

**Date: 20080325**

**Docket: T-662-07**

**Citation: 2008 FC 327**

**Ottawa, Ontario, March 25, 2008**

**PRESENT: The Honourable Mr. Justice Martineau**

**BETWEEN:**

**NEELAM MAKHIJA**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**AMENDED REASONS FOR ORDER AND ORDER**

[1] This is a consolidated proceeding for judicial review of four Investigation Reports rendered by Michael Nelson, Registrar of Lobbyists (the Registrar), in February, 2007 and communicated to the applicant on March 21, 2007, wherein it is concluded that the applicant has contravened subsection 5(1) of the *Lobbyists Registration Act*, R.S.C. 1985 (4<sup>th</sup> Supp.), c. 44, as amended (the Act), and Rule 3, and in one instance Rule 2, of the *Lobbyists' Code of Conduct* (the Code).

***BACKGROUND***

[2] The applicant, Neelam Makhija, is an electronic engineer and President of NJM Initiatives Inc. (NJM). NJM is an Ontario registered corporation based in Oakville which advertises expertise in “Federal Technology and Financial Investment Qualifications” and “Proposal Advocacy and Company Representation”.

[3] In October 2005, based on information provided by officials at Industry Canada, the Registrar determined that he had reasonable grounds to believe the applicant had breached the Code with respect to his activities on behalf of four high technology (high tech) companies in British Columbia, namely TIR Systems Inc. (TIR), Infowave Software Inc. (Infowave), Intrinsic Software Inc. (Intrinsic) and Wavemakers Inc (Wavemakers).

[4] Pursuant to subsection 10.4(1) of the Act, the Investigations Directorate of the Office of the Registrar of Lobbyists (the ORL) conducted four investigations with respect to the applicant’s activities on behalf of the four high tech companies in question. The investigations included an examination of correspondence among the high tech company in question, the applicant and federal government employees; internal federal government correspondence; agreements between the high tech company and the federal government; contracts and agreements between the high tech company and the applicant or NJM; payments made by the high tech company to the applicant or NJM; the high tech company’s annual and quarterly reports; government information related to the funding program at issue; the Registry of Lobbyists; and, publicly available information from the Internet.

[5] In the spring of 2006, upon completion of these investigations, the Investigations Directorate submitted to the Registrar four preliminary Investigation Reports, each of which concluded that the applicant had not met his obligations under the Act or the Code during the period covered by the investigation in question. The Investigations Directorate was of the view that the applicant had contravened subsection 5(1) of the Act since, for payment, he had acted on behalf of each high tech company to communicate with a public office holder in an attempt to influence the awarding of a financial contribution and to arrange a meeting between a public office holder and each respective high tech company's representatives. The Investigations Directorate also determined that the applicant had breached the principle of "Professionalism" contained in the Code which requires lobbyists to conform to the Code, the Act and its regulations. Further, all four investigations concluded the applicant had breached Rule 3 of the Code by failing to inform the high tech company in question of his obligations under the Act and by failing to adhere to the Code. Finally, the applicant's activities on behalf of Infowave were found to have breached the remaining two principles of "Integrity and Honesty" and "Openness" as it was found that he failed to conduct his relations with his client with integrity and honesty and failed to be open and frank about lobbying. With respect to his activities associated with Infowave, he was also found to have breached Rule 2 which requires lobbyists to provide information that is accurate and factual to public office holder and prohibits lobbyists from knowingly misleading anyone.

[6] Subsection 10.4(5) of the Act provides that before finding that a person under investigation has breached the Code, the Registrar must give that person a reasonable opportunity to present their views. Accordingly, on July 25, 2006, the applicant received copies of the preliminary Investigation

Reports and was provided an opportunity to make representations in response to the findings contained therein. The applicant's counsel filed written representations on October 4, 2006. Between October and November 2006, the applicant's counsel requested on two occasions to be heard orally by the Registrar. His requests to present *viva voce* evidence were denied and the applicant was informed that upon completion of the Investigation Reports, they would be tabled in Parliament.

[7] In early December 2006, the applicant filed an interlocutory motion to enjoin the Registrar from sending the final Reports to the Registrar General of Canada (the Registrar General). The motion was dismissed by this Court on December 18, 2006. The Registrar drafted four final Investigative Reports, dated February 2007 (together, the Decisions). As was found in the preliminary Investigative Reports, the Decisions concluded that the applicant had breached subsection 5(1) of the Act, Rule 3 of the Code and in the case of Infowave, Rule 2 of the Code. The Registrar submitted the Decisions to the President of the Treasury Board (who acts in place of the Registrar General for the purposes of the Act) and they were tabled in the House of Commons and Senate on March 19, 2007 and March 20, 2007 respectively. The Decisions were communicated to the applicant on March 21, 2007.

[8] It is worthwhile to examine in greater detail the Registrar's finding of facts and conclusions with respect to each of the four Decisions.

## ***THE TIR DECISION***

### ***Findings of Fact***

[9] In the TIR Decision, the Registrar provides a detailed factual description of the interaction between the applicant, NJM and TIR. According to the findings of the Registrar, in the fall of 2000, the applicant was in contact with a number of high tech companies in British Columbia to determine if there was a match between their investment needs and the contribution arrangement that might be available through the Technology Partnerships Canada (TPC), a special agency of Industry Canada mandated to provide conditionally repayable contributions to companies in Canada in order to bring research and development in technology to the marketplace. TPC works with the National Research Council (NRC) and the Communications Research Council (CRC) to deliver its financing program. TIR, a corporation based in Burnaby, British Columbia, was one such company seeking funding through the TPC program.

[10] The applicant arranged a series of meetings in Vancouver in December 2000 between TIR, and federal government employees involved in the TPC funding process. TIR submitted its proposal for funding to TPC on January 11, 2001. TIR's proposal was considered at a TPC prioritization meeting held on February 6, 2001. TIR's proposal was not selected for further consideration at that time. On February 16, 2001, the President of TIR stated that the applicant had informed him the TIR proposal was still under review by TPC.

[11] A memorandum of understanding (MOU) between NJM and TIR was signed by the applicant on February 23, 2001. According to the preamble of the MOU, NJM was retained to assist in a planning process “with the object of qualifying for and securing financial support from government agencies” among other professional services. TIR was to pay the applicant a fixed amount upon signing of the MOU, as well as a fee calculated at 15% of the government’s financial contribution to the project upon government approval of TIR’s proposal. The MOU contained the following caveat:

The role of NJM concludes with the achievement of the stated objective, i.e. qualifying for government funding. However, as a complimentary service subsequent to approval of funding, ongoing liaison with funding source(s) will be provided, until completion or termination of the project.

[12] On April 6, 2001, the applicant met with a TPC Director and later that day he spoke with the President of TIR to inform him of the meeting. A meeting was scheduled between TIR and TPC for May 2, 2001. The applicant was to be present at this meeting and was described by TIR as “TIR’s representative in Ottawa (Consultant).” The applicant invited a CRC manager to this meeting. That same month, the applicant arranged other meetings between TIR, the investment officer of the TPC and another Industry Canada employee.

