



Office of the Commissioner
of Lobbying of Canada

Commissariat au lobbying
du Canada

Report on Investigation

The Lobbying Activities of Michael McSweeney

February 2011

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Rapport d'enquête – Les activités de lobbying de Michael McSweeney

Commissioner of Lobbying



Commissaire au lobbying

Ottawa, Canada. K1A 0R5

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

Dear Mr. Speaker:

Pursuant to section 10.5 of the *Lobbying Act*, I have the honour of presenting to you a Report on Investigation on the lobbying activities of Michael McSweeney for tabling in the Senate. The investigation was conducted in accordance with the provision of section 10.4 of the Act.

Sincerely yours,

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line.

Karen E. Shepherd

Commissioner of Lobbying



Commissaire au lobbying

Ottawa, Canada, K1A 0R5

The Honourable Peter Milliken, M.P.
Speaker of the House of Commons
Room 316-N, Centre Block
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Mr. Speaker:

Pursuant to section 10.5 of the *Lobbying Act*, I have the honour of presenting to you a Report on Investigation on the lobbying activities of Michael McSweeney for tabling in the House of Commons. The investigation was conducted in accordance with the provision of section 10.4 of the Act.

Sincerely yours,

A handwritten signature in black ink, consisting of a stylized 'K' and 'S' followed by a horizontal line.

Karen E. Shepherd

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Commissioner's Comments

As Commissioner of Lobbying, I have the responsibility to investigate allegations of activities that may be in breach of the *Lobbying Act* and the *Lobbyists' Code of Conduct*. This case came to my attention as a result of the publication of media reports in the Toronto Star regarding a political event held to raise money for the Honourable Lisa Raitt, who was at the time, the Minister of Natural Resources. On October 2, 2009, the Star reported, among other things, that Michael McSweeney, a registered lobbyist employed as Vice President, Industry Affairs at the Cement Association of Canada (CAC), had participated in the organization of a fundraising dinner held on September 24, 2009, for the Minister of Natural Resources. On October 5, 2009, I initiated an administrative review, a fact-finding exercise to help me determine whether to conduct an investigation. It was conducted by the Investigations Directorate of my Office. On July 29, 2010, based on information obtained during the administrative review, I decided to open an investigation under subsection 10.4(1) of the *Lobbying Act*.

Issue

Lobbyists have legal and professional obligations to follow when they work on behalf of clients or employers. Corporations and organizations are required to file a registration that lists their employees engaged in lobbying activity, if the corporation or organization meets the minimum level of lobbying activity set out in the *Lobbying Act*. Lobbying is communicating with public office holders in respect of: the development of any legislative proposal; introduction, passage, defeat or amendment of any Bill or resolution; making or amendment of any regulation; development or amendment of any policy or program; or, the awarding of any grant, contribution or financial benefit. Once a registration is required, there is a further requirement that lobbyists must report upon certain communications with designated public office holders on a monthly basis.

All lobbyists are required to comply with the *Lobbyists' Code of Conduct*. It was alleged that Mr. McSweeney actively participated in the organization of a political fundraiser on behalf of Minister Raitt during a period of time when he was registered as a lobbyist by the CAC to lobby Natural Resources Canada, and that he had engaged in direct lobbying of Minister Raitt. This was alleged to be a breach of Rule 8 of the *Lobbyists' Code of Conduct*, one of three rules in the Code dealing with conflict of interest.

Investigation

The *Lobbyists' Code of Conduct* investigation carried out by my Office involved a review and analysis of the allegations against Mr. McSweeney, a series of interviews and the preparation of an investigation report by the Investigations Directorate. Mr. McSweeney was provided with an opportunity to present his views upon that investigation report. I have considered the views of Mr. McSweeney and the arguments of his legal counsel in preparing this Report to Parliament on my findings, conclusions and reasons for those conclusions, as required by subsection 10.5(1) of the *Lobbying Act*.

Conclusions

In this report, I conclude that Mr. McSweeney participated in the organization of a fundraising event for the Halton Conservative Association held on September 24, 2009, by selling tickets for that event. His actions advanced the private interest of then Minister of Natural Resources, the Honourable Lisa Raitt, by virtue of the fact that she was the electoral candidate of the Halton Conservative Association at the time of the fundraiser.

During the same period of time, Mr. McSweeney was registered to lobby on behalf of the Cement Association of Canada in respect of subjects that fell within the purview of Minister Raitt, and he communicated with her directly in respect of registrable subjects.

In view of this, I have concluded that his actions placed the Minister in an apparent conflict of interest and he was, therefore, in breach of Rule 8 of the *Lobbyists' Code of Conduct*.

However, in fairness to Mr. McSweeney, following the decision of the Federal Court of Appeal in *Democracy Watch v. Barry Campbell et al.*¹ on March 12, 2009, lobbyists were placed in a position in which their obligations under Rule 8 of the *Lobbyists' Code of Conduct* had changed. Given the variety of different factual situations that could arise, lobbyists have argued that it was difficult for them to determine the point at which their political activities might have implications upon their lobbying activities. The point at which their lobbying activities would place a public office holder into a conflict of interest had been changed by that Federal Court of Appeal decision, and the result was the creation of some uncertainty for lobbyists.

I trust that this Report will provide further guidance regarding the application of Rule 8 and assistance to lobbyists in reconciling their lobbying activities with political activities that they may be engaged in.

¹ *Democracy Watch v. Barry Campbell and Attorney General of Canada (Registrar of Lobbyists)*, [2009] FCA 79

The *Lobbyists' Code of Conduct*

Lobbying is a legitimate activity. When carried out ethically and transparently, and in conformity with the highest standards of conduct, it can enhance the dialogue between Canadians, businesses, organizations and government.

