Date: 20080219

Docket: T-1942-06

Citation: 2008 FC 214

Ottawa, Ontario, February 19, 2008

PRESENT: The Honourable Orville Frenette

BETWEEN:

DEMOCRACY WATCH

Applicant

and

BARRY CAMPBELL
AND
THE ATTORNEY GENERAL OF CANADA
(OFFICE OF THE REGISTRAR FOR LOBBYIESTS)

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, S.C. 2002, c. 8 (*Act*), of a decision of the Registrar of Lobbyists, dated October 10, 2006, that the respondent Mr. Barry Campbell did not breach Rule 8 of the *Lobbyists' Code of Conduct* (*Code*) in 1999.

[2] This is the latest in a long-running series of disputes over the interaction between Mr. Campbell and Jim Peterson, who held the post of Secretary of State (International Financial

Institutions) at the time of the alleged breach of the *Code*. Democracy Watch alleges that Mr. Campbell breached the *Code* when, as the Chair of the *Friends of Jim Peterson*, he organized a benefit dinner for Mr. Peterson's re-election campaign in 1999, at which $70, 000 was raised, while registered to lobby the Finance Ministry for a variety of financial institutions. The respondent Barry Campbell notes that Mr. Peterson sought the advice of the Ethics Counsellor prior to the event, and received his approval. Contributions to the fundraiser made by financial institutions were returned and refunded.

[3] The applicant first complained about this matter to the Ethics Counsellor on April 13, 2000. Ten subsequent complaints were made by Democracy Watch, about other matters, to the Ethics Counsellor between 2000 and 2002. Democracy Watch filed an application for judicial review in May 2003 related to rulings the Ethics Counsellor had made on some of those complaints, not including the Campbell matter. My colleague Justice Frederick E. Gibson ruled on July 9, 2004 that one of the rulings (the Fugère ruling) of the Ethics Counsellor was to be reconsidered due to the appearance of bias, both personal and institutional: *Democracy Watch v. Canada (Attorney General)*, 2004 FC 969, [2004] F.C.J. No. 1195 [*Democracy Watch 1*]. He declined, however, to provide other remedies sought by Democracy Watch on the basis that the regime overseeing the compliance of lobbyists with ethical guidelines had been significantly altered by the enactment of Bill C-4 on May 17, 2003.

[4] The evidence (Conacher affidavit) reveals that Michael Nelson was appointed Registrar of Lobbyists in July 2004. At that time, he was Assistant Deputy Minister (ADM) comptrollership and administration and performed his functions as Registrar on a part-time basis.

[5] In September 2005, he assumed the role of Registrar on a full-time basis and gave up his position as ADM. The office of the Registrar was moved from Industry Canada headquarters in Ottawa to a separate location at 255 Albert Street, Ottawa.

I. Security of tenure

[6] As a public servant, the tenure of Mr. Nelson is secure; he was appointed by the Public Service Commission under the *Public Service Employment Act*. No minister can terminate his employment.

[7] The function of the Registrar of Lobbyists is the responsibility of the Registrar General of Canada. Even if Mr. Nelson were replaced as Registrar, he would be eligible for deployment to another EX-04 position within the public service.

[8] The above structure will be further re-organized as an independent and impartial function when the Federal Accountability Act (*F.A.A.*) Bill C-2, given Royal assent on December 12, 2006, is implemented.

[9] The former regime of the Ethics Commissioner and the Lobbyist Code, which existed between 1995 and 2004, was fundamentally revised by the creation of the position of "Registrar of Lobbyists" in 2004. The Registrar who oversees this office reports directly to Parliament through the Registrar General on an annual basis (see the Lobbyists Registration Report, 2005-2006, exhibit L: Conacher-Affidavit).

[10] Since September 2005, the Registrar of Lobbyists has been a full-time appointment, with its office located at 255 Albert Street, Ottawa. In February 2006, the Office of the Registrar of Lobbyists (ORL) became a stand-alone department and the Registrar of Lobbyists was given the authority of a Deputy Head for the purpose of the *Financial Administration Act* and other Acts.

