

Democracy Watch (*Appellant*)

v.

Barry Campbell and the Attorney General of Canada (Office of the Registrar of Lobbyists)
(*Respondents*)

INDEXED AS: DEMOCRACY WATCH v. CAMPBELL (F.C.A.)

Federal Court of Appeal, Nadon, Sharlow and Pelletier JJ.A.—Toronto, January 12; Ottawa, March 12, 2009.

Ethics — Appeal from Federal Court decision dismissing judicial review of Registrar of Lobbyists' decision dismissing appellant's complaint — Respondent Campbell, registered to lobby Department of Finance, hosting fundraising dinner for re-election of Secretary of State (International Financial Institutions) — Appellant alleging breach of Lobbyists' Code of Conduct, Rule 8 (conflict of interest) — Issue whether grounds to intervene with respect to Registrar's interpretation of Rule 8 — Concept of conflict of interest in Rule 8 intimately bound to problem of divided loyalties, conflicting obligations — Ethics Counsellor's reading of Rule 8 on which Registrar relying deeply flawed — Finding Rule 8 not prohibiting lobbyists from placing public office holders in conflict of interest so long as no activities proposed, undertaken that would amount to improper influence — Rule against conflicts of interest rule against possibility public office holder may prefer private interests to public interests — Improper influence must be assessed in context of conflict of interest — Public officer's private interest constituting improper influence to which Rule 8 referring — Registrar's interpretation of Rule 8 unreasonable — Appeal allowed.

Administrative Law — Judicial Review — Standard of Review — Appeal from Federal Court decision dismissing judicial review of Registrar of Lobbyists' decision dismissing appellant's complaint — Appellant alleging breach of Lobbyists' Code of Conduct, Rule 8 (conflict of interest) — Federal Court's standard of review analysis not distinguishing between Registrar's decision on merits of complaint, interpretation of Rule 8 — Misconstruing nature of problem since failing to examine separately whether Registrar's interpretation of Rule 8 reasonable, thus committing error of law.

This was an appeal from a Federal Court decision dismissing the appellant's application for judicial review of the decision of the Registrar of Lobbyists dismissing its complaint. The respondent Barry Campbell hosted a fundraising dinner for the re-election of the Secretary of State (International Financial Institutions), a position associated with the Department of Finance. Mr. Campbell was registered pursuant to the *Lobbyists Registration Act* with respect to a number of lobbying mandates, including the Department of Finance. The appellant filed a complaint alleging that Mr. Campbell had breached Rule 8 of the *Lobbyists' Code of Conduct* regarding conflict of interest. Further to a legislative amendment, responsibility for enforcement of the Code was transferred from the Ethics Counsellor to the Registrar. The Registrar concluded that no breach of the Rule could be found in the absence of evidence that Campbell's involvement in the political fundraising event constituted or led to an actual or attempted interference in the exercise of the Secretary of State's discretionary powers or those of any officials working with him. The Registrar relied in particular on a document regarding Rule 8 and Improper Influence (Advisory Opinion) prepared by the Ethics Counsellor. The Federal Court found that the Registrar's

decision was not unreasonable.

The main issues were the appropriate standard of review of the Registrar's decision, and whether there were grounds to intervene with respect to the Registrar's interpretation of Rule 8.

Held, the appeal should be allowed.

The Registrar's decision was a question of mixed fact and law. It involved the application of a legal standard (interpretation of Rule 8) to a set of facts. In the present case, whether or not Mr. Campbell breached Rule 8 of the Code subsumed the question of the interpretation of Rule 8. The interpretation of Rule 8 by the tribunal charged with the responsibility for enforcing the Code is an example of a tribunal interpreting a statute or other normative document with which it has a particular familiarity. In the absence of some other overriding consideration, this suggests that the standard of review of that question is reasonableness. As for the application of the interpretation of Rule 8 to the facts of Mr. Campbell's case, the appropriate standard was reasonableness. In this case, the Federal Court's standard of review analysis did not distinguish between the Registrar's decision on the merits of the complaint and his interpretation of Rule 8. After conducting a pragmatic and functional analysis, the Federal Court determined that the standard of review was reasonableness and found the Registrar's decision reasonable. However, it misconstrued the nature of the problem because it failed to examine separately whether the Registrar's interpretation of Rule 8 was reasonable, and this was an error of law.

As to Rule 8 of the Code, which is entitled "Improper Influence", the Registrar adopted the interpretation set out in the Advisory Opinion written by the Ethics Counsellor when the latter was responsible for the enforcement of the Code. The concept of conflict of interest is an important element in properly understanding Rule 8. The idea of conflict of interest is intimately bound to the problem of divided loyalties or conflicting obligations. While the specific facts giving rise to a conflict of interest will vary from one profession to another, that which leads to the conclusion that a person is subject to a conflict of interest is the presence of a tension between the person's duty and some other interest of obligation.

