OVERVIEW

1. This Application asks the Court to determine whether the process that led to the appointment of the Commissioner of Lobbying ("**Lobbying Commissioner**" or "**Commissioner**") by the Governor in Council was contrary to the *Lobbying Act*, the *Conflict of Interest Act* ("***CofI Act***") and/or the common law of procedural fairness. The Applicant maintains that the Governor in Council failed to engage in meaningful consultation with the leaders of the recognized parties in the House of Commons as required by subsection 4.1(1) of the *Lobbying Act* when it appointed Nancy Bélanger as Lobbying Commissioner. The Applicant also maintains that the Governor in Council contravened the *CofI Act* by furthering a private interest and making or participating in a decision that its members knew or ought reasonably to have known would place them in a conflict of interest in appointing the Lobbying Commissioner. The Applicant further maintains that the Governor in Council was biased, and also denied the Applicant, representing the public interest, procedural fairness in the process of appointing the Lobbying Commissioner.

2. The process of appointment chosen by the Governor in Council was contrary to the common law, as well as the express terms and the objects and purposes of both the *Lobbying Act* and the *CofI Act*. Those objects and purposes are: to provide parliamentarians a right to participate meaningfully in appointing an officer of Parliament occupying a position critical to maintaining ethical conduct among parliamentarians; and to promote and enhance public confidence in the integrity of government and avoidance of conflicts in furtherance of the public interest.

PART I – STATEMENT OF FACTS

A. Public Interest Standing of Democracy Watch

3. Democracy Watch is a not-for-profit organization founded and incorporated in 1993 that advocates for democratic reform, citizen participation in public affairs, and ethical behaviour in government and business in Canada. Democracy Watch is governed by its Coordinator, Directors, and Advisory Committee. Democracy Watch has more than 45,000 supporters from across Canada who are members of its DemocracyWatcher Network and has had more than 100,000 Canadians sign its online petitions for changes to federal and provincial laws.[1]

[1] Applicant's Record, Affidavit of Duff Conacher, para. 2.

4. Democracy Watch articulates its mandate as "20 Steps towards a modern, working democracy", including changes to the information governments and businesses provide to citizens; changes in the ways citizens participate in government and business decision-making; and changes to the ways in which citizens can hold governments and businesses accountable.[2]

5. In pursuit of this mandate, Democracy Watch actively participates in public policy-making and legislative processes in matters relating to government accountability. In particular, Democracy Watch has made submissions and appeared before parliamentary committees in legislative proceedings leading to the enactment or amendment of measures including:

a. Amendments to the *Lobbying Act,* RSC 1985, c.44 (4th Supp.), its predecessor the *Lobbyist Registration Act*, and the *Lobbyists Registration Regulations*, SOR/2008-116 (1994, 1997, 2000, 2003, 2006, and 2010);
b. Creation of the position of Ethics Commissioner as an independent Officer of Parliament and subsequent changes to the enforcement powers and title of this position to Conflict of Interest and Ethics Commissioner through amendments to the *Parliament of Canada Act,* RSC 1985, c.P-1 (2002-2007);
c. Enactment of the *Conflict of Interest Act,* SC 2006, c.9, s.2;
d. Drafting and amendment of the *Conflict of Interest Code for Members of the House of Commons* in (2004; am. 2009);
e. Drafting and amendment of the *Lobbyist Code of Conduct* (1997 and 2015 versions); and
f. Drafting and amendment of the *Conflict of Interest and Post-Employment Code for Public Office Holders* (establishing the position of Ethics Counsellor in 1994, and amendments in 2000, 2003, 2004 and 2006).[3]

6. Democracy Watch welcomed the enactment and development of these statutes and codes as significant advances beyond the *Criminal Code* sanctions (which punish parties for actual cases of corruption and abuse of public office) as they were intended to prevent undisclosed and/or unethical lobbying, and conflict from arising between the public duty and the private interests of public officials (including in their relationships with lobbyists), and to ensure a full, independent investigation and ruling on such circumstances when and if they do arise.[4]

7. Democracy Watch actively participates in proceedings before the various bodies created by the legislative regimes noted above. Democracy Watch further pursues its mandate of

[2] Applicant's Record, Affidavit of Duff Conacher, para. 3, Exhibit A.
[3] Applicant's Record, Affidavit of Duff Conacher, para. 4.
[4] Applicant's Record, Affidavit of Duff Conacher, para. 5.

advancing accountability in democratic governance by utilizing these mechanisms, initiating complaints and participating in proceedings before the various bodies created by these legislative regimes. In particular, Democracy Watch has filed more than 50 government ethics-related petitions with the Commissioner of Lobbying the Conflict of Interest and Ethics Commissioner, and their predecessors.[5] Democracy Watch has also pursued the advancement of accountability in democratic governance before the courts. Democracy Watch appeared as an intervener before the Supreme Court of Canada, in *Harper v. Canada (Attorney General)*, [2004] 1 SCR 827, 2004 SCC 33, and has brought proceedings concerning the Lobbying Commissioner, the Ethics Commissioner, and their predecessors including:

a. *Democracy Watch v. Attorney General of Canada (Office of the Ethics Counsellor)*, 2004 FC 969, [2004] 4 FCR 83;
b. *Democracy Watch v. Barry Campbell and the Attorney General of Canada (Office of the Registrar of Lobbyists)*, 2009 FCA 79, [2010] 2 FCR 139
c. *Democracy Watch v Conflict of Interest and Ethics Commissioner*, 2009 FCA 15; and
d. *Democracy Watch v Attorney General of Canada* (Federal Court of Appeal File #A-287-16).[6]

B. The Selection Process for the New Lobbying Commissioner

8. The Lobbying Commissioner is an Officer of Parliament, appointed for a renewable seven-year term by the Governor in Council following consultation with the leaders of every recognized party in the House of Commons and upon resolution of the House of Commons, in accordance with subsection 4.1(1) of the *Lobbying Act*.[7]

9. Karen Shepherd served as the Lobbying Commissioner from July 2009 on for an initial seven-year term. Ms. Shepherd was then reappointed solely by the Governor-in-Council for three successive six-month terms under subsection 4.1(4) of the *Lobbying Act*. Commissioner Shepherd's last six-month reappointment occurred in June 2017 with the term ending December 29, 2017.[8] Nancy Bélanger was appointed as the new Lobbying Commissioner by Order in Council of the Governor in Council on December 14, 2017, effective December 30, 2017.[9]

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[5] Applicant's Record, Affidavit of Duff Conacher, para. 6.
[6] Applicant's Record, Affidavit of Duff Conacher, para. 7.
[7] *Lobbying Act*, RSC 1985, c.44 (4th Supp.), subsection 4.1(1), Applicant's Book of Authorities, Tab A6.
[8] Applicant's Record, Affidavit of Duff Conacher, para. 14-15 and 27, Exhibits M-Q and BB.
[9] Applicant's Record, Affidavit of Duff Conacher, para. 41, Exhibit KK.

10. In June 2017, the Prime Minister wrote to the leaders of the recognized parties in the House of Commons informing them that a Notice of Appointment Opportunity for the position of Lobbying Commissioner had been posted on a government website. The letter invites both leaders to share the notice with Canadians and with stakeholders who should be consulted. Similar letters were sent to the leaders or recognized parties and groups in the Senate.[10]

11. In June of 2017, Conservative Party of Canada ("**CPC**") Leader Andrew Scheer and then-New Democratic Party ("**NDP**") Leader Thomas Mulcair wrote a joint letter to Prime Minister Trudeau expressing their concern about the Trudeau Cabinet's failure to consult them on appointments of officers of Parliament.[11]

12. On June 12, 2017, the NDP introduced a motion to change the appointment process for officers of Parliament calling for the establishment of a special all-party House of Commons subcommittee, which would review the government's nominees for officers of Parliament and other parliamentary positions. The committee would include one member from each of the recognized parties in the House, with a deputy Speaker serving as its chair.[12]

13. On July 4, 2017, Mr. Mulcair responded to the Prime Minister's letter of June 2017, again expressing concerns about the appointment process for officers of Parliament, and again requesting that the Prime Minister use the process proposed by the NDP in its motion of June 12, 2017.[13]

14. The Governor in Council controlled the entire selection process for the Lobbying Commissioner. Its selection advisory committee was made up of four people, all of whom serve at the pleasure of the Governor in Council, as follows: Janine Sherman, Deputy Secretary to the Cabinet (Senior Personnel and Public Service Renewal); Yaprak Baltacioglu, Secretary of the Treasury Board; Sabina Saini, Chief of Staff to the President of the Treasury Board, and; Hilary Leftick, Director of Public Appointments in the Prime Minister's Office.[14]

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[10] Respondent's Record, Affidavit of Levente-Adrian Balint, paras. 7 and 8, Exhibit B.
[11] Applicant's Record, Affidavit of Duff Conacher, para. 24, Exhibit Z.
[12] Applicant's Record, Affidavit of Duff Conacher, para. 25, Exhibit AA.
[13] Respondent's Record, Affidavit of Levente-Adrian Balint, para 9, Exhibit C.
[14] Applicant's Record, Affidavit of Duff Conacher, para. 35, Exhibit GG.

