Opinion Respecting the Constitutionality of Rule 8 of the *Lobbyists' Code of Conduct*

NATIONAL CONSTITUTIONAL AND HUMAN RIGHTS LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Constitutional and Human Rights Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association (CBA) is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice. CBA wishes to comment upon the *Guidance on Conflict of Interest* provided by the Commissioner of Lobbying of Canada (the Guidance) respecting Rule 8 of the *Lobbyists' Code of Conduct* (the *Code*). The *Code* promulgated under section 10.2 of the *Lobbyists Registration Act*[1] (the *Act*) came into effect on March 1, 1997. The CBA has a fundamental concern with the Guidance, and in particular, questions whether the Guidance on Rule 8 is consistent with the *Canadian Charter of Rights and Freedoms* (the *Charter*).[2]

Lobbyists come from various backgrounds. Some are former MPs and members of Cabinet. Some are former political staff or public officials. Some do not have a political background, but are subject-matter experts. Some represent a narrow tranche of private interests, some represent entire industries, and some represent not-for-profit public interest organizations, like the CBA. Our point for emphasizing this is that the stigmatizing stereotype of a lobbyist as an ex-political insider working their contacts in government at the behest of a private sector client with deep pockets and motivated exclusively by self-interest is not accurate.

Lobbying is not only a legal activity but one that can enhance democracy, allowing law makers to hear from those whose interests and rights they may not otherwise fully consider. Indeed, elements of the *Charter* were themselves a result of lobbying efforts by those who felt not adequately heard in the constitutional negotiations, such as women and indigenous peoples. At

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1 R.S.C. 1985, c. 44 (4th Supp.)

2 Part I of the *Constitution Act*, 1982, being Schedule B to *the Canada Act*, 1982 (U.K.), 1982, c.11.

the same time, in a society of unequal resources, the regulation of lobbyists and law-makers is required to proscribe improper influence. Law must not be for sale to the highest bidder.

Citizen engagement in the political process also leads to a strengthened democracy. It promotes the expansion of citizens' focus from self-interest to civic interest:

> To take an active interest in politics is, in modern times, the first thing which elevates the mind to large interests and contemplations; the first step out of the narrow bounds of individual and family selfishness, the first opening in the contracted round of daily occupations. . . . The possession and the exercise of political, and among others of electoral, rights, is one of the chief instruments both of moral and of intellectual training for the popular mind . . . .[3]

Thus, ethical rules for lobbyists should not be based upon an inaccurate stereotype or be built around the minority of cases where there is abuse or unethical behaviour. The net must be cast with sufficient precision to catch such behaviour, but pay equal attention to lobbyists' entitlement to engage in constitutionally protected political activities that have little or no bearing upon their ethical responsibilities. Further, ethical rules must not chill constitutionally protected political expression as a result of being vague or overbroad. The Guidance over Rule 8, and specifically the naming of "political activity" as potentially giving rise to a conflict of interest, goes too far. It violates lobbyists' freedom of expression under s.2(b) of the *Charter* and is not reasonably justified in a free and democratic society under s.1. We explain our position in detail below.

II. RULE 8 OF THE *CODE* AND THE COMMISSIONER'S GUIDANCE

Rule 8 of the *Code* reads:

> 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.

While the text of Rule 8 has not been modified since its inception, its understanding and application has evolved. Most significantly, in *Democracy Watch v. Campbell and Attorney*

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[3] J. S. Mill, "Thoughts on Parliamentary Reform" (1859), in J. M. Robson, ed., "Essays on Politics and Society", vol. XIX, 1977, 311, at 322-23, cited with approval in *Sauvé v. Canada* (Chief Electoral Officer) [2002] 3 S.C.R. 519 at paragraph 38.

General of Canada (Registrar of Lobbyists),[4] the Federal Court of Appeal ruled that the previous understanding of how this Rule applies to lobbyists, namely that it required evidence of actual interference with actions or decisions of a public office holder, was in error and unreasonable.

