Court File Nos.
T-641-03
T-642-03
T-690-03
T-711-03

FEDERAL COURT - TRIAL DIVISION

BETWEEN:

DEMOCRACY WATCH

Applicant

- and -

THE ATTORNEY GENERAL OF CANADA
(OFFICE OF THE ETHICS COUNSELLOR)

Respondent

DEMOCRACY WATCH'S MEMORANDUM OF FACT AND LAW

PART I - THE FACTS

A. INTRODUCTION

1. This case concerns the vital role of ethics in the federal Government, particularly the role of the federal Ethics Counsellor in enforcing codes of ethics for federal public office holders and lobbyists. It is a serious issue. Public confidence in the integrity, objectivity and impartiality of government forms the foundation of democratic government: the public's consent to be governed depends on its confidence in the integrity of those who govern, which confidence itself is dependent on the perception of the ability and willingness of the government to enforce ethical conduct in government.

2. Democracy Watch ("DW") applies for judicial review of four rulings of the Ethics Counsellor made under the *Lobbyists' Code of Conduct* (the "Lobbyists' Code"). The most fundamental challenge to each of the four decisions is the lack of independence and thus

disabling institutional bias of the Ethics Counsellor in dealing with his obligations under the Lobbyists' Code.

3. DW also seeks review of each of the rulings on the basis that they are not merely incorrect but unreasonable in substance.

4. Further, in each of the cases at issue, the Ethics Counsellor employed an attitude towards lobbyists and public office holders of undue complaisance and docility — perhaps even servility — and in so doing acted unreasonably, and contrary to his statutory mandate, in a manner that did not support the objectives of the LRA and Lobbyists' Code. In essence, DW asserts that the Ethics Counsellor is motivated improperly, and therefore has failed in his duty to exercise his jurisdiction in accordance with the governing regulatory parameters.

B. DEMOCRACY WATCH

5. DW was founded in September 1993 and incorporated under federal law as a not-for-profit corporation. It is a non-partisan organization that advocates democratic reform, citizen participation in public affairs, government and corporate accountability, and ethical behaviour in government and business in Canada. In pursuit of its mandate, DW has initiated numerous campaigns, including one relating to government and lobbyist ethics.[1]

C. THE DOMAIN OF THE OFFICE OF THE ETHICS COUNSELLOR

Public Office Holders' Code

6. In June 1994, Prime Minister Chretien introduced *The Conflict of Interest and Post-Employment Code for Public Office Holders* (the "Public Office Holders' Code") to govern the conduct of public office holders. It prohibits public office holders from engaging in conduct that constitutes a conflict of interest.[2] The Code's objective "is to enhance public

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[1] Affidavit of Duff Conacher ("Affidavit of DC"), para. 2, Application Record ("AR"), Tab 6.

[2] Public Office Holders' Code, AR, Tab 6-A.

confidence in the integrity of public office holders and the decision-making process in government."[3]

7. The Public Office Holders' Code applies to all, among others, members of the Ministry: the Prime Minister, Ministers, Ministers of State and Secretaries of State. It also applies to Parliamentary Secretaries and all full-time Governor-in-Council appointees such as deputy ministers of government departments and the heads of agencies, Crown corporations, boards, commissions and tribunals. Equally, all political staff members of a Minister or Secretary of State are subject to the Code, whether they work in a ministerial office, a Parliament Hill office or in a constituency.[4]

8. The Public Office Holders' Code sets out ten principles that direct the conduct of public office holders. The first two principles set the tone. The first provides that "public office holders shall act with honesty and uphold the highest ethical standards of conduct so that public confidence and trust in the integrity, objectivity, and impartiality of government are conserved and enhanced." The second provides that public office holders "have an obligation to perform their official duties and arrange their private affairs in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged by simply acting within the law." A further principle requires that public office holders arrange their private affairs in a manner that will prevent "real, potential, or apparent conflicts" from arising.[5] They must take care to avoid being placed, or appearing to be placed, under obligation to someone who might benefit from "special consideration" on the part of the public office holder.[6]

9. The Public Office Holders' Code also sets out measures that apply to public office holders when they leave office. There is a cooling-off period (one year generally, two years for Ministers) on taking employment with any organization with which public office holders had direct and significant dealings during their last year in public office. Further, they are prohibited from giving advice to an employer or client based on

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[3] Report of the Ethics Counsellor dated Sep. 30/02, Section 2.2, AR, Tab 6-D.

[4] *Ibid.*, s. 2.3., p. 6.

[5] *Ibid.*, s. 2.4, p. 6.

[6] *Ibid.*, s. 2.12, p. 9.

information obtained in the course of their public office if this information is not available to the public.[7]

10. At the same time as the Prime Minister issued the Public Office Holders' Code in June 1994, he created the new position of Ethics Counsellor, with responsibility to administer and ensure compliance with the Code. The Ethics Counsellor acts under the general direction of the Clerk of the Privy Council, but reports to the Prime Minister with respect to non-compliance with the Code.

Lobbyists Registration Act and Lobbyists' Code of Conduct

11. The *Lobbyists Registration Act*[8] (the "LRA") and the Lobbyists' Code govern the conduct of lobbyists.

12. For the purposes of the LRA, lobbyists are defined as individuals paid to make representations with the goal of influencing federal public office holders. The Act requires lobbyists to register and disclose certain information. The information disclosed is made public through a computerized registry system. The Act distinguishes among three types of lobbyists:

(1) An individual who lobbies on behalf of a client must register as a *Consultant Lobbyist;*

(2) An employee whose job involves a significant amount (20% or more) of lobbying for his or her employer must register as an *In-House Lobbyist (Corporate);* and

(3) The senior officer of an organization that pursues non-profit objectives must register as an *In-House Lobbyist (Organization)* when one or more employees lobby and where the total lobbying duties of all employees constitute a significant part of the duties of one employee.

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[7] *Ibid.*, s. 2.13, p. 10.

[8] R.S.C. 1985, c. 44 (4th Supp.).

13. The LRA requires that lobbyists submit certain information in returns and notify the Registrar of any changes to information previously submitted, including termination of lobbying activity.