[11] The ORL was transferred from Industry Canada to the Treasury Board. Between 2005-2006, the office personnel grew from five to twenty employees and its tasks were divided into three areas:

a) An operations directorate to handle the registration process;

b) An investigative directorate to strengthen the enforcement capacity of the ORL; and

c) An office of the Registrar of Lobbyists to deal with the management and coordination of the ORL.

[12] The investigative directorate is responsible for monitoring lobbying activities by conducting administrative reviews; if necessary, the Royal Canadian Mounted Police is called in to investigate complaints under the *Code*.

II. Summary of Justice Gibson decision of July 9, 2004

[13] Justice Gibson reviewed nine complaints by Democracy Watch in its application against the respondent Campbell.

[14] He granted four applications on the ground that there existed, in 1999-2000, a reasonable apprehension of bias on the part of the then Ethics Counsellor and his office. He dismissed three other applications on the basis that, on the totality of the evidence, the decisions of the Ethics Counsellor met the standard of reasonableness *simpliciter*.

[15] He also would have allowed the ninth application (Fugère ruling) on the ground that there had been an error committed in the ruling, had he not already found a reasonable apprehension of bias in that allegation. Finally, he refused to grant the applicant any of the declarations requested relating generally to the Ethics Commissioner and his alleged bias against Democracy Watch. He granted costs in favour of the applicant because it had substantial success in four applications.

[16] Justice Gibson found that two primary factors weighed in favour of the finding of bias, i.e.:

A. The office of the former Ethics of Commissioner existed at the "will of the Prime Minister"; and

B. The dual role of the Ethics Counsellor and his office under the *Lobbyists Registration Act* and the two related codes, created a conflict of interest in both the application of resources and in fully and effectively carrying out the dual mandates.

[17] I believe that both those factors have since been eliminated by the structure presently in place, because security of tenure and independence of action is assured and the mandate of the Registrar has been significantly narrowed, eliminating the causes of Justice Gibson's finding of a reasonable apprehension of bias.

[18] The proposition that a public servant cannot act independently by nature of the insecurity of his tenure as a public servant has been rejected by the Federal Court of Appeal in *Mohammad v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 363, [1988] F.C.J. No. 1141 (C.A.).

[19] The Registrar of Lobbyists, newly created pursuant to the *Lobbyists Registration Act*, 1985, c. 44 (4th Supp.) (*LRA*), wrote to Democracy Watch in February 2005 to inquire whether the applicant wished him to address the Campbell complaint. As of that time, no decision had been made on it. The applicant responded on June 17, 2005 that it did wish to proceed with the complaint. After an administrative review was conducted by the Investigations Directorate of the Office of the Registrar, the Registrar concluded that he did not have reasonable grounds to believe that Mr. Campbell had violated Rule 8 of the *Code* as alleged by the applicant. Democracy Watch was advised of this decision by letter dated October 10, 2006.

III. Relevant Provisions

[20] Rule 8 of the *Lobbyists Code* reads as follows:

Improper influence	Influence répréhensible

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.	Les lobbyistes doivent éviter de placer les titulaires d'une charge publique en situation de conflit d'intérêts en proposant ou en prenant toute action qui constituerait une influence répréhensible sur ces titulaires.

IV. Issues

A. Did the Registrar have jurisdiction to investigate the applicant's complaint against Mr. Campbell?

B. Should the decision of October 10, 2006 be returned for reassessment because of a reasonable perception of bias?

C. If not, what is the appropriate standard of review for assessing the Registrar's decision?

D. Assessed against that standard, did the Registrar commit an error in his determination of the applicant's complaint against Mr. Campbell?

