Office of the Commissioner of Lobbying of Canada
Commissariat au lobbying du Canada

INVESTIGATION REPORT

DANA O'BORN, COUNCIL OF CANADIAN INNOVATORS

MARCH 2020

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Preface

This report is submitted to the Parliament of Canada pursuant to section 10.5 of the Lobbying Act (Act) R.S.C., 1985, c. 44 (4th Supp.).

After conducting an investigation, the Commissioner of Lobbying prepares a report that includes findings, conclusions and reasons for the conclusions.

The Commissioner is required to submit the report to the Speaker of the Senate and the Speaker of the House of Commons. Each Speaker tables the report in the House over which they preside.

The Lobbying Act ensures the transparency of federal lobbying. It requires paid lobbyists to publicly register their lobbying activities and to report their communications with designated public office holders. The Lobbyists' Code of Conduct establishes the principles and rules of ethical behaviour expected from lobbyists.

THIS REPORT WAS TABLED BY:

Nancy Bélanger
Commissioner of Lobbying of Canada

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Executive summary

This Report follows an investigation conducted by the Office of the Commissioner of Lobbying (OCL) pursuant to section 10.4 of the Lobbying Act (Act) to determine whether Ms. Dana O'Born, a registered in-house organization lobbyist employed by the Council of Canadian Innovators (CCI), contravened the Lobbyists' Code of Conduct (Code). The investigation focused on whether Ms. O'Born contravened Rule 6 (Conflict of Interest) or Rule 9 (Political Activities) of the Code by lobbying the Honourable Chrystia Freeland or members of her ministerial staff after undertaking political activities on behalf of Ms. Freeland.

The investigation found no evidence that Ms. O'Born ever lobbied Ms. Freeland. However, while Ms. Freeland was Minister of International Trade, Ms. O'Born had two logistical telephone conversations to finalize arrangements in relation to CCI's lobby day meeting with the Honourable David Lametti in his former capacity as Parliamentary Secretary to the Minister of International Trade. One of these logistical conversations was with Ms. Gillian Nycum, a member of Mr. Lametti's constituency (MP) staff, on October 13, 2016. The other was with Ms. Megan Buttle, Special Assistant to Mr. Lametti, on October 17, 2016. Ms. O'Born also arranged and attended CCI's lobby day for the clean technology industry on October 20, 2016, which was attended by Mr. Lametti and Ms. Buttle. CCI reported these communications in the Registry of Lobbyists.

Rule 9 prohibits lobbyists from lobbying elected officials (or members of their staff) on whose behalf they have undertaken political activities. As the subject matter of this investigation engages Rule 9, which is identified as a more specific formulation of the general conflict of interest prohibition set out in Rule 6, the analysis began with the specific rule of conduct set out in Rule 9.

RULE 9

To determine whether Ms. O'Born contravened Rule 9, I needed to consider whether Ms. O'Born engaged in political activities on behalf of Ms. Freeland when she was a lobbyist that could be reasonably seen to create a sense of obligation and, if so, whether she lobbied Ms. Freeland or members of her staff.

Ms. O'Born undertook two types of political activities on behalf of Ms. Freeland. The first, acting as co-campaign manager of Ms. Freeland's re-election campaign in 2015, predated Ms. O'Born's employment as an in-house lobbyist for CCI. The second, sitting on the Executive of Ms. Freeland's Electoral District Association, overlapped with slightly more than 15 months of her employment as an in-house lobbyist for CCI (i.e., July 1, 2016 to October 12, 2017).

I found that Ms. O'Born's campaign-related activities and her activities on the Executive of Ms. Freeland's Electoral District Association could each be reasonably seen to create a sense of obligation on the part of Ms. Freeland.

Having made this determination, I then had to determine whether Ms. O'Born lobbied "staff in [Ms. Freeland's] office" in relation to the two logistical telephone conversations she had and the lobby day meeting she attended in October 2016. I found that Mr. Lametti and Ms. Nycum do not qualify as "staff" in Ms. Freeland's office for the purposes of Rule 9. I also found that Ms. Buttle was identified to Ms. O'Born as Special Assistant to Mr. Lametti in his capacity as Parliamentary Secretary. I therefore found that Ms. O'Born did not contravene Rule 9 in relation to these communications in which she participated.

RULE 6

With respect to Rule 6, I found no basis to conclude that Ms. O'Born placed Ms. Freeland in a real conflict of interest. There is no indication, based on the information collected in this investigation, that Ms. Freeland made any decisions or exercised any official powers, duties or functions in her capacity as Minister of International Trade in respect of any programs, policies or services within her ministerial portfolio that related to the subject matter of CCI's lobbying activities. There is also no indication that Ms. Freeland had any knowledge about any of CCI's lobbying activities.

I also found no basis to conclude that Ms. O'Born placed Ms. Freeland in an apparent conflict of interest. In my view, a reasonable observer, informed of the relevant factual circumstances, could not reasonably conclude that Ms. O'Born's actions – in having two logistical conversations with Mr. Lametti's political staff and in attending CCI's lobby day meeting, all of which were reported in the Registry of Lobbyists – must have affected Ms. Freeland's ability to exercise her official powers, duties and functions.

OBSERVATIONS

Although I determined that Rule 6 had not been contravened in the factual circumstances at issue in this investigation, I observed that the analysis required by Rule 6 raises concerns about the manner in which this provision is currently drafted.

My jurisdiction as Commissioner of Lobbying is confined to regulating the conduct of lobbyists. However, 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, including those overseen by the Senate Ethics Officer and the Conflict of Interest and Ethics Commissioner. These concerns with Rule 6 should be addressed as part of any future amendments to the Code, which will require stakeholder consultations as contemplated by the Lobbying Act. In doing so, it will be necessary to consider amending the rules of conduct to focus exclusively on the specific behaviours of lobbyists without importing the regime governing the ethical conduct of public office holders by implied reference.

In determining that Rule 9 had 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 future stakeholder consultations aimed at revising the Code.

Introduction

This report follows an investigation conducted by the Office of the Commissioner of Lobbying (OCL) pursuant to section 10.4 of the Lobbying Act (Act) to determine whether Ms. Dana O'Born, a registered in-house organization lobbyist employed by the Council of Canadian Innovators (CCI), contravened the Lobbyists' Code of Conduct (Code). The investigation focused, in particular, on whether Ms. O'Born contravened Rule 6 (Conflict of Interest) or Rule 9 (Political Activities) of the Code by lobbying the Honourable Chrystia Freeland or members of her ministerial staff after undertaking political activities on behalf of Ms. Freeland.

As set out in greater detail below, there is no evidence that any in-house lobbyists employed by CCI, including Ms. O'Born, have ever lobbied Ms. Freeland. However, between October and December 2016, while Ms. Freeland was Minister of International Trade,[1] CCI reported four communications with the Honourable David Lametti, then-Parliamentary Secretary to the Minister of International Trade,[2] and/or with members of Mr. Lametti's political staff.

In addition to determining whether Ms. O'Born engaged in political activities for Ms. Freeland that could reasonably be seen to create a sense of obligation, this investigation sought to understand the circumstances in which the communications that CCI reported having with Mr. Lametti and/or with members of Mr. Lametti's political staff took place, including whether Ms. O'Born was present for any of these communications.

The investigation also focused on whether Ms. O'Born's actions as a lobbyist placed Ms. Freeland in a real or apparent conflict of interest. This determination required the OCL to ascertain whether Ms. Freeland was ever debriefed about these communications as well as whether she ever made any decisions or exercised any official powers, duties or functions in her capacity as Minister of International Trade in relation to the subject matter of the communications that CCI had with Mr. Lametti and/or with members of his political staff during this period.

Background

On July 11, 2017, The Globe and Mail reported[3] that CCI, a national business council made up of CEOs from Canadian technology companies, had employed as in-house lobbyists three full-time staff members who had worked for Liberal politicians at either the federal or provincial level. In particular, this report noted that Mr. Benjamin Bergen, Executive Director of CCI, had worked as an executive assistant to Ms. Freeland when she was an opposition MP and that he had acted as Ms. Freeland's co-campaign manager during the 2015 federal election. The report also noted that Ms. O'Born, identified as CCI's Director of Policy, had acted as Ms. Freeland's official campaign manager during the 2015 election and that Mr. Patrick Searle, CCI's Director of Communications, had been a spokesperson for Liberal cabinet ministers in Ontario between 2012 and January 2017.

On July 12, 2017, then-Commissioner of Lobbying, Karen Shepherd, received a letter requesting that she investigate whether Ms. O'Born contravened the Code by lobbying Global Affairs Canada, which encompasses the ministries of International Trade, Foreign Affairs and International Development, after having played a senior management role in Ms. Freeland's federal election campaign in 2015.

Process

On July 25, 2017, former Commissioner Shepherd initiated an administrative review to determine whether Ms. O'Born had contravened any of her obligations under the Code, including whether she had contravened Rules 6 or 9 in light of her alleged political activities on behalf of Ms. Freeland.

On July 31, 2017, the OCL contacted Ms. O'Born to inform her that it had commenced an administrative review of this matter.

On August 2, 2017, the OCL conducted an in-person interview with Ms. O'Born. At this time, Ms. O'Born submitted a binder of documentation containing summaries of her work with the Government of Ontario, her experience as Ms. Freeland's co-campaign manager, her role with CCI and her interactions with the Department of International Trade. Ms. O'Born also submitted documentation pertaining to these summaries, including letters and email exchanges.

Between September 20 and October 4, 2017, the OCL interviewed the following witnesses:

- Mr. David Lametti, Member of Parliament for LaSalle-Émard-Verdun and Parliamentary Secretary to Minister Freeland in her capacity as Minister of International Trade from December 2015 until January 2017.
- Ms. Megan Buttle, Special Assistant to Mr. Lametti in his capacity as Parliamentary Secretary to the Minister of International Trade from August 2016 until January 2017; and
- Ms. Gillian Nycum, Special Assistant in Mr. Lametti's Parliamentary office from January 2016 through January 2017.

On March 21, 2018, I commenced an investigation on the basis that the information gathered to that point provided reason to believe that an investigation was necessary to ensure compliance with the Code. Ms. O'Born was subsequently notified that an investigation had been initiated to determine whether she had contravened Rules 6 or 9 of the Code by lobbying Ms. Freeland or staff in Ms. Freeland's office after engaging in political activities on behalf of Ms. Freeland.

On June 15, 2018, the OCL interviewed Ms. Freeland.

On July 25, 2019, I wrote to Ms. Freeland and Emily Yorke, a former policy advisor in Ms. Freeland's ministerial office when she was Minister of International Trade, to request that they each respond in writing by way of a sworn affidavit to a set of questions.

On August 17, 2019, Ms. Yorke responded to the OCL's questions by email. As her response was not in the form of a sworn affidavit, the OCL subsequently arranged to interview Ms. Yorke under oath. During this interview, which took place on September 30, 2019, the OCL confirmed Ms. Yorke's initial written answers.