The *Lobbyists' Code of Conduct* came into effect on March 1, 1997, as a complement to the former *Lobbyists Registration Act* (the LRA). It was instituted to assure Canadians that the lobbying of federal public office holders is carried out in a manner that ensures public confidence and trust in the integrity, objectivity and impartiality of government decision-making. Individuals who engaged in activity deemed registrable under the *Lobbying Act* (the Act) must also comply with the *Lobbyists' Code of Conduct*.

During the period covered by this report, individuals paid to communicate, or arrange meetings, with public office holders were required to register in the Registry of Lobbyists. Public office holders are defined as being virtually anyone occupying a position in the Government of Canada, including members of the Senate and the House of Commons and their staff, as well as employees of federal departments and agencies, members of the Canadian Forces and members of the Royal Canadian Mounted Police.

The *Lobbyists' Code of Conduct* establishes mandatory standards of conduct for individuals who engage in activity deemed registrable under the Act. Like most professional codes, the *Lobbyists' Code of Conduct* begins with a preamble that states its purpose and places it in a broader context. Next, a body of overriding principles sets out, in positive terms, the goals and objectives to be achieved, without establishing precise standards. The principles of Integrity, Honesty, Openness and Professionalism are set out as goals that should be pursued, and are intended as general guidance.

The principles are followed by a series of eight rules that place specific obligations and requirements on lobbyists. The rules are organized into three categories: Transparency, Confidentiality and Conflict of Interest. Under the rules of Transparency, lobbyists have an obligation to provide accurate information to public office holders, and to disclose the identity of the persons or organizations on whose behalf their representation is made, as well as the purpose of the representation. They must also disclose to their clients, employers or organizations their obligations under the *Lobbying Act* and the *Lobbyists' Code of Conduct*. Under the rules of Confidentiality, lobbyists may not divulge confidential information, nor use insider information to the disadvantage of their clients, employers or organizations. The Conflict of Interest rules prohibit lobbyists from representing conflicting or competing interests without the consent of those whose interests are involved, or placing public office holders in a conflict of interest by proposing or undertaking any action that would constitute an improper influence.

Investigations of Alleged Breaches of the *Lobbyists' Code of Conduct*

Lobbyists have a legal obligation to comply with the *Lobbyists' Code of Conduct*. Under the *Lobbying Act*, the Commissioner is required to conduct an investigation if the Commissioner has reason to believe that an investigation is necessary to ensure compliance with the Act or the Code, as applicable.

Breaches of the *Lobbyists' Code of Conduct* do not carry fines or jail sentences, but the Commissioner's report of the investigation – including the findings, conclusions, and reasons for those conclusions – must be tabled before both Houses of Parliament. There is no limitation period for investigating breaches of the *Lobbyists' Code of Conduct*.

Rule 8 of the *Lobbyists' Code of Conduct* reads as follows:

Rule 8 – Improper Influence (Conflict of Interest)

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

Rule 8 of the *Lobbyists' Code of Conduct* (the Code) has not changed since the Code first came into effect in 1997. However, the decision of the Federal Court of Appeal in *Democracy Watch v. Campbell et al.* had the effect of changing the manner in which Rule 8 of the Code must be interpreted. This decision led me to provide guidance to lobbyists regarding the interpretation of Rule 8, which I consider to be consistent with the ruling of the Federal Court of Appeal. I provided lobbyists with my *Guidance on Conflict of Interest – Rule 8 (Lobbyists' Code of Conduct)* in November 2009². This led to discussion and dialogue with lobbyists regarding the interpretation and application of Rule 8, and I provided further clarification regarding political activities in August 2010.³ This Guidance and the Clarifications were provided to lobbyists following the events that this Report addresses. I have considered the fact that Mr. McSweeney did not have the benefit of my Guidance to help assist him in evaluating his lobbying activities in consideration of his political activities.

The following Report on Investigation concerns a particular political fundraising event that occurred about six months after the decision of the Federal Court of Appeal in *Democracy Watch v. Campbell et al.*

² Guidance on Conflict of Interest – Rule 8 (*Lobbyists' Code of Conduct*), November 2009

³ Clarifications about political activities in the context of Rule 8, August 2010

Background

History of the Case Prior to the *Lobbyists' Code of Conduct* Investigation

I initiated the administrative review in this case on October 5, 2009, following the publication of reports in the Toronto Star regarding a political event held to raise money for the Honourable Lisa Raitt, then the Minister of Natural Resources. On October 2, 2009, the Star's Richard J. Brennan reported, among other things, that Michael McSweeney, a registered lobbyist employed as Vice President, Industry Affairs, at the Cement Association of Canada (CAC), had participated in the organization of a fundraising dinner for Minister Raitt. The article also contained a copy of an invitation to the September 24, 2009 fundraiser held at the Kultura restaurant in Toronto. The invitation solicited donations of "a minimum of \$250 per person," and instructed donors to send questions and RSVPs to Michael McSweeney's personal email address, or by fax to the CAC number in Ottawa.

The Star pointed out that Mr. McSweeney was a registered lobbyist employed by the CAC, that Natural Resources Canada was among the federal departments identified in their registration of the CAC and that the organization had "...lobbied the government eight times from March to August, including (Minister) Raitt and Prime Minister Stephen Harper."

The Star also noted that invitations to the event were distributed by Janet MacDonald, an executive assistant to Alan Paul, Acting President and CEO of the Toronto Port Authority, a federal agency, using the organization's email system. Both Ms. MacDonald and Mr. Paul had worked with Minister Raitt at the Toronto Port Authority until she took a leave of absence to run for Parliament in the federal election of October 14, 2008.