E. What relief should be granted?

V. Analysis

A. Did the Registrar have jurisdiction to investigate the applicant's complaint against Mr. Campbell?

[21] The respondent Barry Campbell alleges that the Registrar had no jurisdiction to investigate the applicant's complaint against him, as the *Code* has been significantly altered by statutory and administrative changes in the period between 1999 and 2006. He submits that the Registrar only has jurisdiction to enforce the interpretation of the version of the *Code* operative under his regime and

not previous regimes. I do not agree that this is the case. The Registrar may assess violations of previous ethics regimes, but must not retroactively impose his interpretations in those cases. As is not infrequently the case in this Court, cases may take time to come before the tribunal and to find that there is no jurisdiction over any complaints brought prior to an amendment to the governing statute would essentially equate to wiping the slate clean with every amendment.

[22] The Registrar properly took jurisdiction to assess the complaint, which at the relevant time remained unresolved. He also, properly, applied the interpretation of the relevant Rule which was in use at that time. In fact, he noted in his letter informing the applicant of his decision on October 10, 2006:

> It would be unfair to retroactively impose my approach to enforcement of the *Lobbyists' Code of Conduct* upon lobbyists who operated under the previous approach to enforcing the Code.

B. Should the decision of October 10, 2006 be returned for reassessment because of a reasonable perception of bias?

[23] It is settled law that where breaches of procedural fairness, such as bias on the part of a decision-maker, are found, the decision must be quashed and the matter returned for redetermination as demonstrated by the decision of Justice Gibson in *Democracy Watch 1*. As in that case, the parties again disagree on how stringent the assessment of possible bias should be. The applicant favours a "reasonable apprehension of bias" while the respondent Attorney General submits that the "open mind" test should apply.

[24] The distinction between the two tests rests largely on the extent to which the decision-maker acts in a quasi-judicial manner. Where the decision-maker is dealing with policy-centred administrative decisions, he or she is required to approach the decision with an open mind, amenable to persuasion: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, [1992] S.C.J. No. 21. The respondent Attorney General contends that that is the correct approach in this matter.

[25] Where, however, the decision to be made is more of an adjudicative nature, the foundational test is that set out by Justice Louis-Philippe de Grandpré in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394: "the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information."

[26] As did my colleague Justice Gibson, I prefer the somewhat stricter test of the reasonable apprehension of bias in this instance. While the Registrar of Lobbyists is involved in the development of policy regarding the constraints imposed on lobbyists under the *LRA*, his decisions with regard to the enforcement of those rules are more of an adjudicative task than one of administration. I do accept the argument of the respondent Attorney General that the applicant's reliance on *Wewaykum Indian Band v. Canada*, 2003 SCC 45 , [2003] 2 S.C.R. 259 is misplaced, as that case clearly relates only to those who adjudicate in law and is not relevant to the decision of the Registrar. This does not, however, affect my view of the appropriate test.

[27] Having reached the conclusion that the applicant's allegation of bias must be evaluated as would a reasonable person, informed of the circumstances, the next step is to assess those allegations. I would note, at this juncture, that Justice Gibson quashed three decision of the Ethics Counsellor in 2004 for bias, both personal and institutional. In this proceeding the applicant contends that the Registrar is also biased and that his decision not to conduct a full investigation into the Campbell matter should likewise be quashed.

[28] The applicant argues that the Registrar displayed bias in continuing to apply the Advisory Opinion established by the Ethics Counsellor, whose decisions were returned for reconsideration on account of bias, in assessing Rule 8 of the *Code*. This same opinion was addressed by Justice Gibson in *Democracy Watch 1*, in which he noted at paragraph 85 that, in the absence of the finding of bias on the part of the Counsellor, he would have held that his interpretation of Rule 8 was not an unreasonable interpretation. I would agree with my colleague that, while strict, the Counsellor's interpretation of Rule 8 was not unreasonable. The Registrar, therefore, does not display bias towards the applicant and similar groups by applying it. I would note that a finding of bias on specific points of an officer's conduct will not taint every decision or policy guideline that person has ever produced.