The *Democracy Watch* ruling motivated the Commissioner to issue the Guidance, which provides:

> Conflict of interest may exist because of a "reasonable apprehension" of an apparent conflict of interest, rather than a demonstration of interference with the public duties of a public office holder.
>
> The Commissioner of Lobbying has, for the purposes of the *Lobbyists' Code of Conduct*, interpreted real or apparent conflict of interest as follows:
>
> > A conflict of interest can be created by the presence of a tension between the public officer holder's duty to serve the public interest and his or her private interest or obligation created or facilitated by the lobbyist.
>
> The determination of what constitutes an improper influence upon a public office holder must remain a question of fact in each case. Depending on the specific circumstances, a competing obligation or private interest could arise from factors such as, but not limited to:
>
> - the provision of a gift, an amount of money, a service, or property without an obligation to repay;
> - the use of property or money that is provided without charge or at less than its commercial value; and
> - political activities.
>
> Lobbyists should endeavour to conduct themselves in the highest ethical manner thus avoiding situations which could create a real or apparent conflict of interest for a public office holder.[5]

The controversial aspect of the Commissioner's Guidance is the apparent prohibition it places on a lobbyist's "political activities". The 'guidance' this directive offers is unclear, at best. It states that an assessment of whether a particular political activity runs afoul of Rule 8 involves a case specific assessment. There does not appear to be provision for an advance ruling and will be an 'after-the-fact' determination. The practical effect of this, if not its purpose, is to

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4 2009 FCA 79 per Pelletier J.A. for the Court.

5 Commissioner's Guidance on Conflict of Interest – Rule 8 (*Lobbyists' Code of Conduct*), online: http://www.ocl-cal.gc.ca/eic/site/lobbyist-lobbyiste1.nsf/eng/nx00418.html.

discourage a lobbyist from participating in the political process. Given the vagueness of the Guidance, conscientious lobbyists likely will refrain from any political activity to avoid contravening this Rule and the serious implications to their reputation that could flow from a finding of a Rule 8 contravention.

III. CONSTITUTIONAL ISSUES RAISED BY THE COMMISSIONER'S GUIDANCE

Two constitutional issues are engaged by the Guidance. These issues are:

- Does the Commissioner's Guidance contravene lobbyists' freedom of expression under section 2(b) of the *Charter*?
- If so, does the Commissioner's Guidance qualify as a reasonable limitation upon the guarantee of freedom of expression for the purposes of section 1 of the *Charter*?

It might also be contended that the Guidance is inconsistent with section 3 of the *Charter*, which includes not only the right to vote but also to otherwise play a meaningful role in the electoral process.[6] The CBA's view is that it would be extraordinary and an unconstitutional application of the Guidance if it were to be interpreted as discouraging a lobbyist from casting a vote, which absolutely could not be justified. To the extent that the Guidance interferes with lobbyists' ability to play a meaningful role in the electoral process by requiring them to refrain from political activities during an election, we rely upon the section 1 analysis below.

IV. ANALYSIS

A. Section 2(*b*) of the *Charter*

The first question to be addressed is whether the Guidance impairs lobbyists' freedom of expression. Essentially, any activity that is meant to convey meaning, short of violence, is protected under s.2(b).[7] Political activities, such as the placement of a lawn sign, participating in a campaign, or donating money, undoubtedly are meant to convey support for a particular

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6 See especially: *Haig v. Canada* (Chief Electoral Officer), [1993] 2 S.C.R. 995, at pp. 1048-1049; *Figueroa v. Canada* (Attorney General), [2003] 1 S.C.R. 912, at para. 30,; and *Henry v. Canada* (Attorney General), 2010 BCSC 610 per L. Smith, J.

7 See especially: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, and *R. v. Bryan*, [2007] 1 S.C.R. 527.

candidate, party, or political philosophy. This expression in fact lies at the core of the s.2(b) guarantee.[8] As indicated above, both the purpose and the effect of the Commissioner's Guidance is to limit a lobbyist's ability to engage in political activities. Thus, they constitute a *prima facie* violation of section 2(*b*) of the *Charter*.