[13] An Agreement between the TPC Executive Director (on behalf of the Minister of Industry) and TIR was signed on November 5, 2001, which provided maximum funding to TIR in the amount of \$6,636,271. Prior to the signing of this Agreement, TIR had certified to TPC that it would advise if a lobbyist were used for the purpose of its investment proposal and that such a lobbyist would

comply with the Act. Section 6.11 of Schedule 1 of this Agreement provided that any person lobbying for TIR in order to obtain the Agreement and any of its benefits would register under the Act.

[14] In September 2003, the applicant met with the Executive Director of TPC concerning TIR. The applicant then negotiated with an investment officer of the TPC regarding amendments to the financing provisions of the Agreement between TIR and the TPC.

[15] On December 16, 2003, NJM, the applicant and TIR entered into a “Settlement and Release” agreement terminating the applicant who acknowledged receipt of payment in the amount of \$1,065,121.50. During the relevant period, specifically from October 2000 to December 2003, there was no registration of the applicant or NJM in the Registry.

### ***The Applicant’s Views***

[16] Having reviewed the facts that led to the TIR Decision, the Registrar next summarizes the applicant’s response to the preliminary Investigation Reports, as contained in the letter sent by his counsel to the Registrar dated October 4, 2006. This correspondence contained biographical information about the applicant, as well as descriptions of the work he carried out in the 1980s and 1990s. In the letter, applicant’s counsel argued that TPC was actively searching for projects in 2000 and that TPC contacted the applicant to aid them in funding projects. The applicant was of the view that during the period covered by the investigation, the registration requirements of the Act did not apply if a public office holder made a written request to a lobbyist soliciting their advice or

comment on a matter. Likewise, applicant's counsel stated that the arrangement of the meeting in December 2000 was made at the request of TPC officers; was not arranged with respect to any particular company (instead it was organized so the TPC could see a variety of potential companies); and, at that time, the applicant was not yet under a contract with any of the companies. Regarding the May 2001 visit, the applicant argued the meeting was arranged for the benefit of the TPC officer and not TIR. Finally, it was argued that the applicant never communicated with TPC officials in an attempt to influence the TPC funding process. The applicant's communication with public office holders was necessary for the funding process to function and was restricted to providing TPC with information regarding the companies and with regards to the status of the TPC application. In short, the applicant did not believe he carried out any activity that would have required registration under the Act.

### *Conclusions*

[17] The Registrar analyzed the significance of his findings of fact and concluded the applicant had breached the Act and the Code. The Registrar noted that it is not uncommon for companies seeking a repayable contribution from government organizations to hire individuals to assist them with the application process. In doing so, these individuals may arrange meetings between the company and officials and may communicate with officials on behalf of the company. The Registrar emphasized that such action are legitimate; however, the Act imposes certain obligations of disclosure and behaviour on those who undertake to assist companies in this way and receive payment for doing so.



Breach of the Act

[18] The Registrar considered the wording of section 5(1) of the Act which, during the period of the applicant's activities on behalf of TIR, read in part as follows:

<p>5.(1) Every individual who, for payment, on behalf of any person or organization (in this section referred to as the "client"), undertakes to</p>	<p>5. (1) Est tenue de fournir au directeur, dans les dix jours suivant l'engagement, une déclaration, en la forme réglementaire, contenant les renseignements prévus au paragraphe (2) toute personne (ci-après « lobbyiste-conseil ») qui, moyennant paiement, s'engage, auprès d'un client, personne physique ou morale ou organisation :</p>
<p>(a) communicate with a public office holder in an attempt to influence</p>	<p>a) à communiquer avec un titulaire de charge publique afin de tenter d'influencer :</p>
<p>...</p>	<p>[...]</p>
<p>(v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada, or</p>	<p>(v) l'octroi de subventions, de contributions ou autres avantages financiers par Sa Majesté du chef du Canada ou en son nom,</p>
<p>(vi) the awarding of any contract by or on behalf of Her Majesty in right of Canada, or</p>	<p>(vi) l'octroi de tout contrat par Sa Majesté du chef du Canada ou en son nom;</p>
<p>(b) arrange a meeting between a public office holder and any other person,</p>	<p>b) à ménager pour un tiers une entrevue avec le titulaire d'une charge publique.</p>
<p>shall, not later than ten days after entering into that undertaking, file with the registrar, in the prescribed form and manner, a return setting out</p>	

the information referred to in subsection (2).

[19] The Registrar analyzed whether the applicant had complied with these legislative requirements. With respect to paragraph 5(1)(a), the Registrar emphasized how the preamble of the MOU between NJM and TIR states that NJM had been retained to assist with the “objective of qualifying for and securing of financial support” from government agencies and how the list of services to be supplied by NJM included “proposal preparation, initial presentation, submission, discussion and defense.” Further, the MOU provided that NJM would offer “ongoing liaison with funding source(s)” until completion or termination of the project. The Registrar reasoned that this language indicated it was the intention of the parties that NJM would work to influence the awarding of a contribution, contract or financial benefit. The Registrar concluded that during the period of 2001 to 2003, the applicant met with TPC investment officers and other TPC officials to provide information about TIR and its projects. In his communications with TIR, the applicant reported the names of the government employees with whom he met, as well as the names of those employees who supported or intended to support the TIR proposal and the kind of support they could provide. After the signing of the funding agreement between TIR and the TPC, the applicant spoke directly to the TPC to suggest financing changes for the project that were favourable to TIR.

[20] Regarding paragraph 5(1)(b), the Registrar found that the applicant’s role included arranging meetings between TIR and public office holders in May, 2001. Indeed, the applicant “co-ordinated between government and TIR representatives, determining the availabilities of those attending and

setting or changing the time and date of the meeting.” Further, the work performed for TIR by NJM or the applicant was for payment.

[21] The Registrar therefore found that the applicant had contravened subsection 5(1) of the Act and stated as follows:

For payment, he acted a consultant lobbyist. He arranged at least one meeting between public office holders and TIR representatives. He communicated with public office holders in an attempt to influence the awarding of a financial contribution by TPC. [The applicant] was required under the [Act] to register as a lobbyist but failed to do so. At the latest, he should have registered within 10 days of the signing of the MOU with TIR on February 23, 2001.

[22] The Registrar rebutted the applicant’s argument that he was not required to register because he was contacted initially by TPC and stated that he had misinterpreted the former paragraph 4(2)(c) of the Act which was in place during the relevant period and which provided public office holders with the ability to seek the advice of a specialist without triggering the requirement for the individual to register. This provision did not sanction a lobbyist to seek out clients and perform lobbying activities on their behalf without registering. Likewise, although the applicant argued he did not attempt to influence TPC official and thus was not required to register, the Registrar was of the view that influence with respect to the decision to invest in a high tech company such as TIR arises in part through the presentation of data regarding the proposed investment, including technical data, financial data and market data. Likewise, the wording of the MOU, in the view of the Registrar, clearly evidences that the intent was that “NJM would carry out these services in order to obtain a financial contribution from TIR for the federal government.”

*Breach of the Code*

[23] In terms of whether the applicant breached the Code, the Registrar determined that because the applicant was in breach of the Act, his “lobbying on behalf of TIR without registering violates the principle of Professionalism under the Code.” However, during the period covered by the investigation, it was necessary to contravene one or more of the Rules of the Code to be found in breach of the Code. Rule 3 of the Code requires lobbyists to indicate to their client their obligations under the Act and to adhere to the Code. As the applicant was of the view that his activities were not subject to registration under the Act, the Registrar concluded: “It follows, then, that he did not disclose his obligations under the Act to TIR.” The Registrar found the applicant in breach of Rule 3 of the Code.