[29] The applicant submits that the Office of the Registrar is tainted by institutional bias because of his lack of security of tenure in the position, the lack of criteria or qualifications required for his appointment, the requirement for approval of the Office's budget by the Treasury Board, indicia of under-resourcing, the alleged two-year delay in ruling on the Campbell complaint, and the failure to

respond to other complaints which were passed on to him unanswered by the elimination of the position of Ethics Counsellor, see *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, [1996] S.C.J. No. 112 at para. 951.

[30] The respondent Attorney General argues that, especially following the extensive changes which occurred in 2006, the Registrar's Office is independent because the Registrar's performance pay is fixed at a prescribed rate, his employment in the public service is secure due to his classification level, he has discretion over the budget and staffing as a stand-alone department and that both the delay and the priorities set by the Registrar are insufficient to show bias.

[31] In *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, Justice William Ian Corneil Binnie set out the relevant test at paragraph 195:

> The test for institutional impartiality is whether a well-informed person, viewing the matter realistically and practically and having thought the matter through, could form a reasonable apprehension of bias in a substantial number of cases (citations removed)

[32] At issue in this case is one particular decision of the Registrar. The applicant alleges that seven other cases remain outstanding at present, but information about those cases is not before me and thus the allegations remain unproven. I would note that the requirement of multiple instances of a reasonable apprehension of bias is not possible on the facts of a single case. It is, therefore, not possible for the applicant to meet the admittedly high threshold required for the test of institutional bias in this proceeding.

[33] The applicant's reliance on the delay of almost two years bears further inspection. The Registrar inherited unresolved complaints from his predecessor in May 2004. He sent a letter to the applicant in February 2005 to inquire whether it wished to pursue the complaint against Mr. Campbell. In June 2005, the applicant responded in the affirmative. The ensuing investigative review, which included interviews, research into the complaint and the circumstances of the event from which it sprang and other sources of information, is well-documented in the tribunal record. That record clearly shows that from at least March 2006 to the date of the decision of the Registrar the investigation was diligently undertaken. The activities of the Investigations directorate in the period between June 2005 and March 2006 are not detailed, but I cannot see that, even if nothing had been done in that period, it is sufficiently lengthy as to reach the high standard required to substantiate an allegation of bias.

[34] Likewise, the other indicia of institutional bias to which the applicant points are not as damaging as it would contend. Complete institutional independence, which appears to be the standard asserted by Democracy Watch, is required for the effective working of the judiciary, but it is widely recognized that tribunals and other federal decision makers need not be accorded that standard. Operational decisions, which place emphasis on certain types of complaints, most notably those which might result in criminal charges and are thus subject to limitations periods, are reasonable where they do not effectively cut off the assessment of other complaints. It is clear that the complaint against Mr. Campbell was assessed, and the delay was not unreasonable, as discussed

previously. I cannot agree with the applicant that the prioritizing of particular cases indicates that the Office of the Registrar is incapable of carrying out its obligations.

[35] For the above reasons, I do not find that the decision of the Registrar should be vacated for bias.

C. If not, what is the appropriate standard of review for assessing the Registrar's decision?

[36] The applicant argues that the applicable standard of review is correctness. The respondent Attorney General submits it is reasonableness *simpliciter*. The respondent Barry Campbell contends that the decision of the Registrar should be overturned only if patently unreasonable.

[37] The pragmatic and functional approach to determining which standard to apply considers four factors: (1) a privative clause, right of appeal or silence in the governing statute; (2) the relative expertise of the tribunal; (3) purpose of the legislation; and, (4) nature of the question: *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 [*Ryan*].

[38] The first factor is neutral in this instance, as the *Code* contains neither a privative clause nor a statutory right of appeal.

