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Second Submission to the Commissioner of Lobbying's Consultation on Changes to the *Lobbyists' Code of Conduct*

(February 2022)

NOTE: Click here to download the first submission made in December 2020.

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A. Summary – Loopholes and Commissioner's Weak Enforcement Causing Most Problems with *Lobbyists' Code*

1. Loopholes mean *Code* only applies to some lobbying, and unethical lobbying by every lobbyist is allowed

A few key problems have been revealed in the version of the *Lobbyists' Code of Conduct* (the "*Code*")[1] that has been in place since December 1, 2015. However, most of the problems are created by key loopholes in the ethics rules for public office holders that create loopholes in the application of the conflict of interest section of the *Code*, and by the huge loopholes in *Lobbying Act*[2] that allow for secret, unregistered lobbying and, as a result, also unethical lobbying as the *Code* does not apply to unregistered lobbying.

The biggest loopholes in the *Act* are that:

a) unpaid lobbying;
b) lobbying concerning the enforcement of a rule;
c) lobbying as an employee of a business less than 20 percent of one's work time, and;
d) arranging meetings for other people with public office holders while working as an employee of a business or other organization

are all not required to be registered as lobbying, and also that;

e) registered lobbyists are only required to disclose communications that are oral and pre-arranged and (with one exception for communications concerning financial benefits) initiated by the lobbyist.

and these loopholes should all be closed so that the only non-registrable lobbying activity would be a person signing a mass email letter that an individual or organization sets up (as the individual or organization would be required to register the letter-writing effort).

Because of these loopholes, the *Code* really should be called the "*Some Lobbyists' Code of Conduct*" as the *Code* does not apply to many people who are lobbying the federal government.

As well, the *Code* does not apply to some registered lobbyists' unethical lobbying tactics. Most especially, the *Code*'s Rule 10 does not prohibit lobbyists from giving the unethical gift of unlimited travel (known as "sponsored travel") to MPs and senators (and their families and associates) whom they are lobbying[3]

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[1] See the *Lobbyists' Code of Conduct* at: https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/lobbyists-code-of-conduct/.
[2] *Lobbying Act* (R.S.C., 1985, c. 44 (4th Supp.)). See it at: https://laws-lois.justice.gc.ca/eng/acts/l-12.4/.
[3] See details in the Commissioner's April 2019 report *Sponsored travel provided by lobbyists*, at: https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/sponsored-travel-provided-by-lobbyists/.

because the MP and senator codes explicitly allow them to receive the gift of sponsored travel, no matter how unethical the gift is. **See below in subsection B.3(f)** for details re: Rule 10.

2. Commissioner's weak, secretive enforcement ignores clear violations

The other problems with the *Code* have, very unfortunately, been created by negligent and legally incorrect enforcement by new Commissioner of Lobbying Nancy Bélanger.

This continues a long pattern – the former Ethics Counsellor, who enforced the *Code* from 1997 to 2004, and the Registrar of Lobbyists who enforced the *Code* from 2004 to 2008, both enforced the *Code* in a "deeply flawed" manner, according to a unanimous 2009 ruling by the Federal Court of Appeal,[4] and their enforcement of the *Act* was also very weak and secretive.

The first Commissioner of Lobbying, Karen Shepherd, continued this negligent enforcement. Overall, from April 1, 2005 to March 31, 2017, the Registrar and Commissioner:

a) reviewed only 210 situations (only approximately 17 situations per year);
b) found only 90 lobbyists in violation of the *Lobbying Act* and/or *Lobbyists' Code*;
c) did not issue a public ruling identifying 80 of those 90 lobbyists (89%) even though they violated the *Act* or the *Code*, and the RCMP prosecuted only 4 lobbyists (from 1988 up to March 31, 2017);
d) took on average 3 years or more to issue a ruling on 59 (28%) of the 210 situations;
e) stopped reviewing 8 situations due to delays in completing the review.

New Commissioner of Lobbying Bélanger has continued this negligent enforcement since she took office on December 30, 2017, although she is trying to hide just how negligent her enforcement record is. Commissioner Bélanger's office deleted from the Commissioner's website the *Compliance Statistics* webpage first published by former Commissioner of Lobbying Karen Shepherd in 2012 after the House of Commons Standing Committee on Access to Information, Privacy and Ethics requested that she disclose the statistics.

As a result, while the *Compliance Statistics* webpage is thankfully still available from the Internet archive website https://web.archive.org at:
https://web.archive.org/web/20191213112605/https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00831.html
it has not been updated since the end of the 2016-2017 fiscal year in March 2017.

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[4] *Democracy Watch v. Campbell*, 2009 FCA 79 (CanLII), [2010] 2 FCR 139, <http://canlii.ca/t/22vcj>, at para. 48.

In her four Annual Reports since taking office, for fiscal year 2017-2018 at: https://lobbycanada.gc.ca/en/reports-and-publications/annual-report-2017-18/ and for fiscal year 2018-2019 at: https://lobbycanada.gc.ca/en/reports-and-publications/annual-report-2018-19/ and fiscal year 2019-2020 at: https://lobbycanada.gc.ca/en/reports-and-publications/annual-report-2019-20/ and fiscal year 2020-2021 at: https://lobbycanada.gc.ca/en/reports-and-publications/annual-report-2020-21/ Commissioner Bélanger has failed to disclose several key details on completed investigations that were provided on the *Compliance Statistics* webpage by former Commissioner Shepherd up to March 31, 2017.

In the Compliance and Enforcement section for fiscal year 2017-2018 and the Investigations section for fiscal year 2018-2019 and the Ensuring compliance section for fiscal year 2019-2020 and the Ensuring compliance section for fiscal year 2020-2021, **Commissioner Bélanger's four Annual Reports do not disclose the following key information that was disclosed by former Commissioner Shepherd:**

a) what the alleged violation was in each case reviewed or investigated;
b) when each investigation began;
c) when each investigation concluded;
d) the reason why specifically any investigation that was ceased was stopped, and;
e) the sanction applied to each lobbyist who violated the *Act* or *Code* for which a public ruling was not issued under subsection 10.5 of the *Lobbying Act*.

As a result of Commissioner Bélanger hiding this information from the public, and from MPs and Senators, it is much more difficult than in the past to determine if the Commissioner is enforcing the *Lobbying Act* and *Lobbyists' Code of Conduct* properly, effectively, and in a timely manner.

All the indications are that Commissioner Bélanger is continuing the weak enforcement record of the former Ethics Counsellor and Registrar by ignoring clear violations and interpreting the *Act* and *Code* in ways that ignore their purpose of ensuring transparent, ethical lobbying so as to let most lobbyists off, usually in secret, instead of holding them accountable for their wrongdoing.

Commissioner Bélanger let the responsible officer and lobbyists at Apotex Inc. off the hook when Apotex's Chairman Barry Sherman passed away even though they had participated in the fundraising event Sherman held for the Liberal Party that Justin Trudeau attended, and also let Clearwater Seafoods Inc. off the hook without even investigating the fundraising event its board member Mickey MacDonald held for the Liberal Party that Justin Trudeau also attended. Both

events clearly violated the *Code*, as did both companies lobbying the Prime Minister's Office after the events.

Also very concerning is that Commissioner Bélanger, in three public rulings on investigations she has issued since becoming Commissioner in January 2018, has ignored the four Principles of the *Code* even though they are clearly enforceable. **See below in subsection B.2** for details.

This clearly means Commissioner Bélanger is also ignoring the Principles when she makes secret rulings letting people off for violating the *Code*.

Also concerning is what has developed with regard to the old, broad conflict of interest rule in the *Code*, Rule 8,[5] which Democracy Watch spent 11 years, from 2000 to 2011, through several court cases and public appeals, attempting to have the then-Registrar of Lobbyists enforce properly. Rule 8 was replaced in the December 1, 2015 new version of the *Code* by Rule 6, with other related Rules 7 to 10.