Media reports prompted allegations that Minister Raitt acted inappropriately, and that the resources of the federal agency were used for partisan gain. In one article, Paul Szabo (MP, Mississauga South), the Chair of the House of Commons Standing Committee on Access to Information, Ethics and Privacy, made the following allegation: "... [the] fundraiser not only appears to be a clear violation of the Conflict of Interest Act but also appears to run counter to the lobbyists' code of conduct."

Complaints received

On October 6, 2009, I received a letter from Mr. Szabo requesting an investigation of whether Mr. McSweeney's activities constituted a breach of Rule 8 of the *Lobbyists' Code of Conduct* (Improper Influence), or any other provision set out in the Code or the *Lobbying Act*. Mr. Szabo provided additional information and evidence in a second letter, received October 16, 2009.

On October 13, 2009, I received a letter from Olivia Chow (MP, Trinity-Spadina), requesting an investigation of “a potential breach of the *Lobbying Act*.” In it, Ms. Chow suggested that Mr. McSweeney’s voluntary fundraising efforts on behalf of Minister Raitt constituted a gift or other advantage “in the value of \$5,000.” She further alleged that Mr. McSweeney contravened paragraph 5(1)(b) of the Act by failing to file a return in respect of his meetings with Minister Raitt within 10 days.

On October 22, 2009, I received a letter from Duff Conacher (Coordinator, Democracy Watch) requesting an “investigation and ruling” concerning Mr. McSweeney’s role at the fundraising event for Minister Raitt.

On October 23, 2009, I received a letter from Michael McSweeney advising that he vehemently denied the allegations contained in the complaints, and offering his assistance with any investigation.

Disclosure by the Conservative Party of Canada

On October 6, 2009, I received a letter from Arthur Hamilton identifying himself as the “solicitor for the Conservative Party of Canada and its various electoral district associations.” In it, Mr. Hamilton informed me that the Halton Electoral District Association⁴ had undertaken a fundraiser on behalf of Minister Raitt, and that two registered lobbyists had “participated in certain ticket sales in respect of the fundraiser – Mr. Will Stewart and Mr. Michael McSweeney.” He also advised that the Conservative Party of Canada and the Halton Electoral District Association were reviewing potential remedial measures, and that he would correspond further once they were implemented.

On October 29, 2009, Mr. Hamilton sent me a fax message advising that, as of October 7, 2009, the Halton Electoral District Association “voluntarily began refunding money paid by certain ticket purchasers.” He stated that full refunds were provided to ticket purchasers falling into the following three categories.

1. Tickets sold by “lobbyist Michael McSweeney.”
2. Tickets sold by “lobbyist Will Stewart.”
3. Tickets sold to stakeholders of Natural Resources Canada and their employees including persons registered to lobby the department.

Mr. Hamilton offered to provide confirmation of the ticket purchase and the date on which the money was refunded.

⁴ The Halton Electoral District Association is the Halton Conservative Association.

Initiation of the *Lobbyists' Code of Conduct* Investigation

I initiated an investigation under subsection 10.4(1) of the Act on July 29, 2010, based on information obtained during the administrative review conducted by the Investigations Directorate of my Office. That administrative review was for the purpose of enabling me to determine whether an investigation was necessary to ensure compliance with the *Lobbying Act* or the *Lobbyists' Code of Conduct*. Upon completion of the administrative review, I instructed the Investigations Directorate to initiate a *Lobbyists' Code of Conduct* investigation under the Act.⁵

Objective

The objective of the investigation was to determine whether Michael McSweeney was in breach of Rule 8 of the *Lobbyists' Code of Conduct* as a consequence of his involvement in the September 24, 2009 fundraising event by the Halton Conservative Association (HCA) for the benefit of Minister Raitt.

Methodology

The investigation involved a review of the allegations and an assessment of the activities of Mr. McSweeney in support of the fundraiser. This involved an assessment of the facts surrounding the allegations and information received from the complainants and those interviewed, as well as a review of information in the media, news releases and information on the Internet. Interviews were conducted with a number of people including:

- The Honourable Lisa Raitt, Minister of Natural Resources;
- Janet Macdonald, Executive Assistant, Toronto Port Authority;
- John Challinor, President, Halton Conservative Association;
- Will Stewart, registered consultant lobbyist; and
- Michael McSweeney, then Vice-President, Cement Association of Canada (CAC).

The Investigations Directorate analyzed the information gathered from all of the sources and the allegations against Mr. McSweeney and reached the conclusion that his actions placed Minister Raitt in an apparent conflict of interest and he was, therefore, in breach of Rule 8 of the *Lobbyists' Code of Conduct*. This report was provided to Mr. McSweeney, who provided a response to the report, making a number of arguments based in both fact and law. I have considered all of these arguments carefully in reaching my findings and conclusions.

⁵ An administrative review is the initial fact-finding review of a matter, which may become the initial stage of an investigation, if one is commenced.

The Subject

At the time of the fundraising event, Mr. McSweeney was the Vice President, Industry Affairs, at the Cement Association of Canada (CAC). He has been listed as an in-house (organization) lobbyist in the CAC registration since May 17, 2007, and identified the following public offices previously held:

- 1983-1984: Executive Assistant to the Leader of the Opposition and Prime Minister;
- 1984-1985: Special Assistant to the Minister of Defence;
- 1986: Special Assistant to the Associate Minister of Defence; and
- 1992-1998: CEO, Standards Council of Canada.

On May 1, 2010, the CAC registration was updated to identify Mr. McSweeney as President and Chief Executive Officer.