The Ethics Counsellor found that Rule 8 did not prohibit lobbyists from placing public office holders in a conflict of interest but only prohibited them from placing public office holders in a conflict of interest by proposing or undertaking activities which would amount to improper influence. This was a deeply flawed reading of the Rule. The Rule prohibits lobbyists from placing public office holders in a conflict of interest. The words "by proposing or undertaking any action that would constitute an improper influence on a public office holder" in Rule 8 are properly read as an attempt to elaborate on the meaning of "conflict of interest" in the context of the regulation of lobbyists and not as a limitation on the scope of the prohibition. The rule against conflicts of interest is a rule against the possibility that a public office holder may prefer his or her private interests to the public interest.

The Ethics Counsellor's position that Rule 8 only prohibits those acts which demonstrably result in actual interference in the public office holder's discharge of his duty mistook conflict of interest for corruption. Improper influence has to be assessed in the context of conflict of interest, where the issue is divided loyalties. Since a public office holder has, by definition, a public duty, one can only place a public office holder in a conflict of interest by creating a competing private interest. That private interest, which claims or could claim the public office holder's loyalty, is the improper influence to which the Rule refers. Therefore, the Registrar's interpretation of Rule 8 was unreasonable and was set aside.

STATUTES AND REGULATIONS CITED

Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence, S.C. 2004, c. 7, s. 23.

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 52 (as am. by S.C. 1990, c.

8, s. 17; 2002, c. 8, s. 50).
Lobbyists Registration Act, R.S.C., 1985 (4th Supp.), c. 44, preamble (as am. by S.C. 2003, c. 10, s. 1), ss. 5(1) (as am. *idem*, s. 4), 7(1) (as am. *idem*, s. 7), 10.2(1) (as enacted by S.C. 1995, c. 12, s. 5; 2004, c. 7, s. 39).

CASES CITED

CONSIDERED:

Democracy Watch v. Canada (Attorney General), 2004 FC 969, [2004] 4 F.C.R. 83, 20 Admin. L.R. (4th) 163, 257 F.T.R. 6; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 37, 232 D.L.R. (4th) 385, [2003] CLLC 220-071; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577; *Cox v. College of Optometrists of Ontario* (1988), 65 O.R. (2d) 461, 52 D.L.R. (4th) 298, 33 Admin. L.R. 287 (Div. Ct.); *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, 281 D.L.R. (4th) 640, [2007] 7 W.W.R. 381.

REFERRED TO:

Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, 223 D.L.R. (4th) 599; [2003] 5 W.W.R. 1.

AUTHORS CITED

Black's Law Dictionary, 5th ed. St. Paul, Minn.: West Pub. Co., 1979, "undue influence".
Black's Law Dictionary, 7th ed. St. Paul, Minn.: West Group, 1999, "conflict of interest".
Code of Professional Conduct. Revised edition 2006: amendments adopted by Council, August 2004 and February 2006. Ottawa: Canadian Bar Association, 2006.
Lobbyists' Code of Conduct, 1997, *C. Gaz.* 1997, 331, preamble, RR. 1, 2, 3, 4, 5, 6, 7, 8.
Rule 8 — Improper Influence — Lobbyists and Leadership Campaigns. Guidelines issued by Howard R. Wilson, Ethics Counsellor, September 2002, online: <<http://www.ocl-cal.gc.ca/eic/site/lobbyist-lobbyiste1.nsf/eng/nx00029.html>>.

APPEAL from a Federal Court decision (2008 FC 214, 324 F.T.R. 44) dismissing the appellant's application for judicial review of the decision of the Registrar of Lobbyists dismissing its complaint. Appeal allowed.

APPEARANCES

David Baker and Bahreet Singh Bopari for appellant.
Peter H. Griffin and Jordan B. Goldblatt for respondent Barry Campbell.
Michael H. Morris and Derek C. Allen for respondent Attorney General of Canada.

SOLICITORS OF RECORD

Bakerlaw, Toronto, for appellant.
Lanzner Slaght Royce Smith Griffin LLP, Toronto, for respondent Barry Campbell.
Deputy Attorney General of Canada for respondent Attorney General of Canada.

The following are the reasons for judgment rendered in English by

[1] PELLETIER J.A.: This appeal deals with the meaning of Rule 8 of the *Lobbyists' Code of Conduct* [1997, *C. Gaz.* 1997.I.331] (the Code), a code promulgated [S.C. 1995, c. 12, s. 5] under the *Lobbyists Registration Act*, R.S.C., 1985 (4th Supp.), c. 44 (the LRA). The appeal is from the decision of Deputy Judge Frenette of the Federal Court (the Deputy Judge), dismissing Democracy Watch's application for judicial review of the decision of the Registrar of Lobbyists (the Registrar) dismissing its complaint. The Deputy Judge's reasons (the reasons) are reported as *Democracy Watch v. Campbell*, 2008 FC 214, 324 F.T.R. 44.

