Federal Court  Cour fédérale

Date: 20230620

Dockets: T-915-20
T-916-20

Citation: 2023 FC 825

Toronto, Ontario, June 20, 2023

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

DEMOCRACY WATCH CANADA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

PUBLIC JUDGMENT AND REASONS
(Identical to the Confidential Judgment and Reasons issued on June 9, 2023)

[1] This Judgment is in respect of two applications for judicial review of decisions [Decisions] made in two reports issued by the Commissioner of Lobbying of Canada [Commissioner] from March 2020 [Reports]. The Reports found that two in-house organization lobbyists employed by the Council of Canadian Innovators [CCI], Benjamin Bergen and Dana O'Born, did not contravene Rules 6 and 9 of the conflict of interest provisions of the *Lobbyists'*

Code of Conduct (2015)[Code] by attempting to lobby the then Minister of International Trade, Chrystia Freeland or her staff members.

[2] The report for Mr. Bergen is the decision under review in Court file T-915-20 and the report for Ms. O'Born is the decision under review in Court file T-916-20.

[3] As discussed further below, in my view the Applicant has not established that the Commissioner unreasonably interpreted the Code, or that her analysis lacked justification, transparency or intelligibility. As such, I find that the applications should be dismissed.

I. Background regarding the Code

[4] Subsection 10.2(1) of the *Lobbying Act,* RSC, 1985, c 44 (4th Supp) [Act] provides the Commissioner with authority to develop the Code. As stated in subsection 10.2(4) of the Act, the Code is not a statutory instrument for the purposes of the *Statutory Instruments Act* RSC, 1985, c S-22. However, subsections 10.2(2)-10.2(4) of the Act require that the Code be developed in consultation with interested parties, that it be referred to a Committee of the House of Commons prior to being published, and that it be published in the *Canada Gazette.* Although breaches of the Code are not sanctioned by charges and penalties, lobbyists must comply with the Code and suspected breaches are to be brought to the Commissioner's attention: section 10.3 of the Act; Code, Introduction; *Makhija v Canada (Attorney General),* 2010 FCA 342 at para 7.

[5] The introduction to the 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." It describes the Code as complementing the registration of lobbyist requirements of the Act.

[6] The introduction to the Code refers to its preamble as stating its purpose and situating the Code in its broader context. The preamble of the Code states as follows:

> The *Lobbying Act* is based on four principles;
>
> - Free and open access to government is an important matter of public interest;
> - Lobbying public office holders is a legitimate activity;
> - It is desirable that public office holders and the public be able to know who is engaged in lobbying activities; and
> - A system for the registration of paid lobbyists should not impede free and open access to government.
>
> The *Lobbying Act* provides the Commissioner with the authority to develop and administer a code of conduct for lobbyists. The Commissioner has done so, with these four principles in mind. The *Lobbyists' Code of Conduct* is an important instrument for promoting public trust in the integrity of government decision making. The trust that Canadians place in public office holders to make decision in the public interest is vital to a free and democratic society.

[7] The Commissioner investigates potential breaches of the Code under subsection 10.4(1) of the Act, which reads as follows:

> 10.4 (1) The Commissioner shall conduct an investigation if he or she has reason to believe, including on the basis of information received from a member of the Senate or the House of Commons, that an investigation is necessary to ensure compliance with the Code or this Act, as applicable.

[8] The Commissioner has authority to enforce the Code if there is an alleged breach. The Commissioner is required to prepare and report to the Speaker of the Senate and the Speaker of the House of Commons on an investigation after it is conducted as set out in section 10.5:

> 10.5 (1) After conducting an investigation, the Commissioner shall prepare a report of the investigation, including the findings, conclusions and reasons for the Commissioner's conclusions, and submit it to the Speaker of the Senate and the Speaker of the House of Commons, who shall each table the report in the House over which he or she presides forthwith after receiving it or, if that House is not then sitting, on any of the first fifteen days on which that House is sitting after the Speaker receives it.