***THE INFOWAVE DECISION***

***Findings of Fact***

[24] As stated, in the fall of 2000, the applicant was in contact with a number of high tech companies in British Columbia to determine if there was a match between their investment needs and the contribution arrangement that might be available through the TPC. Infowave, a corporation based in Burnaby, British Columbia, was, like TIR, one such company seeking funding through the TPC program. According to the Infowave Decision, the applicant arranged a series of meeting in Vancouver to be held in December 2000 between Infowave and federal government employees

involved in the TPC funding process. Infowave submitted its funding proposal to TPC in January 2001. In February of that year, Infowave's proposal was considered at the same TPC prioritization meeting that considered the proposals of TIR, Intrinsic and Wavemakers. Infowave's proposal was not selected at that time but remained in consideration for future funding.

[25] An MOU between NJM and Infowave was signed by the applicant on April 12, 2002 which contained the same preamble as the MOU between TIR and NJM. The applicant was to receive \$2,000 upon signing of the MOU and upon approval of government funding, a professional fee calculated at a stated percentage (15%) of the total amount of the funding.

[26] The applicant arranged a series of meetings for May 2001 between TPC investment officers, another Industry Canada employee to provide information about Infowave and its product. In April 2003, the applicant also met with the investment officer for "a bit of strategization" to prepare for a meeting in May, 2003.

[27] Infowave's repayable contribution agreement with the TPC Executive Director was signed on December 8, 2003. The maximum funding for Infowave was set at \$7,289,500. The agreement contained the same section 6.11 of Schedule 1 as the agreement between TIR and the TPC which provides that any person lobbying for Infowave in order to obtain the Agreement and any of its benefits would register under the Act.

[28] By letter to NJM dated November 4, 2003, Infowave advised that the TPC funding agreement required the applicant to confirm that he did not solicit the agreement with TPC on behalf of Infowave. Infowave submitted a similar representation to TPC and requested the applicant contact them immediately if he had information “inconsistent with these representations.”

[29] Infowave waived its right under the MOU for a complimentary service of ongoing liaison with funding sources and requested NJM not to engage in such activities except at the request of the company. The applicant signed his acknowledgement and agreement to this waiver by letter dated November 4, 2003. On March 24, 2004, the applicant, on his own behalf and on behalf of NJM, signed a “Compliance Certificate” to certify that he did not solicit the agreement between TPC and Infowave and that he did not engage in lobbying on behalf of Infowave. He acknowledged that Infowave was relying on this certificate in its dealings with TPC.

[30] Two days later the applicant cancelled the MOU for “personal reasons” effective immediately. In its third quarter report for 2004, Infowave stated that TPC would reduce its funding by 15% or \$1.1 million which “equals the amount Infowave was to pay a consultant for assisting the development of Infowave’s “technology road map” and the application for TPC funding.” Due to the cancellation of the MOU, NJM was paid the signing fee of \$2,000 but no further payments were made. During the relevant period, specifically from October 2000 to November 2003, there was no registration of the applicant or NJM in the Registry.

### ***The Applicant’s Views***

[31] The Registrar summarizes the applicant's response to the Preliminary Investigation Report, as contained in the letter by his counsel to the Registrar dated October 4, 2006. It is not necessary to reiterate the arguments raised in the letter since the Registrar summarizes the letter in the same manner as was done in the TIR decision.

### *Conclusions*

[32] The Registrar analyzed the significance of his findings of fact and concluded the applicant had breached the Act and the Code. The Registrar again noted that it is not uncommon or illegitimate for companies seeking a repayable contribution from government organizations to hire individuals to assist them with the application process; however, the Act imposes certain obligations of disclosure and behaviour on those who undertake to assist companies in this way and receive payment for doing so.

### *Breach of the Act*

[33] The Registrar (as in the TIR decision) considered the wording of section 5(1) of the Act during the period of the applicant's activities on behalf of Infowave analyzing whether or not the applicant had complied with these legislative requirements. With respect to paragraph 5(1)(a), the Registrar again emphasized how the preamble of the MOU between Infowave and TIR states that NJM had been retained to assist with the "objective of qualifying for and securing of financial support" from government agencies and how the list of services to be supplied by NJM included "proposal preparation, initial presentation, submission, discussion and defense." Further, the MOU provided that NJM would offer "ongoing liaison with funding source(s)" until completion or

termination of the project. The Registrar reasoned that this language indicated it was the intention of the parties that NJM would work to influence the awarding of a contribution, contract or financial benefit. During the relevant period, the applicant met with TPC investment officers and other TPC officials to provide information about Infowave and its projects. Again, it was found that the applicant “co-ordinated between government and Infowave representatives, determining the availabilities of those attending and setting or changing the time and date of the meeting.” Also, the work performed for Infowave by NJM or the applicant was for payment. The Registrar therefore found that the applicant had contravened subsection 5(1) of the Act.

[34] As in the TIR Decision, the Registrar stated that the applicant had misinterpreted the former paragraph 4(2)(c) of the Act and was therefore not exempt from registration by virtue of this provision. Likewise, although the applicant argued he did not attempt to influence TPC officials and thus, was not required to register, the Registrar was of the view that influence with respect to the decision to invest in a high tech company (such as Infowave) arises in part through the presentation of data regarding the proposed investment which includes technical data, financial data and market data. Likewise, the Registrar found the MOU evinces the intent “NJM would carry out these services in order to obtain a financial contribution from TIR for the federal government.”

#### *Breach of the Code*

[35] In terms of whether the applicant breached the Code, the Registrar determined that because the applicant was in breach of the Act, his “lobbying on behalf of Infowave without registering violates the principle of Professionalism under the Code.” The Registrar also considered the two remaining principles of the Code, finding that the applicant had violated these principles by “failing



to conduct his relations with his clients with integrity and honesty and by failing to be open and frank about his lobbying.” However, again it was emphasized that during the period covered by the investigation, it was necessary to contravene one or more of the Rules of the Code to be found in breach of the Code.

[36] Rule 3 of the Code requires lobbyists to indicate to their client their obligations under the Act and to adhere to the Code. As the applicant was of the view that his activities were not subject to registration under the Act, the Registrar concluded: “It follows, then, that he did not disclose his obligations under the Act to Infowave.” The Registrar found the applicant in breach of Rule 3 of the Code.

[37] Rule 2 of the Code requires lobbyists to provide accurate and factual information to public office holders and to not knowingly mislead anyone. The Registrar emphasized that the applicant has signed statements to confirm he did not solicit the agreement with TPC and that he did not engage in lobbying on behalf of Infowave and had done so known that Infowave was relying on these statements in its dealings with TPC and others. The Registrar concluded that the applicant breached Rule 2 in that “he either knowingly misled Infowave or, in failing to exercise proper care, he inadvertently did so.”

## ***THE INTRINSYC DECISION***

### ***Findings of Fact***

[38] Following a similar pattern as the two decisions described above, the Registrar found that the applicant arranged a series of meetings in Vancouver in December 2000 between Intrinsyc, a corporation based in Vancouver, British Columbia, and federal government employees involved in the TPC funding process. Intrinsyc submitted its funding proposal to TPC in January 2001. In February of that year, Intrinsyc's proposal was not selected by the TPC, although it too remained in consideration for future funding.