The Organization

The Cement Association of Canada Registration

The following description of CAC activities is contained in the association's lobbyist registration:

The Cement Association of Canada is the voice of Canada's cement industry. Through collective action by its members, CAC promotes the sustainable growth of the cement industry. The Association achieves this objective by representing members' interests by working with stakeholders to:

- Advocate for regulations that will enhance the competitiveness of the domestic cement industry;
- Create market opportunities for Canadian cement and concrete products; and
- Raise awareness and understanding of the economic, social, and environmental contributions of the industry and its products.

The Ottawa-based association represents cement producers across Canada and is involved in the promotion of cement products on construction projects funded by the federal government. The officer responsible for filing lobbyist registration returns during the period under review was then President and CEO, Mr. Pierre Boucher.

The CAC has been represented by in-house or consultant lobbyists continuously since 1996. On September 24, 2009, the date of the HCA fundraiser, the CAC had an active in-house (organization) lobbyist registration identifying 25 federal departments or organizations as being the potential object of communication during the course of the undertaking, including: Agriculture and Agri-Food Canada; Environment Canada; Finance Canada; Fisheries and Oceans Canada; Industry Canada; Members of the House of Commons; National Defence; National Energy Board; Natural Resources Canada; Prime Minister's Office; Privy Council Office; Public Works and Government Services Canada; Revenue Canada; Senate of Canada; Transport Canada; and, Treasury Board Secretariat of Canada.

The CAC declared the following subject matters of communication in its registration:

Agriculture, Education; Employment and Training; Energy; Environment; Fisheries; Forestry; Government Procurement; Health; Industry; Infrastructure; Internal Trade; International Relations; International Trade; Labour; Mining; Regional Development; Science and Technology; Taxation; and, Finance and Transportation.

Twenty-eight different legislative proposals, bills, resolutions, policies or programs were identified as being the potential subject of the CAC's lobbying activity.

Between July 2, 2008 and March 22, 2010, the CAC filed 13 monthly communication returns in respect of oral and arranged communications with designated public office holders from a number of federal departments: Environment Canada; Transport Canada; Indian and Northern Affairs; Canadian Heritage; Foreign Affairs and International Trade; Minister of State (Sports); Natural Resources Canada; and, the Prime Minister's Office.

The CAC listed one or more of the following subjects in the contents of their communication returns: Climate change and clean air; infrastructure; energy; environment; and, international relations.

The CAC filed returns in respect of oral and arranged communications with Minister Raitt occurring on March 3, 2009 and September 24, 2009. During the time period of this investigation, the CAC has always been in compliance with the *Lobbying Act* and no allegations were ever made that the CAC was not in compliance with the law.

Minister Raitt indicated that she first met Mr. McSweeney during a meeting with the Cement Association of Canada that took place on Parliament Hill in March or April 2009, and met him again on September 24, 2009, during the fundraiser in Toronto. On that occasion he introduced her to two individuals from St Mary's Cement Group, a cement company with a presence in her riding.

The Fundraiser

The September 24, 2009 fundraiser was organized by the Halton Conservative Association in coordination with a member of the Minister's staff, Colin McSweeney, in an effort to prepare for an upcoming election. Colin McSweeney sought the help of his brother Michael McSweeney to help with the event. Three members of the HCA Board of Directors organized the event and sent out the invitations: Pat Whyte; Will Stewart; and, Beth Gregg. They targeted residents in Halton, including friends and people who had donated in the past. Approximately 30 to 40 people attended the event. The amount of money raised was approximately \$8,300. The Minister did not have a pre-fundraiser briefing, and did not know who was attending the event until she arrived.

Process

The *Lobbyists' Code of Conduct* investigation of Michael McSweeney covered his lobbying activities on behalf of the Cement Association of Canada during the period surrounding the fundraiser, and involved an examination of the lobbying activities of Mr. McSweeney and the CAC, and information and materials regarding the organization of the fundraiser on behalf of the Halton Conservative Association, interviews with a number of public office holders and persons involved in the Halton Conservative Association, an examination of the Registry of Lobbyists and an examination and analysis of information obtained during the course of the administrative review.

Following the investigation, a copy of the Investigations Directorate's report was sent to Mr. McSweeney to give him an opportunity to present his views, as required by subsection 10.4(5) of the *Lobbying Act*, and in accordance with the principles of administrative fairness. He provided his response in letters from his legal counsel dated August 23 and 30, and December 13, 2010.

I considered both the report of the Investigations Directorate and Mr. McSweeney's views in making my findings and reaching my conclusions, which are set out in this Report on Investigation.

Lobbyists' Code of Conduct

Rule 8 reads as follows:

Rule 8 – Improper Influence (Conflict of Interest)

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

Interpretation of Rule 8

Guidance has been provided to lobbyists regarding Rule 8 since 2002. The former Ethics Counsellor examined the application of the *Lobbyists' Code of Conduct*, in particular Rule 8, to a situation that had been referred to him: allegations that registered lobbyists had breached the *Lobbyists' Code of Conduct* by lobbying a federal department at the same time they were involved in assisting the Minister responsible for that department on a potential bid for the leadership of a political party. The Ethics Counsellor issued guidelines entitled "Rule 8 – Improper Influence – Lobbyists and Leadership Campaigns" (the "2002 Guidelines")⁶.

⁶ These Guidelines are located in the Archives at <http://www.ocl-cal.gc.ca>

The 2002 Guidelines were the subject of the March 2009 decision of the Federal Court of Appeal in *Democracy Watch v. Campbell and Attorney General of Canada (Registrar of Lobbyists)*.⁷ In that decision, the Federal Court of Appeal held that the interpretation of Rule 8 based upon those 2002 Guidelines by my predecessor, the Registrar of Lobbyists, was unreasonable.

