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# LOBBYISTS' CODE OF CONDUCT

## ANNUAL REPORT

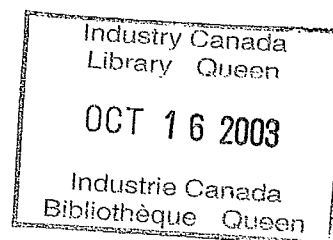
for the year ended March 31, 2003

# **LOBBYISTS' CODE OF CONDUCT**

## **ANNUAL REPORT**

For the year ended March 31, 2003

Office of the Ethics Counsellor



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June 30, 2003

The Honourable Allan Rock, P.C., M.P.  
Registrar General of Canada  
House of Commons  
Confederation Building  
Ottawa ON K1A 0A6

Dear Sir:

I have the honour of presenting you the eighth Annual Report on the *Lobbyists' Code of Conduct* for transmission to Parliament and in accordance with section 10.6 of the *Lobbyists Registration Act*. The Act requires the Ethics Counsellor to table a report on the exercise of the powers, duties and functions related to the *Lobbyists' Code of Conduct*. The report covers the period from April 1, 2002, to March 31, 2003.

Yours sincerely,

Howard R. Wilson  
Ethics Counsellor

Canada

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## INTRODUCTION

This is the eighth Annual Report on the exercise of the powers, duties and functions conferred on the Ethics Counsellor under the *Lobbyists Registration Act* for the *Lobbyists' Code of Conduct*. This report covers the period from April 1, 2002, to March 31, 2003.

## BACKGROUND

Under the *Lobbyists Registration Act*, the Ethics Counsellor was directed to develop a code of conduct for lobbyists. After extensive consultations, the code was referred to the House of Commons Standing Committee on Procedure and House Affairs and subsequently published in the Canada Gazette on February 8, 1997. The *Lobbyists' Code of Conduct* entered into force on March 1, 1997.

## PURPOSE AND DESCRIPTION OF THE *LOBBYISTS' CODE OF CONDUCT*

The purpose of the *Lobbyists' Code of Conduct* (the Code) is to assure the Canadian public that lobbying is done ethically and with the highest standards, with a view to conserving and enhancing public confidence and trust in the integrity, objectivity and impartiality of government decision making.

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

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 comes a body of overriding principles that set out, in positive terms, the goals and objectives to be attained without establishing precise standards. They are intended as general guidance. The principles of integrity and honesty, openness and professionalism thus represent goals that should be pursued.

The principles are then followed by rules that set out specific obligations or requirements. The rules are in three categories: transparency, confidentiality and conflict of interest. Under the rule of transparency, lobbyists have an obligation to provide accurate information to public office holders and to disclose the identity of the person or organization on whose behalf the representation is made and the purpose of the representation. They must also disclose to their client, employer or organization, their obligations under the *Lobbyists Registration Act* and the Code itself. Under the rule of confidentiality, lobbyists cannot divulge confidential information nor use insider information to the disadvantage of their client, employer or organization. Finally, under the rule of conflict of interest, lobbyists are not to use improper influence nor represent conflicting or competing interests without the consent of their clients.

The *Lobbyists' Code of Conduct* is also an integral part of the registration kit distributed to all lobbyists and printed copies can be obtained from the Office of the Ethics Counsellor.

## ADVISORY ROLE OF THE OFFICE

Since a major objective of the Code is to promote public trust in the integrity of government decision making, the Office places a high priority on its advisory role by providing guidance and clarification on the Code to lobbyists and their clients and, more generally, to the public.

One issue that arose involved a number of allegations that lobbyists would be in breach of the *Lobbyists' Code of Conduct* if they were registered under the *Lobbyists Registration Act* to lobby a federal government department at the same time that they were involved in assisting the Minister of the department in that Minister's campaign for the leadership of the Liberal Party.

In examining this issue, it quickly became apparent that the *Conflict of Interest and Post-Employment Code for Public Office Holders* was more directly applicable. The pursuit of the leadership of the Liberal Party by a Minister is a private interest. The Conflict of Interest Code requires that where there is a real, potential or apparent conflict of interest between a Minister's private interests and his or her official duties, the conflict shall be resolved in the public interest. This led to Guidelines, issued on June 11, 2002, by the Prime Minister, on the Ministry and Activities for Personal Political Purposes.

Under these Guidelines, "Ministers also need to be mindful of situations where individuals involved in the Minister's campaign, whether as fundraisers, organizers or strategists, may be registered under the *Lobbyists Registration Act* to lobby the Minister's department. This again is a situation which can give rise to the appearance of a conflict of interest and needs to be resolved by the Minister in the public interest by declining the active support of the individual on the campaign. Alternatively, the individual might choose not to lobby the department so long as he or she was involved in the campaign."