THE FACTS

[2] In September 1999, Mr. Barry Campbell, at Mr. James Peterson's invitation, hosted a fundraising dinner for the latter, a Liberal Member of Parliament who was running for re-election. The circumstances which brought this arrangement to the attention of Democracy Watch were that, at the time, Mr. Peterson was Secretary of State (International Financial Institutions), a Cabinet appointment with certain responsibilities in relation to the Department of Finance, while Mr. Campbell was registered pursuant to the LRA with respect to a number of lobbying mandates, one of which involved Mr. Peterson and the Department of Finance.

[3] On April 13, 2000, Democracy Watch complained to the Ethics Counsellor, who was then responsible for the enforcement of the Code. Democracy Watch alleged that Mr. Campbell had breached Rule 8 of the Code which states:

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

[4] Despite the fact that this complaint was among the first, if not the first, filed by Democracy Watch under the newly promulgated Code, the Ethics Counsellor had not ruled on it by the time the law was amended to transfer responsibility for enforcement of the Code to the Registrar: see S.C. 2004, c. 7, s. 23 [*An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence*]. On February 25, 2005, the Registrar wrote to Democracy Watch to ask if it was still interested in pursuing its complaint with respect to Mr. Campbell. On June 17, 2005, Democracy Watch indicated that it wanted the Registrar to deal with its complaint.

[5] On October 10, 2006, the Registrar wrote to Democracy Watch to advise it of his findings. The letter began by setting out Rule 8 and noting that "the advice currently provided to lobbyists on Rule 8 is available at the Office of the Registrar of Lobbyists' website". The letter went on to state the view of the Office of the Registrar that "improper influence" is a question of fact in each case and that the factors to be taken into account in determining whether any action constitutes an improper influence include, but are not limited to (A.B., Vol. 1, at page 111):

- whether there has been interference with the decision, judgment or action of the public office holder.

- whether there has been a wrongful constraint whereby the will of the public office holder was overpowered and whether the public office holder was induced to do or forbear an act which he or she would not do if left to act freely; and
- whether there has been a misuse of a position of confidence or whether the lobbyist took advantage of a public office holder's weakness, infirmity or distress to alter that public office holder's actions or decisions.

[6] These factors are taken from a publication prepared by the Ethics Counsellor entitled, *Rule 8 — Improper Influence — Lobbyists and Leadership Campaigns*, which, as of the date of these reasons, could still be found on the Office of the Registrar of Lobbyists' Web site at <<http://www.oclc.ca/eic/site/lobbyist-lobbyiste1.nsf/eng/nx00029.html>>. In its materials, Democracy Watch referred to this document as the "Advisory Opinion", and I will do the same in these reasons.

[7] The Registrar went on to advise that his Office examined relevant documents and interviewed key individuals, "including current and former public office holders from the Department of Finance and elsewhere" (A.B., Vol. 1, at page 111). On the basis of his view of the requirements of the Rule and the investigative work undertaken by his office, the Registrar concluded as follows (A.B., Vol. 1, at page 111):

Based on the evidence gathered, the Office of the Registrar of Lobbyists has determined that Mr. Campbell did not interfere with Secretary of State Peterson's action or decisions and that his accepting to take on the Chair of the *Friends of Jim Peterson* did not cause Secretary of State Peterson to treat his [Campbell's] client (or ask his staff to treat his [Campbell's] client) favourably. In addition, the Office of the Registrar of Lobbyists has concluded that the role and discretion of officials working on the relevant file had not been in any way constrained.

Therefore, we have concluded that Mr. Campbell did not breach Rule 8 of the *Lobbyists' Code of Conduct*, when he became Chair of the *Friends of Jim Peterson* while being registered to lobby the Department of Finance.

[8] Thus, the Registrar concluded that he could not find a breach of the Rule in the absence of evidence that Mr. Campbell's involvement in the political fundraising event for Mr. Peterson constituted or led to an actual or attempted interference in the exercise of the discretionary powers vested in Mr. Peterson in his capacity as Secretary of State (International Financial Institutions) or any officials working with him in that position.

[9] The Registrar went on to say that he took a broader view of the Code than did his predecessor, the Ethics Counsellor. Since Democracy Watch attributes some significance to his comments, they are reproduced below (A.B., Vol. 1, at pages 111–112):

I take a view of the *Lobbyists' Code of Conduct* that is more broad than that of the former Ethics Counsellor. You will note that the version of the Code that is posted on the Office of the Registrar of Lobbyists' website no longer includes the constraint that a rule must be broken in order to initiate an investigation. It would be unfair to retroactively impose my approach to enforcement of the *Lobbyists' Code of Conduct* upon lobbyists who operated under the previous approach to enforcing the Code. However, I will expect lobbyists to observe both the spirit and the letter of the entire *Lobbyists' Code of Conduct* in their current and future lobbying assignments.