New Rule 6 has the same broad wording as old Rule 8, encompassing all forms of conflict of interest and prohibiting lobbyists from lobbying any public office holder directly or indirectly if the office holder has any form of a sense of obligation to the lobbyist, as the Federal Court of Appeal unanimously ruled in 2009 on an application filed by Democracy Watch.[6]

However, and while Rules 7-10 are explicitly subsets of Rule 6, Commissioner Bélanger has enforced Rule 6 narrowly in the public rulings she has issued, and enforced Rules 7-10 without reference to Rule 6, or to the Principles of the *Code* or the purpose set out in the Introduction of the *Code*. **See below in subsection B.3(c)** for details.

However, now Commissioner Bélanger is gutting that broad, comprehensive standard by parsing new rules 6-10:

1. As if Rule 6 is not equally broad and comprehensive as old Rule 8;
2. As if the *Code*'s purpose is not what is stated in the *Code* (to ensure all lobbying complies with the highest ethical standards so that it enhances the public's trust and confidence in the integrity of government decision-making), and;
3. As if the Principles of the *Code* did not exist (when, in fact, the *Code* states that the Principles are requirements lobbyists must comply with, and that they are enforceable by the Commissioner).

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[5] See the archived previous version of the *Code* at: https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/lobbyists-code-of-conduct/archived-archived-information-lobbyists-code-of-conduct-1997/.

[6] Also see *Democracy Watch v. Campbell*, 2009 FCA 79 (CanLII), [2010] 2 FCR 139, <http://canlii.ca/t/22vcj>.

Again, this clearly means Commissioner Bélanger is also ignoring the broad meaning and intent of Rule 6, and the Principles and purpose of the *Code*, when she makes secret rulings letting people off for violating Rules 6-9. **See below in subsection B.3(c)** for details re: Rule 6 and on through Rules 7-9.

Overall, Commissioner Bélanger is also ignoring the ethics enforcement approach required by the seminal ruling of the Supreme Court of Canada in *R. v. Hinchey*, [1996] 3 S.C.R. 1128, in which L'Heureux-Dubé, J. writing for the majority, stated: "The need to preserve the appearance of integrity..." requires that statutory provisions be interpreted so as to prohibit actions "...which can potentially compromise that appearance of integrity" (para. 16).

This is all the more concerning given how many secret rulings Commissioner Bélanger is making. As detailed above, Commissioner Bélanger has stopped disclosing key information about those rulings.

3. Require lobbyists to confirm they are complying with rules

Finally, set out below concerning Rules 3 and 4 is the suggestion that a requirement be added to confirm by clicking a box in the Registry of Lobbyists that the lobbyist/responsible officer has complied with the requirement in Rule 4. In addition, another "box" should be added to the Registry that each lobbyist/responsible officer should be required to click confirming that they will comply with every Principle and Rule in the *Code*. As set out below under Rules 3 and 4, this requirement should be added to the Registry to nudge lobbyists/ responsible officers to comply with the *Code*.[7]

B. Needed Changes to the *Lobbyists' Code*

1. Introduction and Preamble of the *Code*

No changes are needed to the Introduction or to the Preamble of the *Code*. However, the Commissioner of Lobbying needs to stop ignoring the purpose of the *Code* set out in the Introduction when ruling on alleged violations of the *Code*. The purpose set out in the Introduction is:

> "The purpose of the Code is to assure the Canadian public that when lobbying of public office holders takes place, it is done ethically and with the highest standards with a view to enhancing public confidence and trust in the integrity of government decision making."

[7] See article on this type of nudging to increase compliance at: https://academic.oup.com/jcr/article/39/5/1070/1794934.

The *Interpretation Act* requires interpreting a legal provision in accordance with its text, context, and purpose, and to give it "…such fair, large, and liberal construction and interpretation as best ensures the attainment of its objects."[8] The Commissioner is, therefore, required to interpret and apply the Principles and Rules of the *Code* in a way that assures the Canadian public that lobbying "is done ethically and with the highest standards with a view to enhancing public confidence and trust in the integrity of government decision making."

The Commissioner is not doing this. For example, in the March 2020 rulings on the lobbying activities of Benjamin Bergen[9] and Dana O'Born,[10] the Commissioner did not even mention the purpose of the *Code* in interpreting how various rules in the *Code* applied to their activities.

2. The Four Principles of the *Code*

Only one change is needed to the four Principles of the *Code*. The "Integrity and Honesty" Principle should be changed back to its previous wording of:

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

This change is needed to ensure that lobbyists act with integrity and honesty in all their relations, not just in their relations with public office holders.

The Commissioner of Lobbying, and the Commissioner's Investigations Directorate, also needs to stop ignoring the four Principles of the *Code* when investigating and ruling on alleged violations of the *Code*.

The Introduction to the *Code* states:

> "Lobbyists, when engaging in lobbying activities, shall meet the standards set out in the principles and rules of the Code."
>
> …
>
> The Commissioner of Lobbying has the authority to enforce the ***Lobbyists' Code of Conduct*** if there is an alleged breach of either a principle or a rule of the Code."

The Preamble to the *Code* states:

> "For their part, lobbyists communicating with public office holders must also abide by standards of conduct, which are set out below."

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[8] *Interpretation* Act (R.S.C., 1985, c. I-21), section 12; *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at paras 41-42.

[9] See ruling at: https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/benjamin-bergen-council-of-canadian-innovators/.

[10] See ruling at: https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/dana-o-born-council-of-canadian-innovators/.

The Principles of the *Code* are set out below the Preamble, along with the Rules. Clearly, lobbyists must abide by both the Principles and the Rules.
As well, the predecessor to the Commissioner, the Registrar of Lobbyists, concluded that the Principles were enforceable, and enforced them, and those rulings were upheld in Federal Court[11] and by the Federal Court of Appeal.[12]

As a result, lobbyists are clearly required to comply with the Principles, and the Commissioner is clearly required to consider and rule on whether a lobbyist has complied with the Principles when ruling on the lobbyist's activities.

Further, the "Professionalism" Principle states that:

> "…lobbyists should 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."

As a result, the "Professionalism" Principle also sets out an interpretation standard that the Commissioner is required to apply when considering allegations of violations of the *Code* or *Act* by a lobbyist. The Commissioner is required to consider whether the lobbyist complied with not only the "letter" but also with the "spirit" of the *Code* and the *Act*.

The Commissioner is neither evaluating alleged violations of the *Code* by lobbyists as including the Principles of the *Code*, nor is the Commissioner applying a standard that requires lobbyists to comply with not only the "letter" but also with the spirit of the *Code* and the *Act*.

For example, in the March 2020 rulings on the lobbying activities of Benjamin Bergen[13] and Dana O'Born,[14] the Commissioner did not even mention the Principles of the *Code*.

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[11] A Principle in the Code was enforced in all four February 2007 rulings by the former Registrar on the activities of Neelam J. Makhija at: https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/. Also see on that page the following rulings in which one or more Principles of the Code were enforced: *The lobbying activities of Bruce Rawson*; *The lobbying activities of Paul Ballard*; *The lobbying activities of Graham Bruce*; *The lobbying activities of Mark Jiles*; *The lobbying activities of GPG-Green Power Generation Corp. and Patrick Glémaud and Rahim Jaffer*; *The lobbying activities of Keith Beardsley*; *The lobbying activities of Julie Couillard*;*The lobbying activities of Trina Morissette*. See also *Makhija v. Canada (Attorney General)*, 2010 FC 141 (CanLII), <http://canlii.ca/t/28112>, at para. 45. Also see *Democracy Watch v. Campbell*, 2009 FCA 79 (CanLII), [2010] 2 FCR 139, <http://canlii.ca/t/22vcj>, at para. 9.

[12] *Makhija v. Canada (Attorney General)*, 2010 FCA 342 (CanLII), <http://canlii.ca/t/2f3ql>.

[13] See ruling at: https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/benjamin-bergen-council-of-canadian-innovators/.

[14] See ruling at: https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/dana-o-born-council-of-canadian-innovators/.