15. The actual notice by which the Governor in Council purported to comply with the consultation requirements set out in subsection 4.1(1) of the *Lobbying Act* was issued by the Prime Minister by a letter delivered on November 23, 2017 to the leaders of the recognized parties in the House of Commons and leaders of the recognized parties and groups in the Senate. The letters informed each leader that the government proposed Ms. Nancy Bélanger for appointment as the next Lobbying Commissioner.[15] Each leader was asked to the respond to the nomination within seven calendar days from the date of the letter and that the matter be kept confidential.

16. On November 30, 2017, the Prime Minister issued a news release announcing Ms. Bélanger's nomination. The nomination certificate was tabled in the House and Senate.[16]

17. On December 6, 2017, the House of Commons Standing Committee on Access to Information, Privacy and Ethics (the "**Ethics Committee**") held a meeting to hear from, and question, Nancy Bélanger and to vote on her proposed nomination to be Lobbying Commissioner. At the hearing, Ms. Bélanger explained that she had only applied for the position of Information Commissioner, not the Lobbying Commissioner. During an interview for the Information Commissioner position she was asked whether she would consider applying for the position of Commissioner of Lobbying. She then reported that she received a 25-second telephone call from the chief of staff of the President of the Treasury Board informing her that her name would likely be put forward. She was informed on November 22 that in fact her name would be "on the letter."[17]

18. At the hearing, NDP Ethics Critic MP Nathan Cullen, in questioning Ms. Bélanger, expressed disappointment with the lack of consultation with the recognized parties in the House of Commons:

> … for the committee's understanding, we received a letter from the Prime Minister's Office with just your name on it, and it said, "We're consulting. This is the only person on the list, and this is what's going to happen next," which is what we're in now, and then eventually if we pass this stage, we move to Parliament.

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[15] Respondent's Record, Affidavit of Levente-Adrian Balint, paras. 10 to 12, Exhibit D.
[16] Respondent's Record, Affidavit of Levente-Adrian Balint, para. 13, Exhibits E, F, G.
[17] Applicant's Record, Affidavit of Duff Conacher, para. 33, Exhibit GG at page 5.

> … The law talks about consultation, and what most Canadians would think of as consultation is a conversation. The government changed the process, so that you submitted your application."[18]

19. Later in the hearing, NDP MP Cullen abstained from the Ethics Committee's vote to recommend to the House of Commons that Nancy Bélanger be approved as the new Lobbying Commissioner.[19]

20. NDP House Leader Guy Caron is reported in the *Globe and Mail* as having written a letter to Prime Minister Trudeau about the nomination of Nancy Bélanger. He is quoted: "A simple notice of consultation does not constitute consultation and goes against the essence of the law."[20]

21. On December 12, 2017, Mr. Caron, and Mr. Cullen asked Prime Minister Trudeau questions about government appointments, and stated clearly that the NDP's position was that it was not consulted by the government concerning the person nominated as the next Lobbying Commissioner.[21]

22. On December 13, 2017, the House of Commons approved the appointment of Ms. Bélanger on division (meaning some MPs voted against the appointment).[22] The next day, the Governor in Council issued Order in Council 2017-1564 appointing Ms. Bélanger as the new Lobbying Commissioner with her appointment taking effect on December 30, 2017, for a seven-year term during which she will investigate and rule on every alleged violation of lobbying rules by lobbyists in their relationships with the Governor in Council and its staff and appointees, and MPs and senators from all political parties, and other public office holders.[23]

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[18] Applicant's Record, Affidavit of Duff Conacher, para. 34, Exhibit GG at page 4.
[19] Applicant's Record, Affidavit of Duff Conacher, para. 36, Exhibit GG at page 9.
[20] Applicant's Record, Affidavit of Duff Conacher, para. 38, Exhibit HH.
[21] Applicant's Record, Affidavit of Duff Conacher, para. 39, Exhibit II.
[22] Applicant's Record, Affidavit of Duff Conacher, para. 40, Exhibit JJ.
[23] Applicant's Record, Affidavit of Duff Conacher, para. 41, Exhibit KK.

C. Matters Before Lobbying Commissioner Shepherd During New Commissioner Selection Process, and Failure of Ministers to Recuse Themselves

23. On October 25, 2016, Democracy Watch filed a petition with the Lobbying Commissioner alleging violations of the *Lobbyists' Code of Conduct* ("***Lobbyists' Code***") by Barry Sherman, Chairman of Apotex Inc., because according to media reports he had assisted in organizing a fundraising event attended by Minister of Finance Bill Morneau ("**Minister Morneau**") that was scheduled for November 7, 2016, and because Apotex Inc. was registered to lobby Finance Canada.[24] The Lobbying Commissioner confirmed in a letter dated October 25, 2016 that her office was investigating those alleged violations.[25]

24. On November 4, 2016, Democracy Watch filed a second petition with the Lobbying Commissioner alleging violations of the *Lobbyists' Code* by Barry Sherman, Chairman of Apotex Inc., because he organized and hosted a fundraising event attended by then-Liberal Party Leader Justin Trudeau in August 2015 and because Apotex Inc. was registered to lobby the Office of the Prime Minister.[26] The Lobbying Commissioner confirmed in a letter dated November 18, 2016 that her office was investigating the situation and those alleged violations.[27]

25. On March 1, 2017, Democracy Watch filed a third petition with the Lobbying Commissioner alleging violations of the *Lobbyists' Code* by Mickey MacDonald, board member of Clearwater Seafoods Inc., because he organized and hosted a fundraising event attended by then-Liberal Party Leader Trudeau in August 2014, and because Clearwater Seafoods Inc. was registered to lobby the Office of the Prime Minister. In a letter dated March 3, 2017, the Lobbying Commissioner confirmed that her office was investigating the situation and alleged violations set out in Democracy Watch's March 1, 2017 petition.[28]

26. In a letter dated July 12, 2017, Democracy Watch filed a fourth petition with the Lobbying Commissioner alleging violations of the *Lobbyists' Code* by staff members of the Council of Canadian Innovators ("**CCI**") because they had assisted with the 2015 federal election campaign

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[24] Applicant's Record, Affidavit of Duff Conacher, para. 17, Exhibit R.
[25] Applicant's Record, Affidavit of Duff Conacher, para. 18, Exhibit S.
[26] Applicant's Record, Affidavit of Duff Conacher, para. 19, Exhibit T.
[27] Applicant's Record, Affidavit of Duff Conacher, para. 20, Exhibit U.
[28] Applicant's Record, Affidavit of Duff Conacher, paras. 21, 22, Exhibits V, W.

of Minister of Foreign Affairs Chrystia Freeland ("**Minister Freeland**"), and because CCI was registered to lobby Minister Freeland's department, Global Affairs Canada.[29] In a letter dated July 20, 2017, the Lobbying Commissioner confirmed that her office was investigating the situation and alleged violations set out in Democracy Watch's July 12, 2017 petition.[30]

27. Commissioner Shepherd was conducting her investigations under Rule 8 and Rule 6, among other rules of the *Lobbyists' Code*, the code established under the *Lobbying Act* that, among other things, prohibits lobbyists from engaging in activities that could place public office holders (including members of the Governor in Council) in a real or apparent conflict of interest.[31] A finding of a breach of those rules would mean that the Prime Minister, Minister Morneau and Minister Freeland were in a conflict of interest.

