Court File No. A-181-23

FEDERAL COURT OF APPEAL

BETWEEN:

DEMOCRACY WATCH

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

APPELLANT'S MEMORANDUM OF FACT AND LAW

Date: December 15, 2023

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OVERVIEW

1. This is an appeal of the Judgement of the Honourable Justice Furlanetto (the "Application Judge") at the Federal Court (the "FC") which dismissed the Appellant's Application for Judicial Review seeking to set aside, and return for reconsideration, two Commissioner of Lobbying ("Commissioner") decisions.[1]

2. The Commissioner concluded that lobbyists Benjamin Bergen ("Bergen Ruling") and Dana O'Born ("O'Born Ruling") did not breach Rules 6 and 9 of the *Lobbyists' Code of Conduct* (the "*Lobbyists' Code*") under the *Lobbying Act* by co-managing the election campaign and serving on the executive of the electoral district association ("EDA") for Chrystia Freeland and soon thereafter lobbying her as then-Minister of International Trade.[2]

3. The Application Judge erred in law by finding that the Commissioner's interpretation and application of Rules 6 and 9 were reasonable.

4. Rule 6 prohibits a lobbyist from placing a public office holder in a real or apparent conflict of interest, while Rule 9 prohibits a lobbyist from lobbying a public office holder or their staff after being involved in political activities that could reasonably be seen to create a sense of obligation for the public office holder. The Commissioner's interpretations of Rules 6 and 9 allow an individual who participates in activities that create a "sense of obligation" on the part of an office holder to effectively lobby the office holder despite this sense of obligation. Rules 6 and 9 clearly prohibit these actions.

5. The Commissioner's conclusion in both decisions that the lobbyists did not place Minister Freeland in an apparent conflict of interest was based on a flawed interpretation of Rule 6

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[1] *Democracy Watch v Canada (Attorney General)*, 2023 FC 825, **Appeal Book ("AB"), Tab 2, p 12.**
[2] *Lobbying Act*, RSC 1985, c 44 (4th Supp); Office of the Commissioner of Lobbying of Canada, *Lobbyists' Code of Conduct (2015)*.

that conflated the definitions of real conflict of interest and apparent conflict of interest. In doing so, the Commissioner (and the Court) failed to properly consider a 2009 Federal Court of Appeal ("FCA") decision that overturned a decision in similar circumstances.[3]

6. With respect to Rule 9, the Commissioner adopted unreasonably narrow definitions of "lobbying" an office holder, and of a minister's "staff". The Commissioner's interpretations allowed the lobbyists to lobby those who reported to Minister Freeland, and to her staff, so long as they did not lobby her directly. The Commissioner's interpretation also ignored the statutory definition of Ministerial Responsibility. Due to a change to the *Lobbyists' Code,* where the definition of "associate" explicitly includes the staff that were at issue in the rulings, the issue of the Commissioner's interpretation of "staff" is moot.

7. As a result, the issues in this Appeal are the reasonableness of the Commissioner's interpretations of: (1) "apparent conflict of interest" and (2) "lobbying" a public office holder.

8. The Appellant has not pursued this Appeal with the objective of finding the lobbyists in violation of the *Lobbyists' Code*, but rather, with the objective of ensuring that the Commissioner's interpretation of the *Lobbyists' Code* going forward is reasonable. The Appellant aims to ensure transparent decision-making, public accountability, and judicial oversight over the *Lobbying Act* and *Lobbyists' Code* which are intended to allow the public to know who is engaged in lobbying activities and to prohibit unethical lobbying of the Federal government.

9. The Appellant has also appealed the Application Judge's cost award. Given the fact that this case raises issues of public interest, and the Appellant did not seek its own costs, there was no basis for the Application Judge's award of costs in this matter.

[3] *Democracy Watch v Campbell*, 2009 FCA 79.

PART I - FACTS

10. The facts are not at issue. The Appellant accepts the facts in the Commissioner's rulings concerning whether lobbyists Benjamin Bergen and Dana O'Born violated Rules 6 or 9 of the *Lobbyists' Code* by lobbying then-Minister of International Trade Chrystia Freeland, as is summarized below:[4]

    i. Mr. Bergen was the manager of Minister Freeland's constituency office as a Member of Parliament ("MP") from November 2013 until March 2016, with the exception of the fall of 2015 when he was Minister Freeland's re-election co-campaign manager.[5] Mr. Bergen was also on the Executive of Minister Freeland's EDA from May 22, 2016 until October 12, 2017.[6]

    ii. Ms. O'Born was co-campaign manager for Minister Freeland's 2015 re-election campaign.[7] Ms. O'Born was also Vice-President of Election Readiness on the Executive of Minister Freeland's EDA from May 22, 2016 until October 12, 2017.[8]

    iii. In March 2016, Mr. Bergen became the Executive Director of the Council of Canadian Innovators ("CCI")[9] and, on July 1, 2016, Ms. O'Born became the Director of Policy for CCI.[10] Both Mr. Bergen and Ms. O'Born subsequently became registered in-house lobbyists for CCI, which was registered to lobby Global Affairs Canada. Global Affairs Canada encompasses the Ministry of International Trade, the Ministry of Foreign Affairs, and the Ministry of International

[4] Investigation Report re: Benjamin Bergen Council of Canadian Innovators, **AB, Tab 5, p 61 and 84** ("Bergen Ruling"); Investigation Report re: Dana O'Born Council of Canadian Innovators, **AB, Tab 6, p 109 and 133** ("O'Born Ruling").
[5] Bergen Ruling, **AB, Tab 5, p 74**.
[6] Bergen Ruling, **AB, Tab 5, p 75**.
[7] O'Born Ruling, **AB, Tab 6, p 123.**
[8] O'Born Ruling, **AB, Tab 6, p 124.**
[9] Bergen Ruling, **AB, Tab 5, p 77.**
[10] O'Born Ruling, **AB, Tab 6, p 125.**

Development. During this time, Minister Freeland was the Minister of International Trade (from November 4, 2015 until January 10, 2017).[11]

iv. When Mr. Bergen and Ms. O'Born began to work for CCI, Mr. Bergen sought advice from the Commissioner's office about restrictions on their lobbying activities. The Commissioner's office advised that their past political activities in support of Minister Freeland risked creating a "sense of obligation" and, therefore, to comply with Rule 9 of the *Lobbyists' Code* they could not lobby Minister Freeland or her staff for five years.[12]

v. At the time, Minister Freeland was responsible for the Canada Export Program ("CEP"), which was coordinated out of her ministerial office.[13] CCI lobbied various people within the Ministry of International Trade for changes to the CEP.[14]

vi. On October 13, 2016, Ms. O'Born communicated with Gillian Nycum, Assistant to Minister Freeland's Parliamentary Secretary David Lametti in his role as MP. On October 17, 2016, Ms. O'Born communicated with Megan Buttle, Special Assistant to Mr. Lametti and one of Minister Freeland's exempt staff. These communications concerned arranging a meeting on October 20, 2016 between members of CCI and Mr. Lametti.[15]

vii. On November 16, 2016, Ms. O'Born sent a letter co-signed by Mr. Bergen to Parliamentary Secretary Lametti following up on an October 20, 2016 meeting