The conclusion was that the obligation under the Conflict of Interest Code to ensure that there was not a conflict rested with the Minister and not the lobbyist.

Nonetheless, there continued to be questions as to whether Rule 8 — Improper Influence of the Lobbyists' Code also applied.

The Ethics Counsellor concluded that it is not reasonable to believe that a lobbyist has exercised an improper influence on a Minister, placing him or her in a conflict of interest, merely because the lobbyist was assisting the Minister in a leadership campaign at the same time that the lobbyist was lobbying the Minister's department on behalf of a client. What constitutes an improper influence on a public office holder is a question of fact in

each particular case, and factors to be considered in assessing this are (i) whether there has been interference with the decision, judgment or action of the public office holder; (ii) whether there has been a wrongful constraint whereby the will of the public office holder was overpowered and whether the public office holder was induced to do or forbear an act which he or she would not do if left to act freely; and (iii) whether there has been a misuse of a position of confidence or whether the lobbyist took advantage of a public office holder's weakness, infirmity or distress to alter that public office holder's actions or decisions.

The complete text of this advice, entitled "Lobbyists and Leadership Campaigns — *The Lobbyists' Code of Conduct* — Rule 8: Improper Influence", is provided as an appendix to this report. It may also be accessed on our Web site at <http://strategis.gc.ca/ethics> under *Lobbyists' Code of Conduct*.

## COMPLAINTS

Lobbyists have a legal obligation to comply with the Code. Where, on reasonable grounds, the Ethics Counsellor believes that a rule has been breached, the Act provides that the Ethics Counsellor shall investigate and the results of that investigation must be tabled in Parliament.

During the year, the replies to five matters were completed: two from complaints received this year, and three from complaints received in previous years.

In January 2003, the Ethics Counsellor provided advice (referred to above in Advisory Role of the Office) in response to concerns raised last year about the links between consultant lobbyists who also work on political party leadership campaigns. This advice was of assistance in replying to another complaint, received in this reporting year. This complaint alleged violations of the Lobbyists' Code by nine individuals registered as Consultant Lobbyists under the *Lobbyists Registration Act* who formerly worked, or were still working, on organizational efforts with Ministers in anticipation of a leadership campaign. The Ethics Counsellor concluded, on the basis of the facts presented, that there was no basis to believe on reasonable grounds that the *Lobbyists' Code of Conduct*, more specifically Rule 8, had been breached.

Another complaint received this reporting year, raised concerns that lobbyists who had made financial contributions to the leadership campaign of a Minister may have been in violation of Rule 8 of the *Lobbyists' Code of Conduct*. The Ethics Counsellor indicated that "Fundraising is an important part of the political process, including for leadership campaigns and is generally viewed as legitimate, particularly in circumstances where full public disclosure is provided". The Ethics Counsellor concluded that, on the basis of the information provided, there was no basis to believe on reasonable grounds that a breach of the *Lobbyists' Code of Conduct* had occurred.



Work was also completed on a complaint received in 2001 which alleged breaches to the *Lobbyists' Code of Conduct* by an individual making representations on behalf of companies but who had not registered as a lobbyist under the *Lobbyists Registration Act*. The Ethics Counsellor made reference to the fact that the RCMP had investigated this case and that they were advised by the Crown prosecutors that they would be unable to prove beyond a reasonable doubt that this individual was paid to communicate with a public office holder "in an attempt to influence". Accordingly, since there was an inability to demonstrate in a court of law that there was an obligation on this lobbyist to register, the application of the *Lobbyists' Code of Conduct* did not arise. The application of the *Lobbyists' Code of Conduct* will only arise where individuals against whom a complaint is alleged are registered lobbyists, or where there is a judgement that the individuals should have registered under the *Lobbyists Registration Act* because their conduct constituted a registrable activity. To address this issue, appropriate amendments were introduced to the *Lobbyists Registration Act*.

Two other complaints from 2001 were also answered in the 2002–2003 fiscal year: one involved a company which had hired a professional lobbying service to help obtain a government grant; it was concluded that the concerns of the complainant related more to the contractual relationship between the parties than in relation to the nature of the lobbyists' dealings with the federal government. The other concerned work by a Minister's former senior policy advisor now working in government relations for a private sector company. In this particular case, although at the time of the complaint the particular individual in question was not registered under the *Lobbyists Registration Act*, he subsequently registered when his lobbying activities became a significant part of his duties. Following receipt of this complaint, the preliminary inquiries made by the Office of the Ethics Counsellor did not indicate that the individual was not in conformity with the *Lobbyists' Code of Conduct*. The Ethics Counsellor therefore concluded there were no reasonable grounds to believe, on the basis of the information and preliminary inquiries made, that a breach of the *Lobbyists' Code of Conduct* had occurred.