14. Not all lobbyists or all lobbying activities are covered by the LRA. Paid lobbyists are required to register; unpaid lobbyists are not.

15. Responsibility for administration of the information disclosure provisions of the LRA and maintenance of the public registry is assigned to the Registrar, designated by the Registrar General of Canada (Minister of Industry). The Registrar heads the Lobbyists Registration Branch.

16. Under the LRA, the Ethics Counsellor was directed to develop a code of conduct for lobbyists. After consultations were completed, the draft code was referred to the House of Commons Standing Committee on Procedure and House Affairs and subsequently published in the Canada Gazette on February 8, 1997. The Lobbyists' Code came into force on March 1, 1997.[9]

17. The purpose of the Lobbyists' Code is to assure the public that lobbying is done ethically, in a manner that conserves and enhances public confidence and trust in the integrity, objectivity and impartiality of government decision-making.[10]

18. "The Lobbyist's Code establishes mandatory standards of conduct for all lobbyists communicating with federal public office holders and forms a counterpart to the obligations that federal officials must honour in their codes of conduct when they interact with the public and with lobbyists."[11]

19. The Lobbyists' Code is structured like a conventional ethics code. It begins with a preamble that sets out its purpose and context. It continues with a set of primary

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[9] Lobbyists' Code, Annual Report 2002, AR, p. 4, Tab 6-C.

[10] *Ibid.*

[11] *Ibid.*

principles that articulate in positive terms the objectives to be attained. These objectives are: integrity, honesty, openess and professionalism.[12]

20. Next follow the rules that set out specific obligations. They fall into three categories: transparency, confidentiality and conflict of interest. Under the rule of transparency, lobbyists are obligated to provide accurate information to public office holders and disclose the identity of the person or organization they represent. They must also disclose to their client or employer their obligations under the LRA and the Lobbyists' Code. Under the rule of confidentiality, lobbyists are prohibited from disclosing confidential information or using insider information to the detriment of their client or employer.[13] Finally, and most importantly for present purposes, is Rule 8, which deals with conflict of interests. It provides as follows:

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

21. The Ethics Counsellor is charged with investigating breaches of the Lobbyists' Code. His powers of investigation are triggered where there is an alleged breach of the Code. Where the Ethics Counsellor believes, on reasonable grounds, that a breach of the Lobbyists' Code has occurred, he must investigate and prepare a report for Parliament.

22. Investigations pursuant to the Lobbyists' Code purportedly are carried out in accordance with an internal policy entitled "Lobbyists Registration Act Investigations" (the "LRAI"). It provides, in part, that an outside complainant may initiate an investigation.[14]

23. The LRAI also provides that the Ethics Counsellor is not involved with the preliminary investigation process, nor is privy to the information being gathered, prior

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[12] *Ibid.*

[13] *Ibid.*

[14] Affidavit of Robert Benson, paras. 22, 23, AR, Tab 7.

to a determination being made by him whether a person has, on reasonable grounds, breached the Lobbyists' Code. The LRAI provides as follows:

> "Since the Ethics Counsellor will be the person presiding over any formal hearing, he/she should not receive any representations, prior to that hearing, from or on behalf of a participant respecting the investigation or other proceeding, other than facts or information of which judicial or official notice may be taken. This would not preclude the Ethics Counsellor from reviewing materials already filed on the record or from receiving any reports prepared by his staff for the purposes of making his/her 'reasonable grounds' decision."[15]

24. "The initial determination will be triggered in one of two ways: (a) by receipt of a complaint, anonymously or otherwise, and whether made verbally, in writing, or through electronic means ...; and (b) by the Ethics Counsellor himself, where, in his opinion, circumstances warrant initiating a preliminary inquiry in order to determine whether reasonable ground exist to investigate under the LRA."[16]

25. The LRAI states that "at this initial stage, only a general record will be kept of all complaints received. However, in order to ensure that complaints are not made in bad faith complainants will be required to provide first-hand knowledge of details or facts in support of their complaint. Jurisdiction to receive and act on the complaint will also need to be established. Once the requirements in either (a) or (b) above have been met, a separate file is opened and the case is assigned to an advisor for the purpose of making preliminary inquiries.[17]

26. The LRAI then specifies the following "Preliminary Inquiry" procedure:

> "Once a file has been opened, further preliminary inquiries will, in all likelihood, have to be made by the Office (Advisors) in order to gather further information that will assist the Ethics Counsellor in making his/her 'reasonable grounds' determination whether a breach has occurred. ... The power to subpoena, summons, or to administer oaths will not be available at this initial stage since the Ethics Counsellor would not have yet made a determination on 'reasonable grounds' that a breach has occurred. The

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[15] *Ibid.*

[16] *Ibid.*, p. 1.

[17] *Ibid.*, p. 2.

> powers of summons, subpoena and administration of oath only come into play once that determination has been made by the Ethics Counsellor.
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> At the conclusion of the preliminary inquiry made by an Advisor, a summary (i.e. staff report) will be prepared for review by the Ethics Counsellor, following which his/her determination on 'reasonable grounds" will be made."[18]

Dual Roles

27. Howard R. Wilson ("Wilson") simultaneously holds the office of Ethics Counsellor under the Public Office Holders' Code, and the office of Ethics Counsellor under the LRA. He carries out his dual roles through the single "Office of the Ethics Counsellor", with no distinction in title.[19]

28. There is no requirement under the Lobbyists' Code or the Public Office Holders' Code that the same Ethics Counsellor serve under both regimes.

29. The staff of the Office of the Ethics Counsellor comprises 23 individuals. Of this group, seven advisors are responsible for performing the advisory and investigative functions related to both the Public Office Holders' Code and the Lobbyists' Code.[20]

30. Wilson's dual roles have occasioned controversy, criticism and Parliamentary recommendations for change. As part of the statutory review by a parliamentary committee of the LRA in early 2001, the Standing Committee on Industry, Science and Technology examined the investigative powers of the Ethics Counsellor and the enforcement of the Lobbyists' Code. The Committee addressed the issue of whether the Ethics Counsellor should simultaneously be administering and enforcing both the Public Office Holders' Code and the Lobbyists' Code. Its conclusion was negative.