[9] Rules 6 and 9 of the Code relate to conflicts of interest and state as follows:

Conflict of Interest	**Conflit d'intérêts**
6. A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest	**6.** Un lobbyiste ne doit proposer ni entreprendre aucune action qui placerait un titulaire d'une charge publique en situation de conflit d'intérêts réel ou apparent.
In particular:	**Plus particulièrement :**
[...]	**[…]**
Political activities	**Activités politiques**
9. 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).	**9.** Si un lobbyiste entreprend des activités politiques pour le compte d'une personne qui pourraient vraisemblablement faire croire à la création d'un sentiment d'obligation, il ne peut pas faire de lobbying auprès de cette personne pour une période déterminée si cette personne est ou devient un titulaire d'une charge publique. Si cette personne est un élu, le lobbyiste ne doit pas non plus faire de lobbying auprès du personnel du bureau dudit titulaire.

II. Factual Background

[10] Between July 25, 2017 and January 30, 2020, the Commissioner conducted administrative reviews and then investigations into whether Mr. Bergen and Ms. O'Born contravened Rules 6 and 9 of the Code by lobbying Chrystia Freeland or members of her ministerial staff after undertaking political activities on her behalf.

[11] Mr. Bergen had previously volunteered on Ms. Freeland's initial by-election campaign in 2013 and acted as co-campaign manager for her re-election campaign in 2015. He managed Ms. Freeland's constituency office when she was a Member of Parliament [MP] from January 2014 to March 2016. Mr. Bergen also played a limited role as a Director on the Executive of University-Rosedale Federal Liberal Association [FLA], the electoral district association for the riding represented in the House of Commons by Ms. Freeland from May 2016 until October 2017.

[12] Ms. O'Born was co-campaign manager for Ms. Freeland's 2015 federal re-election campaign. She was also the Vice-President of Election Readiness on the Executive of the University-Rosedale FLA from May 2016 until October 2017, although in a relatively inactive role.

[13] CCI, a business council of CEOs from Canadian technology companies, was registered to lobby Global Affairs Canada [Global Affairs] – which encompasses the Ministry of International Trade, the Ministry of Foreign Affairs, and the Ministry of International Development – during a

time that coincided with when Ms. Freeland was the Minister of International Trade from November 4, 2015 until January 10, 2017.

[14] Mr. Bergen was the Executive Director of CCI as of March 2016 and was identified as the responsible officer and a lobbyist employed by CCI in the Registry of Lobbyists. Ms. O'Born was hired in July 2016 as CCI's Director of Policy and became the Director of Strategic Initiatives in January 2017. She was also identified as a lobbyist employed by CCI in the Registry of Lobbyists.

[15] Before they began working for CCI in 2016, Mr. Bergen sought advice from the former Commissioner about who they were allowed to lobby in Ms. Freeland's office. The Office of the Commissioner of Lobbying [OCL] advised that to comply with the Code, Mr. Bergen and Ms. O'Born could not lobby Ms. Freeland or her staff for five years.

[16] In the Reports, the Commissioner found no evidence of Mr. Bergen or Ms. O'Born lobbying Ms. Freeland. However, between the time when Mr. Bergen and Ms. O'Born joined CCI and the time Ms. Freeland ceased to be Minister of International Trade, CCI reported in the Registry of Lobbyists four communications with Mr. David Lametti, who was then the Parliamentary Secretary to Ms. Freeland, or his staff:

A. On October 13, 2016, Ms. O'Born had a telephone call with Gillian Nycum, a member of Mr. Lametti's constituency (MP) staff;

B. On October 17, 2016, Ms. O'Born had a telephone call with Megan Buttle, Special Assistant to Mr. Lametti;

C. On October 20, 2016, Ms. O'Born arranged and attended CCI's lobby day for the clean technology industry, which was also attended by Ms. Buttle and Mr. Lametti;

D. On December 7, 2016, Mr. Bergen organized and attended a meeting with Mr. Lametti and the Chair of CCI to discuss "Intellectual Property and Internal Trade".