In my *Guidance on Conflict of Interest – Rule 8 (Lobbyists' Code of Conduct)*, published November 6, 2009, I provided guidance to lobbyists regarding the interpretation and application of Rule 8, based upon the Court's direction in that decision. In the Annex to that Guidance⁸, I expanded upon my reasoning, explaining that:

The following consideration factored into the Commissioner's guidance regarding Rule 8 of the *Lobbyists' Code of Conduct*:

Conflict of interest may exist because of a "reasonable apprehension" of an apparent conflict of interest, rather than a demonstration of interference with the public duties of a public office holder.

The determination of what constitutes an improper influence upon a public office holder must remain a question of fact in each case. Depending on the specific circumstances, a competing obligation or private interest could arise from factors such as, but not limited to:

- the provision of a gift, an amount of money, a service, or property without an obligation to repay;
- the use of property or money that is provided without charge or at less than its commercial value; and
- political activities.

Lobbyists should endeavour to conduct themselves in the highest ethical manner thus avoiding situations which could create a real or apparent conflict of interest for a public office holder.

I also interpreted "real or apparent conflict of interest" as follows:

A conflict of interest can be created by the presence of a tension between the public office holder's duty to serve the public interest and his or her private interest or obligation created or facilitated by the lobbyist.

⁷ *supra*, footnote 1

⁸ Reasoning Underlying the Commissioner's Guidance on Conflict of Interest – Rule 8 (*Lobbyists' Code of Conduct*), available at <http://www.oel-cal.gc.ca>

I take the view that this interpretation flows directly from the manner in which the Federal Court of Appeal summarized the concept of improper influence in its March 12, 2009 decision:

"Improper influence has to be assessed in the context of conflict of interest, where the issue is divided loyalties. Since a public office holder has, by definition, a public duty, one can only place a public office holder in a conflict of interest by creating a competing private interest. That private interest, which claims or could claim the public office holder's loyalty, is the improper influence to which the Rule refers."⁹

From my perspective, the risk of creating the appearance of a conflict of interest is proportionate to the degree to which a lobbyist's actions advance the private interest of a public office holder and the degree to which that lobbyist may interact with the public office holder as a consequence of their employment or undertaking.

In conducting this investigation, I asked the Investigations Directorate to examine whether Mr. McSweeney placed Minister Raitt in a conflict of interest, including the appearance of a conflict of interest.

⁹ *supra*, footnote 1, at paragraph 52

Findings

Report of the Investigations Directorate

The Investigations Directorate (the Directorate) examined whether Mr. McSweeney was in breach of Rule 8 when he participated in the organization of the September 24, 2009 fundraising event for the Halton Conservative Association (HCA). The Directorate's Report analyzed the degree to which Mr. McSweeney advanced the private interest of Minister Raitt.

The fundraising event was organized by the HCA to raise money for Minister Raitt's next election campaign. The previous election campaign had cost the HCA approximately \$106,000. The Directorate concluded that the efforts of the HCA and various volunteers to raise sufficient funds to run a campaign for re-election are actions which advance the private interest of Minister Raitt. Those actions could potentially create a tension between her private interest and her duty to serve the public interest.

Michael McSweeney became involved in the fundraiser at the request of his brother, Colin McSweeney, who worked in Minister Raitt's office, and was responsible for liaison with the HCA. He was involved in a teleconference to plan the fundraiser, helped to determine the location of the event and participated in the sale of tickets. He agreed to become the contact point for responses to invitations sent to various supporters of Minister Raitt's bid for re-election.

Mr. McSweeney also sold tickets and sent 20 invitations to friends and acquaintances. He sold a total of seven tickets, three of them to people in the cement industry, one to himself and the remainder to acquaintances. Those tickets were sold for a minimum donation of \$250, and the HCA expected to make a net profit of \$205.36 per ticket. Mr. McSweeney collected approximately \$1,200 of the estimated \$8,300 raised at the event.

The Directorate concluded that Mr. McSweeney's involvement in the fundraising event advanced the private interest of Minister Raitt to a moderate degree. These conclusions were based upon an analysis of the information obtained by the Directorate and the decision of the Federal Court of Appeal in *Democracy Watch v. Campbell et al.* The framework for analysis that was developed by my Office has been set out in my Guidance and the *Clarifications about political activities in the context of Rule 8* that I issued in August 2010¹⁰.

¹⁰ Available at <http://www.ocl-cal.gc.ca>

The Directorate examined the degree to which Mr. McSweeney interacted with Minister Raitt as a consequence of his employment as a lobbyist and the degree to which the subject matter of his lobbying activities fell within the purview of the Minister.

Minister Raitt was first elected to the House of Commons on October 14, 2008. She was appointed as Minister of Natural Resources on October 30, 2008 and remained in that portfolio until January 19, 2010. At the time of the events under examination, she was a member of the Cabinet Committee on Economic Growth and Long-term Prosperity and the Cabinet Committee on Environment and Energy Security.

At the time that he participated in the organization of the fundraiser, Mr. McSweeney was a registered lobbyist employed as the Vice President, Industry Affairs, at the Cement Association of Canada. The CAC is registered to lobby 25 federal departments, agencies or organizations, including Natural Resources Canada.

The CAC is registered to lobby federal public office holders in respect of various subjects, including: international trade; natural resources; fisheries; agriculture; transport; infrastructure; regional development; environment; and, energy. Minister Raitt, as the Minister of Natural Resources and as a member of the two Cabinet Committees set out above, could have been involved in the consideration of any of those subjects in her capacity as Minister or as a member of one of those Cabinet committees.

On March 3, 2009 and on September 24, 2009, Mr. McSweeney communicated directly with Minister Raitt on behalf of the CAC and in respect of registrable subjects. The CAC declared both communications in monthly communication returns filed in the Registry of Lobbyists. The subject matters of energy and environment were described in the contents of the returns.