28. Commissioner Shepherd had not issued public rulings on any of Democracy Watch's four petitions alleging violations of the *Lobbyists' Code* in situations involving Prime Minister Trudeau or other ministers before the new Lobbying Commissioner was appointed by the Governor in Council on December 14, 2017.[32]

29. Under subsection 25(1) of the *CofI Act*, all reporting public office holders are required to make public declarations when they recuse themselves that provide sufficient detail that identifies the conflict of interest that was avoided. The public declarations are then reported on the Commissioner's Public Registry maintained on its website. On May 15, 2017, Prime Minister Trudeau's office issued a statement that claimed he was recusing himself from the decision-making process concerning the appointment of the next Ethics Commissioner due to the Ethics Commissioner's ongoing Aga Khan trip investigation, and that he had designated Minister Chagger "to fulfil any relevant obligations in relation to the appointment process for the Conflict of Interest and Ethics Commissioner."[33]

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[29] Applicant's Record, Affidavit of Duff Conacher, para. 29, Exhibit DD.
[30] Applicant's Record, Affidavit of Duff Conacher, para. 30, Exhibit EE.
[31] *Lobbyists' Code of Conduct*, Rule 6, Rule 8, Rule 9, Applicant's Book of Authorities, Tab A7.
[32] Applicant's Record, Affidavit of Duff Conacher, para. 31.
[33] Applicant's Record, Affidavit of Duff Conacher, paras. 23-24, Exhibits X, Y.

30. Even though Lobbying Commissioner Shepherd, like the Ethics Commissioner, was investigating situations involving the Prime Minister Trudeau (and other ministers), neither Prime Minister Trudeau nor the ministers recused themselves from the decision-making process concerning the appointment of the next Lobbying Commissioner.

PART II – ISSUES RAISED BY THIS APPLICATION

Issue 1: Whether the Applicant has standing to bring the present application.

Issue 2: The appropriate standard of review.

Issue 3: Whether the Governor in Council violated subsection 4.1(1) of the *Lobbying Act* by failing to consult with the leaders of every recognized party and group in Parliament.

Issue 4: Whether the Governor in Council violated section 4, subsection 6(1) and section 21 of the *Conflict of Interest Act* by making a decision or exercising a power that provided an opportunity to further the private interests of its members?

Issue 5: Whether the common law on reasonable apprehension of bias and legitimate expectations required the Governor in Council to recuse itself.

PART III – LAW AND ARGUMENT

A. Democracy Watch has Standing to Bring this Application

i) The Test for Public Interest Standing

31. Granting public interest standing is a discretionary power within the jurisdiction of the Court. When exercising this discretion, the test for public interest standing must be applied contextually, liberally, and generously, with reference to the policy rationales for granting standing.[34] The test for was most recently refined by the Supreme Court of Canada in *Downtown Eastside*:

> In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has

[34] *Canada v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 ("*Downtown Eastside*") at paras 35-36, 44-52, Applicant's Book of Authorities, Tab B3; *Sierra Club of Canada v Canada (Minister of Finance),* [1999] 2 FC 211 ("*Sierra Club*") at 13, Applicant's Book of Authorities, Tab B15.

> a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts[.][35]

32. Democracy Watch meets the test for public interest standing. It has raised serious issues arising from a legislative regime in which it has played a significant and active role; it has a genuine stake in ensuring the purpose and intent of these provisions is realized; and, it is uniquely situated to bring these issues before the Court.

i) A Serious Justiciable Issue has been Raised

33. The present case raises serious justiciable issues concerning compliance by key public officials with statutes that govern ethical conduct by members of the Executive. These issues are: the requirement to consult with Parliament on the selection of the Lobbying Commissioner; and compliance with the regime of conflict of interest under the *CofI Act* and the common law. The Governor in Council failed to meaningfully consult with the leaders of each recognized party in the House of Commons, violating the *Lobbying Act*. The failure of members of the Governor in Council to recuse themselves from the decision-making process that led to the selection of the current Lobbying Commissioner is contrary to the requirements of the *CofI Act* and the common law. These matters raise issues of public confidence in the integrity of government.

i) Democracy Watch has a Genuine Interest in the Matter

34. The applicant has a "genuine interest," a "real stake" in the proceedings, and is firmly "engaged with the issues" raised by the Application. The applicant has a "real and continued interest" in the issue, and is not a "mere busybody". The Applicant's experience and expertise and its involvement in the issue makes it an appropriate body to bring the case in the public interest.[36]

35. The Applicant's *raison d'etre* is to advocate for democratic reform, citizen participation, and ethical behaviour in government by actively participating in public policymaking and legislative processes in matters relating to government accountability.[37] In pursuit of these objectives, Democracy Watch has played an important role in the development of government

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[35] *Downtown Eastside,* para. 37, Applicant's Book of Authorities, Tab B3.
[36] *Downtown Eastside, supra* at para. 43, Applicant's Book of Authorities, Tab B3.
[37] Applicant's Record, Affidavit of Duff Conacher, paras. 3, Exhibit A.

oversight and accountability legislation and in the subsequent use of these mechanisms to continue promoting and advancing transparency and accountability in government.

36. Democracy Watch maintains a strong "track record" and "degree of involvement" with the subject matter of the application. Indeed, Democracy Watch actively participated in the legislative processes leading to the amendment of the *Lobbying Act* in 2006 that created the Lobbying Commissioner position.[38] Democracy Watch also has a record of engaging these mechanisms, initiating public complaints and participating in proceedings before the various bodies created by these regimes, and by pursuing the advancement of accountability in democratic governance before the courts.[39]

37. As in *Sierra Club*, where the Court recognized involvement in the development and enforcement of a legislative system as relevant to establishing a general understanding and genuine interest in a matter, the Applicant's active participation in the legislative development and subsequent operation of these regimes demonstrates it has the requisite interest and record of engagement in the issues raised by this application.[40]

i) A Reasonable and Effective Means of Bringing the Issues Before the Court

38. The third factor in the public interest standing analysis is "whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court."[41] This factor is closely linked to the principle of legality, as courts should consider whether granting standing is desirable from the point of view of ensuring lawful action by government actors.[42] As noted in *Downtown Eastside*:

> [B]y taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is

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[38] Applicant's Record, Affidavit of Duff Conacher, paras. 4, 5 and 10, Exhibits C and D.
[39] Applicant's Record, Affidavit of Duff Conacher, paras. 6, 7.
[40] *Sierra Club,* paras 66-68, Applicant's Book of Authorities, Tab B15.
[41] *Downtown Eastside,* para 52, Applicant's Book of Authorities, Tab B3.
[42] *Downtown Eastside,* para. 49.

> effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.[43]

39. Public interest standing will be granted where individual litigants are not reasonably likely to bring an issue before the Court. In this case, Democracy Watch is likely the only interested party having the experience and ability to initiate legal proceedings to ensure that the Lobbying Commissioner and public office holders comply with its statutory obligations. There is no other "directly affected" party who could launch an application for judicial review, and no other reasonable and effective way to bring this matter before the Court.[44]

40. Democracy Watch submits that its present application is a reasonable and effective means of bringing this important matter before the Court. As a party with an established track record and a real and continued interest in issues of ethics, transparency, and accountability of government institutions, Democracy Watch has standing to bring this application for judicial review.

B. The Appropriate Standard of Review

41. Failure of procedural fairness is at the heart of this Application. Correctness is the appropriate standard of review where procedural fairness is concerned. The duty of procedural fairness is "flexible and variable, and depends upon an appreciation of the particular statute and rights affected."[45] This approach, with some modification, has been adopted by the Federal Court of Appeal in at least one judgment. The Court held that while it remains a "black-letter rule" that allegations of procedural unfairness are to be reviewed on a standard of correctness, some deference is called for in certain procedural matters, particularly where a decision-maker has sought to "balance maximum participation" and "efficient decision-making" and has particular expertise in a given procedure that differs from a reviewing court's expertise.[46] It is submitted that those factors have little application to the present Application.

42. The conclusion on the correctness standard is reinforced by a number of additional factors:

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[43] *Downtown Eastside,* para. 50.
[44] *Sierra Club,* p. 20, Applicant's Book of Authorities, Tab B15.
[45] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, paras. 22-27, (hereinafter *Baker*), Applicant's Book of Authorities, Tab B1.
[46] *Re: Sound v. Fitness Industry Council of Canada,* 2014 FCA 48, paras. 34-36 (hereinafter *Sound*), Applicant's Book of Authorities, Tab B13.

the nature and importance of the interests to be protected – maintaining public confidence in the integrity of government and ensuring the effective functioning or our democratic institutions; and the issues to be addressed in this Application require interpretation of a complex statutory regime in which the Governor in Council's expertise is no greater than that of the Courts (arguably lesser).[47] The Governor in Council is, thus, due only minimal deference concerning the process it chose for making an appointment to an important position that is central to maintaining integrity and ethical conduct in government.

