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émocratie en surveillance

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July 12, 2017

RE: Request for investigation and ruling on the situation involving Benjamin Bergen and Dana O'Born of the Council of Canadian Innovators and the CCI's lobbying activities

Dear Commissioner Shepherd:

I am writing on behalf of Democracy Watch to request an investigation and ruling on the situation involving Benjamin Bergen and Dana O'Born of the Council of Canadian Innovators (CCI) and the CCI's lobbying activities, and whether anyone's actions violate Rules 6, 7, 8 or 9 of the *Lobbyists' Code of Conduct*.

The details concerning why Democracy Watch's position is that these activities cause a violation of rules in the *Lobbyists' Code of Conduct* are set out in the rest of this letter.

First, however, Democracy Watch requests that you recuse yourself from investigating this and the other two complaints it filed with you on October 25, 2016 and November 4, 2016 concerning fundraising events involving Apotex chairman Barry Sherman, and the complaint it filed with you on March 1, 2017 concerning the fundraising even involving Clearwater Seafoods board member Mickey MacDonald.

This request is being made because you received a contract in mid-December from the Trudeau Cabinet worth approximately $90,000 as you were reappointed under subsection

4.1(4) of the *Lobbying Act* in an interim position for six months (as was done last July), and you received a renewal of that six-month contract in mid-June.

Even though you have announced publicly that you are not seeking to be reappointed to another seven-year term, these contracts cause at least the appearance of a conflict of interest for you, a reasonable apprehension of bias. This is caused by the fact that: the contract was given to you by the Cabinet as a sole-source contract; the contract could be renewed by Cabinet so you are essentially serving at the pleasure of the Cabinet, and; while the opposition party leaders may have been consulted on your interim reappointment, there is no requirement in the *Lobbying Act* that they be consulted and so your reappointment was entirely at the legal discretion of, and controlled by, the Cabinet.

Democracy Watch's position is also that your current contract is illegal under subsection 4.1(4) of the *Lobbying Act*, and as you are likely aware Democracy Watch has challenged the Prime Minister Trudeau's decision to give you that contract in Federal Court.

As a result of your conflict of interest, and what in Democracy Watch's opinion your current illegal position, Democracy Watch requests that you recuse yourself from investigating these situations, and all situations involving the Trudeau Cabinet, and that you refer the investigations to someone who is fully independent of the Cabinet and all federal political parties.

Reasons for investigation and ruling on CCI's lobbying activities

According to the CCI's website, and the CanTechLetter.com article at:
https://www.cantechletter.com/2016/03/ben-bergen-appointed-executive-director-of-council-of-canadian-innovators/
Benjamin Bergen has been the Executive Director since March 2016. According to the CCI's website, Dana O'Born is the Director of Policy (I do not know the date Ms. O'Born starting working at CCI).

Democracy Watch is filing this complaint for the following reasons. First, according to this *Globe and Mail* article:
https://www.theglobeandmail.com/news/politics/lobby-group-asked-to-stop-offering-access-to-ottawa-for-cash/article35660454/
and the CanTechLetter.com article linked above, Mr. Bergen played a senior management role in the 2015 federal election campaign of Chrystia Freeland, former International Trade Minister from November 2015 to January 2017, and since the Minister of Foreign Affairs. According to Mr. Bergen, as cited in the *Globe* article linked above, Ms. O'Born was Ms. Freeland's 2015 election campaign manager.

Second, the reminder you published in June 2015 concerning former Rule 8 of the *Lobbyists' Code of Conduct*, which can be viewed at:
https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01115.html

states that Rule 8 applies even if the lobbyist deregisters during an election campaign (i.e. the rule applies to anyone who assists a candidate or party in a significant way during an election campaign). Therefore, it does not matter whether Mr. Bergen or Ms. O'Born were registered lobbyists before or during the 2015 election campaign when they were co-campaign managers for Ms. Freeland.

Third, as Rule 8 did, since December 2015 current Rules 6-9 of the *Lobbyists' Code of Conduct*, which can be viewed at:
https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01192.html
prohibit people who help in senior positions in election campaigns from lobbying for five years the politician they helped get elected or their staff or department.

According to the Registry of Lobbyists, CCI has been registered to lobby the federal government (including Ms. Freeland's Global Affairs ministry) with Mr. Bergen as the listed senior official since April 4, 2016:
https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/vwRg?cno=357757&regId=858937

According to the Registry of Monthly Communications, CCI has had 202 registered communications with government officials since then:
https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/clntCmmLgs?cno=357757&regId=858937 (although many more could have occurred as only oral, pre-arranged communications initiated by the lobbyist are required to be disclosed (unless the communication is about a financial benefit and then even if the government official initiates the communication it must be disclosed)).