Osborne v. Canada (Treasury Board) best illustrates this point. At issue there was the constitutionality of section 33 of the *Public Service Employment Act,* which prohibited federal public servants from engaging in most forms of political activity. The Supreme Court of Canada (Stevenson J. dissenting) concluded that this prohibition violated section 2(*b*) of the *Charter*. Writing for the majority, Sopinka J. stated at page 93: "By prohibiting public servants from speaking out in favour of a political party or candidate, [s. 33] expressly has for its purpose the restriction of expressive activity." He observed that "where opposing values call for a restriction on the freedom of speech, and apart from exceptional cases, the limits on that freedom are to be dealt with under the balancing test in s. 1, rather than circumscribing the scope of the guarantee at the outset."

B. Section 1 of the *Charter*

The applicable analysis under section 1 of the *Charter* is well known, having first been established in *R. v. Oakes*[9] and refined in subsequent authorities, most notably *Dagenais v. Canadian Broadcasting Corporation*.[10] It requires the party seeking to justify a rights violation to prove: (1) the goal sought to be achieved by the impugned limitation is pressing and substantial; and (2) the limitation is proportionate to that goal. The second proposition involves three considerations, namely, whether the limitation is: (a) rationally connected to its objective; (b) carefully tailored to avoid excessive and undue impairment of the constitutional right in question; and (c) proportionate in that its societal benefits outweigh its deleterious effects upon an individual's rights.

However, before a full section 1 analysis can be undertaken, it is necessary to find that the limitation in question is "prescribed by law." For reasons set out below, it is questionable

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8 See especially: *Osborne*, *ibid*, at 93, and *Libman*, *ibid*, at para. 591 ("Political expression is at the very heart of values sought to be protected by the freedom of expression guaranteed by s. 2(*b*) of the Canadian *Charter*").

9 [1986] 1 S.C.R. 103.

10 [1994] 3 S.C.R. 835.

whether the Commissioner's Guidance can satisfy this significant pre-condition to the operation of section 1 of the *Charter*.

1 Prescription by Law

Typically, this pre-condition is easily met, as a statutory provision or regulation is the source of the constitutional infringement. However, until very recently it was unclear whether a policy directive established by a government entity and not Parliament or a legislature qualified as a prescription by law. This uncertainty was clarified in *Greater Vancouver Transit Authority v. Canadian Federation of Students – British Columbia Component*.[11] Justice Deschamps for the majority concluded that, provided a policy satisfied certain criteria, it would be "prescribed by law" for purposes of section 1 of the *Charter*. She summarized her analysis as follows:

> [W]here a government policy is authorized by statute and sets out a general norm or standard and that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law".[12]

Applying this analytical framework to the Guidance, the CBA suggests that it does not qualify as a prescription by law because it is not sufficiently precise.

Neither the *Code* nor the associated Guidance is a statutory instrument.[13] However, that fact is not determinative. As Deschamps J. stated in *G.V.T.A.*, for purposes of section 1 of the *Charter* the policy "need not take the form of statutory instruments."[14] What is critical is that the enabling legislation authorizes the governmental entity to adopt binding rules that are accessible and sufficiently precise.

The Federal Court of Canada has stated the *Code* cannot be characterized as "non-law."[15] Since section 10.2 of the *Act* compels the Commissioner of Lobbyists to create a code of conduct, and since section 10.3 of the *Act* commands all registered lobbyists to comply with the terms and conditions set out in such a code, it is apparent that the *Code* together with the Guidance satisfy

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11 [2009] 2 S.C.R. 295, 2009 SCC 31 [G.V.T.A.]

12 *Ibid*, at para. 70

13 See section 10.2(4) of the *Act*.

14 *Supra*, note 11, at para. 69.

15 *Makhija v. Attorney General of Canada*, 2010 FC 141, at para. 16. See also: *Democracy Watch v. Canada (Attorney General)*, 2004 FC 969, at para. 23.

the first criterion of a prescription by law, namely, that it is intended to be a binding, and not an administrative, policy.