THE DECISION BELOW

[10] Democracy Watch disagreed with the Registrar's decision and brought an application for judicial review, which was heard by the Deputy Judge. A number of arguments made before him were not pursued in this appeal. As a result, this summary of the Deputy Judge's reasons will deal only with those aspects of his decision that were contested before us, namely, the standard of review, the appropriateness of the Registrar's interpretation of Rule 8 in light of the proper standard of review, the application of the doctrine of legitimate expectations and the issue of costs given the submission of Democracy Watch that it is a public interest litigant.

[11] The Deputy Judge addressed the question of standard of review by conducting a pragmatic and functional analysis. On the basis of his analysis, the Deputy Judge found that the applicable standard of review was that of reasonableness, so that he ought not to interfere with the Registrar's decision unless it did not stand up to a somewhat probing examination.

[12] Applying that standard of review, the Deputy Judge held that the Registrar's decision was not unreasonable. He rejected the argument that the question of the reasonableness of the Registrar's interpretation was *res judicata*, so far as Democracy Watch was concerned, because that question had been previously decided in proceedings to which Democracy Watch was a party: *Democracy Watch v. Canada (Attorney General)*, 2004 FC 969, [2004] 4 F.C.R. 83 (*Democracy Watch*). In that case (at paragraph 85), Gibson J. found that:

I would not be prepared to conclude on the evidence before me that the Ethics Counsellor's interpretation of Rule 8 of the Lobbyists' Code, issued January 21, 2003, and underlying his ruling or decision on the Nine Lobbyists' petition or complaint, in and of itself, was such an "unreasonable interpretation", strict as it was, as to give rise to a reviewable error.

[13] The Deputy Judge found that these comments were *obiter dicta*, in that Gibson J. had previously disposed of the application before him on the ground of bias, and so, his comments had no binding or persuasive effect. Nonetheless, in the context of his analysis of Democracy Watch's allegations of bias—allegations which were not pursued in this Court—the Deputy Judge indicated that he agreed with Gibson J.'s assessment that the Ethics Counsellor's interpretation of Rule 8 was not unreasonable.

[14] The Deputy Judge found that the Registrar investigated the facts surrounding Mr. Campbell's fundraising for Mr. Peterson and that he applied the analysis set out in the Advisory Opinion. The Deputy Judge quoted the Registrar's conclusion that he "found that there were not sufficient indicia of improper influence to support reasonable grounds of belief that Mr. Campbell's actions constituted a breach of Rule 8" (the reasons, at paragraph 45). The Deputy Judge went on to say that:

While the "reasonable grounds to believe" test is not a significant threshold, as noted by Justice Gibson in *Democracy Watch I*, it behove the Registrar to not merely have reasonable belief that there was some appearance of impropriety, but that there had been a breach of Rule 8. He did not find that, and was not unreasonable in doing so.

[15] On the matter of costs, Democracy Watch argued that it should be awarded its costs against the Attorney General of Canada, but did not seek costs against Mr. Campbell (the reasons, at

paragraph 50). Democracy Watch argued that it was entitled to its costs in any event of the cause in its capacity as a public interest litigant, even though counsel for Democracy Watch was acting *pro bono*.

[16] The Deputy Judge found that all of the issues in the application before him had been dealt with in *Democracy Watch*. The allegations of bias had been addressed by amendments to the legislation, which dealt with the lack of independence identified by Gibson J. *Democracy Watch* also addressed the question of standard of review and the reasonableness of the interpretation of Rule 8 found in the Advisory Opinion, which was adopted by the Registrar. In the result, the Deputy Judge held that the issues raised in the application before him were not questions of public interest, such that Democracy Watch should be relieved of the obligation to pay costs if unsuccessful in its application. As a result, he made an award of costs against Democracy Watch in favour of both Mr. Campbell and the Attorney General.

ISSUES

[17] Democracy Watch characterizes the issues in this appeal as follows:

- 1- What is the appropriate standard of review of the Registrar's decision?
- 2- What is the correct interpretation of Rule 8 of the *Lobbyists' Code of Conduct*?
- 3- Did the Registrar err in applying the "doctrine of legitimate expectations" to the facts of this case?
- 4- Is Democracy Watch a public interest litigant before this Court?

[18] The second issue, as framed by Democracy Watch, assumes that the standard of review of the Registrar's decision is correctness. A more neutral statement of the issue would be: "Are there grounds to intervene with respect to the Registrar's interpretation of Rule 8?"

[19] The issue of the application of the doctrine of legitimate expectations does not appear to have been raised before the Deputy Judge. In light of Democracy Watch's submissions, it appears to me that the issue it seeks to address is whether the Registrar fettered his discretion by applying the Ethics Counsellor's interpretation of the Code, rather than his own. I propose to restate this issue as: "Did the Registrar fetter his discretion?"

