



FEDERAL COURT

DEMOCRACY WATCH

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

(pursuant to sections 18 and 18.1 of the *Federal Courts Act*)

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at (place where Federal Court of Appeal (or Federal Court) ordinarily sits).

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after

being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: January 19, 2018

Issued by:

**ORIGINAL SIGNED BY
MARC MEDAS
ORIGINAL SIGNÉ PAR**

(Registry Officer)

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the _____

day of JAN 19 2018 A.D. 20 _____

Address of local office:

Dated this _____ day of JAN 19 2018 20 _____

Registries of the Federal Courts
Thomas D'Arcy McGee Building
90 Sparks Street, 5th floor
Ottawa, Ontario
K1A 0H9


**MARC MEDAS
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APPLICATION

THIS IS AN APPLICATION FOR JUDICIAL REVIEW in respect of a decision of the Commissioner of Lobbying (the "Lobbying Commissioner").

The date of the decision (the "Decision") was September 21, 2017 and was in the form of a letter to the complainant only, a letter that the Lobbying Commissioner did not make public. The fact that the Decision had been made was not made public until December 22, 2017 when it was mentioned in a CBC.ca article, in which a spokesperson for the Lobbying Commissioner confirmed that the Decision had been made on September 21, 2017. The full Decision has not been made public.

At the time of the Decision, the Lobbying Commissioner was Karen Shepherd who had been appointed on an interim basis as Lobbying Commissioner under subsection 4.1(4) of the *Lobbying Act*.

The Decision was a ruling on the complaint in which the Lobbying Commissioner decided that the Aga Khan was not covered by the *Lobbyists' Code of Conduct* ("*Lobbyists' Code*") which is established under the *Lobbying Act* (R.S.C., 1985, c. 44 (4th Supp.)) and that, therefore, the Lobbying Commissioner would not undertake an investigation into whether the Aga Khan's gift to Prime Minister Justin Trudeau (the "Prime Minister") of a vacation on his private island in the Bahamas in December 2016 violated rules in the *Lobbyists' Code*.

The application seeks an order quashing the Decision because:

1. at the time the Lobbying Commissioner made the Decision, a reasonable apprehension of bias existed on the part of the Lobbying Commissioner given she was given a third six-month interim appointment by order in council dated June 7, 2017 of the Governor-in-Council ("Trudeau Cabinet"), an appointment that was possibly renewable, and given that her Decision concerned a gift to the Prime Minister;
2. at the time the Lobbying Commissioner made the Decision, the Lobbying Commissioner was in violation of section 4 and subsection 6(1) of the *Conflict of Interest Act* (S.C. 2006, c. 9, s. 2 – the "*Conf Act*"), which together prohibit office holders like the Lobbying Commissioner from participating in or making decisions when they have an opportunity to further their own private interests or to improperly further another person's private interests;
3. the *Conf Act* gives rise to a legitimate expectation that the Lobbying Commissioner would recuse herself from making the Decision, and;

4. the Lobbying Commissioner erred in law and the Decision was patently unreasonable given the rules in the *Lobbyists' Code*, and that its purpose 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" and given that the Lobbying Commissioner's mandate is to ensure lobbyists "conform fully with the letter and the spirit of the *Lobbyists' Code of Conduct* as well as all relevant laws, including the *Lobbying Act* and its regulations";

THE APPLICANT MAKES APPLICATION FOR:

1. An order quashing the Lobbying Commissioner's Decision of September 21, 2017 and substituting its own decision directing the Lobbying Commissioner to proceed with a full investigation of the situation;
2. In the alternative, an order quashing the Lobbying Commissioner's Decision of September 21, 2017 and remitting the matter back to the Commissioner in accordance with the Directions of this Court;
3. Costs, and;
4. Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE APPLICATION ARE:

A. Reasonable apprehension of bias on the part of the Commissioner

1. The Lobbying Commissioner Karen Shepherd completed her first seven-year term in office in June 2016. The Trudeau Cabinet then appointed Commissioner Shepherd on an interim basis under subsection 4.1(4) for six month terms from July to the end of December 2016, and then renewed that appointment for another six months from January 2017 to the end of June 2017, and then renewed that appointment again from July 2017 to the end of December 2017;
2. Each of those appointments by order in council were on the "recommendation of the Prime Minister";
3. At some point in 2017, the Lobbying Commissioner received the complaint raising the question of whether the Aga Khan's gift to the Prime Minister of a vacation on his private island in the Bahamas in December 2016 violated rules in the *Lobbyists' Code*;

