Court File No.: A-159-19

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

DEMOCRACY WATCH

Respondent

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT

DEMOCRACY WATCH

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OVERVIEW

1. This Appeal concerns a decision of the Commissioner of Lobbying on September 18, 2017 not to investigate allegations that a violation of the *Lobbying Act* and/or the *Lobbyists' Code of Conduct* occurred when Shah Karim Al Husseini Aga Khan (**"the Aga Khan"**), during a period when he was engaging in activities that are regulated by the *Act*, gave the Prime Minister a gift of a family vacation on the Aga Khan's private island in the Bahamas and a gift of air travel on a private aircraft. At the same time, the Aga Khan Foundation of Canada had an active in-house lobbying registration listing its Chief Executive Officer as the responsible officer for compliance purposes and a lobbyist, along with another employee, but not the Aga Khan.

2. The Court below committed no error in ruling that the decision of the Commissioner of Lobbying not to initiate an investigation into potential non-compliance with the legislative scheme of lobbying was unreasonable, "lacking in transparency, justification, and intelligibility when considered in the context of her duties and functions."[1] The conclusion of the Court below correctly drew upon and was guided by the objects and purposes of the legislative scheme of lobbying in defining the content of the Commissioner of Lobbying's duty to investigate where she has "reason to believes an investigation is necessary to ensure compliance with the *Lobbying Act* or the *Lobbyists' Code of Conduct*"[2] as a proactive duty aimed at preventing violations and ensuring they have not occurred. Those objects and purposes include enhancing public confidence and trust in the integrity of government decision-making and maintaining the integrity of the democratic process. They are reinforced by the structure of the legislative scheme that: requires transparency in relation to communications with public office holders for prescribed purposes; that prohibits placing public office holders in an actual or apparent conflict of interest; and that targets avoidance and prevention of more egregious forms of unlawful conduct such as corruption or influence-peddling. Whereas the prior iterations of the investigative mandate were backward-looking, with their objects being to look for evidence that improprieties had been committed, the current version of the legislation is forward-looking focusing on prevention and avoidance by mandating the Commissioner of Lobbying to "ensure compliance" with the scheme of lobbying.

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[1] *Democracy Watch v. Attorney General of Canada*, 2019 FC 388, para. 146.
[2] *Lobbying Act*, RSC 1985, c.44 (4th Supp.), subsection 10.4(1) (hereinafter "*Lobbying Act*").

PART I – STATEMENT OF FACTS

A. Overview of the Facts

3. During the time period to which this Appeal relates, the Aga Khan Foundation Canada ("**Foundation**" or "**AKFC**") was registered under the *Canada Not-for-profit Act*. Among the members of the board of directors of the organization is the Aga Khan.[3] The AKFC was also registered in the Registry of Lobbyists pursuant to the *Lobbying Act* (the *Act*) as an organization. It had an active "in-house" lobbyists registration.[4] The Chief Executive Officer of the AKFC and the responsible officer for the organization for purposes of the AKFC's compliance with the *Lobbyists' Code of Conduct* (the "***Lobbyists' Code***" or "***Code***") was Mr. Khalil Shariff. Only two individuals are listed as lobbyists employed by the AKFC: Mr. Steve Mason, Director of Programs and Mr. Shariff. The Aga Khan is not listed as a lobbyist. Among the institutions the AKFC lobbied were the Prime Minister's Office, the Privy Council Office, Global Affairs Canada and the House of Commons. The Registry information also indicates that the AKFC had received funding from Global Affairs Canada ($46,796,700) and from the International Development Research Centre ($578,585).[5]

4. Following reports that the Prime Minister, his family and friends had celebrated the new year on a private island as guests of the Aga Khan, a private citizen initiated a complaint with the Commissioner of Lobbying (the "***Lobbying Commissioner***" or "***Commissioner***").[6] After receiving the complaint in January 2017, the Investigations Directorate of the Commissioner's office undertook what the office refers to as an "administrative review" of the complaint. The process included reviewing the website of the AKFC, which states that the board of directors "has overall statutory governance responsibility for AKFC and maintains an active role in setting AKFC's strategy, ensuring its coherence with the direction and activities of the Aga Khan Foundation globally and of the wider AKDN."[7] Also reviewed was the registration in the federal Registry of Lobbyists for the AKFC at the time the Aga Khan gave the gift to the Prime Minister, showing that the

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[3] Affidavit of Duff Conacher, Exhibit CC, Appeal Book, Tab 4, pp. 311-312.
[4] Office of the Commissioner of Lobbying, "Level II Administrative Review Memo to Close File," Appeal Book, Tab 5, p. 423. (Hereinafter, Administrative Review Memo)
[5] Affidavit of Duff Conacher, Exhibit DD, Appeal Book, pp. 314-316.
[6] Administrative Review Memo, Appeal Book, Tab 5, pp. 422-423.
[7] Affidavit of Duff Conacher, Exhibit BB, Appeal Book, Tab 4, p. 308.

Foundation was registered in to lobby the Government of Canada at the time, including the Prime Minister's Office.[8]

5. On September 13, 2017, the Investigations Directorate reported its findings to the Lobbying Commissioner. On September 18, 2017, the Commissioner accepted the recommendation of the Investigations Directorate to close the review and not conduct an investigation. The reasons for so doing were: 1) no evidence was found that the Aga Khan was "remunerated" for his work with the AKF; 2) he was therefore not "engaged in registrable lobbying activity during the Prime Minister's Christmas vacation"; and, 3) as a consequence, "the *Lobbyists' Code of Conduct* does not apply to the Aga Khan's interactions with the Prime Minister."[9]

6. The reference in the Administrative Review Memo to the Aga Khan's "interactions with the Prime Minister" contains no details. It suggests, however, that interactions or some engagement took place. Similarly, no detail is provided in the document to provide context on "registrable lobbying activities." Again, the comment suggests that lobbying activities took place, but presumably because of the conclusion drawn earlier that the Aga Khan was not remunerated for his work as a director of the AKFC, the activities were deemed non-registrable.

7. There is no evidence that the investigators or Lobbying Commissioner considered that the investigation should include determining whether Khalil Shariff, responsible officer for compliance purposes and registered lobbyist for the AKFC, violated the *Code* or the *Act* by either allowing the Aga Khan to give the gift to the Prime Minister or by lobbying the Prime Minister around the time or after the gift was given. There is also no evidence that the investigators inquired into whether Mr. Shariff or Mr. Mason had lobbied the Prime Minister around the time or after the gifts were given and thus violated the *Code*. Indeed, the Administrative Review Memo only lists two grounds for the review: Rule 8 (creating a sense of obligation) and Rule 10 (prohibited gifts). As discussed below, other potentially relevant lines of inquiry were Rule 4 (obligations of the responsible officer), Rule 6 (placing a public office holder in a conflict of interest), and Rule 7 (creating a sense of obligation).

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[8] Affidavit of Duff Conacher, para. 29, Exhibits AA, DD, Appeal Book, Tab 4, p. 304 and 314-316.
[9] Administrative Review Memo, Appeal Book, Tab 5, p. 423.