[39] An MOU between NJM and Intrinsyc was signed by the applicant on March 26, 2001 which contained the same preamble as discussed above. The applicant, yet again, was to receive a fixed amount upon signing of the MOU and a stated percentage of the total amount of the financial contribution upon approval of government funding.

[40] During the period from 2001 to 2003 the applicant met with investment officers and other TPC officials to provide information about Intrinsyc and its product. During that same time frame, the applicant arranged meetings between Intrinsyc and the TPC.

[41] Intrinsyc entered into its repayable contribution agreement with the TPC Executive Director on August 9, 2002. The maximum funding for Intrinsyc was set at \$6,636,271. NJM was paid the MOU signing fee of \$2,000 and further payments totalling \$393,367.93 throughout 2003.

***The Applicant's Views***

[42] The Registrar next reviews the applicant's response to the Preliminary Investigation Report, as contained in the letter by his counsel to the Registrar dated October 4, 2006. The Registrar summarizes the letter in the same manner as was done in both the TIR and the Infowave Decisions.

### *Conclusions*

[43] The Registrar concluded the applicant had breached the Act and the Code, again emphasizing that it is not illegitimate for companies seeking a repayable contribution from government organizations to hire individuals to assist them with the application process. Nevertheless, the Act imposes certain obligations of disclosure and behaviour on those who undertake to assist companies in this way and receive payment for doing so.

### *Breach of the Act*

[44] The Registrar (as in the TIR Decision and the Infowave Decision) considered the wording of section 5(1) of the Act during the period of the applicant's activities on behalf of Intrinsyc. With respect to his analysis of paragraph 5(1)(a), the Registrar noted how the preamble of the MOU between Intrinsyc and TIR states that NJM had been retained to assist with the "objective of qualifying for and securing of financial support" from government agencies and how the list of services to be supplied by NJM included "proposal preparation, initial presentation, submission, discussion and defense." Further, the MOU provided that NJM would offer "ongoing liaison with funding source(s)" until completion or termination of the project. The Registrar reasoned that this language indicated it was the intention of the parties that NJM would work to influence the awarding of a contribution, contract or financial benefit. During the period of 2001 to 2003, the

applicant met with TPC investment officers and other TPC officials to provide information about Intrinsyc and its projects. Again, it was found that the applicant “co-ordinated between government and Intrinsyc representatives, determining the availabilities of those attending and setting or changing the time and date of the meeting.” The work performed by NJM or the applicant was for payment. The Registrar therefore found that the applicant had contravened subsection 5(1) of the Act.

[45] As occurred in the TIR and Infowave Decisions, the Registrar rebutted the applicant’s arguments as follows: the applicant misinterpreted the former paragraph 4(2)(c) of the Act; the applicant was required to register since the applicant undertook to influence the TPC decision to invest in Intrinsyc in part through the presentation of data regarding the proposed investment, including technical data, financial data and market data; and, that in consideration of the wording of the MOU, the intent was “clearly that NJM would carry out these services in order to obtain a financial contribution from TIR for the federal government.”

#### *Breach of the Code*

[46] In terms of whether the applicant breached the Code, the Registrar determined that because the applicant was in breach of the Act, his “lobbying on behalf of Intrinsyc without registering violates the principle of Professionalism under the Code.” Again, given that the applicant was of the view that his activities were not subject to registration under the Act, the Registrar concluded: “It follows, then, that he did not disclose his obligations under the Act to Intrinsyc.” The Registrar found the applicant in breach of Rule 3 of the Code.

#### ***THE WAVEMAKERS DECISION***

***Findings of Fact***

[47] The Registrar found as a fact that the applicant also arranged a series of meetings in Vancouver in December 2000 between Wavemakers and federal government employees involved in the TPC funding process. Wavemakers submitted its funding proposal to TPC in January 2001. In February of that year, (unlike in the other three proposals), Wavemakers' financing proposal was selected for further funding consideration.

[48] An MOU between NJM and Wavemakers was signed by the applicant on February 23, 2001 with the same preamble contained in the three other MOU's. Likewise, in a similar fashion, the applicant was to receive a fixed amount upon signing of the MOU and a stated percentage of the total amount of the financial contribution upon approval of government funding.

[49] During the period from 2001 to 2003 the applicant communicated with TPC officials to regarding Wavemakers' funding proposal. In that same time, the applicant arranged meetings between Wavemakers, investment officers of the TPC and an Industry Canada employee.

[50] Wavemakers entered into its repayable contribution agreement with the TPC Executive Director on October 24, 2001. The maximum funding for Wavemakers was set at \$4,418,283. Section 6.11 of Schedule 1 of this agreement provided the same requirement that any person lobbying for Wavemakers in order to obtain the Agreement and any of its benefits would register under the Act.

[51] NJM was paid the MOU signing fee of \$2,000 plus G.S.T. and further payments totalling \$291,136.03 from March 2002 to January 2004. The first of these checks was made payable to the applicant himself, the rest were made out to NJM. From October 2000 to January 2004, there was no registration of the applicant or NJM in the Registry.

### *The Applicant's Views*

[52] The Registrar then considers the applicant's response to the Preliminary Investigation Report, as contained in the letter by his counsel to the Registrar dated October 4, 2006. The Registrar summarizes the letter in the same manner as was done in the three other Decisions.

### *Conclusions*

[53] The Registrar concluded the applicant had breached the Act and the Code. He first notes that it is not illegitimate for companies seeking a repayable contribution from government organizations to hire individuals to assist them with the application process. However, for those who undertake to assist companies in this way and receive payment for doing so, the Act imposes certain obligations of disclosure and behaviour on lobbyists.

### *Breach of the Act*

[54] The Registrar (as occurred in the three other Decisions) considered the wording of section 5(1) of the Act during the period of the applicant's activities on behalf of Wavemakers. The Registrar quotes the same phrases cited above from the preambles of the MOUs in question to

highlight that the applicant was retained to assist with the “objective of qualifying for and securing of financial support” from government agencies and how the list of services to be supplied by NJM included “proposal preparation, initial presentation, submission, discussion and defense.” Further, as the MOU provided that NJM would offer “ongoing liaison with funding source(s)” until completion or termination of the project, the Registrar concluded that this language evidences the intention of the parties that NJM would work to influence the awarding of a contribution, contract or financial benefit. During the period of 2001 to 2003, the applicant met with TPC investment officers and other TPC officials to provide information about Wavemakers and the project it was proposing for funding. Again, it was found that the applicant “co-ordinated between government and Wavemakers representatives, determining the availabilities of those attending and setting or changing the time and date of the meeting.” The work performed by NJM or the applicant was for payment. The Registrar therefore found that the applicant had contravened subsection 5(1) of the Act.

[55] As in the other Decisions, the Registrar found the applicant had misinterpreted the former paragraph 4(2)(c) of the Act; was required to register since the applicant undertook to influence the TPC decision to invest in Wavemakers (through the presentation of data regarding the proposed investment, including technical data, financial data and market data); and, that *per* the MOU, the intent was “clearly that NJM would carry out these services in order to obtain a financial contribution from TIR for the federal government.”

