



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

Nancy Bélanger, 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

April 25, 2017

RE: Request for investigation and ruling on the lobbying activities of Facebook Canada by provincial commissioner (but not by you given reasonable apprehension of bias due to your appointment process)

Dear Commissioner Bélanger:

I am writing on behalf of Democracy Watch to request an investigation and ruling on Facebook Canada's lobbying activities, and whether anyone's actions violate the *Lobbying Act* (the "Act") and/or Rules 6, 10 and 8 of the *Lobbyists' Code of Conduct* (the "Code").

The details concerning why Democracy Watch's position is that some of the actions of Facebook Canada's employees and lobbyists seem to be a violation of provisions in the *Act* and/or rules in the *Code* are set out in the rest of this letter.

And while Facebook Canada has announced that it will now register in the Registry of Lobbyists, as you can see reported in this article:
<https://www.theglobeandmail.com/politics/article-facebook-agrees-to-join-federal-lobbyist-registry/>

an investigation is still warranted of whether its past lobbying and other actions may have violated the *Act* or the *Code*.

A. Request for your recusal from investigation and ruling

First, however, Democracy Watch again requests, as it did in its letter of January 25, 2018, and in its letter of April 20, 2018, that you recuse yourself from decisions concerning the enforcement of the *Act* and *Code* for any situations involving the Trudeau Cabinet or Liberals, including decisions concerning the other four complaints that Democracy Watch has filed with your office (all of which are about situations involving the Trudeau Cabinet or Liberal MPs) and any future similar complaints that Democracy Watch may file.

Democracy Watch requests that you recuse yourself from making any decisions about any investigations or rulings on situations involving the Trudeau Cabinet or Liberals because you were nominated by Prime Minister Trudeau to the position of Lobbying Commissioner, as set out at:

<https://pm.gc.ca/eng/news/2017/11/30/prime-minister-nominates-next-commissioner-lobbying>

after a process that was controlled by the Prime Minister's Office (PMO) and Cabinet and involved officials from the PMO and the office of Treasury Board Minister Scott Brison who is responsible for the *Lobbying Act*, as detailed in this Democracy Watch news release:

<http://democracywatch.ca/headhunting-firms-confirm-pmo-and-cabinet-staff-on-watchdog-selection-committees/>

and in this news article:

<https://ipolitics.ca/2017/12/06/lobbying-commissioner-nominee-applied-watchdog-post-not-one-got/>

As a result, there exists a reasonable apprehension of bias on your part when you play any role in investigating or ruling on situations involving Liberals.

To allow the investigations into these situations to continue, Democracy Watch again requests that you delegate the investigations and rulings on the situations to a provincial ethics/integrity/lobbying commissioner who is not in any way under the control of, or connected to, you or the Trudeau Cabinet or any of the federal political parties.

Under section 4.4 of the *Lobbying Act*, you can delegate to anyone outside the investigation of, and rulings on, Democracy Watch's complaints. I realize that subsection 4.4(b) states that you are prohibited from delegating the preparation and tabling in Parliament of the report on an investigation as set out in subsection 10.5(1). However, Democracy Watch requests that you accept whatever conclusions are reached by the independent person to whom you delegate the investigation and ruling on each complaint.

B. Threshold for investigation of alleged violation of Act or Code

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 or that your investigation will discover a violation.

Your own “Guiding principles and criteria for recommending compliance measures” document at:

<https://lobbycanada.gc.ca/eic/site/012.nsf/eng/00519.html> 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 situations that raise questions concerning compliance, in order to ensure compliance with the *Act* and the *Code*.

C. Reasons for investigation and ruling on Facebook Canada’s lobbying activities

1. Possible violations of the *Lobbying Act*

(a) Failure to register as a company in the Registry of Lobbyists

This *Maclean’s* magazine article summarizes several interactions between Facebook Canada’s employees and federal government officials:

<http://www.macleans.ca/politics/ottawa/what-facebook-is-not-doing-in-ottawa/>

The question to be investigated is whether Facebook Canada's employees have, collectively, spent more than 20% of their time lobbying in any six-month period. Kevin Chan, Global Director and Head of Public Policy at Facebook Canada, is quoted in the *Macleans*'s article stating that he and other employees have never come close to spending more than 20% of their collective time lobbying the federal government.