8. Concurrent with the Lobbying Commissioner's review of the complaint, the Conflict of Interest and Ethics Commissioner ("**Ethics Commissioner**") was conducting her own review of whether the Prime Minister was in breach of the *Conflict of Interest Act* ("***CofI Act***") by accepting the gift trip from the Aga Khan. The Ethics Commissioner's report sheds light on the interactions between the PM and the Aga Khan and the AKFC. It was reported in various media shortly after the Lobbying Commissioner received the complaint of January 18, 2017 that the Ethics Commissioner was re-opening her investigation of the Prime Minister's acceptance of the gift from the Aga Khan.[10]

9. The Ethics Commissioner identified five occasions when the Prime Minister had official dealings relating to the Aga Khan and his institutions. On three of those occasions – a briefing in preparation for a dinner with the Aga Khan in November 2015, a bilateral meeting with the Prime Minister in May 2016 and in a briefing prior to the meeting of May 2016 - the Ethics Commissioner found that an outstanding request for a $15 million grant to an AKFC project was discussed. At the May 2016 bilateral meeting with the Prime Minister, the Aga Khan represented the AKFC in relation to the project (the Global Centre for Pluralism). The Ethics Commissioner concluded as follows:

> "...I determined that Mr. Trudeau had a number of official dealings relating to the Aga Khan and his institutions where he was exercising an official power, duty or function. I also determined that he was provided with an opportunity to improperly further the private interests of the Global Centre for Pluralism on two occasions in May 2016 during which the discussions involved the outstanding $15 million grant to the endowment fund...."[11]

10. The Ethics Commissioner ruled that the Prime Minister was in breach of the following sections of the *CofI Act*:

- **section 5** (failure to "arrange his or her private affairs in a manner that will prevent the public office holder from being in a conflict of interest.");
- **section 11** (accepting a "gift or other advantage ... 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");
- **section 12** (accepting "travel on non-commercial chartered or private aircraft for any purpose unless required in his or her capacity as a public office holder"); and,

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[10] See for example Kristy Kirkup, "Ethics Watchdog opens 2nd investigation into the PM's trip to spiritual leader's private island," *Canadian Press*, February 13, 2017, Affidavit of Duff Conacher, Exhibit Z, Appeal Book, Tab 4 pp.299-301.

[11] Office of the Conflict of Interest and Ethics Commissioner, *The Trudeau Report made under the Conflict of Interest Act and the Conflict of Interest Code for Members of the House of Commons*, December 20, 2017, pp. 35, 38 and 40-43.

- section 21 (failure of a public office holder to "recuse himself or herself from any discussion, decision, debate or vote on any matter in respect of which he or she would be in a conflict of interest.")

11. The Lobbying Commissioner's decision was rendered on September 18, 2017 but was not made public until December 22, 2017 when it was mentioned in an article on CBCNews.ca.[12] The Ethics Commissioner's decision is dated December 20, 2017. The Respondent filed its application for judicial review on January 18, 2018.[13]

B. Evolution of the Legislative Scheme of Lobbying

1. *The Lobbyists Registration Act, 1988* (Bill C-82)

12. The first act of Parliament specifically directed at lobbying activities was the *Lobbyists Registration Act*, (*LRA 1988*) which came into force on September 30, 1989, imposing a modest system of registration of persons who engaged in lobbying, without regulating the activity of lobbying.[14] Prior to the enactment of the *LRA 1988*, certain activities associated with illegitimate lobbying were prosecuted only under the *Criminal Code of Canada*.[15]

13. The *LRA 1988* was amended in 1995, 2003, 2004, and 2006. Two classes of lobbyists were subject to the legislation: professional lobbyists who for "payment" undertook to arrange a meeting with a public office holder or to communicate in an attempt to influence them for prescribed purposes;[16] and, other lobbyists – employees of persons or organizations who engaged in lobbying. An employee included an "officer other than an officer who is not compensated for the performance of the duties of the office."[17] The term "officer" was not, and still is not, defined in the *Act*.

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[12] Affidavit of Duff Conacher, Exhibit EE, Appeal Bok, Tab 4, pp. 318-324.
[13] Notice of Application, Appeal Book, Tab 3, p. 78.
[14] RSC 1985 (35-36-37 Eliz II) c.44 (4th Supp), 1988 Vol II 1359 (hereinafter, *LRA 1988*).
[15] *Criminal Code of Canada*, R.S.C. 1985, c. C-46: section 119 prohibits bribery of members of Parliament and of provincial legislatures; section 121 deals with influence peddling and making or soliciting political contributions in order to obtain or retain a government contract; section 122 deals with fraud or breach of trust by government officials. P. B. Meunier, A. Turmel and G. Giorno, *Lobbying the Federal and Ontario Governments*, Thomson Reuters Canada Ltd., 2013., p. 2 (hereinafter Meunier, Turmel and Giorno).
[16] *LRA 1988*, s. 5.
[17] *LRA 1988*, s. 6(3).

14. The definition of "payment" in subsection 2(1) of the *LRA 1988* and the *Lobbying Act* has not been amended since the original version of the legislation. Payment is defined in both versions as:

payment means money or anything of value and includes a contract, promise or agreement to pay money or anything of value; (paiement)	***paiement*** Argent ou autre objet de valeur. Y est assimilée toute entente ou promesse de paiement. (payment)

15. Commenting on the scope of the legislation during second reading of Bill C-82 (enacting the *LRA 1988*) on March 8, 1988, the Hon. Harvie Andre (the responsible Minister) stated:

[Français] Monsieur le Président, j'aimerais faire porter votre attention sur le fait que la definition de lobbyiste ne s'applique pas aux simples citoyens qui communiquent avec le titulaire d'une charge publique de leur propre chef, ni aux bénévoles qui ne perçoivent aucune retribution ni avantage personnel de l'organisme qu'ils représentent dans leure démarches auprès de représentants publics.	[Translation] Mr. Speaker, I would like to draw your attention to the fact that the term lobbyist does not apply to private citizens who communicate with a public office holder on their own behalf, nor does it apply to volunteers who do not receive any remuneration or personal benefit from the agency they represent when lobbying public office holders.[18]

16. The word "remuneration" does not appear in the original version of the *LRA* with reference to the definition of lobbying, nor subsequent versions of the statute, until the most recent version of the legislation. As noted below, the word "remuneration" was added by Bill C-2 in 2006, which retitled the *LRA* as the *Lobbying Act*, only as a heading in one section prohibiting contingency fees.

2. *Lobbyists Registration Act*, 1995 (Bill C-43)

17. Bill C-43, resulted in a substantial revision of *LRA*.[19] It continued the focus on registration of lobbyists – as the Hon. Prime Minister Chretien stated in the House of Commons about the bill:

> "These changes will force lobbying out from the shadows into the open and make it clear to everyone who is representing whom, on which issue, and what they are doing.
> [Translation]

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[18] House of Commons Debates, 33rd Parliament, 2nd Session: Vol. 11, March 8, 1988, page 13495, available online at: http://parl.canadiana.ca/view/oop.debates_HOC3302_11.

[19] *Bill C-43, An Act to amend the Lobbyists Registration Act and the make related amendments to other Acts*, introduced on June 16, 1994 and enacted as S.C. 1995, Ch. 12 (hereinafter, *Bill C-43* or *LRA 1995*).

> "We have no disagreement with individuals or companies that choose to have someone represent them. That is their business and their right. But Canadians nonetheless have a right to know who is trying to influence elected and public officials."[20]

18. Bill C-43 created new categories of lobbyists in the *LRA*: section 6 applied to for-profit corporations, creating the term "In-House Lobbyists (Corporate)," while section 7 covered not-for-profit corporations, charities, foundations, unions and other organizations, and created the term "In-House Lobbyists (Organizations)".[21] Among the notable changes was to place the responsibility for registering employees and officers who engage in lobbying on a "senior officer of the organization." In addition, the information to be contained in a registration was greatly expanded.[22]

19. A new section 10.2 was enacted, requiring the Ethics Counsellor to develop a *Lobbyists' Code of Conduct*. A new, modest, investigative power was introduced in the statute, where previously none existed, requiring the Ethics Counsellor to investigate if he or she "believed on reasonable grounds that a person ... breached the Code..."[23]

3. *The Lobbyists Registration Act*, 2003 (Bill C-15)

20. The notable changes brought about by Bill C-15 included a change to the definition of registrable lobbying from communication with a public office holder "in an attempt to influence" to simply communication with a public office holder "in respect of" various prescribed matters.[24] The phrase "attempting to influence" in the third preamble was also changed to "engaged in lobbying activities."[25] The Bill also strengthened the investigation and enforcement provisions of the *LRA*. The Ethics Counsellor was required to advise a peace officer if he or she believed on reasonable grounds that a person committed an offence under the legislation. This provision remains in the current legislation. Finally, Bill C-15 harmonized the reporting and registration requirements for corporations and organizations under subsection 7(2).[26]

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[20] House of Commons Debates, 35th Parliament, 1st Session, Vol. 4, June 16, 1994, page 5396, available online at: http://parl.canadiana.ca/view/oop.debates_HOC3501_04.
[21] *Bill C-43*, clause 3, amended sections 6 and 7.
[22] *Bill C-43*, clause 3, amended section 5.
[23] *Bill C-43*, clause 5, new section 10.4.
[24] *Bill C-15, An Act to amend the Lobbyists Registration Act*, S.C. 2003, Ch. 10, clause 4(1), amending section subsection 5(1), (hereinafter, Bill C-15).
[25] Bill C-15, clause 1, amending the preamble.
[26] G. P. Kieley, *Bill C-15: An Act to amend the Lobbyists Registration Act*, Library of Parliament (Revised 19 March 2003), pp. 4, 5, 8, 9..