Furthermore, the webpage on the Commissioner's website concerning this consultation makes the inaccurate statement that the *Code*:

> "establishes four principles setting out the broader goals and objectives of the Code."[15]

The four Principles do not only set out broader goals and objectives of the *Code*. They also set out eight requirements that lobbyists are required to comply with, as follows:

1. Act in a manner that demonstrates respect for democratic institutions, including the duty of public office holders to serve the public interest.
2. Conduct with integrity all relations with public office holders;
3. Conduct with honesty all relations with public office holders;
4. Be open about their lobbying activities;
5. Be frank about their lobbying activities;
6. Observe the highest professional standards;
7. Observe the highest ethical standards;
8. Conform fully with the letter and the spirit of the *Code* and all relevant laws, including the *Act*.

Current Commissioner Nancy Bélanger's failure to enforce the Principles is simply negligent. It is particularly negligent given the Registrar of Lobbyists enforced the Principles in the past, and given that in the April 2019 ruling on *Sponsored travel provided by lobbyists*, Commissioner Bélanger stated in the Preface that:

> "The Lobbyists' Code of Conduct establishes the principles and rules of ethical behaviour expected from lobbyists required to register their activities under the *Lobbying Act*."[16]

In stating this, the Commissioner made it clear that the Principles of the *Code* are enforceable standards (although it should be noted that the Commissioner failed to mention any of the four Principles again in that ruling).

Why Commissioner Bélanger decided in the *Bergen* and *O'Born* rulings not to mention the Principles of the *Code* is an open question for the Commissioner to answer. If Commissioner Bélanger, and the Investigations Directorate have been ignoring the Principles of the *Code* since Commissioner Bélanger began her term in office in January 2018, they have been enforcing the *Code* in a clearly legally incorrect and negligent manner throughout her term.

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[15] See the consultation page at: https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/lobbyists-code-of-conduct/consultation-on-future-changes-to-the-lobbyists-code-of-conduct/.

[16] See the ruling at: https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/sponsored-travel-provided-by-lobbyists/.

3. Rules of the *Code*

a) Transparency and honesty section of the *Code*

(i) Rule 1: Require disclosure of relationships with officials

Rule 1 of the *Code* should be changed to add at the end the following additional requirement:

> "A lobbyist, when communicating with a public office holder, shall also inform the office holder of the lobbyist's relationship with any other office holder and/or the lobbyist's political activities on behalf of any other office holder who may be involved or may become involved in the decision-making process the lobbyist is communicating in respect of, if the relationship and/or the political activities could reasonably be seen to create a sense of obligation on the part of the office holder."

Of course, the *Act* should be amended to require public disclosure of such relationships and political activities in the Registry of Lobbyists. However, adding this rule to the *Code* would be helpful until the *Act* is amended in this way.

As well, of course, for the *Code* to effectively address transparency in lobbying, the *Act* must be amended to close the many huge loopholes it contains that allow for secret lobbying (the loopholes are that unpaid lobbying, lobbying concerning the enforcement of a rule, and lobbying as an employee less than 20 percent of one's work time are all not required to be registered as lobbying, and registered lobbyists are only required to disclose communications that are oral, pre-arranged and (with one exception for communications concerning financial benefits) initiated by the lobbyist).

(ii) Rule 2: Require accurate information always

Rule 2 of the *Code* should be changed by adding at the end the second requirement from the previous version of the *Code*:

> "Moreover, lobbyists shall not knowingly mislead anyone and shall use proper care to avoid doing so inadvertently."

This change is needed to ensure that lobbyists act with honesty in all their relations, not just in their relations with public office holders. **See below in subsection C.2** for more details.

(iii) Rule 3: Add requirement to confirm all have been informed

Rule 3 of the *Code* should be changed to add at the end:

> "and shall confirm that the lobbyist has done this by indicating it in the Registry of Lobbyists."

This change is needed, along with a related change to the form in the Registry of Lobbyists to allow lobbyists to click a box confirming that they have informed

each client of their obligations under the *Act* and *Code*, to nudge lobbyists to comply with this rule.[17]

(iv) Rule 4: Add a requirement to confirm that all have been informed

Rule 4 of the *Code* should be changed to add after the word "behalf" the following:

> "(even if their lobbying is not required to be registered in the Registry of Lobbyists)"

to ensure that responsible officers inform all employees who communicate with public office holders in respect of their decisions of the requirements of the *Act* and the *Code*, whether or not their lobbying is registered in the Registry.

Rule 4 of the *Code* should also be changed to add at the end:

> "and shall confirm that the responsible officer has done this by indicating it in the Registry of Lobbyists."

This change is needed, along with a related change to the form in the Registry of Lobbyists to allow responsible officers to click a box confirming that they have informed each employee of their obligations under the *Act* and *Code*, to nudge responsible officers to comply with this rule.[18]

b) Use of information section of the *Code*

(i) Rule 5: Ensure all records are covered, and returned

Rule 5 of the *Code* should be changed by changing the word "document" in the second sentence to "record as defined in the *Access to Information Act*" and by adding at the end:

> "and the lobbyist shall not retain a copy of the record, and shall return the record to the head of the institution that created the record and inform them, and the Information Commissioner of Canada and the Public Sector Integrity Commissioner who provided the record to them."

These changes are needed so that the rule covers all types of records not just documents, and so that the rule has a built-in enforcement mechanism that makes it effectively illegal for the lobbyist to use or disclose the record. Currently the rule establishes an unrealistic standard that relies entirely on the lobbyist's honour not to act in a self-interested way after obtaining a document, likely secretly. Changing the rule to make it illegal for the lobbyist to keep the document secretly adds a much-needed incentive to comply with the rule. **See below in subsection C.1** for more details re: Rule 5.

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[17] See article on this type of nudging to increase compliance at: https://academic.oup.com/jcr/article/39/5/1070/1794934.

[18] See article on this type of nudging to increase compliance at: https://academic.oup.com/jcr/article/39/5/1070/1794934.

c) Conflict of interest section of the *Code*

(i) Rule 6: Interpret properly to cover all apparent conflicts

Rule 6 of the *Code* could be made stronger, but just as important is that it be properly applied even if the wording remains as it is now. While, as the statement drawn from the rulings on the activities of lobbyists Bergen and O'Born and set out on the webpage concerning this consultation on the Commissioner's website claims, there may not be:

> "a need to consider amending the conflict of interest rules to focus exclusively on the specific behaviours of lobbyists without importing the conflict of interest regimes covering public office holders."

it could be helpful to re-word Rule 6 and Rule 10 to make them clearly stronger (see explanation with regard to Rule 10 further below).

Rule 6 could be changed to something like:

> "A lobbyist shall not lobby a public office holder or anyone who reports to the office holder if the lobbyist has proposed or undertaken any action that could be seen to create a sense of obligation on the part of the office holder."

However, essentially Rule 6 already means the same thing as those words, and there is no distinction between the conflict of interest standard that Rule 6 currently establishes and the standards that apply to the most powerful public office holders in the federal government and to all Government of Canada employees. As well, statutory interpretation rules would still require, in applying such a differently worded Rule 6, taking into account the context established by the ethics rules that apply to any office holder concerning what "a sense of obligation" means for the office holder. In other words, there is likely no escaping at least somewhat "importing" the regime that applies to office holders.

As the Preamble to the *Code* states:

> "Public office holders, when they deal with the public and with lobbyists, are required to adhere to 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. These codes complement one another and together contribute to public confidence in the integrity of government decision-making."

Every Government of Canada employee is required by the Government's *Directive on Conflict of Interest*[19] and *Values and Ethics Code for the Public Sector*[20] to avoid an appearance of a conflict of interest.

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[19] See the *Directive* at: https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32627.
[20] See the Public Sector *Code* at: https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25049.

