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

(December 2020)

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

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

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

The biggest loopholes in the *Act* are that:

a) unpaid lobbying;
b) lobbying concerning the enforcement of a rule, and;
c) lobbying as an employee less than 20 percent of one's work time

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

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

and these loopholes should all be closed so that the only non-registrable lobbying activity would be a person signing a mass email letter that an individual

[1] See the *Lobbyists' Code of Conduct* at: https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/lobbyists-code-of-conduct/.
[2] *Lobbying Act* (R.S.C., 1985, c. 44 (4th Supp.)). See it at: https://laws-lois.justice.gc.ca/eng/acts/l-12.4/.

or organization sets up (as the individual or organization would be required to register the letter-writing effort).

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

As well, the *Code* does not apply to some registered lobbyists' unethical lobbying tactics. Most especially, the *Code*'s Rule 10 does not prohibit lobbyists from giving the unethical gift of unlimited travel (known as "sponsored travel") to MPs and senators (and their families and associates) whom they are lobbying[3] because the MP and senator codes explicitly allow them to receive the gift of sponsored travel, no matter how unethical the gift is. (**See details below** in section D.10 re: Rule 10).

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

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

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

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

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

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[3] See details in the Commissioner's April 2019 report *Sponsored travel provided by lobbyists*, at: https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/sponsored-travel-provided-by-lobbyists/.

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

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

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

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

In the Compliance and Enforcement section for fiscal year 2017-2018 and the Investigations section for fiscal year 2018-2019 and the Ensuring compliance section for fiscal year 2019-2020, **Commissioner Bélanger's three Annual Reports do not disclose the following key information:**

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

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

All the indications are that Commissioner Bélanger is continuing the weak enforcement record of the former Ethics Counsellor and Registrar by ignoring clear violations and interpreting the *Act* and *Code* in ways that ignore

their purpose of ensuring transparent, ethical lobbying so as to let most lobbyists off, usually in secret, instead of holding them accountable for their wrongdoing.

Commissioner Bélanger let the responsible officer and lobbyists at Apotex Inc. off the hook when Apotex's Chairman Barry Sherman passed away even though they had participated in the fundraising event Sherman held for the Liberal Party that Justin Trudeau attended, and also let Clearwater Seafoods Inc. off the hook without even investigating the fundraising event its board member Mickey MacDonald held for the Liberal Party that Justin Trudeau also attended. Both events clearly violated the *Code*, as did both companies lobbying the Prime Minister's Office after the events.

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

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

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

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

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

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

1. As if Rule 6 is not equally broad and comprehensive as old Rule 8;

[5] See the archived previous version of the *Code* at: https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/lobbyists-code-of-conduct/archived-archived-information-lobbyists-code-of-conduct-1997/.
[6] Also see *Democracy Watch v. Campbell*, 2009 FCA 79 (CanLII), [2010] 2 FCR 139, <http://canlii.ca/t/22vcj>.

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

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

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

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

3. Require lobbyists to confirm they are complying with rules

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

B. Introduction and Preamble of the Code

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

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

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

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

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

C. The Four Principles of the *Code*

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

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

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

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

The Introduction to the *Code* states:

> "Lobbyists, when engaging in lobbying activities, shall meet the standards set out in the principles and rules of the Code."
> …

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[8] *Interpretation* Act (R.S.C., 1985, c. I-21), section 12; *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at paras 41-42.
[9] See ruling at: https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/benjamin-bergen-council-of-canadian-innovators/.
[10] See ruling at: https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/dana-o-born-council-of-canadian-innovators/.

> The Commissioner of Lobbying has the authority to enforce the *Lobbyists' Code of Conduct* if there is an alleged breach of either a principle or a rule of the Code."

The Preamble to the *Code* states:

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

The Principles of the *Code* are set out below the Preamble, along with the Rules. Clearly, lobbyists must abide by both the Principles and the Rules.

As well, the predecessor to the Commissioner, the Registrar of Lobbyists, concluded that the Principles were enforceable, and enforced them, and those rulings were upheld in Federal Court[11] and by the Federal Court of Appeal.[12]

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

Further, the "Professionalism" Principle states that:

> "…lobbyists should conform fully with the letter and the spirit of the *Lobbyists' Code of Conduct* as well as with all relevant laws, including the *Lobbying Act* and its regulations."

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

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

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

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

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

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

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

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

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

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

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

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

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

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[13] See ruling at: https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/benjamin-bergen-council-of-canadian-innovators/.
[14] See ruling at: https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/dana-o-born-council-of-canadian-innovators/.
[15] See the consultation page at: https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/lobbyists-code-of-conduct/consultation-on-future-changes-to-the-lobbyists-code-of-conduct/.
[16] See the ruling at: https://lobbycanada.gc.ca/en/investigations/reports-on-investigation/sponsored-travel-provided-by-lobbyists/.

D. Rules of the *Code*

Transparency section of the *Code*

1. Rule 1: Identity and purpose

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

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

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

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

2. Rule 2: Accurate information

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

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

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

3. Rule 3: Duty to disclose

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

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

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

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

4. Rule 4: Duty to disclose

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

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

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

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

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

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

Use of information section of the *Code*

5. Rule 5:

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

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

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

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

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

Conflict of Interest section of the *Code*

6. Rule 6

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

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

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

Rule 6 could be changed to something like:

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

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

As the Preamble to the *Code* states:

> "Public office holders, when they deal with the public and with lobbyists, are required to adhere to the standards set out for them in their own codes of conduct. For their part, lobbyists communicating with public office holders must also abide by standards of conduct, which are set out below. These codes complement one another and together contribute to public confidence in the integrity of government decision-making."

