

Court File No.: T-80-18



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 15, 2018

Issued by:


(Registry Officer)
PAULINE CHARTRAND
REGISTRY OFFICER
AGENT DU GREFFE

Address of local office:

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

TO:

Attorney General of Canada
c/o Nathalie G. Drouin, Deputy Attorney General of Canada
Office of the Deputy Attorney General of Canada
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APPLICATION

THIS IS AN APPLICATION FOR JUDICIAL REVIEW in respect of a decision of the Governor in Council (the "Cabinet").

The decision was an Order in Council, dated December 14, 2017 (the "Decision"), by which Nancy Bélanger was appointed for her first seven-year term as the new Commissioner of Lobbying ("Lobbying Commissioner") under subsection 4.1(1) of the *Lobbying Act* (R.S.C., 1985, c. 44 (4th Supp.)).

The application seeks an order quashing the Decision because:

1. the Cabinet failed to consult with the leader of every recognized party in the House of Commons before making the Decision, as required under subsection 4.1(1) of the *Lobbying Act*;
2. the Prime Minister and all members of the Cabinet were in violation of the *Conflict of Interest Act* ("CoflAct"), section 4 and subsection 6(1), which prohibit Cabinet ministers from exercising an "official power, duty or function that provides an opportunity" to further a private interest or to "improperly further another person's private interests." Since, at the time of the appointment, the Office of the Lobbying Commissioner was investigating three complaints filed by Democracy Watch alleging violations of the *Lobbyists' Code of Conduct* in situations involving members of Cabinet (including one involving the Prime Minister, one involving the Finance Minister, and one involving the Minister of Foreign Affairs), the Prime Minister was furthering a private interest, and all members of Cabinet were complicit in furthering another person's private interest;
3. the Lobbying Commissioner was investigating situations involving the Prime Minister and other Cabinet ministers at the time of the appointment and, therefore, the Prime Minister and Cabinet as a whole were in violation of the Prime Minister's *Open and Accountable Government* code ("PM's Code"), and had a reasonable apprehension of bias, that prohibited the Prime Minister and Cabinet from advising the appointment; and
4. the Prime Minister's *Open and Accountable Government* code ("PM's Code") gives rise to a legitimate expectation that the Prime Minister and Cabinet would recuse themselves from deciding upon or advising upon the appointment of the Lobbying Commissioner.

THE APPLICANT MAKES APPLICATION FOR:

1. An order quashing the Decision of December 14, 2017 and remitting the matter back to the Governor in Council in accordance with the Directions of this Court;
2. Costs, and;
3. Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE APPLICATION ARE:

A. Failure to consult with the leaders of every recognized party in the Senate and House of Commons

1. The appointment by the Cabinet of Nancy Bélanger for her first seven-year term as the new Lobbying Commissioner violates subsection 4.1(1) of the *Lobbying Act* because the Cabinet failed to fulfill the requirement not to make the appointment until "after consultation with the leader of every recognized party in the Senate and the House of Commons" had occurred;
2. Representatives of the Conservative Party and the New Democratic Party both made several statements that the Cabinet had not consulted with them before making the appointment of the new Lobbying Commissioner;

B. Failure of Prime Minister and Cabinet to comply with the *Conflict of Interest Act* in making the Lobbying Commissioner appointment

3. Section 4 and subsection 6(1) of the *Conf Act* prohibit the Prime Minister and all members of Cabinet from participating in or making a decision that exercises any powers "that provides an opportunity to further his or her private interests...;"
4. On October 25, 2016, Democracy Watch filed a petition with the Lobbying Commissioner alleging violations of the *Lobbyists' Code of Conduct* ("*Lobbyists' Code*") by Barry Sherman, Chairman of Apotex Inc., because according to media reports he had assisted in organizing a fundraising event attended by Minister of Finance Bill Morneau that was scheduled for November 7, 2016, and because Apotex Inc. was registered to lobby Finance Canada;

5. In a letter dated October 25, 2016, the Lobbying Commissioner confirmed that her office was investigating the situation and alleged violations set out in Democracy Watch's October 25, 2016 petition;
6. On November 4, 2016, Democracy Watch filed a petition with the Lobbying Commissioner alleging violations of the *Lobbyists' Code* by Barry Sherman, Chairman of Apotex Inc., because he organized and hosted a fundraising event attended by then-Liberal Party Leader Justin Trudeau in August 2015 and because Apotex Inc. was registered to lobby the Office of the Prime Minister;
7. In a letter dated November 18, 2016, the Lobbying Commissioner confirmed that her office was investigating the situation and alleged violations set out in Democracy Watch's November 4, 2016 petition;
8. In a letter dated March 1, 2017, Democracy Watch filed a petition with the Lobbying Commissioner alleging violations of the *Lobbyists' Code* by Mickey MacDonald, board member of Clearwater Seafoods Inc., because he organized and hosted a fundraising event attended by then-Liberal Party Leader Trudeau in August 2014, and because Clearwater Seafoods Inc. was registered to lobby the Office of the Prime Minister;
9. In a letter dated March 3, 2017, the Lobbying Commissioner confirmed that her office was investigating the situation and alleged violations set out in Democracy Watch's March 1, 2017 petition;
10. On May 15, 2017, the office of Prime Minister Justin Trudeau (the "Prime Minister") issued a statement that said he was recusing himself from the decision-making process for appointing the next Conflict of Interest and Ethics Commissioner ("Ethics Commissioner") because the Ethics Commissioner was investigating him for alleged violations of the *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2 – the "COI 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;"
11. The Prime Minister did not issue a recusal statement concerning the appointment of the Lobbying Commissioner;
12. In a letter dated July 12, 2017, Democracy Watch filed a petition with the Lobbying Commissioner alleging violations of the *Lobbyists' Code* by staff members of the Council of Canadian Innovators ("CCI") because they had assisted with the 2015 federal election campaign of Minister of Foreign Affairs Chrystia Freeland's ("Minister Freeland"), and because CCI was registered to lobby Minister Freeland's department, Global Affairs Canada;