[11] Bergen Ruling, **AB, Tab 5, p 77.**
[12] Bergen Ruling, **AB, Tab 5, p 75-76**; O'Born Ruling, **AB, Tab 6, p 124-125**.
[13] Yorke Transcript, **Confidential Appeal Book ("Confidential AB"), Vol 3, Tab 34-G, p 1207-1211.**
[14] Bergen Ruling, **AB, Tab 5, p 80-82**; O'Born Ruling, **AB, Tab 6, p 129-131**.
[15] Bergen Ruling, **AB, Tab 5, p 79-80**; O'Born Ruling, **AB, Tab 6, p 128-129**.

where Ms. O'Born and others from CCI had lobbied Mr. Lametti and Ms. Buttle. The letter stated that Mr. Lametti had agreed to regular meetings with CCI.[16]

viii. On November 23, 2016, Ms. O'Born sent an email following up on the letter to Ms. Buttle. On November 24, 2016, Ms. Buttle responded to Ms. O'Born and copied the email exchange to Emily Yorke, one of Minister Freeland's policy advisors.[17]

ix. Mr. Bergen arranged and attended a lobbying meeting with Mr. Jim Balsillie, Chair of CCI, and Parliamentary Secretary Lametti on December 7, 2016.[18]

x. Between October 2016 and January 2017, CCI reported four communications in the Registry of Lobbyists concerning trade issues with public servants at Global Affairs Canada, most particularly on October 20, 2016 with Susan Bincoletto, then-Assistant Deputy Minister, International Business Development concerning the subject matter "International Trade".[19]

xi. Minister Freeland and Parliamentary Secretary Lametti:

- "[T]alked frequently";
- "[F]requently they would touch base either by email or a few meetings";
- On occasion, "they would sit in on meetings together";
- Mr. Lametti would "cover in the House of Commons" for Minister Freeland after being prepared by Minister Freeland's legislative assistant[20]; and
- Mr. Lametti was "part of the Minister's staff" and supported her just like "her director of policy would be supporting her."[21]

xii. Parliamentary Secretary Lametti:

[16] Bergen Ruling, **AB, Tab 5, p 81**; O'Born Ruling, **AB, Tab 6, p 130**.
[17] Bergen Ruling, **AB, Tab 5, p 81**; O'Born Ruling, **AB, Tab 6, p 130**.
[18] Bergen Ruling, **AB, Tab 5, p 82-83**; O'Born Ruling, **AB, Tab 6, p 131-132**.
[19] Bergen Ruling, **AB, Tab 5, p 87**; O'Born Ruling, **AB, Tab 6, p 137**.
[20] Buttle Transcript, **Confidential AB, Vol 3, Tab 34-D, p 1072-1078.**
[21] Buttle Transcript, **Confidential AB, Vol 3, Tab 34-D, p 1099-1102.**

- was at times "explicitly replacing" Minister Freeland when she couldn't be present;[22]
- one of his "major responsibilities in the management of legislation going through the House of Commons";[23]
- was "often" at the Minister's office and had a "computer with a server on the Global Affairs server" in his office;[24]
- represented the Minister in conducting consultations and other official meetings on core issues and policy-making processes;[25]
- communicated regularly with the Minister including about communications with other MPs, stakeholders, and lobbyists;[26]
- "operated in close collaboration" and "had zillions of meetings" with the Minister;[27] and,
- Minister Freeland "has the final decision on – on virtually everything"[28] and "has the responsibility."[29]

Procedural History

11. On August 7, 2020, Democracy Watch filed Applications for Judicial Review of the Bergen Ruling and the O'Born Ruling on the grounds that the Commissioner unreasonably interpreted and applied Rules 6 and 9 of the *Lobbyists' Code*. While the Commissioner issued two Rulings, both are nearly identical with respect to the facts.

12. The Applications were continued and consolidated on consent of the parties. At the same time, the FC rejected the Respondent's motion to strike (in part) and granted Democracy Watch public interest standing.[30]

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[22] Lametti Transcript, **Confidential AB, Vol 3, Tab 34-E, p 1111-1112.**
[23] Lametti Transcript, **Confidential AB, Vol 3, Tab 34-E, p 1116-1117.**
[24] Lametti Transcript, **Confidential AB, Vol 3, Tab 34-E, p 1122-1123.**
[25] Lametti Transcript, **Confidential AB, Vol 3, Tab 34-E, p 1128-1129.**
[26] Lametti Transcript, **Confidential AB, Vol 3, Tab 34-E, p 1130-1133.**
[27] Freeland Transcript, **Confidential AB, Vol 3, Tab 34-F, p 1181-1183.**
[28] Lametti Transcript, **Confidential AB, Vol 3, Tab 34-E, p 1153.**
[29] Freeland Transcript, **Confidential AB, Vol 3, Tab 34-F, p 1184-1185.**
[30] *Democracy Watch v Attorney General of Canada*, 2021 FC 613, **AB, Tab 7, p 159-160**.

13. In a subsequent ruling, the FC ordered the Commissioner to disclose the confidential Certified Tribunal Record ("CTR") concerning the investigation of the alleged violations of Rules 6 and 9.[31]

14. Up until the Application Hearing, the Respondent maintained a position that Commissioner decisions were not capable of Judicial Review from the Courts, given that the Commissioner was ultimately only accountable to Parliament. However, the week before the hearing, and again at the hearing, the Respondent conceded this point.

15. The Application Judge dismissed the Application for Judicial Review on June 9, 2023. The Application Judge concluded that Democracy Watch did not establish that the Commissioner unreasonably interpreted the *Lobbyists' Code*, or that her analysis lacked justification, transparency, or intelligibility, as set out below:[32]

- With respect to Rule 9, the Application Judge found that the Commissioner's interpretation of "that person" referring only to Minister Freeland was reasonable as it was consistent with the ordinary meaning of those words and gave effect to the remainder of Rule 9.[33]

- With respect to Rule 6, the Application Judge found that:

    - The Commissioner's articulation of the test for apparent conflict of interest followed a rational chain of analysis.[34]

    - The Commissioner reasonably concluded that an apparent conflict of interest could not exist based on mere suspicion or speculation and therefore the Commissioner reasonably rejected that an apparent conflict encompasses

[31] *Democracy Watch v Attorney General of Canada*, 2021 FC 1417, **AB, Tab 9, p 611-612.**
[32] *Democracy Watch v Canada (Attorney General)*, 2023 FC 825 at para 3, **AB, Tab 2,** p 14.
[33] *Democracy Watch v Canada (Attorney General)*, 2023 FC 825 at para 36, **AB, Tab 2,** p 24.
[34] *Democracy Watch v Canada (Attorney General)*, 2023 FC 825 at para 55, **AB, Tab 2,** p 30.

situations in which it is merely possible that a public office holder's ability to exercise their official powers, duties, or functions could be affected by their private interests.[35]

