

Court File No.: T-366-18

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: February 23, 2018

Issued by:



(Registry Officer)

JEAN-FRANÇOIS DUPORT
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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 decision (the "Decision") was in the form of letter dated January 24, 2018 and sent on January 25, 2018 to Democracy Watch, which had filed a complaint on November 4, 2016 with the Lobbying Commissioner requesting an investigation into an August 2015 situation involving Dr. Barry Sherman, then-Chairman of Apotex Inc. ("Dr. Sherman") and the Liberal Party of Canada and Prime Minister Justin Trudeau.

The Decision was a ruling on Democracy Watch's complaint in which the Lobbying Commissioner decided, because Dr. Sherman had passed away in December 2017, to cease the investigation into whether the fundraising event Dr. Sherman hosted on August 26, 2015 that reportedly raised more than \$100,000 for the Liberal Party of Canada, an event that was attended by then-Liberal Party Leader, now Prime Minister Justin Trudeau ("Prime Minister Trudeau") caused Dr. Sherman and Apotex Inc. to violate the *Lobbyists' Code of Conduct* ("*Lobbyists' Code*" – which is established under the *Lobbying Act* (R.S.C., 1985, c. 44 (4th Supp.)).

The application seeks an order quashing the Decision because:

1. A reasonable apprehension of bias exists on the part of the Lobbying Commissioner in making the Decision given that she was appointed by Order in Council 2017-1564 dated December 14, 2017 of the Governor-in-Council ("Trudeau Cabinet") on the recommendation of the Prime Minister after a process that was secretive and controlled by the Office of the Prime Minister, and that failed to consult with opposition party leaders as required under subsection 4.1(1) of the *Lobbying Act*, and also given that her Decision concerned a situation involving the Prime Minister;
2. a reasonable apprehension of bias also exists on the part of the Lobbying Commissioner due to public statements she has made concerning lobbyists and lobbying;
3. 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 "*Cofl Act*"), which together prohibit office holders like the Lobbying Commissioner from participating in or making decisions when they have an opportunity to improperly further another person's private interests;
4. the *Cofl Act* gives rise to a legitimate expectation that the Lobbying

Commissioner would recuse herself from making the Decision, and;

5. the Lobbying Commissioner erred in fact and 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* as well as all relevant laws, including the *Lobbying Act* and its regulations" and to investigate whenever there is reason to believe an investigation is needed to ensure compliance;

THE APPLICANT MAKES APPLICATION FOR:

1. An order quashing the Lobbying Commissioner's Decision of January 24, 2018 and substituting its own decision directing the Lobbying Commissioner to continue the investigation of the Dr. Sherman/Apotex situation;
2. In the alternative, an order quashing the Lobbying Commissioner's Decision of January 24, 2018 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 appointment by the Trudeau Cabinet of Nancy Bélanger for her first seven-year term as the new Lobbying Commissioner created a reasonable apprehension of bias for the Lobbying Commissioner when making the Decision about a situation involving Prime Minister Trudeau because:
 - (a) the Trudeau Cabinet controlled the selection process, including establishing a partisan appointment advisory committee made up only of the Director of Appointments for the Prime Minister, the Chief of Staff to the Treasury Minister, one Treasury Board Secretariat staff person, and two Privy Council staff persons;

- (b) Prime Minister Trudeau recommended her appointment, and;
 - (c) the Trudeau 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, as required under subsection 4.1(1);
2. Representatives of the Conservative Party and the New Democratic Party both made several public statements that the Cabinet had not consulted with them before making the appointment of the new Lobbying Commissioner;
 3. Prime Minister Trudeau choosing Nancy Bélanger as Lobbying Commissioner to make the Decision is analogous to a situation of Prime Minister Trudeau choosing the judge to hear a case concerning whether he was involved in a situation that violates a federal law;
 4. 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."
 5. The Prime Minister did not issue a recusal statement concerning the appointment of the Nancy Bélanger as the new Lobbying Commissioner even though through the entire time period of the appointment process the Lobbying Commissioner was investigating Dr. Sherman's August 26, 2015 fundraising event for the Liberal Party of Canada that was attended by then-Liberal Party Leader, now Prime Minister Trudeau;
 6. 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 has a conflict of interest concerning any matters that come before her that involved the Prime Minister;
 7. When testifying before the House of Commons Standing Committee on Access to Information, Privacy and Ethics on December 6, 2017, Nancy Bélanger stated that "Canadians need to understand that lobbying is okay; it's a good thing."