13. In a letter dated July 20, 2017, the Lobbying Commissioner confirmed that her office was investigating the situation and alleged violations set out in Democracy Watch's July 12, 2017 petition;
14. As of December 14, 2017, the Office of the Lobbying Commissioner had not concluded its investigation into the two petitions filed by Democracy Watch alleging violations of the *Lobbyists' Code* in situations involving the Prime Minister, nor had it concluded its investigation into Democracy Watch's petition alleging violations of the *Lobbyists' Code* in a situation involving the Minister Morneau, nor had it concluded its investigation into Democracy Watch's petition alleging violations of the *Lobbyists' Code* in a situation involving Minister Freeland;
15. On December 14, 2017, the Cabinet issued Order in Council 2017-1564, pursuant to subsection 4.1(1) of the *Lobbying Act*, that stated the Prime Minister advised the appointment of Nancy Bélanger for her first seven-year term as Lobbying Commissioner, effective December 30, 2017;

C. Bias of Prime Minister and Cabinet in making the Lobbying Commissioner appointment

16. In the *PM's Code* under Annex A, Part I: Ethical Guidelines and Statutory Standards of Conduct, the Prime Minister is required to "uphold the highest ethical standards so that public confidence and trust in the integrity, objectivity and impartiality of the government are conserved and enhanced" and "to perform their official duties... in a manner that will bear the closest public scrutiny... [an] obligation that is not fully discharged by simply acting within the law;"
17. The Prime Minister and Cabinet choosing the judge who has the power to rule on whether the Prime Minister and other Cabinet ministers were involved in a situation that violates a federal law or other requirement is a decision in which the Prime Minister and Cabinet have an opportunity to further the Prime Minister's and other ministers' private interests, in which the Prime Minister and Cabinet are neither impartial nor objective, and in which they have a reasonable apprehension of bias;

D. The Public has a legitimate expectation as a rule of procedural fairness that the Prime Minister and Cabinet would respect the *PM's Code*

18. The public, including individual stakeholders whose interests may be affected by the Cabinet's choice of Lobbying Commissioner, have a

legitimate expectation created by the *PM's Code* that the Prime Minister and Cabinet would recuse themselves in making this appointment of the Lobbying Commissioner;

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

19. The nature of the Decision and its impact directly affect the public's right to legally proper statutory decisions by members of Cabinet, and to impartial and proper enforcement of the *Lobbying Act* and the *Lobbyists' Code*;
20. 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 Cabinet's 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;
21. The Prime Minister and Cabinet's December 14, 2017 Decision violates the *Lobbying Act* requirement to consult with the leaders of recognized parties in the Senate and the House of Commons before making the Lobbying Commissioner appointment, and also violates the *Cofl Act* rules that require them to recuse themselves when they have an opportunity to further their own private interest or to improperly further another person's private interest;
22. The Prime Minister and Cabinet, in issuing its Decision of December 14, 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 Prime Minister and Cabinet would respect the *PM's Code* and recuse themselves;
23. Therefore, the Prime Minister and Cabinet, under the rules of the *Cofl Act*, and the rules of the *PM's Code*, and because they had a reasonable apprehension of bias, were prohibited from making or advising any decisions concerning the Lobbying Commissioner at the same time the Lobbying Commissioner is investigating situations involving the Prime Minister and other Cabinet ministers;

24. The Federal Court has jurisdiction to issue orders in response to this application for the relief sought based on the ground that the Cabinet's December 14, 2017 Decision was contrary to various statutory duties and contrary to duties under the law of procedural fairness;
25. *Lobbying Act*, R.S.C., 1985, c. 44 (4th Supp.);
26. *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2;
27. *Federal Courts Act*, R.S.C., 1985, c. F-7;
28. *Federal Court Rules*, 1998, SORJ98-106
29. *Open and Accountable Government 2015*, and;
30. 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 2017-1564 (dated December 14, 2017), and;
3. 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 Cabinet's December 14, 2017 Decision, including documents concerning communications with the leader of every recognized party in the Senate and the House of Commons that preceded the Decision.

January 15, 2018

Sebastian Spano

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