C. The Governor in Council Failed to Consult With the Leaders of Every Recognized Party and Group in Parliament Contrary to the *Lobbying Act*

43. The *Lobbying Act* provides at subsection 4.1(1) that "the Governor in Council shall … appoint a Lobbying Commissioner after consultation with the leader of every recognized party in the Senate and House of Commons" and approval by resolutions of both chambers.[48] The *Lobbying Act* may be seen as one of the statutes that furthers a number of unwritten principles of the Constitution of Canada, among them: democracy, constitutionalism and the rule of law.[49] It regulates the conduct of lobbyists in their relationships with members of the Governor in Council and other public office holders, including through mandating the Lobbying Commissioner to play a central role in enforcing the *Lobbying Act*, and to enforce the *Lobbyists' Code*.

44. The Lobbying Commissioner position was created by the enactment of Bill C-2 in 2006 as an officer of Parliament, given the "perception that partisan oversight is inappropriate for an activity as highly political as lobbying."[50] The Lobbying Commissioner is accountable to and reports only to Parliament. The Lobbying Commissioner has frequently emphasized the independence of the position, highlighting the importance of the change from a Registrar of Lobbyists chosen solely by the Governor in Council (pre-2006) to a Lobbying Commissioner chosen after consultation with both Houses of Parliament.[51]

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[47] *Dunsmuir v. New Brunswick*, 2008 SCC 9, paras. 54-56, (hereinafter *Dunsmuir*), Applicant's Book of Authorities, Tab B9.
[48] *Lobbying Act*, R.S.C. 1985, c. 44 (4th Supp.), subsection 4.1(1), Applicant's Book of Authorities, Tab A6.
[49] *Reference Re Senate Reform*, 2014 SCC 32, para. 25, Applicant's Book of Authorities, Tab B14.
[50] M. A. Chaplin, *Officers of Parliament: Accountability, Virtue and the Constitution* (LL.M. Thesis) 2009, pp. 26-27, Applicant's Book of Authorities, Tab C4.
[51] Applicant's Record, Affidavit of Duff Conacher, paras. 8-12, Exhibits B to K.

45. The Lobbying Commissioner has broad investigatory and enforcement powers, including legislative authority to maintain a code of conduct for lobbying, effectively a regulation-making power.[52] The *Lobbyists' Code* regulates lobbying activities, with lobbyists being required by statute to comply with the *Code*.[53] It contains principles that reinforce the importance of the regime of regulation of lobbying to the democratic process and to safeguarding the integrity of government. These principles are: respect for democratic institutions; integrity and honesty; openness; and professionalism.[54]

46. The *Lobbying Act* does not set out criteria on what should constitute consultation. In keeping with the broad, purposive interpretation of the statute, one that gives effect to its objects and purposes, consultation should be meaningful. Such an interpretation would accord with Parliament's intention as expressed by the House of Commons Standing Committee on Procedure and House Affairs in its 2003 report on Bill C-34, An Act to amend the Parliament of Canada (Ethics Commissioner and Senate Ethics Officer). (Due to prorogation, the bill was reintroduced in a subsequent session of Parliament as Bill C-4.) The Committee was concerned that the proposed legislation did not allow for "meaningful consultation" with parliamentarians in the process of selection of the Commissioner of Ethics and Conflict of Interest.[55] The Government responded to this concern and added the consultation requirement in the bill.[56] Bill C-4 was enacted in 2004, with the consultation requirement now found in subsection 81(1) of the *Parliament of Canada Act*.[57] The process that led to the enactment of the consultation requirement for the Ethics Commissioner serves also to define what consultation means in relation to the Lobbying Commissioner.

47. The duty of consultation may be properly regarded as an aspect of procedural fairness. Since the statute is silent on the content of that duty, resort must be had to common law principles of procedural fairness, as articulated in *Baker*. Given the intent of Parliament, and the critical

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[52] *Lobbying Act*, section 10.2; *Lobbyists Code of Conduct*, "Principles," Applicant's Book of Authorities, Tab A6.
[53] *Lobbying Act*, section 10.3.
[54] *Lobbyists' Code of Conduct*, Applicant's Book of Authorities, Tab A7.
[55] Canada, House of Commons, 27th Report of the House of Commons Standing Committee on Procedure and House Affairs, 37:2, April 10, 2003, Applicant's Book of Authorities, Tab C3.
[56] House of Commons, *Debates*, 37:2 (Official Report: Hansard), September 22, 2003, p. 7605, Applicant's Book of Authorities, Tab C7.
[57] *Parliament of Canada Act*, R.S.C., 1985, c. P-1, subsection 81(1), Applicant's Book of Authorities, Tab A8.

functions performed by the Lobbying Commissioner enforcing rules that lobbyists must adhere to in lobbying the Governor in Council, and all Members of the House of Commons and the Senate and other public office holders, a very high degree of procedural fairness is required.

48. The Governor in Council failed to fulfill its statutory duty to consult by failing to engage in a meaningful consultation. The kind of consultation that took place can best be described as cursory or *pro forma*. The nominee for appointment was chosen solely by the Governor in Council, and the leaders of the recognized parties in the House of Commons and Senate were essentially told that the nominee would be the person appointed.

49. The chronology of events leading up the appointment of the Lobbying Commissioner is set out here for ease of reference:

- June 8, 2017: Andrew Scheer, CPC leader, and Thomas Mulcair, then-leader of the NDP, wrote a joint letter to Prime Minister Trudeau expressing their concern about the Governor in Council's failure to consult them on appointments of officers of Parliament;[58]
- June 12, 2017: The NDP introduced a motion calling for the establishment of a special all-party committee to review the Government's nominees for officers of Parliament;[59]
- June 20, 2017: Letter from the Prime Minister to the leaders of the recognized parties in the House of Commons and of recognized parties and groups in the Senate, informing them of job notice for Lobbying Commissioner position so they can distribute it;[60]
- July 4, 2017: Letter from Mr. Mulcair to the Prime Minister again expressing concern about appointment process for the Lobbying Commissioner and proposing different process;[61]
- November 23, 2017: Letter from Prime Minister delivered to leaders of recognized parties in House and Senate nominating of Nancy Bélanger as Lobbying Commissioner;[62]
- November 30, 2017: Prime Minister issued a public statement announcing the nomination of Ms. Bélanger. A nomination certificate for Ms. Bélanger was tabled in both chambers;[63]
- November 30, 2017: *Globe and Mail* article re: letter from NDP House Leader Guy Caron to Prime Minister saying party leader not consulted on nomination of Ms. Bélanger;[64]
- December 6, 2017: House Ethics Committee meeting with Ms. Bélanger. MPs from both opposition parties expressed their concern about a lack of consultation. The meeting lasted 50 minutes, and NDP MP Cullen abstained from the approval vote;[65]
- December 11, 2017; Appointment of Ms. Bélanger approved by resolution of the Senate;[66]

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[58] Applicant's Record, Affidavit of Duff Conacher, para. 25, Exhibit Z.
[59] Applicant's Record, Affidavit of Duff Conacher, para. 26, Exhibit AA.
[60] Respondent's Record, Affidavit of Levente-Adrian Balint, paras. 7, 8, Exhibit B.
[61] Respondent's Record, Affidavit of Levente-Adrian Balint, para. 9, Exhibit C.
[62] Respondent's Record, Affidavit of Levente-Adrian Balint, paras. 10-12, Exhibit D.
[63] Respondent's Record, Affidavit of Levente-Adrian Balint, paras. 10- 12, Exhibits E, F, G.
[64] Applicant's Record, Affidavit of Duff Conacher, para. 38, Exhibit HH.
[65] Applicant's Record, Affidavit Duff Conacher, para. 33, Exhibit GG.
[66] Respondent's Record, Affidavit of Levente-Adrian Balint, para. 13, Exhibit J.

- December 12, 2017: Mr. Caron and Mr. Cullen re-iterated in the House of Commons that their party had not been consulted on the nomination of Ms. Bélanger; [67]
- December 13, 2017: House of Commons passed motion approving appointment of Ms. Bélanger with the vote taken on division (that is, with an undetermined number of MPs voting against the appointment). The vote took place on the last sitting day of House;[68]
- December 14, 2017: Governor in Council appoints Ms. Bélanger as Lobbying Commissioner;[69]
- December 14, 2017: as of this date, the Lobbying Commissioner had not concluded its investigation into any of the four complaints brought by the Applicant concerning lobbyists relationships with the Prime Minister and members of the Governor in Council.