- It was not necessary to consider whether a reasonable observer would reasonably conclude that Minister Freeland's exercise of her official powers, duties, and functions "will be affected" by a private interest because it was known that the Minister did not act on any of the items about which CCI had communicated with her Parliamentary Secretary. The Application Judge rejected the argument that the details from the investigation should not have been considered in determining whether an apparent conflict existed since they would not be known to the public, but rather, found that the details should be considered, as to exclude them would render the scheme of the Act – which provides for an investigation – meaningless.[36]

- A reasonable person would not likely have perceived an apparent conflict of interest, especially given the finding that Rule 9 had not been breached.[37]

- The Commissioner focused on the actions of the lobbyists, rather than those of public office holders.[38]

A New Lobbyists' Code came into force on July 1, 2023

16. The Objectives and Expectations sections of the new *Lobbyists' Code*, together with new Rule 4.3 (which replaces Rule 6) and new Rule 4.2 (which replaces Rule 9), establish the same prohibitions as existed in the *Lobbyists' Code* at the time of the Commissioner's rulings. However, the definition of "associate" in the new *Lobbyists' Code* renders the issue

[35] *Democracy Watch v Canada (Attorney General)*, 2023 FC 825 at para 57, **AB, Tab 2, p 30.**
[36] *Democracy Watch v Canada (Attorney General)*, 2023 FC 825 at paras 65-66, **AB, Tab 2, p 33.**
[37] *Democracy Watch v Canada (Attorney General)*, 2023 FC 825 at para 67, **AB, Tab 2, p 34.**
[38] *Democracy Watch v Canada (Attorney General)*, 2023 FC 825 at para 68, **AB, Tab 2, p 34.**

of whether the Commissioner's interpretation of "staff" was reasonable moot because the definition of "associate" now encompasses the officials whose status as "staff" under the previous *Lobbyists' Code* was at issue.[39] Indeed, the activities of Mr. Bergen and Ms. O'Born in lobbying Minister Freeland's staff are now captured as improper lobbying activities under the new *Lobbyists' Code*.

17. The following table compares the relevant rules in the old[40] and new *Lobbyists' Code*.[41]

Old *Lobbyists' Code* (in force December 2015 – June 30, 2023)	**New *Lobbyists' Code*** (in force since July 1, 2023)
from Introduction section: "…The purpose of the Code is to assure the Canadian public that when lobbying of public office holders takes place, it is done ethically and with the highest standards with a view to enhancing public confidence and trust in the integrity of government decision making…."	from Objectives section: "The objective of this Code is to foster transparent and ethical lobbying of federal officials…."
from Preamble section: "…The *Lobbyists' Code of Conduct* is an important instrument 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…."	from Objectives section: "…By complying with the rules of this Code, lobbyists: • strengthen the ethical culture of lobbying • avoid placing officials in real or apparent conflict of interest situations • contribute to public confidence in the integrity of federal government institutions and decision making"
from Principles section: **"Respect for democratic institutions** Lobbyists should act in a manner that demonstrates respect for democratic institutions, including the duty of public office holders to serve the public interest. **Integrity and honesty**	from Expectations section: **"Respect for government institutions** Canada's parliamentary democracy and its institutions serve Canadians. Understanding and respecting that officials have a duty to serve the public interest over private interests is vital to ethical lobbying.

[39] Office of the Commissioner of Lobbying of Canada, *Lobbyists' Code of Conduct (2023)*.
[40] Office of the Commissioner of Lobbying of Canada, *Lobbyists' Code of Conduct (2015)*.
[41] Office of the Commissioner of Lobbying of Canada, *Lobbyists' Code of Conduct (2023)*.

Lobbyists should conduct with integrity and honesty all relations with public office holders. … **Professionalism** Lobbyists should observe the highest professional and ethical standards. In particular, lobbyists should conform fully with the letter and the spirit of the *Lobbyists' Code of Conduct* as well as with all relevant laws, including the *Lobbying Act* and its regulations."	It is therefore essential that lobbyists avoid placing officials in real or apparent conflict of interest situations, including where an official could reasonably be seen to have a sense of obligation towards a lobbyist. **Integrity, honesty and professionalism** Ethical lobbying is conducted with integrity, honesty and professionalism. Being trustworthy and respectful supports informed decision making by officials and, in turn, public confidence in federal government institutions. It is therefore essential that lobbyists uphold the letter and spirit of the *Lobbying Act*, its regulations and this Code."
from Rules section: **"Conflict of Interest** 6. A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest. In particular:" [Rules 7-10 follow] "**Political activities** 9. When a lobbyist undertakes political activities on behalf of a person which could reasonably be seen to create a sense of obligation, they may not lobby that person for a specified period if that person is or becomes a public office holder. If that person is an elected official, the lobbyist shall also not lobby staff in their office(s)."	from Rules section: "**Sense of Obligation** 4.1 Never lobby an official where the official could reasonably be seen to have a sense of obligation towards you because you have a close relationship with the official. 4.2 Never lobby an official or their associates where the official could reasonably be seen to have a sense of obligation towards you because of political work — paid or unpaid — you are doing or have done for the benefit of the official, unless the cooling-off period has expired. 4.3 Never lobby an official where the official could reasonably be seen to have a sense of obligation towards you in circumstances beyond the scope of other rules in this Code."

PART II – ISSUES

18. There are three issues in this Appeal:

    i. What is the standard of review?

    ii. Did the Commissioner reasonably interpret Rule 6?

    iii. Did the Commissioner reasonably interpret Rule 9?

PART III - SUBMISSIONS

1) The standard of review is reasonableness

19. The question before this Court is whether the FC "choose the correct standard of review and applied it correctly". This amounts to "a *de novo* review" of the Commissioner's rulings, often described as "stepping into the shoes" of the lower court.[42]

20. Since *Canada (Minister of Citizenship and Immigration) v Vavilov,* reasonableness is the default standard of review.[43] While this proceeding involves the Commissioner interpreting its home statute and the *Lobbyists' Code* (thus attracting a reasonableness standard), the Commissioner's rulings must nonetheless still adhere to principles of statutory interpretation. Specifically, its interpretation must still be consistent with the text, context, and purpose of the administrative regime.[44]

2) The Commissioner unreasonably interpreted and applied Rule 6

21. The Commissioner unreasonably used the test for a "real conflict of interest" when determining whether the lobbyists had placed Minister Freeland in an "apparent conflict of interest". As a result, the Commissioner unjustifiably based her conclusion that the lobbyists had not violated Rule 6 on evidence she gathered through a two-year investigation of Minister Freeland's actual knowledge and actions concerning the lobbyists' activities.

22. In contrast, and as is explained below, the well-established test for whether a lobbyist has placed an office holder in an "apparent" conflict of interest in violation of Rule 6 depends only on determining how the lobbyists' activities appear to an outside observer informed of the evidence accessible to them as an outside observer.

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[42] *Gordillo v Canada*, 2022 FCA 23 at para 58.
[43] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.
[44] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 116-120.

23. The Commissioner's decisions were also unreasonable because, in interpreting Rule 6 and Rule 9, the Commissioner ignored the central purposes and principles set out in the *Lobbyists' Code* requiring lobbyists to "observe the highest professional and ethical standards" and "conform fully with the letter and the spirit" of the *Code* in order to ensure lobbying is "done ethically and with the highest standards with a view to enhancing public confidence and trust in the integrity of government decision making." As the *Code*'s Preamble states:

> "The *Lobbyists' Code of Conduct* is an important instrument 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."