> "The Committee recommends that the Act [LRA] be amended to create a new office, which shall have the exclusive responsibility of investigating and

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[18] *Ibid.*, p. 2.

[19] Affidavit of DC, para. 5, AR, Tab 6.

[20] Affidavit of Robert Benson, para. 9, AR, Tab 7.

reporting to Parliament on alleged violations of the Lobbyists' Code of Conduct."[21]

D. DW'S PETITIONS TO THE ETHICS COUNSELLOR

General

31. Between April 2000 and October 2002, DW filed 11 petitions with the Ethics Counsellor alleging violations of the Lobbyists' Code and the Public Office Holders' Code. The Ethics Counsellor issued rulings in 7 of the 11 petitions. Four of those rulings are the subject of the present (consolidated) application.

32. The following chart illustrates the history of DW's petitions: [22]

	Date of Petition	Date of Response	Time for Response
1.	April 13, 2000		No response after 39 months
2.	September 25, 2000		No response after 33 months
3.	November 9, 2000		No response after 31 months
4.	December 5, 2000	January 22, 2001	1 month
5.	March 27, 2001 (Fugère)	March 21, 2003	24 months
6.	March 27, 2001	August 28, 2001	5 months
7.	April 12, 2001 (Dossetor)	March 27, 2003	23 months
8.	September 6, 2001	November 6, 2001	2 months
9.	June 17, 2002 (Nine Lobbyists)	March 21, 2003	9 months
10.	September 26, 2002		No response after 9 months
11.	October 17, 2002 (Donations)	March 31, 2003	5 months

33. The Ethics Counsellor consistently delayed in responding to DW's petitions. The first three petitions on the list still await rulings after more than three years.

The Fugere Petition (re File No. T-642-03)

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[21] Lobbyists' Code 2002 Annual Report, p. 6, AR, Tab 6-D.

[22] Affidavit of DC, para. 22, AR, Tab 6.

34. On March 27, 2001, DW petitioned the Ethics Counsellor to investigate possible violations of the Lobbyists' Code and Public Office Holders' Code arising from the fundraising activities of Rene Fugere, an aide to the Prime Minister.[23]

35. Media reports through 1999 and early 2000 covered the activities of Mr. Fugere, who reportedly acted at the time as an unpaid aide to Prime Minister Chretien and as a member of the executive of the Prime Minister's local Liberal riding association. In addition, the media reported clear evidence that Mr. Fugere was involved in the following activities:

(a) Being paid at least $15,000 to represent Phillipe Clement and his company, Les Maisons Beam International, and its project to build modular homes in Grande Mere, Quebec (in the Prime Minister's riding) in its unsuccessful attempt to obtain over $1 million in federal grants;

(b) Being paid to represent the Opiticiwan sawmill in Obedjiwan, Quebec in its successful attempt to obtain a $300,000 grant from the federal government, following two unsuccessful grant requests in which Mr. Fugere was not involved; and

(c) Representing other companies seeking federal grants including at least one other company in the Prime Minister's riding.[24]

36. Mr. Fugere did not register as a lobbyist for any of these activities.

37. Accordingly, DW alleged that Mr. Fugere violated, *inter alia*, the following:

(a) Section 5(a)(v) of the LRA, which requires "[e]very individual who, for payment, on behalf of any person or organization (in this section referred to as the 'client'), undertakes to communicate with a public office holder in an attempt to influence the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada"

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[23] Affidavit of DC, para. 9, AR, Tab 6.

[24] Petition of DW dated March 27, 2001, AR, Tab 6-E.

to "not later than ten days after the undertaking" register as a lobbyist with the registrar;

(b) Rule 3 of the Lobbyists' Code, which requires lobbyists "to indicate to their client . . . their obligations under the LRA, and their obligation to adhere to the Lobbyists' Code;

(c) Rule 8 of the Lobbyists' Code, which prohibits lobbyists from placing "public office holders in a conflict of interest by proposing or undertaking any action that would constitute an improper influence on a public office holder;"

(d) The Lobbyists' Code's principle of "Professionalism" which mandates that lobbyists "observe the highest professional and ethical standards" and, in particular, that "lobbyists ... conform fully with not only the letter but the spirit of the Lobbyists' Code as well as all the relevant laws, including the LRA and its regulations."

38. In addition to Mr. Fugere's failure to register as a lobbyist, DW alleged that his performance of favours for the Prime Minister as an aide and member of the Prime Minister's riding association executive, together with Mr. Fugere's involvement in the awarding of several federal grants, may have placed the Prime Minister in a conflict of interest.

39. As a consequence, DW requested the Ethics Counsellor to launch an investigation under the LRA and the Lobbyists' Code into Mr. Fugere's activities.

40. DW heard nothing for almost two years. Finally, on March 21, 2003, DW received a ruling from the Ethics Counsellor essentially holding that he had no basis on which to proceed.

41. In so deciding, the Ethics Counsellor relied on only one ground. He noted that, in a different matter, relating to Mr. Fugere's assistance to the Auberge des Gouverneurs and Celebrity Boats to obtain funding, the Registrar communicated with the RCMP and

requested it investigate whether Mr. Fugere was in violation of the LRA. The RCMP carried out its investigation and Crown prosecutors concluded in August 200 that there was "insufficient evidence" to support a successful prosecution under s. 5 of the LRA. As the Ethics Counsellor wrote:

> "Their conclusion was based on the great difficulty of developing a case which could prove 'beyond a reasonable doubt' that an individual was paid to communicate with a public office holder 'in an attempt to influence' such matters as the awarding of a grant or contribution, etc. We were, therefore, unable to demonstrate in a court of law that Mr. Fugere had an obligation to register as a lobbyist. In this situation, Mr. Fugere was never subject to the provisions of the Lobbyists' Code".[25]