The Directorate determined that Mr. McSweeney's discussions with the Minister related to the efforts of CAC to use renewable forms of energy in anticipation of a potential cap and trade emission trading system, as well as the eligibility of the cement industry for clean air program funding. According to Mr. McSweeney, Minister Raitt recommended to him that the CAC submit an application for the Clean Energy fund, and indicated her willingness to support it. The CAC submitted an application, but did not receive any funding.

In view of the above, the Directorate concluded that Mr. McSweeney interacted with Minister Raitt to a high degree as a consequence of his employment as a lobbyist for the Cement Association of Canada and that the subject matter of his lobbying efforts fell within the purview of the Minister.

The report of the Investigations Directorate contained the following conclusions. Mr. McSweeney participated in the organization of a fundraising event for the HCA to raise money for Minister Raitt's re-election campaign. As a consequence, his actions advanced her private interest to a moderate degree. In addition, he interacted with the Minister to a high degree as a consequence of employment as a lobbyist with the CAC.

He was registered to lobby in respect of subjects within the Minister's purview and, on two occasions, communicated directly with the Minister. The intersection of the above-mentioned activities placed the Minister in an apparent conflict of interest, and as a consequence, Mr. McSweeney's actions breached Rule 8 of the *Lobbyists' Code of Conduct*.

The report of the Investigations Directorate containing those conclusions was provided to Mr. McSweeney for his comments.

Mr. McSweeney's Views and my Perspective on those Views

Issues

Mr. McSweeney's perspective on the report of the Investigations Directorate that was provided to him pursuant to subsection 10.4(5) of the *Lobbying Act* was provided to me in three letters from his legal counsel, Jack Hughes of Borden Ladner Gervais, dated August 23 and 30, 2010 and December 13, 2010.

1. Procedural Fairness

Mr. Hughes raised a number of points regarding procedural fairness in his letter of August 23rd. The process used by my Office to carry out administrative reviews and investigations in relation to the investigation of allegations under the *Lobbyists' Code of Conduct* under section 10.4 of the *Lobbying Act* is described earlier in this Report. I clarified the process in my reply to Mr. Hughes of December 2, 2010.

2. Errors of Fact

Mr. Hughes pointed out a number of "errors of fact" regarding the involvement of Mr. McSweeney in the Halton Conservative Association fundraiser held on September 24, 2009, and in relation to Mr. McSweeney's activities as a lobbyist. I have taken notice of the discrepancies between the investigation report and Mr. McSweeney's view of the events surrounding the fundraiser and regarding Mr. McSweeney's communications with Minister Raitt in his capacity as a lobbyist for the Cement Association of Canada.

I accept Mr. McSweeney's description of the events surrounding the fundraiser. In my view, there is a difference in degree from the description of Mr. McSweeney's activities set out in the report of the Investigations Directorate and Mr. McSweeney's description. In summary, Mr. McSweeney has indicated that he was not a primary organizer of the fundraiser, but rather that he was involved as a ticket seller. He was not a member of the board of the Halton Conservative Association, and his involvement came primarily as a result of the request from his brother. Nonetheless, in my view, although Mr. McSweeney's involvement was to a lesser degree than others who were involved as the primary organizers of the fundraiser, his participation in selling ticket for the fundraiser constitutes involvement in the organization of the fundraiser.

3. Errors of Law

Three “Errors of Law” were raised in relation to the application of Rule 8 in this case. From my perspective, these representations were very important elements of Mr. McSweeney’s position. I have considered each of the arguments and wish to address them in a substantive manner in this Report on Investigation.

i. Retroactive Application of the Rule 8 Guidance

Mr. McSweeney argues that my *Guidance on Conflict of Interest – Rule 8 (Lobbyists’ Code of Conduct)* has a retroactive effect, as there was no guidance at all between March 12, 2009 and the date of issuance of the Guidance in November 2009. This alleged retroactive application of the Guidance is contrasted with my predecessor’s statement that “It would be unfair to retroactively impose my approach to the enforcement of *the Lobbyists’ Code of Conduct* upon lobbyists who operated under the previous approach to enforcing the Code.”¹¹ This statement was made by the former Registrar of Lobbyists in relation to his decision to enforce the Principles of the *Lobbyists’ Code of Conduct*, along with the Rules of the Code.

In my view, this is not what I have done in this case. Rather, I take the view that the decision of the Federal Court of Appeal on March 12, 2009 had the effect of changing the manner in which Rule 8 of the *Lobbyists’ Code of Conduct* must be interpreted, effective on that date. The Court, in striking down the previous Guidance, clearly intended that its decision should apply to events prior to that date, as it struck down the Registrar’s ruling of October 10, 2006. In addition, the Court, in declaring the previous interpretation of Rule 8 to be “unreasonable” and setting aside the Registrar’s decision, stated clearly at paragraph 57 that “...Democracy Watch has achieved its objective of clarifying the interpretation of the Code.” As a result, in my view, the Federal Court of Appeal intended that its clarified interpretation of Rule 8 be effective on the date of the decision.

The decision of the Federal Court of Appeal on the interpretation of Rule 8 has guided lobbyists since March 12, 2009. My Guidance was developed to further assist lobbyists in making judgments regarding their lobbying activities and their political activities and as a tool for the purposes of analyzing the activities of lobbyists in the Rule 8 context. There is no obligation on me to issue guidance respecting Rule 8, nor regarding the Code in general. I have done so in order to provide guidance about a potentially difficult area of the law. My view is that there was no gap in the law after March 12, 2009 – the Federal Court of Appeal decision established a revised interpretation of Rule 8. Finally, I do not agree that my Guidance has retroactive effect – and in my view, the same is true of the *Clarifications about Political Activities* of August 2010¹².