### *Breach of the Code*

[56] The Registrar determined that because the applicant was in breach of the Act, his “lobbying on behalf of Wavemakers without registering violates the principle of Professionalism under the Code.” Again, given that the applicant was of the view that his activities were not subject to registration under the Act, the Registrar concluded: “It follows, then, that he did not disclose his obligations under the Act to Wavemakers” in breach of Rule 3 of the Code.

### ***APPLICATION FOR JUDICIAL REVIEW***

[57] On April 20, 2007, the applicant filed four separate applications for judicial review of the Decisions (T-662-07, T-664-07, T-665-07 and T-666-07) alleging that the Registrar erred in law in holding that the applicant breached the Act and the Code. The applicant seeks an order quashing the Decisions and causing the Registrar General to withdraw them from the Parliament of Canada. The applicant also seeks a declaration that he is not a lobbyist under the Act and that he has not infringed the Act or Code. This Court ordered that the four files be consolidated under the current Court file (T-662-07) on May 14, 2007.

[58] In this judicial review, the applicant alleges the Registrar erred in his interpretation of the Act. Counsel for the applicant raises many of the same arguments that were raised in the written submissions provided to the Registrar in October 2006. First, it is argued that the applicant never acted as a lobbyist. In this regard the applicant has never communicated with a “public office holder” in an attempt to influence the awarding of any grant, contribution, contract or other financial benefit. Any communication that the applicant had with TPC officials or other “public office holders” is characterized as “strictly limited to communicating the salient features of the project and



to facilitate, within the companies, the response to questions raised by the TPC review process.”

Secondly, the applicant alleges that TPC actively solicited the assistance of the applicant. By virtue of subparagraph 4(2)(c) of the Act as it read in 2003 (which allowed public office holders to seek the advice of a specialist without triggering requirement for the individual to register), the applicant states he was not required to register. Thirdly, the applicant argues that changes to the Act which came into force on June 20, 2005 reveal a legislative intent to target “direct attempts” to influence government officials. In this instance, all of the dealings the applicant had with TPC officials were incidental to the obligations he had to the high tech companies, and are thus not aptly characterized as direct attempts to influence public office holders. Finally, the applicant argues that the Act is a penal statute and should therefore be interpreted strictly. The applicant emphasizes that the sanctions contemplated by the Act are not limited to fines and imprisonment. Indeed, given that the Registrar has the discretion to present his final Investigation Reports to the Registrar General for tabling before Parliament “represents a level of personal humiliation for that applicant that is very real ...”. Applying these strict rules of interpretation to the Act, it is submitted that the applicant was not “attempting to influence government” as set out in the Act.

### ***PRELIMINARY ISSUE***

[59] In the course of the hearing, questions were raised by the Court regarding the jurisdiction of the Registrar to embark on an investigation for an alleged breach of the Act. This issue was not raised by the applicant in his application for judicial review or in his memorandum of fact and law. However, the issue of jurisdiction must be canvassed before this Court may even begin to analyze

the merits of this application. Therefore, the Court directed the parties to submit supplementary written representations addressing, *inter alia*, the following issues: (1) Does the Registrar have the jurisdiction to embark on an investigation if there are reasonable grounds to believe a breach of the Act has occurred? (2) Does the Code apply to individuals who are not registered “Lobbyists” pursuant to the requirements of the Act?

[60] In answer to the first question, the applicant submits the Registrar’s powers are limited to investigating breaches of the Code, if there are reasonable grounds to believe that such a breach has occurred. The Registrar does not have jurisdiction to investigate breaches of the Act. Indeed, no section of the Act gives the Registrar the jurisdiction, right, duty, power or discretion to investigate breaches of the Act. To the contrary, subsections 10.4(7) and 10.4(8) of the Act, by use of the imperative “shall”, obligates the Registrar to suspend any investigation of a breach of the Code if the Registrar finds reasonable grounds to believe that any law has been violated and to report same to a peace officer. Even if the Registrar were to believe that the Act had been violated in this instance, subsection 10.4(9) prevents him from continuing his investigation of the breach of the Code until a peace officer has completed her or his investigation (and any charges related thereto have been disposed of). As such, the Act creates a scheme whereby the Registrar is expressly excluded from investigating breaches of the Act. The Registrar has improperly issued the Decisions. The applicant also argues that the Code, as written, does not conform to the Act, but I shall not consider this argument as it touches on an issue not raised by the Court in its direction and the respondent has not had an opportunity to address same.

[61] In response to the second question as to whether the Code apply to individuals who are not registered “Lobbyists” pursuant to the requirements of the Act, the applicant submits, in light of his arguments above that this question is moot since the Registrar has no power to investigate breaches of the Act or the failure to register for a person required to register. In the alternative, the applicant states the Code does not apply to persons who are not subject to the Act. Further, the Code does not apply to a person who had no notice of it. The Code is not a part of an Act (or an appendix to an Act). It is not a regulation made by the Governor in Council pursuant to section 12 of the Act, nor is it a Statutory Instrument pursuant to the *Statutory Instruments Act*, R.S.C 1985, c. S-22 (the SIA). Consequently, a person cannot be deemed to know the contents of it. According to the applicant’s submissions, the following persons must comply with the Code: persons who know they are lobbyists under the Act (but decline to register); persons who register under the Act; and, persons who register under the Act but allow their registration to improperly lapse. Given that the applicant was none of these, the Code did not apply to him.

[62] The respondent first argues that the Registrar has jurisdiction to investigate a breach of the Code which could include a situation where there may have been a breach of the Act. The respondent states that the Code is made under authority of the Act and that a Code investigation commenced by the Registrar may include the investigation of a breach of the Act in a situation where such a breach may have occurred. The Code establishes mandatory standards for all persons who are required to register as lobbyists under the Act. Under the principle of Professionalism, lobbyists are required to conform to the Act and the Code. Finally, when the Registrar conducts an investigation of a possible breach of the Code, it implicitly includes an investigation of a possible

breach of the Act. Otherwise, the Registrar could never advise any peace officer of a breach of the Act, thereby rendering subsections 10.4(7), 10.4(8) and 10.4(9) of the Act of no effect.

Investigations by the Registrar are administrative in nature and can never lead to the prosecution of the individual under investigation. The fact that formal investigations leading to the laying of charges are left to peace officers does not mean that the Registrar cannot investigate a possible breach of the Act, during the course of an investigation of a possible breach of the Code.

[63] Secondly, according to the respondent, section 10.3(1) makes it clear that the Code applies to an individual who is required to file a return under subsection 5(1). As such, it applies to all individuals who are registered as lobbyists and all individuals who should be registered as lobbyists under the Act (even if they have not registered as required). To find otherwise would mean that the Registrar could only conduct investigations of individuals who are registered as lobbyists (and not of individuals who should have registered as lobbyists but failed to do so). This, it is argued would be counter-productive as it would invite lobbyists to not register in order to avoid the consequences of the Act. Finally, although the Code is not a Statutory Instrument, *per* the SIA, it is a Regulation under section 2 of the *Interpretation Act*, R.S.C. 1985, c. I-21.

[64] In spite of the arguments raised by the respondent in his supplementary written representations, I am of the view that the Registrar has exceeded his jurisdiction in this instance. In coming to this conclusion, I have examined the purpose and legislative scheme provided by the Act and Code, as well as the legal status of the Code.