The Dossetor Petition

42. On April 12, 2001, DW petitioned the Ethics Counsellor to investigate possible violations of the Public Office Holders' Code and the Lobbyists' Code arising from the employment by Monsanto Canada of John Dossetor ("Dossetor"), former Senior Policy Advisor to the Minister of Health.[26]

43. Monsanto advertised that it had hired Dossetor as Vice-President, Government Affairs, with responsibility for the development and implementation of Monsanto's government affairs strategies in Canada. His stated responsibilities included "building alliances and partnerships through the government channel."[27]

44. The Petition also noted that, while working for the government, Dossetor had dealt with a file concerning decisions with respect to Monsanto Canada's applications for approval of genetically modified foods.[28]

45. DW alleged, among other things, that Dossetor had breached the LRA requirement to register as a lobbyist, the provisions of the Lobbyists' Code requiring lobbyists to follow all laws, and Rule 3 of the Lobbyists' Code requiring lobbyists to

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[25] Fugere Ruling, *supra.*

[26] Dossetor Petition, AR, Tab 6-G.

[27] *Ibid.*; Monsanto announcement of Dossetor Appointment, AR, Tab 14.

[28] Dossetor Petition, AR, Tab 6-G.

indicate to their organizations their obligations under the LRA and the Lobbyists' Code.[29]

46. Accordingly, DW requested the Ethics Counsellor to undertake a full and detailed investigation, and in particular to determine what Dossetor did for the government, what he had done in the intervening two months for Monsanto, and whether he had contacted any government department with which he had dealings during the year before he left government.

47. The Office of the Ethics Counsellor soon commenced its inquiry. On November 2, 2001, Deputy Ethics Counsellor sent to Wilson a report setting out the Office's findings and recommendations. Among other things, the Report made clear that Dossetor had not registered under the LRA at the time of DW's petition; that he only registered afterwards, on May 18, 2001, in response to the Petition; that his original registration form (filed within the year he left government) the possibility that he would be lobbying Health Canada; that during his last year in government he requested a status report from Health Canada officials regarding a Monsanto issue.[30]

48. For unexplained reasons, the Ethics Counsellor did nothing with nothing with this report for 17 months. Finally, on March 27, 2003, he issued his ruling. He held that Dossetor was not registered as a lobbyist at the time DW submitted its Petition (i.e. April 12, 2001) but did register on May 18, 2001, "once his lobbying activities became a significant part of his duties at Monsanto." The Ethics Counsellor did not specify how Dossetor's duties had changed in the five weeks between the date of DW's Petition and the date of registration. The Ethics Counsellor also ruled that, in relation to the complaint that Dossetor had failed to disclose to Monsanto his obligations under the LRA, the complaint would be dismissed because "no further information was provided by DW in support of this allegation."[31]

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[29] *Ibid.*

[30] Dossetor Report, AR, Tab 7-D.

[31] Ruling of the Ethics Counsellor on the Dosseter Petition, AR, Tab 6-H.

The Nine Lobbyists Petition

49. On June 17, 2002, DW petitioned the Ethics Counsellor to investigate possible violations of the Lobbyists' Code arising from the activities of nine particular lobbyists who worked with either the Prime Minister, a Cabinet Minister or opposition MP.[32]

50. The nine lobbyists were all registered under the LRA to lobby the federal government at the same time that they were working with Cabinet Ministers and public office holders on the private initiative of running for the leadership of the Liberal Party. Indeed, most the lobbyists were working with a Cabinet Minister who headed a government department the lobbyist was lobbying (or recently stopped lobbying).[33]

51. As such DW alleged that the lobbyists violated the following elements of the Lobbyists' Code:

(a) The principles that lobbyists follow "not only the letter but the spirit" of the Lobbyists' Code and all relevant laws, and that lobbyists conduct all their relations with "integrity and honesty" and "observe the highest professional and ethical standards";

(b) Rule 8 of the Lobbyists' Code which prohibits lobbyists from placing "public office holders in a conflict of interest by proposing or undertaking any action that would constitute an improper influence on a public office holder" [add public office holders code stuff here]

52. DW alleged, among other things, that a disabling conflict of interest arises when a lobbyist works with any Cabinet Minister because every Cabinet Minister is involved, through behind-closed-door Cabinet decision-making processes, with every Cabinet decision, and therefore cannot have ties to a private interest without creating a conflict of interest. DW submitted that the standard for evaluating whether a public office holder is placed in a conflict of interest is whether a "real, potential or apparent" conflict

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[32] Nine Lobbyists Petition, AR, Tab 6-I.

[33] *Ibid.*

of interest has been created, which thereby creates an affirmative obligation to avaoid even potential or apparent conflicts of interest.

53. The Ethics Counsellor issued its ruling on DW's petition on March 21, 2003. He noted that on June 11, 2002, the Prime Minister released "Guidelines - The Ministry and Activities for Personal Political Purposes" in which it was recognized that pursuit of the leadership of a political party was a "private interest" and that the Public Office Holders' Code was therefore directly relevant.

54. The Ethics Counsellor then quoted with approval from Principle Five of the Public Office Holders' Code and concluded that under this Code the obligation to ensure that there was not a conflict rested with the Minister and not the lobbyist.

55. The Ethics Counsellor then turned to the issue raised under Rule 8 of the Lobbyists' Code. He held that an interpretation he issued in January 2003 in another case applied, quoting the following conclusion:

> "My conclusion is that it is not reasonable to believe that a lobbyist has exercised an improper influence on a Minister, placing him or her in a conflict of interest, merely because the lobbyist was assisting the Minister in a leadership campaign at the same time that the lobbyist was lobbying the Minister's department on behalf of a client. More broadly, I conclude that the mere fact that these two legitimate activities are being pursued by a lobbyist does not, in and of itself, breach the Lobbyists' Code".[34]

56. The Ethics Counsellor then went on to elaborate on his interpretation:

> "This is not to say that Rule would never apply in this situation but, as the interpretation states, 'what constitutes an improper influence on a public office holder is a question of fact in each particular case.' The interpretation of Rule 8 sets out the factors to be considered in assessing whether a lobbyist has proposed or undertaken any action that would constitute an improper influence on a public office holder. These factors include but are not limited to:
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> - 'whether there has been interference with the decision, judgment or action of the public office holder;
> - whether there has been a wrongful constraint whereby the will of the public office holder was overpowered and whether the public office

[34] *Ibid.*

holder was induced to do or forbear an act which he or she would not do if left to act freely; and

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

These factors are absent in the cases you cite. Furthermore, with the issuance of the Guidelines of last June, I am satisfied that Ministers and their offices have ensured that those lobbyists who are working on a Minister's campaign team have ceased lobbying that Minister's department. Some other lobbyists, in a similar situation, have chosen not to work on the respective campaign.