[17] On November 16, 2016, Ms. O'Born sent an email to Mr. Lametti attaching a letter co-signed by Mr. Bergen as Executive Director of CCI, along with the Chair and Vice-Chair of CCI. The letter referred to a proposal to establish a working group to regularly meet between the CCI CEOs and Mr. Lametti "and the ministry" on issues related to the Canada Export Program [CEP].

[18] On November 23, 2016, Ms. O'Born emailed Ms. Buttle requesting further information about the CEP in follow up to the October 20, 2016 meeting so that the CCI's member companies could provide feedback. On November 24, 2016, Ms. Buttle replied, indicating she had copied Emily Yorke of Ms. Freeland's office with the correspondence as she would be able to provide more information on CEP. Ms. Buttle informed the Commissioner that the email was forwarded to Ms. Yorke because the CEP was managed out of Ms. Freeland's Ministerial Office. The CCI did not respond to the email chain or otherwise pursue follow up.

[19] On December 7, 2016, Mr. Bergen arranged and attended a meeting with the Chair of CCI and Mr. Lametti. The December 7, 2016 meeting involved a discussion of intellectual property strategy and innovation policy. Ms. Nycum informed the Commissioner that CCI did not make any specific requests or proposals to Mr. Lametti during this meeting.

[20] The Commissioner found no evidence that Mr. Bergen or Ms. O'Born ever attempted to lobby Ms. Freeland herself. Further, the Commissioner found that neither Mr. Lametti in his capacity as Parliamentary Secretary, nor any member of his staff were "staff" of Ms. Freeland's office for the purpose of Rule 9.

[21] With respect to Rule 6, the Commissioner found that the evidence did not support a finding that either Mr. Bergen or Ms. O'Born placed Ms. Freeland in a real or apparent conflict of interest.

III. Issues and Standard of Review

[22] There are two issues raised by this application:

A. Did the Commissioner err in her interpretation and application of Rule 9 of the Code? and

B. Did the Commissioner err in her interpretation and application of Rule 6 of the Code?

[23] The Respondent also initially raised the issue of whether the Court had jurisdiction to hear this application. However, by the time of the hearing, it had conceded that in view of the finding of this Court in *Democracy Watch v Canada (Attorney General)*, 2021 FC 613, the Applicant had public interest standing and could seek judicial review of the Reports, which were made pursuant to section 10.5 of the Act. I agree that no issue of jurisdiction remains and that the present matter is distinguishable from the findings of the Court in *Democracy Watch v Canada (Attorney General)*, 2021 FCA 133, which dealt with a refusal to investigate a public request.

[24] The parties assert, and I agree, that the applicable standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*] at para 25; *Portnov v Canada (Attorney General),* 2021 FCA 171 at paras 26-27.

[25] In conducting reasonableness review, the Court must determine whether the decision under review is "based on an internally coherent and rational chain of analysis" that is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85-86; *Canada Post Corp* v *Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A reasonable decision, when read as a whole and taking into account the administrative setting, bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

[26] The standard of reasonableness applies to a decision-maker interpreting its home statute. It is not the role of the Court to undergo a *de novo* analysis: *Vavilov* at para 116. An approach to reasonableness review assumes that the approach taken will be consistent with the principles of statutory interpretation; the modern approach of which considers the words of a statute "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Vavilov* at paras 117-118, citing *Rizzo & Rizzo Shoes Ltd. (Re),* 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21 and *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 87. Omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis

causes the reviewing court to lose confidence in the outcome reached by the decision maker: *Vavilov* at para 122.

[27] In my view, these principles of review apply equally well to the Court's consideration of the issues at play.