The 20% figure is a reference to the "significant duties" threshold for registration by an in-house lobbyist (corporation or organization) in the Registry of Lobbyists which is set out clause 7(1)(b) of the *Act*.

In investigating this situation, it is important to note, as you can see in the fourth paragraph of the Lobbying Commissioner's interpretation bulletin entitled "A Significant Part of Duties ("The 20% Rule")" at:

<https://lobbycanada.gc.ca/eic/site/012.nsf/eng/00115.html>

that the calculation of whether the employees have spent 20% of their time lobbying over a 6-month period includes "the time spent preparing for communicating (researching, drafting, planning, compiling, travelling, etc.) and actually communicating with public office holders."

Given that Facebook Canada is a wholly-owned subsidiary of Facebook Inc., Democracy Watch's position is that they should be considered to be the same company for the purposes of the *Lobbying Act* and, therefore, that the 20% calculation for Facebook Canada should include time spent by any Facebook Inc. employees either preparing for communicating or actually communicating with federal government public office holders.

As well, since spring 2012, Instagram has been wholly owned by Facebook, and while it is a separate online service it is not a separate company. As a result any lobbying of the federal government by Facebook Canada employees concerning Instagram should also be counted as Facebook Canada lobbying in the 20% calculation (See details below under (ii)).

Finally, of course if Facebook's lobbying activities have crossed the 20% threshold in the past, it would not only be in violation of the requirement to register in the Registry of Lobbyists under the *Act*, it would also be in violation of the requirement in regulation SOR 2008-116 to disclose monthly communications with public office holders.

These are the questions that need to be investigated to ensure compliance with the *Act*.

(b) Inaccurate or incomplete consultant lobbyist registrations in the Registry of Lobbyists?

Also according to the *Maclean's* magazine article linked above in subsection (a), which I have verified by searching the Registry of Lobbyists, Facebook Canada has had several consultant lobbyists registered for it at one time or another from 2010 up to today, as follows:

- From Crestview Strategy: Ginny Movat; Stephen Hampton; Chad Rogers; Joanna Carey; Adam Bolek; Michael Sung; Morgan Hayduk; Alex Chreston; Jason Clark; Sarina Rehal, and; Mackenzie Bartlett;
- From AA Access Partnership Limited: Gregory Francis; Matthew Allison, and; Michael Laughton;
- From Baker & McKenzie LLP: Gary Sprague; Kevin Bendemire, and; Randall Schwartz, and;
- From Heenan Blaikie LLP: Erin O'Toole.

Of the above listed consultant lobbyists, the following currently have active registrations for Facebook:

- From AA Access Partnership Limited: Gregory Francis; Matthew Allison, and; Michael Laughton, and;
- From Crestview Strategy: Chad Rogers; Joanna Carey, and; Jason Clark.

As well, the following seven consultant lobbyists from Crestview Strategy have been registered in the Registry of Lobbyists for Instagram, which again is wholly owned by Facebook and does not operate as a separate company, at one time or another since March 2014: Ginny Movat; Stephen Hampton; Chad Rogers; Adam Bolek; Michael Sung; Morgan Hayduk; Sarina Rehal.

Of these people, the following have an active registration currently as a consultant lobbyist for Instagram: Chad Rogers and Sarina Rehal.

Under subsection 5(1) of the *Act*, consultant lobbyists are required to register in the Registry of Lobbyists if they (a) communicate with public office holders "in respect of" various policy, program, financial or contract matters or (b) arrange a meeting between a public office holder and any other person.