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

Every federal Cabinet minister, ministerial staff, ministerial adviser, senior government official and almost all Cabinet appointees are prohibited from taking

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

part in decisions, discussions and votes if they are “in a conflict of interest” by section 6 of the *Conflict of Interest Act* (“*CofI Act*”).[21]

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

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

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

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

While the *CofI Act* contains a huge loophole that means an office holder cannot be in a conflict of interest when dealing with a matter that applies generally to a

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

broad class of persons or organizations, in an important way this loophole does not (or, at least, should not) affect the interpretation and application of Rule 6.

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

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

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

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

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

Again, an office holder does not have to undertake any decision or action in order to be in a real or apparent conflict of interest. The office holder is in the conflict of interest as soon as a person (or entity) they have a sense of obligation to begins to communicate with the office holder directly or with other office holders

that the office holder oversees. If the office holder then goes on to participate in a decision that is affected by that conflict of interest, they then move from being in a conflict of interest to violating the rule that prohibits them from participating in a decision when they have a conflict of interest.

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

In any case, Commissioner Bélanger makes it clear that even if Minister Freeland had been informed about Bergen and O'Born's lobbying of people who reported to her, or even if Minister Freeland had been lobbied directly by them, she would also have had to exercise an official power, duty or function that affected the entities Bergen and O'Born were lobbying on behalf of in order for the Commissioner to find Bergen and O'Born guilty of violating Rule 6.[26]

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

It should be noted that the *Conflict of Interest Code for Members of the House of Commons*[27] defines "private interest" as only including the personal financial interests of the member and his or her family. As a result, a re-worded Rule 6 in the *Lobbyists' Code* would assist in ensuring that lobbyists are prohibited from lobbying MPs when they have a sense of obligation in any way to the lobbyist.

The *Ethics and Conflict of Interest Code for Senators*[28] also defines "private interest" as only including the personal financial interest of the senator and his or her family. However, the Senate Code also contains broader rules 7.1 and 7.2

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[25] *Investigation Report: Benjamin Bergen, Council of Canadian Innovators*, https://lobbycanada.gc.ca/media/1857/investigation-report-benjamin-bergen-en.pdf, at pages 6-7. *Investigation Report: Dana O'Born, Council of Canadian Innovators*, https://lobbycanada.gc.ca/media/1850/investigation-report-dana-oborn-en.pdf, at pages 6-7.
[26] *Bergen Report*, at pages 28-31. *O'Born Report*, at pages 29-31.
[27] See the MP *Code* at: https://www.ourcommons.ca/about/standingorders/appa1-e.htm.
[28] See the Senate *Code* at: http://www.sen.parl.gc.ca/seo-cse/PDF/CodeJune2014.pdf.

that require senators to upholding the highest standards of integrity in all of their actions. Having any type of conflict of interest with a person communicating with a senator or anyone who reports to the senator would, therefore, violate rule 7.1 and/or 7.2 of the Senate *Code*.

So, overall, Rule 6 could be made stronger with a broader ruling. However, just as important is that Rule 6 be enforced by the Commissioner properly and strictly and strongly, especially given the wording of Rule 6 may remain as is.

Preferential access subsection of the *Code*

7. Rule 7

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

Alternatively, the Commissioner could simply begin enforcing Rule 7 taking into account Rule 6 (of which Rule 7 is a particular subsection), and taking into account the purpose of the *Code* of ensuring Canadians that lobbying complies with the highest ethical standards that enhance the public's trust and confidence in the integrity of government decision-making. Such an approach to enforcement would mean that, of course, meeting with a public office holder directly or indirectly (by meeting people who report to them) is the same thing, and that both are covered by Rule 7, as the people who report to a public office holder provide reports to the office holder about meetings with lobbyists.

8. Rule 8

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

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

Political activities subsection of the *Code*

9. Rule 9

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

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

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

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

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

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

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

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

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

Gifts subsection of the *Code*

10. Rule 10 – Banning sponsored travel is the only effective solution

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

This loophole is most problematic concerning the unethical practice of lobbyists giving the gift of unlimited travel (known as "sponsored travel") to MPs and senators (and their families and associates) whom they are lobbying. Lobbyists are allowed to do this because the MP and Senator codes explicitly allow them to receive the gift of sponsored travel, no matter how unethical the gift is.[29]

Other gifts and benefits are not a problem as the MP and Senator codes prohibit them from accepting any gift or benefit that could be seen as being given in order to influence them (although the Senate code's disclosure threshold of $500 in gifts annually from any person or entity is too high to prevent gifts being used as a secret, unethical means of influence).

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

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

There is no reason to allow sponsored travel, even in its relatively benign form of an invitation for an MP or Senator to speak at a conference at the invitation of another country's politicians or government. The number of such conferences recorded annually in the sponsored travel report[30] are minimal, and Canadians can afford to pay the costs of MPs and Senators taking these few trips.

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

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

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

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

E. Conclusion

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

However, to make these wording changes really effective, loopholes must be closed in the *Lobbying Act* so that the *Code* applies to all lobbying activities. The only exception to registering lobbying communications in the Registry should be when someone signs a mass email letter appeal that an individual or organization has set up (as the individual or organization will be required to register that lobbying effort). Loopholes must also be closed and in MP and Senator ethics codes to prohibit unethical lobbying tactics, most specifically gifts like sponsored travel.

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