of the *Conflict of Interest Act* must be changed by deleting the statements that "private interest" does not include an "interest in a decision or matter (a) that is of general application; (b) that affects a public office holder as one of a broad class of persons . . ." because this exemption allows, for example, the federal Environment Minister to own or be a partner in a privately held shipping company and still take part in all the discussions and make all the decisions concerning changes to the *Marine Liability Act* (because that *Act* applies to all shipping companies and is, therefore, of "general application").

This exemption to the definition in the *Act* of "private interest" (which Gregory J. Levine neglects to mention, let alone discuss, in his draft research paper prepared for the Commission) was added to the *Act* when it was a code in December 2003 by then-Prime Minister Paul Martin, who at the time owned a shipping company that, but for the loophole he created, would have required him

to recuse himself from Cabinet decisions about a wide variety of federal laws and regulations.

The recommended change is needed for the obvious reason that it is not in the public interest to have the decision-making of the most powerful decision-makers in the federal government affected in any way by incentives to protect their private interests.

This recommended change is also needed because almost all decisions (except only approving contracts for their own advisers and staff) that those covered by the *Act* make, and all matters they address, are decisions and matters of general application. In other words, it is not an exaggeration in any way to say that the exemption Prime Minister Martin added removes almost every discussion and decision in which the most powerful decision-makers in the federal government from the scope of the *Conflict of Interest Act*.

True, reporting public office holders covered by the *Conflict of Interest Act* are required to divest certain controlled assets, or place them in a blind trust (under sections 20 and 27), but ownership of a privately held company is not included in the list of controlled assets.

Subsection 25(2) of the *Act* requires a public declaration of the ownership of or partnership in a privately held company, but otherwise the *Act* does not apply in any way to such assets (and would not in any case apply because of the exemption in the definition of "private interest").

Sub-recommendations: The definitions of "private interest" in subsection 3(2) of the *MPs Code* and subsection 11(1) of the *Senators Code* should also be changed to remove the exemptions for matters of general application or that affect a broad class of persons.

> **Recommendation 12:** The *Conflict of Interest Act* must be changed by deleting subsection 27(5) which allows public officials to give general instructions to their trustee) and adding a new subsection to section 27 to make it clear that any controlled asset placed in a blind trust that is, in the opinion of the Ethics Commissioner, unlikely to be sold by the trustee will continue to be considered as a "private interest" of the public official.

Democracy Watch's position is that the option of a blind trust, which for obvious reasons any public official would choose in order to not have to divest their controlled assets, is completely insufficient as a mechanism for avoiding conflicts of interest simply because the official still knows that they own the asset (and, in addition, chooses their own trustee).

While the public official and trustee are prohibited from communicating with each other (under clauses 27(4)(d) and (g)) this prohibition is impossible to enforce/easy to violate.

The consequence of violating the prohibition is that the fundamental good government rule of the federal government would be violated by a person in a position to influence or make

decisions that directly further their private financial interests. For this reason, the rules and enforcement system for ensuring that no public official is ever in a position to influence or make such a decision must be strict and strong.

Sub-recommendations: For the same reasons set out above, the *MPs Code* and the *Senators Code* must also be changed to prohibit communication with a trustee and to include, as an ongoing private interest, assets and liabilities in a blind trust that not likely to be divested.

> **Recommendation 13:** Subsections 25(2) and (3) of the *Conflict of Interest Act* must be changed to require disclosure to the Ethics Commissioner of assets and liabilities worth more than the limit on an annual donation in the *Canada Elections Act*.

This change is needed because the current disclosure threshold for assets and liabilities for persons covered by the *Act* is $10,000. As a result, in effect, no asset or liability worth less than $10,000 is considered to be a "private interest" that could cause a "conflict of interest".

The *Canada Elections Act* prohibits donations totalling more than $1,100 annually to any candidate or riding association ($2,200 during an election year). The limit was approved by Parliament as part of the *FAA*, and came into force on January 1, 2007.

While the $1,100 limit is arbitrary, it is close to the amount a Canadian with average income could afford (it should be noted that about half of such a donation would be tax deductible). As a result, the limit is set at an amount that reflects the fundamental democratic principle of "one person, one vote" as it makes it illegal for any person to give more than what a person with an average income can afford.

Section 23 of the *Conflict of Interest Act* requires the disclosure to the Ethics Commissioner and the public of gifts of money, property or services received that are worth more than $200 annually, thereby essentially upholding the same democratic principle as the donation limit.

Essentially, the donation limit and gift disclosure rules establish a standard that, in effect, strongly suggest that a conflict of interest is created by anything that has a value of a few hundred dollars. The Ethics Commissioner has made this very clear in the *Guideline on Gifts* she issued sometime in 2008, which can be seen at:
http://ciec-ccie.gc.ca/Default.aspx?pid=36&lang=en

Therefore, to be consistent with the other standards Parliament has established, and to help ensure enforcement of the limits on donations and gifts, the disclosure threshold for assets and liabilities should be lowered from $10,000 down to about $1,000.

This will make it clearly illegal for those covered by the *Act* and *MPs Code* to hide gifts they may receive that are, in fact, donations intended to influence them.

Sub-recommendations: For the same reasons set out above, the threshold for disclosure of assets and liabilities in subsection 21(1) of the *MPs Code* and clause 28(1)(g) of the *Senators Code* should also be decreased from $10,000 down to about $1,000, and the disclosure requirement should cover some of the staff of MPs and senators on a sliding scale based upon their decision-making power, and the threshold should also be decreased for disclosure for the statements of decision-making public servants under the *Value and Ethics Code for the Public Service* ("Public Servants Code"). In addition, the *Senators Code* and *Public Servants Code* should also be changed to require that the public statements disclosed by senators and public servants be put online in a searchable database (as the statements of MPs and those covered by the *Conflict of Interest Act* already are)).

Sub-recommendations: The exemption from the general prohibition on gifts and benefits for "sponsored travel" contained in section 15 of the *MPs Code* and section 18 of the *Senators Code* must be deleted because it contradicts the prohibition on gifts, and that general prohibition must be defined in the same way as the Ethics Commissioner defined the rules prohibiting gifts in the *Conflict of Interest Act* in her 2008 *Guideline on Gifts*.

The general prohibitions on gifts in the *MPs Code* (section 14) and *Senators Code* (section 17) are fundamentally undermined by the exemptions in both codes that allow anyone, including lobbyists, to give an unlimited amount of travel as a gift. These loopholes must be closed.

In addition, another exemption to the general ban on gifts/benefits in both codes is that "a normal expression of courtesy or protocol, or within the customary standards of hospitality that normally accompany" the MP's or Senator's position is permissible. These exemptions must be defined in both codes in the same strict, strong way as the Ethics Commissioner defined the gifts rule in the Act in her 2008 *Guideline on Gifts*, which can be seen at:
http://ciec-ccie.gc.ca/Default.aspx?pid=36&lang=en

3. New general ethics rule must be added

> **Recommendation 14:** The *Conflict of Interest Act* must be changed by adding a new section, a new, clearly enforceable rule that states "All persons to whom this *Act* applies shall, at all times, be honest and uphold the highest ethical standards, including but not limited to complying with the spirit and intent, not just with the technical requirements, of every law, regulation, code, policy, guideline or other rule that applies to them."

