File Number: 39202

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

DEMOCRACY WATCH

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

MEMORANDUM OF ARGUMENT
(REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL)
from the judgment of the Federal Court of Appeal
File No. A-159-19 made April 1, 2020

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A. Legal community affirm national, public importance of appeal

1. The legal community is affirming that this proceeding is of national and public importance In an article published on June 22, 2020, Marion Sandilands, Member-at-Large of the Executive of the Administrative Law section of the Canadian Bar Association, wrote that the Federal Court of Appeal's ruling in this proceeding is "a decision with wide-ranging implications for the lobbying community and for administrative law generally" and:

> "The court's reasoning on the Commissioner's duty to investigate complaints is informative for administrative lawyers. The court's review and comparison of statutory language from 6 federal statutes regarding a public officer's duty to investigate complaints is interesting. What is more controversial, perhaps, is the way that this comparison of language weighed so heavily in the court's reasoning. In contrast to the Federal Court, the Federal Court of Appeal placed far less weight on the purpose and design of the specific statutory scheme at issue, and in particular, on the *Lobbying Act*'s purpose, the *Lobbyists' Code*, and the interpretation bulletins."[1]

[1] Marion Sandilands, "Federal Court of Appeal rules that lobbying commissioner has no duty to investigate complaints from the public," (June 22, 2020), Canadian Bar Association, Administrative Law

2. In an article entitled "Was the Decision Wrong? We May Never Find Out: Lobbying, a Private Island Vacation, and the Justiciability of Administrative Decisions"[2] lawyer Alyssa Holland writes that this proceeding "demonstrates how profoundly judges can disagree about the application of this principle [of justiciability] to a particular case" and:

> "The Federal Court of Appeal emphasized that, unlike many other statutes, the *Lobbying Act* does not expressly create a process for receiving and investigating public complaints…The Federal Court of Appeal relied on this distinction to conclude that, because there is no statutory right for a member of the public to have a complaint investigated, the decision not to investigate is not subject to judicial review. This is a curious and largely unexplained distinction to draw. It is an uncontroversial principle of statutory interpretation that the word "includes" usually carries a broad and non-restrictive meaning, and signals that the list or categories that follow are not exhaustive. The Federal Court of Appeal's reasons do not deal with this interpretive issue."
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> . . .
>
> "Whose rights have to be affected for an administrative body's decision to be justiciable for purposes of judicial review? Must a complaint process, or other decision-making process, expressly and formally allow participation by the public in order to trigger a right of judicial review? What if the complaint isn't about vindicating an individual's rights, but instead seeks to hold a decision-maker to their statutory obligations? How does the concept of justiciability apply where Parliament has authorized – indeed, required – an administrative body to create and enforce rules about how lobbyists interact with public officials?
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> . . .
>
> "Technical legal language aside, there is a very real public interest in having clarity around what sorts of cases are in or out of bounds when it comes to judicial review. This case provides an opportunity for the Supreme Court to weigh in on the meaning of justiciability and to clarify this most basic of ground rules."

B. It is of national and public importance to clarify what is justiciable and reviewable

3. As the above commentaries make clear, the law relating to judicial review under the *Federal Courts Act* and the *Federal Courts Rules*, particularly as it relates to what is justiciable and reviewable, is far from "clear and settled" as the Respondent claims. To the extent that it may have had some clarity, it is now lost as a result of the judgment of the Federal Court of Appeal (FCA) in this proceeding, a judgment which also unduly narrows the grounds for judicial review and ignores the law of public interest standing.

Section, Member Articles, online: https://www.cba.org/Sections/Administrative-Law/Articles/2020/that-lobbying-commissioner-has-no-duty?lang=en-ca.

[2] Alyssa Holland, "Was the Decision Wrong? We May Never Find Out: Lobbying, a Private Island Vacation, & the Justiciability of Administrative Decisions," (June 25, 2020) Commercial Litigation and Dispute Resolution Blog, Lawson Lundell LLP, online: https://www.lawsonlundell.com/Commercial-Litigation-and-Dispute-Resolution-Blog/justiciability-disputes-what-can-courts-rule-on.

4. The Respondent commits the same error as the Federal Court of Appeal in conflating the doctrines of justiciability and reviewability.[3] This would not be the first occasion where a court has conflated the two concepts under the *Federal Courts Act*.[4] For the purposes of legal coherence and consistency, a clear distinction needs to be made between the two doctrines. This Honourable Court's guidance on these matters is necessary to bring coherence and clarity to judicial review proceedings under the *Federal Courts Act*, as it has broad implications beyond the immediate parties to this proceeding, making it a matter of national importance.