4. **The *Lobbying Act and the Federal Accountability Act***

21. The current *Lobbying Act* is a direct response to an ethical crisis that led to the creation of a judicial inquiry, the Commission of Inquiry into the Sponsorship Program and Advertising Activities, headed by Justice Gomery (Gomery Commission).[27] Justice Gomery identified various deficiencies in the *LRA* that allowed unlawful lobbying to flourish in relation to the federal sponsorship programs he was examining.[28] The *LRA* was retitled as the *Lobbying Act* as part of an extensive government bill, commonly known as the "*Federal Accountability Act*" that created or amended several democratic good governance laws, including enacting the *Conflict of Interest Act*.[29] The expanded scope of the *Lobbying Act* is reflected in comments by the Hon. John Baird, the responsible minister, in the House of Commons on September 20, 2006:

> "Mr. Speaker, we were very clear in the last election campaign. We wanted to reform the Lobbyists Registration Act in a way that had never been done in Canadian history, to make it the most accountable and transparent in Canadian history, and in fact, one of the most transparent and accountable in the world."[30]

22. The *Lobbying Act* amended the *LRA* by, among other changes: creating the Office of the Commissioner of Lobbying and making the Commissioner an Officer of Parliament; increasing the Commissioner's investigatory powers; lowering the requirement threshold for initiating an investigation; raising the limitation period for initiating prosecutions; establishing a five-year prohibition on lobbying by Cabinet ministers, their staff and senior government officials after they leave their government position, and; increasing penalties.[31]

23. The *Lobbying Act* subsection 10.4(1), set out below, does not require the Commissioner to have grounds to believe that a breach had been committed before initiating an investigation. Instead, the threshold is lower, requiring the Commissioner to investigate if he or she has reason to believe

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[27] Canada, *Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities* (Justice John H. Gomery), Volume 1, 2005 & Volume 2, 2006, (hereinafter, Gomery Commission Report).
[28] Gomery Commission Report, Vol. 1, pp. 171 to 175.
[29] *Bill C-2, An Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability*, S.C. 2006, C. 9. See also, *Legislative Summary of Bill C-2, The Federal Accountability Act*, Library of Parliament, (Revised 6 December 2006), pp. 5-18 and 25-34.
[30] House of Commons Debates, 39th Parliament, 1st Session, Vol. 141, No.49, September 20, 2006, page 3019, available online at: https://www.ourcommons.ca/Content/House/391/Debates/049/HAN049-E.PDF#page=9.
[31] Library of Parliament, *Legislative Summary of Bill C-2, The Federal Accountability Act*, 21 April 2006 (Revised 6 December 2006), pp. 25-26.

an investigation is "necessary to ensure there is compliance with the Code or this Act." The approach may be said to be preventive with the goal of avoidance of improper or unregistered lobbying:

"Investigation 10.4 (1) The Commissioner shall conduct an investigation if he or she has reason to believe, including on the basis of information received from a member of the Senate or the House of Commons, that an investigation is necessary to ensure compliance with the Code or this Act, as applicable."	**Enquête** 10.4 (1) Le commissaire fait enquête lorsqu'il a des raisons de croire, notamment sur le fondement de renseignements qui lui ont été transmis par un parlementaire, qu'une enquête est nécessaire au contrôle d'application du code ou de la présente loi.

5. ***The Lobbyists' Code of Conduct***

24. The *Lobbyists' Code* came into force in March 2007 and was amended in December 2015.[32] The *Code* was not mentioned in the original *LRA 1988*. In 1995, Bill C-43 enacted section 10.2 directing the then-Ethics Counsellor to develop the *Code*. The Commissioner is now mandated to administer the *Code* (s. 10.2) and all persons or entities who are required to register as lobbyists must comply with the *Code* (s. 10.3(1)). While it is not a statutory instrument as defined in the *Statutory Instruments Act*, it is enforceable, imposing a legal obligation on lobbyists to conduct themselves in accordance with the *Code*'s rules and principles.[33] Failure to comply with the *Code* can result in a report by the Commissioner to Parliament. Moreover, the finding that a lobbyist has breached the *Code* is a justiciable matter for which a judicial remedy is available.[34]

25. The Code's purposes parallel those of the *Lobbying Act* and the *Conflict of Interest Act*. Its first purpose is "to assure the Canadian public that when lobbying of public office holders takes place, it is done ethically and with the highest standards with a view to enhancing public confidence and trust in the integrity of government decision making." Lobbyists "shall meet the standards set out in the principles and rules of the Code."[35] The Preamble also states that the *Code* is an instrument to promote public trust in the integrity of government decision-making as central to a vital and free democratic process. Lobbyists must conduct themselves in accordance with basic

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[32] Canada, Office of the Commissioner of Lobbying, *Lobbyists' Code of Conduct*, (1997 and 2015), (hereinafter "*Lobbyists' Code*" or "*Code*").
[33] *Makhija v. Canada (Attorney General)*, 2008 FCA 402, paras. 8-11 (hereinafter, *Makhija*)
[34] *Makhija*, paras. 14-16.
[35] *Lobbyists Code of Conduct (2015)*, Introduction, p. 3

principles when engaged in lobbying activity. These principles include honesty and integrity, professionalism (which includes observing the "highest professional and ethical standards" and "conforming" with the "spirit" of the *Act* and *Code*), and openness.[36] The Commissioner has issued several reports in which she found violations of the *Code*'s principles.[37] Decisions of the Commissioner have been upheld where both the principles and the rules have been breached.[38]

26. There are 10 rules in the *Code* with which lobbyists who are required to register must comply. The relevant rules applicable in this Appeal are the following:

- **Rule 4**: the responsible officer of an organization or corporation must ensure that employees who lobby on behalf of the organization are informed of their obligations under the legislation and the Code;
- **Rule 6**: lobbyists shall not propose or undertake action that would place a public office holder in a real or apparent conflict of interest;
- **Rule 7**: lobbyists shall not arrange a meeting with a public office holder with whom they share a relationship that could be seen to create a sense of obligation;
- **Rule 8**: lobbyists shall not lobby a public office holder with whom they share a relationship that could be seen to create a sense of obligation.
- **Rule 10:** to avoid creating a sense of obligation, lobbyists shall not "provide or promise a gift, favour, or other benefit" to a public office holder whom they are lobbying or intend to lobby, which the public office holder is not allowed to accept.

PART II – ISSUES

Issue 1: What is the appropriate standard of appellate review?

Issue 2: Did the Court below commit a reviewable error in determining that the Lobbying Commissioner's decision was reviewable?

Issue 3: Did the Court below commit a reviewable error in determining that the Lobbying Commissioner's decision was justiciable?

Issue 4: Did the Court below commit a reviewable error in ruling that the Lobbying Commissioner's decision was unreasonable?

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[36] *Lobbyists Code of Conduct (2015)*, Principles, p. 3.
[37] Office of the Lobbying Commissioner, *Annotated Lobbyists Code of Conduct (2015)*, p. 4.
[38] *Makhija*, para. 65.