On September 8, 2019, the OCL received Ms. Freeland's sworn affidavit.

On October 23, 2019, the OCL wrote to Susan Bincoletto, Canada's Ambassador to Switzerland, to request that she provide information about a communication CCI reported in the Registry of Lobbyists during the period covered by this investigation. Ms. Bincoletto had participated in this communication in her former capacity as Assistant Deputy Minister, International Business Development, Global Affairs Canada.

On December 5, 2019, Ms. Bincoletto responded to the OCL's request.

On December 20, 2019, after receiving undertakings of confidentiality from Ms. O'Born and her counsel, the OCL provided Ms. O'Born with a draft copy of the investigation report (without the observations) in order to obtain her views.

On January 30, 2020, Ms. O'Born responded and requested that the OCL correct her official title as "co-campaign manager" of Ms. Freeland's re-election campaign in 2015. This corrected title is reflected in this report.

Issues

This investigation focused on whether Ms. O'Born contravened Rule 6 (Conflict of Interest) or Rule 9 (Political Activities) of the Code by lobbying Ms. Freeland or members of her ministerial staff after undertaking political activities on behalf of Ms. Freeland.

Findings

MS. O'BORN'S POLITICAL ACTIVITIES

Co-campaign manager

In her interview, Ms. O'Born stated that, in September 2015, she took an unpaid leave of absence from her position in the office of the Ontario Minister of Transportation to act as the co-campaign manager, along with Mr. Bergen, of Ms. Freeland's successful re-election campaign in the re-organized riding of University-Rosedale in the 2015 federal election. Ms. O'Born noted that she became involved in Ms. Freeland's campaign after meeting Mr. Bergen through their respective political activities in Toronto and then discussing the campaign management opportunity with him and Ms. Freeland.

Ms. O'Born stated that, as co-campaign manager, she developed and executed overarching campaign strategy, leading a 15-member campaign team. She indicated that she also undertook marketing and outreach activities and organized speaking engagements for Ms. Freeland with potential voters, business organizations, residential groups, advocacy groups and other not-for-profit organizations.

During her interview, Ms. Freeland stated that she had first gotten to know Ms. O'Born through Mr. Bergen, who had volunteered on her first federal campaign in 2013 and subsequently worked in her constituency office. Ms. Freeland stated that Ms. O'Born joined her 2015 election campaign on Mr. Bergen's recommendation. She indicated that, during the campaign, she worked very closely with Ms. O'Born, who had done everything from knocking on constituents' doors to providing strategic advice. Ms. Freeland characterized the experience of working very closely together for many hours per day as "intense".

Ms. O'Born stated that she returned to her position in the office of the Ontario Minister of Transportation immediately following the federal election, which took place on October 19, 2015.

I would note that Ms. O'Born's political activities in respect of Ms. Freeland's successful election campaign in 2015 predated her role as an in-house lobbyist employed by CCI.

The University-Rosedale Federal Liberal Association

In her interview, Ms. O'Born confirmed that she served as the VP of Election Readiness on the Executive of the University-Rosedale Federal Liberal Association (FLA), the electoral district association for the riding represented in the House of Commons by Ms. Freeland.

Ms. O'Born stated that she was essentially a "placeholder" and indicated that she was not active in this position, which did not require her to be involved in any fundraising activities. She estimated that she had attended three FLA meetings after the 2015 federal election.

As set out in Ms. Freeland's sworn affidavit provided in response to the OCL's request for additional information, she confirmed that, as reflected in the minutes of the FLA's meetings,[4] Ms. O'Born was present for two meetings, one on June 11, 2016 and the other on September 12, 2017.

Ms. Freeland also confirmed that Ms. O'Born assumed her position as VP of Election Readiness on the Executive of the University-Rosedale FLA on May 22, 2016 and that she held this position until October 12. 2017, when a new Executive was elected.

This response is consistent with screen captures of the University-Rosedale FLA website saved by the OCL on July 31 and October 11, 2017. As reflected in these screen captures, whereas Ms. O'Born was listed as the VP of Election Readiness on the Executive of the FLA as of July 31, 2017, she was not listed among the candidates vying for positions on the FLA Executive in the election notice captured on October 11, 2017.

Taken together, Ms. O'Born's political activities in serving as the VP of Election Readiness on the Executive of the University-Rosedale FLA overlapped with her employment as an in-house lobbyist for CCI for a period of slightly more than 15 months (i.e., from July 1, 2016 to October 12, 2017). As such, Ms. O'Born was publicly identified as VP of Election Readiness on the Executive of the FLA for the riding represented by Ms. Freeland when, as set out in greater detail below, CCI reported communications with Mr. Lametti, Ms. Buttle and Ms. Nycum that took place in October 2016.

OCL ADVICE REGARDING MS. O'BORN'S PAST POLITICAL ACTIVITIES

In her interview, Ms. O'Born stated that, before she started her job with CCI in July 2016, she approached Ontario's Integrity Commissioner to inquire about her obligations under provincial lobbying rules. She also reported that Mr. Bergen contacted the OCL about any restrictions on Ms. O'Born's federal lobbying activities given her work on Ms. Freeland's 2015 re-election campaign. Among the supporting documents she provided, Ms. O'Born included a letter from the OCL, dated July 8, 2016, which reads in part as follows:

> Serving as campaign manager is a political activity that risks creating a sense of obligation which could reasonably be seen to place a public office holder in a conflict of interest. A

> former campaign manager for a minister should not lobby that minister, nor should he or she lobby that minister's office and staff.
>
> As per the Commissioner' Guidance for lobbyists regarding the application of Rule 9 of the Lobbyists' Code of Conduct – Political Activities, the sense of obligation towards a lobbyists created as a result of a lobbyist's political activities decreases over time. When a lobbyist has carried out political activities that pose a risk of creating a sense of obligation, the Commissioner is of the view that five years is a sufficient period of time to wait before lobbying the public office holder and/or his or her staff, in order to avoid creating a conflict of interest for that public office holder.

Ms. O'Born stated that she has not met with Ms. Freeland or written to her or her office staff since she started to work for CCI on July 1, 2016. She also stated that she understood that she was prohibited from doing so for five years. Ms. O'Born described her relationship with Ms. Freeland as professional and stated she has had essentially no communication with Ms. Freeland since the election campaign other than seeing her incidentally once or twice in Toronto.

In her written submissions, Ms. O'Born stated: "In accordance with the advice of the OCL, I have not engaged in any lobbying of Mrs. Freeland or her staff while at CCI. Furthermore, CCI's Conflict of Interest policy prohibits staff from any lobbying of previous direct employers for a period of five years."

COUNCIL OF CANADIAN INNOVATORS (CCI)

As set out on its website, the Council of Canadian Innovators describes itself as a "21st century business council uniquely made up of CEOs from Canada's fastest growing technology companies and is exclusively focused on helping high-growth Canadian technology firms scale-up globally." Founded in September 2015, CCI characterizes its mandate as seeking to "optimize the growth of Canada's innovation-based sector by ensuring Canadian tech leaders and public-policy leaders are working together to shape Canada's innovation agenda." In particular, CCI indicates that it "advocate[s] for policy that spurs innovation and helps domestic tech companies gain greater access to talent, capital and customers."

At present, CCI is comprised of 118 member CEOs from a diverse cross-section of Canadian technology companies.

CCI's Board of Directors consists of five members, including Jim Balsillie, Chair of CCI and John Ruffolo, Vice-Chair of CCI.[5]

CCI's website identifies six staff members, including Mr. Bergen (Executive Director) and Ms. O'Born (Director, Strategic Initiatives).

MS. O'BORN'S ROLE WITH CCI

In her interview, Ms. O'Born indicated that she was hired on July 1, 2016 as CCI's Director of Policy. In January 2017, she became CCI's Director of Strategic Initiatives, in which role she stated that she develops, leads and oversees projects that advance the needs of the CCI member

companies. She also provides strategic direction to member CEOs with respect to government engagement and relationship building at the federal and provincial levels and "guides" feedback from industry to the federal government on Canada's Innovation Agenda. Prior to working for CCI, Ms. O'Born held a series of political positions with the Government of Ontario.

In response to questions about her lobbying responsibilities at CCI, Ms. O'Born estimated that she spends 30 per cent of her time lobbying, including preparation for and travel to meetings. She stated that CCI made it clear to her from the outset that she was not to lobby politicians for whom she had worked for a period of five years.

THE REGISTRY OF LOBBYISTS - CCI

CCI has maintained an active registration in the Registry of Lobbyists since April 4, 2016, when it first registered as an organization employing in-house lobbyists.

In the versions of the registrations it filed between September 15, 2016[6] and January 15, 2017,[7] CCI listed Mr. Bergen not only as the officer responsible for filing returns on behalf of CCI pursuant to section 7 of the Lobbying Act, but also as an in-house lobbyist. Ms. O'Born and Mr. Christopher Salloum (Assistant Director) were also listed as in-house lobbyists employed by CCI.

In these same two versions of its registration, CCI listed Global Affairs Canada (GAC) among the federal government institutions that it lobbies. GAC encompasses the Ministries of International Trade, Foreign Affairs and International Development. Ms. Freeland served as Minister of International Trade from November 4, 2015 until January 10, 2017, when she was named Minister of Foreign Affairs.

In each of these two versions of its registration, CCI is registered to lobby the federal government with respect to the following subject matters:

- Changes to Industrial Research Assistance Program (IRAP) to make the process easier for Medium and Small Business (SMEs) to apply and report on the current program, to increase the maximum amount a SME can apply for;
- Finance – Changes to Scientific Research and Experimental Development (SR&ED) tax incentive program to make the process easier for Medium and Small Business (SMEs) to apply and report on the current program, to further increase the maximum a SME can apply for;
- Small Business and Tourism, Changes to Canadian Export Program (CanExport)[8] so it allows more technology companies to apply;
- Citizenship and immigration – Change the current work visa time lines, seek changes to the Labour Market Impact Assessment for expatiating [*sic*] and a faster process; and
- Procurement – Changes to Request for Proposal (RFP) process to break down large bundles into smaller amounts for Medium and Small Business (SMEs) can apply.

COMMUNICATIONS REPORTED IN THE REGISTRY OF LOBBYISTS

Between July 1, 2016, when Ms. O'Born first joined CCI, and January 10, 2017, when Ms. Freeland ceased to be Minister of International Trade, CCI reported four communications with members of Mr. Lametti's political staff, two of which also involved Mr. Lametti, himself:

- On October 13, 2016, CCI communicated with Gillian Nycum, identified as Special Assistant, Global Affairs Canada[9] to discuss "Internal Trade."
- On October 17, 2016, CCI communicated with Megan Buttle, Special Assistant, Global Affairs Canada to discuss "International Trade."
- On October 20, 2016, CCI communicated with Ms. Buttle and Mr. David Lametti, identified as Parliamentary Secretary to the Minister of International Trade, to discuss "International Trade."
- On December 7, 2016, CCI communicated with Ms. Nycum, identified as "Member's Assistant, House of Commons", and Mr. Lametti to discuss "Intellectual Property and Internal Trade."