[65] The following four basic principles are set out in the preamble to the 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 engaged in lobbying activities; and, a system for the registration of paid lobbyists should not impede free and open access to government.

[66] The Act does not define the term “lobbying;” however, it provides for the public registration of those individuals who are paid to communicate with “public office holders” with regard to certain matters as described in the legislation. According to section 2(1) of the Act, “public office holder” means “any officer or employee of Her Majesty in right of Canada and includes (a) a member of the Senate or the House of Commons and any person on the staff of such a member, (b) a person who is appointed to any office or body by or with the approval of the Governor in Council or a minister of the Crown, other than a judge receiving a salary under the Judges Act or the lieutenant governor of a province, (c) an officer, director or employee of any federal board, commission or other tribunal as defined in the Federal Courts Act, (d) a member of the Canadian Armed Forces, and(e) a member of the Royal Canadian Mounted Police.”

[67] *Per* section 5(1) of the Act (as cited above), an individual is required to register with the Registrar if they, for payment, on behalf of any person or organization undertake to either communicate with a public office holder in respect of, *inter alia*, the awarding of any financial benefit on behalf of Her Majesty in right of Canada (subparagraph 5(1)(a)(v)) or the awarding of

any contract by or on behalf of Her Majesty in right of Canada (subparagraph 5(1)(a)(vi)); or if they arrange a meeting between a public office holder and any other person (paragraph 5(1)(b)).

[68] According to section 9 of the Act, the maintenance of the public registry rests with the

Registrar:

- |  |   |
|--|---|
| 9. (1) The registrar shall establish and maintain a registry in which shall be kept a record of all returns and other documents submitted to the registrar under this Act. | 9. (1) Le directeur tient un registre contenant tous les documents — déclarations ou autres — qui lui sont fournis en application de la présente loi. |
| (2) The registry shall be organized in such manner and kept in such form as the registrar may determine.   | (2) Le registre est tenu en la forme et selon les modalités fixées par le directeur.  |
| (3) The registrar may verify the information contained in any return or other document submitted to the registrar under this Act.  | (3) Le directeur peut vérifier la régularité des renseignements contenus dans les documents.  |
| (4) The registry shall be open to public inspection at such place and at such reasonable hours as the registrar may determine.   | (4) Le public peut consulter le registre au lieu et aux heures que fixe, dans des limites raisonnables, le directeur.                                 |

[69] Pursuant to section 10 of the Act, the Registrar may issue advisory opinions and interpretation bulletins with respect to the enforcement, interpretation or application of the Act (other than under sections 10.1 to 10.6). However, these advisory opinions and interpretation bulletins are not statutory instruments for the purposes of the SIA and are thus not binding.

[70] Section 10.3(1) states that the following individuals shall comply with the Code: (a) an individual who is required to file a return under subsection 5(1); and (b) an employee who, in accordance with paragraph 7(3)(f) or (f.1), is named in a return filed under subsection 7(1).

[71] The Registrar's powers to investigate a breach of the Code are set out in subsection 10.4(1) as follows:

10.4 (1) Where the registrar believes on reasonable grounds that a person has breached the Code, the registrar shall investigate to determine whether a breach has occurred.

10.4 (1) Le directeur fait enquête lorsqu'il a des motifs raisonnables de croire qu'une personne a commis une infraction au code.

...

[...]

(5) Before finding that a person has breached the Code, the registrar shall give the person a reasonable opportunity to present their views to the registrar.

(5) Le directeur doit, avant de statuer qu'elle a commis une infraction au code, donner à la personne la possibilité de présenter son point de vue.

[72] If, during the course of the Registrar's investigation commenced in accordance with subsection 10.4(1), the Registrar believes on reasonable grounds that a person has committed an offence under the Act (or any other Act of Parliament or of the legislature of a province), the Registrar is obliged to advise a peace officer having jurisdiction to investigate the alleged offence:

10.4 (7) If, during the course of performing duties and functions under this section, the registrar believes on reasonable grounds that a person has committed an offence under this or any other

10.4 (7) Si, dans l'exercice des pouvoirs et des fonctions que lui confère le présent article, le directeur a des motifs raisonnables de croire qu'une personne a commis une

Act of Parliament or of the legislature of a province, the registrar shall advise a peace officer having jurisdiction to investigate the alleged offence.

(8) The registrar must immediately suspend an investigation under this section of an alleged breach of the Code by any person if

(a) the registrar believes on reasonable grounds that the person has committed an offence under this or any other Act of Parliament or of the legislature of a province in respect of the same subject-matter; or

(b) it is discovered that the subject-matter of the investigation under this section is also the subject-matter of an investigation to determine whether an offence referred to in paragraph (a) has been committed or that a charge has been laid with respect to that subject-matter.

(9) The registrar may not continue an investigation under this section until any investigation or charge regarding the same subject-matter has been finally disposed of.

infraction à la présente loi ou à toute autre loi fédérale ou provinciale, il avise un agent de la paix compétent pour mener une enquête relativement à l'infraction.

(8) Le directeur suspend sans délai l'enquête menée en vertu du présent article à l'égard d'une infraction présumée au code si, selon le cas :

a) il a des motifs raisonnables de croire que la personne a commis une infraction à la présente loi ou à toute autre loi fédérale ou provinciale portant sur le même sujet;

b) l'on découvre que l'objet de l'enquête est le même que celui d'une enquête menée dans le but de décider si une infraction visée à l'alinéa a) a été commise, ou qu'une accusation a été portée à l'égard du même objet.

(9) Le directeur ne peut poursuivre l'enquête avant qu'une décision finale n'ait été prise relativement à toute enquête ou à toute accusation portant sur le même objet.



[73] After conducting an investigation, the Registrar shall prepare a report of the investigation, including the findings, conclusions and reasons for the conclusions, and submit it to the Registrar General of Canada who shall cause a copy of it to be laid before each House of Parliament on any of the first fifteen sitting days on which that House is sitting after it is received (subsection 10.5(1)). The report may contain details of any payment received, disbursement made or expense incurred by an individual who is required to file a return under subsection 5(1) or by an employee who, in accordance with paragraph 7(3)(f) or (f.1), is named in a return filed under subsection 7(1), in respect of any matter referred to in any of subparagraphs 5(1)(a)(i) to (vi) or 7(1)(a)(i) to (v), as the case may be, if the registrar considers publication of the details to be in the public interest.

[74] Every individual who contravenes any provision of this Act (other than subsection 10.3(1) or the regulations) is guilty of an offence and liable on summary conviction to a fine not exceeding twenty-five thousand dollars: subsection 14(1). Further, according to subsection 14(2), every individual who knowingly makes any false or misleading statement in any return or other document submitted to the registrar under this Act, whether in electronic or other form, is guilty of an offence and liable (a) on summary conviction, to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months, or to both; and (b) on proceedings by way of indictment, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding two years, or to both. However, proceedings by way of summary conviction in respect of an offence under section 14 must be instituted within two years after the time when the subject-matter of the proceedings arose. There is no limitation period for investigating breaches of the Code.

