emocracy Watch
émocratie en surveillance

1 Nicholas St., Suite 1510, P.O. Box 821, Stn. B, Ottawa K1P 5P9
Tel: 613-241-5179 Fax: 613-241-4758
Email: info@democracywatch.ca Internet: http://democracywatch.ca

Karen Shepherd, Commissioner
Office of the Commissioner of Lobbying of Canada
255 Albert Street
10th Floor
Ottawa, Ontario K1A 0H2
Tel: 613-957-2760
Fax: 613-957-3078
Email: QuestionsLobbying@ocl-cal.gc.ca

March 1, 2017

RE: Request for investigation and ruling on fundraising event held by Clearwater Seafoods board member in August 2014 for Liberal Party of Canada and Justin Trudeau, and request that you recuse yourself from investigations and rulings on situations involving the Trudeau Cabinet

Dear Commissioner Shepherd,

I am writing on behalf of Democracy Watch to request an investigation and ruling on an August 25, 2014 fundraising event for the Liberal Party of Canada hosted by Clearwater Seafoods co-founder and board member (and, according to media reports, possible major shareholder) Mickey MacDonald at his home, and attended by Justin Trudeau.

The details concerning why Democracy Watch's position is that this event causes a violation of Rule 9 of the *Lobbyists' Code of Conduct* are set out in the rest of this letter. First, however, Democracy Watch requests that you recuse yourself from investigating this and the other two complaints it filed with you on October 25, 2016 and November 4, 2016 concerning fundraising events involving Apotex chairman Barry Sherman. This request is being made because you received a contract in mid-December from the Trudeau Cabinet worth approximately $90,000 as you were reappointed under subsection 4.1(4) of the *Lobbying Act* in an interim position for six months (as was done last July).

Even though you have announced publicly that you are not seeking to be reappointed to another seven-year term, this contract causes at least the appearance of a conflict of

interest for you, a reasonable apprehension of bias. This is caused by the fact that: the contract was given to you by the Cabinet as a sole-source contract; the contract could be renewed by Cabinet so you are essentially serving at the pleasure of the Cabinet, and; while the opposition party leaders may have been consulted on your interim reappointment, there is no requirement in the *Lobbying Act* that they be consulted and so your reappointment was entirely at the legal discretion of, and controlled by, the Cabinet.

As a result of your conflict of interest, Democracy Watch requests that you recuse yourself from investigating these situations, and all situations involving the Trudeau Cabinet, and that you refer the investigations to someone who is fully independent of the Cabinet and all federal political parties.

Concerning the details of the event organized by Mr. MacDonald, according to an article in the *Globe and Mail* -- http://www.theglobeandmail.com/news/politics/gin-and-jaguar-set-to-fete-trudeau-on-former-tory-turf/article19787702/ -- a ticket for the event cost $1,000 and 75 to 80 people attended (the *Chronicle Herald* reported the ticket price as $1,200 -- http://thechronicleherald.ca/novascotia/1231741-justin-trudeau-lots-to-do-despite-poll/). In a piece on CTV Halifax news -- https://www.youtube.com/watch?v=LZr0TiZtcvc -- on the day of the event Mr. MacDonald is quoted as saying about the event that "It's a small price to pay right now for the long term benefits that we'll receive."

According to an article in the *Halifax Chronicle Herald* -- http://thechronicleherald.ca/metro/1122291-wealthy-businessman-keeps-to-mom%E2%80%99s-advice -- Mickey MacDonald was a major shareholder of Clearwater as of April 2013. According to that article and a February 2011 *Globe and Mail* article containing several statements from Mr. MacDonald -- http://www.theglobeandmail.com/report-on-business/small-business/sb-money/former-boxer-built-cellphone-empire/article4258903/ -- he was a co-founder of Clearwater along with his brother Colin (who is currently chairman of Clearwater) and John Risley who is also a board member. According to Clearwater's website -- http://www.clearwater.ca/en/home/investor-relations/executive-directors-corporate-governance/corporate-governance.aspx#Directors_ -- Mr. MacDonald is a member of the company's board of directors.

At the time of the event, Clearwater was not registered to lobby the federal government. In May 2015, according to the Registry of Lobbyists (which, due to loopholes in the *Lobbying Act*, does not include all lobbying activities), Clearwater hired consultant lobbyists Phil von Finckenstein and Gordon Quaiatinni of Maple Leaf Strategies to lobby several federal government institutions including the Prime Minister's Office, and their registrations continue until today. In May 2016, another Maple Leaf Strategies consultant lobbyists registered to lobby the Prime Minister's Office on behalf of Clearwater, Kellie Major.

As you set out in your guidance document on Rule 9 of the *Lobbyists' Code of Conduct* (the "*Code*") at: https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01182.html anyone

assisting with such events is prohibited from lobbying any federal politician or other public office holder involved in or affected by the event (or their staff) for the five-year period after the event.

While Rule 9 came into effect in December 2015, in a public guidance document on Rule 8 you published in 2009 at: https://lobbycanada.gc.ca/eic/site/012.nsf/eng/00150.html, and in a clarification document you published later at: https://lobbycanada.gc.ca/eic/site/012.nsf/eng/00151.html, and in an updated guidance document on Rule 8 you published on June 25, 2015 at: https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01114.html, and in a reminder to lobbyists about Rule 8 and political activities you published on June 25, 2015 at: https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01115.html, you made it clear that lobbyists assisting a party, candidate or politician with campaigning or fundraising violate Rule 8 by creating an apparent conflict of interest for the politician that continues into the future (and in June 2015 you clarified that by "future" you meant for five years). Therefore, anyone who assists with campaigning or fundraising cannot be involved, and their organization cannot be involved, in lobbying the politicians involved in the campaign or fundraising initiatives for the following five years.