According to a search I conducted of the Registry of Lobbyists, only one of Facebook's consultant lobbyists have registered a monthly communication report since June 4, 2014, namely Gregory Francis on March 14, 2017, as you can see in his report at:

<https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/cmmLgPblcVw?comlogId=398159>

According to section 6 of the SOR 2008-116 regulation under the *Act* concerning communication reports, which you can see at:

<http://laws.justice.gc.ca/eng/regulations/SOR-2008-116/index.html>

only oral, pre-arranged communications with public office holders are required to be disclosed in the monthly communications reports if they are initiated by the lobbyist and are in respect of any of the matters listed under 5(1)(a) of the *Act*, and if they are initiated by the public office holder and concern any of the matters listed in 5(1)(a)(v) or (vi) of the *Act* (i.e. financial or contract matters).

If Facebook's and Instagram's consultant lobbyists have not had any registrable monthly communications with public office holders for the past four years (except for the one noted above), then what are they doing? They are not required to be registered unless they are communicating with public office holders in respect of matters listed under 5(1)(a) of the *Act* or arranging meetings for others with public office holders. As a result, they must be either communicating in a way that does not require disclosure in a monthly communication report (i.e. communications which are not oral or pre-arranged in respect of the matters listed under 5(1)(a)) and/or they must be arranging meetings.

Kevin Chan is quoted in the *Macleans*' article linked above saying, concerning these consultant lobbyists, that they "do not talk to government on our behalf."

Therefore, these people must all be only arranging meetings with public office holders. This does not seem probable and raises the question of whether their registrations and monthly communication reports are accurate. It also raises the question, if they are actually only arranging meetings, of whether some of their communications in arranging meetings have been oral and pre-arranged and addressed matters listed under 5(1)(a) of the *Act* and should have been disclosed in a monthly communication report.

This raises a question that ties back to the issue addressed above in subsection (a) – If Facebook and Instagram currently have seven consultant lobbyists who only arrange meetings (presumably for Facebook employees), and have generally had consultant lobbyists only arranging meetings back to 2010, is it likely that Facebook employees have never crossed the 20% threshold during any six-month period since 2010?

This is the question that needs to be investigated to ensure compliance with the *Act*: Have the registrations and monthly communication reports of Facebook and Instagram's consultant lobbyists been accurate since 2010, as required under section 5 and 14(1) of the *Act*, and regulation SOR-2008-116 under the *Act*?

2. Possible violations of the *Lobbyists' Code*

(a) Possible violations of Principles of the *Lobbyists' Code*

The Professionalism principle in the *Lobbyists' Code* requires that lobbyists follow the spirit of the registration requirements of the *Lobbying Act*, and the Integrity and Honesty principle requires that lobbyists "conduct with integrity and honesty all relations with public office holders."

The information set out above in section 1 raises questions whether Facebook has complied with these two principles, which are enforceable parts of the *Lobbyists' Code*.

The information set out below in subsection (b) raises questions of whether Facebook has complied with the Integrity and Honesty principle

(b) Possible violations of Rules 6, 10 and 8 of the *Lobbyists' Code*

- (i) Favours and benefits offered and given to Cabinet ministers and politicians

During the hearing on Thursday, April 19, 2018 of the House of Commons Standing Committee on Access, Privacy and Ethics, the ParlVu video of which you can see at: <http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/meeting-100/notice>

(NOTE: the transcript was not available as of today)

Kevin Chan stated at the 8:57-8:58 am point in his testimony that Facebook Canada is offering “cyber-hygiene” training for all federal political parties, as well as a “cyber-threats email line” for federal politicians and political parties that “is a direct pipe into our security team at Facebook, and will help fast-track responses for compromised pages or accounts.”