This change is needed because the *Federal Accountability Act* (*FAA*) deleted several of the ethics rules that were in section 3 (Principles) of the *Conflict of Interest and Post-Employment Code for Public Office Holders* ("Public Office Holders Code") that the *Act* replaced.

Some of the rules in the *Public Office Holders Code* set standards that were so vague as to

be meaningless, and so were essentially unenforceable. Others set standards that were specific enough to be enforceable (such as the requirement to "act with honesty") but were never enforced.

In any case, the deletion of these rules narrowed the scope of the jurisdiction of the Ethics Commissioner too much. The Ethics Commissioner should have clear jurisdiction to rule on the ethics of any action of a public officials, whether or not that action occurs while the official is performing his/her public duties. By adding this rule, an avenue of accountability will be created that will cover all actions and decisions of public officials covered by the *Act*, no matter whether they escape legal liability for those actions and decisions because of some technicality.

Such a rule will send a very potent, and important, message to public officials about the public's expectations of those who enter public service.

If the Commissioner decides that the rule set out above is still too vague to set an enforceable standard, the wording should be changed to set such an enforceable standard. However, the requirement to "be honest" should be retained in the rule no matter how the wording is changed, because dishonesty is the most prevalent problem in politics in Canada, and prohibiting it will be one of the most important steps that can be taken to restore public trust in government.

If any vague words are added to the proposed rule set out above, such as a requirement that persons covered by the *Act* to be "respectful", "prudent", "act with integrity", "act with dignity" then those words must be specifically defined or they will be unenforceable due to vagueness.

Sub-recommendations: For the same reasons set out above, the general principles which are vague, unenforceable and therefore meaningless, set out in section 2 of the *MPs Code* (along with the reference in section 3.1 which makes it clear that the Ethics Commissioner may only "have regard to" the section 2 principles when enforcing an MPs' actual obligations under the MPs Code), and set out in subsection 2(1) of the *Senators Code,* and set out in the *Public Servants Code*, should be deleted and replaced by the enforceable general ethics rule proposed above, including specific mention that the general rule is enforceable and compliance with it is required.

4. The term "friends" in *Conflict of Interest Act* must be broadly defined in the *Act*

Again, the 2004 Federal Court ruling in the Sinclair Stevens case establishes a legal precedent that allows any public official to escape accountability for violating any rule that has not been specifically defined in law. As a result, many key provisions in the *Conflict of Interest Act* must be defined as soon as possible.

This task could be left to the Ethics Commissioner, however given the highly questionable, loophole-filled definition of "private interest" and "conflict of interest" she set out in her first ruling in January 2008 (on a complaint filed by Democracy Watch), and given that the Ethics

Commissioner refused in that ruling to consider the definition of conflicts of interest concerning "friends" of public officials (even though it was a key issue raised in Democracy Watch's complaint), and given that the *Act* is a key good government law, a much better way to proceed is to change the *Act* to define key provisions, as follows:

> **Recommendation 15:** A definition of the term "friends" (section 4) in the *Conflict of Interest Act* must be added to the *Act*, and a list of the friends of each public official should be disclosed at least to the Ethics Commissioner, if not also the public.

A person covered by the *Act* is in a conflict of interest if they are in a position that presents the opportunity to further their own, their relatives' or their friends' private interests, or if they improperly further another person's private interests. The term "relatives" is defined in the *Act*, but the term "friends" is not.

"Friends" should be defined broadly, and must include political friends, including anyone who provides significant assistance to the public official in their nomination or election campaigns or in-between election activities, and including all staff or appointees who serve at the pleasure of the public official. If this definition is not used, the *Act* will be fundamentally undermined.

Requiring each public official to disclose to the Ethics Commissioner their list of friends (if not also requiring disclosure to the public) will help prevent conflicts of interest involving friends by ensuring the public official and the Ethics Commissioner both know whose private interests the public official cannot be involved in furthering in any way.

While a March 2009 Federal Court of Appeal ruling made it clear that people who assist public officials in their private and political activities create a private interest for the official that is the basis for a conflict of interest, including these people in the definition of "friends" in the *Act* will ensure the rule is clear.

***Democracy Watch v. Barry Campbell and the Attorney General of Canada (Registrar of Lobbyists)* 2009 FCA 79**

Finally, at-pleasure staff and appointees of public officials must be included in the definition of "friends" simply because otherwise officials will be permitted to have their staff act for them when they are in a conflict of interest, an arrangement that would completely thwart the purpose and enforcement of the *Act*.

In other words, if the politician is in a conflict of interest and therefore must recuse himself or herself from taking part or making decisions about a situation, the politician's at-pleasure staff and appointees automatically share the conflict of interest and must also recuse. The Federal Court supported this conclusion when it ruled in July 2004 that the former federal Ethics Counsellor, who served "at pleasure" of Prime Minister Jean Chrétien, was institutionally biased when investigating

the actions of the Prime Minister and Cabinet ministers, even though the Ethics Counsellor's primary role was to conduct such investigations.

> ***Democracy Watch* v. *The Attorney General of Canada (Office of the Ethics Counsellor)* [2004 FC 969] and [2004] 4 F.C.R. 83, paras.36 to 45, 50 to 56**

While this ruling made it clear that at-pleasure staff share the conflict of interest of the public official they serve, including these people in the definition of "friends" in the *Act* will ensure the rule is clear. This change is also needed because the current Ethics Commissioner Mary Dawson ruled in December 2008 that when Finance Minister Jim Flaherty's staff awarded a sole-source contract to one of their political friends, it did not constitute a violation of the *Act*.

***The Flaherty Report* by the Conflict of Interest and Ethics Commissioner, December 18, 2008**

Sub-recommendations: For the same reasons set out above, new sections must be added to the *MPs Code* and the *Senators Code* and *Public Servants Code* to cover conflicts of interest involving "friends" of MPs, senators and their senior policy staff, and decision-making public servants. This rule should apply most broadly only to those people who have significant decision-making power (ie. only to members of Cabinet, opposition party leaders, opposition critics, chairs of committees and their policy staff, and decision-making public servants).

5. Public officials' post-employment restrictions must be strengthened, and clearly defined

> **Recommendation 16:** The phrase "firm offers of outside employment" in subsection 24(1) of the *Conflict of Interest Act* should be changed to "offers of outside employment".

The current phrase in subsection 24(1) is typical of the *Act* in that it contains a technical loophole that any public official could easily exploit to escape accountability by claiming that the offer of outside employment they received was not "firm" and, therefore, they were not required to disclose it to the Ethics Commissioner. All such technical loopholes must be closed for the *Act* to be effective at preventing conflicts of interest and other unethical activities.

