CORRECTIONS/ADDITIONS
TO THE SUBMISSION OF DEMOCRACY WATCH
FOR THE PART II: POLICY REVIEW OF THE COMMISSION OF INQUIRY

Set out below are the corrections and additions to Democracy Watch's submission to the Commission:

1. Sub-recommendation on page 22 -- the wording is incorrect and should have instead repeated the wording of Recommendation 13 on page 21, and so should read as follows:

> "For the same reasons set out above, the *MPs Code* and the *Senators Code* must also be changed to prohibit communication with a trustee and to include, as an ongoing private interest, assets and liabilities in a blind trust that not likely to be divested."

2. Just before the Sub-recommendation on page 26, add the following sentence and citation:

> "This change is also needed because the current Ethics Commissioner Mary Dawson ruled in December 2008 that when Finance Minister Jim Flaherty's staff awarded a sole-source contract to one of their political friends, it did not constitute a violation of the *Act*.
>
> ***The Flaherty Report* by the Conflict of Interest and Ethics Commissioner, December 18, 2008"**

3. Sub-recommendation at the top of page 37 -- add the following sentence with regard to the power of the Commissioner of Lobbying to impose penalties:

> "Similarly, the power of the Commissioner of Lobbying under sections 14.01 and 14.02 of the *Lobbying Act* to penalize violators of the *Act* must be changed to require the Commissioner to impose penalties, and also to empower the Commissioner also to penalize violators of the *Lobbyists Code of Conduct*."

4. Recommendation 36 (on page 37), should have also mentioned the *Lobbyists Code of Conduct*, and so should be changed to read:

> "**Recommendation 36:** The *MPs Code* and *Senators Code* and *Lobbyists Code of Conduct* must be changed into laws so that there is no question concerning the enforceability of both codes, and so they can't be changed without a full public review."

decisions that directly further their private financial interests. For this reason, the rules and enforcement system for ensuring that no public official is ever in a position to influence or make such a decision must be strict and strong.

Sub-recommendations: For the same reasons set out above, the *MPs Code* and the *Senators Code* must also be changed to prohibit communication with a trustee and to include, as an ongoing private interest, assets and liabilities in a blind trust that not likely to be divested.

> **Recommendation 13:** Subsections 25(2) and (3) of the *Conflict of Interest Act* must be changed to require disclosure to the Ethics Commissioner of assets and liabilities worth more than the limit on an annual donation in the *Canada Elections Act*.

This change is needed because the current disclosure threshold for assets and liabilities for persons covered by the *Act* is $10,000. As a result, in effect, no asset or liability worth less than $10,000 is considered to be a "private interest" that could cause a "conflict of interest".

The *Canada Elections Act* prohibits donations totalling more than $1,100 annually to any candidate or riding association ($2,200 during an election year). The limit was approved by Parliament as part of the *FAA*, and came into force on January 1, 2007.

While the $1,100 limit is arbitrary, it is close to the amount a Canadian with average income could afford (it should be noted that about half of such a donation would be tax deductible). As a result, the limit is set at an amount that reflects the fundamental democratic principle of "one person, one vote" as it makes it illegal for any person to give more than what a person with an average income can afford.

Section 23 of the *Conflict of Interest Act* requires the disclosure to the Ethics Commissioner and the public of gifts of money, property or services received that are worth more than $200 annually, thereby essentially upholding the same democratic principle as the donation limit.

Essentially, the donation limit and gift disclosure rules establish a standard that, in effect, strongly suggest that a conflict of interest is created by anything that has a value of a few hundred dollars. The Ethics Commissioner has made this very clear in the *Guideline on Gifts* she issued sometime in 2008, which can be seen at:
http://ciec-ccie.gc.ca/Default.aspx?pid=36&lang=en

Therefore, to be consistent with the other standards Parliament has established, and to help ensure enforcement of the limits on donations and gifts, the disclosure threshold for assets and liabilities should be lowered from $10,000 down to about $1,000.

the actions of the Prime Minister and Cabinet ministers, even though the Ethics Counsellor's primary role was to conduct such investigations.

> ***Democracy Watch* v. *The Attorney General of Canada (Office of the Ethics Counsellor)* [2004 FC 969] and [2004] 4 F.C.R. 83, paras.36 to 45, 50 to 56**

While this ruling made it clear that at-pleasure staff share the conflict of interest of the public official they serve, including these people in the definition of "friends" in the *Act* will ensure the rule is clear. This change is also needed because the current Ethics Commissioner Mary Dawson ruled in December 2008 that when Finance Minister Jim Flaherty's staff awarded a sole-source contract to one of their political friends, it did not constitute a violation of the *Act*.

***The Flaherty Report* by the Conflict of Interest and Ethics Commissioner, December 18, 2008**

Sub-recommendations: For the same reasons set out above, new sections must be added to the *MPs Code* and the *Senators Code* and *Public Servants Code* to cover conflicts of interest involving "friends" of MPs, senators and their senior policy staff, and decision-making public servants. This rule should apply most broadly only to those people who have significant decision-making power (ie. only to members of Cabinet, opposition party leaders, opposition critics, chairs of committees and their policy staff, and decision-making public servants).

5. Public officials' post-employment restrictions must be strengthened, and clearly defined

> **Recommendation 16:** The phrase "firm offers of outside employment" in subsection 24(1) of the *Conflict of Interest Act* should be changed to "offers of outside employment".

The current phrase in subsection 24(1) is typical of the *Act* in that it contains a technical loophole that any public official could easily exploit to escape accountability by claiming that the offer of outside employment they received was not "firm" and, therefore, they were not required to disclose it to the Ethics Commissioner. All such technical loopholes must be closed for the *Act* to be effective at preventing conflicts of interest and other unethical activities.