[39] The Registrar is specifically tasked with investigating and punishing breaches of the *Code*, which gives him greater expertise in that field than the reviewing Court. On the other hand, this decision required him to interpret the *Code* and test the conduct of Mr. Campbell against that

interpretation. This sort of exercise is well within the expertise of the Court. This factor is, therefore, neutral. I would note that the applicant is incorrect in submitting that the personal experience of the Registrar is relevant to this assessment. It is the institution of a tribunal or other decision-maker which is to be compared in expertise against that of the reviewing Court.

[40] The purpose of the legislation and the relevant provision points towards greater deference. The *Code* seeks to define and regulate the relationship between lobbyists and members of the federal government. This is an area of great importance to the general public, and the Registrar must balance the competing interests of these three groups in coming to his decisions, all the while bearing in mind a variety of policy considerations.

[41] Finally, the nature of the question at issue in this proceeding is one which is more legal than administrative in nature, as it required the Registrar to assess the compliance of Mr. Campbell against his interpretation of the *Code*. This points to less deference.

[42] Having assessed the Registrar's decision by a pragmatic and functional analysis, I conclude that the applicable standard of review is reasonableness *simpliciter*, which does not allow me to replace the Registrar's decision unless it fails to stand up to a somewhat probing examination: *Ryan*, at paragraphs 50-52.

D. Assessed against that standard, did the Registrar commit an error in his determination of the applicant's complaint against Mr. Campbell?

[43] As noted by the applicant at paragraph 65 of its memorandum of fact and law, it is the narrow interpretation of Rule 8 of the *Code* with which it takes issue. It submits that the Registrar interpreted "improper influence" overly narrowly such that the threshold is equivalent to illegality, whereas impropriety sufficient to affect the confidence of the public would be a more appropriate interpretation.

[44] The respondent Mr. Campbell suggests that this issue was decided against the applicant in *Democracy Watch I* and should not, therefore, now be re-litigated. I would point out, however, that the comments of Justice Gibson in this regard were made in *obiter*, as he had already decided the matter on the basis of bias. The question is not *res judicata*.

[45] That said, however, I agree with both respondents in that I do not find the decision of the Registrar unreasonable. He assessed the evidence about Mr. Campbell's fundraising for Mr. Peterson, applied the admittedly high threshold test of the Advisory Opinion and found that there were not sufficient indicia of improper influence to support reasonable grounds of belief that Mr. Campbell's actions constituted a breach of Rule 8. While the "reasonable grounds to believe" test is not a significant threshold, as noted by Justice Gibson in *Democracy Watch I*, it behove the Registrar to not merely have reasonable belief that there was some appearance of impropriety, but that there had been a breach of Rule 8. He did not find that, and was not unreasonable in doing so.

E. What relief should be granted?

[46] The applicant asks this Court to quash the finding of the Registrar, provide him with the correct interpretation of Rule 8 and send the matter back for an investigation pursuant to section 10.4 of the *LRA*. Alternatively, it requests that the Court quash the Ruling, provide a reasonable interpretation of Rule 8 and return the matter to the Registrar for reconsideration. In the event of a finding of bias, it seeks to have a declaration that it was deprived of its right to a fair hearing contrary to section 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44. In any event, it requests costs on a substantial indemnity basis.

[47] The respondent Barry Campbell seeks to have the application denied with costs. He notes that no useful purpose is being served by prolonging and repeating reviews of the treatment of the complaint against him in the absence of any evidence that Rule 8 was contravened.

[48] The respondent Attorney General notes that the applicant's request for relief constitutes a request for *mandamus*, and that one of the requirements for such an order is that the duty at issue must be owed to the applicant: *Apotex Inc. v. Canada (Attorney General) (C.A.)*, [1994] 1 F.C. 742, [1993] F.C.J. No. 1098. He submits that no duty is owed to the applicant and therefore there should be no *mandamus* order issued by the Court. He further argues that the applicant's request for declaratory relief is likewise inappropriate as it shares no legal relationship with the Registrar and that the Court lacks jurisdiction to make declarations on findings of fact: *Canada v. Solosky*, [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745. Finally, he seeks his costs of the application.