> **Recommendation 17:** A new section must be added to the the *Conflict of Interest Act* requiring public officials to disclose to the Ethics Commissioner if they seek "outside employment" not just if they are offered outside employment.

Currently, those covered by the *Act* are only required under subsection 24(1) to disclose to the Ethics Commissioner "all firm offers of outside employment." This provision is typical of the *Act* in that it only covers one side of the equation. It is more than obvious that a strong incentive exists for a public official to do favours for private actors if the official is seeking employment with those actors. Therefore, again obviously, it must be made illegal for public officials to secretly seek outside employment.

Recommendation 18: Broad definitions of the terms "employment" (subsection 24(1)) and "improper advantage" (section 33) in the *Conflict of Interest Act* must be added to the *Act*.

Gregory J. Levine supports this recommendation in the draft research paper he prepared for the Commission (pp. 49-51). These terms must be defined broadly in order to ensure that the *Act* establishes a comprehensive, strict, strong and loophole-free standard, and again the inconsistent rulings of the Ethics Commissioner (the first of which was highly questionable) make it clear that she should not be entrusted with determining the definition of these terms over time on a case-by-case basis.

Recommendation 19: The term "direct and significant official dealings" (subsections 35(1) and (2) and 36(2)) in the *Conflict of Interest Act* must be changed to "significant official dealings" and a definition of this term must be added to the *Act*.

The current standard in the *Act* that prohibits (for one to two years) former reporting public office holders from working with or representing private actors with which they had "direct and significant official dealings" during their last year in office is too vague and must be clarified.

Given the exchanges that occur regularly on many issues amongst Cabinet ministers, their staff, their appointees and public servants in their departments, it seems very unlikely that a meaningful line could be drawn in many cases concerning which public officials had "direct" dealings with various private actors. As a result, the word "direct" is, in effect, one of the typical loopholes that undermine the *Act*. Therefore, the word "direct" should be deleted from the *Act*.

In addition, the term "significant official dealings" should be clearly defined so that everyone knows the line that the term draws that cannot be crossed by ex-public officials.

Recommendation 20: The prohibition set out in subsections 35(1) and (2) and 36(2) of the *Conflict of Interest Act* on working (for one to two years) with private actors, or making representations (for one to two years) to government institutions, with which a public official had dealings during their last year in office must be changed to expand the application of the ban to private actors and government institutions to those with which the public official had dealings during their last four (4) years in office for the most senior public officials, and the last two (2) years in office for intermediate public officials, and the ban on working with such private actors should be extended to three (3) years for the most senior officials, and two (2) years for intermediate public officials.

The current standard in the *Act* prohibits (for one to two years) former reporting public

office holders from working with or representing private actors with which they had "direct and significant official dealings" during their last year in office.

In both cases, the length of time of these prohibitions is too short, and they should be extended to match the five-year prohibition on becoming a registered lobbyist that Parliament approved in the new *Lobbying Act*. These extended time periods are necessary to ensure that people are effectively discouraged from entering the public service with the intention of cashing in on their inside knowledge, access and relationships soon after they leave.

Sub-recommendations: For the same reasons set out above, new sections must be added to the *MPs Code* and *Senators Code* and *Public Servants Code* to restrict the transition to, and post-employment, activities of MPs, senators and their staff and decision-making public servants. The requirements should be set on a sliding scale depending on the policy-making power and activities of the MP, senator or staff person (ie. opposition party leaders and their staff should face the most strict and strong restrictions, followed by opposition critics, chairs of committees, members of committees and members who do not sit on any committee) and should only apply to policy-making public servants.

To give but one example of the danger of this gap in federal ethics rules, opposition party leaders and their policy staff, who in a minority government have powers concerning the passage of laws that (depending on the situation) can approach those of Cabinet ministers and their policy staff, are not subject to any post-employment restrictions. At any time, a majority of these opposition party officials could (after only a two-month election and Cabinet appointment process), become a Cabinet minister and ministerial staff or, more importantly, choose to leave and become a lobbyist just when their party wins power and subsequently cash in on their inside knowledge, access and relationships with their former party colleagues now serving in Cabinet positions.

Of course, the choice of leaving public service may be made for any MP or their staff if the MP is defeated in an election.

The examples of former MPs and their staff who have become lobbyists are too numerous to list, but can be seen in the Registry of Lobbyists as work in the public service is required to be disclosed as part of each lobbyist's registration.

These loopholes must be closed to level the playing field and ensure that everyone in the public service is covered by a post-employment restriction that effectively discourages them from entering the public service with the intention of cashing in when they leave.

Recommendation 21: The *Conflict of Interest Act*, *MPs Code*, *Senators Code* and *Public Servants Code* must be changed to require former public officials to continue to disclose a financial statement of their assets and liabilities to their ethics enforcement officer, and disclose publicly a summary statement, for at least the length of the "cooling-off" period that applies to them (following the sliding scale of such time periods set out in the previous recommendation).

This measure is needed to help ensure that former public officials are not receiving benefits from private actors in return for decisions the officials made while they were in office.

C. General Lobbying Rules Loopholes Must Be Closed

Even if the changes recommended above are made to federal ethics rules and post-employment restrictions, gaps will still remain because of loopholes in the federal *Lobbying Act* (1985, c. 44 (4th Supp.)), as follows:

Recommendation 22: Either Cabinet ministers, their staff, appointees, senior opposition MPs and senators and their staff, and public servants with decision-making power must be required to register in a searchable online database all of the details of the identity of anyone connected with any organized lobbying effort who communicates (directly or indirectly) with them, and the details of the communication, or the loopholes must be closed in the *Lobbying Act* that exempt from registration unpaid lobbyists, exempt from registration in-house corporate lobbyists who lobby less than 20% of their work time, and exempt from registration lobbyists who are lobbying about the enforcement of laws, regulations etc. (clause 4(2)(b)).

The loopholes in the lobbying registration requirements allow some lobbyists to avoid registration, not surprisingly (given how the federal government policy-making process usually operates) mainly corporate lobbyists. As a result of these loopholes and loopholes in the *Conflict of Interest Act*, as mentioned above in subsection III.B.1, it is actually legal for a Cabinet minister to hire or appoint such lobbyists to part-time positions.

As well, obviously these loopholes also permit secret lobbying (especially by wealthy corporate lobbyists), which is a recipe for corruption.

For these reasons, these loopholes must be closed.

Recommendation 23: The loophole in the *Lobbying Act* that exempts anyone participating in the federal government's "employment exchange program" (who are mainly people from large corporations) from the five-year ban on becoming a lobbyist after they leave government must be closed. Instead, the Commissioner of Lobbying should be empowered to reduce the time period of the ban, or

comprehensiveness of the ban, depending on the role the person has played in government.

The public interest of ensuring that people who work with government do not cash in on their inside knowledge, access and relationships outweighs the interest in facilitating contacts and exchanges between private actors and the government. Government can always obtain access to the knowledge, skills and expertise of private actors by consulting with them or hiring them on contract instead of through participation int he employment exchange program.