IV. Analysis

A. *Did the Commissioner err in her interpretation and application of Rule 9 of the Code?*

[28] As a preliminary matter, I note that Rule 9 is identified as a more specific formulation of the general conflict of interest prohibition set out in Rule 6 of the Code. Rule 9 prohibits lobbyists whose political activities could reasonably be seen to create a sense of obligation in someone, from lobbying that person or their staff if that person is or becomes a public office holder.

[29] As the Commissioner conducted her analysis of Rule 9 before her analysis of Rule 6, I have dealt with Rule 9 first.

[30] In the Reports, the Commissioner found that the role of Mr. Bergen and Ms. O'Born serving on the Executive of Ms. Freeland's electoral district association at the time when they were in-house lobbyists for CCI could reasonably be seen as creating a sense of obligation on the part of Ms. Freeland within the meaning of Rule 9. However, the Applicant argues that the Commissioner erred in taking too limited an approach to the interpretation of "that person" and "staff" within the remainder of Rule 9 (reproduced below) so as to not find that the

communications with the Parliamentary Secretary, Mr. Lametti, and with Ms. Buttle constituted lobbying in contravention of Rule 9.

> 9. 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). [Emphasis added]

[31] The Applicant argues that a limited interpretation is inconsistent with the principles of statutory interpretation and ministerial responsibility. It asserts that the Commissioner placed too much emphasis on the literal meaning of these words, rather than considering their interpretation in the broader context of the scheme and objects of the Code, which is intended to enhance public confidence and trust in public office holders to make decisions in the public interest and not based on a private sense of obligation.

[32] The Applicant asserts that restricting the interpretation of "lobby that person" to Ms. Freeland herself fails to recognize the concept of ministerial responsibility.

[33] A set out in the Privy Council Office's *Guide for Parliamentary Secretaries*, a Parliamentary Secretary has no independent decision-making power. The main role of a Parliamentary Secretary is to "assist the minister in carrying out his or her duties in the House and to speak on the Government's behalf when issues arise in the absence of the minister". They cannot be delegated the minister's statutory powers, duties and functions.

[34] As Ms. Freeland remained the decision-maker and authority for the CEP during the time of lobbying, the Applicant asserts that lobbying the Parliamentary Secretary would inevitably result in the communications being passed on to the minister and could have only been for the purpose of lobbying Ms. Freeland.

[35] I agree that the Applicant's arguments on ministerial responsibility raise an issue for further consideration as identified by the Commissioner in her Observations relating to the Rule 9 analysis, reproduced below:

> In determining that Rule 9 has not been contravened in the circumstances of this investigation, I found that parliamentary secretaries do not qualify as "staff" in a minister's office for the purposes of Rule 9. However, parliamentary secretaries share the same political commitments as the minister they are appointed to assist.
>
> For this reason, I am of the view that the scope of application of Rule 9 should be expanded to include individuals, such as parliamentary secretaries, who do not qualify as political staff in the office of an elected official, but who share the same political commitments as the elected official under whose purview they operate. This issue should also be addressed as part of any further stakeholder consultations aimed at revising the Code.

[36] However, such concerns do not render the decision unreasonable. The Applicant's arguments do not overcome the plain reading of Rule 9. While the scheme and objects of the Act must be considered, it cannot be considered devoid of the plain text of the Code. In my view, it was reasonable for the Commissioner to interpret "that person" as referring to Ms. Freeland only. This interpretation is not only consistent with the ordinary meaning of those words, but also gives effect to the remainder of Rule 9, which refers to that same person as being the public office holder (with whom lobbying should not be directed) and includes express and separate mention of "staff" in the person's office.

[37] Similarly, in my view it was reasonable for the Commissioner to consider the plain meaning of the words in Rule 9 to distinguish between "elected officials" and "staff" when determining whether Mr. Lametti could be included in the interpretation of "staff".