The flaw in the Guidance is that it fails to satisfy another critical criterion of a prescription by law identified in *G.V.T.A.*, namely, it is not sufficiently precise.

Lack of precision engages the void for vagueness doctrine. The leading case on this doctrine is *R. v. Nova Scotia Pharmaceutical Society*.[16] In that case, Gonthier J. writing for the Court stated that a law would be impermissibly vague if it "does not provide an adequate basis for legal debate."[17] This would include a failure to "sufficiently delineate any area of risk" which would include failure to provide "fair notice to the citizen" or "a limitation of enforcement discretion."[18] Admittedly, this standard establishes a fairly high threshold for an application of the vagueness doctrine to an impugned law.[19]

The Guidance states that a lobbyist should not engage in any political activity which could place an office holder in a real or apparent conflict of interest. It expressly states that this will have to be assessed on a case-by-case basis. This implies that any determination of whether a real or apparent conflict of interest has occurred will take place only after the challenged political activity has occurred. This *ex post facto* determination provides no guidance to a lobbyist as to what is the appropriate conduct. It also distinguishes this situation from that considered in *Osborne*. There, the limitation at issue prohibited federal public servants from engaging in any work that could be construed as partisan political activity. Justice Sopinka for the Court admitted that, although the language was exceedingly broad, it nevertheless was "capable of interpretation."[20] In contrast, the Guidance is not capable of interpretation as it cannot be predicted with any degree of certainty which political activities would create a real or apparent conflict of interest until after the fact and, as a consequence, fails to sufficiently delineate the area of risk for lobbyists. For this reason, the Guidance does not qualify as a prescription by law for the purposes of section 1 of the *Charter*.

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16 [1992] 2 S.C.R. 606.

17 *Ibid*, at 639.

18 *Ibid*.

19 See e.g.: *Winko v. British Columbia (Forensic Psychiatric Institute)* (1990), 135 C.C.C. (3d)129 (S.C.C.), at para. 68, and *R. v. Lindsay*; *R. v. Bonner*, 2009 ONCA 532, at para. 22.

20 *Osborne*, *supra* note 7 at 96.

2 Deference and Context in the Section 1 Analysis

The jurisprudence of the Supreme Court of Canada respecting limitations placed upon political expression reveals that two important principles are typically brought to bear in the section 1 analysis: deference and context.[21] For the following reasons, neither of these principles would assist the Commissioner in an argument to uphold the Guidance under s.1.

2.1 Deference

Most of the leading authorities decided by the Supreme Court involve changes or alterations to the current electoral system. The Court has indicated that it will typically defer to Parliament's legislative choices in such matters. As Fish J. concurring in *R. v. Bryan* pithily observed respecting changes to existing electoral arrangement, "when Parliament prefers, the courts defer — except where the Constitution otherwise dictates."[22] The rationale presented for judicial deference in such matters is that because Parliament or a provincial legislature has the right to select an electoral model and because there are considerable nuances inherent in implementing the model, courts should adopt a natural attitude of deference to such legislative decisions.[23]

This level of deference would likely not be applied to the Guidance for two reasons. First, it is not a statutory provision that represents the preferred and deliberate choice of the people's elected representatives. Rather, it is simply a policy directive released by a governmental official, albeit one possessing a statutory mandate to oversee the professional activities of lobbyists.

Second, the Guidance does not pertain to the electoral system generally or how elections are to be conducted in Canada. Rather, it severely constrains, if not prohibits altogether, the participation of certain individuals (registered lobbyists) in the political process. This important consideration ties the issue here more closely to the prohibition found

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21 See e.g.: *Thomson Newspapers v. Canada* (Attorney General), [1998] 1 S.C.R. 877, at para. 88; *Harper v. Canada (Attorney General), supra* note 7 paras. 75-80, and *R. v. Bryan*, *supra* note 7 at paras. 9-11

22 *Bryan*, *ibid* at para. 59. See generally: Feasby, "Freedom of Expression and the Law of the Democratic Process" (2005), 29 S.C.L.R. (2d) 237; Bredt and Pottie, "Liberty, Equality and Deference: A Comment on Colin Feasby's Freedom of Expression and the Law of the Democratic Process" (2005), 29 S.C.L.R.(2d) 291, and Feasby, "Issue Advocacy and Third Parties in the United Kingdom and Canada" (2003), 48 McGill L.J. 11.