PART III – LAW AND ARGUMENT

A. The Standard of Appellate Review is Palpable and Overriding Error

27. The standard of appellate review is palpable and overriding error. '"Palpable"' means an error that is obvious. 'Overriding' means an error that goes to the very core of the outcome of the case."[39] No such errors were committed by the application judge. Even under the less deferential standard where the appellate court "steps into the shoes of the application judge" and determines whether the application judge selected and applied the correct standard of review, there are no flaws in the approach taken and conclusions drawn by the application judge. He selected and applied the reasonableness standard in a wholly defensible manner.

28. While reasonableness is a single standard, it is nevertheless a "flexible deferential standard" that "varies" or "takes its colour" from the context and nature of the issue.[40] There are occasions where only one "defensible" interpretation of a statutory provision exists, rejecting as unreasonable any interpretation that may undermine the purpose of the statutory scheme at issue in the case.[41] In *McLean*, Justice Moldaver, writing for the majority, explained:

> It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of deference can justify its acceptance; … the "range of reasonable outcomes" … will necessarily be limited to a single reasonable interpretation.[42]

29. The framing of the standard of review as correctness or reasonableness would make no discernible difference to the conclusion of the Court below that the Commissioner's determination was not defensible and suffered from defects that required a remedy to cure. There was only one appropriate or defensible outcome, as any other interpretation would have been incompatible with the objects and purposes and wording of the statutory scheme. The submission that the nature of the questions before the Court below were jurisdictional, and thus attract a less deferential standard of

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[39] *Sturgeon Lake Cree Nation v. Hamelin*, 2018 FCA 131, paras. 36, 38.
[40] See *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 at paras 17-18, 23; *Dunsmuir v New Brunswick*, 2008 SCC 9 ("*Dunsmuir*") at para. 64.
[41] *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at paras 18-19, 35 and *Halifax (Regional Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29).
[42] *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para. 38.

appellate review, similarly lacks merit. This Court observed recently that questions of legislative interpretation of an administrative decision-maker's home statute are routinely and inaccurately labelled "jurisdictional" and invariably rejected by this Court.[43]

B. The Decision of the Commissioner of Lobbying is Reviewable

30. *Democracy Watch v. Conflict of Interest and Ethics Commissioner* (*Democracy Watch 2009*) is not "binding authority" from this Court applicable to this appeal.[44] There are fundamental differences between the Ethics Commissioner's statutory mandate at issue in that case and the statutory mandate of the Lobbying Commissioner. The Ethics Commissioner's decision was rendered under subsection 45(1) of the *Cofl Act*, under which the Commissioner "may examine" a matter "on his or her own initiative" if he or she has reason to believe a violation has occurred.

31. The Ethics Commissioner's decision not to conduct an examination into the complaint that Democracy Watch had filed was held not to be reviewable because her decision did not constitute an order within the meaning of subsection 18.1(3) of the *Federal Courts Act*, since it did not affect an applicant's rights or carry legal consequences. In so holding, the Court noted that the legislation does not grant a member of the public a right to have its complaint investigated, and the Ethics Commissioner has no statutory duty to act on such a complaint.

32. In contrast, under subsection 10.4(1) of the *Lobbying Act*, the Commissioner "shall" conduct an investigation "if he or she has reason to believe" that one is "necessary ensure compliance with the Code or this Act." In addition, any member of the public may bring a complaint directly to the Commissioner. Indeed, the *Code* encourages "anyone" suspecting non-compliance to bring the matter to the attention of the Commissioner.[45]

33. The Commissioner may only refuse to investigate or cease an investigation based on four listed grounds in the subsection 10.4(1.1) of *Lobbying Act*: (a) the matter would be more appropriately dealt with under another Act of Parliament; (b) the matter is not sufficiently important;

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[43] *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58, paras . 56-60.
[44] *Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15 (*Democracy Watch 2009*).
[45] *Annotated Lobbyists' Code of Conduct (2015)*, page 3.

(c) dealing with the matter would serve no useful purpose given the passage of time; or (d) there is any other valid reason not to deal with the matter.

34. The Court below correctly held that a matter that is amenable to judicial review need not be an order or a decision.[46] Subsection 18.1(1) of the *Federal Courts Act* states that an application for judicial review may be made by the Attorney General of Canada "or by anyone directly affected by the matter in respect of which relief is sought." The Court below made reference to subsection 18.1(3), the remedies or relief provision, which refers to relief for an "act or thing" (paragraph 18.1(3)(a)), or relief in relation to "a decision, order, act or proceeding of a federal board, commission or other tribunal" (paragraph 18.1(3)(b)). The inquiry is not into how one characterizes the act or thing, or decision, order or proceeding. It is rather on whether an administrative body's conduct, act or thing done affects an applicant's legal rights, imposes obligations or causes prejudicial effects.

35. There is a well-developed body of case law to support this conclusion. *Air Canada v. Toronto Port Authority* is but one of many decisions that buttress the lower Court's determination.[47] In that case two communications in the nature of information bulletins, describing processes that would be used in relation to such matters as issuing landing slots at a local airport, were issued by the Toronto Port Authority. These bulletins made no determinations having any direct or indirect effects on any entity concerned, much less legal effects, or legal consequences. As the Court noted: the bulletins did not "determine anything."[48] On appeal, this Court agreed with the Court below.

36. None of the other authorities cited by the Appellant are of assistance. Whether or not a determination has legal consequences is a misguided inquiry. As this Court held in the context of findings in the nature of opinions by a commission of inquiry, notwithstanding their non-binding nature and their absence of "legal consequences," such findings are reviewable under the *Federal Courts Act* since they have consequences for the persons subject to an inquiry and declaratory relief is available.[49] A partial listing of some the consequences or prejudicial effects of the Commissioner's decision is provided at paragraph 82 of this Memorandum of Fact and Law.

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[46] *Democracy Watch v. Canada (Attorney General)*, 2019 FC 388, para. 101.
[47] *Air Canada v. Toronto Port Authority*, 2011 FCA 347 (hereinafter, *Air Canada*).
[48] *Air Canada*, para. 22.
[49] *Morneault v. Canada (Attorney General)*, [2001] 1 FC 30 (FCA), para. 41.

C. The Commissioner of Lobbying's Decision is Justiciable

37. Justiciability is concerned with "the boundaries between our legal and political systems."[50] Three doctrines have been said to comprise the law of justiciability: ripeness, which includes "hypothetical, speculative, contingent, academic and abstract questions;" mootness; and political questions.[51] The alternative grounds rule is an aspect of the ripeness doctrine.[52] The Appellant appears to raise the issue of justiciability either on the basis of the political questions doctrine, or on the basis of the ripeness sub-category of "alternative grounds."

38. The doctrine of political questions is premised on the notion that political disputes, or disputes designated as such by a legislature, should not be adjudicated by the courts given that they generally involve "moral, social or policy considerations that are ill-suited to the adversarial process or inappropriate for judicial intervention in light of Canada's constitutional separation of powers."[53] In the Canadian context, core political questions include disputes: "which fail to raise legal issues" such as purely political disputes; in relation to the "wisdom or desirability of legislation or government policy;" relating to social and economic rights; relating to the legislative process, parliamentary privilege, Crown prerogatives, constitutional conventions and intergovernmental relations; and, relating to the enforcement of international agreements or law. [54]

39. The issues before this Court fail to raise any of the questions that make up the political questions doctrine. Fundamental legal issues that are suited to the adversarial process and appropriate for judicial intervention are raised, as noted by the Court below in the context of the Respondent's standing.[55] The issues before this Court do not challenge the wisdom or desirability of the enactment of any legislation or policy, indeed no challenge is brought to any statute, regulation or policy. There are no issues that raise questions about the legislative process, parliamentary privilege, Crown prerogatives or constitutional conventions.

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[50] L. M. Sossin, *The Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd Ed., Thomson Reuters Canada Ltd., 2012, p. 2 (hereinafter, Sossin).
[51] Sossin, p. 27.
[52] Sossin, p. 83.
[53] Sossin, p. 29.
[54] Sossin, pp. 29, 185.
[55] *Democracy Watch 2019*, para. 65.