ANALYSIS

- 1- What is the appropriate standard of review of the Registrar's decision?

[20] In its memorandum of fact and law, Democracy Watch undertakes the standard of review analysis and concludes that, in the case of the Registrar's decision, the standard is correctness. Democracy Watch identifies the nature of the question as consisting of three questions of law (the interpretation of Rule 8, the application of the doctrine of legitimate expectations, and its status as a public interest litigant), questions which it says are of general importance and outside the Registrar's area of expertise. In my view, this analysis fails to properly address either the Deputy Judge's

reasoning or the nature of the question decided by the Registrar.

[21] The Registrar's decision is a question of mixed fact and law. It involves the application of a legal standard (the interpretation of Rule 8) to a set of facts (Mr. Campbell's involvement in Mr. Peterson's fundraising dinner). Generally, in an application for judicial review, such questions are to be reviewed on the same standard as questions of fact, which is reasonableness, unless it is possible to identify an extricable question of law, in which case the discrete legal question is to be reviewed on the basis which is appropriate in the circumstances: see by analogy *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*), at paragraph 26.

[22] If an extricable question of law is an issue in a judicial review and that question is one which is "of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise," then the appropriate standard will be correctness: see *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paragraph 62; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*), at paragraph 60. On the other hand, where the question of law arises in the course of a tribunal interpreting "its own statute or statutes closely connected to its function, with which it will have particular familiarity", then reasonableness may be the appropriate standard: see *Dunsmuir*, at paragraph 54.

[23] In the present case, whether or not Mr. Campbell breached Rule 8 of the Code subsumes the question of the interpretation of Rule 8, an extricable question of law. The interpretation of Rule 8 by the tribunal charged with the responsibility for enforcing the Code is an example of a tribunal interpreting a statute or other normative document with which it has a particular familiarity. In the absence of some other, overriding, consideration, this suggests that the standard of review of that question is reasonableness: see *Dunsmuir*, at paragraph 54.

[24] As for the application of the interpretation of Rule 8 to the facts of Mr. Campbell's case, the appropriate standard is that applicable to the review of questions of mixed fact and law, reasonableness.

[25] This Court's role, on appeal from a judicial review of an administrative tribunal's decision, is to determine if the tribunal has correctly identified the appropriate standard of review, and if it has, to confirm that it has properly applied that standard: see *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paragraph 43.

[26] In this case, the Deputy Judge's standard of review analysis did not distinguish between the Registrar's decision on the merits of the complaint and his interpretation of Rule 8. He simply decided, after conducting a pragmatic and functional analysis, that the standard of review of the Registrar's decision was reasonableness. He then went on to find that the Registrar's decision was not unreasonable. In proceeding in that truncated fashion, the Deputy Judge misconstrued the nature of the problem before him because he failed to examine separately whether the Registrar's interpretation of Rule 8 was reasonable. In my view, his failure to examine that legal question separately was an error of law.

• Are there grounds to intervene with respect to the Registrar's interpretation of Rule 8?

[27] The authority to promulgate the Code is found at section 10.2 [as enacted by S.C. 1995, c. 12, s. 5; 2004, c. 7, s. 39] of the LRA, which provides as follows:

10.2 (1) The registrar shall develop a Lobbyists' Code of Conduct respecting the activities described in subsections 5(1) and 7(1).

[28] Subsections 5(1) [as am. by S.C. 2003, c. 10, s. 4] and 7(1) [as am. *idem*, s. 7] are parallel provisions; the former deals with consultant lobbyists, while the latter deals with in-house lobbyists. For present purposes, it is sufficient to reproduce subsection 5(1):

5. (1) An individual shall file with the registrar, in the prescribed form and manner, a return setting out the information referred to in subsection (2), if the individual, for payment, on behalf of any person or organization (in this section referred to as the "client"), undertakes to

(a) communicate with a public office holder in respect of

- (i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons,
- (ii) the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament,
- (iii) the making or amendment of any regulation as defined in subsection 2(1) of the *Statutory Instruments Act*,
- (iv) the development or amendment of any policy or program of the Government of Canada,
- (v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada, or
- (vi) the awarding of any contract by or on behalf of Her Majesty in right of Canada; or

(b) arrange a meeting between a public office holder and any other person.

[29] The preamble [as am. *idem*, s. 1] to the LRA recognizes that lobbying is a legitimate activity, but that both public office holders and the public have the right to know who is engaged in lobbying activities. The Code, which is reproduced as a schedule to these reasons, begins with a preamble which restates the preamble to the LRA and emphasizes the role of the Code in promoting public trust in government decision-making. The Code then sets out three principles and eight rules. The principles are: Integrity and Honesty, Openness, and Professionalism. The rules are grouped under three headings: Transparency, Confidentiality and Conflict of interest. Rule 8 appears as one of the three rules grouped under the latter heading, as reproduced below:

Conflict of interest

6. Competing interests

Lobbyists shall not represent conflicting or competing interests without the informed consent of those whose interests are involved.