You can see these services that Facebook Canada is offering to federal politicians and political parties also summarized at:

<http://facebookcanadianelectionintegrityinitiative.com/>

You can see a CTV news article and TV news piece about the announcement event that organized to launch these Facebook Canada services in October 2017, along with a video about the event (an event at which Kevin Chan was the moderator, and a speaker, who also introduced federal Minister of Democratic Institutions Karina Gould who spoke at the event), at:

<https://www.ctvnews.ca/politics/facebook-canada-debuts-new-email-crisis-line-to-thwart-election-cyberthreats-1.3640410>

In addition, at the 9:59 am mark of the ParlVu video linked above, Kevin Chan stated that he personally responded to a request from Finance Minister Bill Morneau met with him and gave him free advice about how to communicate his budget through a Facebook Live event. You can see more details concerning this meeting, and the favour that Mr. Chan did for Minister Morneau, in the *Globe and Mail* article at:

<https://www.theglobeandmail.com/politics/article-facebook-executive-with-liberal-ties-denies-lobbying-finance-minister/>

- (ii) The application of the *Lobbyists' Code* to everyone involved in Facebook's lobbying efforts

Section 10.3 of the *Lobbying Act* states that all registered consultant lobbyists, and all employees of organizations or corporations who are listed in a registration, are required to comply with the *Lobbyists' Code*.

Democracy Watch is filing this part of its complaint directly about possible violations of the *Lobbyists' Code* concerning the consultant lobbyists who are registered for Facebook and Instagram named above in subsection 1(b). This part of its complaint also applies directly to the employees of Facebook if their past actions required them to be registered in the Registry of Lobbyists – and in any case it applies to them indirectly because of their direct connection to Facebook's lobbying efforts.

Whether registered or not, Kevin Chan and other Facebook employees have lobbied for Facebook, and were legally connected to their organizations in a direct and significant manner when they did so, and Facebook and Instagram were registered to lobby the federal government at the time of their activities in question.

As a result of the legal, direct and significant connection between Facebook and Instagram Kevin Chan and any other employees involved in lobbying and other government relations activities including the favours and benefits provided to a Cabinet minister and other federal politicians summarized above in (i), what they did was essentially done by Facebook and Instagram.

As detailed below in subsection (iii), Democracy Watch's position is that the favour to Cabinet Minister Bill Morneau, and the favours/benefits offered to federal politicians under the Canadian Election Integrity Initiative, violate rules 6 and 10 of the *Lobbyists' Code*.

Democracy Watch's position is also that, by allowing Kevin Chan and possibly other Facebook employees to provide these benefits and favours to federal public office holders, Facebook's consultant lobbyists violated the Professionalism principle that requires that they "observe the highest professional and ethical standards" and "conform fully with the letter and the spirit of the *Lobbyists' Code of Conduct* as well as with all relevant laws, including the *Lobbying Act* and its regulations."

These consultant lobbyists violated this principle because they allowed people in the organization they lobby for to give favours/benefits that violate both the letter (rules 6 and 10) and the spirit of the *Code*.

In addition, Facebook's consultant lobbyists have also likely violated Rule 8 of the *Code* by continuing to lobby federal public office holders after Kevin Chan and Facebook have offered favours/benefits to them. Rule 8 states that a

lobbyist shall not lobby someone “with whom they share a relationship that could reasonably be seen to create a sense of obligation.”

Kevin Chan’s actions, and the benefits/favours Facebook has offered to all federal politicians, created that sense of obligation/appearance of a conflict of interest that conflicts out everyone representing Facebook in its lobbying efforts at the federal government level.

(iii) The specific application of Rules 6 and 10 to the Facebook situation

As Rule 8 of the *Lobbyists’ Code* did previously, since December 2015 current Rules 6-10 of the *Lobbyists’ Code*, which can be viewed at:

<https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01192.html>

prohibit lobbyists from doing anything for, or providing any gifts, benefits to, people they are lobbying, and if they do any of these things from lobbying the person they helped or gifted.

It is important to note, as you do in your guidance documents at:

https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00015.html

that past Rule 8, and current Rules 6-10, of the *Lobbyists’ Code* must be interpreted based on the standard set out in the unanimous Federal Court of Appeal (FCA) 2009 ruling in the case of *Democracy Watch v. Campbell* (2009 FCA 79, [2010] 2 F.C.R. 139) in which the court considered the meaning of Rule 8.