The above loophole in the program directly undermines the federal government's ethics enforcement system, and as a result it must be closed by eliminating the blanket exemption for exchange program participants and instead giving the Commissioner of Lobbying the power to set the terms of any exemption.

Recommendation 24: Lobbyists must be clearly prohibited from working directly or indirectly, paid or volunteer, with government or opposition political parties, and in senior positions with political parties, riding associations or candidates.

Democracy Watch's position is that the general conflict-of-interest Rule 8 of the *Lobbyists' Code of Conduct* prohibits lobbyists from doing such work, paid or volunteer, but this rule is not specific. The Federal Court of Appeal's March 2009 ruling in *Democracy Watch v. Barry Campbell and the Attorney General of Canada (Registrar of Lobbyists)* 2009 FCA 79 has clarified the rule somewhat, but left it to the discretion of the Commissioner of Lobbying to determine what activities of lobbyists Rule 8 actually prohibits on a case-by-case basis. See details about the ruling at:
http://www.dwatch.ca/camp/RelsMar1709.html

The Commissioner of Lobbying position replaced the former Registrar of Lobbyists in July 2008, and two different registrars (Howard Wilson and Michael Nelson) applied the same interpretation of Rule 8 over a nine-year period and failed in many cases to enforce Rule 8 in any way. The interpretation of Rule 8 they applied was rejected as a "bizarre" interpretation by the Federal Court of Appeal. The negligence of these two registrars delayed effective enforcement of Rule 8 for years.

As a result of the experience of the past nine years, the Commissioner of Lobbying must not be trusted to enforce Rule 8 properly and effectively in the future. Instead, the *Lobbying Act* must be changed to clearly prohibit lobbyists from doing any favours for political parties, candidates and public officials.

Recommendation 25: Lobbyists must be banned under the *Conflict of Interest Act* from becoming members of Cabinet for at least a few years after they are elected as a federal politician.

The *Conflict of Interest Act* and *Lobbying Act* contain restrictions (however loophole-filled) on lobbying and some other activities of some public officials after they leave government. These restrictions are aimed at preventing conflicts of interest from tainting government policy-making.

To have a consistent, comprehensive and effective ethics enforcement system, measures must be added to the *Conflict of Interest Act* to restrict lobbyists in a similar way when they enter government.

Recommendation 26: All lobbyists must be required to disclose on the online, searchable Lobbyist Registry their past work with any government, political party, riding association or candidate (currently, lobbyists are only required to disclose their past work with the federal government).

Recommendation 27: All lobbyists must be required to disclose on the online, searchable Lobbyist Registry how much they spend on each lobbying campaign (as required in more than 30 U.S. states) and, if this disclosure shows that corporate lobbyists have far more resources to spend on lobbying that citizen lobbyists, then limits on spending on lobbying campaigns must be established (similar to the limits that have been established for advertising spending by lobbyists during election campaign periods).

The information recommended to be disclosed above is important for the Ethics Commissioner and Commissioner of Lobbying, and the public, to know in order to track the interconnections among public officials and private actors, both to assist effective enforcement of good government rules, and to assist the public's assessment process concerning whether each specific policy-making process is democratically legitimate.

Recommendation 28: The search page of the online Lobbyist Registry must be changed to allow for searches by any data field in the registry (currently, the database can only be searched by the name and client(s) or organization of the lobbyist, the department being lobbied and the subject matter, and the lobbying time period).

This change is needed to make all of the information in the Lobbyist Registry easily accessible to the public (and this change would have been made years ago if the two former Registrars of Lobbyists were independent, and did not have such a weak enforcement record).

D. General Ethics and Lobbying Rules Enforcement Must Be Strengthened

Even if all of the ethics and lobbying rule changes recommended in the previous section are made, the experience of the past 20 years has shown clearly that without effective enforcement many public officials and private actors will continue to fail to comply with the rules. As a result, the ethics and lobbying rule enforcement systems must be strengthened, as follows:

1. Ethics rules enforcement must be strengthened

> **Recommendation 29:** The appointment process for the Ethics Commissioner and the Senate Ethics Officer must be changed by having the independent Public Appointments Commission established and mandated to conduct the search for candidates for both positions, and by requiring the approval of the person appointed to both positions from all of the leaders of the recognized parties in the House of Commons and Senate of Canada. In addition, as with the Ethics Commissioner, the Senate Ethics Officer must be required to have legal expertise and experience given that the position is quasi-judicial in nature.

Currently, the Ethics Commissioner and Senate Ethics Officer are chosen through the usual Cabinet appointment process, only after consultation with opposition party leaders. The Conservatives promised during the 2006 election to establish an independent Public Appointments Commission (PAC) to conduct searches for candidates for all Cabinet appointments, including both these positions, and the Federal Accountability Act contains provisions that allow (but do not require) Cabinet to establish the PAC.

To ensure the independence of these key good government enforcement officers, the PAC must be established to search for and nominate candidates for these positions, and approval of the appointee by all opposition party leaders must be required.

> **Recommendation 30:** The Senate Ethics Officer's independence and powers must be increased by changing the appointment process for the Officer, and removing the Officer from the control of a committee of senators.

The Senate Ethics Officer lacks independence and key powers in ways similar to the former federal Ethics Counsellor who was found to be institutionally biased by the Federal Court in the July 2004 ruling on the court challenge of the Ethics Counsellor filed by Democracy Watch.

Democracy Watch* v. *The Attorney General of Canada (Office of the Ethics Counsellor)
[2004 FC 969] and [2004] 4 F.C.R. 83

Among other structural and operational problems, the Senate Ethics Officer has the following flaws under the *Conflict of Interest Code for Senators* ("Senators Code"):

- the Officer is under the direction of a committee of senators (subsection 39(2));
- the Officer cannot launch an inquiry/investigation without the committee's approval (subsections 44(8) and (13)) or release an inquiry/investigation report (subsection 45(1));
  the Officer cannot contact proper authorities if the Officer suspects a senator has violated a law without first consulting with the committee (subsection 47(4));
- the committee (not the Officer) designs the conflict of interest forms for senators (subsection 39(1)) and sets the annual form filing date (subsection 29(2));
- the Officer cannot issue interpretation bulletins of the *Senators Code*'s rules unless the committee gives its approval (subsection 8(6) and section 9);
- the committee is the appeal body if a senator disagrees with the Officer (subsection 39(4)).

In order to have an effective ethics enforcement system for the Senate of Canada, these and other flaws must be corrected to give the Senate Ethics Officer independence and key powers.

Recommendation 31: The *Conflict of Interest Act* and *MPs Code* must be changed to require the Ethics Commissioner to examine and rule on every complaint she receives in a way that complies with administrative law principles, no matter who files the complaint, and the same change must be made to the *Senators Code* to require the Senate Ethics Officer to examine every complaint.

Currently, the Ethics Commissioner is only clearly required to examine and rule on a complaint if it is filed by an MP or Senator, and the Senate Ethics Officer is only clearly required to examine complaints filed by senators.