23 *Bryan*, *ibid*, at para. 9. See also: *Harper*, *supra*, note 7 at paras. 86-87.

unconstitutional in *Osborne* and distinguishes it from the kinds of cases in which the Supreme Court has deferred to Parliament's choice.

2.2 Context

In the electoral system line of cases, the Court devised four contextual factors which would determine "the nature and sufficiency of evidence required for the Attorney General to establish that a violation of s. 2(b) is saved by s.1."[24] These contextual factors announced in *Thomson Newspapers Co. v. Canada (Attorney General)*[25] and applied in subsequent cases are: "(i) the nature of the harm and the inability to measure it, (ii) the vulnerability of the group protected, (iii) subjective fears and apprehension of harm and (iv) the nature of the infringed activity."[26]

These contextual factors have no relevance to the limitation at issue here. As already stated, the Guidance does not pertain to the electoral system and its operation. Rather, it is intended to restrict the political activities of lobbyists. Its impact is stark and identifiable. It is not the case, as in the electoral reform cases, of Parliament attempting to address broad and diffuse problems, where the harm is difficult to quantify.

C. Pressing and Substantial Objective

The first stage of the *Oakes* inquiry is whether the limitation at issue seeks to achieve a pressing and substantial governmental objective. In *Harper* [27]and again in *Bryan,*[28] the Supreme Court stated that this stage is not an "evidentiary contest."[29] All that is demanded at this stage is whether the government or the body attempting to defend the limitation "*has asserted* a pressing and substantial objective."[30]

The *Act* requires that the *Code* be developed to govern the conduct of lobbyists in their dealings with public office holders in the Government of Canada. More particularly, the Guidance seeks to ensure that lobbyists do nothing that would place a public office holder in a real or apparent

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24 *Bryan*, *supra* note 7 at para. 10.
25 *Supra* note 21 at para. 88.
26 *Bryan*, *supra* note 7 at para. 10.
27 *Supra* note 7 at para. 25.
28 *Supra* note 7.
29 *Ibid*, at para. 32.
30 *Ibid*. quoting McLachlin C.J. and Major J. in *Harper*, *supra* n. 20, at para. 25 (italics in original).

conflict of interest. It is difficult to suggest that seeking to regulate the conduct of lobbyists in their dealing with public office holders is not a pressing and substantial governmental objective.

In *Osborne*, Sopinka J. concluded that preserving the neutrality of the federal public service qualified as a pressing and substantial governmental objective.[31] Similarly, seeking to ensure that lobbyists do not compromise the integrity of public office holders through a conflict of interest is an important public good and a pressing and substantial objective. The CBA acknowledges that the Guidance would likely satisfy the first stage of the *Oakes* analysis.

D. Rational Connection

As explained in *Bryan*, the rational connection stage of the analysis requires a demonstration of "a causal connection between the infringement and the benefit sought on the basis of reason and logic."[32] Generally speaking, this is not a difficult standard to meet, and we acknowledge that the Guidance probably does meet it. It could be seen as logical for the Guidance to impose limitations on political activities of lobbyists in an attempt to ensure that public office holders are not compromised or placed in a real or apparent conflict of interest. The flaw in the Guidance is instead located in the minimal impairment aspect of the analysis, and specifically, its lack of lack of clarity.

E. Minimal Impairment

Political expression lies at the core of the protection afforded by section 2(*b*) of the *Charter*. This affects the degree of tailoring required under section 1. Since the nature of expression at issue here is fundamental to our democratic process, any limitation placed upon it must be much more carefully drawn than would be the case if the value of the speech was lower.[33]

The Supreme Court of Canada has accepted that if a limitation "falls within a range of reasonable alternatives," Parliament or the legislature will have complied with this particular

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31 *Osborne*, *supra* note 7.