7. Disclosure

Consultant lobbyists shall advise public office holders that they have informed their clients of any actual, potential or apparent conflict of interest, and obtained the informed consent of each client concerned before

proceeding or continuing with the undertaking.

8. Improper Influence

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

[30] One notes that Rule 6 deals with a lobbyist's own conflict of interest, and that Rule 7 requires a lobbyist to disclose any conflict of interest to the public office holders he or she is attempting to influence. It is not necessary to inquire into these rules any further, other than to note that conflict of interest presumably means the same thing in Rule 8 as it does in rules 6 and 7.

[31] In his decision, the Registrar adopted the interpretation of Rule 8 set out in the Advisory Opinion, which, as noted, was written by the Ethics Counsellor at a time when the latter was responsible for the enforcement of the Code. Given the Advisory Opinion's prominence in the Registrar's decision, it is useful to examine it in more detail.

[32] The Ethics Counsellor began his analysis by noting that the Code does not prohibit lobbyists from placing public office holders in a conflict of interest: it prohibits lobbyists from placing public office holders in a conflict of interest by proposing or undertaking activities that would constitute an improper influence on a public office holder.

[33] The Ethics Counsellor's analysis of Rule 8 then focused on the meaning of "improper influence". He quoted *Black's Law Dictionary*, 5th ed., an often-cited American reference work, which equates "improper influence" with "undue influence". He referred to the following definition of "undue influence" from *Black's Law Dictionary*:

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

[34] The Ethics Counsellor then went on to note that the seventh edition of the same work "more succinctly, again equates 'improper influence' to 'undue influence' and defines the phrase as the 'improper use of power or trust in a way that deprives a person of free will and substitutes another's objective.'"

[35] Based on these definitions, the Ethics Counsellor articulated his view as to the limitations to be placed on Rule 8:

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

[36] This is followed by the enumeration of some of the factors to be considered in deciding

whether any action, proposed or undertaken by a lobbyist, has resulted in “improper influence”. Those factors were set out earlier in these reasons, but are repeated here for ease of reference:

- whether there has been interference with the decision, judgment or action of the public office holder;
- whether there has been a wrongful constraint whereby the will of the public office holder was overpowered and whether the public office holder was induced to do or forbear an act which he or she would not do if left to act freely; and
- whether there has been a misuse of position of confidence or whether the lobbyist took advantage of a public office holder’s weakness, infirmity or distress to alter that public office holder’s actions or decisions.

[37] If the Ethics Counsellor’s view of the meaning to be given to Rule 8 is unreasonable, then the Registrar erred in law in adopting that interpretation.

[38] The Registrar was no doubt influenced by Gibson J.’s decision in *Democracy Watch* in which the latter held that the Ethics Counsellor’s view, while strict, was not so unreasonable as to give rise to a reviewable error: see *Democracy Watch*, at paragraph 85. As noted above, the Deputy Judge accepted Gibson J.’s view.

[39] For the reasons that follow, I am of the view that the interpretation given to Rule 8 by the Ethics Counsellor, and subsequently adopted by the Registrar, was unreasonable.

[40] To properly understand Rule 8, one must grasp the concept of conflict of interest, a notion which is very elastic (*Cox v. College of Optometrists of Ontario* (1988), 65 O.R. (2d) 461 (Div. Ct) (*Cox*), at page 468):

Conflict of interest takes many different forms and invites many different definitions and techniques of regulation. Its definition depends on the dynamics of the particular trade or calling in question. There is often no single definition for any particular trade or calling.

[41] The common element in the various definitions of conflict of interest is, in my opinion, the presence of competing loyalties. This was articulated in the *Cox* case as follows (at page 469):

Conflict of interest in this context means a personal interest so connected with professional duty that it might reasonably be apprehended to give rise to a danger of actually influencing the exercise of the professional duty.

[42] The same emphasis on divided loyalties can be found in a passage from a recent decision of the Supreme Court (*Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177 (*Strother*), at paragraph 56):

A “conflict of interest” was defined in *Neil* as an interest that gives rise to a

substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third

person.

[43] The Canadian Bar Association's *Code of Professional Conduct*, under the heading of "Conflict of Interest between Lawyer and Client", contains the following prohibition (2006, at page 46):

3. The lawyer shall not act for the client where the lawyer's duty to the client and the personal interests of the lawyer or an associate are in conflict.

[44] If one looks to the same authority as the Ethics Counsellor, that is, the seventh edition of *Black's Law Dictionary*, "conflict of interest" is defined as follows:

conflict of interest. 1. A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.