40. The alternative grounds rule is appropriately invoked when the court is asked to decide a matter not necessary to dispose of a case (superfluousness) or when asked to decide a matter before all other available remedial avenues have been exhausted (exhaustion of remedies). The first limb of the rule may be said to be concerned with the economic use of judicial resources. The second limb of the rule seeks to ensure that applicants have first sought out other remedies available to them, after which they may seek a judicial remedy. First, all the matters raised and canvassed by the Court below were necessary to dispose of the case. There was a live issue and concrete legal questions, all going to the central question of when the duty to initiate an investigation under the *Lobbying Act* is triggered. The central question, of course, required a determination of related questions: the interpretation of the terms "remuneration" and "payment" and the scope of an inquiry or review to determine whether an investigation is necessary to ensure compliance with the legislation. These questions are far from hypothetical, or superfluous.

41. Secondly, there is no alternative remedy. The reporting mechanism cited by the Appellant, where the Commissioner must prepare a report upon the conclusion of an investigation under section 10.4 and present it to the Speakers of both Houses of Parliament, is not a remedy. It is but a reporting mechanism, and it is only engaged when an investigation is concluded. No report to Parliament is prepared when the Commissioner determines that no investigation is necessary, and indeed, none has been prepared in this case. The mechanism is properly construed as a means by which Parliament requires all its officers of Parliament to account to it for their activities, but it does not shield them from judicial review, or review for the legality of their actions, particularly when they affect the public interest. Upon tabling the report, no specific action is required of Parliament. Nevertheless, the Federal Court of Canada found it fit to issue a remedy of a declaration that the conclusions in a report to Parliament by the Commissioner's predecessor under the *LRA*, the Registrar of Lobbyists, were unlawful.[56] This view is shared by the Lobbying Commissioner in one of her periodic reports to Parliament, where she states in the context of administrative reviews that her decisions are subject to judicial review and that administrative reviews "just like investigations" must be conducted thoroughly in order that they be "defensible in a court of law."[57]

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[56] *Makhija*, paras. 85-87.

[57] Office of the Lobbying Commissioner of Canada, *Administering the Lobbying Act: Observations and Recommendations Based on the Experience of the Last Five Years*, (Report presented by the Commissioner of

42. This Court recently expressed doubt that analogous provisions in the *Conflict of Interest Act* were adequate remedies. Sections 44 and 45 of that Act set out the investigative mandate of the Ethics Commissioner. Both require the presentation of a report to the Prime Minister at the conclusion of an investigation.[58] Moreover, cases such as *Auditor General v. Canada (Attorney General)* are of no assistance to the Appellant.[59] The Federal Court of Canada held in *Page v. Mulcair* that *Auditor General* is distinguishable as Parliament had expressly set out an exclusive and comprehensive remedial framework available to the Auditor General when a Crown corporation refuses to comply with a request for information for purposes of conducting an audit. The Court also noted *Auditor General* concerned an officer of Parliament *qua* officer of Parliament, not as a private citizen seeking to assert rights.[60] It has also been observed that Dickson, C.J.C. commented in *Auditor General* that the outcome in the case may well have been different if rights under the *Canadian Charter of Rights and Freedoms* (*Charter*) had been invoked.[61] While the Respondent does not seek to enforce a *Charter* right, the constitutional principle of democracy is very much engaged in this Appeal.

D. The Commissioner of Lobbying's Decision was Unreasonable

1. Objects and Purposes of the Legislative Scheme

43. The legislative framework within which the Commissioner operates is to be interpreted in a manner that promotes the constitutional principle of democracy. The democratic principle is part of the architecture of the Canadian Constitution.[62] The *Lobbying Act* and the *Lobbyists' Code* "co-exist with other statues and rules that govern lobbying and the interaction between lobbyists and government officials,"[63] including the *Cofi Act* and the provisions of the *Criminal Code* relating to corruption and influence peddling, as components of this architecture since they allow the democratic

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Lobbying to the Standing Committee on Access to Information, Privacy and Ethics, December 13, 2011), Affidavit of Duff Conacher, Exhibit I, Appeal Book, Tab 4, p. 224 (p. 28 in the report). (Hereinafter, Lobbying Commissioner, Five Year Review of the *Lobbying Act*.)

[58] *Democracy Watch v. Canada (Attorney General) and Dominic Leblanc*, 2018 FCA 194, para. 22.

[59] *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 (hereinafter, *Auditor General*).

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

[61] Sossin, p. 191; *Auditor General*, pp. 109-110.

[62] *Reference Re Senate Reform*, 2014 SCC 32, para. 25.

[63] Meunier, Turmel and Giorno, pp. 2 and 3.

process to function by regulating conduct that can undermine its integrity and erode it.

44. The objects and purposes of the *Lobbying Act*, which parallel the objects and purposes of its companion statute the *Cofl Act*, are enhancing or maintaining public confidence and trust in the integrity of government decision-making, which in turn are underpinnings of a healthy democracy – they are essential to the integrity of the democratic process. This connection was made by Justice L'Heureux-Dubé writing for the majority in *R. v. Hinchey*:

> "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."[64]

45. *Hinchey* concerned criminal conduct, corruption, by a government official. A more recent case illustrates the relationship between illegitimate lobbying and government integrity:

> "[1] By criminalizing influence peddling, s. 121(1)(d) of the *Criminal Code*, R.S.C. 1985, c. C-46, strives to preserve both government integrity and the appearance of government integrity. It helps ensure that government activity is driven by the public interest and promotes confidence in our democratic process."[65]

46. Illegitimate lobbying can lead to corrupt behavior – influence peddling, for example - if it is not addressed through compliance with laws regulating lobbying. This is addressed by the Court of Appeal for Ontario, in articulating the relationship between the influence-peddling provisions in the *Criminal Code* and the registration requirements in the *Lobbying Act*:

> "If the purpose of the s. 121(1)(d) prohibition is to bar the non-transparent exercise of influence, it may be that the two regimes can work harmoniously together. It may be in some cases that the transparency afforded by compliance with the reporting requirements of the *Lobbying Act* will mitigate the evils to which s. 121(1)(d) is directed."[66]

47. Academic commentary reinforces the concern about the harm to the democratic process that can result when its integrity is threatened. Commenting on the consequences of acting inappropriately in a conflict of interest, Professor Levine notes that it leads to "corruption (abuse of office) or biased or unfair decision-making." Further, "[c]orruption demeans the idea of government

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[64] *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at para. 14.
[65] *R. v. Carson*, [2018] 1 SCR 269, 2018 SCC 12, para. 1 (hereinafter *R. v. Carson 2018*).
[66] *R. v. Carson*, 347 CCC (3d) 164, [2017] OJ No 1223 (QL) (Ont. C.A.), majority judgment (hereinafter *R. v. Carson 2017*), aff'd *R. v. Carson*, [2018] 1 SCR 269, 2018 SCC 12.

and destroys fair administration. It is an assault on the integrity of government and the trust of people in government....[it] attacks the very soul of democracy."[67]

48. The objects and purposes are found in the various instruments that make up the scheme of ethics and integrity in government. The preamble to the *Lobbying Act* states "it is desirable that public office holders and the public be able to know who is engaged in lobbying activities." The "Introduction" section of the *Lobbyists' Code* states that its purpose is "to assure the Canadian public that when lobbying of public office holders takes place, it is done ethically and with the highest standards with a view to enhancing public confidence and trust in government decision making."[68] In a similar vein, the preamble to the *Code* states that it "is an important instrument for promoting public trust in the integrity of government decision making. The trust that Canadians place in public office holders to make decision in the public interest is vital to a free and democratic society."[69]

49. This Court has affirmed that the underlying purpose of lobbying legislation is to "advance public confidence in the integrity and transparency of government decision making..." in rejecting an interpretation of the former Rule 8 under the 1997 version of the *Code* (now Rule 6) that would have permitted lobbying activity that placed public office holders in an apparent conflict of interest.[70] Similarly, the Federal Court of Canada described the role of the Ethics Counsellor (the predecessor to the Commissioner of Lobbying) under the *LRA* as enhancing "...public confidence in the integrity of public office holders and the decision making process in government..."[71]