Every federal Cabinet minister, ministerial staff, ministerial adviser, senior government official and almost all Cabinet appointees are prohibited from taking part in decisions, discussions and votes if they are “in a conflict of interest” by section 6 of the *Conflict of Interest Act* (“*CoI Act*”).[21]

The Federal Court of Appeal has ruled unanimously that the phrase "a conflict of interest" means a situation in which a public office holder has "competing loyalties" or "a real or seeming incompatibility between one's private interests and one’s public or fiduciary duties" that "might reasonably be apprehended to give rise to a danger of actually influencing the exercise of a professional duty."[22] As a result, the words “in a conflict of interest” in section 6 of the *CoI Act* encompass an apprehended or apparent conflict of interest.

The regime set out in the *CoI Act* and the broad, comprehensive language used in the operative provisions make clear that it was intended to apply not only to real but also to apparent conflicts of interest. Section 3 of the *CoI Act* articulates among its purposes prevention and avoidance of "conflicts of interest" generally, without any limiting language that would confine it to "real" conflicts of interest.

More expressly, subsection 6(1) of the *CoI Act* applies to decision-making where the “public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest.” [emphasis added]. Similarly, section 5 is directed at prevention of all conflicts of interest without any specification of types of conflict. In addition, subsection 11(1) bans the acceptance of gifts and other advantages “that might reasonably be seen to have been given to influence the public office holder in the exercise of an official power, duty or function.” [emphasis added]

There was a conflict between the old conflict of interest Rule 8 in the *Code* and the provisions in the *CoI Act* because former Conflict of Interest and Ethics Commissioner Mary Dawson took the legally incorrect position that “conflict of interest” only applied to personal financial interests and did not encompass any political or other interests of the office holder.[23] This position was legally incorrect because there is nothing in the *CoI Act* that indicates it only applies to financial interests. New Ethics Commissioner Mario Dion corrected this erroneous interpretation of the *CoI Act* in an August 2019 ruling stating that private interests include “financial, social or political” interests.[24]

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[21] *Conflict of Interest Act* (S.C. 2006, c. 9, s. 2).
[22] *Democracy Watch v. Campbell*, [2010] 2 F.C.R. 139, 2009 FCA 79, para. 49, quoting from *Cox v. College of Optometrists of Ontario* (1988), 65 O.R. (2d) 461 (Div. Ct.).
[23] *The Cheques Report*, pages 14-17. See it at: https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/The%20Cheques%20Report%20-%20Act.pdf.
[24] *Trudeau II Report*, paras. 288-292, pp. 45-46. See it at: https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/Trudeau%20II%20Report.pdf.

While the *COfI Act* contains a huge loophole that means an office holder cannot be in a conflict of interest when dealing with a matter that applies generally to a broad class of persons or organizations, in an important way this loophole does not (or, at least, should not) affect the interpretation and application of Rule 6.

The reason this loophole does not affect the application of Rule 6 to any lobbying situation is because being "in a conflict of interest" does not require any action on the part of a public office holder. If a person, whether or not the person is a registered lobbyist, is communicating with a public office holder in respect of the office holder's current or potential future decisions when the person (or an entity they represent) has a relationship with the office holder that creates a sense of obligation on the part of the office holder, or after they (or an entity they represent) have done something or proposed to do something for the office holder that creates a sense of obligation, then the office holder is in a real or apparent conflict of interest (depending on the extent of the obligation).

As well, to be clear, "communicating with a public office holder" includes communicating with anyone who reports to that office holder. To interpret Rule 6 in a manner that takes into account the purpose of the *Code* of ensuring lobbying complies with the highest ethical standards to enhance public confidence and trust in government integrity, the assumption must be that, when an office holder has an obligation to a person or entity, the person puts the office holder in at least an apparent conflict of interest when the lobbyist communicates with anyone who reports to the office holder in respect of decisions for which the office holder has responsibility.

For example, in the case of a Deputy Minister, if a person is communicating with people the Deputy Minister oversees or who report to the Deputy Minister when the Deputy Minister has a sense of obligation to the person doing the communicating (or to an entity the person represents), then the Deputy Minister has a real or apparent conflict of interest.

In the case of a Cabinet minister, if a person is communicating with the Minister's staff, Parliamentary Secretary or senior government officials and appointees who report to the minister when the Minister has a sense of obligation to the person doing the communicating (or to an entity the person represents), then the Minister has a real or apparent conflict of interest.

This interpretation is required, again if the purpose of the *Code* is taken into account, because the assumption must be that the lobbying communication will be reported to the senior official (Deputy Minister or Minister) if the senior official ever becomes involved in making a decision affecting the person or entity lobbying the junior official.

Again, an office holder does not have to undertake any decision or action in order to be in a real or apparent conflict of interest. The office holder is in the conflict of interest as soon as a person (or entity) they have a sense of obligation to begins to communicate with the office holder directly or with other office holders that the office holder oversees. If the office holder then goes on to participate in a decision that is affected by that conflict of interest, they then move from being in a conflict of interest to violating the rule that prohibits them from participating in a decision when they have a conflict of interest.

Commissioner Bélanger did not rule on Rule 6 in this way in the *Bergen* and *O'Born* rulings, which is part of the reason Democracy Watch is challenging those rulings in Federal Court.[25] Instead, Commissioner Bélanger claimed that neither Bergen nor O'Born violated Rule 6 because Minister Chrystia Freeland, who had a sense of obligation to both of them, did not exercise an official power, duty or function that affected the entities they were lobbying on behalf of, and because the Commissioner believed that Minister Freeland was not informed about their lobbying of several people who report to Minister Freeland. It should be noted though that Commissioner Bélanger's belief is suspect given the investigation did not include examining all communications between Minister Freeland and everyone who Bergen and O'Born lobbied. Instead, Commissioner Bélanger relied on the word and memory of Bergen and O'Born, of the people who were lobbied, and of Minister Freeland.[26]

In any case, Commissioner Bélanger makes it clear that even if Minister Freeland had been informed about Bergen and O'Born's lobbying of people who reported to her, or even if Minister Freeland had been lobbied directly by them, she would also have had to exercise an official power, duty or function that affected the entities Bergen and O'Born were lobbying on behalf of in order for the Commissioner to find Bergen and O'Born guilty of violating Rule 6.[27]

For all of the above reasons, this is a legally incorrect application of Rule 6 – Minister Freeland was in at least an apparent conflict of interest as soon as Bergen and O'Born began communicating with office holders who reported to

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[25] The case is proceeding despite the Government of Canada's attempt to have the case thrown out. See the Federal Court ruling rejecting the Government's motion to strike at: *Democracy Watch v. Canada (Attorney General)*, 2021 FC 613 (CanLII), <https://canlii.ca/t/jggb8>. And see the ruling on the Commissioner's motion re: disclosure of the Certified Tribunal Record at: *Democracy Watch v. Canada (Attorney General)*, 2021 FC 1417 (CanLII), <https://canlii.ca/t/jlmrm>.

[26] *Investigation Report: Benjamin Bergen, Council of Canadian Innovators*, https://lobbycanada.gc.ca/media/1857/investigation-report-benjamin-bergen-en.pdf, at pages 6-7. *Investigation Report: Dana O'Born, Council of Canadian Innovators*, https://lobbycanada.gc.ca/media/1850/investigation-report-dana-oborn-en.pdf, at pages 6-7.

[27] *Bergen Report*, at pages 28-31. *O'Born Report*, at pages 29-31.

Minister Freeland. Therefore, Bergen and O'Born violated Rule 6 as soon as they began communicating with those office holders.

It should be noted that the *Conflict of Interest Code for Members of the House of Commons*[28] defines "private interest" as only including the personal financial interests of the member and his or her family. As a result, a re-worded Rule 6 in the ***Lobbyists' Code*** could assist in ensuring that lobbyists are prohibited from lobbying MPs when they have a sense of obligation in any way to the lobbyist.

The *Ethics and Conflict of Interest Code for Senators*[29] also defines "private interest" as only including the personal financial interest of the senator and his or her family. However, the Senate Code also contains broader rules 7.1 and 7.2 that require senators to upholding the highest standards of integrity in all of their actions. Having any type of conflict of interest with a person communicating with a senator or anyone who reports to the senator would, therefore, violate rule 7.1 and/or 7.2 of the Senate *Code*.