4. The Lobbying Commissioner made the Decision on the complaint in the form of a letter dated September 21, 2017 to the complainant only – although the fact that the Decision had been made by the Lobbying Commissioner on that date was not made public until December 22, 2017 through mention in a CBC.ca article;
5. At the time the Lobbying Commissioner made the Decision, she was essentially serving at the pleasure of the Prime Minister as it was the Prime Minister who had renewed her interim appointment in June 2017, and it was the Prime Minister who would determine if her interim appointment would be renewed again for another six months at the end of December 2017;
6. On May 15, 2017, the Prime Minister issued a statement that said he was recusing himself from the decision-making process for appointing the Conflict of Interest and Ethics Commissioner ("Ethics Commissioner") because the Ethics Commissioner was investigating him for alleged violations of the "Cofl Act". The statement said: "Effective immediately, the Prime Minister has recused himself from all matters related to the appointment of the Conflict of Interest and Ethics Commissioner, given the ongoing inquiry into the Prime Minister's family vacation this past Christmas." Like the Lobbying Commissioner, the Ethics Commissioner has also been appointed on an interim basis three times by the Trudeau Cabinet since her term ended in July 2016, for six months each time.
7. The Prime Minister did not issue a recusal statement concerning the renewal of the appointment of the Lobbying Commissioner even though the Lobbying Commissioner was investigating the same Aga Khan's gift of the Prime Minister's family vacation that past Christmas as the Ethics Commissioner was investigating;
8. The Prime Minister's public acknowledgement that he had a conflict of interest concerning the appointment of the Ethics Commissioner highlights the failure of the Prime Minister to recognize that he also had a conflict of interest concerning the appointment of the Lobbying Commissioner, and also highlights the Lobbying Commissioner's failure to recognize that she had a conflict of interest concerning any matters that came before her that involved the Prime Minister;
9. Given the above, there is a reasonable apprehension of bias on the part of the Lobbying Commissioner when she made the September 21, 2017 Decision.

B. Failure of the Lobbying Commissioner to comply with the *Conflict of Interest Act* in making the Decision

10. Section 4 and subsection 6(1) of the *Cofl Act* prohibit public office holders like the Lobbying Commissioner from participating in or making a decision that exercises any powers “that provides an opportunity to further his or her private interests... or to improperly further another person’s private interests”;
11. At the time the Lobbying Commissioner made the Decision, she was serving her third six-month interim appointment, as made on the recommendation of the Prime Minister, an appointment that could possibly be renewed again;
12. Given that the Prime Minister had renewed the Lobbying Commissioner’s interim appointment a few months before the Lobbying made the Decision, and given that the Prime Minister would decide whether the Lobbying Commissioner’s interim appointment would be renewed a few months after the Decision was made, and given the Decision concerned a situation involving the Prime Minister, it was in the Lobbying Commissioner’s private interest to make a decision that would further the private interests of the Prime Minister, such as the Decision she made to not investigate the situation;
13. Given that it was improper for the Lobbying Commissioner to render the Decision because she had an opportunity to further her private interest in doing so, and given that the Decision furthered the private interests of the Prime Minister, the Decision that she made improperly furthered the interests of the Prime Minister.
14. Therefore, the Lobbying Commissioner was in violation of section 4 and subsection 6(1) of the *Cofl Act* when she made the Decision.

C. The Public has a legitimate expectation as a rule of procedural fairness that the Lobbying Commissioner would respect the *Cofl Act*

15. The public, including individual stakeholders whose interests may be affected by the Lobbying Commissioner’s Decision, have a legitimate expectation due to the *Cofl Act* that the Lobbying Commissioner would recuse herself from making the Decision.

D. The Lobbying Commissioner erred in law

16. The Introduction to the *Lobbyists' Code* states that its purpose 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";
17. One of the Principles of the *Lobbyists' Code* is entitled "Professionalism" and it mandates lobbyists to "observe the highest professional and ethical standards" and to "conform fully with the letter and the spirit of the *Lobbyists' Code of Conduct* as well as all relevant laws, including the *Lobbying Act* and its regulations." Therefore, the Lobbying Commissioner's mandate is to ensure that lobbyists comply and fulfill these standards;
18. The Aga Khan is a member of the Board of Directors of the Aga Khan Foundation (the "Foundation"), which is registered under the *Lobbying Act* to lobby the Prime Minister's Office;
19. The Aga Khan is not listed as one of the Foundation's lobbyists in the Registry of Lobbyists. The *Lobbying Act* only requires people who are employees of an organization like the Foundation who spend any part of their time lobbying to be listed in the organization's registration in the registry.
20. However, the Aga Khan does lobby public office holders including the Prime Minister on behalf of the Foundation, and as a member of the Board of Directors is legally bound to further the interests of the Foundation;
21. In December 2016, the Aga Khan gave to Prime Minister and his family the gift of a vacation on his private island in the Bahamas (the "vacation gift");
22. The Ethics Commissioner issued a ruling on December 20, 2017 that it was a violation of the *Cofl Act* for the Prime Minister to accept the vacation gift from the Aga Khan, and that the gift created a conflict of interest for the Prime Minister;
23. Rule 6 of the *Lobbyists' Code* 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";
24. Rule 10 of the *Lobbyists' Code* states: "To avoid the creation of a sense of obligation, a lobbyist shall not provide or promise a gift, favour, or other

benefit to a public office holder, whom they are lobbying or will lobby, which the public office holder is not allowed to accept”;