I do not, therefore, have any basis to believe on reasonable grounds that the persons you cite have breached the Lobbyists' Code. In the absence of such a belief an investigation under the provisions of the LRA cannot occur."[35]

The Donations Petition

57. On October 17, 2002, DW petitioned the Ethics Counsellor to investigate possible violations of the Public Office Holders' Code and the Lobbyists' Code arising from donations of lobbyists to the leadership campaigns of certain Cabinet Ministers.[36]

58. Among other things, the Petition alleged that such donations violated Rule 8 of the Lobbyists Code. DW noted that the Ethics Counsellor apparently agreed with DW's interpretation because in June and July 2002, he had required Cabinet Ministers Sheila Copps, John Manley and Allan Rock to return donations they received from lobbyists, although the Ethics Counsellor had refused to disclose the sources and amounts of the donations, except a donation of $25,000 to then Industry Minister Allan Rock by BCE Inc.

59. On July 11, 2002, the Ethics Counsellor's reason for requiring the three Ministers to return certain donations was publicized: "I was concerned that the Minister was going to have to stand back on files that were just so important to their ministerial

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[35] *Ibid.*

[36] Donations Petition, AR, Tab 6-L.

responsibilities that it would represent a serious impairment of the Minister's abilities to carry out his or her responsibilities."[37]

60. DW further asked the Ethics Counsellor to review and rule on whether numerous other donations from lobbyists to Cabinet Ministers that were not initially disallowed violated Rule 8 of the Lobbyists' Code. [38]

61. Approximately 9 months later, on March 31, 2003, the Ethics Counsellor issued his ruling, denying DW's Petition. He basically followed his ruling in the Nine Lobbyists case. He held that he could not "conclude that the mere fact that a lobbyist has made a political contribution to a Minister involved in the leadership race in and of itself would constitute a breach of the Lobbyists' Code. ... ... No information has come to my attention that indicates that any of these factors were present in the cases you mention. I, therefore have no basis on reasonable grounds that these individuals or organizations breached the Lobbyists' Code. In the absence of such a belief an investigation under the provisions of the LRA cannot occur."[39]

PART III - SUBMISSIONS

A. THE ETHICS COUNSELLOR WAS DISABLED BY BIAS.

62. "[P]ublic confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so."[40]

63. Bias or prejudice has been defined as

> "... a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or

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[37] *Ibid.*

[38] *Ibid.*

[39] Ruling of the Ethics Counsellor on the Donations Petition, AR, Tab 6-M.

[40] *Wewaykum Indian Band v. Canada*, [2003] S.C.J. No. 50, 2003 SCC 45, para. 57 (Q.L.).

> state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case."[41]

64. Under Canadian law, one standard has emerged as the criterion for disqualification — the "reasonable apprehension of bias". The standard is set out in *Committee for Justice and Liberty v. National Energy Board*:

> "... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."[42]

65. The emphasis on the appearance of bias rather than with the actual existence of bias is a product of two key principles.

66. First, the courts have recognized the difficulties associated with having to prove in a satisfactory manner whether a decision-maker is actually biased. The law does not generally countenance direct questioning and probing of a decision-maker about the influences on his or her mind.[43] Concerns of invasiveness, lack of decorum, and fruitlessness, are exacerbated once the problem of "unconscious bias" is recognized. The seminal statement about unconscious bias was made by Lord Devlin:

> "Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, nevertheless, he may hve allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit."[44]

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[41] *Ibid.*at para. 58, quoting with approval *R. v. Bertram*, [1989] O.J. No. 2123 (QL) (H.C.), quoted in turn by Cory J. with approval in *R. v. S. (R.D.)*., [1997] 3 S.C.R. 484 at para. 106.

[42] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369 at p. 394; quoted with approval by SCC in *Weywaykum*, *supra*, at para. 60.

[43] *Newf. Tel. Co. v. Newf. (Bd. of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at p. 636, per Cory J., cited with approval in *Wewaykum*, *supra*, para. 64.

[44] *Queen v. Barnsley Licensing Justices*, [1960] 2 Q.B. 167 (C.A.) quoted with approval in *R. v. Gough*, [1993] A.C. 646 (H.L.) at p. 665 and *Wewaykum*, *supra*, para. 65.

67. Second, Justice Hewart's famous principle that "justice should not only be done, but should manifestly and undoubtedly be seen to be done,"[45] has become a standard of superordinate importance in Anglo-Canadian administrative law. As the Supreme Court of Canada recently stated:

> "In cases where disqualification is argued, the relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge [or decision-maker] but whether a reasonable person properly informed would apprehend that there was. In that sense, the reasonable apprehension of bias is not just a surrogate for unavailable evidence, or an evidentiary device to establish the likelihood of unconscious bias, but the manifestation of a broader preoccupation about the image of justice. As was said by Lord Goff in *Gough, supra,* at p. 659, 'there is an overriding public interest that there should be confidence in the integrity of the administration of justice.'"[46]

68. Independence is a fundamental component of the rule against bias. A party is entitled to receive a hearing before a tribunal that is not only independent in fact, but appears independent.[47]

69. The nature of the requirement of tribunal independence is akin to the requirement of judicial independence, which has been defined by the Supreme Court as follows:

> "I thus define judicial independence as the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control."[48]

70. In *Lippe,* the Supreme Court referred to independence as the "cornerstone" of a tribunal's impartiality. A decision-maker who is dependent (or appears to be

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[45] *King v. Sussex Justices, ex parte McCarthy*, [1924] 1 K.B. 256 at p. 259.