As mentioned above in subsection III. B.2, the Federal Court of Appeal ruled in January 2009 that the Ethics Commissioner does not have any legal duty to examine and rule on a complaint filed by a member of the public, a ruling about which Democracy Watch has applied to the Supreme Court of Canada for leave to appeal.

The basis of Democracy Watch's appeal is that the *Canadian Charter of Rights and Freedoms* ("Charter") protects members of the public from being forced to associate with an MP or Senator in order to have a complaint about a public official examined and ruled on by the ethics enforcement officers. Details about Democracy Watch's court challenge and related documents can be seen at:
http://www.dwatch.ca/camp/RelsMar2709.html

Even if Democracy Watch wins its court challenge and a *Charter* right to have ethics complaints examined and ruled on is established, the *Act* and *MPs Code* and *Senators Code* must

be changed to make it completely clear that all complaints must be examined and ruled on by the Ethics Commissioner and Senate Ethics Officer.

> **Recommendation 32:** To ensure that all public officials' financial statements of assets and liabilities are accurate, the *Conflict of Interest Act* and *MPs Code* must be changed to require the Ethics Commissioner to conduct random audits (without advance notice) of the assets and liabilities of Cabinet ministers, their staff and appointees and family members, and MPs and their staff and family members, and the the same change must be made to the *Senators Code* to also require the Senate Ethics Officer to conduct random audits of senators and their staff, and the *Public Servants Disclosure Protection Act* must be changed to require the Public Sector Integrity Commissioner to conduct similar audits of public servants, especially those with decision-making power.

Currently, there is no public evidence that the Ethics Commissioner or Senate Ethics Officer conduct audits of the financial statements submitted to them, even though they could conduct such audits under their general administrative powers. The Public Sector Integrity Commissioner does not have the power to conduct such audits of the financial statements of public servants.

The Canada Revenue Agency conducts random audits of the forms filed by taxpayers, and (as set out above in section II.B) many other rule enforcement systems established by the federal government for various private actor activities include random audits/inspections as part of an effective enforcement system.

Given that financial statements are the main basis for determining whether a public official is in a conflict of interest, there are many incentives for public officials to file an inaccurate statement that hides either assets or liabilities.

For these reasons, in order to have an effective ethics enforcement system in the federal government, the enforcement officers must be required to conduct random audits of public officials' financial statements.

> **Recommendation 33:** The *Conflict of Interest Act* and *MPs Code* must be changed to give the Ethics Commissioner the right to annual funding adequate to fulfill all statutory duties on a timely basis (including the important enforcement duties of examining and ruling on complaints, and conducting random audits), with the funding total determined in consultation with the Auditor General so that best-practice standards of obtaining value for money spent are incorporated into the Commissioner's annual budget, and the Senators Code must be changed in the same way for the Senate Ethics Officer, and the *Public Servants Code* and *Public Servants Disclosure Protection Act* ("PSDPA" - 2005, c. 46) changed in the same way for the Public Sector

Integrity Commissioner.

The key ethics enforcement officers must have the resources necessary to undertake enforcement actions that ensure a high chance that violators of rules will be caught. One of the easiest ways for politicians to undermine these officers is to cut their budgets, as has occurred at various times in Canadian governments over the years.

For example, as was determined by the Federal Court in its July 2004 ruling concerning the federal Ethics Counsellor, the Counsellor was not given enough resources to investigate and rule on complaints in a timely way, and the government of the day admitted that the Registrar of Lobbyists also did not have adequate resources to fulfill his statutory duties between 2004 and 2006, when the Registrar's budget was increased significantly. This lack of funding, as well as specific bias on the part of the Ethics Counsellor, led to a situation in which Democracy Watch waited more than four years for rulings on several of its complaints filed with the Ethics Counsellor/Registrar. In fact, Democracy Watch is still awaiting rulings on complaints it filed in 2002. Details about the history of these complaints can be seen at:
http://www.dwatch.ca/camp/Eight_Ethics_Complaints.html

***Democracy Watch* v. *The Attorney General of Canada (Office of the Ethics Counsellor)* [2004 FC 969] and [2004] 4 F.C.R. 83**

Of course, it is possible to argue that many enforcement entities, let alone many government programs, should have a guarantee of adequate annual funding. The reason the funding for good government officers is a priority is that the track record of such officers, when they have adequate resources, is that they save money overall (by preventing waste due to corruption) and ensure that government programs run better as the decision-makers who oversee such programs are effectively required to make public interest decisions.

For these reasons, the laws that empower these officers must be changed to ensure that they have a guarantee of adequate annual funding to be effective.

> **Recommendation 34:** The provisions of the *Conflict of Interest Act* (subsection 43(b)) and *MPs Code* (subsection 26(2)) that allow the Ethics Commissioner to give secret advice to those covered by the *Act* and *Code*, and of the *Senators Code* that gives the Senate Ethics Officer the same power (subsection 42(4)), must be changed to require the Ethics Commissioner and Senate Ethics Officer to issue a public, written summary of every opinion they provide to any public official so that the public knows the standards and interpretations being applied by the Commissioner and Officer and can challenge them in court if the public is of the opinion that they are legally incorrect.

As summarized above in subsection III. B.2, the Ethics Commissioner issued a highly

questionable ruling in January 2008 on a complaint filed by Democracy Watch, a ruling Democracy Watch is challenging in court. Again, details about Democracy Watch's court challenge and related documents can be seen at:
http://www.dwatch.ca/camp/RelsMar2709.html

This ruling highlights how dangerous it is to allow the Ethics Commissioner and the Senate Ethics Officer to give secret advice to Cabinet ministers, their staff, and Cabinet appointees, and MPs and senators, as they can easily be giving legally incorrect advice that undermines the purpose and standards set in ethics rules. Further, under the current rules, MPs and senators can rely on that advice to protect themselves from any challenge to their actions in the future.

For these reasons, the ethics enforcement officers must be prohibited from giving secret advice.

> **Recommendation 35:** The *Conflict of Interest Act* must be changed to extend the penalties to cover violations of any provision in the *Act*, and to increase the penalties at least to the level of penalties faced by anyone who violates the *Lobbying Act* (ie. fine of up to $50,000 and a jail term of up to six months on summary conviction, and a fine of up to $200,000 and a jail term of up to two years if convicted by indictment) if not higher given that those covered by the *Conflict of Interest Act* are public officials with decision-making and policy-making power over federal government spending and laws, officials who have taken an oath to uphold the public trust.

As set out above in Part II, a key part of an effective legal system, including in the area of good government, is penalties significant enough to discourage violations, penalties consistent for the various people involved in government processes, and penalties determined by fully independent, fully empowered, well-resourced enforcement entities.

Currently, the *Conflict of Interest Act* only empowers the Ethics Commissioner to levy a maximum $500 penalty against only some of the people covered by the *Act* for violating only some of the provisions of the *Act* (the provisions re: disclosure of assets and liabilities).

