

File Number:

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

DEMOCRACY WATCH

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION FOR LEAVE TO APPEAL
pursuant to section 40 of the Supreme Court Act

TAKE NOTICE that the Applicant, Democracy Watch, applies for an order granting leave to appeal to the Court, pursuant to section 40 of the *Supreme Court Act*, from the judgment of the Federal Court of Appeal in File No. A-159-19 made April 1, 2020;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. That this proceeding presents this Honourable Court with the first opportunity to consider whether and how the federal Commissioner of Lobbying (“Commissioner”) is required to investigate an allegation by a member of the public that a lobbyist has violated the *Lobbying Act* (R.S.C., 1985, c. 44 (4th Supp.)) and/or the *Lobbyists’ Code*

of Conduct (“*Lobbyists’ Code*” – in force under the *Lobbying Act*) under subsection 10.4(1) of the *Act*, and issue a public ruling under related provisions in the *Act*, and whether the Commissioner is subject to judicial review. The issues in this proceeding are of public and national importance, and of such a nature and significance as to warrant decision by the this Honourable Court, because they raise fundamental questions concerning:

- a) upholding the constitutional principles of democracy and the rule of law;
- b) the protection of the integrity of our democratic process and governmental decision-making;
- c) the proper enforcement of the *Lobbying Act* and *Lobbyists’ Code* which regulate thousands of lobbyists (lobbying for businesses, unions, non-profit organizations and individuals) in terms of the transparency and integrity of their relationships and communications with federal public office holders including the Prime Minister and all members of the Governor in Council (“GIC”), all staff and appointees of the GIC, all members of the House of Commons (“MPs”), all members of the Senate of Canada (“Senators”), and the more than 285,000 employees of the Government of Canada. In addition, this proceeding has implications for the proper enforcement of a prohibition in the *Act* on lobbying federal office holders for five years after leaving office that applies to all members of the GIC, all staff and appointees of the GIC, as well as MPs and senators, and some staff of the Office of the Leader of the Opposition in the House of Commons, and in the Senate of Canada, and;
- d) whether there would be harm done to the democratic process governed by the rule of law and constitutionalism that the public should be denied the right to petition the Commissioner to investigate an allegation of a violation by a lobbyist (and whether such a denial would cause the same harm in respect of similar administrative tribunals at the federal, provincial and territorial level to investigate an allegation), and;

- e) whether the decisions of the Commissioner (and similar administrative tribunals at the federal, provincial and territorial level) are subject to judicial review and, therefore, whether these tribunals are accountable to the public.
2. That the Commissioner of Lobbying is a quasi-judicial administrative tribunal who enforces a key law and code aimed at ensuring the integrity of every decision-making process of the Government of Canada and Parliament and is, therefore, a defender of the constitutional principles of democracy and the rule of law;
 3. That, as set out in this Honourable Court's ruling in *R. v. Hinchey*, [1996] 3 S.C.R. 1128, the *Lobbying Act* and *Lobbyists' Code*, which are enforced by the Commissioner of Lobbying, are among the key federal laws and codes ("the myriad ways" – para. 13) aimed at "the important goal" (para. 13) of preserving government integrity and our democracy. *R. v. Hinchey* states that "Protecting the integrity of government is crucial to the proper functioning of a democratic system" (para. 15) and that "preserving the appearance of integrity, and the fact that the government is fairly dispensing justice, are, in this context, as important as the fact that the government possesses actual integrity and dispenses actual justice" (para. 17 – emphasis in original). In a similar vein, the Court of Appeal for Ontario in *R. v. Carson*, 2017 ONCA 142 (CanLII), articulated that the lobbying transparency registration requirements in the *Lobbying Act* are connected to clause 121(1)(d) of the *Criminal Code of Canada* prohibition on influence peddling by a common purpose of promoting government decisions based on merit (paras. 43-46, 49-50 and 52);
 4. That the fundamental objective of *Lobbying Act* and *Lobbyists' Code* is ensuring public trust in the integrity of government through public accountability of lobbyists concerning the transparency and ethics of their relationships and communications with public office holders (including MPs and senators) and, by necessity, public accountability of the Commissioner of Lobbying as the enforcement officer charged with ensuring that the *Act* and *Code* are properly enforced;