5. Justiciability is concerned with the appropriate boundaries between the courts, Parliament and the executive, or the boundaries between our legal system and the political system.[5] Reviewability concerns whether a matter is amenable to judicial review. Four grounds upon which a right to review can be established may be found in the FCA and Federal Court jurisprudence, with some rulings addressing more than one of the grounds: (i) whether a decision or action of a governmental entity affects legal rights, imposes legal obligations or causes prejudicial effects;[6] (ii) whether, based on the words in the *Federal Courts Act* and *Federal Court Rules*, there was a decision, action or "matter" of a board, commission or tribunal;[7] (iii) whether there is a judicial remedy available,[8] and; (iv) whether the applicant has standing, including public interest standing.[9]

6. The Respondent, in paragraphs 34-38 of its Response, identifies section 11 of the *Lobbying Act* by which the Commissioner of Lobbying reports annually to Parliament concerning her administration of the *Act*, and subsection 10.5(1) under which the Commissioner's rulings on completed investigations are reported to Parliament. These mechanisms, the Respondent contends, mean that Parliament has provided an exclusive and adequate remedy and, therefore, under the test

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[3] *Canada (Attorney General) v. Democracy Watch*, 2020 FCA 19, para. 19.
[4] *Birch Narrows Dene Nation v. Canada*, 2018 FC 11, paras. 24-27.
[5] L. M. Sossin, *The Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd Ed., (Thomson Reuters Canada Ltd., 2012), p. 2.
[6] *Air Canada v. Toronto Port Authority*, 2011 FCA 347, paras. 28-32, 37 and 39 (hereinafter "*Air Canada*"). *Sganos v. Canada (Attorney General)*, 2018 FCA 84, paras. 6-7. *Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15, para. 10.
[7] *Morneault v. Canada (Attorney General)*, [2001] 1 FC 30 (FCA), para. 41; *Democracy Watch v. Canada (Attorney General)*, 2019 FC 388, para. 101; *Air Canada*, paras. 21-26.
[8] *Krause v. Canada*, 1999 CanLII 9338 (FCA), [1999] 2 FC 476; *Makhija v. Canada (Attorney General)*, 2010 FC 141, at para. 85.
[9] *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116 (CanLII), [2010] 2 FCR 488, paras. 31 and 33-35.

set out in *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49[10] for justiciability, the Commissioner's rulings are not reviewable. Among other distinctions, however, the court in *Auditor General* made clear that the Auditor General was seeking a remedy as an officer of Parliament who is required by statute to report directly to Parliament, not as a private entity like the Applicant in this proceeding.

7. The FCA recently expressed doubt that similar parliamentary reporting provisions in the federal *Conflict of Interest Act* were adequate remedies and, therefore, held that a decision by the Ethics Commissioner was justiciable based on the applicant Democracy Watch's public interest standing.[11] The Federal Court of Canada also distinguished *Auditor General* in a judgment in which the Parliamentary Budget Officer (PBO), another servant of Parliament, was seeking disclosure of documents from a government department on behalf of a member of Parliament, holding that a remedy from the courts is still available.[12]

8. The Applicant submits that the Commissioner of Lobbying does not meet even the first part of the three-part test in *Auditor General* because there is no parliamentary remedy set out in the *Lobbying Act*. If Parliament intended that MPs or Senators review the Commissioner's rulings to approve or reject them, it would have set out that remedy explicitly in the *Act*. For example, the House of Commons set out such a parliamentary review remedy for rulings on the conduct of MPs by the federal Ethics Commissioner in section 28 (specifically subsections 28(9) to (13)) of the *Conflict of Interest Code for Members of the House of Commons*).[13]

9. Turning to reviewability, the FCA in its ruling in this proceeding failed to consider all four grounds for judicial review, and in particular failed to acknowledge the Applicant's public interest standing, when concluding that the Applicant was not "directly affected by the outcome" of the Commissioner's determination and, therefore, that the determination was not reviewable.[14] In

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[10] *Canada (Auditor General) v. Canada (Minister of Energy Mines and Resources)*, [1998] 2 S.C.R. 49 (hereinafter, *Auditor General*).

[11] *Democracy Watch v. Canada (Attorney General) and Dominic Leblanc*, 2018 FCA 194, paras. 18, 18, 21 and 22.

[12] *Page v. Mulcair*, 2013 FC 402, paras. 44, 62.

[13] *Conflict of Interest Code for Members of the House of Commons*, Standing Orders of the House of Commons, Consolidated version as of April 20, 2020, Appendix 1, section 28, https://www.ourcommons.ca/About/StandingOrders/Appa1-e.htm.