There is no logical reason to have financial penalties only for some provisions of the *Act*, and the current penalty is so ridiculously low it very likely has absolutely no effect as a disincentive. As noted above, the penalties are also completely inconsistent with the possible penalties for violations of the *Lobbying Act*.

These reasons provide a strong argument for establishing mandatory minimum penalties for violating the Conflict of Interest Act that start at the level of the maximum penalties for violating the *Lobbying Act*, and certainly, at the very least, to establish penalties that at least match the *Lobbying*

Act penalties (and to establish penalties for violations of the *Lobbyists Code of Conduct*).

Sub-recommendations: The vague power of the Ethics Commissioner to recommend sanctions to the House of Commons under subsection 28(6) of the *MPs Code*, and similar vague power of the Senate Ethics Officer under subsections 45(2) and (4) of the *Senators Code*, must be changed to require the Commissioner and Officer to impose penalties (without the consent of the House or Senate required) on MPs or senators or their staff who violate any rule in their codes, and the penalties should be on a sliding scale depending on the decision-making power of the MP or senator or staff person (ie. opposition party leaders and their staff should face the highest penalties, followed by opposition critics, chairs of committees, members of committees and members who do not sit on any committee). Similarly, the power of the Commissioner of Lobbying under sections 14.01 and 14.02 of the *Lobbying Act* to penalize violators of the *Act* must be changed to require the Commissioner to impose penalities, and also to empower the Commissioner also to penalize violators of the *Lobbyists Code of Conduct*.

> **Recommendation 36:** The *MPs Code* and *Senators Code* and *Lobbyists Code of Conduct* must be changed into laws so that there is no question concerning the enforceability of the codes, and so they can't be changed without a public review.

An overall change needed to make the House of Commons and Senate of Canada and lobbying ethics enforcement systems more effective is to remove the codes from the parliamentary privilege framework by changing them into laws.

True, this change will mean decisions of the Ethics Commissioner and Senate Ethics Officer and Commissioner of Lobbying will be (among other effects) more clearly subject to judicial review by courts, but as summarized in section II.A above, and in this section, members of the legislatures have shown clearly in the past 20 years that they are incapable of impartially and effectively enforcing good government rules, as have the ethics enforcement officers who have been hired or appointed by the legislatures in several cases (as has been revealed clearly by the court cases challenging some of these officers' rulings that have been filed and won by Democracy Watch).

As a result, many changes are clearly needed to ensure better enforcement of good government rules, including ensuring that courts can review decisions made by enforcement officers to ensure they comply with rules of administrative law and natural justice, and strict and strong ethics standards.

> **Recommendation 37:** Section 66 of the *Conflict of Interest Act* must be changed to allow applications for judicial review of any of the Ethics Commissioner's decisions on any grounds in any Canadian court, and provisions must be added to the *MPs Code* to make it clear that any the Ethics Commissioner's decisions under the *Code* can be challenged on any grounds in any court, and similar provisions must be added to the *Senators Code* and *Lobbyists Code of Conduct* to make it clear that any of the Senate Ethics Officer's or Commissioner of Lobbying's decisions under those codes can be challenged on any grounds in any court.

Currently, the *Act* restricts the grounds under which a judicial review application can be filed concerning a decision of the Ethics Commissioner, and requires that such applications be filed in the Federal Court of Appeal.

It is unclear in the *MPs Code* whether decisions of the Ethics Commissioner can be challenged in court, and also unclear in the *Senators Code* whether the Senate Ethics Officer can be challenged, and is not completely clear concerning challenges of the Commissioner of Lobbying.

There is no good reason to protect these key good government enforcement officers from accountability for their decisions, and it is dangerous to allow them to be immune from accountability for legally incorrect decisions. For these reasons, judicial review applications of their decisions based on any grounds must be allowed to be filed in any Canadian court.

2. Lobbying Rules Enforcement Must Be Strengthened

Recommendation 38: As recommended above in subsection III.D.1 concerning the appointment process for the Ethics Commissioner and the Senate Ethics Officer, the appointment process for the Commissioner of Lobbying must be changed by having the independent Public Appointments Commission established and mandated to conduct the search for candidates for both positions, and by requiring the approval of the person appointed to both positions from all of the leaders of the recognized parties in the House of Commons and Senate of Canada. In addition, as with the Ethics Commissioner, the Commissioner of Lobbying must be required to have legal expertise and experience given that the position is quasi-judicial in nature.

Recommendation 39: As recommended above in subsection III.D.1 concerning the Ethics Commissioner and Senate Ethics Officer, the Lobbying Act must be changed to require the Commissioner of Lobbying to examine and rule on every complaint received in a way that complies with administrative law principles, no matter who files the complaint.

Recommendation 40: As recommended above in subsection III.D.1 concerning the Ethics Commissioner and Senate Ethics Officer and Public Sector Integrity Commissioner conducting audits of public officials' financial statements to ensure their accuracy, to ensure that all lobbyists' registration statements are accurate, and to ensure that former public officials are complying with the five-year ban on being a registered lobbyist, the *Lobbying Act* must be changed to require the Commissioner of Lobbying to conduct random audits (without advance notice) of lobbyists' and former public officials' communications with public officials.

Recommendation 41: As recommended above in subsection III.D.1 concerning the Ethics Commissioner and Senate Ethics Officer and Public Sector Integrity Commissioner, the *Lobbying Act* must be changed to give the

Commissioner of Lobbying the right to annual funding adequate to fulfill all statutory duties on a timely basis (including the important enforcement duties of examining and ruling on complaints, and conducting random audits), with the funding total determined in consultation with the Auditor General so that best-practice standards of obtaining value for money spent are incorporated into the Commissioner's annual budget.

Recommendation 42: As recommended above in subsection III.D.1 concerning the Ethics Commissioner and Senate Ethics Officer, the *Lobbying Act* must be changed to require the Commissioner of Lobbying to issue a public, written summary of every opinion they provide to any lobbyist or public official so that the public knows the standards and interpretations being applied by the Commissioner and can challenge them in court if the public is of the opinion that they are legally incorrect.

Recommendation 43: Subsection 10.4(1.1) of the *Lobbying Act* must be changed to require the Commissioner of Lobbying to issue a written, public statement summarizing why the Commissioner stopped an investigation, to ensure the Commissioner does not end an investigation for an unjustifiable reason, and to allow the public to challenge the Commissioner's decision in court if the public is of the opinion that the decision is legally incorrect.

E. Political Finance Rules and Enforcement Must Be Strengthened

Directly connected to government ethics rules and their enforcement are political finance rules and their enforcement, and both are connected to the business and financial dealings between lobbyists and public officials.

Unfortunately, despite positive legislative changes over the past decade, key loopholes still exist in the federal government's political finance rules and enforcement system.

The following changes are needed to close these loopholes:

Recommendation 44: The *Canada Elections Act* (2000, c. 9) must be changed to prohibit secret, unlimited donations of money, property and services to nomination race and political party leadership race candidates who are not sitting MPs or senators.