50. The Governor in Council's only step taken to consult was a letter sent on November 22, 2017, and delivered the next day, by the Prime Minister to the leaders of each recognized party or group in each House requesting a reply by no later than November 29, 2017. While, the Respondent's affidavit characterizes the June 2017 letters as "engagement" letters, they were little more than invitations to share the notice of appointment opportunity and to identify other stakeholders. They cannot be reasonably be construed as consultation efforts and, in fact, the government has conceded that they did not constitute consultation as required under subsection 4.1(1) of the *Lobbying Act*.

51. In effect, only six days were provided to each party or group leader to reply to the proposal on the single nominee during one of the busiest periods in the parliamentary calendar, with no indication that the Governor in Council was prepared to consider, let alone appoint, any other nominee. This short amount of time, and lack of choice, provided by the Governor in Council could not credibly provide any opportunity for review, input or commentary on the appointment, much less a meaningful opportunity to become involved in the process. It cannot be seen as consultation, much less "meaningful consultation."

52. In other contexts, courts have been prepared to grant remedies for failure of consultation where a statute or the common law required such. In the labour relations context where legislation gave a provincial minister of labour broad discretion to appoint arbitrators in hospital labour disputes, and there was no express duty to consult, the Supreme Court of Canada held that failure to consult was contrary to the objects and purposes of the relevant legislation. The minister's

[67] Applicant's Record, Affidavit of Duff Conacher, para. 39, Exhibit II.
[68] Applicant's Record, Affidavit of Duff Conacher, para. 40, Exhibit JJ.
[69] Applicant's Record, Affidavit of Duff Conacher, para. 41, Exhibit KK.

discretion to appoint arbitrators was constrained by the regime and object of the legislation, and a remedy was granted.[70]

53. In the context of school closures, a school board was found to have breached a common law duty to consult the affected community in a decision to close a school. Notwithstanding the absence of a legislative requirement of consultation, the Court in *Bezaire v. Windsor Roman Catholic Separate School Board* found that the board had only provided a "pro forma" opportunity to parents to present views and alternatives.[71]

54. As for the content of the duty to consult, the aboriginal law context is instructive. In *Dene Tha' First Nation v. Canada (Minister of Environment)*, the Federal Court of Canada summarized the Supreme Court of Canada's formulation of the content of that duty:

> [88] … at the lowest end of the spectrum, the duty to consult requires the Crown to give notice, disclose information, and discuss any issues raised in response to said notice. On the highest end of the spectrum, the duty to consult requires the opportunity to make submissions for consideration, formal participation in the decision-making process, and the provision of written reasons that reveal that Aboriginal concerns were considered and affected the decision.[72]

D. The Governor in Council Breached the *Conflict of Interest Act*

i) The Brief History of the *Conflict of Interest Act*

55. The *Conflict of Interest Act* ("*CofI Act*") was enacted in 2006 as part of the *Federal Accountability Act*, and came into force in 2007. It contained some new rules and some of the rules that were in the *Conflict of Interest and Post-Employment Code for Public Office Holders* issued by Prime Ministers from 1985 on ("*PM Code*"). The *PM Code* (which continues to exist) may be described as a "soft law" instrument intended to guide public office holders in the conduct of their affairs.[73] The *CofI Act* thus placed the federal conflict of interest regime on a "hard law" statutory

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[70] *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 SCR 539, 2013 SCC 29, para. 49, 94 and 184 (hereinafter *C.U.P.E.*) Applicant's Book of Authorities, Tab B5.
[71] *Bezaire v. Windsor Roman Catholic Separate School Board*, 1992 CanLII 7675 (ON SC), Applicant's Book of Authorities, Tab B2.
[72] *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, at para. 88, summarizing paras. 43-45 of *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, Applicant's Book of Authorities, Tab B8.
[73] L. Sossin and C. W. Smith, "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of Courts in Regulating Government," *Alberta Law Review* 40, April 2003, pp. 867-893, Applicant's Book of Authorities, Tab C9 (hereinafter, Sossin and Smith).

footing where previously it had only been a guideline not capable of judicial control.

56. The enactment of the *CofI Act* was the culmination of several decades of attempted reforms to the conflict of interest regimes at the federal level. An exhaustive account of the developments that led up the statute's enactment would be beyond the scope of this document. Nonetheless, an overview may assist the Court:

- Pre-1994: Conflict of interest guidelines for Cabinet (*PM Code*) issued by the Prime Minister and administered by Office of the Assistant Deputy Registrar General (ADRG);
- 1994: ADRG changed to the Ethics Counsellor who reported privately and directly to the Prime Minister and had no investigative or decision-making powers over *PM Code*;
- 2003: Bill C-34 proposes to amend *PofC Act* to create independent Ethics Commissioner to enforce *PM Code* and new MP Code (Bill C-34 was enacted in 2004 as Bill C-4);
- 2006: enactment of Bill C-2 *Federal Accountability Act*, includes, among other things, the new *Conflict of Interest Act* ("*CofI Act*") which contains some rules from existing *PM Code* and some new rules, and renames the Ethics Commissioner the Conflict of Interest and Ethics Commissioner to reflect the new mandate to enforce *CofI Act*, and;[74]
- 2015: Prime Minister Trudeau issues his updated version of the *PM Code*.

ii) Objects and Purposes of the *Conflict of Interest Act*

57. The *CofI Act* addresses long-standing concerns about abuses of public office by some public office holders. It sets out a regime of conflict of interest and post-employment rules for public office holders, including ministers of the Crown, ministerial staff and advisors and certain Governor in Council appointees. The regime is enforced and administered by a Conflict of Interest and Ethics Commissioner, an officer of Parliament reporting directly to Parliament, endowed with broad investigative and enforcement powers and exercising quasi-judicial functions.

58. The *CofI Act* is remedial legislation. The *Interpretation Act* requires that the Act be "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[75] This was the approach adopted by the Oliphant Commission.[76] The *CofI Act*'s objects can be gleaned from various provisions of the statute, supplemented by judicial sources. They may

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[74] I. Green, D. P. Ed., Shugarman, R. Shepherd, "Ethical Problems in Public Life," in I. Green and D. P. Shugarman, Eds., *Honest Politics Now: What Ethical Conduct Means in Public Life*, (J. Lorimer Publishers, 2017), p. 74-79. Applicant's Book of Authorities, Tab C6.

[75] *Interpretation Act*, R.S.C., 1985, c. I-21, section 12, Applicant's Book of Authorities, Tab A4.

[76] Canada, *Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney*, 2010, Vol. 3, Policy and Consolidated Findings and Recommendations, p. 485, (hereinafter, Oliphant Commission). Applicant's Book of Authorities, Tab C1.

be summarized as avoidance, minimizing and prevention of conflicts, and enhancing or maintaining public confidence in the integrity of government. Section 3 identifies minimizing the possibility of conflicts, avoidance of conflicts, and resolution of those conflicts "in the public interest" among its purposes:

> **3** The purpose of this Act is to
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> ….
>
> (b) **minimize the possibility of conflicts** arising between the private interests and public duties of public office holders and provide for the **resolution of those conflicts in the public interest** should they arise;
>
> (c) provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to **avoid conflicts of interest** and to determine whether a contravention of this Act has occurred;
>
> …. [emphasis added]

59. Section 5 of the *CofI Act* requires public office holders to arrange their personal affairs "in a manner that will **prevent the public office holder from being in a conflict of interest**." [emphasis added] Section 6 speaks to having knowledge or reasonably knowing of being in a conflict of interest position:

> **6** (1) No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder **knows or reasonably should know that**, in the making of the decision, he or she would be in a conflict of interest. [emphasis added]

60. The *CofI Act* defines a conflict of interest with reference to furthering "private interests," whether one's own or those of another. Significantly, none of the *PM Codes* that preceded the enactment of the *CofI Act* contained a definition of conflict of interest. It was the lack of such a definition that rendered enforcement of conflict of interest rules so difficult. The Federal Court of Canada, for example, was compelled to declare of no force and effect the report of the Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair Stevens because the Commission developed on its own initiative a definition of conflict of interest.[77] The text of section 4 of the *CofI Act* is set out for ease of reference:

> **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

[77] Canada, *Commission of Inquiry into the Facts of Allegations of Conflicts of Interest Concerning the Honourable Sinclair M. Stevens*, 1987 (hereinafter, Parker Commission), Applicant's Book of Authorities, Tab C2. *Stevens v. Canada (Attorney General)* 2002 FC 1746, paras. 46, 47, Applicant's Book of Authorities, Tab B16.