¹¹ *supra*, footnote 1 at paragraph 9

¹² *supra*, footnote 3

ii. Incorrect Application of the Principles in Democracy Watch

Mr. McSweeney relies upon the Federal Court of Appeal's judgment in making the argument that he did not cultivate a sense of personal obligation, or create a private interest, by his actions in relation to the fundraiser on behalf of Minister Raitt. However, in my view, this is a restricted or limited interpretation of the Court's decision. It is clear to me that the Federal Court of Appeal considered that "facilitating" or "advancing" a public office holder's private interest is equivalent to "creating" such a private interest. In addition, it is also clear that the Court considered that "... Any conflict of interest impairs public confidence in government decision-making."¹³ The Court also stated that "... Where the lobbyist's effectiveness depends upon the decision maker's personal sense of obligation to the lobbyist, or on some other private interest created or facilitated by the lobbyist, the line between legitimate and illegitimate lobbying has been crossed."¹⁴

In my view, Mr. McSweeney's legal argument is too narrow and restrictive an interpretation of the Federal Court of Appeal's decision. Such a narrow and restrictive approach is the type of approach that the Federal Court of Appeal overturned in concluding that the Registrar's interpretation of Rule 8 was unreasonable. I have considered Mr. McSweeney's argument that the facts surrounding his involvement in the fundraiser fall short of having the effect of advancing the private interest of Minister Raitt to a moderate degree. I take the view that, by selling tickets to the fundraiser, Mr. McSweeney did advance the private interest of Minister Raitt in her re-election. This involvement in selling tickets to the fundraiser was a greater degree of involvement than simply buying a ticket and attending the event would have been. I do not consider that I have applied the principles of the Court's decision incorrectly.

iii. Cannot be Reconciled with Reports Issued by the Conflict of Interest and Ethics Commissioner

Mr. McSweeney argues that the Investigation Report he received is irreconcilable with the reports regarding Minister Raitt issued by the Conflict of Interest and Ethics Commissioner, Mary Dawson.¹⁵ I have read Commissioner Dawson's reports. In her report entitled *The Raitt Report* (made under the *Conflict of Interest Act*), Commissioner Dawson concluded that Minister Raitt had not breached the *Conflict of Interest Act* because "...the political contribution, volunteer time and resources provided by the lobbyists in connection with the fundraiser were given to the organizer of the event, the Halton Conservative Association." As a result, Commissioner Dawson found no breach by the Minister of the

¹³ *supra*, footnote 1 at paragraph 48

¹⁴ *supra*, footnote 1 at paragraph 53

¹⁵ *The Raitt Report* (made under the *Conflict of Interest Act*) and *The Raitt Report* (made under the *Conflict of Interest Code for Members of the House of Commons*), Mary Dawson, Conflict of Interest and Ethics Commissioner, May 13, 2010

prohibition against accepting a gift or other advantage under the *Conflict of Interest Act*. The Commissioner made a similar finding in her other report under the *Conflict of Interest Code for Members of the House of Commons*, that Minister Raitt had not accepted a gift or other benefit in contravention of that Code.

The legislation that Commissioner Dawson administers provides a definition of conflict of interest, set out in section 4 of the *Conflict of Interest Act*, as follows:

4. For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.

In my opinion, this is a definition of an actual conflict of interest, similar to that used by the Ethics Counsellor in his original Guidance regarding Rule 8, and applied by the Registrar of Lobbyists in the case of *Democracy Watch v. Campbell et al.* This is the approach to conflict of interest that the Federal Court of Appeal did not consider to be reasonable for the Registrar to apply in the case of the conduct of lobbyists. Mr. McSweeney argues that a finding of no conflict of interest by the Conflict of Interest and Ethics Commissioner cannot be reconciled with a finding that a conflict of interest was created by his actions. I take the view that this is not the correct interpretation of Commissioner Dawson's conclusions. However, I believe that such a seemingly irreconcilable conclusion can be reconciled. In my view, this is because the two standards of conflict of interest are different. For public office holders, the definition in the *Conflict of Interest Act* clearly sets out the standard for conflict of interest. For lobbyists, a standard of conflict of interest that incorporates the concept of apparent conflict of interest arises as a result of a decision of the Federal Court of Appeal.

I am required to examine the activities of a lobbyist in light of the new standard of conflict of interest established by the Federal Court of Appeal. I believe that this situation is indeed reflected in Commissioner Dawson's decision, as she recognized the possibility that Minister Raitt could be placed into a position of an appearance of a conflict of interest by asking her to enter into "...an agreed compliance measure establishing an interim conflict of interest screen to prevent any potential conflicts of interest, more particularly, any potential for preferential treatment." Commissioner Dawson states in her report: "... I was concerned that, should a situation arise where Minister Raitt had to make an official decision involving the Cement Association of Canada, she could be subject to allegations of preferential treatment because of the help that Mr. McSweeney had provided for the fundraiser."¹⁶ From my perspective, this could create the appearance that a lobbyist had placed a public office holder into a position of conflict of interest.

¹⁶ *supra*, at page 25

Conclusions

Allegation Regarding a Breach of the *Lobbyists' Code of Conduct*

I have taken both the report of the Investigations Directorate and the representations of Mr. McSweeney into consideration in reaching my conclusions. I have concluded that Mr. McSweeney participated in the fundraising event for the Halton Conservative Association (HCA) held on September 24, 2009. He was not one of the principal organizers, but his role in selling tickets and acting as a contact person was nonetheless an important organizational role. His actions advanced the interests of the Halton Conservative Association in raising funds to ensure adequate financial resources to contest the next election. The funds raised were not the property of Minister Raitt, nor were they to be used to directly provide a financial benefit to the sitting Member of Parliament and presumptive candidate in the next election. However, at the time of the fundraiser, the funds raised were intended to be used by the HCA to the benefit of Minister Raitt in her re-election. This, in my opinion, advances the private interest of Minister Raitt, who remains the presumptive candidate at the time of the writing of this report.