Subsection 10.4(1) of the *Lobbying Act* states:
"Investigation
10.4 (1) The Commissioner shall conduct an investigation if he or she has reason to believe, including on the basis of information received from a member of the Senate or the House of Commons, that an investigation is necessary to ensure compliance with the Code or this Act, as applicable."

The "Code" referred to in that subsection is the federal *Lobbyists' Code of Conduct*. The subsection requires you to investigate if you have reason to believe that an investigation is necessary to ensure compliance with the *Code* (or *Act*). This wording makes it clear that you do not need evidence of a violation – that your investigations are also required when a situation simply raises questions concerning compliance with the *Code* and the investigation is required to ensure compliance with the *Code* (or *Act*). In other words, you are required to investigate when you have a reasonable belief that an investigation will prevent a violation by ensuring compliance.

Your own "Guiding principles and criteria for recommending compliance measures" document states:

> "It is the role of the Office of the Commissioner of Lobbying (OCL) to support this mandate by conducting administrative reviews of suspected, alleged, or known contraventions of the Act and Code, recommending appropriate enforcement measures and, where the Commissioner deems necessary, conducting formal investigations under subsection 10.4 of the Act."

All that is needed is a suspected violation to trigger an administrative review and, it is Democracy Watch's position, subsection 10.4(1) of the *Act* also requires an investigation of all suspected violations that raise questions concerning compliance.

The Federal Court of Appeal unanimously ruled on March 12, 2009 in the case *Democracy Watch v. Barry Campbell, the Attorney General of Canada and the Office of the Registrar of Lobbyists*:

> "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 lobbying and illegitimate lobbying has been crossed. The conduct proscribed by Rule 8 is the cultivation of such a sense of personal obligation, or the creation of such private interests." (para. 53)

That case concerned a lobbyist, Barry Campbell, who organized a fundraising event for a minister that he was registered to lobby, and was actively lobbying, around the same time as the event. The Federal Court of Appeal ruling makes it clear that lobbying and fundraising around the same time violates Rule 8 (now Rule 6) of the federal *Lobbyists' Code of Conduct*.

Rule 6 of the *Lobbyists' Code of Conduct* states:

> "A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest."

While the wording of Rule 6 is different than Rule 8, as you set out in your guidance statement on Rule 6 at: https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01180.html the standard is the same as the Federal Court Appeal set out in its ruling – lobbyists are not allowed to put any public office holder in even the appearance of a conflict of interest.

Buying a ticket to a political party's fundraising event is the same as making a donation to the party as allowed under the *Canada Elections Act*. However, organizing an event, including hosting an event, does a greater favour for the politician or candidate who is the featured guest at the event – the star attraction and the reason why many people would attend such an event. The *Act*'s definition of public office holder includes ministers, parliamentary secretaries and MPs, and the prohibition set out in Rule 9 of the *Code* covers assisting a candidate who later becomes an MP or other type of public office holder.

It is true that the event that was at issue in the 2009 Federal Court of Appeal's ruling was a fundraising event for the minister's riding association, not for the minister's political party. It would be unreasonable and legally incorrect for you to distinguish a fundraising event for the political party from a riding association event because money raised for political party can as directly assist the minister or parliamentary secretary or MP as money raised for a riding association. Parties and their riding associations often transfer funds between each other; the events and promotional activities that each party undertakes in between elections assists with the profile of each minister and candidate, and; the national election campaign run by each party assists every candidate with their re-election campaign.

It is also true that Barry Campbell, the lobbyist at issue in the 2009 Federal Court of Appeal's ruling was a consultant lobbyist, not a board member of a company or organization that lobbies the federal government, and that Mr. Campbell was personally doing the lobbying. Again, however, it would be unreasonable and legally incorrect for you to treat differently a person who is directly and significantly associated with a company or organization and who assists with a fundraising event (or assists with anything else that helps a political party, riding association, candidate, politician or any other public office holder) at the same time or before their company lobbies the politician involved in the event. Doing so would create a technical loophole that would be exploited companies and organizations to undermine entirely the purpose and effect of Rule 6 and Rule 9 of the *Code*, as they would simply have non-registered executives or board members assist with party and politician fundraising or other campaign initiatives, while other company representatives do the lobbying.

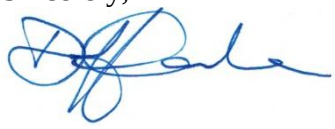
To be legally correct and reasonable, taking into account the purpose of the *Code* and the Principles set out in the *Code* that emphasize integrity and observance of the highest ethical standards to protect the public interest, your position must be that anyone working for or associated with a company that is registered to lobby a public office holder who gives to or does anything for that office holder (or that office holder's political party or riding association) that is more than an average voter does (e.g. an average voter may post a sign on their lawn, or make a donation or vote) puts that office holder in an apparent conflict of interest (and possibly a real conflict of interest depending on the significance of what they give or do). And, therefore, the activities of the person who works for or is associated with the company or organization cause the company or organization to be in violation of Rule 9 of the *Code* if it lobbies the public office holder any time in the next five years.

You have an opportunity to uphold a key measure in a key democratic good government law in a legally correct manner. We hope you will do so.

Democracy Watch looks forward to hearing from you soon concerning what process will be used to investigate and rule on the complaint.

Please let us know if you need any more information to act on this request – Democracy Watch is happy to provide further details.

Sincerely,



Duff Conacher, Co-founder of Democracy Watch
on behalf of the Board of Directors of Democracy Watch