[46] *Wewaykum, supra*, at para. 66.

[47] *Can. Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 SCR 3 at 49.

[48] *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 at 688.

dependent) on others with an interest in the proceedings will not be able to bring an open mind to the task of decision-making.[49]

71. It is now trite law, therefore, that it is not necessary in proving bias to engage in an objective inquiry into the decision-maker's subjective state of mind. It is sufficient to identify objective indicia of bias. In considering particular decision-makers the reasonable member of the public will consider objective guarantees of independence such as security of tenure and financial security,[50] and, in the context of institutional bias (discussed below), the "objective status" of the tribunal as evidenced by recruitment and appointment of members,[51] institutional structures defined by statute and regulation,[52] and the pattern of case results. All of these attributes are observable, and so capable of proof, in a way that the metaphysical operation of the mind is not.

72. Delay, or at least inordinate delay, is also an important indicator of disabling bias, because it reflects badly on the appearance of the administration of justice. An agency or tribunal with a reputation for delay jeopardizes public "respect and confidence in the administration of justice".[53]

73. One sub-type of disabling bias is termed "institutional bias". This is a reasonable apprehension of bias generated by the structure of an institution, rather than from the words or actions of an individual.[54]

74. The test for institutional bias flows from the *National Energy Board* test for reasonable apprehension of bias, and was articulated by the Supreme Court with an additional, important, caveat as follows:

> "As a result of *Lippe, supra,* and *Ruffo v. Conseil de la magistrature,* [1995] 4 S.C.R. 267, *inter alia,* the test for institutional impartiality is well established. It is clear that the governing factors are those put forward by de Grandpre J.

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[49] *Lippe v. Charest*, [1991] 2 SCR 114.

[50] *Valente, supra.*

[51] *Lippe, supra.*

[52] *Ibid.*

[53] See *Sask. (Human Rights Comm.) v. Kodellas* (1989), 60 DLR (4th) 143 at 196 (Sask. C.A.).

[54] *Ibid.* It is in this case that the Supreme Court of Canada first accepted the concept of institutional bias.

> in *Committee for Justice and Liberty v. Nat. Energy Bd.*, [1978] 1 S.C.R. 369, at p. 394. The determination of institutional bias presupposes that a well-informed person, viewing the matter realistically and practically — and having thought the matter through — would have a reasonable apprehension of bias in a substantial number of cases. In this regard, all factors must be considered, but the guarantees provided for in the legislation to counter the prejudicial effects of certain institutional characteristics must be given special attention."[55]

75. In its recent decision in *Ocean Port*, the Supreme Court articulated one further limit to the reach of the institutional bias principle, as set out in *Regie*. The Court noted that, when confronted with silent or ambiguous legislation, it is inferred generally that "Parliament or the legislature intended the tribunal's process to comport with the principles of natural justice. In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision-maker, one of the fundamental principles of natural justice . . . Indeed, Courts will not likely assume that legislators intended to enact procedures that run contrary to this principle ...."[56] The Court held, however, that "like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication."[57]

76. This limit does not apply in the present circumstances. The Ethics Counsellor is disabled by institutional bias. He lacks the requisite independence to be seen by the reaonable person as being capable of acting impartially.

77. The lack of independence flows from the Ethics Counsellor's dual roles under the *Lobbyists' Code* and the *Public Office Holders' Code* , and his subservience to the Executive Branch of Government. The characteristics of Wilson's situation, described below, raise a reasonable apprehension of institutional bias. They make it appear that he is incapable of rendering a fair and impartial decision under the Lobbyists' Code.

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[55] *2747-3174 Quebec Inc. v. Quebec (Regie des permis d'alcools)*, [1996] 3 S.C.R. 919, at p. 951 [emphasis added.]

[56] *Ocean Port Hotel Ltd. v. B.C. (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, at para. 21.

[57] *Ibid*,. at para. 22.

78. Wilson is at all times subject to the joint direction and control of the Minister of Industry, the Clerk of the Privy Council and the Prime Minister. In his legal position of Ethics Counsellor (Lobbyists), he serves at pleasure, pursuant to an appointment by the Governor General in Council, on the recommendation of the Prime Minister. In his capacity as the Ethics Counsellor (Public Office Holders), he serves at the pleasure of the Prime Minister. In both roles he has no financial security. Most importantly, he is required to deal with complaints involving the conduct of the Prime Minister and members of Cabinet — the very persons to whom he reports, and to whom he owes his appointments and his livelihood.

79. Secondly, by serving in the dual legal positions of Ethics Counsellor (Lobbyists) and Ethics Counsellor (Public Office Holders), Wilson is placed in a constant state of potential conflict of interest. Exercise of his responsibilities in one legal position may often lead to repercussions relating to his other legal position. He appears unable, for instance. to investigate impartially an allegation that a lobbyist has violated the Lobbyists' Code in situations involving a public official or Minister, including the Prime Minister.

80. Thirdly, despite the fact that, technically, in his position of Ethics Counsellor (Lobbyists), he reports to the Privy Council an the Minister of Industry, he is or appears to be subject to control in that role by the Prime Minister, because in his position of Ethics Counsellor (Public Office Holders) he reports to the Prime Minister.

81. Fourthly, all investigations conducted by Wilson in his position of Ethics Counsellor (Public Office Holders) are conducted in private.

82. Fifthly, in his position of Ethics Counsellor (Public Office Holders), Wilson reports directly to the Prime Minister on a confidential basis, and the Prime Minister deals with compliance issues confidentially.

83. Further, there is nothing in the LRA or the Lobbyists' Code that ousts the requirement of independence; there is nothing in the LRA or the Lobbyists' Code which

mandates that the Ethics Counsellor (Public Office Holders) must also serve as the Ethics Counsellor (Lobbyists).

84. In addition, there are other institutional and non-institutional grounds that also raise an appearance of bias in favour of government officials in the context of complaints under the Lobbyists' Code generally, and partisanship against the complainant, DW, in particular.