So, overall, Rule 6 could be made stronger with a broader wording. However, this would very likely delay proper enforcement of Rule 6, as the upcoming binding Federal Court rulings in the Bergen and O'Born cases would not have as binding an effect if the wording of Rule 6 is changed, and the Commissioner would thereby be allowed to continue to fail to enforce Rule 6 properly until the courts took an opportunity to issue directions concerning the proper interpretation and application of a newly worded Rule 6. For this reason alone, the words "sense of obligation" could be added to Rule 6, but the reference to "real or apparent conflict of interest" should not be removed from Rule 6. In any case, it is obviously key that Rule 6 be consistently enforced by the Commissioner properly and strictly and strongly. **See below in subsection C.5** for more details on Rule 6.

d) Preferential access subsection of the *Code*

(i) Rule 7: Interpret rule to cover arranging meeting with official and anyone who reports to official

Because the Commissioner of Lobbying, in the *Bergen* and *O'Born* rulings, did not even consider that Rule 7 had been violated by them, it seems that Rule 7 needs to be amended to clarify that the phrase "meeting with a public office holder" includes a meeting with anyone who reports to the office holder and is, therefore, representing the public office holder in any meeting.

Alternatively, the Commissioner could simply begin enforcing Rule 7 taking into account Rule 6 (to which Rule 7 is related), and taking into account the purpose

[28] See the MP *Code* at: https://www.ourcommons.ca/about/standingorders/appa1-e.htm.
[29] See the Senate *Code* at: http://www.sen.parl.gc.ca/seo-cse/PDF/CodeJune2014.pdf.

of the *Code* of ensuring Canadians that lobbying complies with the highest ethical standards that enhance the public's trust and confidence in the integrity of government decision-making. Such an approach to enforcement would mean that, of course, meeting with a public office holder directly or indirectly (by meeting people who report to them) is the same thing, and that both are covered by Rule 7, as the people who report to a public office holder provide reports to the office holder about meetings with lobbyists.

In addition, the words in Rule 7 "arrange a meeting" must be defined in the Commissioner's Guidance on Rule 7 as including:

> "arranging a meeting between a public office holder and any other person, including a meeting by phone, email, Internet or any other communication method."

This is needed to make it clear to all lobbyists, consultant and in-house, that if a lobbyist is prohibited under the rules from lobbying, they are also prohibited from arranging meetings and/or communications of any kind with public office holders for anyone else. **See below in subsection C.4** for more details.

As well, to fully prohibit lobbyists arranging a meeting for another person with a public office holder when the office holder has a sense of obligation to the lobbyist, as **noted above in subsection A.1**, the *Lobbying Act* definition of lobbying in subsection 7(1) must be changed to include "arranging meetings" as a lobbying activity that is covered by the *Act* and the *Code* for employees and officers of businesses and other organizations (i.e. for all in-house lobbyists).

(ii) Rule 8: Interpret rule to cover meeting with official and anyone who reports to official

Because the Commissioner of Lobbying, in the *Bergen* and *O'Born* rulings, did not even consider that Rule 8 had been violated by them, it seems that Rule 8 also needs to be amended to clarify that the phrase "lobby a public office holder" includes lobbying anyone who reports to the office holder and is, therefore, representing the public office holder in any communications.

Alternatively, the Commissioner could simply begin enforcing Rule 8 taking into account Rule 6 (to which Rule 8 is related), and taking into account the purpose of the *Code* of ensuring Canadians that lobbying complies with the highest ethical standards that enhance the public's trust and confidence in the integrity of government decision-making. Such an approach to enforcement would mean that, of course, lobbying a public office holder directly or indirectly (by lobbying people who report to them) is the same thing, and that both are covered by Rule 8, as the people who report to a public office holder provide reports to the office holder of communications from lobbyists. **See below in subsection C.4** for more details.

e) Political activities subsection of the *Code*

(i) Rule 9: Extend rule and cooling-off period

Because the Commissioner of Lobbying, in the *Bergen* and *O'Born* rulings, concluded that Rule 9 does not apply to political activities of a lobbyist before they became a lobbyist, it seems that Rule needs to be amended to make it clear that it applies to political activities of a lobbyist before they became a lobbyist.

Alternatively, the Commissioner could simply begin enforcing Rule 9 taking into account Rule 6 (to which Rule 9 is related), and taking into account the purpose of the *Code* of ensuring Canadians that lobbying complies with the highest ethical standards that enhance the public's trust and confidence in the integrity of government decision-making. Such an approach to enforcement would mean that a person undertaking political activities on behalf of someone who is or becomes a public office holder would, of course, include activities before the office holder takes office, and therefore before the person becomes a lobbyist (given that the *Act* only requires registering as a lobbyist when one begins lobbying a public office holder).

The webpage about the first phase of this consultation in November-December 2020 on the Commissioner's website makes the proposal, drawn from the Observations section of the *Bergen* and *O'Born* rulings, that Rule 9 be amended to change the second line from:

> "If that person is an elected official, the lobbyist shall also not lobby staff in their office(s)."

to include people other than staff. If this change was made, the second line would read something like:

> "If that person is an elected official, the lobbyist shall also not lobby staff in their office(s) or anyone else who reports to them."

That change is fine but, at the same time, unnecessary if the Commissioner would just adopt the purposive interpretations suggested above for Rules 7 and 8, based on the broad, overarching Rule 6 and the purpose of the *Code*, which would mean that lobbyists would be (as all these rules clearly intend) prohibited from lobbying office holders directly or indirectly if the office holder has a sense of obligation to the lobbyist or any entity the lobbyist is representing.

In any case, if the wording of the second line is amended it should be made much more comprehensive than was proposed on the consultation webpage in the first phase of this consultation, as people can undertake political activities on behalf of people who become Cabinet staff and senior government officials (for example, working or volunteering for them when they are managing a campaign for a political party or a candidate. The amended wording should be as follows:

> "Whether or not that person is an elected official, the lobbyist shall also not lobby staff in their office(s) or anyone else who reports to them."

See below in subsection C.4 for more details concerning how this provision could be worded.

Also, **see below in subsections C.7, C.8 and C.9** for details concerning the cooling-off period that must be clearly established in the Commissioner's *Guidance* on Rule 9 at:
https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/guidance-lobbyists-code-of-conduct/guidance-to-mitigate-conflicts-of-interest-resulting-from-political-activities/
during which a lobbyist may not lobby an official after political activities that assisted the official.

f) Gifts subsection of the *Code*

(i) Rule 10 – Banning sponsored travel is only effective solution, and banning all gifts is the best solution

Finally, as mentioned above in the Summary section, and at the beginning of the subsection re: Rule 6, Rule 10 of the *Code* is explicitly connected to the ethics codes for MPs and senators, as Rule 10 allows lobbyists to "provide or promise a gift, favour or other benefit to a public office holder" if the office holder is allowed to accept it.

This loophole is most problematic concerning the unethical practice of lobbyists giving the gift of unlimited travel (known as "sponsored travel") to MPs and senators (and their families and associates) whom they are lobbying. Lobbyists are allowed to do this because the MP and Senator codes explicitly allow them to receive the gift of sponsored travel, no matter how unethical the gift is.[30]

At $1,650 (increasing each year by $25), the federal annual donation limit is also too high, and it allows wealthy individuals to continue to use money as a means of unethical influence. However, that is a problem that must be solved by amending the *Canada Elections Act* as an amendment to the *Code* could not override the statutory right to make a donation to a party or a riding association.

MPs and Senators could amend the *Code* to prohibit lobbyists from giving the gift of sponsored travel. However, if they are willing to do this, they should be willing to amend their ethics codes to prohibit them from receiving sponsored travel.

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[30] See details in the Commissioner's April 2019 report *Sponsored travel provided by lobbyists*, at: https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/sponsored-travel-provided-by-lobbyists/. See section 15 of the MP *Code* at: https://www.ourcommons.ca/about/standingorders/appa1-e.htm. And see section 18 of the Senate *Code* at: http://www.sen.parl.gc.ca/seo-cse/PDF/CodeJune2014.pdf.