During the same period of time, Mr. McSweeney was registered to lobby on behalf of the Cement Association of Canada in respect of subjects that fell within the Minister Raitt's responsibilities, as a Minister and as a member of Cabinet Committees. Mr. McSweeney communicated with the Minister directly in respect of subject matters for which he registered as a lobbyist. His direct communications with Minister Raitt were not extensive. Nonetheless, I would agree with the conclusion that Commissioner Dawson reached when looking at Minister Raitt's circumstances in relation to the fundraiser: should a situation arise where Minister Raitt may be required to make an official decision involving the Cement Association of Canada, she could be subject to allegations of preferential treatment because of the help that Mr. McSweeney had provided for the fundraiser. In that respect, the actions of Mr. McSweeney have created a reasonable apprehension that the Minister has been placed into a situation of an apparent conflict of interest. This is the situation that Rule 8 is meant to address.

It is my wish that the circumstances outlined in this report will provide additional guidance for lobbyists who wish to engage in political activities and lobbying activities in the future. I take the view, however, that the “general deterrence” of tabling in Parliament a Report on Investigation can also be effective if the Report recognizes the unusual aspects of the specific case. In fairness to Mr. McSweeney, I must say that, following the decision of the Federal Court of Appeal on March 12, 2009, lobbyists were placed in a position in which their obligations under Rule 8 of the *Lobbyists’ Code of Conduct* had changed. Therefore, given the variety of different factual situations which could arise, it might have been difficult for them to determine the point at which their political activities may have implications for their lobbying activities. This includes the point at which they would risk placing a public office holder into a conflict of interest. Mr. McSweeney was clearly in such a situation.

I trust that this Report will provide assistance to lobbyists in reconciling their lobbying activities with political activities that they may be engaged in.

Allegation Regarding a Breach of the Lobbying Act

I noted earlier in this Report on Investigation, under the heading “Complaints Received”, that an allegation had been made that Mr. McSweeney had contravened paragraph 5(1)(b) of the *Lobbying Act*, by failing to file a return in respect of his meetings with Minister Raitt within 10 days. This was alleged by Olivia Chow (MP, Trinity-Spadina) in her October 13, 2009 letter to me.

At the time, Mr. McSweeney was employed by the Cement Association of Canada, and was registered as an in-house (organization) lobbyist. He is also currently employed by the CAC and registered as an in-house (organization) lobbyist. As a result, he was and remains subject to the registration requirements set out in section 7 of the Act.

The Cement Association of Canada filed monthly communication returns in respect of meetings with Minister Raitt occurring March 3 and September 24, 2009, both within the time limit specified in subsection 7(4) of the Act.

Mr. McSweeney does not perform activities that necessitate registration as a consultant lobbyist, and he is not required to register the arrangement of a meeting between a public office holder and another person pursuant to paragraph 5(1)(b) of the Act.

In view of this, I have concluded that Mr. McSweeney was not in breach of paragraph 5(1)(b) of the Act.

Appendix A – *Lobbyists' Code of Conduct*

Preamble

The *Lobbyists' Code of Conduct* is founded on four concepts stated in the *Lobbying Act*:

- Free and open access to government is an important matter of public interest;
- Lobbying public office holders is a legitimate activity;
- It is desirable that public office holders and the public be able to know who is engaged in lobbying activities; and,
- A system for the registration of paid lobbyists should not impede free and open access to government.

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

To this end, public office holders, when they deal with the public and with lobbyists, are required to honour the standards set out for them in their own codes of conduct. For their part, lobbyists communicating with public office holders must also abide by standards of conduct, which are set out below.

Together, these codes play an important role in safeguarding the public interest in the integrity of government decision-making.

Principles

Integrity and Honesty

Lobbyists should conduct with integrity and honesty all relations with public office holders, clients, employers, the public and other lobbyists.

Openness

Lobbyists should, at all times, be open and frank about their lobbying activities, while respecting confidentiality.

Professionalism

Lobbyists should observe the highest professional and ethical standards. In particular, lobbyists should conform fully with not only the letter but the spirit of the *Lobbyists' Code of Conduct* as well as all the relevant laws, including the *Lobbying Act* and its regulations.

Rules

Transparency

1. Identity and purpose

Lobbyists shall, when making a representation to a public office holder, disclose the identity of the person or organization on whose behalf the representation is made, as well as the reasons for the approach.

2. Accurate information

Lobbyists shall provide information that is accurate and factual to public office holders. Moreover, lobbyists shall not knowingly mislead anyone and shall use proper care to avoid doing so inadvertently.

3. Disclosure of obligations

Lobbyists shall indicate to their client, employer or organization their obligations under the *Lobbying Act*, and their obligation to adhere to the *Lobbyists' Code of Conduct*.

Confidentiality

4. Confidential information

Lobbyists shall not divulge confidential information unless they have obtained the informed consent of their client, employer or organization, or disclosure is required by law.

5. Insider information

Lobbyists shall not use any confidential or other insider information obtained in the course of their lobbying activities to the disadvantage of their client, employer or organization.

Conflict of interest

6. Competing interests

Lobbyists shall not represent conflicting or competing interests without the informed consent of those whose interests are involved.

7. Disclosure

Consultant lobbyists shall advise public office holders that they have informed their clients of any actual, potential or apparent conflict of interest, and obtained the informed consent of each client concerned before proceeding or continuing with the undertaking.

8. Improper influence

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