[38] As noted by the Commissioner, as an MP, Mr. Lametti was "an elected official in his own right with staff of his own, both in his parliamentary and constituency offices in connection with his role as [MP] as well as in support of his former role as Parliamentary Secretary". Although the role of the Parliamentary Secretary is to assist a minister as directed by the minister, the minister does not have authority over the terms and conditions of the Parliamentary Secretary's appointment as it would for staff.

[39] The Applicant's disagreement with the interpretation of the meaning of "staff" does not make the interpretation unreasonable.

[40] The Applicant argues that even if Mr. Lametti is not recognized as Ms. Freeland's staff for the purposes of Rule 9, Ms. Buttle should be so recognized. It refers to the email exchanges between Ms. O'Born and Ms. Buttle in October and November 2016, one of which attached a letter co-signed by Mr. Bergen, and another that was forwarded to Ms. Yorke.

[41] In the Reports, the Commissioner acknowledged that Ms. Buttle, as Special Assistant to the Parliamentary Secretary, was an exempt member of Ms. Freeland's staff; however, the Commissioner found that for the purposes of the investigation, it was relevant to consider that

Ms. Buttle was identified as staff to Mr. Lametti only and was not publicly presented to Ms. O'Born as Ms. Freeland's staff:

> …Although the Special Assistant to the Parliamentary Secretary technically qualifies as an exempt staff position in the minister's office, this was not readily apparent to anyone, including Ms. O'Born, who, as demonstrated by the information collected in this investigation, was well aware, based on the advice she had received from the OCL, that she was precluded from lobbying Ms. Freeland or any of her staff. Ms. Buttle's title as well as the functions that she performed in her interactions with Ms. O'Born identified her as staff to Mr. Lametti in his former capacity as Parliamentary Secretary. In my view, it would be unfair to admonish Ms. O'Born for having relied on these outward indicators.

[42] I agree with the Respondent, as the Commissioner's role is to regulate the conduct of lobbyists when evaluating such conduct, it was reasonable for the Commissioner to consider what facts were known to the lobbyists and how Ms. Buttle had represented herself and the functions that she performed in her interactions with Ms. O'Born. In view of the scheme of the Code, it was reasonable to allow Ms. O'Born to rely on these outward indicators.

[43] The Commissioner notes the evidence that Ms. Buttle forwarded Ms. O'Born's email to Ms. Yorke because Ms. Yorke was the policy advisor in Ms. Freeland's office responsible for responding to inquiries about the CEP. Ms. O'Born indicated that she did not follow up with Ms. Yorke so as to adhere to the five-year ban on lobbying Ms. Freeland's staff. This was consistent with Ms. Buttle's statements that she did not recall any further replies on the email chain and Ms. Yorke's statement that she never met or interacted with anyone from CCI. There was no direct interaction between CCI and Ms. Yorke.

[44] In my view, contrary to the Applicant's submissions, the Reports set out a rational chain of analysis as to why the Commissioner found that Mr. Bergen and Ms. O'Born did not lobby Ms. Freeland or her staff, while still highlighting concerns in the Observations section as to how to handle interactions with the Parliamentary Secretary. The Applicant has not demonstrated a reviewable error in the Commissioner's Rule 9 analysis.

B. *Did the Commissioner err in her interpretation and application of Rule 6 of the Code?*

[45] I am similarly not persuaded that the Commissioner's interpretation and application of Rule 6 was unreasonable.

[46] To determine whether Mr. Bergen and Ms. O'Born contravened Rule 6 of the Code, the Commissioner evaluated whether their actions as in-house lobbyists employed by CCI placed Ms. Freeland in either a real or apparent conflict of interest.

[47] As neither the Code nor Act defined what constitutes a real or apparent conflict of interest, the Commissioner reviewed related federal and provincial legislation, including both the federal *Conflict of Interest Act*, SC 2006, c 9, s 2 [COIA] and British Columbia's *Members' Conflict of Interest Act*, RSBC 1996, c 287 [BC COIA] to understand how the concepts were defined in other jurisdictions. She also reviewed two commission of public inquiry reports: The Commission of Inquiry into the Facts and Allegations of Conflict of Interest Concerning the Honourable Sinclair M Stevens [Parker Commission]; and the Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney [Oliphant Commission].