24. Rule 6 of the *Lobbyists' Code* reads as follows:

Conflict of Interest	**Conflit d'intérêts**
6. A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest. In particular: [Rules 7-10 follow]	6. Un lobbyiste ne doit proposer ni entreprendre aucune action qui placerait un titulaire d'une charge publique en situation de conflit d'intérêts réel ou apparent. Plus particulièrement: [les règles 7 à 10 suivent]

25. At the time of the Commissioner's rulings, the Commissioner's website did not include a guideline for Rule 6. However, the website did include general statements that refer to, but do not explicitly mention, Rule 6. These statements are as follows:

> A conflict of interest is created when there is a perception that a public office holder's private interests may influence their performance when carrying out their official duties.
> …
> Assessing conflicts of interest
> The Commissioner of Lobbying considers the following to assess whether a lobbyist has placed a public office holder in a real or apparent conflict of interest:
>
> > Would an informed person, viewing the matter realistically and practically and having thought the matter through, think that an action taken by a lobbyist has created a sense of obligation on the part of the public office holder, or a tension between the public

> office holder's private interests and the duty of the public office holder to serve the public interest? – *Oliphant Inquiry*[45]

26. The test for "apparent conflict" in Rule 6 is simply whether a past action by a person has created a sense of obligation on the part of the office holder, and whether the person then registers to lobby the office holder's department, institution or office concerning something about which the office holder has power or authority. These two actions alone place the office holder in an apparent conflict of interest between the private interest the lobbyist represents and the office holder's duty to uphold the public interest.

27. It is unreasonable for the Commissioner's rulings to disregard the public notice to lobbyists concerning how the Commissioner would determine whether a lobbyist had placed an office holder in a real or apparent conflict of interest. The purpose of the rules in the *Lobbyists' Code* is to prevent a lobbyist from doing anything that creates a conflict of interest for a public office holder. The public office holder's actions are irrelevant when considering an apparent conflict. As the Commissioner's website says, the test is whether there is a "perception" that an office holder's private interests "may" influence their decisions and actions and, concerning Rule 6, whether an informed person would "think that an action taken by a lobbyist has created a sense of obligation on the part of the public office holder, or a tension between the public office holder's private interests and the duty of the public office holder to serve the public interest."

28. The Commissioner ignored the standard that the FCA set in its 2009 ruling in *Democracy Watch v Campbell* concerning Rule 8 of the previous *Lobbyists' Code*, which is worded similarly to Rule 6 which replaced Rule 8.[46] Rule 8 stated: "Lobbyists shall not place

[45] "Guidance – Lobbyists' Code of Conduct" (last modified 2023-07-04), online: *Office of the Commissioner of Lobbying of Canada*, https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/guidance-lobbyists-code-of-conduct/.
[46] *Democracy Watch v Campbell*, 2009 FCA 79.

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." This Court stated that:

> Since a public office holder has, by definition, a public duty, one can only place a public office holder in a conflict of interest by creating a competing private interest. That private interest, which claims ***or could claim*** the public office holder's loyalty, is the improper influence to which the Rule refers.
> …
> A lobbyist's stock in trade is his or her ability to gain access to decision makers, so as to attempt to influence them directly by persuasion and facts. Where the lobbyist's effectiveness depends upon the decision-maker's personal sense of obligation to the lobbyist, or on some other private interest created or facilitated by the lobbyist, the line between legitimate lobbying and illegitimate lobbying has been crossed. The conduct proscribed by Rule 8 is the cultivation of such a sense of personal obligation, or the creation of such private interests [***emphasis added***].[47]

29. As stated by the FCA about Rule 8, Rule 6 similarly prohibits a lobbyist from creating a competing private interest or sense of obligation on the part of an office holder and then lobbying. Rule 6 also prohibits lobbying when the competing private interest or sense of obligation already exists. Both actions "place" the office holder in a conflict of interest.

30. In *Democracy Watch v Campbell*, the Commissioner's predecessor ruled that a lobbyist did not place an office holder in a conflict of interest in violation of Rule 8 after having fundraised for the office holder while being registered to lobby them and their department.[48] The FC found this ruling to be reasonable. However, the FCA overturned this decision, finding that the interpretation of Rule 8 was "deeply flawed" and "unreasonable" because any activity by a lobbyist that causes an office holder to have a "sense of obligation" to the lobbyist creates a private interest and places the office holder in a conflict of interest, whether or not the office holder exercises any power that affects the lobbyist or the lobbyist's clients.[49]

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[47] *Democracy Watch v Campbell*, 2009 FCA 79 at paras 52-53.
[48] *Democracy Watch v Campbell*, 2009 FCA 79 at paras 2.
[49] *Democracy Watch v Campbell*, 2009 FCA 79 at paras 45-54.

31. The Commissioner unreasonably failed to mention *Campbell* in her rulings, and the FC erred in stating that the ruling was of "limited assistance" in this proceeding.[50] The 2009 ruling is directly relevant and applicable to the test for an apparent conflict of interest.

32. Under the proper definition of Rule 6, Mr. Bergen and Ms. O'Born placed Minister Freeland in an apparent conflict of interest by lobbying Minister Freeland's Parliamentary Secretary and senior officials concerning matters about which she had decision-making power and responsibility – namely, the CEP. This is the case whether Minister Freeland knew that Mr. Bergen and Ms. O'Born were lobbying. The Rule 6 test encompasses a reasonable perception that Minister Freeland's ability to exercise her powers "will be" affected in the future by the lobbyists' past (or current) actions that created (or create) a sense of obligation for the Minister. There is no requirement under this test that the Minister know about the lobbying or be exercising a power at the time of the lobbying because, after a lobbyist acts (for example by sending a communication to that Minister's office), they no longer have control or autonomy over what happens with that communication. The *Lobbyists' Code* is designed to prevent this lobbying from occurring.

The Commissioner used the real conflict of interest test as the apparent conflict of interest test

33. The Commissioner correctly concluded that Minister Freeland had a sense of obligation to Mr. Bergen and Ms. O'Born based on their past political activities. The Commissioner also correctly concluded that the activities of the lobbyists did not place Minister Freeland in a real conflict of interest. After an in-depth, two-year investigation, the Commissioner concluded that while the Minister had a sense of obligation, the Minister did not know that the lobbyists were lobbying her Parliamentary Secretary and senior officials in her department and office, and the Minister did not have an opportunity to exercise a power that affected the private interests that the lobbyists represented.

[50] *Democracy Watch v Canada (Attorney General)*, 2023 FC 825 at para 59, **AB, Tab 2, p 31.**

34. The Commissioner unjustifiably relied on this evidence, which was only discovered through a two-year investigation, and also unjustifiably used other aspects of the test for a real conflict of interest, when considering the following four questions concerning a reasonable interpretation of the apparent conflict of interest test under Rule 6:

i. What does a reasonable observer have to know to be "well-informed" and, therefore, in a position to determine if a lobbyist has placed the office holder in an apparent conflict of interest?

ii. Does the test require the office holder to know the lobbyist is lobbying?

iii. Does the test require the office holder to have an actual opportunity to exercise, or be exercising, a power that affects the private interest(s) that the lobbyist has or represents?

iv. Does the test require the lobbyist to lobby the office holder directly?

