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F I L E D	FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE July 07, 2023 07 juillet 2023 I Laviolette-Duval
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Court File No. A-

FEDERAL COURT OF APPEAL

BETWEEN:

DEMOCRACY WATCH

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at *Ottawa*.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

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 APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

(Date)

Issued by: _____
(Registry Officer)

Address of local office: _____

TO: ATTORNEY GENERAL OF CANADA
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Counsel for the Respondent

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the Judgement of Justice Angela Furlanetto (the “Application Judge”) dated June 9, 2023 which dismissed the Appellant’s Applications for Judicial Review seeking to set aside, and return for reconsideration, two decisions of the Commissioner of Lobbying (the “Commissioner”), and which awarded costs to the Respondent.

THE APPELLANT ASKS that:

1. The Judgment of the Application Judge be set aside;
2. An Order that both decisions of the Commissioner be set aside and returned for reconsideration;
3. No costs be awarded in this Appeal; and
4. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

Background

1. The Appellant, Democracy Watch, brought two Applications for Judicial Review of decisions made in two reports (the “Reports”) issued by the Commissioner of Lobbying (the “Commissioner”) in March 2020. The Commissioner’s Reports found that lobbyists Benjamin Bergen and Dana O’Born did not breach the *Lobbying Act* or the *Lobbyists’ Code of Conduct* (the “*Lobbyists’ Code*”) by lobbying then-Minister of International trade, Chrystia Freeland.
2. The Appellant filed petitions with the Commissioner concerning the two lobbyists’ actions in July 2017 and requested an investigation into whether the lobbyists had violated the *Lobbying Act* or *Lobbyists’ Code*. The actions of the lobbyists that led to the Applicant filing petitions are summarized as follows:
 - a. Mr. Bergen was the manager of Minister Freeland’s constituency office as a Member of Parliament (“MP”) from November 2013 until March 2016, with the exception of

- the Fall of 2015 when he was Minister Freeland's re-election co-campaign manager. Additionally, he was a Director on the Executive of Minister Freeland's electoral district association ("EDA") from May 2016 until October 2017.
- b. Ms. O'Born was co-campaign manager for Minister Freeland's 2015 re-election campaign. Additionally, she was Vice-President of Election Readiness on the Executive of Minister Freeland's EDA from May 2016 until October 2017.
 - c. In March 2016, Mr. Bergen became the Executive Director of the Council of Canadian Innovators ("CCI") and, in July 2016, Ms. O'Born became the Director of Policy for CCI. Both subsequently became registered in-house lobbyists for CCI, which 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 this time, Minister Freeland was the Minister of International Trade (from November 4, 2015 until January 10, 2017).
 - d. The Commissioner's office advised Mr. Bergen and Ms. O'Born that, to comply with Rule 9 of the *Lobbyists' Code*, they could not lobby Minister Freeland or her staff for five years.
 - e. Then-Minister of International Trade Freeland was responsible for the Canada Export Program ("CEP"), which was coordinated out of her ministerial office. At the time, CCI lobbied various people within the Ministry of International Trade for changes to the CEP.
 - f. On October 13, 2016, Ms. O'Born communicated with Gillian Nycum, Assistant to Minister Freeland's Parliamentary Secretary, David Lametti, in his role as MP. On October 17, 2016, Ms. O'Born communicated with Megan Buttle, Special Assistant to Mr. Lametti and one of Minister Freeland's exempt staff. These communications concerned arranging a meeting on October 20, 2016 between members of CCI and Mr. Lametti.
 - g. On November 16, 2016, Ms. O'Born sent a letter co-signed by Mr. Bergen to Parliamentary Secretary Lametti following up on an October 20, 2016 meeting where Ms. O'Born and others from CCI had lobbied Mr. Lametti and Ms. Buttle. The letter stated that Mr. Lametti had agreed to regular meetings with CCI.
 - h. On November 23, 2016, Ms. O'Born emailed Ms. Buttle to follow up on the letter. On

November 24, 2016, Ms. Buttle responded and copied Emily Yorke, one of Minister Freeland's policy advisors.

- i. Mr. Bergen arranged and attended a lobbying meeting with Mr. Jim Balsillie, Chair of CCI, and Parliamentary Secretary Lametti on December 7, 2016.
- j. Between October 2016 and January 2017, CCI reported four lobbying communications in the federal Registry of Lobbyists concerning trade issues with public servants at Global Affairs Canada, including with Susan Bincoletto, Assistant Deputy Minister, International Business Development.

Grounds of Application for Judicial Review

3. The Appellant Democracy Watch brought an Application for Judicial Review on the grounds that the Commissioner unreasonably interpreted and applied Rules 6 and 9 of the *Lobbyists' Code*.

4. Rule 6 of the *Lobbyists' Code* provides that:

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

5. The Commissioner unreasonably interpreted and applied Rule 6 by:

- a. Improperly defining ministerial responsibility; and
- b. Applying an unreasonably narrow definition of conflict of interest by interpreting apparent and real conflict of interest to mean the same thing. This led the Commissioner to apply the test to determine a real conflict of interest when determining if the lobbyists had placed Minister Freeland in an apparent conflict of interest, including by requiring Minister Freeland to have known about Mr. Bergen's and Ms. O'Born's lobbying for CCI, and to have exercised a power, duty, or function that favoured CCI, and by reaching conclusions based on detailed internal government information gathered during the Commissioner's almost three-year review and investigation instead of reaching conclusions based on how the situation would appear to a member of the public informed of the key summary facts.

6. Rule 9 of the *Lobbyists' Code* provides 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 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).

7. The Commissioner unreasonably interpreted and applied Rule 9 by:
 - a. Unreasonably concluding that Mr. Bergen and Ms. O’Born did not lobby Minister Freeland, a conclusion the Commissioner reached by ignoring the definition of ministerial responsibility and by ignoring the definition of lobbying in the *Lobbying Act*;
 - b. Ignoring that Mr. Bergen and Ms. O’Born lobbied Minister Freeland’s staff including Ms. Buttle and Ms. Yorke; and
 - c. Unreasonably defining “staff” and “office(s)” to exclude a Parliamentary Secretary from the definition of “staff” in a minister’s “office”.

8. The Application Judge dismissed the Application for Judicial Review on June 9, 2023.

Grounds of Appeal

9. The Appellant asks that the Judgment of the Application Judge be set aside, and for an Order that both decisions of the Commissioner be set aside and returned for reconsideration, because the Application Judge erred in law by:
 - a. Finding that the Commissioner’s interpretation and application of Rule 6 was reasonable. The Application Judge improperly applied the test for an apparent conflict of interest by actually applying the test for a real conflict of interest and by failing to properly consider the context of the scheme and objects of the *Lobbying Act* and *Lobbyists’ Code* when interpreting Rule 6.
 - b. Finding that the Commissioner’s interpretation and application of Rule 9 was reasonable. The Application Judge failed to properly consider the context of the scheme and objects of the *Lobbying Act* and *Lobbyists’ Code* when interpreting the meaning of “lobby” and “that person” and “staff” in Rule 9. In particular, the Application Judge erred in restricting the meaning of “lobby that person” to Minister Freeland, thus ignoring the concept of ministerial responsibility, and in placing too much weight on

the plain meaning of the words in Rule 9 to distinguish between “elected officials” and “staff” in determining that Mr. Lametti was not considered “staff”.

10. The Appellant Democracy Watch also appeals the award of costs in the Federal Court decision on the basis that the litigation was brought in the public interest, and the Application Judge erred by not considering and applying the test for awarding costs in public interest litigation before awarding costs against Democracy Watch.

July 6, 2023



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