

Court File No.:

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: August , 2020

Issued by:

(Registry Officer)

Address of local office:

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APPLICATION

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

The decision (the “Decision”) was in the form of a report entitled *Investigation Report: Benjamin Bergen, Council of Canadian Innovators* by the Commissioner of Lobbying (“Commissioner”) dated March 2020, and tabled in Parliament on March 12, 2020.

The Decision was one of two rulings on the petition Democracy Watch filed with the Commissioner on July 12, 2017 concerning the lobbying activities of Benjamin Bergen and Dana O’Born of the Council of Canadian Innovators (“CCI”) who both worked in senior roles on Chrystia Freeland’s 2015 federal election campaign, and from spring 2016 until October 2017 both held senior roles on the executive of Ms. Freeland’s electoral district association. After the 2015 election, Chrystia Freeland was appointed Minister of International Trade (“Minister Freeland”). The CCI then lobbied Minister Freeland’s staff, her Parliamentary Secretary David Lametti and his staff, and officials in her department. Democracy Watch’s petition requested that the Commissioner investigate and rule on whether the actions of Mr. Bergen and Ms. O’Born violated Rules 6, 7, 8 or 9 of the *Lobbyists’ Code of Conduct* (“*Lobbyists’ Code*”) which collectively prohibit lobbyists from lobbying a public office holder if the lobbyist has been involved in significant political activities that assisted the office holder, has a relationship that creates a sense of obligation on the part the office holder, or puts the office holder in a conflict of interest. The Commissioner ruled that Mr. Bergen did not violate any rules of the *Lobbyists’ Code*.

The application seeks an order quashing the Decision because:

1. A reasonable apprehension of bias exists on the part of the Lobbying Commissioner Nancy Bélanger 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 Trudeau Cabinet, and that failed to consult with opposition party leaders as required under subsection 4.1(1) of the *Lobbying Act*, an appointment decision in which Minister Freeland participated;
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. the Commissioner’s reasonable apprehension of bias gives rise to a legitimate expectation that the Lobbying Commissioner would recuse

herself from making the Decision;

4. the Lobbying Commissioner erred in fact and in law in concluding that Mr. Bergen did not lobby Minister Freeland, and erred in law in concluding that Mr. Bergen did not violate Rules 6, 7, 8 and 9 of the *Lobbyists' Code*, and the "Respect for democratic institutions" and "Integrity and honesty" Principles of the *Code*, by lobbying Minister Freeland, and;
5. the Lobbying Commissioner erred in law and the Decision was patently unreasonable given the rules in the *Lobbyists' Code* that require the senior officer of any organization to ensure the company complies with the *Code*, and given that 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" 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";

THE APPLICANT MAKES APPLICATION FOR:

1. An order quashing the Lobbying Commissioner's Decision of March 12, 2020 and substituting its own decision directing the Lobbying Commissioner to find that Mr. Bergen violated the "Respect for democratic institutions" and "Integrity and honesty" Principles, and Rules 6, 7, 8 and 9, of the *Lobbyists' Code of Conduct* by lobbying Minister Freeland;
2. In the alternative, an order quashing the Lobbying Commissioner's Decision of March 12, 2020 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 “*Co/I 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 Mr. MacDonald’s August 25, 2014 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 March 12, 2020 Decision.

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

10. On July 12, 2017, Democracy Watch sent a letter to then-Commissioner of Lobbying Karen Shepherd that, in part, requested that the Commissioner recuse herself from ruling on the situation set out in the letter given the Commissioner had been handpicked through a process controlled by the Governor in Council (“GIC”);
11. On April 20, 2018, Democracy Watch sent a letter to new Commissioner of Lobbying Nancy Bélanger that requested that the Commissioner recuse herself from ruling on all the situations about which Democracy Watch had filed petitions requesting investigations given the Commissioner had been handpicked through a process controlled by the Governor in Council (“GIC”);
12. On April 24, 2018, Commissioner Bélanger sent a letter to Democracy Watch stating that she would not recuse herself from ruling on any of the situations, including the situation at issue in this proceeding;
13. The public, including individual stakeholders whose interests may be affected by the Lobbying Commissioner’s Decision, have a legitimate expectation that the Lobbying Commissioner would recuse herself from making the Decision given the Commissioner reasonable apprehension of bias.

C. The Lobbying Commissioner erred in law

14. On July 12, 2017, Democracy Watch filed a petition with the Commissioner of Lobbying (“Commissioner”) requesting 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 of Minister Freeland and officials in her ministry, and whether Mr. Bergen and Ms. O’Born’s actions or the actions of anyone at CCI violate Rules 6, 7, 8 or 9 of

the Lobbyists' Code of Conduct;