During this period of time, Mr. Lametti was Parliamentary Secretary to Ms. Freeland in her capacity as Minister of International Trade.

As described in greater detail below, whereas Ms. O'Born was involved in or present for the three communications that took place in October 2016, she was not present for the meeting with Mr. Lametti and Ms. Nycum in December 2016. Following the meeting that she attended with Mr. Lametti and Ms. Buttle on October 20, 2016, Ms. O'Born forwarded to Ms. Buttle a letter to Mr. Lametti that was co-signed by Mr. Bergen in his capacity as Executive Director of CCI, Mr. Balsillie, Chair of CCI, and Mr. Ruffolo, Vice-Chair of CCI. This letter to Mr. Lametti followed up on the subject matter of the October 20 meeting.

Public office holders involved in communications with CCI

Mr. Lametti

As noted, Mr. Lametti was Parliamentary Secretary to Minister Freeland when the communications reported by CCI took place in October and December 2016.

Ms. Buttle

For her part, Ms. Buttle was Special Assistant to Mr. Lametti in his capacity as Parliamentary Secretary to the Minister of International Trade when the communications reported by CCI took place in October 2016.

In her interview, Ms. Buttle stated that she was Assistant to the Parliamentary Secretary to the Minister of International Trade from August 2016 until January 2017. Ms. Buttle specified that her position as Assistant to the Parliamentary Secretary was a position within Ms. Freeland's ministerial office. She indicated that she sent her resume to Mr. Lametti, who interviewed her for this position, but that her employment agreement was signed by Ms. Freeland.

Mr. Lametti confirmed that the Special Assistant to the Parliamentary Secretary is an exempt staff position in the minister's office and estimated that 70 per cent of this person's work is to support the Parliamentary Secretary. Mr. Lametti indicated that he hired Ms. Buttle as his second Special Assistant and that he was given "free reign" to do so by the Minister's Office.

Ms. Nycum

Although Ms. Nycum is identified as "Special Assistant, Global Affairs Canada" in the report filed by CCI in respect of the communication that took place on October 13, 2016, she is identified as a "Member's Assistant, House of Commons" in the report filed with respect to the meeting that took place on December 7, 2016. In her interview, Ms. Nycum stated that she was not a Special Assistant at Global Affairs Canada, but rather a Senior Advisor/Special Advisor in Mr. Lametti's parliamentary office between January 2016 and January 2017. Mr. Lametti confirmed Ms. Nycum's statements in this regard, characterizing her as the Chief of Staff of his office on Parliament Hill. In his interview, Mr. Bergen acknowledged that he understood Ms. Nycum to have worked in Mr. Lametti's Hill (MP) Office and that she had been identified in the Registry of Lobbyists as a Special Assistant with Global Affairs Canada in error.

Taken together, I am of the view that Ms. Nycum's position involved supporting Mr. Lametti in his capacity as a Member of Parliament.

Communication with Ms. Nycum on October 13, 2016

In her interview, Ms. O'Born stated that she contacted Ms. Nycum to arrange a meeting with Mr. Lametti in his capacity as Parliamentary Secretary to the Minister of International Trade. Ms. O'Born confirmed that her call to Ms. Nycum was administrative in nature.

Mr. Bergen separately corroborated Ms. O'Born's characterization of the purpose of this communication, noting that it had been between Ms. Nycum and Ms. O'Born and related to the logistics of the lobby day meeting with Mr. Lametti that took place on October 20.

In her interview, Ms. Nycum stated that the purpose of her communication with Ms. O'Born on October 13, 2016 was to discuss logistical arrangements for what became CCI's lobby day meeting with Mr. Lametti on October 20, 2016. Ms. Nycum further stated that she did not attend the lobby day meeting.

Taken together, I am of the view that Ms. O'Born's communication with Ms. Nycum was logistical in nature and, consequently, did not involve a communication that qualifies as lobbying for in-house lobbyists under the Act.

Communications with Ms. Buttle on October 17, 2016

Ms. O'Born also stated that the communication with Ms. Buttle on October 17, 2016, which consisted of a telephone conversation focused on confirming who would be attending the meeting on October 20 and sharing details of CCI's proposed agenda, was entirely logistical in nature. In her interview, Ms. Buttle stated that the communication on October 17 was a call to make arrangements for the meeting on October 20. For his part, Mr. Bergen stated that this

communication consisted of a telephone conversation between Ms. Buttle and Ms. O'Born, which focused on confirming who would be attending the meeting on October 20 and sharing details of CCI's proposed agenda.

In the supporting documentation provided to the OCL, Ms. O'Born included a copy of an email exchange she had with Ms. Buttle, which attests to the administrative nature of this communication. Ms. O'Born also included the following written statement: "When arranging the meeting with MP Lametti, CCI took steps to adhere to the five-year ban against lobbying Minister Freeland and her staff by working directly with MP Lametti's assistants, Megan Buttle and Gillian Nycum."

Taken together, I am of the view that Ms. O'Born's October 17 communication with Ms. Buttle was also logistical in nature and, consequently, did not involve a communication that qualifies as lobbying for in-house lobbyists under the Act.

Communications with Mr. Lametti and Ms. Buttle on October 20, 2016

The written submissions provided on behalf of Ms. O'Born characterized this meeting with Mr. Lametti as forming part of the lobby day that CCI organized in Ottawa in which CCI member CEOs participated in meetings with an array of public office holders. As reflected in the communication reports filed by CCI in the Registry of Lobbyists, CCI reported 24 meetings with public office holders as part of the lobby day that it organized in Ottawa on October 20, 2016.

In his interview, Mr. Lametti stated that he met with approximately 10 CCI member CEOs in his parliamentary office as part of CCI's lobby day for the clean technology industry. Mr. Lametti stated that the discussion centred on the Canada Export Program, innovation, export, global trade, trade commissioners as well as CCI members' ongoing strategic relationship with government. Mr. Lametti further stated that he could not definitively say whether Mr. Bergen or Ms. O'Born were present for this meeting. He noted that Ms. O'Born was on the list of attendees scheduled to attend this meeting.

For her part, Ms. Buttle stated that she attended the October 20 meeting in Mr. Lametti's parliamentary office, which she characterized as a roundtable discussion that lasted for approximately 30 minutes about issues related to the clean technology industry. Ms. Buttle stated that Ms. O'Born was present, but that Mr. Bergen was not in attendance and observed that CCI staff were not active at the meeting. She stated that Mr. Lametti mostly listened to the CCI member CEOs discussing the corporate profiles of their respective companies. She also recalled that she had been provided with an information package about each company.

In her interview, Ms. O'Born stated that the meeting between the CCI member CEOs and Mr. Lametti lasted for approximately half an hour. She stated that the CEOs introduced themselves and talked about their respective businesses and that Mr. Lametti spoke about his role as Parliamentary Secretary and provided a high-level overview of the government initiatives with which he was involved, including, for example, the Canada Export Program.

Ms. O'Born noted that she did not speak during the meeting, but rather "took notes in the background". She explained that member CEOs do most of the talking in these types meetings and that CCI provides support before and afterward. She also observed that Ms. Buttle played similarly "passive role" during the meeting.

In her interview, Ms. O'Born was asked whether the CCI member CEOs had also wanted to meet with Minister Freeland. Ms. O'Born stated that she did not recall receiving any communications to this effect from the participating CEOs. She stated that CCI advises its member CEOs that Parliamentary Secretaries have an important role to play, but added: "[I]t wasn't like we were going to go and speak to Minister Freeland; obviously we are aware of our restrictions so it was what it was." Ms. O'Born also noted that Mr. Lametti is a former intellectual property lawyer, which is of interest to many of CCI's members.

Letter to Mr. Lametti

The supporting documents provided to the OCL included an email that Ms. O'Born sent to Mr. Lametti on November 16, 2016 attaching a letter signed by Mr. Bergen (CCI Executive Director), Mr. Ruffolo (CCI Vice Chair) and Mr. Balsillie (CCI Chair).

In her email, Ms. O'Born wrote: "Thank you kindly for your time on the 20th of October. We are hoping to keep the conversation going and have outlined proposed next steps in the letter attached."

The attached letter reads in part:

> During our meeting CCI's CEOs proposed establishing a working group to regularly meet with you and the ministry on issues including the CanExport program, ensuring that the services offered by Export Development Canada encourage international growth of Canadian scale-ups and working with international trade offices to ensure information sharing and training to better inform them about what services Canadian technology companies have to offer the global economy.

During its interview of Mr. Lametti, the OCL presented Mr. Lametti with CCI's letter. Mr. Lametti stated that he agreed to regular meetings, but noted that this represented the full extent of his commitment.

On November 23, 2016, Ms. O'Born emailed Ms. Buttle as follows:

> [I] was hoping I could get some more information about the CanExport review you mentioned during our meeting. We've touched base with some of the trade offices in France and the UK and wanted to make sure we were on the same track. We have a series of member companies who would certainly like to provide feedback.

On November 24, 2016, Ms. Buttle sent Ms. O'Born the following response:

> [I] have cc'd Emily Yorke in [Minister Freeland's] office who has been working on the CanExport file and can provide more insight into the feedback from stakeholders and how some of your members can get more involved in that.

Beyond forwarding Ms. Buttle's email response to Mr. Bergen with the note "FYI", Ms. O'Born did not engage in any additional follow-up with Ms. Buttle.

In her interview with the OCL, Ms. Buttle noted that the Canada Export program was managed out of Ms. Freeland's ministerial office and that this was the reason she forwarded Ms. O'Born's email to Ms. Yorke, who was the policy advisor in Ms. Freeland's office responsible for responding to inquiries about the Canada Export Program. Ms. Buttle indicated that, after forwarding Ms. O'Born's email to Ms. Yorke, she did not recall any further follow up with CCI.

The written submissions provided on behalf of Ms. O'Born noted that, in arranging meetings with Mr. Lametti, CCI took steps to adhere to the five-year ban against lobbying Ms. Freeland by working directly with Mr. Lametti's assistants, Ms. Buttle and Ms. Nycum. The submissions also noted that "CCI did not reply to [the] chain of emails [to Ms. Buttle and forwarded to Ms. Yorke referred to immediately above] nor pursue a follow-up on 'The CanExport Review' file".

Ms. O'Born's statement in this regard is consistent with the written responses that Ms. Yorke provided to the OCL to the effect that she did not recall any follow-up by CCI in relation to the email that Ms. Buttle forwarded to her on November 24, 2016. In her written responses, Ms. Yorke stated that she did not recall any calls, meetings, emails or other interactions resulting from this forwarded email. She stated that there was no formal review of the Canada Export Program. She also stated that she did not believe that she spoke with Ms. Freeland or anyone else in her ministerial office about this email. In her subsequent interview with the OCL on September 30, 2019, Ms. Yorke confirmed her written responses under oath. She further stated that she had never met or interacted with anyone from CCI.