> **Recommendation 17:** A new section must be added to the the *Conflict of Interest Act* requiring public officials to disclose to the Ethics Commissioner if they seek "outside employment" not just if they are offered outside employment.

Currently, those covered by the *Act* are only required under subsection 24(1) to disclose to the Ethics Commissioner "all firm offers of outside employment." This provision is typical of the *Act* in that it only covers one side of the equation. It is more than obvious that a strong incentive exists for a public official to do favours for private actors if the official is seeking employment with those actors. Therefore, again obviously, it must be made illegal for public officials to secretly seek outside employment.

Act penalties (and to establish penalties for violations of the *Lobbyists Code of Conduct*).

Sub-recommendations: The vague power of the Ethics Commissioner to recommend sanctions to the House of Commons under subsection 28(6) of the *MPs Code*, and similar vague power of the Senate Ethics Officer under subsections 45(2) and (4) of the *Senators Code*, must be changed to require the Commissioner and Officer to impose penalties (without the consent of the House or Senate required) on MPs or senators or their staff who violate any rule in their codes, and the penalties should be on a sliding scale depending on the decision-making power of the MP or senator or staff person (ie. opposition party leaders and their staff should face the highest penalties, followed by opposition critics, chairs of committees, members of committees and members who do not sit on any committee). Similarly, the power of the Commissioner of Lobbying under sections 14.01 and 14.02 of the *Lobbying Act* to penalize violators of the *Act* must be changed to require the Commissioner to impose penalities, and also to empower the Commissioner also to penalize violators of the *Lobbyists Code of Conduct*.

> **Recommendation 36:** The *MPs Code* and *Senators Code* and *Lobbyists Code of Conduct* must be changed into laws so that there is no question concerning the enforceability of the codes, and so they can't be changed without a public review.

An overall change needed to make the House of Commons and Senate of Canada and lobbying ethics enforcement systems more effective is to remove the codes from the parliamentary privilege framework by changing them into laws.

True, this change will mean decisions of the Ethics Commissioner and Senate Ethics Officer and Commissioner of Lobbying will be (among other effects) more clearly subject to judicial review by courts, but as summarized in section II.A above, and in this section, members of the legislatures have shown clearly in the past 20 years that they are incapable of impartially and effectively enforcing good government rules, as have the ethics enforcement officers who have been hired or appointed by the legislatures in several cases (as has been revealed clearly by the court cases challenging some of these officers' rulings that have been filed and won by Democracy Watch).

As a result, many changes are clearly needed to ensure better enforcement of good government rules, including ensuring that courts can review decisions made by enforcement officers to ensure they comply with rules of administrative law and natural justice, and strict and strong ethics standards.

> **Recommendation 37:** Section 66 of the *Conflict of Interest Act* must be changed to allow applications for judicial review of any of the Ethics Commissioner's decisions on any grounds in any Canadian court, and provisions must be added to the *MPs Code* to make it clear that any the Ethics Commissioner's decisions under the *Code* can be challenged on any grounds in any court, and similar provisions must be added to the *Senators Code* and *Lobbyists Code of Conduct* to make it clear that any of the Senate Ethics Officer's or Commissioner of Lobbying's decisions under those codes can be challenged on any grounds in any court.

Currently, the *Act* restricts the grounds under which a judicial review application can be filed concerning a decision of the Ethics Commissioner, and requires that such applications be filed in the Federal Court of Appeal.

It is unclear in the *MPs Code* whether decisions of the Ethics Commissioner can be challenged in court, and also unclear in the *Senators Code* whether the Senate Ethics Officer can be challenged, and is not completely clear concerning challenges of the Commissioner of Lobbying.

There is no good reason to protect these key good government enforcement officers from accountability for their decisions, and it is dangerous to allow them to be immune from accountability for legally incorrect decisions. For these reasons, judicial review applications of their decisions based on any grounds must be allowed to be filed in any Canadian court.

2. Lobbying Rules Enforcement Must Be Strengthened

Recommendation 38: As recommended above in subsection III.D.1 concerning the appointment process for the Ethics Commissioner and the Senate Ethics Officer, the appointment process for the Commissioner of Lobbying must be changed by having the independent Public Appointments Commission established and mandated to conduct the search for candidates for both positions, and by requiring the approval of the person appointed to both positions from all of the leaders of the recognized parties in the House of Commons and Senate of Canada. In addition, as with the Ethics Commissioner, the Commissioner of Lobbying must be required to have legal expertise and experience given that the position is quasi-judicial in nature.

Recommendation 39: As recommended above in subsection III.D.1 concerning the Ethics Commissioner and Senate Ethics Officer, the Lobbying Act must be changed to require the Commissioner of Lobbying to examine and rule on every complaint received in a way that complies with administrative law principles, no matter who files the complaint.

Recommendation 40: As recommended above in subsection III.D.1 concerning the Ethics Commissioner and Senate Ethics Officer and Public Sector Integrity Commissioner conducting audits of public officials' financial statements to ensure their accuracy, to ensure that all lobbyists' registration statements are accurate, and to ensure that former public officials are complying with the five-year ban on being a registered lobbyist, the *Lobbying Act* must be changed to require the Commissioner of Lobbying to conduct random audits (without advance notice) of lobbyists' and former public officials' communications with public officials.

Recommendation 41: As recommended above in subsection III.D.1 concerning the Ethics Commissioner and Senate Ethics Officer and Public Sector Integrity Commissioner, the *Lobbying Act* must be changed to give the