[14] *Canada (Attorney General) v. Democracy Watch*, 2020 FCA 69, at para. 38.

direct contrast to its ruling in this proceeding, the FCA in *Irving Shipbuilding* held that the phrase "directly affected" in s. 18.1 of the *Federal Courts Act* "was not intended to preclude the Court from granting public interest standing to persons who were not directly affected."[15]

10. Given many federal and provincial commissioners who watch over actions and decisions of politicians and public officials submit investigative and annual reports to the legislatures in a similar manner as the Commissioner of Lobbying, a decision by this Honourable Court in this proceeding that clearly distinguishes between justiciability and reviewability, and clarifies the grounds of each (especially for public interest litigants), is of national and public importance.

11. The Respondent also contends in paragraphs 39-47 of its Response that the Commissioner's role is only investigative, and no constitutional issues arise, and therefore the Commissioner is not subject to judicial review. As set out in paragraphs 17-19 of the Applicant's Memorandum, the Commissioner's role is clearly quasi-judicial.

12. As well, constitutional principles are clearly engaged in this proceeding, as the Respondent acknowledges by stating in its Response at para. 13 that: "The over-arching purpose of the Act is to ensure transparency and accountability in the lobbying of public office holders and consequentially increase public confidence in the integrity of government decision-making" and by arguing paras. 34-38 that the Commissioner of Lobbying is only accountable to Parliament and not to the courts or the public. The *Lobbying Act*, and the Respondent's argument, are both based on the interconnected constitutional principles of democracy, rule of law and constitutionalism.

13. As this Honourable Court has stated, the principle of democracy includes "faith in social and political institutions"[16] and "[t]o be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation … they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution" and; "constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it."[17]

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[15] *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116 (CanLII), [2010] 2 FCR 488, citing *Sunshine Village Corp. v. Superintendent of Banff National Park* (1996), 1996 CanLII 11890 (FCA), 44 Admin. L.R. (2d) 201 (F.C.A.), at paras. 66–68.

[16] *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at para. 136.

[17] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217, at paras. 67 and 78.

14. It is of national and public importance that this Honourable Court determine whether the role of the Commissioner of Lobbying is "constitutional" in nature because many federal and provincial commissioners who watch over actions of government, politicians and public officials have investigative and enforcement powers similar to the federal Commissioner of Lobbying, and play a similar role in helping to ensure integrity and public confidence in government, goals which are directly connected to the constitutional principles of rule of law and democracy.

15. Finally, this Honourable Court should note that the Respondent wrongly asserts in paragraphs 48-51 of its Response that the Applicant only sought from the Federal Court of Canada an order mandating the Commissioner to proceed with a full investigation of the situation at issue in this proceeding. In fact, the Applicant's Notice of Application in Federal Court and memorandum both requested, in the alternative, an order remitting the matter back to the Commissioner. The Federal Court correctly issued just such an order in *Democracy Watch v. Attorney General of Canada*, 2019 FC 388, an order the FCA erred in overturning.

16. For all these reasons, and the reasons set out in the Applicant's initial Memorandum, it is of national and public importance that this Honourable Court hear this appeal.

ALL OF WHICH IS SUBMITTED THIS 31st day of July 2020

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TABLE OF AUTHORITIES

Legislation and Codes

Conflict of Interest Code for Members of the House of Commons, Standing Orders of the House of Commons, Consolidated version as of April 20, 2020, Appendix 1, section 28, https://www.ourcommons.ca/About/StandingOrders/Appa1-e.htm, cited above in para. 8.

Jurisprudence

Air Canada v. Toronto Port Authority, 2011 FCA 347, cited above in para. 5.

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Irving Shipbuilding Inc. v. Canada (Attorney General), 2009 FCA 116 (CanLII), [2010] 2 FCR 488, cited above in paras. 5 and 9.

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Sunshine Village Corp. v. Superintendent of Banff National Park (1996), 1996 CanLII 11890 (FCA), 44 Admin. L.R. (2d) 201 (F.C.A.), cited above in para. 9.

Other Authorities

Alyssa Holland, "Was the Decision Wrong? We May Never Find Out: Lobbying, a Private Island Vacation, & the Justiciability of Administrative Decisions," (June 25, 2020) Commercial Litigation and Dispute Resolution Blog, Lawson Lundell LLP, online: https://www.lawsonlundell.com/Commercial-Litigation-and-Dispute-Resolution-Blog/justiciability-disputes-what-can-courts-rule-on. Cited above in paragraph 2.

Marion Sandilands, "Federal Court of Appeal rules that lobbying commissioner has no duty to investigate complaints from the public," (June 22, 2020), Canadian Bar Association, Administrative Law Section, Member Articles, online: https://www.cba.org/Sections/Administrative-Law/Articles/2020/that-lobbying-commissioner-has-no-duty?lang=en-ca. Cited above in paragraph 1.

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