In her interview with the OCL, Ms. Freeland stated that she did not have any interaction with CCI in her capacity as Minister of International Trade and that she did not recall any such interaction between CCI and her office. Ms. Freeland further stated that she did not recall being briefed by Mr. Lametti on any meetings that he may have had with CCI, Mr. Bergen or Ms. O'Born.

In her sworn affidavit, Ms. Freeland confirmed that she was not briefed at any time by anyone, including Mr. Lametti, about CCI's lobbying activities between October 2016 and January 2017. She further confirmed that she was unaware, at the time of CCI's lobby day meeting with Mr. Lametti on October 20, 2016 or at any time up to and including the moment she became Minister of Foreign Affairs on January 10, 2017, that CCI had sought to establish a working group to meet with Mr. Lametti on a regular basis to discuss the items referred to in CCI's follow-up letter dated November 16, 2016.

In her sworn affidavit, Ms. Freeland further confirmed that she did not make any decisions or exercise any official powers, duties or functions with respect to any of items referred to in CCI's follow-up letter co-signed by Mr. Bergen, Mr. Balsillie and Mr. Ruffolo. Ms. Freeland also stated that she did not retain any responsibility for any of the items referred to in CCI'S follow-up letter after January 10, 2017 when she became Minister of Foreign Affairs.

Communications with Mr. Lametti and Ms. Nycum in December 2016

Ms. O'Born was not involved in this communication and, as a result, it cannot form the basis of a contravention of Rule 9 by Ms. O'Born.

Analysis

This investigation focused on whether Ms. O'Born contravened Rule 6 (Conflict of Interest) or Rule 9 (Political Activities) of the Code by lobbying Ms. Freeland or members of her ministerial staff after undertaking political activities on behalf of Ms. Freeland.

As the subject matter of this investigation engages Rule 9, which is explicitly identified as a more specific formulation of the general conflict of interest prohibition set out in Rule 6, the analysis begins by first determining whether Ms. O'Born contravened the specific rule of conduct set out in Rule 9.

RULE 9 – POLITICAL ACTIVITIES

Rule 9 provides as follows:

> 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).**

In order to determine whether Ms. O'Born contravened Rule 9 of the Code, I must consider whether Ms. O'Born engaged in political activities on behalf of Ms. Freeland when she was a lobbyist that could be reasonably seen to create a sense of obligation and, if so, whether she lobbied Ms. Freeland or members of her staff.

First element: Political activities that could be seen to create a sense of obligation

As set out in the findings section above, Ms. O'Born undertook two different sorts of political activities on behalf of Ms. Freeland. The first, acting as co-campaign manager of Ms. Freeland's 2015 re-election campaign, predated Ms. O'Born's employment as an in-house lobbyist for CCI. The second, sitting on the executive of Ms. Freeland's electoral district association, overlapped with the first slightly more than 15 months of her employment as an in-house lobbyist for CCI (i.e., July 1, 2016 to October 12, 2017).

In keeping with OCL guidance on Rule 9,[10] serving as a campaign chair or in another strategic role on a campaign team and serving on the Executive or Board of Directors of a candidate's electoral district association are each considered to be political activities capable of creating a sense of obligation on the part of the public office holder who benefits from these activities.

Given the intensity of the close working relationship that Ms. Freeland attested to developing with Ms. O'Born during her 2015 re-election campaign and given the significance of Ms. O'Born's role in helping Ms. Freeland to retain public office as a Member of Parliament, I am of the view that Ms. O'Born's campaign-related political activities on behalf of Ms. Freeland could reasonably be seen to create a strong sense of obligation on the part of Ms. Freeland.

That said, however, I am also of the view that Ms. O'Born's campaign-related activities during the 2015 election are not covered by Rule 9 of the Code, which applies to political activities undertaken by **lobbyists.**

In particular, Rule 9 explicitly applies "[w]hen a **lobbyist** undertakes political activities" on behalf of any person who is or becomes a public office holder that "could reasonably be seen to create a sense of obligation." Ms. O'Born was not a lobbyist when she engaged in campaign-related political activities on behalf of Ms. Freeland.

Moreover, whereas Rule 9 contemplates that a person on whose behalf the political activities were performed may subsequently become a public office holder ("is or becomes a public office holder"), it does not purport to apply to the political activities of lobbyists **before** they become lobbyists (i.e., the rule does not similarly provide that it applies to "a person who is or becomes a lobbyist").

In keeping with principles of interpretation, I am of the view that this choice of language must be presumed to have been intentional. In other words, if the rule was intended to apply to the past activities of lobbyists before they became lobbyists, the rule would have explicitly said so as it does for individuals who subsequently become public office holders. In my view, the fact that it does not do so should, **a contrario**, be interpreted to have been by design.

I am also of the view not only that the OCL is bound to apply the Lobbyists' Code od Conduct as written, but also that lobbyists subject to the Code are entitled to rely on the letter of the Code as currently formulated in carrying out their activities.

Seen in this light, I am of the view that Rule 9 cannot be understood to apply to any political activities that Ms. O'Born engaged in on behalf of Ms. Freeland before July 1, 2016, when she first became an in-house lobbyist employed by CCI. As such, Ms. O'Born's campaign-related political activities on behalf of Ms. Freeland are not captured by Rule 9.

That said, it would be artificial and lack an air of reality not to acknowledge this pre-existing political relationship between Ms. O'Born and Ms. Freeland. In my view, this reality is relevant to the analysis under Rule 6 of the Code, below.

It is also important to acknowledge that Ms. O'Born made efforts to ascertain whether she was subject to any limitations in carrying out her lobbying activities on behalf of CCI. As noted above, Ms. O'Born contacted the Ontario Integrity Commissioner to inquire about her obligations under provincial lobbying rules in relation to her former position as political staff to the Ontario Minister of Transportation. It is also significant that Mr. Bergen followed up with the OCL on behalf of Ms. O'Born in late June 2016 to confirm his understanding of the restrictions on her lobbying activities entailed by her past campaign-related political activities on behalf of Ms. Freeland. Insofar as there is no evidence that Ms. O'Born lobbied Ms. Freeland or knowingly lobbied any members of her ministerial staff, it appears that Ms. O'Born endeavoured to follow the advice received from the OCL.[11]

With respect to Ms. O'Born's role as VP of Election Readiness on the Executive of Ms. Freeland's electoral district association, the information collected during this investigation demonstrates

that this role was less significant than Ms. O'Born's role as co-campaign manager, both in terms of her level of involvement and in terms of the level of obligation it could reasonably be seen to create on the part of Ms. Freeland. As noted in the findings section, above, Ms. O'Born stated that she held this role as a "placeholder" in the wake of the 2015 election and that it did not require her engage in any fundraising activities. Ms. O'Born estimated that she attended three meetings of the FLA during her tenure. As noted in the findings section, above, Ms. Freeland separately confirmed in her sworn affidavit that, as reflected in the minutes of the FLA's meetings, Ms. O'Born attended two meetings, one on June 11, 2016 and the other on September 12, 2017.

Taken together, the information collected during this investigation establishes that, Ms. O'Born's political activities in serving as the VP of Election Readiness on the Executive of the University-Rosedale FLA overlapped with her employment as an in-house lobbyist for CCI for a period of slightly more than 15 months (i.e., from July 1, 2016 until October 12, 2017).

Despite being less relatively significant than her campaign-related activities, by acting as VP of Election Readiness on the Executive of the University-Rosedale FLA, Ms. O'Born engaged in a political activity while she was a lobbyist that could nonetheless reasonably be seen to create a sense of obligation on the part of Ms. Freeland within the meaning of Rule 9.

Second element: Lobbying directed to Ms. Freeland or a member of her staff

Mr. Lametti, Ms. Buttle and Ms. Nycum

Based on the information collected in this investigation, there is no evidence that anyone from CCI, including Ms. O'Born, ever attempted to lobby Ms. Freeland.

Ms. O'Born had two logistical telephone conversations to finalize arrangements in relation to CCI's lobby day meeting with Mr. Lametti – one with Ms. Nycum on October 13, 2016 and one with Ms. Buttle on October 17, 2016.

Ms. O'Born also arranged and attended CCI's lobby day for the clean technology industry on October 20, 2016. Mr. Lametti and Ms. Buttle attended this meeting in their respective capacities as Parliamentary Secretary to the Minister of International Trade and Special Assistant to the Parliamentary Secretary. This meeting, which lasted for half an hour, was also attended by CCI member CEOs. The CEOs introduced themselves and talked about their respective businesses. Mr. Lametti spoke about his role as Parliamentary Secretary and provided a high-level overview of the initiatives with which he was involved, including the Canada Export Program. Both Ms. Buttle and Ms. O'Born played passive roles during the meeting. CCI reported this meeting in the Registry of Lobbyists.

In order for these telephone conversations and this lobby day meeting to provide a basis for finding that Ms. O'Born contravened Rule 9, I would need to determine that, having engaged in political activities on behalf of Ms. Freeland that could reasonably be seen to create a sense of obligation, Ms. O'Born lobbied "staff in [Ms. Freeland's] office".

I am of the view that Mr. Lametti, in his former capacity as Parliamentary Secretary, does not qualify as "staff" in Ms. Freeland's office for the purposes of Rule 9.

First, Rule 9 distinguishes between "elected officials" and "staff" ("if that person [on whose behalf political activities were undertaken] is an elected official, the lobbyist shall also not lobby staff in their office(s)"). As a Member of Parliament, Mr. Lametti is 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 an Member of Parliament as well as in support of his former role as Parliamentary Secretary. Mr. Lametti's status an elected public office holder in his own right militates against the view that he can be understood to be staff in Minister Freeland's office within the meaning of Rule 9.

Second, 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, which is governed by the Parliament of Canada Act. Mr. Lametti was appointed Parliamentary Secretary to the Minister of International Trade by Order of the Governor in Council on the recommendation of the Prime Minister pursuant to section 46 of the Parliament Canada Act. Subsection 46(3) provides that parliamentary secretaries hold their office for a term of up to 12 months from the date of their appointment. As set out in the Privy Council Office's Guide for Parliamentary Secretaries, this appointment may be renewed for more than one term.[12] The legislative regime governing the appointment of parliamentary secretaries reinforces the view that they do not qualify as "staff" in the office of a minister.

With respect to Ms. Buttle, the information collected in this investigation demonstrates that she was Special Assistant to Mr. Lametti in his capacity as Parliamentary Secretary to the Minister of International Trade from August 2016 to January 2017. This was the capacity in which Ms. Buttle was identified to Ms. O'Born in both making logistical arrangements for and attending the lobby day meeting that took place on October 20, 2016. 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.

With respect to Ms. Nycum, the information gathered in this investigation demonstrates that her position involved supporting Mr. Lametti in his capacity as a Member of Parliament. I am of the view, therefore, that she cannot be understood to qualify as staff in Ms. Freeland's office for the purposes of Rule 9 of the Code. [13]

For all of these reasons, I am of the view that Ms. O'Born did not contravene Rule 9 of the Code in connection with her logistical telephone conversations on October 13 and 17, 2016 or her attendance at CCI's lobby day meeting with Mr. Lametti and Ms. Buttle on October 20, 2016.

