



[2022] 2 F.C.R. D-27

ETHICS

Judicial reviews of Commissioner of Lobbying of Canada decisions finding Benjamin Bergen, Dana O’Born not contravening *Lobbyists’ Code of Conduct* (2015), rr. 6¹, 9² by attempting to lobby then Minister of International Trade, Chrystia Freeland or her staff members after undertaking political activities on her behalf — Mr. Bergen previously volunteering on Ms. Freeland’s initial by-election campaign in 2013, acting as co-campaign manager for her re-election campaign in 2015 — Managing Ms. Freeland’s constituency office when she was a Member of Parliament from January 2014 to March 2016 — Also playing limited role as a Director on Executive of electoral district association for riding represented in House of Commons by Ms. Freeland from May 2016 until October 2017 — Ms. O’Born was co-campaign manager for Ms. Freeland’s 2015 federal re-election campaign — Also vice-president of Election Readiness on Executive of Ms. Freeland’s electoral district association from May 2016 until October 2017 — CCI, business council of CEOs from Canadian technology companies, registered to lobby Global Affairs Canada, which encompasses Ministry of International Trade, Ministry of Foreign Affairs, and Ministry of International Development, during time that coincided with when Ms. Freeland was Minister of International Trade from November 4, 2015 until January 10, 2017 — Mr. Bergen was Executive Director of CCI as of March 2016, was identified as responsible officer, lobbyist employed by CCI in the Registry of Lobbyists — Ms. O’Born hired in July 2016 as CCI’s Director of Policy, became the Director of Strategic Initiatives in January 2017 — Also identified as a lobbyist employed by CCI in the Registry of Lobbyists — Between time when Mr. Bergen, Ms. O’Born joined CCI, time Ms. Freeland ceased to be Minister of International Trade, CCI reported in Registry of Lobbyists four communications with Mr. David Lametti, then Parliamentary Secretary to Ms. Freeland, or his staff — Commissioner found no evidence that Mr. Bergen or Ms. O’Born ever attempted to lobby Ms. Freeland herself — Further, Commissioner found 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 — With respect to rule 6, Commissioner found evidence did not support finding that either Mr. Bergen or Ms. O’Born placed Ms. Freeland in real or apparent conflict of interest — Whether Commissioner erred in interpretation, application of Code, rr. 6, 9 — Applicant arguing that Commissioner erred in taking too limited an approach to interpretation of “that person”, “staff” in rule 9 so as to not find that communications with Mr. Lametti, staff thereof constituting lobbying in contravention of rule 9 — Main role of 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” — Ms. Freeland remained the decision-maker and authority for the Canadian Export Program (CanExport) during the time of lobbying — Applicant therefore arguing that lobbying Parliamentary Secretary would inevitably result in communications being passed on to minister, could have only been for the purpose of lobbying Ms. Freeland — While these arguments on ministerial responsibility raising issue for further consideration as identified by Commissioner in her observations, such concerns not rendering Commissioner’s decision unreasonable — Reasonable for Commissioner to interpret “that person” as referring to Ms. Freeland only — This interpretation not only consistent with

¹ A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest.

² 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).

ordinary meaning of those words, but also giving effect to 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 — Also reasonable for Commissioner to consider plain meaning of words in rule 9 to distinguish between “elected officials” and “staff” when determining whether Mr. Lametti could be included in the interpretation of “staff” — As to Commissioner’s interpretation, application of rule 6, also not unreasonable — For apparent conflict of interest to exist, Commissioner found 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 — Commissioner found no evidence 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, Commissioner found no basis to conclude any of Mr. Bergen or Ms. O’Born’s actions placed Ms. Freeland in real conflict of interest, or that their actions 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 — Those findings not unreasonable — Commissioner reasonably concluded that articulation of standard of apparent conflict of interest must be varied such that objective standard is qualified by understanding that apparent conflict of interest cannot be determined to exist on basis of mere suspicion or speculation — Approach taken by Commissioner not unreasonable — Reasons set out rational chain of analysis in arriving at conclusions reached — Applications dismissed.

DEMOCRACY WATCH V. CANADA (ATTORNEY GENERAL) (T-915-20, T-916-20, 2023 FC 825, Furlanetto J., public reasons for judgment dated June 20, 2023, 24 pp.)