[49] Given that I have found that there was no bias and that the Registrar's decision was not unreasonable and should not, therefore, be vacated, I need not find on the issues of the relief sought by the applicant. I would finally note that Mr. Campbell has a valid point about the futility of repeated assessments of this case, given the changes of regime which have occurred in the intervening eight years.

VI. Costs

[50] The applicant seeks costs against the respondent, Attorney General of Canada, but not against the respondent Barry Campbell.

[51] The respondents seek costs against the applicant, invoking the general rule that the losing party bears the costs. This rule applies for and against the Crown (Rule 400(2) of the *Federal Court Rules*). The applicant submits that the objective of the proceedings was a cause of public interest and that the interpretation of Rule 8 of the Lobbyists Act required clarification. Therefore, whatever the result of the application, even if it were dismissed, it was entitled to costs.

> *Reese v. Alberta (Ministry of Forestry, Lands and Wildlife)*, 133 A.R. 127, [1992] A.J. No. 745;
> *Stevens v. Conservative Party of Canada*, 2005 FCA 383, [2005] F.C.J. No. 1890

[52] The applicant's attorneys seek costs because the proceedings were in the public interest and even though they were acting *pro bono* in this case, *1465778 Ontario Inc. et al. v. 1122077 Ontario Limited et al.* (2006), 82 O.R. (3d) 757, 275 D.L.R. (4th) 321 (Ont. C.A.)

[53] The respondents, particularly Mr. Campbell, counter that this application was without foundation as the issues involved had already been decided by Justice Gibson in a case based on similar allegations in *Democracy Watch 1* and where the applicant's application on that point was dismissed with costs.

[54] The respondent Campbell's counsel argues that the applicant's proceedings is not only unnecessary but is part of a vendetta directed against his client, a form of persecution which was launched nearly eight years ago and continues today.

VII. Analysis

[55] All the main issues raised by this application were dealt with by Justice Gibson in the first case between the same parties, i.e. *Democracy Watch 1*. It is true that four of the complaints were to be reconsidered because of the appearance of bias, both personal and institutional, but the other complaints were dismissed.

[56] Since then, there have been fundamental changes to the Lobbyist legislation, due to the creation of the office of the Registrar of Lobbyists. It cannot be said to cause a reasonable apprehension of personal and institutional basis as it is currently structured.

[57] The present application is centered upon the interpretation of Rule 8 of the *Code* and the applicable standard of review which were both thoroughly assessed by Justice Gibson in his decision of 2004.

[58] He decided that the standard of review of the impugned ruling was reasonableness *simpliciter* (at paragraph 65 of his decision). He granted the application on four complaints solely for reasons of reasonable apprehension of bias but he refused to find any other reviewable error.

[59] Justice Gibson specifically decided that Rule 8 of the *Code* was not "unreasonable" and need not be interpreted to include an appearance of conflict of interest as well as actual conflict of interest (at paragraph 85 of his decision).

[60] This analysis of Justice Gibson's decision reveals that all the main issues raised in the present application were fundamentally identical to those resolved in his decision.

[61] The interpretation of Rule 8 of the *Code* and the Registrar's reliance upon it are not new issues.

[62] The factors which constituted appearance of bias in the first decision have been eliminated by the fundamental changes made by the Office of the Registrar of Lobbyists.

[63] Therefore, the applicant's contention that this application raised questions of public interest is not well founded. Furthermore, I notice that Justice Gibson granted the first application in favour of the applicant "with costs".

[64] The general rule in the awarding of costs is that the losing party must assume the costs. Even though Democracy Watch is a non-profit organization motivated by the public interest, these proceedings have caused the respondents to incur substantial costs to defend themselves.

[65] Therefore, costs will be granted in favour of the respondents against the applicant.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application is dismissed with costs.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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