Communications with public servants

Between October 2016 and January 2017, during the same period of time in which CCI reported communications with Mr. Lametti and/or Mr. Lametti's political staff and in which Ms. Freeland continued to be Minister of International Trade, CCI reported communications with four officials from Global Affairs Canada (GAC):

- On October 20, 2016, the day of its lobby day meetings in Ottawa, CCI reported a communication with Susan Bincoletto, then-Assistant Deputy Minister, International Business Development, GAC,[14] on the topic of "International Trade."[15]
- On October 21, 2016, CCI reported a communication with Jennifer Beckermann, then-Head of Visits—Political Officer, GAC,[16] on the topic of "Internal Trade."[17]
- On November 2, 2016, CCI reported a communication with "François Gauthe, Délégué Innovation, Science and Technology, GAC,"[18] on the topic of "Internal Trade."[19]
- On November 4, 2016, CCI reported a communication with Ms. Beckermann and Sanjay Purohit, Trade Commissioner (London, U.K.), GAC,[20] on the topic of "Internal Trade."[21]

I am of the view that Rule 9 applies to the political staff of elected public office holders, in this case ministerial staff in Ms. Freeland's ministerial office, as they could most reasonably be **seen** to be potentially influenced by political considerations in their interactions with lobbyists, including any past political activities undertaken by such lobbyists on behalf of the minister.

One important corollary of this view is that "staff in [the] office(s)" of an "elected official" should not be understood to include public servants, who have a professional obligation to maintain their impartiality in carrying out their duties. This obligation of impartiality, which is embodied in the Values and Ethics Code for the Public Sector,[22] extends to senior public servants, including those appointed by order of Governor-in-Council, such as Deputy Ministers and Assistant Deputy Ministers.[23]

This view is reinforced by the guidance set out in Open and Accountable Government (2015), which clearly distinguishes between public servants and "political" or "exempt" staff in a minister's office as two categories of officials with distinct but complementary roles. In particular, whereas departmental public servants carry out their duties in a non-partisan manner and report in a clear chain of command to a deputy minister, ministerial political or exempt staff share the Minister's political commitments and contribute a particular expertise or point of view that the public service cannot provide. It is worth noting that this guidance document also refers to such political or exempt staff as a minister's "own office staff".[24]

Beyond the fact that public servants are not employed in or by the political offices of elected officials, an interpretation of Rule 9 that would include public servants as part of the staff in an elected official's office would be incompatible with the professional ethos of the federal public service as non-partisan and impartial.

From this perspective, the four meetings that CCI reported having with Susan Bincoletto, then-Assistant Deputy Minister, International Business Development, GAC,[25] with Jennifer

Beckermann, then-Head of Visits, GAC, with François Gauthe, Trade Commissioner (Paris), GAC and with Ms. Beckermann and Sanjay Purohit, Trade Commissioner (London), GAC, do not satisfy the elements of Rule 9 as none of these public servants and officials who worked for the Department of Global Affairs, qualify as staff in Ms. Freeland's office.

In light of the foregoing analysis, I am of the view that Ms. O'Born did not contravene Rule 9 in relation to any of the communications that CCI reported having with any of these public servants.

RULE 6 – CONFLICT OF INTEREST

In light of my conclusion that Ms. O'Born did not contravene Rule 9 of the Code, I must determine whether she contravened the more general conflict of interest prohibition set out in Rule 6.

Rule 6 of the Code reads as follows:

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

In order to determine whether Ms. O'Born contravened Rule 6, I must evaluate whether any of her actions as an in-house lobbyist employed by CCI placed Ms. Freeland in either a real or apparent conflict of interest.

Significantly, the Code does not define what constitutes either a real or an apparent conflict of interest and neither does the Lobbying Act.

In the absence of definitions of these concepts in the Act and Code and given that Rule 6 prohibits lobbyists from placing public office holders in real or apparent conflicts of interest, I reviewed related federal and provincial legislation, including both the federal Conflict of Interest Act and British Columbia's Members' Conflict of Interest Act in order to understand how these concepts were defined in other jurisdictions. I also reviewed the reports of two commissions of public inquiry, namely 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), each of which synthesized existing sources of authority in setting out definitions of these concepts.

Definitions of real and apparent conflicts of interest

Section 4 of the Conflict of Interest Act defines what constitutes a conflict of interest in the following terms:

> 4. For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.

It is important to note, however, that the Conflict of Interest Act regulates the conduct of public office holders, including ministers and parliamentary secretaries, rather than lobbyists. It is also important to note that the definition of conflict of interest set out in the Conflict of Interest Act does not extend to or encompass apparent conflicts of interest.[26] As such, this definition of conflict of interest is of limited utility in understanding the circumstances in which a lobbyist can be understood to place a public office holder in an apparent conflict of interest for the purposes of Rule 6 of the Code.

British Columbia is the only jurisdiction in Canada that prohibits public office holders and, more specifically, Members of its Legislative Assembly, from exercising their official powers, duties or functions if they have either a conflict of interest or an apparent conflict of interest.[27] In particular, section 3 of the British Columbia Members' Conflict of Interest Act (B.C. Act) sets out this prohibition in the following terms:

> A member must not exercise an official power or perform an official duty or function if the member has a conflict of interest or an apparent conflict of interest.

Before turning to the manner in which the B.C. Act defines conflict of interest and apparent conflict of interest, it is important to note that, like its federal counterpart, this provincial legislation does not purport to regulate the conduct of lobbyists.

Subsection 2(1) of the B.C. Act defines "conflict of interest" in the following terms (emphasis added):

> For the purposes of this Act, a member has a conflict of interest **when the member exercises** an official power or performs an official duty or function in the execution of his or her office **and at the same time knows** that in the performance of the duty or function or in the exercise of the power there is the opportunity to further his or her private interest.[28]

Subsection 2(2) defines "apparent conflict of interest" as follows (emphasis added):

> For the purposes of this Act, a member has an apparent conflict of interest if there is a **reasonable perception, which a reasonably well informed person could properly have**, that the member's ability to exercise an official power or perform an official duty or function **must have been affected** by his or her private interest.[29]

In the Oliphant Commission Report, Justice Oliphant recommended that the Conflict of Interest Act be amended to include apparent conflicts of interest. In doing so, he concluded that such an amendment could be modelled on the definition set out in subsection 2(2) of the B.C. Act, modified as necessary to accommodate the context of the federal ethics regime and to ensure that such apparent conflicts capture prospective and not only past conduct.[30] In making this recommendation, Justice Oliphant proposed defining apparent conflicts of interest in the following terms:

> The definition of "conflict of interest" in the Conflict of Interest Act should be revised to include "apparent conflicts of interest," **understood to exist if** there is a **reasonable perception, which a reasonably well-informed person could properly have**, that a public office holder's **ability to exercise** an official power or perform an official duty or function

> **will be, or must have been, affected** by his or her private interest or that of a relative or friend.[31]

Several important features of both real and apparent conflicts of interest emerge from these definitions. I will address the significant features of each concept in turn.

Real conflicts of interest

First, in order to have a real conflict of interest, a public office holder, which at the federal level includes a minister, must be in a situation in which he or she is engaged in the exercise or performance of his or her official powers, duties or functions.[32]

This requirement is consistent with the understanding of real conflicts of interest articulated by Justice Parker in the Report of the Parker Commissioner:

> I am thus satisfied that the proper interpretation of [real] conflict of interest is one that is concerned with any situation in which the public office holder is exercising or discharging any duty or responsibility of public office, not just that of decision making.
>
> […]
>
> It should be noted that a real conflict of interest does not materialize until the public office holder is in a situation in which he or she is exercising a duty or responsibility of public office.[33]

The implication of this requirement is that public office holders cannot be understood to be in a situation of real conflict of interest if they are not engaged in exercising or performing their official powers, duties or functions.

Second, in order to have a real conflict of interest, public office holders must **know** that they have an opportunity to further their own private interests when they exercise their official powers, duties or functions.[34]

This knowledge requirement is reflected in the definition of real conflicts of interest set out in the Report of the Parker Commission of Inquiry (emphasis added):

> In my view, the 1973 Green Paper definition can be paraphrased for the purposes of this Inquiry as follows: a real conflict of interest denotes "a situation in which a minister of the Crown **has knowledge** of a private economic interest that is sufficient to influence the exercise of his or her public duties and responsibilities." This is the definition of real conflict of interest that I will employ throughout the balance of this report.[35]

The implication of this knowledge requirement is that public office holders cannot be understood to be in a situation of real conflict of interest if they do not know that the exercise of their official powers, duties and functions provides them with an opportunity to further their private interests.

Third, real conflicts of interest involve situations in which public office holders, in exercising their official powers, duties and functions, have opportunities to further their private interests. Although private interests have traditionally been understood to consist of public office holders'

private economic or pecuniary interests,[36] this concept has come to be understood to include non-pecuniary interests as well.[37]

It is also worth noting that private interests are not limited to the direct interests of the public office holder, but can also include the interests of others with whom a public office holder shares close proximate relationships, including relatives or friends (i.e., those with whom the public office holder shares close bonds of personal affection or loyalty).[38]

These types of indirect interests are reflected in the definition of conflict of interest set out in section 4 of the Conflict of Interest Act, which applies to situations in which a public office holder exercises an official power, duty or function that provides an opportunity to further the public office holder's private interests, those of his or her relatives or friends or that provides an opportunity to improperly further another person's private interests.

Apparent conflicts of interest

Whereas real conflicts of interest cover situations in which public office holders engage in official action knowing that they have opportunities to further their private interests, apparent conflicts of interest turn on reasonable perceptions that a conflict of interest exists.

As with real conflicts, it is worth underscoring a few significant features of apparent conflicts of interest.

First, apparent conflicts of interest are perceived conflicts; that is, they are reasonably perceived to exist, whether or not they do, in fact, actually exist.

Second, apparent conflicts of interest are judged on an objective standard, namely would a reasonable observer, informed of the relevant factual circumstances, reasonably conclude that a conflict of interest exists.

Justice Parker articulated this standard in the following terms (emphasis added):

> An appearance of conflict could thus exist even where there is no real conflict in fact. Real conflict requires, inter alia, knowledge on the part of the public office holder of the private interest that could be affected by his or her actions or inactions. No such actual knowledge is necessary for an apparent conflict because appearance depends on perception. However, **the perception must be reasonable, fair, and objective**. An appearance of conflict should 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.[39]

Subsection 2(2) of the B.C. Act and the definition of apparent conflict of interest recommended by the Oliphant Commission each use the following variation of this formulation of the objective standard: "a reasonable perception, which a reasonably well-informed person could properly have".