[45] As this brief survey demonstrates, the idea of conflict of interest is intimately bound to the problem of divided loyalties or conflicting obligations. While the specific facts giving rise to a conflict of interest will vary from one profession to another, that which leads to the conclusion that a person is subject to a conflict of interest is the presence of a tension between the person's duty and some other interest or obligation.

[46] Turning now to Rule 8, it will be recalled that it provides as follows:

8. Improper Influence

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

[47] The Ethics Counsellor found that Rule 8 did not prohibit lobbyists from placing public office holders in a conflict of interest, but only prohibited them from placing public office holders in a conflict of interest by proposing or undertaking activities which would amount to improper influence.

[48] With respect, this is a deeply flawed reading of the Rule. The Rule prohibits lobbyists from placing public office holders in a conflict of interest. The words "by proposing or undertaking any action that would constitute an improper influence on a public office holder" are properly read as an attempt to elaborate on the meaning of "conflict of interest" in the context of the regulation of lobbyists, and not as a limitation on the scope of the prohibition. It can hardly advance public confidence in the integrity and transparency of government decision-making to condone certain conflicts of interest while prohibiting others. Any conflict of interest impairs public confidence in government decision-making.

[49] Beyond that, the rule against conflicts of interest is a rule against the possibility that a public office holder may prefer his or her private interests to the public interest. If one looks to the passages cited above, they refer to the possibility that one private interest *may* interfere with the discharge of one's public duty:

Conflict of interest in this context means a personal interest so connected with professional duty that it might reasonably be apprehended to give rise to a danger of actually influencing the exercise of the professional duty. [*Cox*, at page 469; emphasis added.]

A “conflict of interest” was defined in *Neil* as an interest that gives rise to a

substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person. [*Strother*, at paragraph 56; emphasis added.]

A real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties. [*Black’s Law Dictionary*, 7th ed., s.v. “conflict of interest”; emphasis added.]

[50] In *Cox*, the Ontario Divisional Court made this point explicitly (at page 469).

Conflict of interest does not require proof of actual influence by the personal interest upon the professional duty any more than it requires proof of actual receipt of a benefit.

[51] The Ethics Counsellor’s position that Rule 8 only prohibits those acts which demonstrably result in actual interference in the public office holder’s discharge of his duty, mistakes conflict of interest for corruption.

[52] Improper influence has to be assessed in the context of conflict of interest, where the issue is divided loyalties. Since a public office holder has, by definition, a public duty, one can only place a public office holder in a conflict of interest by creating a competing private interest. That private interest, which claims or could claim the public office holder’s loyalty, is the improper influence to which the Rule refers.

[53] The Ethics Counsellor made a point of saying that the threshold for Rule 8 must be set high, so that lobbyists are not subject to criticism for legitimate lobbying activities. A lobbyist’s stock in trade is his or her ability to gain access to decision makers, so as to attempt to influence them directly by persuasion and facts. Where the lobbyist’s effectiveness depends upon the decision-maker’s personal sense of obligation to the lobbyist, or on some other private interest created or facilitated by the lobbyist, the line between legitimate lobbying and illegitimate lobbying has been crossed. The conduct proscribed by Rule 8 is the cultivation of such a sense of personal obligation, or the creation of such private interests.

[54] As a result, I conclude that the Registrar’s interpretation of Rule 8 was unreasonable, and that his decision must therefore be set aside. In light of this conclusion, it is not necessary to deal with the second issue raised by Democracy Watch, whether it be described as the application of the doctrine of legitimate expectations or as fettering discretion. The Registrar will have to develop his own approach to the interpretation and application of Rule 8, in light of the principles set out in these reasons.

[55] It remains only to consider the issue of an appropriate remedy. Given that the facts giving rise to Democracy Watch’s complaint are almost 10 years in the past, a question arises as to whether the interests of justice would be served by remitting this matter to the Registrar for a fresh decision in light of these reasons. The powers of this Court are set out at section 52 [as am. by S.C. 1990, c. 8, s.

17; 2002, c. 8, s. 50] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. *idem*, s. 14)]:

52. The Federal Court of Appeal may

(a) quash proceedings in cases brought before it in which it has no jurisdiction or whenever those proceedings are not taken in good faith;

(b) in the case of an appeal from the Federal Court,

(i) dismiss the appeal or give the judgment and award the process or other proceedings that the Federal Court should have given or awarded,

(ii) in its discretion, order a new trial if the ends of justice seem to require it, or

(iii) make a declaration as to the conclusions that the Federal Court should have reached on the issues decided by it and refer the matter back for a continuance of the trial on the issues that remain to be determined in light of that declaration; and

(c) in the case of an appeal other than an appeal from the Federal Court,

(i) dismiss the appeal or give the decision that should have been given, or

(ii) in its discretion, refer the matter back for determination in accordance with such directions as it considers to be appropriate.