(i) A reasonable observer needs to reasonably perceive the situation, not know all the facts

35. With regard to questions (i), (ii), and (iii), the Commissioner's decisions, and the FC's ruling, cite Justice Parker's 1991 Commission report on the distinction between a real conflict of interest and an apparent conflict of interest. However, both decisions ignore key parts of the definition of apparent conflict.

36. First, concerning question (i), on page 26 of both her rulings, the Commissioner quoted the statement from page 32 of the Parker Report that says that all that is required is that the reasonable observer perceive the conflict based on the "surrounding circumstances." However, the Commissioner neglected to mention that Justice Parker continued his statement that:

> although appearance of conflict requires that the perception be fair-minded and reasonably well informed, it does not require that the perception be based on a complete understanding of *all* the facts…[51]

[51] Public CTR, **AB, Tab 8, sub-tab 4, p 222.**

37. As Justice Parker explained on pages 32-35 of his Report, citing the Supreme Court of Canada's ruling in *Valente* on judicial apprehension of bias, it is almost always impossible for an outside observer to find out or know all the facts, including whether a politician or public official knew about their private interest or was exercising a power, without "conducting his or her own commission of inquiry".[52] As well, Justice Parker noted that to require the outside observer to know whether the official knew about their private interest incorporates from criminal law the "actual knowledge" test for *mens rea*.

38. The intent and purpose of the *Lobbyists' Code* are to enhance and maintain the public's confidence in the integrity of government by preventing lobbyists from placing public office holders in even an apparent conflict of interest. As a result, it is unreasonable to require that the office holder's "actual knowledge" of the lobbying be proven to establish that an appearance of a conflict exists.[53]

39. In order to be effective, and in order to differentiate from the test for a real conflict of interest, the test for an apparent conflict of interest must be based only on whether a reasonable person informed of the "surrounding circumstances" could reasonably apprehend or perceive that there is an appearance of a conflict of interest.[54] This test and definition for apparent conflict of interest was established decades ago and is consistent with the long line of Supreme Court of Canada and other court rulings both in the lobbying and other contexts, which emphasize that it is the public's perception as outside observers that determines whether there is an apparent conflict of interest because the aim of preventing apparent conflicts is to promote and enhance public confidence in the integrity of the decision-making process at issue.[55]

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[52] Public CTR, **AB, Tab 8, sub-tab 4, p 222-225.**
[53] Public CTR, **AB, Tab 8, sub-tab 4, p 223.**
[54] Public CTR, **AB, Tab 8, sub-tab 4, p 223.**
[55] Public CTR, **AB, Tab 8, sub-tab 4, p 223.** See also: *Committee for Justice and Liberty et al. v. National Energy Board et al.*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394, and other SCC rulings cited in *Committee* at 391.

40. As Justice Parker concluded, "An apparent conflict of interest exists when there is a reasonable apprehension, which reasonably well-informed persons could properly have, that a conflict of interest exists."[56]

41. Unless Minister Freeland or someone in her office disclosed the information publicly, there is essentially no way for an outside observer to know whether Minister Freeland was exercising a power that affected Mr. Bergen's and Ms. O'Born's organization, nor whether the Minister knew they were lobbying her department about matters over which she had power and authority. The federal *Access to Information Act* does not apply to records created by anyone in a Minister's office, section 21 allows "advice to Cabinet" to be kept secret, section 69 exempts Cabinet confidences from disclosure, and sections 13-20 and 22-26 allow a government to keep all or parts of many other records secret.[57]

42. Despite investigating for two years, and having full subpoena powers, even the Commissioner did not obtain records of all communications on all devices by Minister Freeland or her staff concerning what she knew about Mr. Bergen and Ms. O'Born's lobbying and whether she was exercising a power that affected CCI's interests. Instead, the Commissioner relied only on their claims and a select few emails to conclude that the Minister was not exercising a power and did not know they were lobbying.

43. In addition, no one knows, or can know, whether the office holder will soon, or in the future, have an opportunity to be involved in an exercise of their powers or duties that affects the lobbyist's interests. Once a lobbyist has lobbied the office of someone with a sense of obligation towards them, the lobbyist loses all control over what happens with their communication.

[56] Public CTR, **AB, Tab 8, sub-tab 4, p 225.**
[57] *Access to Information Act* (RSC, 1985, c A-1).

44. The type of information accessible to an outside observer (i.e. the surrounding circumstances about which an outside observer could be "well-informed") is the information contained in the July 11, 2017 *Globe and Mail* article about Mr. Bergen and Ms. O'Born's political activities in support of Minister Freeland and their lobbying for CCI,[58] the information on Minister Freeland's riding association website in July 2017 showing Mr. Bergen and Ms. O'Born on the executive of the association,[59] that Mr. Bergen and Ms. O'Born were registered in the public Registry of Lobbyists to lobby Minister Freeland's department, and that the Registry showed they had met and communicated with her Parliamentary Secretary and/or communicated with senior officials in her department, including Assistant Deputy Minister Susan Bincoletto, about issues over which the Minister had power and authority.[60]

45. Instead of basing her rulings on information about the "surrounding circumstances" to which an outside observer had access, or on the conflict that could be created once the lobbyists began lobbying the Minister's office, the Commissioner unreasonably based her rulings concerning an apparent conflict of interest on all the information she gathered through her in-depth, two-year investigation about what occurred *after* the lobbyists had already lobbied – in other words, on whether an actual conflict occurred.[61]

46. In the rulings, the exact same facts are listed in the section in which the Commissioner determines if Minister Freeland was placed in a "real conflict of interest" as in the section in which she determines if Minister Freeland was placed in an "apparent conflict of

[58] Bill Curry, "Lobby group asked to stop offering access to Ottawa in exchange for $10,000", *The Globe and Mail* (July 11, 2017), Public CTR, **AB, Tab 8, sub-tab 19, p 547-552**.
[59] Screen capture of the University-Rosedale Federal Liberal Association (FLA) website on July 3l, 2017 listing the Members of the FLA Executive, Public CTR, **AB, Tab 8, sub-tab 17, p 540-541**.
[60] Bergen Ruling, **AB, Tab 5, p 77 and 87**; O'Born Ruling, **AB, Tab 6, p 127 and 137**; CCI OCL Registry of Lobbyists and related materials, Public CTR, **AB, Tab 8, sub-tabs 15, 16 and 20-31.**
[61] Bergen Ruling, **AB, Tab 5, p 94-97**; O'Born Ruling, **AB, Tab 6, p 144-146**.

interest".[62] The Commissioner erred by using the "actual knowledge" part of the real conflict test to determine if an apparent conflict exists.