> or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.

61. Nothing in the *CofI Act* restricts the definition of private interests to financial or pecuniary matters, and "private interest more broadly construed is the growing norm in government ethics law in Canada."[78] Instead, subsection 2(1) only defines what a private interest is *not* (and none of the exemptions apply to the appointment process for the Lobbying Commissioner):

> *private interest* does not include an interest in a decision or matter
> (a) that is of general application;
> (b) that affects a public office holder as one of a broad class of persons; or
> (c) that concerns the remuneration or benefits received by virtue of being a public office holder.

62. In contrast to the *CofI Act*, the *Conflict of Interest Code for Members of the House of Commons* ("***MP Code***") expressly defines furthering a private interest in financial terms.[79] The differences between the two bodies of rules reinforces the notion that the *CofI Act* requires a broad definition of the meaning of private interest that goes beyond financial or pecuniary interest. It was open to Parliament to enact provisions in the *CofI Act* to limit the concept of private interest to financial or pecuniary interest. The fact that it did not do so suggests that Parliament's intention was to cast a broad net in defining private interest. The implied exclusion rule of statutory interpretation may serve to assist the Court in this instance. The rule provides that where there is reason to believe that a legislature "had meant to include a particular thing within its legislation, it would have referred to that thing expressly."[80]

63. On a more fundamental level, this Court has expressed the purposes of the conflict of interest regime at the federal level as enhancing public confidence in the integrity of public office holders, noting the public interest in promoting trust in the integrity of government decision-making. The Court in *Democracy Watch v. Canada (Attorney General)* expressed this principle in articulating the test for bias in decisions of the Ethics Counsellor, the predecessor to the Lobbying

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[78] G. J. Levine, *The Law of Government Ethics: Federal, Ontario and British Columbia*, 2nd Ed., Canada Law Books, 2015, p. 10, Applicant's Book of Authorities, Tab C8.
[79] House of Commons, *Standing Orders of the House of Commons, Appendix I, Conflict of Interest Code for Members of the House of Commons*, subsection 3(2), Applicant's Book of Authorities, Tab A2.
[80] R. Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed., Lexis-Nexis, 2014, p. 248, Applicant's Book of Authorities, Tab C10.

Commissioner. The principle still holds in understanding the objects and purposes of the *CofI Act*. The relevant passage from the judgment states:

> [39] I favour the test for determination of bias, whether specific or institutional, urged on behalf of Democracy Watch given the critical role of the Ethics Counsellor in enhancing "...public confidence in the integrity of public office holders and the decision making process in government..."[81] [emphasis added]

iii) The *Conflict of Interest Act* Imposes "Demanding Standards"

64. The *CofI Act* is one of the critical pieces of a regime designed to maintain ethical conduct in government. It is a companion to a series of statutes related to ethics at the federal level, including: the *Criminal Code of Canada* provisions dealing with the most egregious of ethical contraventions such as corruption and influence peddling, and the *Lobbying Act*, as well as codes such as the *PM's Code*, the *MP Code*, and the *Lobbyists' Code*. Given the strong public interest in maintaining integrity in government, "demanding" standards of conduct must be imposed on public office holders governed by ethics legislation.[82]

65. Thus, the integrity measures in the *CofI Act* must be interpreted in light of the Supreme Court of Canada's judgment in *R. v. Hinchey*, which held that the federal ethics rules are part of multiple statutes and codes that "regulate behaviour" of federal government officials "for the important goal of preserving the integrity of government" (para. 13). In this vein, Justice L'Heureux-Dubé wrote for the majority that:

> "Suffice it to say that our democratic system would have great difficulty functioning efficiently if its integrity was constantly in question. … [T]he importance of preserving integrity in the government has arguably increased given the need to maintain the public's confidence in government in an age where it continues to play an ever increasing role in the quality of everyday people's lives."[83]

iv) Conflicts of Interest May be Real or Apparent

a) Real Conflict of Interest

66. The various concepts of conflict of interest have deep roots in Canadian ethics law, with

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[81] *Democracy Watch v. Canada (Attorney General)* 2004 FC 969, para. 39, Applicant's Book of Authorities, Tab B7.
[82] Oliphant Commission, pp. 485-486, Applicant's Book of Authorities, Tab C1.
[83] *R. v. Hinchey*, [1996] 3 S.C.R. 1128, 1996 CanLII 157, at para. 14, Tab B12.

guidance on their meaning found in a number of sources. One important source is the "Parker Commission report.[84] The Parker Commission defined a real conflict of interest as one where: there exists a private interest; that is known to the public office holder; and that has a connection with his or her public duties sufficient to influence the exercise of those duties or responsibilities.[85] Moreover, the focus is "on the situation, not the decision."[86]

b) Apparent Conflict of Interest

67. In articulating the concept of an apparent conflict of interest, the Parker Commission emphasized the underlying objectives of conflict of interest rules as maintaining and enhancing trust and confidence in government and the importance of public perception that government business is being conducted in an "impartial and even-handed manner."[87] To this end, the Parker Commission adopted this definition of an apparent conflict of interest:

> An apparent conflict of interest exists where there is a reasonable apprehension, which reasonably well-informed persons could properly have, that a conflict of interest exists.[88]

68. The Parker Commission drew from the common law case authorities on reasonable apprehension of bias in developing its concept of apparent conflict relying in part on the seminal judgment in *Committee for Justice and Liberty v. National Energy Board*:

> "... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically, and having thought the matter through would conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."[89]

69. The Parker Commission emphasized that no specific, or actual, knowledge on the part of a public office holder that a private interest could be affected by his or her actions or inactions is required:

> 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

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[84] Parker Commission, Applicant's Book of Authorities, Tab C2.
[85] Parker Commission, p. 25.
[86] Parker Commission, p. 26.
[87] Parker Commission, p. 31. Applicant's Book of Authorities, Tab C2.
[88] Parker Commission, p. 35.
[89] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369 at p. 394, Applicant's Book of Authorities, Tab B4.

> appearance of conflict of interest 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.[90]

70. The common law test of reasonable apprehension of bias has also informed statutory definitions of conflict of interest in other contexts, including in municipal councils. In *Old St. Boniface Residents Association*, the Supreme Court of Canada defined a conflict of interest in relation to a member of a municipal council, sufficient to disqualify the member, as follows:

> "Where such [a personal] interest is found, at both common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest."[91]

v) The *Conflict of Interest Act* Covers Real and Apparent Conflicts of Interest

71. The definitions of conflict of interest developed by the Parker Commission have had "a critical influence on the development of government ethics laws in Canada."[92] Those definitions, particularly the definition of apparent conflict, are embedded in the *CofI Act* and must serve to inform the interpretation of the meaning of conflict of interest.

72. As L'Heureux-Dubé, J. wrote for the majority in *Hinchey*: "The need to preserve the appearance of integrity..." requires that the statutory provisions at issue in Hinchey be interpreted so as to prohibit actions "...which can potentially compromise that appearance of integrity" (para. 16).[93] That reasoning is equally applicable to similar government ethics statutes like the *CofI Act*. As Justice L'Heureux-Dubé also noted in *Hinchey*: "...it is not necessary for a corrupt practice to take place in order for the appearance of integrity to be harmed. Protecting these appearances is more than a trivial concern".[94]

73. In a similar vein, the Federal Court of Appeal has ruled unanimously that the phrase "a conflict of interest" means a situation in which a public office holder has "competing loyalties" or "a real or seeming incompatibility between one's private interests and one's public or fiduciary

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[90] Parker Commission, p. 32.
[91] *Old St. Boniface Residents Association Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, at 1196. Applicant's Book of Authorities, Tab B11.
[92] Levine, p. 10, Applicant's Book of Authorities, Tab C8.
[93] *Hinchey*, para. 16, Applicant's Book of Authorities, Tab B12.
[94] *Hinchey*, para. 17.

duties" that "might reasonably be apprehended to give rise to a danger of actually influencing the exercise of a professional duty."[95]

74. The regime of the *CofI Act* and the broad, comprehensive language used in the operative provisions makes clear that it was intended to apply to real and apparent conflicts of interest. As noted out above in paragraph 55, section 3 of the *CofI Act* articulates among its purposes prevention and avoidance of "conflicts of interest" generally, without any limiting language that would confine it to "real" conflicts of interest. More expressly, subsection 6(1) applies to decision-making where the "public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest." [emphasis added] Similarly, section is directed at prevention of conflicts of interest.