[56] Subparagraph 52(b)(iii) authorizes the Court, on appeal from the Federal Court, to make a declaration as to the conclusions which the Federal Court should have reached and to refer the matter “for a continuance of the trial on the issues that remain to be determined in light of that declaration”. This contemplates proceedings of an interlocutory nature (“continuance of the trial”). Subparagraph 52(b)(ii) allows the Court “in its discretion, [to] order a new trial if the ends of justice seem to require it”. The only circumstance in which the Court could order a new trial is if the appeal was successful. Applying this subparagraph by analogy to the facts of this case, Democracy Watch has been successful in attacking the Registrar’s interpretation of Rule 8, and, to that extent, the appeal has been successful. However, given that the events underlying Democracy Watch’s complaint are almost 10 years old, it is doubtful that the interests of justice require that this complaint be returned for a new hearing and a fresh decision. Enough time has passed that this matter should be allowed to lapse.

[57] The original decision found that Mr. Campbell had not engaged in misconduct. In setting that decision aside, I make no finding as to the propriety or impropriety of Mr. Campbell’s conduct. Democracy Watch has achieved its objective of clarifying the interpretation of the Code; the particulars of a specific complaint are, by this point, secondary.

[58] As for the question of costs, Democracy Watch, as the successful party, would normally be entitled to its costs both here and below. Thus, the question of Democracy Watch’s public interest standing is of no consequence in relation to costs. I would grant Democracy Watch its costs against the Attorney General, both in this Court and in the Federal Court.

[59] I would not grant Democracy Watch its costs against Mr. Campbell. While it is not Democracy Watch’s fault that its complaint was allowed to languish for five years, it is not Mr. Campbell’s either. Given that the positions taken by Mr. Campbell and the Attorney General were substantially

the same, I think it appropriate that there be no award of costs against Mr. Campbell, either in this Court or in the Federal Court.

[60] As a result, I would allow the appeal and I would set aside the decision of the Deputy Judge and, making the order that the Deputy Judge ought to have made, I would set aside the decision of the Registrar, dated October 10, 2006, but I would not remit the matter to the Registrar for a new decision. I would award Democracy Watch its costs against the Attorney General in this Court and in the Federal Court. I would make no order of costs with respect to Mr. Campbell.

NADON J.A.: I agree.

SHARLOW J.A.: I agree.

Schedule

Lobbyists' Code of Conduct

PREAMBLE

The *Lobbyists' Code of Conduct* is founded on four concepts stated in the *Lobbyists Registration Act*:

- Free and open access to government is an important matter of public interest;
- Lobbying public office holders is a legitimate activity;
- It is desirable that public office holders and the public be able to know who is attempting to influence government; and,
- A system for the registration of paid lobbyists should not impede free and open access to government.

The *Lobbyists' Code of Conduct* is an important initiative for promoting public trust in the integrity of government decision-making. The trust that Canadians place in public office holders to make decisions in the public interest is vital to a free and democratic society.

To this end, public office holders, when they deal with the public and with lobbyists, are required to honour 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.

Together, these codes play an important role in safeguarding the public interest in the integrity of government decision-making.

PRINCIPLES

Integrity and Honesty

Lobbyists should conduct with integrity and honesty all relations with public office holders, clients,

employers, the public and other lobbyists.

Openness

Lobbyists should, at all times, be open and frank about their lobbying activities, while respecting confidentiality.

Professionalism

Lobbyists should observe the highest professional and ethical standards. In particular, lobbyists should conform fully with not only the letter but the spirit of the *Lobbyists' Code of Conduct* as well as all the relevant laws, including the *Lobbyist Registration Act* and its regulations.

RULES

Transparency

1. Identity and purpose

Lobbyists shall, when making a representation to a public office holder, disclose the identity of the person or organization on whose behalf the representation is made, as well as the reasons for the approach.

2. Accurate information

Lobbyists shall provide information that is accurate and factual to public office holders. Moreover, lobbyists shall not knowingly mislead anyone and shall use proper care to avoid doing so inadvertently.

3. Disclosure of obligations

Lobbyists shall indicate to their client, employer or organization their obligations under the *Lobbyists Registration Act*, and their obligation to adhere to the *Lobbyists' Code of Conduct*.

Confidentiality

4. Confidential information

Lobbyists shall not divulge confidential information unless they have obtained the informed consent of their client, employer or organization, or disclosure is required by law.

5. Insider information

Lobbyists shall not use any confidential or other insider information obtained in the course of their lobbying activities to the disadvantage of their client, employer or organization.

Conflict of interest

6. Competing interests

Lobbyists shall not represent conflicting or competing interests without the informed consent of those whose interests are involved.

7. Disclosure

Consultant lobbyists shall advise public office holders that they have informed their clients of any actual, potential or apparent conflict of interest, and obtained the informed consent of each client concerned before proceeding or continuing with the undertaking.

8. Improper influence

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

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