[48] On the basis of this review, the Commissioner determined that for a real conflict of interest the public office holder must meet the following requirements: 1) they must be engaged in exercising or performing their official powers, duties or functions; 2) they must know that they have an opportunity to further their own private interests when they exercise their official powers, duties or functions; and 3) they must have an opportunity to further their private interests – or, the interests of someone with whom the public office holder shares close bonds – in exercising their official powers, duties or functions.

[49] In contrast, for an apparent conflict of interest to exist, the Commissioner found that the following considerations applied: 1) apparent conflicts of interest are reasonably perceived to exist, whether or not they do in fact actually exist; 2) they are judged on an objective standard as to whether a reasonable observer, informed of the relevant factual circumstances, would reasonably conclude that a conflict of interest exists; and 3) they relate to situations of perceived actual conflict that are not hypothetical or about mere possibility, but rather are definite, allowing a reasonable observer, informed of the relevant factual circumstances, to reasonably conclude that the public office holder's ability to exercise their official powers, duties and functions must have been affected by his or her private interests.

[50] The Commissioner found there was no evidence that Ms. Freeland "either knew about any of CCI's lobbying activities or was engaged or even contemplated engaging in the exercise of any official powers, duties or functions with respect to the subject matter of CCI's lobbying activities". As such, there was no basis to conclude that any of Mr. Bergen or Ms. O'Born's actions placed Ms. Freeland in a real conflict of interest.

[51] Further, the Commissioner found that there was no basis to reasonably conclude that the actions of Mr. Bergen or Ms. O'Born must have affected Ms. Freeland's ability to exercise her official powers, duties and functions or that their actions could reasonably be perceived to have placed Ms. Freeland in a situation of apparent conflict of interest. The Commissioner's finding on apparent conflict is the focus of the arguments before me on Rule 6.

[52] In her analysis of apparent conflict, the Commissioner summarized the background facts relating to Mr. Bergen and Ms. O'Born's political activities on behalf of Ms. Freeland, their inquiries regarding the applicable restrictions on lobbying, their communications and actions with Mr. Lametti and staff, and the resulting knowledge, actions and duties of Ms. Freeland.

[53] The Applicant argues that the Commissioner unreasonably narrowed the test for an apparent conflict of interest, conflating the test with that of an actual conflict of interest by focusing the analysis on the conduct of the minister as opposed to the conduct of the lobbyists themselves. It argues that the Code is meant to guide lobbying behaviour and consider whether behaviour could put a minister in an apparent conflict; it is not about whether a minister was actually in conflict or acted on a conflict. In taking the wrong focus, the Applicant argues that the Commissioner relied too heavily on the results of the investigation instead of considering what the public would actually know and perceive as a conflict, which it argues is at the heart of the Code and underlies the purpose of the regime.

[54] The Respondent argues that the positions taken by the Applicant are nothing more than disagreement. It asserts, and I agree, that the Applicant has not demonstrated that the

Commissioner's decision as it relates to Rule 6 is unreasonable in accordance with the principles set out in *Vavilov*.

[55] First, I do not consider the Commissioner's articulation of the test for apparent conflict of interest to be unreasonable, but rather to follow a rational chain of analysis.

[56] In the Reports, the Commissioner considers all of the source material and articulations of the definition of apparent conflict of interest, including from the Parker Commission, Oliphant Commission and BC COIA. The Commissioner notes that the BC COIA and Oliphant Commission each use a variation of the formulation of the objective standard: "a reasonable perception, which a reasonably well-informed person could properly have". The Commissioner further notes that:

> ... even the expanded definition of apparent conflict of interest recommended by Justice Oliphant (i.e., as including situations in which a public office holder's ability to exercise his or her official powers "will be, or must have been" affected by his or her private interests) does not apply to speculative situations ... the terms "will be affected" and "must be affected" are not conditional in nature – "will" and "must" are pointedly not "could" or "would".