(ii) An office holder is not required to know that the lobbyist is lobbying

47. As explained above, an outside observer can reasonably perceive that there is an apparent conflict of interest without knowing, let alone proving, that the office holder actually knew that the person to whom they have a sense of obligation is lobbying them. The office holder is placed in the apparent conflict of interest by the lobbyist's action of registering to lobby an office holder's department, institution or office in the public Registry of Lobbyists. The public registration is evidence of the surrounding circumstances that is accessible to an outside observer. Therefore, whether the office holder actually knows that the person they have a sense of obligation to is lobbying the office holder's department, institution or office is irrelevant to determining whether the lobbyist has placed the office holder in an apparent conflict of interest. Indeed, the role of the Commissioner is to regulate the conduct of lobbyists, not public office holders.

48. The Commissioner unreasonably based her rulings concerning whether Mr. Bergen or Ms. O'Born had placed Minister Freeland in an apparent conflict of interest on whether the Minister actually knew that Mr. Bergen and Ms. O'Born were lobbying her department about matters over which she had power and authority.[63]

49. By using a test that required the Minister to know that the lobbyists were lobbying, the Commissioner erred by unreasonably interpreting and applying the "knowledge of private interest" part of the test for whether a lobbyist placed an office holder in an apparent conflict in violation of Rule 6, and the FC seemed to approve that unreasonable

[62] Bergen Ruling, **AB, Tab 5, p 93-94 (real conflict) and p 94-97 (apparent conflict)**; O'Born Ruling, **AB, Tab 6, p 142-143 (real conflict) and 144-146 (apparent conflict)**.
[63] Bergen Ruling, **AB, Tab 5, p 96**; O'Born Ruling, **AB, Tab 6, p 145**.

interpretation.[64] The test only requires that, based on publicly accessible evidence of the surrounding circumstances, an outside observer could reasonably conclude that the office holder knows that they have a private interest caused by their sense of obligation to the lobbyist, and that the lobbyist is registered to lobby the office holder's department, institution or office concerning matters for which they have power or authority.

(iii) An office holder is not required to be exercising a power that affects a lobbyist's interest

50. An outside observer can reasonably perceive that there is an apparent conflict of interest without knowing, let alone proving, that the office holder was exercising a power or duty, or that the office holder *may* soon, or in the future, be involved in an exercise of their powers or duties that affects the lobbyist's interest. Therefore, whether the office holder is exercising a power or duty that affects the lobbyist's interest is irrelevant to determining whether the office holder has been placed in an apparent conflict of interest.

51. The Commissioner unreasonably based her rulings concerning whether Mr. Bergen or Ms. O'Born had placed Minister Freeland in an apparent conflict of interest on whether the Minister actually exercised or "will be" exercising a power that affected CCI's interests.[65]

52. Both the Commissioner and the FC unreasonably interpreted the future "will be affected" condition in the test for whether a lobbyist has placed an office holder in an apparent conflict of interest in violation of Rule 6, when in fact the test is "could be affected".[66] The *Lobbyists' Code* is about regulating the behaviour of lobbyists before they act. It is meant to guide behaviour to avoid situations where inappropriate lobbying could occur. As such, a requirement that the Commissioner investigate whether the public officer "will be affected" is inconsistent with the purpose of the act (as well as the long-established jurisprudence in this area) and is therefore unreasonable.

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[64] *Democracy Watch v Canada (Attorney General)*, 2023 FC 825 at para 58, **AB, Tab 2, p 31.**
[65] Bergen Ruling, **AB, Tab 5, p 96**; O'Born Ruling, **AB, Tab 6, p 145**.
[66] *Democracy Watch v Canada (Attorney General)*, 2023 FC 825 at para 56-57 and 65, **AB, Tab 2, p 30 and 33.**

(iv) A lobbyist does not need to lobby an office holder directly to create an apparent conflict

53. If the lobbyist was lobbying the office holder directly, then the office holder would know they were being lobbied by someone towards whom they had a sense of obligation, and that knowledge would place the office holder in a real conflict of interest.

54. Further, a lobbyist is not required to lobby the office holder directly to place the office holder in an apparent conflict of interest because of the doctrine of ministerial responsibility, making the Minister responsible for all decision making within their mandate. This doctrine in Canada's Westminster system of parliamentary democracy has multiple facets: (i) collective responsibility; (ii) individual responsibility; (iii) responsibility for actions of officials in a minister's department and portfolio, and; (iv) responsibility and legal authority for decision-making concerning the creation of, and changes to, a law, regulation, policy, or program of the government, or the approval of an appointment or the awarding of a grant, contribution, contract, or other financial benefit. In this Appeal, only the definition of the (iv) type of ministerial responsibility is at issue.[67]

55. Prime Minister Trudeau's Open and Accountable Government document[68] states the following concerning the part of ministerial responsibility that is at issue:

i. Most ministerial responsibilities are conferred on Ministers by Parliament through statutes that set out the powers, duties and functions for which the Minister is individually accountable.

ii. Ministers are accountable to Parliament for the exercise of the powers, duties and functions vested in them by statute or otherwise.

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[67] Open and Accountable Government Guidance Document (2015), Public CTR, **AB, Tab 8, sub-tab 6, p 233-240**. See the full Document at: https://pm.gc.ca/en/news/backgrounders/2015/11/27/open-and-accountable-government#Ministerial_Responsibility_and_Accountability.

[68] Open and Accountable Government Guidance Document (2015), Public CTR, **AB, Tab 8, sub-tab 6, p 233-240**. See the full Document at: https://pm.gc.ca/en/news/backgrounders/2015/11/27/open-and-accountable-government#Ministerial_Responsibility_and_Accountability, subsections I.1 Individual Ministerial Responsibility; I.2 Collective Ministerial Responsibility; I.3 Ministerial Accountability; II.1 Powers, Duties and Functions; and Annex D Cabinet Decision-Making, subsection D.5 Legislative Program.

iii. It is critical to the principle of responsible government that all organizations within the executive be the responsibility of a Minister who is accountable to Parliament for the organization.

iv. Under departmental statutes, it is the presiding Minister who is vested with *powers, duties and functions*….

56. As set out in Guidance for Deputy Ministers,[69] various statutes empower deputy ministers, and others who have been formally delegated by a minister, to act for a minister. For example, subsection 24(2) of the *Interpretation Act* states that statutory provisions that direct or empower a minister to do any act or thing cover the actions of the minister, the minister's deputy minister, and anyone appointed "in a capacity appropriate to the doing of the act or thing."[70] However, subsection 24(3) states that nothing in subsection 24(2) "shall be construed as authorizing the exercise of any authority conferred on a minister to make a regulation as defined in the *Statutory Instruments Act*."[71]

57. In other words, as the Supreme Court of Canada established in *The Queen v Harrison*, while ministerial authority is exercised by government officials on behalf of ministers, the legal authority and responsibility remains with the Minister unless it can be, and is, formally delegated by the Minister in accordance with the provisions of a statute.[72]

58. The federal government's Guide for Parliamentary Secretaries[73] states:

> While parliamentary secretaries may explain their minister's policies, they cannot be delegated their minister's statutory "powers, duties and functions." Overall responsibility and accountability remains with the minister.