[75] The Code, which is provided in Appendix 1 of this reasons for order, complements the registration requirements of the Act. The purpose of the Code, as stated in its Introductory Message, is to assure the Canadian public that lobbying is done ethically and with the highest standards with a view to conserving and enhancing public confidence and trust in the integrity, objectivity and impartiality of government decision-making. It establishes mandatory standards of conduct for all lobbyists communicating with “public office holders.” The Code contains three principles, “Integrity and Honesty”, “Openness” and Professionalism and eight Rules. As stated by the Registrar in the Decisions, during the relevant period of the investigations, “it was necessary to contravene one or more of the Rules in order to be found in breach of the [Code].”

[76] The power of the Registrar to develop a Lobbyists’ Code of Conduct respecting the activities described in subsections 5(1) and 7(1) is expressly provided for in subsection 10.2(1). However, I note that according to subsection 10.2(4), the Code “is not a statutory instrument for the purposes of the [SIA], but shall be published in the Canada Gazette.” In *Democracy Watch v. Canada (Attorney General)*, 2004 FC 969, [2004] F.C.J. No. 1195 (QL), (Democracy Watch), a case that was decided in the context of four judicial reviews of rulings of the Ethics Counsellor (now the Registrar) with respect to the Conflict of Interest and Post-Employment Code for Public Office Holders, the Code and the Act, Justice Gibson at para. 23 summarized the status of the Code as follows:

Once again at all times relevant to the matters before the Court, the Lobbyists' Code, developed and adopted pursuant to section 10.2 of the *Lobbyists Registration Act*, is set out in full, including a related "message from the Ethics Counsellor", in Schedule III to these reasons. Its status would appear to be somewhat unclear. It is certainly not an enactment of Parliament, nor is it a statutory instrument for the purposes of the *Statutory Instruments Act* [citation omitted]. That being said, following its development by the Ethics

Counsellor, a process which he indicates involved "...extensive consultation with a large number of people and organizations interested in promoting public trust in the integrity of government decision-making", it was reviewed by a Standing Committee of the House of Commons and was published in the Canada Gazette on the 8th of February, 1997. While counsel for the Respondent (the "Ethics Counsellor") referred to the Lobbyists' Code as "non-law", I am not satisfied that it is fully accurate to characterize it in that manner.

[77] Despite the lack of clarity regarding the status of the Code, I am nonetheless of the opinion that the Registrar exceeded his jurisdiction in the case at bar.

[78] In the Decisions, the Registrar states that, based on information provided by officials at Industry Canada, he had reasonable grounds to believe the applicant had breached the Code with respect to his activities on behalf of the four high tech companies in question. Pursuant to section 10.4(1), the Registrar thus began investigating the applicant's activities with respect to the four high tech companies in question. However, early into the investigation (and perhaps from the outset), the Registrar would have been aware that the applicant had not registered as a consultant lobbyist under section 5 of the Act during the relevant period with respect to any of the high tech companies in question. As such, at that time, it would have become apparent to the Registrar that he was indeed dealing with a situation where there is a potential breach of the registration requirements under the Act and not merely an alleged breach of the Code.

[79] Given the mandatory provision contained in subsections 10.4(7), if during the course of his investigations, the Registrar believes on reasonable grounds that a person has committed an offence under the Act, the Registrar shall advise a peace officer having jurisdiction to investigate the alleged

offence. This is a requirement. It is not at the Registrar's discretion to determine whether or not a peace officer ought to be advised. Likewise, in such an instance, pursuant to subsections 10.4(8) and 10.4(9), the Registrar is to immediately suspend the investigation of an alleged breach of the Code and may only continue with the investigation after the investigation of the alleged breach of the Act or charge has been finally disposed of.

[80] I have no evidence before me to suggest that the Registrar followed the statutory requirements as described above. I do not have any evidence (by way of affidavit or otherwise) that would allow me to conclude that the Registrar advised a peace officer having jurisdiction to investigate an alleged breach of the Act. Nor can I conclude that the Registrar immediately suspended the investigation of the alleged breaches of the Code pending a time when the investigation of the alleged breach of the Act or charge has been finally disposed of. As already stated, these are mandatory requirements. It is not at the Registrar's discretion to determine whether or not a peace officer ought to be advised. Nor can the Registrar choose whether or not to immediately suspend the investigation. Nevertheless, based on the facts before me and in spite of these mandatory requirements, the Registrar continued to investigate the applicant's alleged breaches of the Act.

[81] At this point I pause to note that at the time the investigation commenced, the statutory limitation period of two years for an investigation of a breach of the Act had already lapsed.

[82] I am also aware that in the Lobbyist's Code of Conduct, Annual Report 2005-2006, dated June 30, 2006, the Message from the Registrar of Lobbyists reads, in part, as follows:

The period covered by this report saw an unprecedented level of activity related to the [Code], including several reviews and the launching of the first investigations ever conducted in the nine-year history of the Code. [...]

The second contributing factor [to the rise in activity related to the Code] relates to two decisions made during the period regarding enforcement of the Code. The first decision was that the silence of the Act regarding a limitation period for investigations under the Code meant that there was none. The second related to expanding the pursuit of breach of the eight Rules in the Code to include the pursuit of breaches of the Principles of the Code. The combined effect of these decisions was to open up the pursuit of breaches occurring more than two years in the past, and to allow for broader interpretation of what constitutes a breach. For example, although there is no specific rule in the Code which requires a lobbyist to register, there is a Principle of Professionalism under which the failure to register would fall. The Office can now pursue failures to register as a breach of the Code, beyond the two-year limit.

[Emphasis added].

[83] I take this as an admission on the part of the respondent that prior to 2005, an individual was not required to register as a lobbyist according to the terms of the Code. More specifically, prior to 2005, the applicant was not required to register as a lobbyist according to the terms of the Code. Any registration requirement to which he may have been subject, thus, arises from the provisions of the Act, specifically subsection 5(1). Given that the applicant was of the view that he was not required to register during the relevant period (2001-2003), and given the admission on the part of the Registrar that lobbyists were not required to register under the Code, I find the Registrar exceeded his jurisdiction in this instance. Indeed, it appears that the Registrar attempted to justify his investigation (which was in fact an investigation of a potential breach of the Act) under the guise

of an investigation of an alleged breach of the Code. This despite the fact that the applicant was not even subject to the Code during the relevant period due to his failure to register.

[84] An individual who engages in lobbying activities is required to register under the Act and an individual who fails to do so is in breach of the Act. However, based on the statutory scheme as it existed during the relevant period, the Registrar was not empowered to investigate an alleged breach of the Act. The Registrar's jurisdiction was confined to investigating alleged breaches of the Code. Given that the applicant, by failing to register, was not subject to the Code, I am of the view the Registrar exceeded his jurisdiction and erred in issuing (and tabling in Parliament) the four Decisions.

[85] As an additional comment, I am also of the view that the case at bar is clearly distinguishable from the two other cases which have been decided to date in the context of investigations by the Registrar for an alleged breach of the Code. In *Democracy Watch*, above, the applicants filed an application for judicial review with respect to four rulings of the Ethics Counsellor (who, as aforementioned, was the precursor to the Registrar).