The CCI's monthly communications reports in the Registry show that on the following dates when Ms. Freeland was Minister of Foreign Affairs or Minister of International Trade (and, again, possibly many other dates), CCI communicated with Global Affairs Canada officials including assistant deputy ministers, directors, special assistants, and the minister's Parliamentary Secretary:
April 21, 2017; April 10, 2017; March 30, 2017; March 24, 2017; March 1, 2017; February 8, 2017; November 4, 2016; November 2, 2016; October 21, 2017; October 20, 2017 (two meetings); October 17, 2016, and; October 13, 2016.

To highlight some of the disclosed communications with Global Affairs Canada government officials and political staff, CCI communicated:

- On April 10, 2017 with Alish Campbell, Chief Trade Commissioner of Canada and Assistant Deputy Minister;
- On March 24, 2017 with Jim Kapches, Policy Advisor;
- On February 8, 2017 with Andrew Smith, Director;
- On October 20, 2017 with Susan Bincoletto, Assistant Deputy Minister, International Business Development,
- Also on October 20, 2016 with David Lametti, Parliamentary Secretary to Minister of International Trade and Megan Buttle, Special Assistant
- On October 17, 2016 with Megan Buttle, Special Assistant
- On October 13, 2016 with Gillian Nycum, Special Assistant.

The five-year rule for a conflict of interest

As you set out in your guidance document on Rule 9 of the *Lobbyists' Code of Conduct* (the "*Code*") at: https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01182.html anyone assisting with such events is prohibited from lobbying any federal politician or other public office holder involved in or affected by the event (or their staff) for the five-year period after the event.

While Rule 9 came into effect in December 2015, in a public guidance document on Rule 8 you published in 2009 at: https://lobbycanada.gc.ca/eic/site/012.nsf/eng/00150.html, and in a clarification document you published later at: https://lobbycanada.gc.ca/eic/site/012.nsf/eng/00151.html, and in an updated guidance document on Rule 8 you published on June 25, 2015 at: https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01114.html, and in a reminder to lobbyists about Rule 8 and political activities you published on June 25, 2015 at: https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01115.html, you made it clear that lobbyists assisting a party, candidate or politician with campaigning or fundraising violate Rule 8 by creating an apparent conflict of interest for the politician that continues into the future (and in June 2015 you clarified that by "future" you meant for five years).

While Democracy Watch questions whether a conflict of interest disappears after five years, it is irrelevant in this situation as the lobbying in question is taking place one to two years after Mr. Bergen and Ms. O'Born acted as co-campaign managers for Ms. Freeland's election campaign.

Legally correct interpretation and application of Rules 7-9 of the *Lobbyists' Code*

It is important to note, as you do in your guidance documents, that past Rule 8, and current Rules 6-9, of the *Lobbyists' Code* must be interpreted based on the standard set out in the unanimous Federal Court of Appeal 2009 ruling in the case of *Democracy Watch v. Campbell* (2009 FCA 79, [2010] 2 F.C.R. 139) in which the court considered the meaning of Rule 8.

A key point of that ruling is that the court was considering a situation of a lobbyist who was lobbying a public office holder's department – there was no evidence before the court that the lobbyist had actually lobbied the public office holder. The court did not limit its ruling in any way to a situation in which the lobbyist is lobbying the public office holder directly.

A second key point is that all the person's action has to do is create a "sense of personal obligation" or "some other private interest" on the part of the public office holder (para.53). A related third key point is that the court ruled that Rule 8 prohibits a person

from doing anything that places the office holder in even the appearance of a conflict of interest (para. 48).

Within the context of the FCA's 2009 ruling, the key question concerning the application of Rules 7-9 is what is the legally correct meaning of the phrases "arrange a meeting with a public office holder" (Rule 7) and "lobby a public office holder" (Rule 8) and "If that person is an elected official, the lobbyist shall also not lobby staff in their office(s)" mean when the elected official is a Cabinet minister?

Given the standards set out in the FCA's 2009 ruling, Democracy Watch's position is that the legally correct definition of "public office holder" and "staff in their office(s)" must include not only a Cabinet minister's direct staff but also deputy ministers and associate deputy ministers (who are Cabinet appointees) and anyone who is a proxy for them, the minister or the minister's direct staff (i.e. any political staff or department officials who would report about the lobbying to the public office holder or their staff).

Therefore, Democracy Watch's position is that the legally correct application of Rules 7-9 means if a person assists (as defined in your guidance documents) with campaigning for a candidate or fundraising for a politician (or with any other gift or favour for a public office holder that creates a "sense of personal obligation" or "some other private interest"), that person cannot be involved, and their organization cannot be involved, for the following five years in lobbying the politician or their staff or anyone who is a proxy for their staff (i.e. any political staff or department officials who would report about the lobbying to the public office holder or their staff).