As of March 31, 2003, one complaint received this year by the Office of the Ethics Counsellor remains outstanding. It concerns a charitable golf tournament where private sector participants, for a fee, could golf with a Cabinet Minister.

Work on three complaints received during 2000–2001 continues. These complaints allege breaches of the *Lobbyists' Code of Conduct* as a consequence of a registered consultant lobbyist organizing a fundraising event for a public office holder; the involvement of political party officials and non-elected people in the review of federal grant applications; and an alleged placement of public office holders in a conflict situation. Work also continues on one other complaint received during the 1999–2000 fiscal year.

## COURT CHALLENGES

On December 4, 2001, Democracy Watch, a public interest group, filed an application for judicial review with the Federal Court of Canada Trial Division for an order quashing the opinion rendered by the Ethics Counsellor relating to BCE's invitation to the Prime Minister to play a round of golf with a professional golfer at the 2001 Bell Canadian Open Pro-Am event.

The applicant sought a declaration that they were deprived of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of their complaint to the Ethics Counsellor.

Democracy Watch also sought a declaration that the institutional scheme under the *Lobbyists Registration Act*, which permits the same person [Ethics Counsellor] to investigate and report to Parliament on alleged violations of the *Lobbyists' Code of Conduct* while administering the *Conflict of Interest and Post-Employment Code for Public Office Holders*, raises a reasonable apprehension of bias.

The applicant sought relief under paragraph 2(e) of the *Canadian Bill of Rights* to prohibit the appointment of the same person to both the Office of Ethics Counsellor (Lobbyists) and Ethics Counsellor under the Conflict of Interest Code.

On October 28, 2002, the Federal Court dismissed this application for failure by Democracy Watch to satisfy the court that they should be allowed to proceed. On November 6, 2002, Democracy Watch appealed this decision and on December 11, 2002, commenced a second application seeking judicial review and seeking an order to compel the Ethics Counsellor to respond to their complaints and, once again, declaring that the legislative scheme governing the Ethics Counsellor gives rise to a reasonable apprehension of bias, a lack of independence and structural bias.

On February 19, 2003, Democracy Watch commenced a third application for judicial review in relation to the publication by the Ethics Counsellor of guidelines regarding Rule 8 of the *Lobbyists' Code of Conduct* (Lobbyists and Leadership Campaigns).

Following March 31, 2003, Democracy Watch has discontinued all three of the applications for judicial review described above and commenced four new applications for judicial review of the responses to four complaints provided by the Ethics Counsellor. Those applications for judicial review challenge the responses of the Ethics Counsellor in relation to complaints regarding two individuals, as well as the publication by the Ethics Counsellor of guidelines regarding Rule 8 of the *Lobbyists' Code of Conduct* (Lobbyists and Leadership Campaigns) and position taken by the Ethics Counsellor regarding donations by lobbyists to the political campaigns of Ministers (described above).

These matters will be reported upon in the annual report for the period April 1, 2003, to March 31, 2004.

**ADDITIONAL INFORMATION**

The full text of the *Lobbyists' Code of Conduct* and the annual reports on the Code are available on the Internet (<http://strategis.gc.ca/ethics>).

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## APPENDIX: LOBBYISTS AND LEADERSHIP CAMPAIGNS

### *The Lobbyists' Code of Conduct* — Rule 8: Improper Influence

During 2002, there were a number of allegations that lobbyists would be in breach of the *Lobbyists' Code of Conduct* if they were registered under the *Lobbyists Registration Act* (LRA) to lobby a federal department at the same time that they were involved in assisting the Minister of that department on a possible bid for the leadership of the Liberal Party. As Ethics Counsellor, responsible for the *Lobbyists' Code of Conduct*, I was asked to examine the application of the Lobbyists' Code to this situation, in particular Rule 8 — Improper Influence.

It quickly became evident in analysing the matter that the responsibility of resolving any conflict of interest rested with the Minister seeking the leadership of the Liberal Party and not with the lobbyist who was both lobbying the Minister's department and involved in the Minister's leadership campaign.

The *Conflict of Interest and Post-Employment Code for Public Office Holders* (Conflict of Interest Code) places an obligation on Ministers to "arrange their private affairs in a manner that will prevent real, potential or apparent conflicts of interest from arising". The pursuit of the leadership of a political party is a private interest, unrelated to their official duties as Ministers. In recognition of this, the Prime Minister, on June 11, 2002, issued Guidelines on the Ministry and Activities for Personal Political Purposes.