Recommendation 45: The *Canada Elections Act* must be changed to prohibit political parties and riding associations from maintaining secret trust funds.

Recommendation 46: The *Conflict of Interest Act* and the *Canada Elections Act* must be changed to increase the penalty for taking a secret donation or maintaining a secret trust fund to a minimum of $100,000 (NOTE : the *Federal Accountability Act* ("FAA") established ridiculously low penalties of maximum $500 to $2,000)

The *FAA* contained measures prohibiting secret, unlimited donations to election candidates, but left this loophole open for nomination race and political party leadership race candidates.

As long as these two types of candidates do not use the donation for their campaign, there are no limits on the donation, and they are not required to disclose that they have received the donation.

The *FAA* also contained measures (in the *Conflict of Interest Act*) prohibiting MPs from maintaining a trust fund that benefits themselves directly or indirectly into which they take undisclosed donations (with a too-low maximum penalty of only $2,000). However, the *FAA* left open the loophole that allows riding associations and political parties to maintain such secret trust funds.

Democracy Watch's position is that this loophole was likely left open so that riding associations and political parties can collect donations that are given to MPs, senators and party leaders after they retire or are defeated in an election, and also so that riding associations can fund community activities (in essence, buying votes) and political parties can provide funds to people the party wants to run in a nomination race or election to prepare for their campaign.

Those who wish to corrupt people involved in federal politics will always seek to flow money or other benefits to them in secret, and therefore it must be made illegal for any type of federal candidate or political organization to receive any type of donation in secret that will benefit any federal candidate, prospective candidate or public official, directly or indirectly, at any time in their life. In addition, the penalties for violating this prohibition on secret donations must be significant to discourage violations.

> **Recommendation 47:** The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("PCMLTFA" -- 2000, c. 17) must be changed to implement the *UN Convention Against Corruption* or other international standards that require the monitoring of the bank accounts of all public officials who have decision-making power

In November-December 2006, Parliament very quickly and quietly passed Bill C-25, which amended the PCMLTFA to require Canadian financial institutions to monitor for suspicious transactions the bank accounts of foreign government officials, their families and close associates.

Canada ratified the *UN Convention Against Corruption* in 2006, and as a result is in non-compliance with the *Convention*'s Article 52 which requires Canada to change its law to track bank accounts of domestic public officials (not just foreign government officials).

This measure is in the *Convention* because the 140 countries who signed the Convention agreed that it is necessary to combat corruption. Therefore, this measure must be added to the PCMLTFA as soon as possible.

Details about Bill C-25 and the *Convention* can be seen at: http://www.dwatch.ca/camp/RelsDec0908.html

> **Recommendation 48:** The *Canada Elections Act* must be changed to add donation limits and disclosure requirements for "volunteer labour" donated to parties and candidates during nomination race, election and party leadership campaigns, to close this existing secret donations loophole, and; to require disclosure of the identity of each individual donor's employer (as in the U.S.) and direct organizational affiliations (to help ensure that corporations, unions and other organizations do not illegally funnel donations through their executives or employees).

The loopholes addressed above in the *Canada Elections Act* facilitate organizations illegally funnelling money or services through their executives and employees to parties and candidates in violation of the limits on donations of money, property and services contained in the *Act*. Elections Canada needs the information recommended above to be disclosed in order to effectively enforce the *Act*. Therefore, this information should be required to be disclosed.

> **Recommendation 49:** The *Canada Elections Act* must be changed to ban loans to parties, riding associations, nomination race candidates, election candidates and party leadership candidates from corporations, unions and all other types of organizations (as donations have been), and to limit and require disclosure of loans from individuals (as donations are), so that loans cannot be used to influence public officials.
>
> **Recommendation 50:** The *Canada Elections Act* must be changed to require, (as political party leadership campaign candidates are required) all candidates, riding associations and parties to disclose publicly all donations, gifts, and the details and status of any loans, during the week before election day, so voters know who is bankrolling campaigns before they vote.
>
> **Recommendation 51:** The *Canada Elections Act* must be changed to give the Commissioner of Elections and the Chief Electoral Officer more investigative powers, especially the power to audit annually the finances and assets of political parties, riding associations, and candidates in nomination races and elections, and to require them to conduct annual audits.

For the same reasons as set out in the sections above concerning ethics and lobbying rules, these loopholes need to closed, and enforcement actions increased, in order to even approach having an effective enforcement system.

F. Open Government Rules and Enforcement Must Be Strengthened

With regard to Term of Reference 17 of the Commission of Inquiry, while it will always remain difficult to determine exactly who in any government institution has seen any document submitted to the institution by a private actor, the following recommendations set out the changes the federal Conservatives promised to make to the federal *Access to Information Act* ("ATI Act" -- R.S., 1985, c. A-1) and federal government information system.

These changes will help ensure that there is a paper trail of every decision and action within the government, including a paper trail concerning who saw or was made aware of any documents submitted to the government.

Recommendation 52: The *ATI Act* must be expanded to cover all federal government/publicly funded institutions.

Recommendation 53: All government/publicly funded institutions must be required to maintain an internal information system that can fulfill access-to-information requests as required by the *ATI Act*.

Recommendation 54: All government/publicly funded institutions must be required to review and disclose documents regularly as they are created by placing them on the Internet.

Recommendation 55: All public officials must be required to create a written document that records all decisions and actions.

Recommendation 56: All the mandatory exemptions and exclusions in the *ATI Act* must be changed to discretionary exemptions.

Recommendation 57: A public interest override (based on a proof-of-harm test) of all exemptions in the *ATI Act* must be established.

Recommendation 58: All Cabinet documents must be subject to review by the Information Commissioner to ensure that the exemption that applies to such documents is not abused.

Recommendation 59: The federal Information Commissioner must be given the power to order the release of documents (as the commissioner's in Ontario, Québec and B.C. have), to order changes to government institutions' information systems, and to penalize violators of access laws, regulations, policies and rules with significant fines.

G. All Whistleblowers Must Be Protected

> **Recommendation 60:** To ensure all "whistleblowers" who report wrongdoing in federal politics are protected from retaliation, the definition of "public sector" in section 2 of the federal *Public Servants Disclosure Protection Act* ("PSDPA" - 2005, c. 46) must be changed to include all government and quasi-governmental institutions (including all politicians' offices, all Crown corporations, all Officers of Parliament, all foundations, and all organizations that spend taxpayers' money or perform public functions (including political parties and riding associations)), and section 53 of the *PSDPA* must be changed to require Cabinet to apply the *PSDPA* to all the above listed federal government institutions and all new institutions as they are created.

Currently, many people who work in federal politics, especially those in the offices of politicians and political parties and riding associations, are not protected by the PSDPA from retaliation if they report wrongdoing to the proper authorities.

Whistleblower protection is one of the most effective means of law enforcement because it allows people on the inside of government and political organizations to essentially have the power to act as an enforcement officer or inspector.

The Conservatives promised in the 2006 election to enact measures to protect all people who report wrongdoing in government, but failed to keep their promise.