25. On September 21, 2017, the Lobbying Commissioner made the Decision that according to the CBC.ca article stated, in part, “After reviewing the information provided to me in the administrative review report, I have come to the conclusion that the Aga Khan receives no payment for his work on behalf of the Aga Khan Foundation Canada and, therefore, does not engage in activities requiring registration as a lobbyist” and “Consequently, the *Lobbyists’ Code of Conduct* does not apply to his interactions with the prime minister.”
26. Subsection 10.4(1) of the *Lobbying Act* states that “The Commissioner shall conduct an investigation if he or she has reason to believe,...that an investigation is necessary to ensure compliance with the Code or this Act, as applicable.”
27. In making the Decision not to undertake a full investigation, the Lobbying Commissioner interpreted the threshold set out in subsection 10.4(1) which requires an investigation to be conducted in an overly narrow manner, as the threshold is only that there is reason to believe that an investigation is necessary to ensure compliance – blatant evidence of a violation is not needed;
28. In making the Decision that the Aga Khan was not covered by the *Lobbying Act*, and therefore was not required to comply with, the *Lobbyists’ Code* rules, the Lobbying Commissioner ignored her mandate to ensure lobbyists “conform fully with the letter and the spirit of the *Lobbyists’ Code* as well as all relevant laws, including the *Lobbying Act* and its regulations”;
29. In making the Decision, the Lobbying Commissioner also ignored the purpose of the *Lobbyists’ Code* “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”;
30. Given the above, the Lobbying Commissioner’s Decision is patently unreasonable.

E. The public interest in a decision that complies with statutory obligations and the rules of procedural fairness

31. The nature of the Decision and its impact directly affect the public’s right to legally proper statutory decisions by Lobbying Commissioner, and to

impartial and proper enforcement of the *Lobbying Act* and the *Lobbyists' Code*;

32. Democracy Watch has standing to bring the present application as it had filed four petitions with the Lobbying Commissioner that were being investigated at the time of the Decision, and as a public interest litigant in view of its special interest and public role within Canadian civil society in addressing issues of ethics, transparency and accountability of government institutions, which includes matters of lobbying, lobbying ethics, and conflicts of interest. The Applicant has a real stake in the outcome of the proceeding and the issues raised by it. The present application also represents a reasonable and effective means of bringing the Applicant's concern to Court;
33. The Lobbying Commissioner's September 21, 2017 Decision violates the *Cofl Act* rules that require public office holders to recuse themselves when they have an opportunity to further their own private interest or to improperly further another person's private interest;
34. The Lobbying Commissioner, in making her Decision of September 21, 2017, failed to observe the principles of procedural fairness, namely that decision-makers are required to recuse themselves if they have a reasonable apprehension of bias, and that the public has a reasonable expectation that the Lobbying Commissioner would respect the *Cofl Act* and recuse herself;
35. Therefore, the Lobbying Commissioner, under the rules of the *Cofl Act*, and because she had a reasonable apprehension of bias, was prohibited from making or advising any decisions concerning the Prime Minister at the time the Decision was made;
36. The Federal Court has jurisdiction to issue orders in response to this application for the relief sought based on the ground that the Lobbying Commissioner's September 21, 2017 Decision was unreasonable and contrary to various statutory duties;
37. *Lobbying Act*, R.S.C., 1985, c. 44 (4th Supp.);
38. *Lobbyists' Code of Conduct*;
39. *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2;
40. *Federal Courts Act*, R.S.C., 1985, c. F-7;
41. *Federal Court Rules*, 1998, SORJ98-106, and;

42. Such further and other grounds as counsel may advise and this Honourable Court may accept.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL

1. The affidavit of Duff Conacher or such other affidavit as counsel may advise;
2. Order in Council 2017-0695 (dated June 7, 2017);
3. Order in Council 2016-1147 (dated December 16, 2016)
4. Order in Council 2016-0660 (dated June 30, 2016), and;
5. Such further material as counsel may advise and this Honourable Court may permit.

DEMOCRACY WATCH REQUESTS, pursuant to Rule 317, the Attorney General of Canada to send a certified copy of all documents related to the Lobbying Commissioner's September 21, 2017 Decision, including a copy of the full Decision.

January 19, 2018



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