2. The Mechanisms to Maintain Public Confidence: Prevention, Avoidance, Transparency

a. Prevention and Avoidance

50. Parliament's focus on prevention and avoidance may be seen as a means to avert the harm caused by unlawful or unethical lobbying that can lead to criminal conduct including corruption and

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[67] G. J. Levine, *The Law of Government Ethics: Federal, Ontario and British Columbia*, 2nd Ed., Thomson Reuters Canada, 2015, pp.12, 13 and 14 (hereinafter, Levine).
[68] *Lobbyists' Code of Conduct*, Introduction.
[69] *Lobbyists' Code of Conduct*, Preamble.
[70] *Democracy Watch v. Campbell*, 2009 FCA 79, paras. 47-48.
[71] *Democracy Watch v. Canada (Attorney General)* 2004 FC 969, para. 39.

influence peddling,[72] conduct that undermines the public interest and that is corrosive to a democracy.[73] This is evident from the evolution of lobbying legislation: from dealing with unlawful lobbying only after it resulted in criminal conduct; to a system of registration where only bare details were required of lobbyists attempting to influence government; to a system of regulation of lobbyists imposing standards of ethical conduct on lobbyists with an appropriate enforcement mechanism that seeks to ensure there is compliance with the legislation and the *Code*, and avoidance of placing of public office holders in a conflict of interest, before a breach has been committed.

51. References to avoidance and prevention of conflicts are found in related federal laws. The *Cofl Act* lists its purposes as resolving conflicts "in the public interest," minimizing "the possibility of conflicts arising" between a public office holder's public duties and private interests," and providing the Ethics Commissioner with the mandate to determine measures to "avoid conflicts of interest."[74] The latter is reflected in some of the avoidance measures the Ethics Commissioner may order of a public office holder including the sale of assets or their placement in a blind trust, and recusal.[75]

52. Section 10.11 of the *Lobbying Act* is similarly aimed at avoidance and prevention, as it prohibits former public office holders from being registered lobbyists for five years after they leave government. Several Rules in the *Lobbyists' Code* are also aimed at avoidance and prevention. Rule 6 prohibits conduct that would place a public office holder in a real or apparent conflict of interest. Rules 7 and 8 prohibit arranging meetings with or lobbying a public office holder if one shares a relationship with the office holder that "could reasonably be seen to create a sense of obligation." Rule 9 prohibits political activity to support a person who is or becomes a public office holder if it could "reasonably be seen to create a sense of obligation." Rule 10 prohibits giving gifts to a public office holder that he/she is not allowed to accept in order to "avoid the creation of a sense of obligation."

b. Transparency

53. The transparency mechanisms are found in the *Lobbying Act*'s reporting and disclosure

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[72] *R. v. Carson 2017*, paras. 49, 52.
[73] *R. v. Carson 2018*, para. 1.
[74] *Conflict of Interest Act*, section 3.
[75] *Conflict of Interest Act*, sections 21, 27.

requirements. The current *Act* now requires comprehensive disclosure that includes: the name of the lobbyist and organization or corporation on whose behalf the lobbyist is lobbying; the subject-matter of the communication with a public office holder; the name of the department or other governmental entity that is being lobbied or about to be lobbied; the fact that the lobbyist is not being paid by contingency fee; particulars identifying the legislative proposal, Bill, regulation, policy, program, grant or financial benefit; the communication technique used or to be used; the name of any employee whose duties involve lobbying (in-house lobbyists); information that identifies an organization's membership; whether the lobbyist is a former public office holder.[76] This level of transparency has grown considerably from the original *LRA 1988* which only required disclosure of the name and address of the lobbyist and the client, and the proposed subject-matter of the meeting or communication with a public office holder. Employees of organizations were required to provide their own reports containing only their names and the name and address of their employer.[77]

54. In addition, Rules 1 through 4 of the *Lobbyists' Code* specifically address transparency. A lobbyist must: disclose the identity of the person or organization on whose behalf they are lobbying, the nature of the relationship with the person, and the reason for the communication (Rule 1); provide information to the public office holder that is accurate and factual (Rule 2); inform each client of the lobbyist's obligations under the *Act* and *Code* (Rule 3), and; the responsible officer of an organization or corporation must inform employees of their obligations under the *Act* and *Code* (Rule 4).

55. The Court below properly assessed the reasonableness of the Commissioner's decision with reference to these objects and purposes of the scheme of lobbying regulation: transparency and ethical requirements aimed at preventing conflicts of interest to ensure public trust and confidence in the integrity of government decision-making and the integrity of the democratic process.

3. Investigations Further the Purposes and Objects of the Legislative Scheme

56. Section 10.4 of the *Lobbying Act* sets out the Commissioner's mandate, powers, duties and obligations in investigating possible non-compliance with the *Act* or the *Lobbyists' Code*. It is a forward-looking provision that aims to prevent breaches and avoid placing public office holders in a position of conflict of interest or creating the appearance of a sense of obligation. Under subsection

[76] *Lobbying Act*, subsections 5(2), 7(2)
[77] *LRA 1988*, subsections 5(2), 6(2).

10.4(1), if the Commissioner has "reason to believe... that an investigation is necessary to ensure compliance" with the *Act* or *Code*, the Commissioner "shall conduct an investigation."

57. The Appellant incorrectly contends that this court, in the *Campbell* case,[78] defined the current threshold as requiring more than an "appearance of impropriety." In fact, that ruling concerned the threshold in the *LRA* prior to 2008 requiring the Commissioner to have reasonable grounds to believe that a breach of the *Code* had occurred. The current threshold under the *Act*, in force when the Aga Khan's activities were being investigated, requires a much lower standard: simply reason to inquire to ensure compliance – a preventive function. Arguably, the standard is lower than an "appearance of impropriety," as there is no need for an impropriety to have, or to believe that such had, occurred.

58. Recognized experts on lobbying law in Canada support this conclusion, stating that section 10.4: "...lowers the threshold for commencing an investigation, from the belief that a breach has occurred to the belief that an investigation is necessary to ensure compliance."[79]

59. As a result, the Court below properly held, taking into account the broad public interest purpose of the *Act* and *Code* of ensuring government integrity, that the Commissioner of Lobbying has a duty under section 10.4 to investigate "potential compliance issues."[80]

4. Remuneration, Payment, Compensation: Different Words, Different Meanings

60. The terms remuneration and payment do not have the same or similar meaning in the *Lobbying Act*. A fundamental rule of statutory construction is the presumption of consistent expression which holds "that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings."[81]

a. Remuneration

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[78] *Democracy Watch v. Campbell*, [2010] 2 F.C.R. 139, 2009 FCA 79, para. 14.
[79] Meunier, Turmel and Giorno, p. 93.
[80] *Democracy Watch v. Canada (Attorney General)* 2019 FC 388, para. 143.
[81] R. Sullivan, *Sullivan on the Construction of Statutes*, Sixth Ed. LexisNexis, 2014, p. 217 (hereinafter, Sullivan).