[57] The Commissioner reasonably concludes from this that the articulation of the standard of apparent conflict of interest must be varied such that the objective standard is qualified by the understanding that an apparent conflict of interest cannot be determined to exist on the basis of mere suspicion or speculation. As such, the Commissioner does not accept that an apparent conflict would encompass situations in which it is merely possible that a public office holder's ability to exercise his or her official powers, duties or functions could be affected by their private interests as the Applicant proposes.

[58] While the Applicant prefers to emphasize certain parts of the analysis from the Parker Commission report, in my view these passages do not demonstrate a reviewable error. As noted by the Commissioner, even Justice Parker articulated the standard as being one that was definite, where an apparent conflict could "not be found unless a reasonably well-informed person could reasonably conclude as a result of the surrounding circumstances that the public official must have known about his or her private interest."

[59] Similarly, the Applicant's reliance on the decision in *Democracy Watch v Campbell*, 2009 FCA 79 is of limited assistance. That decision involved a different rule under the previous Lobbyists' Code, which did not distinguish between real or apparent conflicts of interest.

[60] Further, in my view, the Applicant has mischaracterized the Commissioner's reasoning and reference to Ms. Freeland's actions.

[61] In considering the purpose and scope of Rule 6, the Commissioner identified her distinct role in enforcing the Code, noting that "the [OCL] does not directly regulate federal public office holders" and as such, the focus of her analysis is on the "actions of the lobbyist[s] under investigation".

[62] The Commissioner further noted that "the [COIA] regulates the conduct of public office holders, including minister and parliamentary secretaries" and expressly stated that nothing in her Reports "either purports to comment or should be interpreted as commenting on the propriety of the conduct of any public office holders subject to the [COIA]".

[63] When determining whether there was an apparent conflict of interest under Rule 6, the fact that the Commissioner identified knowledge gained from the investigation about the information conveyed to Ms. Freeland and the functions and duties she performed, does not suggest that the Commissioner shifted her focus. As evident from the reasons provided, the Commissioner's focus remained on the lobbyists' actions. As stated in the Bergen Report:

> Taken together, I am of the view that a reasonable observer, informed of these factual circumstances, could not reasonably conclude that Mr. Bergen's actions – in co-signing a thank you letter seeking to set up regular meetings with Mr. Lametti that never materialized and attending a meeting that was reported in the Registry of Lobbyists, between Mr. Lametti and Mr. Balsillie – must have affected Ms. Freeland's ability to exercise her official powers, duties and functions.
>
> These actions on the part of Mr. Bergen cannot be reasonably perceived to have placed Ms. Freeland in a situation of apparent conflict of interest.
>
> Any sense of obligation or loyalty that a reasonable observer may reasonably perceive Ms. Freeland to have felt toward Mr. Bergen does not give rise to a reasonable perception that any of Mr. Bergen's actions in connection with CCI's attempt to establish regular meetings with Mr. Lametti placed Ms. Freeland in a conflict of interest situation.
>
> In reaching this conclusion, I would underscore that the question to be determined is not whether it is possible that such a sense of obligation or loyalty could in some abstract or hypothetical sense affect Ms. Freeland's ability to exercise her official ministerial powers, duties or functions in such a way as to further the private interests of CCI or CCI member companies, but rather whether a reasonable observer could reasonably conclude that any such sense of obligation or loyalty must have had such an effect in this particular set of factual circumstances.