There is no reason to allow sponsored travel, even in its relatively benign form of an invitation for an MP or Senator to speak at a conference at the invitation of another country's politicians or government. The number of such conferences recorded annually in the sponsored travel report[31] are minimal, and Canadians can afford to pay the costs of MPs and Senators taking these few trips.

Having Canadians pay for such trips also provides a disincentive for MPs and Senators to take trips that are just junkets, and also prevents foreign politicians and governments from doing the favour of offering to pay for a trip as a means of influencing MPs and Senators.

Deleting the sections in the MP and Senator codes that allow them to accept the gift of sponsored travel is the only effective solution. If the *Lobbyists' Code* was amended to prohibit lobbyists from giving the gift of sponsored travel, that prohibition would only apply to registered lobbyists. All the people and organizations that are not registered because of loopholes in the *Lobbying Act* (including employees of corporations who lobby less than 20 percent of their work time) would be allowed to continue to give the gift of sponsored travel.

Other gifts and benefits would not be a problem given that the MP and Senator codes prohibit them from accepting any gift or benefit that could be seen as being given in order to influence them. However, the Ethics Commissioner and Commissioner of Lobbying have both issued changing and confusing guidelines and rulings since 2007 concerning gifts and benefits, and that has effectively sent a signal to MPs and Senators that they can accept significant gifts from lobbyists, and that lobbyists can give them. As well, the MP Code's disclosure threshold of $200 in gifts annually from any person or entity, and the Senate code's disclosure threshold of $500, are too high to prevent gifts being used as a secret, unethical means of influence.

The simplest solution, given that testing of thousands of people around the world by psychologists has shown that even small gifts and favours influence decisions,[32] is to ban all gifts from lobbyists to public office holders. The other option is to set a very low limit for a gift that can be given by all the lobbyists involved in a lobbying effort to all the office holders involved in the decision that is

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[31] See the 2019 report at: https://ciec-ccie.parl.gc.ca/en/publications/Pages/Travel2019-Deplacements2019.aspx.

[32] Link is to Alix Spiegel, "Give And Take: How The Rule Of Reciprocation Binds Us," NPR.org, November 26, 2012, online: <https://www.npr.org/sections/health-shots/2012/11/26/165570502/give-and-take-how-the-rule-of-reciprocation-binds-us>. See also Robert Cialdini and Noah Goldstein, "The Science and Practice of Persuasion," (2002) 43(2) *Cornell Hotel and Restaurant Administration Quarterly* 40 at 44; Robert Cialdini and Steve Martin, Science of Persuasion, online video: https://www.youtube.com/watch?v=cFdCzN7RYbw/; Robert Cialdini and Steve Martin, "The Power of Persuasion," (2006) Dec. *Training Journal* 40 at 41.

targeted by the lobbying effort. **See below in subsection C.3** for details concerning these options.

Of course, as in every area covered by the *Lobbyists' Code*, all the loopholes in the *Lobbying Act* that allow for unregistered lobbying must be closed, otherwise those lobbyists who are allowed to lobby in secret without registering will also effectively be allowed to violate the *Code* rule, in this area by giving gifts in secret to officials they are lobbying.

C. Response to the Commissioner's Proposed new *Lobbyists' Code*

The current *Lobbyists' Code of Conduct* can be viewed at: https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/lobbyists-code-of-conduct/ and the Commissioner of Lobbying's proposed new *Lobbyists' Code* that was posted on her website on December 15, 2021 can be viewed at: https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/lobbyists-code-of-conduct/consultation-on-future-changes-to-the-lobbyists-code-of-conduct (at least until February 18, 2022, although hopefully the Commissioner will not remove that page from her website – unfortunately, the webpage containing submissions during the first round of the Commissioner's consultation on the *Code* has been removed from the site).

The following is the list of changes needed to the Commissioner's proposed new *Code* because the new *Code* in its current form will delete much-needed rules from the current *Code* or narrow existing rules, and will also create loopholes that will allow for even more unethical lobbying than is currently allowed:

1. Do not delete existing Rule 5

Do not delete existing Rule 5 from the current *Code* (which the Commissioner is proposing to do) because a rule is needed to prohibit lobbyists from using or disclosing documents that are leaked to them. As set out above in subsection B.3(b), the word "document" in Rule 5 should be changed to in the second sentence to "record as defined in the *Access to Information Act*" and by adding at the end:

> "and the lobbyist shall not retain a copy of the record, and shall return the record to the head of the institution that created the record and inform them, and the Information Commissioner of Canada and the Public Sector Integrity Commissioner who provided the record to them."

These changes are needed so that the rule covers all types of records not just documents, and so that the rule has a built-in enforcement mechanism that makes it effectively illegal for the lobbyist to use or disclose the record. **See above in subsection B.3(b)** for more on Rule 5.

2. Ensure the proposed Misinformation prohibition applies to all lobbyists' communications

Add at the end of the Commissioner's proposed new Misinformation Rule 2 the words "or in any public communications or advertising related to a lobby effort or lobbying an official" to ensure that all lobbyists are prohibited from communicating misinformation in any way. The way the current rule is drafted, organizations that do grassroots appeals would be prohibited from making false claims, but corporations that do advertising campaigns to communicate their policy agenda to officials would be allowed to lie in their ads. This would tilt the federal lobbying rules even more in favour of big business lobbying than they already are. See above in subsection B.3(a)(ii) for more details.

3. Only allow one low value gift to an official during a lobbying effort or, even better, ban all gifts

At end of the Commissioner's new proposed Rule 3 (Gifts) and Rule 4 (Hospitality), add a sentence that reads:

> "In total, only one thing of low value is permitted to be given to any office holder and their staff during any 12-month period by all lobbyists at a lobbying firm, or by anyone involved in any lobbying effort, and the registered for a lobbying effort must disclose in the Registry of Lobbyists if a combined total of more than $100 in gifts are given during any 12-month period to all of the office holders involved in a decision targeted by the lobbying effort."

This is needed to prevent firms and organizations that employ dozens of lobbyists from each giving dozens of gifts to a public office holder and their staff, and wining and dining them dozens of times, each year. Even better, given that testing of thousands of people around the world by psychologists has shown that even small gifts and favours influence decisions,[33] simply ban all gifts and hospitality from lobbyists to any public office holder. **See above in subsection B.3(f)** for more on the gifts rule.

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[33] Link is to Alix Spiegel, "Give And Take: How The Rule Of Reciprocation Binds Us," NPR.org, November 26, 2012, online: <https://www.npr.org/sections/health-shots/2012/11/26/165570502/give-and-take-how-the-rule-of-reciprocation-binds-us>. See also Robert Cialdini and Noah Goldstein, "The Science and Practice of Persuasion," (2002) 43(2) *Cornell Hotel and Restaurant Administration Quarterly* 40 at 44; Robert Cialdini and Steve Martin, Science of Persuasion, online video: https://www.youtube.com/watch?v=cFdCzN7RYbw/; Robert Cialdini and Steve Martin, "The Power of Persuasion," (2006) Dec. *Training Journal* 40 at 41.

4. Ensure that arranging a meeting covers arranging all communications

Add at the end of the definition of "lobby or lobbying" in the Appendix a note specifying that the definition includes:

> "arranging a meeting between a public office holder and any other person, including a meeting by phone, email, Internet or any other communication method."

This is needed to make it clear to all lobbyists, consultant and in-house, that if a lobbyist is prohibited under the rules from lobbying, they are also prohibited from arranging meetings and/or communications of any kind with public office holders for anyone else. **See above in subsection B.3(d)(i)** for more details on current Rule 7 which covers similar actions, including how the Lobbying Act must be changed to cover “arranging meetings” as lobbying activity when it is done by employees and officers of businesses and organizations (i.e. all in-house lobbyists).