5. That the proceeding raises fundamental questions about the proper role of the *Lobbying Act* and *Lobbyists' Code of Conduct* in preventing and avoiding breaches of the *Conflict of Interest Act*, the companion statute to the *Lobbying Act*, enacted together in 2007 to address an ethical crisis at the federal level of government;
6. This proceeding raises fundamental questions about the proper scope, interpretation and application of subsection 10.4(1) of the *Lobbying Act* and other provisions in the *Act* and *Code*, specifically whether Federal Court of Appeal erred in law in its April 1, 2020 judgment when its interpretation concluded that only MPs and Senators have the right under subsection 10.4(1) to have their petitions for investigations ruled on by the Commissioner (and that, therefore, decisions by the Commissioner on petitions filed by the public cannot be judicially reviewed), or does the public also have the right to have a petition filed with the Commissioner investigated and ruled on publicly, and the right to have decisions by the Commissioner judicially reviewed?;
7. That the proposed appeal is of national and public importance not only because of the fundamental democracy, rule of law, government integrity, public rights and accountability questions at issue, but also because it has a wide impact across the country and across the federal government beyond the particular parties to the appeal. At the federal government level and in several provinces, similar petition-for-investigation statutory provisions have been enacted for similar ethics/integrity and lobbying commissioners who enforce similar laws and codes that apply to, and establish the rights of, similar lists of public office holders, lobbyists, and the public.
8. That, because it erred in interpreting subsection 10.4(1), the Federal Court of Appeal's judgment will also result in inconsistent application of subsection 18.1 of the *Federal Courts Act* and similar judicial review statutory provisions that apply across Canada to commissioners and other tribunals. The judgment conflicts with past decisions of the

Federal Court of Appeal and Federal Court of Canada, and courts in the United Kingdom, on whether a tribunal's decision is subject to judicial review.

9. That it is, therefore, of national and public importance that this Honourable Court clarify the law concerning the legal and public accountability system that applies to these commissioners and other tribunals across Canada governed by similar provisions;
10. That, in addition, the Court of Appeal's judgment also establishes a petition-for-investigation scheme under subsection 10.4(1) of the *Lobbying Act* that may violate subsection 2(e) of the *Canadian Bill of Rights*, and also subsections 2(b) and (d) of the *Canadian Charter of Rights and Freedoms*. To resolve these conflicts of law, it is therefore of national and public importance that the Applicant be granted leave to appeal to this Honourable Court.
11. That the Federal Court's ruling (2019 FC 388) that was overturned in the Federal Court of Appeal's ruling on File No. A-159-19 (2020 FCA 69), for which leave to appeal is sought in this application, correctly interpreted and applied the *Lobbying Act* and *Lobbyists' Code*, in particular subsection 10.4(1) of the *Act*, and its ruling should be restored by this Honourable Court.
12. That the Commissioner of Lobbying's past record of weak enforcement shows clearly that it is of national importance that the Commissioner be subject to judicial review to ensure proper enforcement of the *Lobbying Act* and *Lobbyists' Code*. Among other very questionable actions and decisions, this record includes:
 - a) more than 100 lobbyists violating the *Act* or *Code* since 2007 without being identified in a public ruling or sanction by the Commissioner (including many investigations arbitrarily shut down due to the Commissioner's failure to complete the investigation and issue a ruling in a timely manner) and;
 - b) according to the Federal Court of Appeal's unanimous 2009 judicial review ruling, the Registrar of Lobbyists (predecessor to the Commissioner) issuing a

ruling that applied to the actions of several lobbyists that contained a “deeply flawed reading” of a key ethics rule in the *Lobbyists’ Code*;

13. For all these reasons, this proceeding, which raises fundamental questions about the public’s right to proper enforcement of the federal *Lobbying Act* and *Lobbyists’ Code* and similar government integrity laws and codes across Canada, and about the democratic and legal accountability of the Commissioner of Lobbying and similar commissioners across Canada for proper enforcement, including whether they are subject to judicial review, is of public and national importance, and is of such a nature and significance as to warrant a decision by this Honourable Court.

Dated at Ottawa, Ontario this 1st day of June 2020.

SIGNED BY

Counsel for the Applicant

Sebastian Spano

Spano Law

900-251 Laurier Avenue West

Ottawa, ON K1P 5J6

Fax: (613) 566-7003

Tel: 819-664-7448

Email: sebastian.spano@spanolaw.ca

Counsel for the Applicant
Democracy Watch

ORIGINAL TO:

The Registrar
Supreme Court of Canada
Attention: Registry Branch, Room 156
301 Wellington Street
Ottawa, Ontario
K1A 0J1

COPIES TO:**ATTORNEY GENERAL OF CANADA**

Department of Justice Canada
Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa, Ontario, K1A 0H8

Per: Alexander Gay

Tel: (613) 670-8497

Fax: (613) 954-1920

Email: Alexander.Gay@justice.gc.ca

Counsel for the Respondent

NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after service of the application. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 40 of the *Supreme Court Act*