A key point of that ruling is that the court was considering a situation of a lobbyist who was registered to lobby a public office holder’s department – there was no evidence before the court that the lobbyist had actually lobbied the public office holder personally. The court did not limit its ruling in any way to a situation in which the lobbyist is lobbying the public office holder directly.

A second key point is that the FCA ruled that all the person’s action has to do is create a “sense of personal obligation” or “some other private interest” on the part of the public office holder (para. 53). A related third key point is that the court ruled that Rule 8 (now Rule 6) prohibits a person from doing anything that places the office holder in even the appearance of a conflict of interest (para. 48).

Democracy Watch’s position is that the legally correct application of Rules 6-10 is that if a person assists or does a favour for or gives a gift to (as defined in your guidance documents) a politician or other public office holder that creates a “sense of personal obligation” (or “some other private interest”), that person cannot be involved, and their organization cannot be involved, in lobbying the politician or their staff or anyone who is a proxy for their staff (i.e. any political staff or department officials who would report about the lobbying to the public office holder or their staff).

If you do not interpret “public office holder” and “staff in their office(s)” in this way, you will create a huge loophole in the *Lobbyists Code* that will allow a person who does something that helps an existing Cabinet minister to lobby that minister through a front person for the minister.

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.”

Rule 6 came into effect in December 2015, and the guidance document you issued for the rule:

<https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01180.html>

also cites the Federal Court of Appeal’s unanimous 2009 ruling. While the wording of Rule 6 is different than Rule 8, as you set out in your guidance statement the standard is the same as the Federal Court Appeal set out in its 2009 ruling – lobbyists are not allowed to put any public office holder in even the appearance of a conflict of interest.

Democracy Watch’s position is that it is clear Kevin Chan’s favour for Finance Minister Bill Morneau of providing free advice to him about how to hold a Facebook Live event for the launch of the federal government’s budget, and the favour/benefit offered by Facebook of free training and a free special hotline for federal politicians, both cross the line set out in Rule 6 and create an appearance of a conflict of interest for Minister Morneau and any federal politician who accepts the offer of free training and uses the hotline.

Rule 10 of the *Lobbyists’ Code* states:

“Gifts

To avoid the creation of a sense of obligation, a lobbyist shall not provide or promise a gift, favour, or other benefit to a public office holder, whom they are lobbying or will lobby, which the public office holder is not allowed to accept.”

And in the annotated version of the *Code* at:

<https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01192.html>

set out under Rule 10 it says that you define “gift” to include “anything of value, given for free or at a reduced rate, when there is no obligation to repay.”

Kevin Chan’s advice to Minister Morneau was given for free, as are Facebook’s cyber-threat training and hotline for federal politicians. Unless Kevin Chan can show that he gives anyone who asks free advice on how to do a Facebook Live event for their announcement, the gift was a favour. The training and hotline are only being offered to federal politicians, so they are clearly a favour.

As a result, Democracy Watch’s position is that they both clearly violate Rule 10.

Again, therefore, Facebook’s registered consultant lobbyists have violated the Professionalism principle in the *Code* by allowing Kevin Chan and Facebook to

do these favours for a Cabinet minister and federal politicians. And if Facebook was required to be registered during the time these favours were offered, then the senior officer has violated the Professionalism rule in the *Code* by allowing these favours to be given and the employees violated the specific rules. And if any of these people lobbied anyone who was given the favours, they have also violated Rule 8 of the *Code*.

D. Conclusion

If you do not adopt the interpretations set out above, you will make Rules 6-10 of the *Lobbyists' Code* a meaningless charade that will not prevent conflicts of interest (real or apparent), and you will directly undermine and defy the standard set out in the Federal Court of Appeal unanimous 2009 ruling. Corporations and organizations will simply arrange to have non-registered people give things to or do things for people they are lobbying as a means of unethical influence that violates the spirit, and rules, in the *Lobbyists' Code*.

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, in particular your decision concerning recusing yourself.

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