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[69] Privy Council Office, "Guidance for Deputy Ministers" (last modified 13 December 2017), online: *Government of Canada* https://www.canada.ca/en/privy-council/services/publications/guidance-deputy-ministers.html.
[70] *Interpretation Act*, RSC 1985, c I-21.
[71] *Interpretation Act*, RSC 1985, c I-21; Privy Council Office, "Guidance for Deputy Ministers" (last modified 13 December 2017), online: *Government of Canada* https://www.canada.ca/en/privy-council/services/publications/guidance-deputy-ministers.html at Statutory and other authorities, subsection II.2(a).
[72] *The Queen v Harrison*, 1976 CanLII 3 (SCC), [1977] 1 SCR 238 at 245-246.
[73] Guide for Parliamentary Secretaries (2016), Public CTR, **AB, Tab 8, sub-tab 7, p 249.**

59. The power to propose or change legislation and regulations and, therefore, to change government policies and programs that operate under legislation and regulations, remains with the Minister.

60. Under the *Lobbying Act*, a person is required to register in the public Registry when they "communicate with a public office holder in respect of" various decisions. This requirement covers direct communications (phone calls and meetings) and indirect communications (emails and other written submissions to anyone in a government department that may be forwarded to a minister's office or to the minister) with some exceptions that make it clear that both direct and indirect communications are covered.[74]

61. It is impossible for a lobbyist to know what will happen with the communications they have with a government official, nor to whom their written communications may be forwarded. However, a lobbyist does know that the minister is the sole authorized decision-maker for changes to legislation, regulations, policies, or programs of the government, or concerning appointments, and often even concerning grants, contributions, contracts, or other benefits. Therefore, for the apparent conflict of interest test to be effective, it is reasonable for an outside observer to perceive that anything that a lobbyist communicates to an official in the Minister's department regarding a matter for which the Minister has legal authority and responsibility will be communicated to the Minister.

62. The fact that an office holder does not need to know that a person they have a sense of obligation towards is lobbying them in order to be in an apparent conflict of interest, combined with the definition of ministerial responsibility, and the explanation of lobbying in the *Lobbying Act*, make clear that lobbying any government institution about anything over which the Minister has power or authority amounts to lobbying the Minister (unless the Minister has formally delegated their power or authority to someone else). As a result,

[74] *Lobbying Act*, RSC 1985, c 44 (4th Supp).ss 4(2), 5(1) and 7(1).

if the Minister has a sense of obligation towards the lobbyist, these lobbying activities alone are enough to place the Minister in an apparent conflict of interest in violation of Rule 6.

63. The Commissioner unreasonably based her rulings concerning whether Mr. Bergen or Ms. O'Born had placed Minister Freeland in an apparent conflict of interest on whether Minister Freeland was directly lobbied by Mr. Bergen and Ms. O'Born.[75]

64. The Commissioner's determination about whether Mr. Bergen or Ms. O'Born had placed Minister Freeland in an apparent conflict of interest was unreasonable because it was based on four factors taken from the test for a real conflict of interest which required:

i. an outside observer to know detailed government information that could only be known after a full investigation by an investigator with subpoena powers;

ii. The office holder to know that the lobbyist is lobbying the office holder's department, institution, and/or office concerning matters about which they had power and authority;

iii. The office holder to be exercising such a power at the time of the lobbying or clear evidence that they "will be" exercising a power in the near future, and;

iv. The lobbyist to lobby the office holder directly.

3) The Commissioner unreasonably interpreted and applied Rule 9

The Commissioner unreasonably defined "lobby that person"

65. Rule 9 of the *Lobbyists' Code* reads as follows:

Political activities 9. When a lobbyist undertakes political activities on behalf of a person which could reasonably be seen to create a sense of obligation, they may not lobby that person for a specified period if that person is or becomes a public office holder. If that	**Activités politiques** 9. Si un lobbyiste entreprend des activités politiques pour le compte d'une personne qui pourraient vraisemblablement faire croire à la création d'un sentiment d'obligation, il ne peut pas faire de lobbying auprès de cette personne pour une période déterminée si cette personne

[75] Bergen Ruling, **AB, Tab 5, p 96**; O'Born Ruling, **AB, Tab 6, p 145**.

person is an elected official, the lobbyist shall also not lobby staff in their office(s).	est ou devient un titulaire d'une charge publique. Si cette personne est un élu, le lobbyiste ne doit pas non plus faire de lobbying auprès du personnel du bureau dudit titulaire.

66. At the time of the rulings, the Commissioner's website contained a Guideline on Rule 9.[76] This Guideline lists political activities with a higher, lower, and no risk of creating a sense of obligation on the part of the office holder. The Guideline states that after higher-risk activities "you should not lobby any public office holder who benefited from them, nor their staff, for a period equivalent to a full election cycle." However, the Guideline does not define the words "lobby that person", "staff", or "office(s)".

67. The Commissioner correctly found that Mr. Bergen and Ms. O'Born engaged in political activities for Minister Freeland to which Rule 9 applies because they created a sense of obligation on the part of the Minister.[77] However, the Commissioner then unreasonably concluded that Mr. Bergen and Ms. O'Born did not "lobby that person" (Minister Freeland) and, therefore, did not violate Rule 9.

68. The Commissioner reached this conclusion by ignoring the definition of ministerial responsibility, being that: unless a Minister clearly grants or delegates legal and decision-making authority and responsibility to another official, the Minister is the authorized decision-maker and is responsible for the area of authority at issue.[78]

69. Minister Freeland did not delegate her legal authority or her decision-making power concerning the CEP and, therefore, she remained the responsible decision-maker. It can

[76] Office of Commissioner of Lobbying, *Guidance to mitigate conflicts of interest resulting from political activities*, Public CTR, **AB, Tab 8, sub-Tab 9, p 278-279**.
[77] Bergen Ruling, **AB, Tab 5, p 84-86**; O'Born Ruling, **AB, Tab 6, p 133-135**.
[78] Open and Accountable Government Guidance Document (2015), Public CTR, **AB, Tab 8, sub-tab 6.** See the full Document at: https://pm.gc.ca/en/news/backgrounders/2015/11/27/open-and-accountable-government#Ministerial_Responsibility_and_Accountability.

be argued that the doctrine of ministerial responsibility does not include that a Minister is responsible for every action of officials in their department or institutions. However, the lobbying situation at issue does not concern the actions of officials, it concerns who has decision-making authority to create or change a law, regulation, policy, or program of the government, or approve an appointment or the awarding of a grant, contribution, contract, or other benefit. Minister Freeland clearly and solely had that authority over the CEP, as a member of the Governor in Council ("GIC"), throughout the relevant period of time.

70. The Commissioner also reached an unreasonable conclusion by ignoring the explanation of lobbying in the *Lobbying Act*. While lobbying is not defined, individuals and organizations are required to register their lobbying under subsection 5(1) or 7(1) when they "communicate with a public office holder in respect of" a legislative proposal, bill or resolution, regulation, policy, or program, or the awarding of a grant, contribution, contract, or other financial benefit.[79]

71. A lobbyist does not know what will happen with their communications with a government official. Therefore, for Rule 9 to be effective, it must be assumed that anything a lobbyist communicates to a government official in the Minister's department regarding a matter for which the Minister has authority and responsibility will be communicated to the Minister.