One important implication of the consensus that apparent conflicts of interest must be judged on an objective, impartial and fair standard, one grounded in a reasonable awareness and

understanding of the applicable factual circumstances, is that apparent conflicts of interest cannot be determined to exist on the basis of mere suspicion or speculation.

This view was forcefully supported by former B.C. Conflict of Interest Commissioner Paul Fraser in the 2009 Campbell Opinion, which examined "whether then-Premier Gordon Campbell was in an apparent conflict of interest by signing an Order-in-Council that allegedly benefited a company in which the Premier held shares" (emphasis added):

> To constitute a breach of the [B.C. Act], **a perception of conflict of interest cannot simply exist in the air or in the abstract**, it must be established against a test of reasonableness. **While the simple perception of conflict of interest may raise a "red flag" or give rise to suspicion, that is clearly not sufficient to support a finding of an apparent conflict of interest until the objective test of reasonableness**, which is mandated by section 2(2), **is applied to the particular circumstances under review**.[40]

Seen in this light, concerns are not enough, on their own, to sustain a reasonable perception that an apparent conflict of interest exists.

Relatedly, third, apparent conflicts of interest are situations of perceived **actual** conflict.[41] They are not hypothetical situations in which it is merely possible that public office holders were influenced by their private interests when they engaged in official action. Rather, apparent conflicts of interest are definite situations in which a reasonable observer, informed of the relevant factual circumstances, can 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.[42]

These definitions of real and apparent conflicts of interest are instructive in identifying the essential characteristics of these concepts. That said, however, it is important to underscore that the Office of the Commissioner of Lobbying does not directly regulate federal public office holders.

As such, the focus of this analysis is on the actions of the lobbyist under investigation, Ms. O'Born, and whether any of her actions as a lobbyist placed Ms. Freeland in any situations of real or apparent conflict of interest contrary to Rule 6. Nothing in this analysis either purports to comment or should be interpreted as commenting on the propriety of the conduct of any public office holders subject to the Conflict of Interest Act.

Application to the facts at issue in this investigation

In order to determine whether Ms. O'Born contravened Rule 6 of the Code, I must evaluate whether any of her actions as an in-house lobbyist employed by CCI placed Ms. Freeland in either a real or apparent conflict of interest. Each of these possibilities is analyzed in turn.

Real conflict of interest

As noted above, real conflicts of interest arise in situations in which a public office holder exercises an official power, duty or function while knowing that, in doing so, there is an

opportunity to further his or her private interest or those of others with whom a public office holder shares close proximate relationships.

In the context of this investigation, there is no basis for concluding that Ms. O'Born placed Ms. Freeland in a real conflict of interest.

First, there is no indication, based on the information collected in this investigation, that Ms. Freeland made any decisions or exercised any official powers, duties or functions in her capacity as Minister of International Trade in respect of any programs, policies or services within her ministerial portfolio that related to the subject matter of CCI's lobbying activities, including any of the topics that CCI raised during the initial lobby day meeting that Ms. O'Born attended on October 20, 2016 or that CCI proposed to discuss with Mr. Lametti as part of the working group referred to in the follow up letter that Ms. O'Born transmitted by email to Ms. Buttle.

In her sworn affidavit, Ms. Freeland affirmed that she did not exercise any official powers, duties or functions as Minister of International Trade in respect of any of the programs or policies that CCI discussed with Mr. Lametti, including the Canada Export Program, between the lobby day meeting on October 20, 2016 and January 10, 2017, when she was appointed Minister of Foreign Affairs. Ms. Freeland further confirmed that she did not retain any responsibility for any of the programs or policies that CCI discussed with Mr. Lametti, including the Canada Export Program, in her capacity as Minister of Foreign Affairs.

Second, there is no indication that Ms. Freeland had any knowledge about any of CCI's lobbying activities, including the suggestion that regular meetings with Mr. Lametti be established to discuss the Canada Export Program among other topics. As noted, Mr. Bergen sought and received advice from the OCL to the effect that neither he nor Ms. O'Born should lobby Ms. Freeland or members of her ministerial staff for a period of five years in light of the roles they each played in co-managing her 2015 election campaign. The evidence gathered in this investigation demonstrates that neither Mr. Bergen nor Ms. O'Born ever met or communicated with Ms. Freeland in her official capacity.

In addition, there is no indication that Ms. Freeland was ever briefed about anything to do with CCI's lobbying activities. In her sworn affidavit, Ms. Freeland affirmed that she was not briefed at any time by anyone, including Mr. Lametti, about CCI's lobbying activities between October 2016 and January 2017. Ms. Freeland's statements in this regard are consistent with Ms. Yorke's sworn testimony to the effect that she did not inform Ms. Freeland or anyone else in Ms. Freeland's ministerial office about CCI's follow up email that Ms. Buttle forwarded to her on November 24, 2016 in which CCI requested additional information about the Canada Export Program.

In absence of any 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, there is no basis to conclude that any of Ms. O'Born's actions placed Ms. Freeland in a real conflict of interest.[43]

Apparent conflict of interest

As described in detail above, apparent conflicts of interest involve situations of perceived **actual** conflict.

As noted, the existence of an apparent conflict of interest is judged on an objective standard, namely would a reasonable observer, informed of the relevant factual circumstances, reasonably conclude that a public office holder's ability to exercise their official powers, duties or functions will be[44] or must have been affected by their own private interests or those of others with whom the public office holder shares close proximate relationships, including both relatives and friends.

As also noted, the focus of the Rule 6 analysis is on the conduct of lobbyists subject to the Code, in this case Ms. O'Born, in her capacity as an in-house lobbyist for CCI.

Based on the information gathered in this investigation, summarized in detail above, a reasonable observer, informed of the relevant factual circumstances, would have to base his or her determination as to whether Ms. O'Born, acting in her capacity as an in-house lobbyist for CCI, could be reasonably seen to have placed Ms. Freeland in an apparent conflict of interest on the following considerations:

- Ms. O'Born engaged in political activities on behalf of Ms. Freeland both before and after she became a lobbyist for CCI. In particular, she acted as co-campaign manager Ms. Freeland's successful re-election campaign in 2015. This activity pre-dated Ms. O'Born's tenure with CCI. For the first slightly more than 15 months of her employment as an in-house lobbyist for CCI (i.e., between July 1, 2016 and October 12, 2017), Ms. O'Born was publicly identified as the VP of Election Readiness on the Executive of Ms. Freeland's riding association. These political activities can reasonably be seen to create a sense of obligation on the part of Ms. Freeland.

- Before Ms. O'Born joined CCI on July 1, 2016, Mr. Bergen contacted the OCL to confirm his understanding of the lobbying restrictions to which he and Ms. O'Born were subject as former co-campaign managers of Ms. Freeland's election campaign in 2015. The OCL advised Mr. Bergen that, in light of these past political activities, neither he nor Ms. O'Born should lobby Ms. Freeland or staff in Ms. Freeland's ministerial office for a period of five years. Ms. O'Born followed this advice insofar as there is no evidence that she ever had official dealings with Ms. Freeland or knowingly had any such dealings with members of Ms. Freeland's ministerial staff. In this latter regard, a reasonable observer would take cognizance of the fact that, to all outward appearances, Ms. Buttle was a Special Advisor to Mr. Lametti in his capacity as Parliamentary Secretary.

- As part of its inaugural lobby day in Ottawa on October 20, 2016, CCI organized an introductory meeting between Mr. Lametti, then-Parliamentary Secretary to Ms. Freeland in her capacity as Minister of International Trade, and the CEOs of 10 CCI member companies. During this meeting, which lasted 30 minutes, the member CEOs introduced themselves and described their respective businesses. For his part, Mr. Lametti spoke

about his role as Parliamentary Secretary and provided a general overview of the initiatives with which he was involved. Although Ms. O'Born attended this meeting, which was publicly reported in the Registry of Lobbyists, she played a passive role.

- Mr. Bergen co-signed a letter to Mr. Lametti, dated November 16, 2016, thanking him for the meeting on October 20th and seeking to establish a working group that would regularly meet with Mr. Lametti to discuss issues including the Canada Export Program, ensuring that the services offered by Export Development Canada encourage the international growth of Canadian technology companies and ensuring that international trade offices are better informed about the services that Canadian technology companies can offer the global economy. Ms. O'Born emailed this letter to Megan Buttle, Special Assistant to Mr. Lametti in his capacity as Parliamentary Secretary, who immediately forwarded it to Emily Yorke, the Policy Advisor in Ms. Freeland's ministerial office responsible for responding to general inquiries regarding the Canada Export Program. Ms. Yorke did not take any further action with respect to this email and no meetings, emails or other interactions resulted from this forwarded email. Ms. Yorke never met or otherwise interacted with anyone from CCI and she did not brief Ms. Freeland or anyone else in Ms. Freeland's ministerial office about the letter that Mr. Bergen co-signed. There is also no evidence that any of the proposed working group meetings with Mr. Lametti ever took place.

- Ms. Freeland was not briefed at any time by anyone, including Mr. Lametti, about CCI's lobbying activities between October 2016 and January 2017, when she ceased to be Minister of International Trade. Ms. Freeland was not aware that CCI had sought to establish a working group to meet with Mr. Lametti on a regular basis either at the time of CCI's lobby day meeting with Mr. Lametti on October 20, 2016 or at any time up to and including the moment she was appointed Minister of Foreign Affairs on January 10, 2017.

- Ms. Freeland did not exercise any official powers, duties or functions in her capacity as Minister of International Trade in respect of any programs or policies within her ministerial portfolio that related to the subject matter of CCI's lobbying activities, including any of the topics that CCI proposed to discuss with Mr. Lametti as part of the working group that it sought to establish following the initial lobby day meeting, between October 20, 2016 and January 10, 2017, when she was appointed Minister of Foreign Affairs.

- Ms. Freeland did not retain any responsibility for any of the programs or policies that CCI discussed with Mr. Lametti, including the Canada Export Program, in her capacity as Minister of Foreign Affairs.

- Mr. Lametti ceased to be Parliamentary Secretary to the Minister of Foreign Affairs on January 14, 2017, when he was appointed Parliamentary Secretary to the Minister of Innovation, Science and Economic Development.

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.

These actions on the part of Ms. O'Born 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 Ms. O'Born does not give rise to a reasonable perception that any of Ms. O'Born'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.

I am of the view that the answer to this latter question is clearly no and therefore that Ms. O'Born did not place Ms. Freeland in an apparent conflict of interest.[45]

Conclusion

For all of the foregoing reasons, I am of the view that Ms. O'Born did not contravene Rule 6 (Conflict of Interest) or Rule 9 (Political Activities) of the Code.

Observations

RULE 6

This investigation is the first during my tenure as Commissioner of Lobbying in which I was required to evaluate whether a lobbyist contravened Rule 6 of the Code by acting to place a public office holder in a real or apparent conflict of interest.

Although I determined that Rule 6 had not been contravened in the factual circumstances at issue in this investigation, the analysis required by Rule 6 raised concerns about the manner in which this provision is currently drafted.