8. On February 5, 2018, Lobbying Commissioner Bélanger posted a message on her Office's website that, among other things, stated "I have confidence in lobbyists' willingness to work in compliance with the established rules. I will work collaboratively with lobbyists..." and that the tenth anniversary of the Office in June 2018 was an opportunity to "renew our commitment to working with lobbyists, [and] public office holders."
9. Given the above, there is a reasonable apprehension of bias on the part of the Lobbying Commissioner in making the January 24, 2018 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 improperly further another person's private interests";
11. The Lobbying Commissioner's Decision was an opportunity to further Prime Minister Trudeau's private interests as he has an interest in never being found to have participated in a situation and relationship with a lobbyist that violates a federal law;
12. Given that Prime Minister Trudeau chose the Lobbying Commissioner, thereby creating a reasonable apprehension of bias on the part of the Lobbying Commissioner, it was improper for her to participate in making the Decision that affected Prime Minister Trudeau's private interests.
13. 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*

14. 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 fact, and in law

15. On November 4, 2016, Democracy Watch filed a complaint with the Lobbying Commissioner concerning the August 2015 fundraising event for

the Liberal Party of Canada hosted by Dr. Sherman and attended by then-Liberal Party Leader Justin Trudeau.

16. Democracy Watch then received a letter dated November 18, 2016 from the Office of the Lobbying Commissioner stating that its complaint had been "referred to the Investigations Directorate."
17. Democracy Watch was not contacted again by the Lobbying Commissioner concerning developments in the investigation of the complaint until it received the January 24, 2018 Decision.
18. Until he passed away in December 2017, Dr. Barry Sherman was Chairman of Apotex Inc., a privately held company which was registered until May 16, 2017 under the *Lobbying Act* to lobby the Prime Minister's Office and approximately 15 other federal government institutions;
19. Dr. Barry Sherman was listed as one of Apotex Inc.'s lobbyists in the Registry of Lobbyists when he hosted the August 26, 2015 fundraising event for the Liberal Party of Canada, and through to May 16, 2017;
20. 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";
21. 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;
22. 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";
23. Rule 8 of the *Lobbyists' Code* states: "A lobbyist shall not lobby a public office holder with whom they share a relationship that could reasonably be seen to create a sense of obligation."
24. Rule 9 of the *Lobbyists' Code* states: "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)."

25. 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";
26. On January 24, 2018, the Lobbying Commissioner made the Decision that stated, among other things:

"As you know, Dr. Sherman passed away in December 2017. Subsection 10.4(1.1) of the Lobbying Act provides me with the authority to cease an investigation if I believe there is a "valid reason for not dealing with the matter". In light of Dr. Sherman's passing, the purpose of the investigation to ensure his compliance with the Code can no longer be fulfilled.