75. Section 8 of the *CofI Act* prohibits the use of insider information not only to further private interests, but also to "seek to further" private interests, while section 9 prohibits the use of a public office holder's position to "seek to influence a decision of another person so as to further" a private interest. In addition, subsection 11(1) of the *CofI Act* bans the acceptance of gifts and other advantages "that might reasonably be seen to have been given to influence the public office holder in the exercise of an official power, duty or function." [emphasis added]

vi) Alternative Selection Processes were Available to the Governor in Council

76. The most analogous non-statutory processes to the appointment process for the quasi-judicial Lobbying Commissioner, which the Governor in Council has also modified since the 2015 election (before the search began for the new Lobbying Commissioner), are the processes for appointing Federal Court, Federal Court of Appeal and provincial superior court judges, and for appointing Supreme Court of Canada justices.[96] All of these processes involve selection committees administered by the Commissioner of Federal Judicial Affairs appointed under the *Judges Act*.[97] Selection committees are composed of members who (in direct contrast to the

[95] *Democracy Watch v. Campbell*, [2010] 2 F.C.R. 139, 2009 FCA 79, para. 49, quoting from *Cox v. College of Optometrists of Ontario* (1988), 65 O.R. (2d) 461 (Div. Ct.), Applicant's Book of Authorities, Tab B6.
[96] Canada, Office of the Commissioner for Federal Judicial Affairs, *Welcome to the Website of the Office of the Commissioner for Federal Judicial Affairs Canada*, (website of the Office of the Commissioner for Federal Judicial Affairs), Applicant's Book of Authorities, Tab C4.
[97] *Judges Act*, R.S.C., 1985, c. J-1, section 73, Applicant's Book of Authorities, Tab A5.

selection committee for the Lobbying Commissioner) served fixed terms, are not members of the Governor in Council nor serve at the pleasure of or under the control of the Governor in Council. The committees all conduct searches for a qualified short list of nominees for each judicial position from which the Governor in Council makes appointments.

77. Another model is the non-statutory body, the Independent Advisory Board for Senate Appointments (Board), created to give effect to a desire to minimize the role that partisanship plays in the appointment of senators, undermining the independence of senators. Board members are selected from outside the Governor in Council and the Government of Canada and are required to "observe the highest standards of impartiality, integrity and objectivity in their consideration of all potential candidates." They served fixed terms and are required to undertake broad consultations and select qualified individuals who meet various prescribed merit-based criteria, including a commitment to independence and non-partisanship. They are responsible for submitting the names of up to five qualified individuals for each Senate vacancy to the Prime Minister, who then selects one nominee to present to the Governor General for appointment.[98]

78. A third model is that adopted by the Governor in Council for the selection of the new Commissioner of the Royal Canadian Mounted Police. Under this model a selection committee was struck composed of 10 members, seven out of whom had no connection to the Governor in Council or the Government of Canada. Members of this committee were subject to strict conflict of interest requirements to reinforce the need for an open, transparent and merit-based process of selection of candidates for the position.[99]

79. The processes for selection of similar commissioners in British Columbia is also instructive. A special committee composed of members from all the political parties represented in the Legislative Assembly must unanimously recommend to the Assembly a nominee for the position. The nomination is approved by a two-thirds majority vote of the members of the Assembly.[100] Although the process is prescribed in a statute, the *Members' Conflict of Interest Act*, it was open to the federal Governor in Council to adopt a similar process for choosing the new

[98] Applicant's Record, Affidavit of Duff Conacher, para. 43, Exhibit MM.
[99] Applicant's Record, Affidavit of Duff Conacher, para. 53, Exhibits QQ, RR and SS.
[100] Applicant's Record, Affidavit of Duff Conacher, para. 55, Exhibits UU, VV.

Lobbying Commissioner, including through an order of reference to an existing committee of the House of Commons, or to create a special committee of the House for the specific purpose (as has happened for other issues), or a special extra-governmental committee as it has for the processes for the appointment of judges, the RCMP Commissioner, and even senators.

80. The Lobbying Commissioner occupies a quasi-judicial position, whose qualifications include being either a judge or a tribunal decision-maker. The process used did not accord due respect to the judicial nature of the position. In 2007, the Canadian Judicial Council cautioned on the dangers of a selection process that lacks sufficient independence from the Governor in Council:

> Because the majority of voting members are now appointed by the Minister, the advisory committees may neither be, nor seen to be, fully independent of the government. This puts in peril the concept of an independent body that advises the government on who is best qualified to be a judge. Judicial independence is not the private right of judges but the foundation of judicial impartiality and a constitutional right of all Canadians.[101]

vii) The Governor in Council Breached the *Conflict of Interest Act*

81. Situations involving the Prime Minister, Minister Morneau and Minister Freeland were under investigation by the Lobbying Commissioner during the period when the Governor in Council conducted the selection process for the new Lobbying Commissioner. The Prime Minister, Minister Morneau and Minister Freeland therefore had a real private interest, as defined by the *CofI Act*, in the Lobbying Commissioner's investigation and the ruling. The Prime Minister admitted his real conflict of interest when he issued a public statement recusing himself from participating in the parallel selection process for the new Ethics Commissioner because the Ethics Commissioner was investigating a situation involving him. There is no record showing that the Prime Minister or the ministers recused themselves from the decision-making process to select the new Lobbying Commissioner. By participating in a decision-making process in which they had an opportunity to further their private interests, the Prime Minister, Minister Morneau and Minister Freeland therefore violated subsection 6(1), and sections 4 and section 21, of the *CofI Act*.

82. Given that the Prime Minister was being investigated by the Ethics Commissioner during the entire decision-making process for selecting the new Ethics Commissioner, the other members

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[101] Applicant's Record, Affidavit of Duff Conacher, para. 51, Tab OO; Canadian Judicial Council, *Judicial Appointments: Perspective from the Canadian Judicial Council*, February 20, 2007, p. 6.

of the Governor in Council had an opportunity to further their real private interest of keeping their jobs as ministers by protecting the private interest of the Prime Minister, at whose pleasure they serve, through their participation in the selection process. By using a selection process involving only at pleasure appointees of the Governor in Council, and especially by controlling the entire process, the other members of the Governor in Council therefore violated subsection 6(1) and section 4 of the *CofI Act*. In addition, by controlling the selection process while in this conflict of interest, including by failing to consult with opposition party leaders about the appointment, the members of the Governor in Council improperly furthered the interests of the Prime Minister and Minister Morneau, also contrary to subsection 6(1) and 4 of the *CofI Act*.

83. Even if the Court determines that the members of the Governor in Council only had an apparent conflict of interest when participating in the selection process to appoint the new Lobbying Commissioner, the conclusion must still be that the members violated subsection 6(1), and sections 4 and 21, of the *CofI Act* as those sections apply also to apparent conflicts of interest.

84. The selection process that led to the nomination of Ms. Bélanger as the new Lobbying Commissioner lacked sufficient safeguards against a biased decision that would further the private interests of members of the Governor in Council, particularly the Prime Minister, Minister Morneau and Minister Freeland. As Prime Minister Trudeau recognized his conflict of interest and bias and removed himself from the selection process, the Governor in Council should have also recognized its conflict of interest and bias and removed itself from the process. The Governor in Council has demonstrated that it recognizes its conflict of interest and bias in such selection processes as it has effectively removed itself from the selection processes that have developed short lists of qualified nominees for judges, the Commissioner of the RCMP, and senators.

85. The Governor in Council's conflict of interest and bias would have been effectively avoided if its only involvement in the selection of the new Lobbying Commissioner had been to choose one person from a short list of qualified candidates that had been proposed by a selection committee that was sufficiently removed from the Governor in Council. If the Governor in Council had recused itself in the same way it distanced itself from the search processes for the short list of qualified candidates for the positions of federal judges, the RCMP Commissioner, and even senators, then its conflict of interest and bias would not be at issue.