My jurisdiction as Commissioner of Lobbying is confined to regulating the conduct of lobbyists. However, 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, including those overseen by the Senate Ethics Officer and the Conflict of Interest and Ethics Commissioner.

For example, if I were to determine that a lobbyist placed a federal public office holder in a real conflict of interest, one implication of such a determination would be that the public office holder exercised his or her official public powers, duties and functions knowing that, in doing so, he or she had an opportunity to further his or her own private interests or those of his or her relatives or friends. To the extent that the public office holder was subject to the Ethics and Conflict of Interest Code for Senators, the Conflict of Interest Act or the Conflict of Interest Code for Members of the House of Commons,[46] such conduct would fall squarely within the mandate of either the Senate Ethics Officer or the Conflict of Interest and Ethics Commissioner.

There is also a risk that, in applying rules of conduct under these separate ethics regimes, the Senate Ethics Officer or the Conflict of Interest and Ethics Commissioner may not reach the same conclusion as I do with respect to whether the public office holder was in a situation of real conflict of interest.

In such an eventuality, I am concerned that I would exceed my jurisdiction, trench on the jurisdiction of the Senate Ethics Officer or the Conflict of Interest and Ethics Commissioner and produce conflicting decisions in respect of the same set of facts.

Although none of these outcomes materialized in the particular circumstances at issue in this investigation, they are a potential consequence of the manner in which Rule 6 is currently drafted.

For these reasons, I am of the view that these concerns with Rule 6 should be addressed as part of any future amendments to the Code, the process for which will require stakeholder consultations as contemplated by the Lobbying Act. In doing so, it will be necessary to consider amending the rules of conduct to focus exclusively on the specific behaviours of lobbyists

without importing the regime governing the ethical conduct of public office holders by implied reference.

RULE 9

In determining that Rule 9 had not been contravened in the circumstances of this particular investigation, I found that parliamentary secretaries do not qualify as "staff" in a minister's office for the purposes of Rule 9.

I found that parliamentary secretaries' status as elected public office holders in their own right militates against the view that they can be understood to qualify as "staff" in a minister's office within the meaning of Rule 9.

I also noted that, 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, which is governed by the *Parliament of Canada Act*. Parliamentary secretaries are appointed by Order of the Governor in Council on the recommendation of the Prime Minister pursuant to section 46 of the *Parliament of Canada Act*. The legislative regime governing the appointment of parliamentary secretaries reinforces the view that they do not qualify as "staff" in the office of a minister.

Although parliamentary secretaries do not qualify as staff in a minister's office for the purposes of Rule 9, they share the same political commitments as the minister they are appointed to assist. As such, the rationale for prohibiting lobbyists from lobbying the political staff of an elected official for whom they have undertaken political activities should also apply to parliamentary secretaries.

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 be addressed as part of any future consultations aimed at revising the Code in accordance with the Lobbying Act.

Endnotes

1 Ms. Freeland is the Member of Parliament for University-Rosedale. She was the Minister of International Trade from November 4, 2015 to January 10, 2017, when she was appointed Minister of Foreign Affairs. Ms. Freeland is currently Deputy Prime Minister and Minister of Intergovernmental Affairs.

2 Mr. Lametti is the Member of Parliament for LaSalle-Émard-Verdun. He was Parliamentary Secretary to Minister Freeland in her capacity as Minister of International Trade from December 2, 2015 until January 27, 2017, when he was appointed Parliamentary Secretary to the Minister of Innovation, Science and Economic Development. Mr. Lametti is currently Minister of Justice and Attorney General of Canada.

3 The Globe and Mail – "Lobby group asked to stop offering access to Ottawa in exchange for $10,000" – July 11, 2017.

4 Ms. Freeland provided a variety of supporting documents in support of her affidavit, including minutes of meetings of the FLA Executive.

5 See CCI Website. Also confirmed in the listing for CCI in the corporate registry maintained by Industry Canada.

6 https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/vwRg?cno=357757&regId=862648#regStart

7 https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/vwRg?cno=357757&regId=863564#regStart

8 The Canada Export Program provides direct financial assistance to small and medium-sized businesses registered in Canada that are seeking to develop new export opportunities and markets, especially high-growth emerging markets. This program is delivered by the Trade Commissioner Service of Global Affairs Canada in partnership with the National Research Council Industrial Research Assistance Program. In their respective interviews, both Mr. Lametti and Ms. Buttle stated that the Canada Export Program was set up to assist exporters to access export markets and that this program is part of the portfolio of the Minister of International Trade.

9 As noted, Ms. Nycum, who served as staff to Mr. Lametti in his capacity as a Member of Parliament, was mis-identified as a Special Assistant with Global Affairs Canada in the report CCI filed in relation to this October 13 communication in the Registry of Lobbyists. Ms. Nycum was appropriately identified as a "Member's Assistant" to Mr. Lametti in the report filed in relation to the December 7 communication, described below.

10 OCL, Guidance to mitigate conflicts of interest resulting from political activities.

11 As noted, Ms. O'Born responded as follows when asked whether the CCI member CEOs would have wanted to meet with Ms. Freeland in addition to Mr. Lametti as part of the lobby day meeting on October 20, 2016: "[I]t wasn't like we were going to go and speak to Minister Freeland; obviously we are aware of our restrictions so it was what it was".

12 Privy Council Office, Guide for Parliamentary Secretaries (January 5, 2016) at p. 9.

13 In reviewing CCI monthly communications, the OCL assessed whether CCI ever lobbied Ms. Freeland or any political staff in Ms. Freeland's ministerial office after she became Minister of Foreign Affairs. The OCL determined that CCI never lobbied Ms. Freeland in her capacity as Minister of Foreign Affairs or any political staff in the Office of the Minister of Foreign Affairs during Ms. Freeland's tenure.

14 Ms. Bincoletto is currently Canada's Ambassador to Switzerland. As reflected on the official webpage of the Embassy of Canada in Switzerland, Ms. Bincoletto has held this position since August 21, 2017.

15 CCI Monthly Communication Report, Communication No. 357757-388128, posted November 15, 2016.

16 As reflected on her LinkedIn page, Ms. Beckermann is currently "Director, Executive Office at High Commission of Canada in the United Kingdom."

17 CCI Monthly Communication Report, Communication No. 357757-388339, posted November 15, 2016.

18 As reflected on the official webpage setting out the list of representatives of the Canadian Trade Commissioner Service based in Paris, France, François Gauthe is identified as "Trade Commissioner, Science and Technology."

19 CCI Monthly Communication Report, Communication No. 357757-391585, posted December 15, 2016.

20 As reflected on the official webpage setting out the list of representatives of the Canadian Trade Commissioner Service based in London, England, Sanjay Purohit is identified as "Trade Commissioner, Information and Communications Technologies."

21 CCI Monthly Communication Report, Communication No. 357757-391586, posted December 15, 2016.

22 As set out in the Values and Ethics Code for the Public Sector, federal public servants are guided by a variety of values in carrying out their professional duties. These values include Respect for Democracy, which not only involves recognizing that a non-partisan public sector is essential to the proper functioning of the Canadian system of government, but also requires that public servants carry out their duties in a non-partisan and impartial manner. These values also include Integrity, which recognizes that, by upholding the highest ethical standards, including by acting at all times in a manner that will bear the closest public scrutiny, federal public servants conserve and enhance public confidence in the honesty, fairness and impartiality of the federal public sector.

23 In describing the role of federal public servants, the Values and Ethics Code for the Public Sector explicitly defines who qualifies as a "public servant" for the purposes of this Code in the following terms (at p. 2, footnote 2, emphasis added):

> The Public Servants Disclosure Protection Act (PSDPA) defines "public servant" as every person employed in the public sector (this includes the core public administration, Crown corporations and separate agencies. Every member of the Royal Canadian Mounted Police **and every chief executive (including deputy ministers and chief executive officers) are also included in the definition of public servant for the purposes** of the PSDPA and **this Code**.

24 As set out in Open and Accountable Government (2015), public servants "repor[t] in a clear chain of command to the deputy minister, provide professional, non-partisan policy advice to Ministers and conduct departmental operations through the exercise of legal authorities flowing from the Minister" (section II.4 at p. 7). By contrast, **"ministerial 'political' or 'exempt' staff "provide advice that can address the political aspects of the Minister's functions** but do not play a role in departmental operations" (ibid., emphasis added). This guidance document also notes that "[P]ublic servants are appointed under a merit-based regime overseen at arm's length from Ministers by the Public Service Commission. They serve democracy by supporting, without partisan bias, the program of the elected government of the day, with faithful regard to the laws of Canada and to codified public service values and ethics. These codifications also note that Ministers have a responsibility for maintaining the tradition of the political neutrality of the public service" (Annex E, section E.2 at pp. 44-45). Section E.3 goes on to describe the role of ministerial "political" or "exempt" staff as follows: "In addition to public servants, Ministers are supported in their official functions **by their own office staff**. The employment of such staff is provided for under the Public Service Employment Act, but they are not members of the public service and are exempt from Public Service Commission staffing and other controls. They are known as 'exempt' or 'political' staff. … **The purpose of establishing a Minister's office is to provide Ministers with advisors and assistants who are not departmental public servants, who share their political commitment, and who can complement the professional, expert and non-partisan advice and support of the public service. Consequently, they contribute a particular expertise or point of view that the public service cannot provide**" (Annex E, section E.3 at p. 46, emphasis added).

25 In responding to the OCL's request for additional information, Ms. Bincoletto indicated that she did not have any specific memory of the communication that CCI reported in the Registry of Lobbyists, which had occurred on October 20, 2016. She noted that, in her former capacity as Assistant Deputy Minister, she regularly met with

individuals from the private sector and that nothing in particular stood out about this communication. Ms. Bincoletto stated that she did not communicate with Ms. Freeland about this meeting and that, to the extent that follow up, if any, were required, she would not have been involved as she was out of the office between November 2016 and January 2017.

26 As Justice Oliphant noted in the May 2010 Report of the Oliphant Commission, the Conflict of Interest Act does not proscribe apparent conflicts of interest (Vol. 2 at pp. 529, 532).

27 As recently stated in an Opinion published by British Columbia's then-Acting Conflict of Interest Commissioner, Lynn Smith: "No assistance is to be found from other jurisdictions [in interpreting what constitutes an apparent conflict of interest], as British Columbia's legislation is unique in its prohibition of acting when in apparent conflict of interest"(Opinion of the Acting B.C. Conflict of Interest Commissioner in the Matter of a Request by Ravi Kahlon, Member for Delta North, August 14, 2019 at p. 16) (Kahlon Opinion).

28 The definition of "conflict of interest" in subsection 2(1) of the B.C. Act is consistent with the definition of '"real conflict of interest" set out in the Report of the Parker Commission. In Volume 1 of his Inquiry Report, Justice Parker canvassed and synthesized various existing sources of authority on the concept of conflict of interest. On the basis of this review, Justice Parker defined real conflicts of interest in the following terms (Vol. 1 at p. 35, emphasis added):

> A real conflict of interest denotes a **situation** in which a minister of the Crown **has knowledge** of a private economic interest that is **sufficient to influence the exercise** of his or her public duties and responsibilities.