These Guidelines directly address the question of lobbyists as follows:

#### **Lobbyists**

Ministers also need to be mindful of situations where individuals involved in the Minister's campaign, whether as fundraisers, organizers or strategists, may be registered under the *Lobbyists Registration Act* to lobby the Minister's department. This again is a situation which can give rise to the appearance of a conflict of interest and needs to be resolved by the Minister in the public interest by declining the active support of the individual on the campaign. Alternatively, the individual might choose not to lobby the department so long as he or she was involved in the campaign. Either step would resolve the matter. In cases where there is any ambiguity, reference should be made to the Office of the Ethics Counsellor.

The full text of the Guidelines can be found at:

<http://strategis.gc.ca/SSG/oe01210e.html>

The Conflict of Interest Code thus places responsibility on the Minister to resolve the conflict posed by having a lobbyist, who is working on his or her campaign, lobbying the Minister's department at the same time. Nonetheless there continue to be allegations that the *Lobbyists' Code of Conduct*, specifically Rule 8 — Improper Influence, is also

applicable and places a specific obligation on the lobbyist to personally avoid this situation. I consider it in the public interest to directly address the application of this Rule and whether it applies. Briefly my conclusion, as I will explain, is that the *Lobbyists' Code of Conduct* does not apply.

Rule 8 of the Lobbyists' Code falls under the general heading of Conflict of Interest and reads as follows:

#### **8. Improper Influence**

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

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

It is important to be clear about the nature of these two activities; first, lobbying a Minister's department on behalf of a client and, second, working on the Minister's campaign. Lobbying public office holders, as stated in the Preamble to the LRA, "is a legitimate activity". What the LRA requires is that this activity be registered with the Lobbyist Registration Branch of my Office. The second activity is assisting the Minister of the department in his or her leadership campaign. The pursuit of the leadership of the Liberal Party is, as I have indicated above, a private interest and it is obviously a democratic right for the lobbyist, as an individual, to assist the Minister. We are thus dealing with two separate legitimate activities neither one of which, taken by themselves, "would constitute an improper influence" on the Minister.

Does the fact, however, that both activities are being pursued at the same time raise the question of "improper influence"?

What constitutes "improper influence" is an expression which has not received a great deal of judicial consideration in Canada. One decision did define the expression. This is a 1943 decision on a collective bargaining dispute from the Ontario Supreme Court (*Lakeshore Workmen's Council v. Lakeshore Mines Ltd.*, [1943] O.J. no. 266). The tribunal stated that:

What is "improper influence" is a question of fact in each particular case, but whatever the acts or attitude which it is alleged in any particular case constitute improper influence, they must, in order to be thus designated, be such that either individually or collectively, they interfered with the decision, judgment or action of the members of the bargaining agency, either to the prejudice of those members, or those whom they represent, or

at least to the extent that the members of the agency are embarrassed in making the decisions, or taking action. [emphasis added]

In the United States, *Black's Law Dictionary*, Fifth Edition, 1979 defines 'improper influence' as equivalent to 'undue influence'. This in turn is defined in the following fashion:

"Any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely. Influence which deprives person influenced of free agency or destroys freedom of his will and renders it more the will of another than his own. Misuse of position of confidence or taking advantage of a person's weakness, infirmity, or distress to change improperly that person's actions or decisions."

The Seventh Edition, 1999, more succinctly, again equates 'improper influence' to 'undue influence' and defines the phrase as the "improper use of power or trust in a way that deprives a person of free will and substitutes another's objective."

These set a very high, but fair, standard for determining whether a lobbyist has put a public office holder in a conflict of interest by "proposing or undertaking any action that would constitute an improper influence" on this individual. This standard must be set high to avoid allegations being made that a lobbyist has breached the *Lobbyists' Code of Conduct* simply by virtue of carrying out a legitimate lobbying activity in a normal professional fashion.

My conclusion is that it is not reasonable to believe that a lobbyist has exercised an improper influence on a Minister, placing him or her in a conflict of interest, merely because the lobbyist was assisting the Minister in a leadership campaign at the same time that the lobbyist was lobbying the Minister's department on behalf of a client. More broadly, I conclude that the mere fact that these two legitimate activities are being pursued by a lobbyist does not, in and of itself, breach the *Lobbyists' Code of Conduct*.

To deal with any allegations that have already been made, or may be in future, that Rule 8 has been breached, the Office of the Ethics Counsellor takes the position that what constitutes an improper influence on a public office holder is a question of fact in each particular case. Factors to be considered in assessing whether a lobbyist has proposed or undertaken any action that would constitute an improper influence on a public office holder include but are not limited to:

- whether there has been interference with the decision, judgment or action of the public office holder;
- whether there has been a wrongful constraint whereby the will of the public office holder was overpowered and whether the public office holder was induced to do or forbear an act which he or she would not do if left to act freely; and

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