72. By lobbying Minister Freeland's Parliamentary Secretary and senior officials about matters over which the Minister had decision-making power and responsibility, Mr. Bergen and Ms. O'Born lobbied the Minister. Therefore, they violated Rule 9 of the *Lobbyists' Code*.

Misinterpreting and misapplying Rules 6 and 9 undermines the Lobbyists' Code's purpose

73. The Commissioner's rulings are unreasonable because if Rules 6 and 9 (and the corresponding rules in the new *Lobbyists' Code*) are not interpreted and applied in

[79] *Lobbying Act*, RSC 1985, c 44 (4th Supp).ss 5(1) and 7(1).

accordance with these submissions, it will open a loophole that undermines the *Lobbyists' Code's* purpose of ensuring public confidence in the integrity of government decision-making. Interpreting Rule 6 as the Commissioner does, using the same test for "real conflict" and "apparent conflict", and interpreting Rule 9 as only applying to direct lobbying of an office holder and their staff, also conflicts with, and undermines, the Principles of the old *Lobbyists' Code*, and the Objectives and Expectations of the new *Lobbyists' Code*, that state that lobbyists must respect the duty of office holders to uphold the public interest, must act with integrity, must avoid placing office holders in a real or apparent conflict of interest, and must comply with the spirit of the *Lobbyists' Code*.

74. Principles of interpretation require that the *Lobbyists' Code* be given a fair, large, and liberal construction and be interpreted as best ensures the attainment of its objects. The Commissioner's unreasonable interpretations of Rules 6 and 9 create a loophole that allows a lobbyist to lobby everyone in a government department or institution who reports to a public office holder and have all their lobbying communications passed on to the office holder, even if the office holder has a "sense of obligation" to the lobbyist. This does not promote public trust in the integrity of government decision-making, is not ethical lobbying, undermines the office holders' obligation to act in the public interest, and allows a lobbyist to place an office holder in an apparent conflict of interest.

75. This is, in fact, what the Commissioner allowed Mr. Bergen and Ms. O'Born to do. Ms. O'Born sent a letter co-signed by Mr. Bergen to Parliamentary Secretary Lametti following up on an October 20, 2016 meeting where Ms. O'Born and others from CCI lobbied Mr. Lametti and Ms. Buttle, a member of Minister Freeland's staff.[80] Ms. O'Born also sent an email following up on the letter to Ms. Buttle on November 23, 2016, and Ms. Buttle

[80] Bergen Ruling, **AB, Tab 5, p 81**; O'Born Ruling, **AB, Tab 6, p 130.**

responded by email to Ms. O'Born on November 24, 2016, copying the email exchange to Emily Yorke, one of Minister Freeland's policy advisors.[81]

76. This correspondence shows that communications from lobbyists are passed on to the Minister's office when the Minister has legal authority or responsibility for the decisions the lobbyist is trying to affect. This correspondence also shows that Mr. Bergen and Ms. O'Born effectively lobbied Minister Freeland's staff, which placed their lobbying demands for changes to a government program for which Minister Freeland was responsible directly into Minister Freeland's office.

77. To effectively achieve the objective of the *Lobbyists' Code* of ensuring public confidence in the integrity of government decision-making and of preventing lobbyists from placing office holders in even an apparent conflict of interest, Rules 6 and 9 (and the corresponding rules of the new *Lobbyists' Code*) can only be reasonably interpreted to prohibit a person to whom a minister has a sense of obligation from lobbying anyone in the minister's department or institution concerning anything over which the minister has power or authority.

78. The Appellant requests that this Honourable Court find that the Commissioner's interpretations and applications of Rules 6 and 9 are unreasonable as they are unjustifiable and unintelligible and that this Honourable Court provide guidance to the Commissioner on what is a reasonable interpretation of the prohibitions contained in Rules 6 and 9.

The Application Judge unreasonably awarded costs

79. The Appellant appeals the award of costs in the FC decision on the basis that the litigation was brought in the public interest, and the Application Judge erred by not considering this fact.[82] While the Appellant acknowledges that costs are discretionary,

[81] O'Born Ruling, **AB, Tab 6, p 130.**
[82] *Federal Courts Rules*, SOR/98-106, R 400(3)(h).

given that the Appellant did not seek its costs below and was acting in the public interest (given the order of public interest standing), the Application Judge should not have awarded costs, particularly given that no reasons were provided in support of the cost award.

80. Moreover, beyond just the merits of this judicial review, up until the eve of hearing this matter contained another significant issue of public importance: whether Commissioner decisions could be the subject of an application of judicial review. Given the significance of the issue of justiciability of Commissioner decisions, this matter was important to the public for Democracy Watch to advance, making the costs award against it, without any reasons given, improper.

PART IV – ORDER SOUGHT

81. The Appellant asks that:

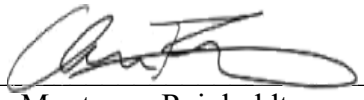
i. The Judgement of the Application Judge be set aside;

ii. An Order that both Commissioner rulings be set aside and returned for reconsideration;

iii. That no costs be awarded in this Appeal; and

iv. Such further and other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of December 2023.



Andrew Montague-Reinholdt
Rhian Foley
Counsel for the Appellant

PART V – LIST OF AUTHORITIES

Legislation

1. *Access to Information Act* RSC, 1985, c A-1
2. *Federal Courts Rules*, SOR/98-106
3. *Interpretation Act*, RSC 1985, c I-21
4. *Lobbying Act*, RSC 1985, c 44 (4th Supp)

Jurisprudence

1. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
2. *Committee for Justice and Liberty et al. v. National Energy Board et al.*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369
3. *Democracy Watch v Attorney General of Canada*, 2021 FC 613
4. *Democracy Watch v Attorney General of Canada*, 2021 FC 1417
5. *Democracy Watch v Campbell*, 2009 FCA 79
6. *Democracy Watch v Canada (Attorney General)*, 2023 FC 825
7. *Gordillo v Canada*, 2022 FCA 23
8. *The Queen v Harrison*, 1976 CanLII 3 (SCC), [1977] 1 SCR 238

Other

1. "Guidance – Lobbyists' Code of Conduct" (last modified 2023-07-04), online: *Office of the Commissioner of Lobbying of Canada*, https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/guidance-lobbyists-code-of-conduct/
2. Office of the Commissioner of Lobbying of Canada, *Lobbyists' Code of Conduct (2015)*
3. Office of the Commissioner of Lobbying of Canada, *Lobbyists' Code of Conduct (2023)*
4. "Open and Accountable Government" (27 November 2015), online: *Canada – Prime Minister of Canada Justin Trudeau* https://pm.gc.ca/en/news/backgrounders/2015/11/27/open-and-accountable-government#Ministerial_Responsibility_and_Accountability
5. Privy Council Office, "Guidance for Deputy Ministers" (last modified 13 December 2017), online: *Government of Canada* https://www.canada.ca/en/privy-council/services/publications/guidance-deputy-ministers.html