29 The definition of "apparent conflict of interest" set out in subsection 2(2) of the B.C. Act is consistent with the definition "apparent conflict of interest" set out in the Report of the Parker Commission, which defined "apparent conflict of interest" as follows (Vol. 1 at p. 35, emphasis added):

> An apparent conflict of interest exists when there is a **reasonable apprehension, which reasonably well-informed persons could properly have, that a conflict of interest exists**.

It is important to note that Mr. Stevens successfully challenged the conclusions set out in the Report of the Parker Commission by way of judicial review in Federal Court, which found, among other things, that Justice Parker had exceeded his jurisdiction as conferred in the terms of reference governing the Commission of Inquiry by conducting an investigation into what the definition of conflict of interest should be (rather than what it was at the time of Mr. Stevens' impugned conduct) and then measuring Mr. Stevens' conduct against this normative standard (Stevens v. Canada (A.G.), [2005] 2 F.C.R. 629). It is also worth noting, however, that Justice Oliphant concluded that the definitions of real and, particularly, apparent conflict of interest set out in the Report of the Parker Commission retain their validity notwithstanding the subsequent judicial review proceedings in Federal Court: "Although the final holding of the Parker Commission was ultimately challenged successfully in Federal Court on administrative law grounds, the definition of apparent conflicts of interest it offered is amply justified by other authorities" (Oliphant Commission Report, Vol. 2 at p. 531).

30 Oliphant Commission Report, Vol. 2 at p. 533.

31 Ibid. It is worth noting that the definition of conflict of interest in the Conflict of Interest Act has not been amended to give effect to this recommendation. It is also worth noting that, as noted in the Report of the Oliphant Commission, the Federal Court of Appeal has effectively equated the definition of apparent conflict of interest set out in the Parker Commission of Inquiry with the administrative law standard of reasonable apprehension of bias (Vol. 2 at p. 531):

> Would an informed person, **viewing the matter realistically and practically and having thought the matter through**, think it **more likely than not** that the public servant, whether consciously or unconsciously, **will be influenced** in the performance of **his official duties** by considerations having to do with his **private interests**? (Threader v. Canada (Treasury Board), [1987] at para. 23 (F.C.A.), emphasis added).

32 Indeed, as provided in subsection 2(1) of the B.C. Act, a conflict of interest arises "when the member exercises an official power or performs an official duty or function in the execution of his or her office" (emphasis added).

33 Report of the Parker Commission, Vol. 1 at p. 28.

34 This knowledge requirement is explicitly stated in subsection 2(1) of the B.C. Act, which provides that a member has a real conflict of interest when he or she exercises an official power, duty or function "and at the same time knows" that in the exercise of such powers, duties or functions, there is an opportunity to further his or her private interests.

35 Report of the Parker Commission, Vol. 1 at p.29.

36 In synthesizing existing sources of authority on conflict of interest, the Report of the Parker Commission, which was released in 1987, referred to public office holders' "private financial interests" (Vol. 1 at p. 28) and "private economic interests" in defining real conflicts of interest (see Vol. 1 at p. 29, 31).

37 As stated in an early opinion of the B.C. Conflict of Interest Commissioner (Blencoe Opinion (1993) at p. 28, cited with approval in the recent Kahlon Opinion published in August 2019 at p. 15):

> Private interest is not limited to a pecuniary or economic advantage. It can include any real or tangible benefit that inures to the personal benefit of the Member.

This view that private interests are not limited to pecuniary or economic advantages is shared by the Conflict of Interest and Ethics Commissioner. As recently acknowledged in the Trudeau II Report (August 2019), the interpretation that the Office of the Conflict of Interest and Ethics Commissioner had applied in determining what constitutes a private interest (i.e., interests of a predominantly financial nature) has evolved and given way to a broader interpretation according to which the term "private interest" is understood to include "all types of interests that are unique to the public office holder or shared with a narrow class of individuals" (at p. 45).

38 Although subsections 2(1) and 2(2) of the B.C. Act are structured with reference to the individual private interests of Members of the B.C. Legislative Assembly ("his or her private interests"), the longstanding interpretation of the term "private interest" by the Office of the B.C. Conflict of Interest Commissioner acknowledges that indirect private interests deriving from close proximate relationships may give rise to conflicts of interest covered by the B.C. Act.

As recently stated in the Kahlon Opinion, former Acting Commissioner Smith described the scope of what constitutes a private interest in the following terms (at pp. 3-4):

> In most cases, a "private interest" involves the Member's own pecuniary interests, or those of a person with whom the Member has a shared pecuniary interest such as a spouse. However, the interpretation of a private interest may, in some circumstances, extend to non-pecuniary interests, the interests of others in close proximity to the Member, or be based on personal loyalty or affection, particularly with respect to apparent conflict of interest. However, such extensions of the definition of private interest require careful consideration and caution.

Commissioner Smith also identified relevant factors that could be taken into consideration in determining whether the exercise of an official power, duty or function was affected or could reasonably be seen to have been affected by a Member's own private interest or those of closely associated others. These factors include: the nature and proximity of a relationship; whether the connection between the Member's performance of public duties and the furtherance of a private interest is remote or speculative and whether the Member knew that such a connection existed (see Kahlon Opinion at p. 15).

39 Report of the Parker Commission, Vol. 1 at p. 32

40 Campbell Opinion at p. 15, cited with approval by Acting Commissioner Smith in the Kahlon Opinion at p. 19.

41 As noted, the Report of the Parker Commission defined apparent conflicts of interest as existing when there is a reasonable apprehension, which reasonably well-informed persons could properly have, that a conflict of interest exists (Vol. 1 at p. 35, emphasis added).

42 It is important to note 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. Significantly, the terms "will be affected" and "must be affected" are not conditional in nature – "will" and "must" are pointedly not "could" or "would". On the definitions set out in subsection 2(2) of the B.C. Act and recommended by Justice Oliphant, apparent conflicts of interest do not 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.

43 This conclusion is reinforced when private interests are taken into account. There is no indication that Ms. Freeland had any private interests at stake in respect of any program or service in her portfolio as Minister of International Trade that CCI referred to in its communications with Mr. Lametti.

To the extent that the circumstances at issue in this investigation implicate any private interests, they would be private interests associated with Ms. O'Born, in her capacity as an in-house lobbyist employed by CCI. Such private interests could include Ms. O'Born's own private interests or those of either the organization she represents (i.e., CCI) or its clients (i.e., CCI member companies). I consider each of these possibilities in turn.

There is no indication that Ms. O'Born had any private interests at stake in respect of any program or service in Ms. Freeland's ministerial portfolio that CCI referred to in its communications with Mr. Lametti. Ms. O'Born's interest, more broadly, can be construed as advancing CCI's mandate as an organization engaged in advocating for public policy options favouring innovation and growth in the technology sector on behalf of CCI members, CEOs of Canadian technology companies seeking to extend the global reach of their operations. I am of the view that it is indirect and remote to a highly significant degree to construe Ms. O'Born's private interest in continuing to earn her salary as Director of Policy of CCI as a relevant private interest for the purposes of determining whether she acted to place Ms. Freeland in a real or apparent conflict of interest.

From this point of view, CCI has a general private interest in increasing the number of member-companies it represents, each of which pays a membership fee in order to join CCI.

Similarly, each CCI member company has a general private interest in obtaining greater access to talented workers, investments and international markets. That said, however, the connection or nexus between Ms. Freeland's generalized responsibility for items in her ministerial portfolio (the term "generalized responsibility" is used because the evidence gathered demonstrates that Ms. Freeland was not engaged in exercising any of her official powers, duties or functions in respect of any of the items about which CCI communicated with Mr. Lametti) and the furtherance of the general private interests of either CCI or any CCI member companies in the items communicated to Mr. Lametti in two meetings and one thank you letter is remote and speculative to the point of non-existence. As has already been noted, Ms. Freeland was not engaged in exercising any of her official powers, duties or functions in respect of any of the items about which CCI communicated with Mr. Lametti and nor was she even aware of any of CCI's lobbying activities involving Mr. Lametti.

This view is consistent with the Kahlon Opinion recently issued by Acting B.C. Conflict of Interest Commissioner Smith (see pp. 3-4). Mr. Kahlon sought an opinion from the Commissioner in connection with allegations made against him that he was in both a real and an apparent conflict of interest in relation to his work on a standing committee of the B.C. Legislative Assembly tasked with conducting research and issuing a report with respect to the regulatory regime governing ride-sharing given that his father held a taxi licence in Victoria. Although the Commissioner noted that "an indirect private interest based on personal loyalty and affection might be sufficient for the purposes of the [B.C. Act]" for example "if there were a direct causal link between the official duties performed by the Member and the financial impact on another person close to the Member, especially if that impact was significant", she found that this was not the case in respect of Mr. Kahlon. In particular, she noted that

the Committee did not have the power to make or alter legislation or require the government to take any particular action and that its recommendations were non-binding. She also found that the impact, if any, of whatever regulatory regime that the government adopted following the issuance of the Committee's report as well as any future impact it might have on Mr. Kahlon's father's taxi licence were matters of speculation" and that, as a regular member of the Committee, Mr. Kahlon had a "very limited" opportunity to further his father's interest. For all of these reasons, Acting Commissioner Smith determined that Mr. Kahlon did not have a real conflict of interest within the meaning of subsection 2(1) of the B.C. Act.

44 It is worth underscoring at the outset that there is no need 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 interests. Beyond the obvious fact that Ms. Freeland has long since ceased to be Minister of International Trade, she did not, as has been noted, exercise any such official powers, duties or functions in respect of any of the items about which CCI communicated with Mr. Lametti during the time period in which she was Minister of International Trade. In addition, Ms. Freeland did not retain any responsibility for any of the programs, policies or services about which CCI communicated with Mr. Lametti when she became Minister of Foreign Affairs.

45 This conclusion is consistent with the body of opinions issued by the Office of the B.C. Conflict of Interest Commissioner with respect to apparent conflicts of interest, which former Acting Commissioner Smith canvassed in her recently issued Kahlon Opinion (at pp. 16-19). Of particular note in this regard are the Opinions in Blencoe (1993), Harcourt (1995), Campbell (2004) and Kahlon (2019), itself, as these provide a cross-section of situations involving alleged apparent conflicts of interest.

46 Such public office holders include Senators, Members of Parliament, Ministers, Ministers of State, Parliamentary Secretaries, ministerial staff members, ministerial advisors, Governor in Council appointees not explicitly exempted in subsection 2(1) of the Conflict of Interest Act, ministerial appointees whose appointments are approved by Governor in Council, the Chief Electoral Officer, the Parliamentary Budget Officer and individuals designated as public office holders under subsections 62.1(1) and 62.2(2) of the Conflict of Interest Act.

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