[64] The same rationale was given in the report relating to Ms. O'Born where, in the first paragraph quoted above, the actions of Ms. O'Born were highlighted as follows:

> Taken together, I am of the view that a reasonable observer, informed of these factual circumstances, could not reasonably

> conclude that Ms. O'Born's actions – in having two logistical conversations with Mr. Lametti's political staff, in attending CCI's lobby day meeting with Mr. Lametti and in emailing Ms. Buttle a follow-up thank you letter seeking to set up regular meetings with Mr. Lametti that never materialized – must have affected Ms. Freeland's ability to exercise her official powers, duties and functions.

[65] As noted in the Reports, it was not necessary to consider whether a reasonable observer would reasonably conclude that Ms. Freeland's exercise of her official powers, duties and functions "*will be affected*" by any applicable private interest. It was already known that she did not exercise any official powers, duties or functions in respect of any items about which CCI communicated with Mr. Lametti during the time when she was Minister of International Trade. Likewise, it was known that she did not retain responsibility for any of the programs, policies, or services about which CCI communicated with Mr. Lametti when she became Minister of Foreign Affairs. The facts established that she was not affected by Mr. Bergen's and Ms. O'Born's actions.

[66] The Applicant argues that the detailed facts arising from the investigation, including the knowledge and duties of Ms. Freeland, would not be known to the public and should not have been considered when determining whether an apparent conflict existed. However, I agree with the Respondent that to view the factual circumstances as excluding details obtained through the investigation would be to render the scheme of the Act meaningless. Section 10.4(1) of the Act provides for an investigation to be conducted to assist the Commissioner in determining whether there has been a breach of the Code. The results of the investigation are accordingly intended to be used in the Commissioner's report and in its determination of whether the Code has been breached.

[67] Further, even without the information relating to Ms. Freeland's knowledge and duties, it would have been difficult to conclude that a reasonable person would have perceived an apparent conflict of interest, particularly where the communications and actions of Mr. Bergen and Ms. O'Born were found to be insufficient to establish lobbying of Ms. Freeland for the purposes of Rule 9.

[68] The Applicant notes the Observations made by the Commissioner, where she states that "by prohibiting lobbyists from placing federal public office holders in real and apparent conflicts of interest, Rule 6 requires the Commissioner of Lobbying to make conclusions that implicate the conduct of public office holders who may be subject to separate ethical regimes". While the Applicant seeks to use these comments to argue that these complications arise because of the Commissioner's erroneous approach, I am not persuaded by this argument. When the Observations are read as a whole, it is clear that the Commissioner understood that her role was confined to regulating the conduct of lobbyists and that their actions were her focus. Her comments merely recognize that facts arising from such investigations might overlap with inquiries others might be conducting.

[69] In my view, the approach taken by the Commissioner was not unreasonable. The reasons set out a rational chain of analysis in arriving at the conclusions reached. While the Applicant does not agree with the definition of apparent conflict applied by the Commissioner, this review is not one of correctness. The Applicant has not identified a reviewable error.

V. Conclusion

[70] For all of these reasons, the applications are dismissed.

[71] In light of the outcome of the applications, and the submissions made by the parties, costs shall be awarded to the Respondent in accordance with the middle of column III of the Federal Courts Tariff.

JUDGMENT IN T-915-20 AND T-916-20

THIS COURT'S JUDGMENT is that

1. The applications for judicial review are dismissed.

2. A copy of these Reasons shall be placed in each of Court file T-915-20 and T-916-20.

3. Costs are awarded to the Respondent in accordance with the middle of column III of the Federal Courts Tariff.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-915-20 AND T-916-20
STYLE OF CAUSE:	DEMOCRACY WATCH CANADA v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 6, 2022
JUDGMENT AND REASONS:	FURLANETTO J.
CONFIDENTIAL JUDGMENT AND REASONS ISSUED:	JUNE 9, 2023.
PUBLIC JUDGMENT AND REASONS ISSUED:	JUNE 20, 2023

APPEARANCES:

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Kirk Shannon	FOR THE RESPONDENT

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