5. Ensure that creating even an apparent conflict of interest continues to be prohibited

To stop the Commissioner from gutting the existing Rule 6 that prohibits lobbying anyone when there is any type of appearance of a conflict of interest, change the Commissioner's proposed new Rule 7 to read:

> "Never lobby an official when actions or decisions you have taken or propose to take create a real or apparent conflict of interest or sense of obligation for the official."

Even better, reject proposed new Rule 7 and just keep existing Rule 6 from the current *Code* in the new *Code*. The Commissioner’s proposed new Rule 7 is an attempt to narrow the scope of the *Code*’s current conflict of interest rule (Rule 6), and escape from the binding unanimous 2009 ruling of the Federal Court of Appeal in the case *Democracy Watch v. Campbell*,[34] which defined the scope of former Rule 8 (now Rule 6). Proposed Rule 7 is also an attempt by the Commissioner to escape the binding rulings on Rule 6 (and Rule 9) that will very likely be issued by the Federal Court in the ongoing consolidated judicial review applications *Democracy Watch v. Canada (Attorney General)*[35] concerning two rulings of the Commissioner issued in spring 2020 that interpreted and applied Rules 6 and 9.

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[34] *Democracy Watch v. Campbell*, 2009 FCA 79 (CanLII), [2010] 2 FCR 139, <https://canlii.ca/t/22vcj>.

[35] The case is proceeding despite the Government of Canada’s attempt to have the case thrown out. See the Federal Court ruling rejecting the Government’s motion to strike at: *Democracy Watch v. Canada (Attorney General)*, 2021 FC 613 (CanLII), <https://canlii.ca/t/jggb8>. And see the ruling on the Commissioner’s motion re: disclosure of the Certified Tribunal Record at: *Democracy Watch v. Canada (Attorney General)*, 2021 FC 1417 (CanLII), <https://canlii.ca/t/jlmrm>.

If Rule 7 is approved in the form proposed by the Commissioner, these court rulings would not apply to it, and the Commissioner would be free once again to ignore or misapply the rule in future situations that are investigated, until the courts rule (likely years from now) on the Commissioner's new interpretation of new Rule 7. This would set back effective enforcement of the conflict of interest rule for years (not that it has ever been effectively enforced in the past, as every official who has enforced the rule since the *Code* was enacted in 1997 has tried to ignore the rule). **See above in subsection B.3(c)** for more details.

6. Ensure that lobbyists are prohibited from lobbying everyone who serves under any official with whom they have an apparent conflict of interest

Add to existing Rule 7 in the current *Code*, or if the Commissioner's new Code is enacted, add to proposed new Rules 3, 4, 5 and 7, a second sentence that says:

> "The words "an official" in this rule mean the official and any "associate" of the official as defined in the Appendix."

And move the definition of "associate" into the list of general definitions and change it to include:

> "for a Minister, anyone in any government institution or department when the lobbying is about any decision or action for which the Minister has decision-making authority, unless the Minister has recused themselves publicly and publicly delegated their decision-making authority entirely to someone who is fully independent of the Minister and not under their control in any way, directly or indirectly."

Also add to the definition of "associate" the following:

> "for any government appointee or employee, anyone who works for them when the lobbying is about any decision or action for which the official has decision-making authority, unless they have recused themselves publicly and publicly delegated their decision-making authority entirely to someone who is independent of them and not under their control in any way, directly or indirectly."

Also add to the definition of "associate" the following:

> "In relation to members of the Senate of Canada, their staff but not their fellow Senators."

All of these changes are needed to prevent Rules 3, 4, 5 and 7 from being a charade that allows for unethical lobbying. First, the current definition of associate means these rules don't even apply to Senate staff, which is a negligent omission by the Commissioner. Secondly, as currently drafted,

these rules would allow lobbyists to lobby department officials of every Cabinet minister, right up to the Deputy Minister and Assistant Deputy Minister, even when they have a relationship with the minister that causes a conflict of interest.

Given that department officials regularly communicate the concerns and proposals of lobbyists to their minister's office, every lobbyist would be legally allowed to lobby those officials even though they would, in effect, be lobbying the minister. This would essentially void the prohibition on lobbying a minister when the minister has a sense of obligation to you. In other words, it would gut Rules 3, 4, 5 and 7 of the proposed *Code*. **See above in subsection B.3.(d)** for more details.

7. Reject the Commissioner's proposal to shorten, even more than she has already, the "cooling-off" period for lobbyists to whom an official has a sense of obligation

Reject the Commissioner's proposal to shorten (in the definition of "Political Work" in the Appendix) the "cooling-off" periods during which a lobbyist is prohibited from lobbying someone they for which they have fundraised, volunteered or done other any other favours. The Commissioner's proposal should be rejected because the conflict of interest caused by those actions lasts in many cases for the rest of the politician's or public official's career, and at least lasts for five years (much longer that one to two years that the Commissioner proposes).

Also remove the proposal that would allow the Commissioner to reduce the cooling-off period. The Commissioner should not have this discretion as it opens the door to allowing even more unethical lobbying than the Commissioner's proposed new periods would allow.

Commissioner Bélanger has clearly been attempting to decrease the cooling-off period during her term in office. Although the Commissioner has attempted to remove any evidence of it from her website, the *Guidance* document on current *Code* Rule 9 (re: Political Activities) that was issued by former Commissioner Karen Shepherd in summer 2016 (after the current *Code* came into force in December 2015)[36] is still available through the Internet Archive site at: https://web.archive.org/web/20160815213919/https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01182.html/[37] and it states clearly that Commissioner

[36] As noted in the "Guidance on the Lobbyists' Code of Conduct" section of Commissioner Shepherd's 2015-2016 Annual Report, online <https://lobbycanada.gc.ca/en/reports-and-publications/annual-report-2015-2016/#toc3-2-2>.

[37] If this link does not work, insert the old URL for the former Commissioner's Guidance on Rule 9 https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01182.html/ into the Internet

Shepherd required a cooling-off period of five years after political activities. As Commissioner Shepherd's *Guidance* document says under the heading "The risk diminishes over time":

> When a lobbyist has carried out political activities that pose a risk of creating a sense of obligation, the Commissioner is of the view that five years is a sufficient period of time to wait before lobbying the public office holder and/or his or her staff, in order to avoid creating a conflict of interest for that public office holder.[38] [emphasis added]

In 2019, for no reason, Commissioner Bélanger issued a new Guidance document for Rule 9, which can be seen at: https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/guidance-lobbyists-code-of-conduct/guidance-to-mitigate-conflicts-of-interest-resulting-from-political-activities/ in which she reduced the "cooling-off" period to the vague time period of "a period equivalent to a full election cycle." A "full election cycle" could mean either the maximum election cycle of four years, or the time between elections (which was only two years between the 2019 and 2021 elections). The vagueness in the Commissioner's current Guidance means that, currently, anyone who worked in any party's headquarters during the 2019 election could, arguably, now lobby the politicians (even the Prime Minister and Cabinet ministers) that they worked with during that campaign (given a full election cycle has passed). This would be clearly unethical by any meaningful standard for ensuring ethical politics. This shows clearly that the Commissioner deliberately reduced the cooling-off period by issuing the new Guidance document.

Now, Commissioner Bélanger is proposing in the new *Code* to reduce the cooling-off period for significant political work to only two years, and the period for other political work to only one year. No evidence and no reason is given for these reductions – the Commissioner simply jumps to the unsupported conclusion that these 1-2 year periods "would typically be a sufficient period to reduce a sense of obligation." Somehow, between 2016 when Commissioner Shepherd established her five-year cooling-off period and 2022, the definition of "sufficient period of time" for a sense of obligation to disappear has magically decreased down to two years.

This is not to say that Commissioner Shepherd made a strong case for a five-year cooling-off period. Likely it was simply based on the five-year period set out in the *Lobbying Act* during which, after they leave office, a former public office holder is prohibited from being a registered lobbyist. The premise of the time period should be based on an actual assessment

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Archive website's WayBackMachine and check the Commissioner's site update from August 15, 2016.