[86] In the first ruling, the individual in question had not registered under the Act. The RCMP carried out its investigation for an alleged breach of the Act; however, Crown prosecutors ultimately concluded that there was insufficient evidence to support a successful prosecution under section 5 of the Act. The Ethics Counsellor denied Democracy Watch's request for an investigation into circumstances that it believed raised serious questions concerning violations of the Code and the

Conflict of Interest and Post-Employment Code for Public Office Holders. In the impugned first ruling, the Ethics Counsellor noted that his ability to proceed with a matter under the Code required that the individual against whom a complaint or allegation had been made was a lobbyist within the meaning of the Act, or was an individual who was required to register as a lobbyist. In denying Democracy Watch's request for an investigation, the Ethics Counsellor relied on an investigation carried out by the RCMP, which found that there was insufficient evidence to demonstrate in a court of law that the individual had an obligation to register as a lobbyist. The Court's decision to grant Democracy Watch's application turned on the issue of standards of proof. Justice Gibson found that to trigger subsection 10.4(1), is not necessary that the Ethics Counsellor be able to demonstrate, on a standard of "beyond a reasonable doubt", in a court of law, that the individual had an obligation to register as a lobbyist. Rather, it was only relevant that the Ethics Counsellor "believes on reasonable grounds", a much lower standard than "beyond a reasonable doubt" that the individual had breached the Code.

[87] In the second impugned ruling, the Ethics Counsellor denied Democracy Watch's request for an investigation with respect to a situation involving a Senior Policy Advisor to then federal Minister of Health. The Ethics Counsellor could not conclude on reasonable and probable grounds that a breach of the Code had occurred. In this instance, the individual in question was not registered under the Act at the time the complaint was submitted to the Registrar but later did so. Justice Gibson determined the decision was not unreasonable.

[88] In the third ruling, the Ethics Counsellor denied Democracy Watch's request for an investigation with respect to nine lobbyists working with ministers and public office holders on their political party leadership campaign. All the individuals were registered as lobbyists. The Ethics Counsellor was of the view that the obligation under the Public Office Holders' Code to ensure that there was not a conflict rested with the Minister and not the lobbyist. Justice Gibson again determined this decision was not unreasonable.

[89] In the fourth ruling, the Ethics Counsellor denied Democracy Watch's request for an investigation with respect to donations to cabinet ministers. After reciting the factors quoted in the third ruling, the Ethics Counsellor concluded he had no basis to believe on reasonable grounds that the Code had been breached.

[90] That being said, Justice Gibson, in the end, allowed the application for judicial based on his finding that, on the totality of the evidence, there were grounds for a reasonable apprehension of bias on the part of the Ethics Counsellor and his office, both specifically against Democracy Watch and of an institutional nature. Such bias resulted in a breach of the principles of procedural fairness in arriving at the rulings under review.

[91] However, the ratio of Democracy Watch is of limited relevance to the case at bar. Regarding the first ruling (the only ruling where the individual was not registered), Justice Gibson's analysis does not provide any insight as to whether the individual in question was subject to the Code, nor does it consider in a broader sense whether individuals who are not registered under the Act are



subject to the Code's Rules and Principles. Likewise, in that instance, the RCMP had investigated the alleged breach of the Act. By virtue of the fact that the Crown exercised its prosecutorial discretion in refusing to prosecute, the investigation had arguably "been finally disposed of." In the other three rulings the individuals in question were all registered under the Act and thus were clearly subject to the Code.

[92] In a recent case, *Democracy Watch v. Campbell*, 2008 FC 214, [2008] F.C.J. No. 255 (QL) (Campbell), this Court was tasked with determining on judicial review whether a decision of the Registrar that the respondent Mr. Barry Campbell did not breach Rule 8 of the Code was reasonable. However in *Campbell*, the individual in question was, unlike the applicant in this case, registered as a lobbyist and thus was clearly subject to the provisions of the Code during the relevant period of the investigation. Likewise, the investigation was conducted by the Registrar for an alleged breach of the Code: it was never alleged that the individual was in breach of the Act. *Campbell* is thus of limited relevance to the case before me.

[93] As a final note, while I understand the policy concerns expressed by the respondent (who wishes that the Registrar be given the authority to investigate breaches of the Act, especially where there is a breach of the obligation to register as a lobbyist), this is a clear case where the Act must be amended by Parliament in order to permit the Registrar to embark on such an inquiry and to be able to table to Parliament a report containing his findings regarding a breach of the Act. At the same time, as the case may be, any such amendment may provide a further opportunity for Parliament to clarify the status or to strengthen the Code, if deemed advisable.

[94] In conclusion, despite the arguments raised by respondent's counsel, I am of the view that the Registrar exceeded his jurisdiction in the four instances raised in this judicial review. Accordingly, the application for judicial review is allowed, in part, with costs in favour of the applicant. The four Decisions are quashed and the Registrar is ordered to forthwith take all necessary steps with the President of the Treasury Board to have removed the four Decisions that were tabled in the House of Commons and the Senate on March 19, 2007 and March 20, 2007 respectively.

**ORDER**

**THIS COURT ORDERS that:**

1. This application for judicial review is allowed, in part, with costs in favour of the applicant;
2. The four Decisions rendered by the Registrar, dated February 2007, are quashed; and,
3. The Registrar shall forthwith take all necessary steps with the President of the Treasury Board to have removed the four Decisions that were tabled in the House of Commons and the Senate on March 19, 2007 and March 20, 2007 respectively.

“Luc Martineau”

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Judge

## Appendix 1

### *Lobbyists' Code of Conduct*

#### **Introductory Message**

The *Lobbyists' Code of Conduct* is the result of extensive consultations with a large number of people and organizations interested in promoting public trust in the integrity of government decision-making. The Code was reviewed in the fall of 1996 by the Standing Committee on Procedure and House Affairs, published in the Canada Gazette on February 8, 1997, and came into effect on March 1, 1997.

The purpose of the *Lobbyists' Code of Conduct* is to assure the Canadian public that lobbying is done ethically and with the highest standards with a view to conserving and enhancing public confidence and trust in the integrity, objectivity and impartiality of government decision-making. In this regard, the *Lobbyists' Code of Conduct* complements the registration requirements of the Act to amend the *Lobbyists Registration Act*, which came into force on January 31, 1996.

Lobbyists - individuals who are paid to communicate with federal public office holders in regard to certain government decisions - are required to comply with the code. "Public office holder" means virtually anyone occupying a position in the federal government and includes members of the Senate and the House of Commons and their staff, officers and employees of federal departments and agencies, members of the Canadian Armed Forces and the Royal Canadian Mounted Police.

The Code begins with a preamble which states its purposes and places it in a broader context. Next comes a body of overriding principles which are in turn followed by specific rules. The principles set out, in positive terms, the goals and objectives to be attained, without establishing precise standards. The rules provide more detailed requirements for behaviour in certain situations. The powers of investigation which are provided to the Registrar will be triggered where there is an alleged breach of either a principle or a rule of the Code.

The *Office of the Registrar of Lobbyists* is available to offer comment and guidance to lobbyists on the application of the *Lobbyists' Code of Conduct*. An important means of communicating more widely our advice and other Code developments will be through annual reports to Parliament.

We welcome questions and enquiries from lobbyists and other members of the public as well. [...]

#### **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 *Lobbyists 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.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-662-07

**STYLE OF CAUSE:** NEELAM MAKHIJA v. ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** January 22, 2008

**AMENDED REASONS FOR ORDER AND ORDER:** Martineau J.

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**APPEARANCES:**

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