32 *Bryan*, *supra* note 7 at para. 39.

33 See especially: *Thomson Newspapers Co. v. Canada* (Attorney General), *supra* note at para. 91.

section 1 requirement and a court should not find it disproportionate "merely because they can conceive of an alternative which might better tailor objective to infringement."[34]

The Guidance does not satisfy this requirement for two reasons. First, it is over-inclusive because it purports to prohibit any political activity which could place a public office holder in a real or apparent conflict of interest. Its lack of precision means that it could apply to political activities as mundane as canvassing for a particular candidate or displaying a lawn sign signifying a lobbyist's political preference. A prohibition of such breadth is a crude instrument in serving the purpose sought to be achieved by the Guidance.

In this respect, it is analogous to the prohibition on political activities for all federal public servants struck down in *Osborne*. This prohibition, found in section 33 of the *Public Service Employment Act,* "ban[ned] all partisan-related work by all public servants, without distinction either as to the type of work, or as to their relative role, level or importance in the hierarchy of the public service."[35] Justice Sopinka concluded that such a rough and un-nuanced restriction on political activities "involve[d] considerable overkill and does not meet the test of constituting a measure that it is carefully designed to impair freedom of expression as little as reasonably possible."[36] A similar observation could be made about the Guidance.

Second, the *ex post facto* determination of whether a particular activity contravenes the Guidance creates a chilling effect on the ability of registered lobbyists to participate in the political process. The potential chill a limitation may place on an individual's freedom of expression is a very relevant consideration under the minimal impairment stage of the *Oakes* analysis.[37] In this case, no registered lobbyist would be willing to risk the potential consequences of running afoul of Rule 8. It is entirely conceivable that a firm seeking to avoid a confrontation with the Commissioner's office over conflicts of interest could require its employees who are registered lobbyists to refrain from any political activity. The imposition of such a policy would be a direct effect of the sweeping interpretation given to Rule 8 by the Guidance.

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34 *Bryan*, *supra* note 7 at para. 42, quoting *RJR-MacDonald Inc. v. Canada* (Attorney General), [1995] 3 S.C.R. 199, at para. 160.

35 *Osborne*, *supra* note 7 at 100.

36 *Ibid*, at p. 99.

37 See especially: *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 773 per McLachlin J. (as she then was).

Accordingly, because of its sweep and uncertainty, not to mention the chill it could place on the activities of registered lobbyists, the CBA submits that the Guidance does not minimally impair freedom of expressions and is unconstitutional.

F. Salutary Benefits vs. Deleterious Effects

While we are of the view that a judicial analysis is unlikely to get to the last stage of the *Oakes* analysis in light of the minimal impairment inquiry, any salutary benefit of the Guidance does not outweigh its deleterious effects. While the salutary benefits of ensuring that lobbyists do not create conflicts of interest for federal public office holders cannot be denied, the cost of achieving this through a prohibition on political activity is striking. It effectively denies registered lobbyists their ability to participate in the political process, at least at the federal level. As a result, no balance can be demonstrated and it fails the salutary benefits/deleterious effects stage.

V. CONCLUSION

The CBA strongly supports lobbyist regulation. However, we support carefully tailored regulation that is responsive to the risks of the enterprise relating to undue influence of public officials, but at the same time recognizes the real circumstances of lobbyists and their right to participate in the political system as interested and conscientious citizens. Registered lobbyists do not leave their fundamental constitutional rights at the threshold when they enter the corridors of power.

Unfortunately, the Guidance on Rule 8 is not sufficiently tailored so as to trench on lobbyists' freedom of expression as little as possible to achieve its legitimate objectives. It is vague, overreaching, and encourages *ex post facto* analyses of political activity. It cannot act as a deterrent to improper activities because it does not provide sufficient direction to lobbyists as to which political activities they may safely engage without being afoul of the *Code.* It is rather a deterrent to *all* political activities. We recommend that the Commissioner withdraw the Guidance, and enter into discussions with stakeholders about how to make future Guidance clear, effective and *Charter* compliant.