[38] Commissioner of Lobbying, *Commissioner's Guidance for lobbyists regarding the application of Rule 9 of the Lobbyists' Code of Conduct – Political Activities*.

of the depth of the sense of obligation someone would feel to someone who helps them obtain a very well-paying job (as the salaries of MPs are in the top five percent salaries of all jobs in Canada, and a Cabinet minister's salary is in the top one percent), as that is what people who help federal candidates win elections are doing. And when someone helps a party leader and the party win the election, they are also helping that person obtain an enormous amount of power.

Again, as with the gifts rule discussed in #3 above, this assessment must take into account the fact that testing of thousands of people around the world by psychologists has shown that even small gifts and favours influence decisions.[39] Helping someone win a very well-paying job is a huge favour that results in a lot of influence. Why would a politician's sense of obligation to someone who helps them win election ever disappear while they remain a politician? They arguably owe that person for their entire career, especially if they happen to be in a "safe" electoral district in which the party they represent has always won elections. In that situation, anyone who helped them win their first election helped them obtain a very well-paying job for the rest of their life.

Based on these factors, and others, former Commissioner Shepherd was correct to establish a minimum five-year cooling-off period for all political activities, and Commissioner Bélanger's proposal to reduce that period should be rejected. Instead, an even longer cooling-off period should be established for the top campaigners, fundraisers and others who do significant favours of any kind for a candidate, party leader or other official, arguably lasting for the entire time period they are in office.

As well, a cooling-off period should be established for people who work in party election campaign headquarters that prohibits lobbying all of the MPs elected by that party, given that research clearly shows that the central campaign is a major assistance to every candidate, and that few voters vote based on who the local candidate is.[40]

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[39] Link is to Alix Spiegel, "Give And Take: How The Rule Of Reciprocation Binds Us," NPR.org, November 26, 2012, online: <https://www.npr.org/sections/health-shots/2012/11/26/165570502/give-and-take-how-the-rule-of-reciprocation-binds-us>. See also Robert Cialdini and Noah Goldstein, "The Science and Practice of Persuasion," (2002) 43(2) *Cornell Hotel and Restaurant Administration Quarterly* 40 at 44; Robert Cialdini and Steve Martin, Science of Persuasion, online video: https://www.youtube.com/watch?v=cFdCzN7RYbw/; Robert Cialdini and Steve Martin, "The Power of Persuasion," (2006) Dec. *Training Journal* 40 at 41.

[40] Allen Stevens, B., Islam, M., De Geus, R., Goldberg, J., McAndrews, J., Mierke-Zatwarnicki, A., . . . Rubenson, D., "Local Candidate Effects in Canadian Elections," (2019) 52(1) *Canadian Journal of Political Science* 83.

Finally, the cooling-off period should clearly apply to lobbyists who were not registered lobbyists under the *Lobbying Act* when they undertook the political activities. This clarification is needed because the Commissioner ruled in the Bergen and O'Born rulings that some of their political activities were not covered by current Rule 9 because they did those activities before they registered as lobbyists. Even though all of their activities were still taken into account under current Rule 6, it makes no sense to have a gap between the application of Rule 6 and the application of Rule 9 to a lobbyist's activities. **See above in subsection B.3(e)** more concerning this issue with Rule 9.

8. Reject the Commissioner's attempt to allow significant favours by lobbyists for parties and candidates to only result a one-year cooling-off period

In the Commissioner's proposed new definition of "political work" move "performing strictly administrative tasks..." and all five actions listed under "other political work" into the category "significant political work" because all six of these actions are significant favours that make a candidate or politician owe the person who does any of these six things for them.

The current Guidance document for current Rule 9 in the current *Code* on the Commissioner's website at:
https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/guidance-lobbyists-code-of-conduct/guidance-to-mitigate-conflicts-of-interest-resulting-from-political-activities/
includes "Gathering or soliciting donations that you then provide to a registered party or electoral district association" and serving in any "strategic role on a campaign team" as higher-risk political activities that would result in a prohibition for a lobbyist from lobbying a politician or party at least until after the next election.

The Commissioner's proposed new definition of "Political Work" shifts "seeking or gathering donations" and "coordinating campaign office logistics" to the category of "other political work" that only prohibits a lobbyist from lobbying the politician for one year after doing that work.

The current Guidance document for current Rule 9 only includes the following as examples of lower-risk political activities that can be undertaken only occasionally without creating an appearance of a conflict of interest:

- Volunteering, canvassing, or scrutineering for a registered party or electoral riding association without significantly interacting with candidates;
- Attending fundraising events; or
- Expressing personal political views strictly in an individual capacity.

The Commissioner's proposed new definition of "Political Work" adds the significant favours of "drafting campaign materials" and "distributing or disseminating campaign materials" to the category of "other political work" that will only result in a lobbyist being prohibited from lobbying the politician for one year after doing that work. These significant favours should result in a much longer cooling-off period.

The current Guidance document for current Rule 9 only includes the following as examples of no-risk political activities that can be undertaken without creating an appearance of a conflict of interest:

- Displaying campaign signs or posters; or
- Making personal donations within the limits established in the *Canada Elections Act*.

The Commissioner's proposed new definition of "Political Work" adds "performing strictly administrative tasks, such as occasional work stuffing envelopes, taking phone messages" to the list of political work that can be done as much as the lobbyist wants without the lobbyist having to sit out from lobbying the politician or official for some period of time after doing the work.

Performing administrative tasks are still favours that assist a candidate or party. As a result, these activities must still be considered lower-risk activities that require sitting out from lobbying the politician, their staff or party officials for a period of time.

9. Reject the Commissioner's attempt to allow lobbyists to support a candidate or party by going to multiple events and then lobby them right afterwards

Finally, change in the Commissioner's proposed new list of exempt political work "simply attending a fundraising or campaign event" to "simply attending a fundraising or campaign event once or twice during any 12-month period" because frequently attending those events amounts to a favour for any politician or candidate, and offers an opportunity to lobby the candidate or politician and/or their assistants. As a result, attending multiple events require sitting out from lobbying the politician, their staff or party officials for a period of time.

D. Conclusion

As set out above in section B, the wording of some parts of the *Lobbyists' Code* could be made stronger, in part by changing the wording back to the original version of the *Code* that was in effect from 1997 until the new *Code* was enacted in December 2015, and in part by adding more expansive terms or wording to some of the rules.

It is an option for the House of Commons Standing Committee on Access to Information, Privacy and Ethics to instead adopt the Commissioner's proposed new *Code*. However, if the new *Code* is adopted without the changes set out above in section C, key rules of the existing *Code* will be removed, and new loopholes will be created, and that will result in even more unethical lobbying being allowed than is currently allowed.

In any case, to make these wording changes to the existing *Code*, or the Commissioner's proposed new *Code*, actually effective, as set out above in section A, loopholes must be closed in the *Lobbying Act* so that the *Code* applies to all lobbying activities. The only exception to registering lobbying communications in the Registry should be when someone signs a mass email letter appeal that an individual or organization has set up (as the individual or organization will be required to register that lobbying effort). Loopholes must also be closed and in MP and Senator ethics codes to prohibit unethical lobbying tactics, most specifically gifts like sponsored travel. A summary of the key changes needed to the MP Code as proposed by Democracy Watch and the Government Ethics Coalition can be seen by clicking here.

As well, Commissioner of Lobbying Nancy Bélanger must stop enforcing the *Lobbyists Code* in the usual negligent and secretive weak way it has been enforced since it was enacted in 1997. The Commissioner must take into account the *Code*'s purpose of ensuring ethical lobbying so public confidence in the integrity of government is enhanced, and must also take into account the *Code*'s strong Principles. If Commissioner Bélanger does not strengthen her enforcement approach, illegal, secret, unethical and dishonest lobbying of Cabinet ministers, their staff and appointees, MPs and senators and their staff, and federal government employees will continue to be allowed, and will continue to undermine and corrupt many federal policy-making processes.