15. On July 20, 2017, then-Commissioner of Lobbying Karen Shepherd sent a letter to Democracy Watch acknowledging receipt of its petition and directing it to contact “Colleen Martin, Senior Investigator” with any further information about the situation;
16. As set out on page 8 of the Decision, Mr. Bergen was the manager of Chrystia Freeland’s constituency office as a Member of Parliament (“MP”) from November 2013 until March 2016, other than during the fall of 2015 when he was her re-election co-campaign manager;
17. As set out on page 9 of the Decision, Mr. Bergen was a Director on the Executive of Minister Freeland’s electoral district association from May 22, 2016 until October 12, 2017;
18. As set out on page 11 of the Decision, in March 2016 Mr. Bergen became the Executive Director of CCI, and subsequently a registered in-house lobbyist for CCI, and CCI was registered to lobby Global Affairs Canada, which encompasses the Ministry of International Trade, the Ministry of Foreign Affairs, and the Ministry of International Development, during the time Chrystia Freeland was the Minister of International Trade from November 4, 2015 until January 10, 2017;
19. As set out on page 15 of the Decision, on November 16, 2016, Ms. O’Born of CCI sent a letter co-signed by Mr. Bergen to Parliamentary Secretary Lametti following up on an October 20, 2016 meeting of Ms. O’Born and others from CCI lobbying Mr. Lametti and Megan Buttle, Special Assistant to Mr. Lametti in his capacity as Parliamentary Secretary to Minister Freeland. The letter stated that Mr. Lametti had agreed to regular meetings with CCI;
20. Then, as also set out on page 15 of the Decision, Ms. O’Born sent an email following up on the letter to Ms. Buttle on November 23, 2016, and Ms. Buttle 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;
21. As set out on pages 16-17 of the Decision, Mr. Bergen arranged and attended lobbying meeting with Mr. Jim Balsillie, Chair of CCI, and Parliamentary Secretary Lametti on December 7, 2016;
22. As set out on page 21 of the Decision, between October 2016 and January 2017, CCI reported four communications 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;

23. The Commissioner erred in law in finding that these lobbying actions by Mr. Bergen and CCI did not violate Rule 6 of the *Lobbyists' Code* which prohibits a lobbyist from proposing or undertaking any action that would place a public office holder in a real or apparent conflict of interest. Given Mr. Bergen's past political activities on behalf of Minister Freeland and his ongoing political activities on behalf of her electoral district association, his and CCI's lobbying of Parliamentary Secretary Lametti, Special Assistant Buttle, Minister Freeland's Policy Advisor Yorke and Assistant Deputy Minister Bincoletto, all of whom serve Minister Freeland and have roles in the decision-making process and activities of the Ministry of International Trade, placed Minister Freeland in an apparent conflict of interest;
24. The Commissioner also erred in finding that these lobbying activities by Mr. Bergen and CCI did not violate Rule 9 of the *Lobbyists' Code* which states that 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 or, if the person is an elected official, their staff for a specified period. The Commissioner erred in law in concluding that Rule 9 only covers the political activities of registered lobbyists, and also erred in law in concluding that Mr. Bergen's lobbying of Parliamentary Secretary Lametti, Special Assistant Buttle, Minister Freeland's Policy Advisor Yorke and Assistant Deputy Minister Bincoletto, all of whom serve Minister Freeland and have roles in the decision-making process and activities of the Ministry of International Trade, did not constitute lobbying Minister Freeland;
25. The Commissioner also erred in law by failing to consider, let alone rule on, whether Mr. Bergen violated Rules 7 and 8 of the *Lobbyists' Code* which prohibits a lobbyist from arranging for another person a meeting with a public office holder (Rule 7) or lobbying a public office holder (Rule 8) when the lobbyist and office holder "share a relationship that could be reasonably seen to create a sense of obligation." Given Mr. Bergen's past political activities on behalf of Minister Freeland and his ongoing political activities on behalf of her electoral district association, his arranging of the meeting between Jim Balsillie, Chair of CCI, and Parliamentary Secretary Lametti, and his lobbying of Mr. Lametti, Special Assistant Buttle, Minister Freeland's Policy Advisor Yorke and Assistant Deputy Minister Bincoletto, all of whom serve Minister Freeland and have roles in the decision-making process and activities of the Ministry of International Trade, was effectively lobbying of Minister Freeland;
26. The Commissioner also erred in law by failing to consider, let alone rule on, whether Mr. Bergen had violated the "Respect for democratic institutions" and "Integrity and honesty" Principles of the *Lobbyists' Code*;
27. In making the Decision, the Lobbying Commissioner erred in law by failing to take into account the Introduction to the *Lobbyists' Code* which 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”;

28. The Lobbying Commissioner also erred in law by failing to take into account the “Professionalism” Principle of the *Lobbyists’ Code* that 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”;
29. Given the above, the Lobbying Commissioner’s Decision is patently unreasonable.

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

30. 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*;
31. Democracy Watch has standing to bring the present application as it filed the petition with the Lobbying Commissioner that resulted in 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;
32. The Lobbying Commissioner, in making her Decision of March 12, 2020, 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 recuse herself;
33. Therefore, the Lobbying Commissioner, 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;
34. 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 March 12, 2020 Decision was unreasonable and contrary to various statutory duties;

35. *Lobbying Act*, R.S.C., 1985, c. 44 (4th Supp.);
36. *Lobbyists' Code of Conduct*;
37. *Federal Courts Act*, R.S.C., 1985, c. F-7;
38. *Federal Court Rules*, 1998, SORJ98-106, and;
39. 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 Office of the Commissioner of Lobbying to send a certified copy of all documents related to the Commissioner's March 29, 2019 Decision.

August 7, 2020



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