For these reasons, in order to have an effective good government enforcement system, everyone who reports wrongdoing by anyone in any federal political institution and organization must be covered by the protections set out under the *PSDPA*.

H. Education of Public Officials Concerning Good Government Rules Must Be Enhanced

> **Recommendation 61:** Extensive educational programs for all public officials concerning good government rules must be undertaken.

Currently, the actual level of awareness of good government rules by politicians, their staff and appointees is not known, but if surveys of public servants are any indication, the level of awareness is fairly low and many have many questions concerning exactly what lines are drawn by the rules.

If even some of the changes recommended above are made, good government rules will be extended to cover many more people involved in federal politics, which will make educational programs even more necessary.

While those covered by the *Conflict of Interest Act* and *MPs Code* and Senators Code and *Public Servants Code* receive briefings and guides from the enforcement officers, and some educational programs are currently available, the standard should be essentially that it is mandatory for all public officials to receive extensive training concerning good government rules soon after they become a public official, with mandatory updates as rules or enforcement practices are changed over time.

PART IV
CONCLUSION: THE SYSTEM IS THE SCANDAL

The framework and recommendations set out above take seriously the problem of the many ways in which federal government decision-making and policy-making processes can be corrupted, and set out solutions that are consistent with the rules and enforcement systems used in many areas of society to ensure people act honestly, ethically, openly and representatively, and prevent waste.

As with the Gomery Commission of Inquiry, this Commission of Inquiry is examining one series of events that reveal systemic problems with Canada's federal good government enforcement system.

While some participants in the Commission's Part II Policy Review may argue that the Commission's Terms of Reference do not allow the Commission to make recommendations in some of the areas addressed in this submission, Democracy Watch urges the Commissioner to consider fully the interconnections between business and financial dealings and communications among lobbyists and federal public officials and the federal government's overall ethics, lobbying, political finance, and open government rules and enforcement systems (interconnections hopefully made clear in this submission).

Democracy Watch's position is that the loopholes and flaws in these systems must be addressed in the Commissioner's policy recommendations because the series of events being examined by the Commission, as with all other similar past series of events, are directly or indirectly a result of these systemic loopholes and flaws.

In other words, the federal good government enforcement system is the scandal, and until the loopholes are closed and flaws are corrected in the system, similar series of events will, unfortunately, continue to occur all too frequently.

APPENDIX
SUPPLEMENTARY SUBMISSION BY DEMOCRACY WATCH IN RESPONSE TO LOOPHOLES ADDED RECENTLY TO *MPs CODE*

A. MPs meet in secret to create two loopholes in the *MPs Code* -- loopholes must be closed

Through in-camera, off-the-record meetings in the past few months (with Ethics Commissioner Mary Dawson participating), leading to a report filed in the House of Commons in early June, the House of Commons Standing Committee on Procedure and House Affairs, and its Subcommittee on Gifts under the *Conflict of Interest Code for Members of the House of Commons* (SCOD - *MPs Code*), concluded that two loopholes should be created in the *MPs Code*.

The Committee's report was adopted unanimously by the House of Commons, and as a result the *MPs Code* has been amended to add the loopholes. These changes were made just after Democracy Watch filed its submission with the Oliphant Commission on June 4, 2009.

The first loophole is that the definition of "benefit" in the *MPs Code* is changed to exempt "a benefit received from a riding association or a political party." This loophole means that any riding association or political party can offer any MP money, property or services in return for the MP changing their decisions or actions as an MP, and such transactions will not have to be reported to the Ethics Commissioner nor the public, nor (even if the public could file complaints about violations of the *MPs Code* with the Ethics Commissioner and have them ruled on) will the Commissioner have jurisdiction to consider complaints about such transactions.

This loophole gives political parties and their leaders another way in which to ensure the loyalty of members of their caucus (adding to their current powers to appoint election candidates, and appoint committee chairs and members, and provide funding for election and by-election campaigns), a development that further decreases the independence of MPs.

Even worse, this loopholes legalizes political parties offering benefits, in secret, to the MPs of other parties to induce them to switch parties or the way they vote on any matter.

As a result of this new loophole in the *MPs Code*, Democracy Watch makes the following recommendations:

> **Recommendation 62 (supplementary):** The definition of "benefit" in the *MPs Code* must be changed to allow political parties and riding association only to provide to their own MPs, in secret, the benefit of paying the travel and accommodation costs of attending their party's events.
>
> **Recommendation 63 (supplementary):** In section III.A above (p.15), it is stated that "Democracy Watch's position is that there are no loopholes in the bribery etc. provisions (sections 119 to 128) that apply to public officials that

are contained in Part IV of the *Criminal Code of Canada*." However, given the June 2009 change to the *MPs Code* that exempts from the conflict of interest rules any benefit provided by political parties or riding associations to MPs, Democracy Watch's position has changed. It is very clear that this change means that the word "corruptly" in clause 119(1)(a) and (b) of the *Criminal Code* must be defined. The word "corruptly" should be defined to make it clear that, despite the change to the definition of "benefit" in the *MPs Code*, it is corrupt for a political party or riding association to offer a benefit to an MP in return for the MP doing or omitting to do anything in the MP's official capacity. This definition of "corruptly" should also be referenced in the changes to the *Canada Elections Act* set out in recommendation 45 above (section III.E, pp. 39-40) to ban political parties and riding associations from maintaining secret trust funds (that could be used to give retiring party leaders or MPs money, property or services).

The second loophole is that the definition of "benefit" in the *MPs Code* is changed to exempt "a service provided by a volunteer working on behalf of a Member." This loophole means that a lobbyist who is lobbying an MP can provide unlimited volunteer services to the MP, in secret, without ever any creating any conflict of interest (and therefore is outside the scope of the Ethics Commissioner).

Proposed above in section III.C is recommendation 24: "Lobbyists must be clearly prohibited from working directly or indirectly, paid or volunteer, with government or opposition political parties, and in senior positions with political parties, riding associations or candidates." The words "senior positions" are used to indicate that lobbyists can do some things for parties, riding associations and candidates (nominal volunteer tasks such as stuffing envelopes once or twice a year), but should be prohibited from doing anything significant, because that creates a conflict of interest (as the Federal Court of Appeal ruled in March 2009 in *Democracy Watch v. Barry Campbell and the Attorney General of Canada (Registrar of Lobbyists)* 2009 FCA 79).

The change to the *MPs Code* directly contradicts both the above recommendation and the Federal Court of Appeal ruling. To prevent lobbyists from obtaining undue, undemocratic and unethical influence through providing volunteer services to MPs, Democracy Watch recommends:

Recommendation 64 (supplementary): The definition of "benefit" in the *MPs Code* must be changed to include any service the market value of which would be more than $500 annually provided by anyone (whether or not they are registered under the *Lobbying Act*) who is participating in an organized or dedicated effort to lobby the federal government, to ensure that lobbyists cannot use the provision of such volunteer services as a means of gaining unethical influence over MPs.