61. The only reference to the term "remuneration" in the *Lobbying Act* is in the heading appearing above section 10.1, which uses the phrase "Lobbyists' Remuneration." This provision is a prohibition on receiving a payment that is contingent on a particular outcome of a lobbying effort: a contingency fee, or a success fee. Contingency fees were banned with the enactment of the *Federal Accountability Act*. According to Driedger's modern principle of statutory interpretation, interpretation of the term must begin with its ordinary meaning, by reading the term in its grammatical or ordinary sense, and then considering the total context in which the term appears."[82]

62. The *Shorter Oxford Dictionary*, defines "remunerate" as follows: "1 Make a repayment or return for (a service etc.); 2 Reward; pay (a person) for services rendered or work done."[83] The total context, however, must be considered in order to glean Parliament's intention as to the meaning of the term. The term "remuneration" is found in the heading to section 10.1. Headings are integral parts of a statute "and should be read and relied on like any other contextual feature."[84] Moreover, as R. Sullivan notes, "[t]he chief use of headings is to cast light on the purpose or scope of the provisions to which they relate."[85] The presence of the term in this particular part of the *Act* sheds light on Parliament's intention: a fee or a payment in return for a service rendered, in this context, a payment for a particular result. Such a meaning is consistent with the ordinary meaning reinforced by the contextual factors. Based on Driedger's modern principle, the conclusion that best fits into the scheme of the legislation is that the use of the term remuneration is to be confined to describing a particular kind of payment to a lobbyist, a payment that is contingent upon achieving a result.

b. Payment

63. The term "payment" is used in subsection 5(1) of the *Lobbying Act*, the provision that requires consultant lobbyists to file a return with the Commissioner of Lobbying if the lobbyist "for payment" engages, or undertakes to engage, in prescribed lobbying activities on behalf of any person or organization. The term is also used in section 10.1 in the context of remuneration of lobbyists by means of a "payment that is contingent." Thus, "remuneration" is a form of payment, the term being subsumed within the definition of payment. The dictionary meaning of payment is: "An act, or the

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[82] Sullivan, p. 28-29.
[83] The *New Shorter Oxford English Dictionary*, L. Brown, Ed., Oxford University Press, 1993, p. 2543 (hereinafter, *Shorter Oxford Dictionary*).
[84] Sullivan, p. 461.
[85] Sullivan, p. 462.

action or process, of paying."[86] The term payment in the *Lobbying Act* may be said to be modified or enlarged from its ordinary meaning by use of the phrasing "means" and "includes."[87] Such a construction would accord with the intention of Parliament.

64. The term "payment," like the term "remuneration," is associated with consultant lobbyists. Subsection 2(1) of the *Lobbying Act* as defines payment as follows: "***payment*** means money or anything of value and includes a contract, promise or agreement to pay money or anything of value." As noted above, the legislative history provides us with important guidance on Parliament's intention, as the definition of payment is unchanged from its original form in the *LRA 1988*. The broad scope of the term is reflected in the statement in Parliament by Minister Andre, on March 8, 1988, that the legislation applied to lobbyists who received "retribution," ("remuneration") or "avantage personnel" ("personal benefit"), thus equating "anything of value" with a "personal benefit."[88] As a result, "payment" should be interpreted very broadly to include any type of personal benefit, including reimbursement of expenses, and including a "directorship within a corporation or organization, even in circumstances where the position is voluntary" as the Court below correctly suggested.[89]

c. Definitions of "Compensated" and "Officer"

65. The term "compensated" is used in the context of employees of organizations and corporations and only in that context. The term "employee" has been unchanged since Bill C-43 in 1995. It is defined as "including an officer who is compensated for the performance of their duties" (subsection 7(6)).[90] In the original *LRA 1988* (section 6), the definition of "employee" was worded in the negative as "an officer other than an officer who is not compensated for the performance of the duties of the office."

66. Unlike the term "payment," the term "compensated" is not defined in the *Lobbying Act* or any of the versions of the *LRA*. While this could indicate Parliament's intention that the

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[86] *Shorter Oxford Dictionary*, p. 2130.
[87] Sullivan, pp. 74-75.
[88] House of Commons Debates, 33rd Parliament, 2nd Session: Vol. 11, March 8, 1988, page 13495, available online at: http://parl.canadiana.ca/view/oop.debates_HOC3302_11.
[89] *Democracy Watch v. Canada (Attorney General)* 2019 FC 388, paras. 135-140, esp. para. 139.
[90] Bill C-43, clause 3, amending section 7 (specifically subsection 7(6)).

registration threshold for organization employees differs from that for consultant lobbyists, in contrast to the word "remunerate" the word "compensate" has a broad meaning like the definition of "payment," encompassing any provision of any benefit, including reimbursement of expenses. In determining its ordinary meaning, we may draw guidance from its dictionary meaning: "compensation" is defined as: "1 The action of compensating; the condition of being compensated. ... 2 A thing that compensates or is given to compensate (*for*); a counterbalancing feature or factor; amends, recompense; *spec.* money given to compensate loss or injury, or for requisitioned property. b. salary, wages, remuneration."[91] Canadian law, and Canadian courts, have defined the word "compensate" to include:

ii. "all forms of pay, benefits and perquisites paid or provided, directly or indirectly, by or on behalf of an employer to or for the benefit of an employee.";[92]

iii. "to counterbalance, make up for, make amends for";[93]

67. The word "officer" is not defined in the *Lobbying Act* or earlier versions under the title *LRA*. Canadian law, and Canadian courts, have defined it to include "the position of a corporate director" (i.e. a member of the board of directors).[94]

d. Payment and Compensation Defined in Their Total Context

68. Placing the two words in their "total context," in accordance with Driedger's modern principle, considering the structure of the legislation, the nature of the legislation, its history, and above all, its purposes of prevention, avoidance of conflicts, preserving public confidence in the integrity of government decision-making and respect for the democratic process, Parliament's intention is properly seen as giving payment and compensation their broadest possible meanings. The dictionary meanings, the *Act*'s "payment" definition, together with Canadian courts' treatment of the term "compensation" all reinforce the same broad intent and meaning as proposed by Minister Andre in 1988 in reference to the original version of the *LRA*, namely that "payment" and "compensation" include all forms of "personal benefit" given or promised.

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[91] *Shorter Oxford Dictionary*, p. 459.
[92] *Tremblay v. Canada*, 2000 CanLII 16142 (FCA), at para. 7.
[93] *Taylor v. Hoskin*, 2006 BCCA 39 (CanLII), at para. 19.
[94] *Canada (National Revenue) v. Conseil central des syndicats nationaux du Saguenay/Lac St-Jean*, 2009 FCA 375, at para. 18. *The Queen v. Nisker*, 2008 FCA 37, at para. 25.

69. Thus, to receive or be promised "payment" or to be "compensated" includes receiving any "personal benefit" including reimbursement of expenses or any perquisite attached to the appointment to an office such as a board of directors of an organization, the AKFC included. Perquisites of simply being appointed to a directorship include such benefits to a person's career as enhancing or maintaining their status or reputation in a community, profession or industry, and expanding their professional relationships and/or professional contacts, to name but a few.

70. The Appellant contends that, in its report following the first five-year review of the *Act*, the Standing Committee on Access to Information, Privacy and Ethics rejected a proposal that, for "consultant lobbyists" under section 5 of the *Lobbying Act* (but not in-house organizations subject to section 7), the definition of "paid" should include "indirect benefits."[95] In fact, the Committee only listed the proposal along with "Other Possible Areas of Reform" that were not discussed or addressed. As a result, the report gives no indication of Parliament's intention on the definition of "paid" as it applies to consultant lobbyists.

5. The Lobbying Commissioner's Advisory Opinion for Directors is Unreasonable

71. As noted by the Court below,[96] the Commissioner's decision on the Aga Khan situation was based upon an "Advisory Opinion" under the authority of subsection 10(1) of the *Act* that the Commissioner issued in February 2009, specifically on when a member of a board of directors of an organization who lobbies public officer holders is subject to the *Act*'s requirements (namely to register the lobbying activities in the Registry of Lobbyists, and comply with the principles and rules in the *Code*).[97] In the Advisory Opinion, the Commissioner opines that these officers, if they are not in an employer-employee relationship with the organization but receive "remuneration" beyond reimbursement of expenses, must register as consultant lobbyists.

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[95] Standing Committee on Access to Information, Privacy and Ethics, *Statutory Review of the Lobbying Act: Its First Five Years* (May 2012), page 20.
[96] *Democracy Watch v. Canada (Attorney General)* 2019 FC 388, para. 142.
[97] "Boards of Directors: Application of the Act to outside chairpersons and members," available online at: https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00011.html.