E. The Common Law Imposes a Duty of Procedural Fairness Requiring the Governor in Council to Recuse Itself from the Selection Process

86. While statute law and the common law on conflict of interest may converge or overlap, it is necessary to seek a common law remedy as a stand-alone remedy in the event it is determined that there are gaps or omissions in the *CofI Act* that the common law may fill. The common law duty of procedural fairness has evolved such that it is applicable to every public authority whose decisions are not legislative in nature.[102]

i) Reasonable Apprehension of Bias

87. Decision-making without bias or the appearance of bias by public office holders is a fundamental principle of law, one that promotes public confidence in the legal process. As expressed by the Supreme Court of Canada: "public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so."[103]

88. The key concern underlying the appearance of bias is how it undermines confidence in the integrity of the administration of justice. As the Supreme Court of Canada has stated:

> … reasonable apprehension of bias is not just … an evidentiary device to establish the likelihood of unconscious bias, but the manifestation of a broader preoccupation about the image of justice. As was said by Lord Goff in Gough, supra, at p. 659, 'there is an overriding public interest that there should be confidence in the integrity of the administration of justice.'"[104]

89. If a decision or the process leading up to the issuance of the decision is tainted by a reasonable apprehension of bias the appropriate remedy is to set aside or quash the decision. "The damage created by apprehension of bias cannot be remedied."[105]

90. The process selected by the Governor in Council for selecting Ms. Bélanger as the nominee created a reasonable apprehension of bias as defined in *Committee for Justice and Liberty*: an

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[102] *Dunsmuir*, paras. 87-90, Applicant's Book of Authorities, Tab B9.
[103] *Wewaykum Indian Band v. Canada*, [2003] S.C.J. No. 50, para. 57 (hereinafter, *Wewaykum*), Applicant's Book of Authorities, Tab B17.
[104] *Wewaykum*, para. 66 citing *King v. Sussex Justices, ex parte McCarthy*, [1924] 1 K.B. 256 at p. 259.
[105] *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, at p. 645, Applicant's Book of Authorities, Tab B10.

informed person, viewing the matter realistically and practically, "and having thought the matter through would conclude" that it is "more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."[106]

ii) **Legitimate Expectations of the Applicant**

91. Democracy Watch, as a representative of the public interest, had, and continues to have, a legitimate expectation that the decision-maker would recuse itself from the process of selecting the Lobbying Commissioner. This expectation is founded upon the objects and purposes of the *CofI Act* as well as the expectations created by the *PM Code*, all of which govern ethical conduct among public office holders. A party's legitimate expectations will entitle it to "more extensive procedural rights than would otherwise be accorded" by decision-makers.[107]

92. As noted by the Oliphant Commission, the *CofI Act* is "augmented" by the *PM Code*,[108] which sets out ethical guidelines and standards of conduct for public office holders subject to the *CofI Act*. Compliance with the *PM Code* is a "term and condition of appointment," with the public office holder required to "certify that he or she will comply with these Guidelines."[109]

93. The *PM Code* requires public office holders to "uphold the highest ethical standards so that public confidence and trust in the integrity, objectivity and impartiality of the government are conserved and enhanced." The *PM Code* further provides that all "Ministers and Parliamentary Secretaries must **avoid** conflict of interest, the **appearance of conflict of interest** and **situations that have the potential** to involve conflict of interest."[110] [emphasis added] There is a further requirement that public office holders "perform their official duties and arrange their private affairs in a manner that will bear the closest scrutiny, an obligation that is not fully discharged by simply acting within the law."[111]

94. Even as soft law, ethical codes have been recognized as crucial elements in the process of judicial scrutiny of decision-makers, particularly in limiting the exercise of discretionary power or

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[106] *Committee for Justice and Liberty*, p. 394, Applicant's Book of Authorities, Tab B4.
[107] *Baker*, para. 26, Applicant's Book of Authorities, Tab B1.
[108] Oliphant Commission, p. 473, Applicant's Book of Authorities, Tab C1.
[109] Applicant's Record, Affidavit of Duff Conacher, para. 13, Exhibit L, *PM Code*, Annex A, p. 17.
[110] Applicant's Record, Affidavit of Duff Conacher, para. 13, Exhibit L, *PM Code*, Annex B, p. 23.
[111] Applicant's Record, Affidavit of Duff Conacher, para. 13, Exhibit L, *PM Code*, Annex A, p. 16.

decision-making. They serve to "bridge law and policy."[112] Notwithstanding any discretion the Governor in Council may have had in selecting the next Lobbying Commissioner, that discretion is constrained by the objects and purposes of the relevant statute.[113]

95. Those public office holders who are subject to the *CofI Act* and the *PM Code* are held to a higher standard than other public office holders because of the crucial positions they occupy in the democratic process. To recall the observations of the majority in *Hinchey*: "…given the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe."[114] That "demanding" standard has not been met in this case.

PART IV – ORDER SOUGHT

96. The Applicant seeks the following relief:

a) An order quashing the Decision, in accordance with the Directions of this Court;
b) Costs of this Application; and
c) Such further and other relief as counsel may recommend and this Honourable Court may order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa this 17th day of May, 2018

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Sebastian Spano

Counsel for the Applicant,
Democracy Watch

[112] Sossin and Smith, p. 892, Applicant's Book of Authorities, Tab C9.
[113] *C.U.P.E.*, para. 184, Applicant's Book of Authorities, Tab B5.
[114] *Hinchey*, para. 18, Applicant's Book of Authorities, Tab B12.

PART V – LIST OF AUTHORITIES

Legislation

Conflict of Interest Act, S.C. 2006, c. 9, subsection 2(1), paragraph 3(a) section 4, section 5, subsection 6(1), section 21, section 66
Conflict of Interest Code for Members of the House of Commons, subsection 3(2), being Appendix I of the *Standing Orders of the House of Commons*
Financial Administration Act, R.S.C., 1985, c. F-11, section 6
Interpretation Act, R.S.C., 1985, c. I-21, section 12
Judges Act, R.S.C., 1985, c. J-1, section 73
Lobbying Act, R.S.C., 1985, c. 44, (4th Supp), section 4.1(1), section 10.2, section 10.3
Lobbyists' Code of Conduct, Principles, Rule 6, Rule 8
Parliament of Canada Act, R.S.C., 1985, c. P-1, sections 81, 82

Jurisprudence

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817
Bezaire v. Windsor Roman Catholic Separate School Board, 1992 CanLII 7675 (ON SC)
Canada v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45
Committee for Justice and Liberty v. National Energy Board, [1978] 1 SCR 369
C.U.P.E. v. Ontario (Minister of Labour), [2003] 1 SCR 539, 2013 SCC 29
Democracy Watch v. Campbell, [2010] 2 F.C.R. 139, 2009 FCA 79
Democracy Watch v. Canada (Attorney General) 2004 FC 969
Dene Tha' First Nation v. Canada (Minister of Environment), 2006 FC 1354
Dunsmuir v. New Brunswick, 2008 SCC 9
Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 SCR 623
Old St. Boniface Residents Association Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170
R. v. Hinchey, [1996] 3 S.C.R. 1128
Re: Sound v. Fitness Industry Council of Canada, 2014 FCA 48

Reference Re Senate Reform, 2014 SCC 32

Sierra Club of Canada v. Canada (Minister of Finance), [1999] 2 FC 211

Stevens v. Canada (Attorney General), 2004 FC 1746

Wewaykum Indian Band v. Canada, [2003] S.C.J. No. 50

Other Authorities

Canada, *Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney*, 2010, Vol. 3, Policy and Consolidated Findings and Recommendations, pp. 464 to 486.

Canada, *Commission of Inquiry into the Facts of Allegations of Conflicts of Interest Concerning the Honourable Sinclair M. Stevens*, 1987, pp. 25 to 35.

M. A. Chaplin, *Officers of Parliament: Accountability, Virtue and the Constitution* (LL.M. Thesis) 2009, pp. 22-24.

I. Green, D. P. Shugarman, R. Shepherd, "Ethical Problems in Public Life," in I. Green and D. P. Shugarman, Eds., *Honest Politics Now: What Ethical Conduct Means in Public Life*, (J. Lorimer Publishers, 2017), p. 60 to 94.

G. Levine, *The Law of Government Ethics: Federal, Ontario and British Columbia*, 2nd Ed., (Canada Law Books, 2015), p. 7 to 29.

L. Sossin and C. W. Smith, "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of Courts in Regulating Government," *Alberta Law Review* 40, April 2003, pp. 867-893.

R. Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed., (Lexis-Nexis, 2014), p. 248.