85. The most important of these are the Ethics Counsellor's unjustifiable delays in responding to complaints by DW, as contrasted with his alacrity in responding to issues raised by government officials themselves, or issues which seem to have a signficant public relations component requiring immediate clearance of any perceived wrongdoing. As noted above, the Ethics Counsellor has failed to render any ruling on 4 petitions issued by DW, which have now been outstanding for approximately 45 months, 39 months, 37 months and 15 months, respectively. Further, among the rulings the Ethics Counsellor did issue, the ruling on the Fugere Petition took 24 months, the ruling on the Dossetor Petition took 23 months, the ruling on the Nine Lobbyists Petition took 9 months, and the ruling on the Donations Petition took 5 months.

86. This disposition to delay gives the appearance either that the Ethics Counsellor is paralyzed in responding by the institutional conflict of interest in which he is placed, or that the Ethics Counsellor is delaying intentionally, in order to discourage DW and other complainants from making complaints under the Lobbyists' Code.

87. A reasonable apprehension of bias in favour of government officials is further raised by the substance of the rulings and interpretations issued by the Ethics Counsellor, which have consistently been made in favour of government officials, in a manner that defeats the intent of the LRA and the Lobbyists' Code, and denudes it of any real import. These chacteristics of the Ethics Counsellors rulings are discussed in the next section.

B. THE ETHICS COUNSELLOR'S DECISIONS ON THE FOUR PETITIONS WERE INCORRECT AND UNREASONABLE.

(1) Standard of Review

88. The law on standard of review is aptly summarized by Iacobucci J. in the recent decision of the Supreme Court of Canada in *Ryan*, where he said in paragraph 1:

> "According to the governing jurisprudence, a court reviewing the decision of an administrative tribunal should employ the pragmatic and functional approach to determine the level of deference to be accorded to the decision in question. The appropriate level of deference will, in turn, determine which of the three standards of review the court should apply to the decision: correctness, reasonableness simpliciter, or patent unreasonableness." [58]

89. As set further set out in *Ryan*:

> "The pragmatic and functional approach determines the standard of review in relation to four contextual factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question -- law, fact, or mixed law and fact".[59]

90. In the present case, the application of the pragmatic and functional approach yields a standard of review of correctness.

91. First, under the Lobbyists' Code, there is neither a privative clause nor a statutory right of appeal. Therefore the first factor is neutral.

92. Far more important, anyway, are the second, third and fourth factors. Iacobucci J. noted in *Southam* that the second and third factors in the pragmatic and functional approach often overlap.[60] McLachlin C.J. in *Dr. Q.*[61] noted that the fourth factor, dealing with the nature of the question, typically overlaps with the factors relating to the

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[58] *Canada New Brunswick v. Ryan*, [2003] SCJ No. 17, 2003 SCC 20.

[59] *Ibid.*, at para. 27.

[60] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, at para. 50.

[61] *Dr. Q. v. College of Physicians and Surgeions of B.C.*, 2003 SCC 19, at para. 28.

purpose of the legislation and relative expertise. The three factors overlap in the present circumstances, so they are discussed together below.

93. The key issues in the present case primarily involve questions of law relating to the interpretation and application of various terms and concepts within the Lobbyists' Code and the LRA. The Ethics Counsellor has no particular legal expertise, and certainly no greater expertise than the court, in dealing with the kind of questions arising in this case, such as the proper interpretation of "conflict of interest". Indeed, the record on review indicates that the Ethics Counsellor experienced great difficulty interpreting and applying the provisions of the Code and the LRA.

94. This is a case like *Pushpanathan*, then, where the Supreme Court of Canada held that the deference to be shown to the Immigration and Refugee Board on questions of law was correctness.[62]

95. The fourth factor relating to the purpose of the regulatory provisions does little to alter the impression that a standard of correctness should apply. The LRA and the Lobbyists' Code are prescriptive in nature. They are not overly concerned with balancing of various factors, and the application of policy, and the Ethics Counsellor is not afforded the kind of wide discretion afforded to policy-oriented administrative tribunals.

96. In conclusion, the standard of review is correctness or, at worst, reasonableness *simpliciter*.

97. At the end of the day, however, it probably matters little to the result of this case, whether the standard or review is correctness or reasonableness. The rulings in question are both incorrect and unreasonable. They do not stand up to even only a "somewhat probing examination". [63] There is at least one, large, fundamental analytical problem with each of them.

(2) The Fugere Ruling is incorrect and unreasonable.

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[62] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982.

98. The Ethics Counsel made a serious error in deciding not to investigate on the basis of its finding in an earlier case involving Mr. Fugere. This constitutes an illegal fettering of discretion.

99. A decision-maker errs if, rather than considering a decision on a case-by-case basis, he simply applies or follows an earlier procedure or policy, without considering whether that procedure or policy is appropriate to the particular case.[64] As MaCaulay & Sprague write:

> "Having to decide a matter on a case-by-case basis means that the decision-maker must apply his or her mind to each matter, and all the components of that matter, and decide each of those components on the basis of their merit in those circumstances. This means that the decision-maker must keep an open-mind on all aspects of the matter — procedural just as much as substantive — and decide what to do on the merits of each case."[65]

100. The facts in support of DW's Petition relating to Mr. Fugere were powerful. The Ethics Counsellor's concern in the previous case that it would be difficult to prove that Mr. Fugere was paid to communicate with a public office holder "in an attempt to influence" could not have been as acute in the present case. The record put before the Ethics Counsellor was replete with evidence of Mr. Fugere's intent to influence offie holders to make federal grants.

101. Two other legal errors are related to this central defect. The "reasonable grounds" standard for investigations under the Lobbyists' Code is not a "beyond reasonable doubt" standard. The Ethics Counsellor should have considered, based on the strong evidence that he already had, launching a formal investigation under the Lobbyists' Code, and using his plethora of investigate powers to then determine whether to embark on both a prosecution under the LRA for failing to register as a lobbyist, and a prosecution for violation of Rule 8 of the Lobbyists' Code.

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[63] See *Ryan*, *supra*, at paras. 50-52, for a discussion of the standard of reasonableness *simpliciter*.