Accordingly, I decided to cease the investigation into the allegation that Dr. Sherman was in breach of the Lobbyists' Code of Conduct (1997) in relation to the August 26, 2015 event."
27. 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."
28. In making the Decision to cease the investigation into Dr. Sherman's actions, the Lobbying Commissioner erred in fact and in law by ignoring that Democracy Watch's complaint alleged that Dr. Sherman's fundraising event for the Liberal Party caused not only Dr. Sherman but also Apotex Inc. to violate the *Lobbyists' Code*;
29. The Lobbying Commissioner erred in fact and in law by failing to take into account that Dr. Sherman's fundraising for the Liberal Party of Canada was a favour that created a sense of obligation and an appearance of a conflict of interest for Prime Minister Trudeau in his relationship with both Dr. Sherman and Apotex Inc, in violation of Rules 6 and 10.
30. The Lobbying Commissioner also erred in fact and in law by failing to take into account that not only Dr. Sherman's but also Apotex Inc.'s subsequent lobbying of the Office of the Prime Minister and other Trudeau Cabinet ministers through to May 2017 violated the Rule 8 and Rule 9 prohibitions on lobbying public office holders when they have a sense of obligation in their relationship with the lobbyist.
31. The Lobbying Commissioner also erred in law by failing to consider that Apotex Inc. violated the "Professionalism" principle in the *Lobbyists' Code*, the principle that requires upholding the highest ethical standards and

complying with the letter and spirit of the *Code*, by failing to prevent Dr. Sherman from holding the August 2015 fundraising event for the Liberal Party of Canada.

32. In addition, the Lobbying Commissioner erred in law by failing to consider the possibility that other Apotex Inc. executives, employees and or lobbyists may have been involved in organizing or assisting with the August 2015 fundraising event hosted by Dr. Sherman.
33. As well, the Lobbying Commissioner erred in law by failing to consider that Apotex Inc. executives, employees and/or lobbyists may have been involved in other fundraising events or other activities in support of the Liberal Party of Canada before and since the August 2015 event, especially given that Dr. Sherman was also involved in a November 2016 fundraising event for the Liberal Party, which the Lobbying Commissioner knew about before making her Decision.
34. The Lobbying Commissioner also erred in law by failing to take into account that, as a privately held company, Apotex Inc. is likely now controlled at least in part by Dr. Sherman's family, and that their private interests would align with his, and the sense of obligation that he created for Prime Minister Trudeau in his relationship with Apotex Inc. continues.
35. Overall, the Lobbying Commissioner's Decision erred in fact and in law by improperly interpreting and applying the requirements in subsection 10.4(1) of the *Lobbying Act* for conducting an investigation, as all that is required is a reason to believe that an investigation is needed to ensure compliance with the *Code* or *Act* – clear evidence of an actual violation is not required. Dr. Sherman's role in Apotex Inc., and his activities, created a clear reason to believe that an investigation was needed to ensure that Apotex Inc. complied with the *Code*.
36. In making the Decision to cease the investigation into the August 2015 fundraising event, the Lobbying Commissioner also erred in law by ignoring her mandate to ensure Apotex Inc. "conform[ed] fully with the letter and the spirit of the *Lobbyists' Code* as well as all relevant laws, including the *Lobbying Act* and its regulations";
37. 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";
38. 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

39. 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*;
40. 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;
41. The Lobbying Commissioner's January 24, 2018 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;
42. The Lobbying Commissioner, in making her Decision of January 24, 2018, 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;
43. 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;
44. 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 January 24, 2018 Decision was unreasonable and contrary to various statutory duties;
45. *Lobbying Act*, R.S.C., 1985, c. 44 (4th Supp.);
46. *Lobbyists' Code of Conduct*;

47. *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2;
48. *Federal Courts Act*, R.S.C., 1985, c. F-7;
49. *Federal Court Rules*, 1998, SORJ98-106, and;
50. 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 Lobbying Commission to send a certified copy of all documents related to the Lobbying Commissioner's January 24, 2018 Decision.

February 23, 2018

I HEREBY CERTIFY that the above document is a true copy of the original filed in the Court./

JE CERTIFIE que le document ci-dessus est une copie conforme à l'original déposé au dossier de la Cour fédérale.

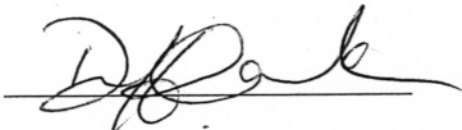
Filing date February 23, 2018
Date de dépôt

February 23, 2018

Dated
Fait le



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