If you do not interpret "public office holder" and "staff in their office(s)" in this way, you will create a huge loophole in the *Lobbyists Code* that will allow a person who does something that significantly helps a candidate who becomes a Cabinet minister, or significantly helps an existing Cabinet minister, to lobby that minister through a front person.

If you adopt such an interpretation, you will make Rules 7-9 of the *Lobbyists' Code* a meaningless charade that will not prevent conflicts of interest (real or apparent), and you will directly undermine and defy the standard set out in the Federal Court of Appeal unanimous 2009 ruling.

Legally correct interpretation and application of Rule 6 of the *Lobbyists' Code*

Rule 6 of the Lobbyists' Code also came into effect in December 2015, and the guidance document you issued for the rule:
https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01180.html
also cites the Federal Court of Appeal's unanimous 2009 ruling. As a result, I will not repeat the paragraphs set out in the section above concerning the context that the ruling sets for the legally correct interpretation and application of Rule 6.

No matter what you decide concerning the interpretation and application of the phrases "public office holder" and "staff in their office(s)" from Rules 7-9 of the *Lobbyists' Code*, you cannot create any loophole that undermines the broad prohibition set out in Rule 6.

Rule 6 of the *Lobbyists' Code of Conduct* states:

> "A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest."

While the wording of Rule 6 is different than Rule 8, as you set out in your guidance statement on Rule 6 at: https://lobbycanada.gc.ca/eic/site/012.nsf/eng/01180.html the standard is the same as the Federal Court Appeal set out in its 2009 ruling – lobbyists are not allowed to put any public office holder in even the appearance of a conflict of interest.

In this situation, the action for Mr. Bergen and Ms. O'Born is being involved as Executive Director and Director of Policy of an organization (the CCI) that is in 2016-2017 lobbying the department for which Minister Freeland is minister after Mr. Bergen and Ms. O'Born served in 2015 as co-campaign managers for Ms. Freeland during her election campaign.

As detailed in the section above, with regard to the line drawn by Rule 6, it is irrelevant that Mr. Bergen and Ms. O'Born were not registered lobbyists during the 2015 election campaign. And the lobbying by CCI is occurring well within the five-year time period you have decided that a conflict of interest continues after it is created by a person's actions for a public office holder.

The simple fact is the Mr. Bergen and Ms. O'Born are in senior positions in an organization that is asking favours from Minister Freeland's department less than two years after Mr. Bergen and Ms. O'Born did favours for Minister Freeland.

The requirement in the *Lobbying Act* that you investigate this situation

Subsection 10.4(1) of the *Lobbying Act* states:
"Investigation
10.4 (1) The Commissioner shall conduct an investigation if he or she has reason to believe, including on the basis of information received from a member of the Senate or the House of Commons, that an investigation is necessary to ensure compliance with the Code or this Act, as applicable."

The "Code" referred to in that subsection is the federal *Lobbyists' Code of Conduct*. The subsection requires you to investigate if you have reason to believe that an investigation is necessary to ensure compliance with the *Code* (or *Act*). This wording makes it clear that you do not need evidence of a violation – that your investigations are also required when a situation simply raises questions concerning compliance with the *Code* and the

investigation is required to ensure compliance with the *Code* (or *Act*). In other words, you are required to investigate when you have a reasonable belief that an investigation will prevent a violation by ensuring compliance.

Your own "Guiding principles and criteria for recommending compliance measures" document states:

> "It is the role of the Office of the Commissioner of Lobbying (OCL) to support this mandate by conducting administrative reviews of suspected, alleged, or known contraventions of the Act and Code, recommending appropriate enforcement measures and, where the Commissioner deems necessary, conducting formal investigations under subsection 10.4 of the Act."

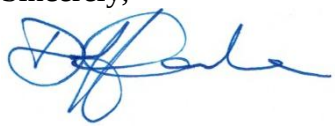
All that is needed is a suspected violation to trigger an administrative review and, it is Democracy Watch's position, subsection 10.4(1) of the *Act* also requires an investigation of all suspected violations that raise questions concerning compliance.

You have an opportunity to uphold a key measure in a key democratic good government law in a legally correct manner. We hope you will do so.

Democracy Watch looks forward to hearing from you soon concerning what process will be used to investigate and rule on the complaint, in particular your decision concerning recusing yourself.

Please let us know if you need any more information to act on this request – Democracy Watch is happy to provide further details.

Sincerely,



Duff Conacher, Co-founder of Democracy Watch
on behalf of the Board of Directors of Democracy Watch