[64] Macaulay & Sprague, *Practice and Procedure Before Administrative Tribunals* (Carswell, Updated), p. 5B-21 and cases cited at fn 38.

[65] *Ibid.*

102. Instead, the Ethics Counsellor employed in this case (and the others that are the subject of this application) an attitude towards lobbyists and public office holders of undue complaisance and docility, and in so doing acted contrary to his statutory mandate, in a manner that did not support the objectives of the LRA and Lobbyists' Code.

103. This faulty attitude or stance was also reflected in the Ethics Counsellor's inordinate delay in the Fugere case.

104. In sum, these features of the Ethics Counsellor's conduct: his failure to consider the different circumstances and evidence before him in this case involving Mr. Fugere (as opposed to a previous one), his faulty attitude, his refusal to consider embarking on a formal investigation so that he was in a position to employ his panoply of investigative powers, and his inordinate delay, defeats his jurisdiction and amounts to a denial of procedural fairness to the complainant, DW.

105. Similar problems infected the other three cases at issue in this application.

(3) The Dossetor Ruling is incorrect and unreasonable.

106. In this case the Ethics Counsellor failed utterly to appreciate his duties under the LRA and the Lobbyists' Code to assess the evidence and facts in accordance with the governing regulatory regime.

107. The evidence was clear that Mr. Dossetor failed to register as a lobbyist under the LRA for many months after his hiring by Monsanto to lobby government. The evidence was clear that he only registered as a lobbyist after DW filed its Petition. It is asserted by the Ethics Counsellor that the explanation for this gap is that, prior to his registration, Mr. Dossetor had not been devoting a significant amount of his time to lobbying. This was at least contradicted on a *prima facie* basis by the public announcement issued months earlier by Monsanto concerning Mr. Dossetor's appointment and job duties. Nowhere in the Ethics Counsellor's investigation report is there any mention, comparison or analysis of the specific lobbying activities conducted by Mr. Dossetor for Monsanto before and after his registration. This is the fundamental question, yet it was

not addressed at all. There were "reasonable grounds" to proceed to a formal investigation utilizing the Ethics Counsellor's full investigative powers.

108. The Ethics Counsellor's inordinate delay in responding to DW's Petition, juxtaposed with the skimpiness of its efforts in evaluating the contentions in Petition, only magnify the unreasonableness of the ruling.

(4) The Nine Lobbyists' and Donations Rulings are incorrect and unreasonable.

109. These two Rulings share a common analytical foundation and therefore common defects. They are both based on the Ethics Counsellor's unreasonable interpretation of Rule 8 of the Lobbyists' Code, issued on January 21, 2003.

110. The main flaw in the Ethics Counsellor's interpretation is his contention that the concept of conflict of interest embodied in Rule 8 requires proof of actual conflict or impropriety as opposed to the appearance of conflict of interest or impropriety.

111. The interpretation advanced by the Ethics Counsellor runs counter to the entire trend of Canadian jurisprudence in this area, in particular as espoused by the Supreme Court of Canada.[66]

112. The interpretation advanced by the Ethics Counsellor also runs counter to the entire trend of the conflict-of-interest jurisprudence created by the Ethics Counsellor's various provincial counterparts. [67]

113. Indeed, the Ethics Counsellor seems to be unaware or at least oblivious to the apprehension of conflict-of-interest in modern jurisprudence.

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[66] See, for example, *Wewaykum*, *supra*, and the Court's discussion of this trend of authority.

[67] See rulings of the Integrity Commissioner- Ontario located at http://www.oico.on.ca, including: Report re Eves, Clement, Flaherty and Coburn dated Nov/28/03; Report re Eves and Clement dated Aug/13/03; Report re Flaherty dated Feb/8/02; Report re Harris and Harnick dated May 16/01. See also the rulings of the B.C. Conflict of Interest Commissioner located at http://www.gov.bc.ca/oci including: Application by McPhail re Minister Sindi Hawkins; Application by Delaney re Minister Stan Hagen; Ruling re Glen Clark; and Application by Tsawwassen Homeowners Association re Minister John Van Dongen.

114. The Ethics Counsellor's interpretation brings into play all of the failings of requiring proof of actual conflict or undue influence, that the court-based and tribunal-based jurisprudence has painstakingly tried to avoid.

115. Moreover, there is nothing in the lobbyists' regulatory regime that compels the Ethics Counsellor's peculiar view of conflict-of-interest. To the contrary, the Ethics Counsellor's interpretation fails to serve the objectives of the LRA and the Lobbyists' Code to assure the public that lobbying is done ethically, in a manner that conserves and enhances public confidence and trust in the integrity, objectivity and impartiality of government decision-making.

PART IV – ORDER REQUESTED

116. DW requests the following order:

(a) An order quashing the rulings issued by the Ethics Counsellor under the LRA and the Lobbyists' Code dealing with the four Petitions of DW raised in this application;

(b) A declaration that DW was deprived of its right to procedural fairness in the context of its four Petitions;

(c) A declaration that the institutional scheme under the LRA, in so far as it permits the same person to (i) carry out the responsibility of investigating and reporting to Parliament on alleged violations of the Lobbyists' Code and (ii) administer the Public Office Holders Code, raises a reasonable apprehension of bias;

(d) A declaration that the current Ethics Counsellor lacks independence and suffers from structural bias;

(e) A declaration that the LRA must be construed so as to prohibit the appointment of the same person to the office of Ethics Counsellor under

the LRA as is appointed to the office of Ethics Counsellor under the Public Office Holders Code;

(f) A declaration that the current Ethics Counsellor is biased against DW;

(g) Costs, inclusive of GST and such other relief as this Honourable Court deems just.

PART V – AUTHORITIES CITED

Wewaykum Indian Band v. Canada, [2003] S.C.J. No. 50, 2003 SCC 45

Committee for Justice and Liberty v. National Energy Board, [1978] 1 SCR 369

Newf. Tel. Co. v. Newf. (Bd. of Commissioners of Public Utilities), [1992] 1 S.C.R. 623

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ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Martin J. Doane