72. As the Court below properly concluded, an Advisory Opinion "cannot have the effect of limiting the provisions of the Act or the Code,"[98] as the Commissioner's Advisory Opinion does. First, as the Court below correctly held, the terms in the *Act* defining the requirement for consultant lobbyists to register are "payment" and "paid," not "remunerated." Secondly, the definition of "payment" expressly includes receiving or being promised "anything of value" which includes reimbursement of expenses and, as the Court below suggested, being given a "directorship within a corporation or organization, even when in circumstances where the position is voluntary."[99]

73. The legislative scheme would be respected if the Commissioner's Advisory Opinion stated that officers of organizations and corporations (including members of a board of directors) who lobby are subject to the *Act* and the *Code*. If this Court does not agree with the suggestion of the Court below that even a directorship is something of "value," it should still rule, taking into account the objects and purposes of the *Act* and the *Code*, that all directors who lobby and receive any personal benefit, including reimbursement of expenses, are subject to the *Act* and the *Code*.

74. The Commissioner's adherence to the Advisory Opinion may be seen as a form of fettering of discretion. The Commissioner's opinion, appears to have to crystallized into a "binding and conclusive rule" resulting in a loss of "flexibility and judgment that are an integral part of discretion."[100] The focus on "remuneration" as the key component, and arguably the central factor, guiding the limited analysis undertaken by the Commissioner's office had the effect of limiting the provisions of the *Lobbying Act* and the *Lobbyists' Code* that were applied in the review of the Aga Khan situation. The Court below was, therefore, correct in concluding that the "Commissioner's limited analysis excluded any consideration of potential compliance issues relating to the AKFC, its senior officer, or its other registered lobbyists. The Aga Khan's status as a board member of the AKFC, coupled with the AKFC's active in-house lobbying registration, flag all of these areas for review."[101]

6. The Lobbying Commissioner's Decision Lacked Justification and Intelligibility

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[98] *Democracy Watch v. Canada (Attorney General)* 2019 FC 388, para. 143.
[99] *Democracy Watch v. Canada (Attorney General)* 2019 FC 388, para. 139.
[100] S. Blake, *Administrative Law in Canada*, 5th Ed., LexisNexis Canada, 2011, p. 102
[101] *Democracy Watch v. Attorney General of Canada*, 2019 FC 388, para., 143.

a. Inconsistent, Irrational Use of Key Terms

75. The key terms in the *Act* of "payment" and "remuneration" are distinct and were not intended to be used interchangeably or inconsistently, or in an unintelligible way, as the Office of the Lobbying Commissioner has evidently done. The Administrative Review Memo uses "remuneration" as the basis for the recommendation not to proceed with an investigation, then applies the category of denial: "No payment."[102] This may suggest that the terms are used interchangeably or that "remuneration" means "payment." Adding to the confusion is that, in the letter to the original complainant, the Commissioner cites "no payment" as the reason for declining to investigate. Yet the Commissioner's Advisory Opinion uses the term "remuneration" in relation to members of boards of directors, effectively redefining the term and restricting its meaning to "beyond reimbursement of expenses." Any number of conclusions are possible from the above analysis. The Commissioner has either: engaged in sloppy drafting; inconsistently applied the terms; interchangeably applied the terms; equated the narrowly defined term "remuneration" with the very broad definition in the *Act* of the term "payment"; or is selective in the use of terms. Whatever conclusion we draw, the terms are used in ways that lack justification and intelligibility.

b. A Limited Inquiry Frustrates the Objects of the Legislative Scheme

76. The Commissioner of Lobbying took an unreasonably narrow view of what and whom should be the focus of an inquiry into whether an investigation was necessary to ensure compliance with the *Lobbying Act* or the *Lobbyists' Code*. First, she erred in concentrating exclusively on whether the Aga Khan was required to be registered as a lobbyist. As the record makes clear, the Aga Khan engaged in lobbying the highest ranking public office holder in Canada, the Prime Minister, in relation to a project of the AKFC in which he plays a role in directing, and gave a gift to that public office holder that caused him to be in a conflict of interest, 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" (section 11, *Conflict of Interest Act*). The record also shows that the AKFC as well as Mr. Khalil Shariff and another employee were registered to lobby various government departments including the Privy Council Office and the Prime Minister's Office. Mr. Shariff is also the Chief Executive Officer of the AKF and the responsible officer for compliance purposes (subsection 7(1)).

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[102] Administrative Review Memo, Tab 5, Appeal Book, pp. 424, 425.

77. Subsection 7(1) requires the responsible officer to register all employees (including officers who are employees) who lobby for an organization or corporation, and to file monthly returns of oral and pre-arranged lobbying communications. Rule 4 of the *Code* also requires the responsible officer to effectively ensure that all employees comply with the *Act* and the *Code*, and several principles and rules in the *Code* require the responsible officer to ensure that the organization/corporation's lobbying upholds the highest ethical standards. The Commissioner's administrative review failed to address itself to the actions of the responsible officer as another person, in addition to the Aga Khan, who had responsibility for complying with the *Act* and the *Code*. The Commissioner failed to cure the defects in the review by accepting the recommendation not to conduct an investigation.

78. Secondly, the administrative review was flawed because it only addressed two rules of the *Code* (Rule 8, preferential access; Rule 10 gifts). One can easily conceive of numerous questions to which the Commissioner and investigators could have and should have directed their minds had they enlarged the focus to include the *Code*'s Rule 4 (obligations of responsible officer), Rule 6 (placing a public office holder in a conflict of interest), and Rule 7 (preferential access creating a sense of obligation). Among the questions that were appropriate for inquiry (the list is not exhaustive):

1. Did the responsible officer of the AKFC inform all employees of their obligations under the *Act* and the *Code* as required by Rule 4?
2. Did any AKFC lobbyists (registered or not) know about the prohibited trip gift?
3. Did the responsible officer of the AKFC do anything to stop the Aga Khan from giving the prohibited trip gift? Was there an effort at due diligence as required to comply with the *Code*'s Professionalism Principle (which requires upholding "the highest professional and ethical standards") and/or the Integrity and Honesty Principle?"
4. If anyone at the AKFC lobbied the Prime Minister around the time or after the Aga Khan's trip gift was given to the Prime Minister, did this violate the *Code*'s Professionalism Principle and/or the Integrity and Honesty Principle?
5. Did the responsible officer or any other AKFC lobbyists go on any of the trips?
6. Didn't the facts call for an inquiry under Rule 6 (re: an action that would place a public office holder in a real or apparent conflict of interest)?
7. Did the Aga Khan and the Prime Minister "share a relationship that could reasonably be seen to create a sense of obligation" and, therefore, did the responsible officer or any other AKFC lobbyists violate Rule 7 or Rule 8 of the *Code* by lobbying the Prime Minister?
8. Did any other AKFC lobbyist share a relationship with a public officer holder that could reasonably be seen to create a sense of obligation contrary to Rules 7 or 8?

79. This "narrow, technical, and targeted analysis" effectively foreclosed a required investigation into potential non-compliance that would have permitted a deeper inquiry into the whole lobbying structure at the AKFC, and enabled the Commissioner to obtain a more complete record in order to exercise her statutory mandate to "ensure compliance" with the *Lobbying Act* or the *Code*. Had the Commissioner's staff broadened the administrative review to examine actual evidence such as financial accounts and records as opposed to relying solely on brief interviews, and had they applied the broader concept of "payment" required by the legislative scheme, an investigation would have shed light into the nature of: any benefit or anything of value the Aga Khan would have received as a director of the AKFC; the Aga Khan's lobbying activities; the lobbying by anyone at the AKFC in relation to the funding request for $15 million; the obligation of the responsible officer of the AKF; and the role any AKFC lobbyist played in the giving of the gifts to the Prime Minister. The Court below found that these areas were clearly flagged as requiring a deeper investigation. The inquiry that was undertaken fails to accord with the guidance the Commissioner has provided in the past that administrative reviews must involve background research and in-depth interviews and "tend to be extensive because they may eventually lead to investigations" as well as being subject to judicial review.[103]

80. In contrast, the Ethics Commissioner, who has a similar mandate as the Commissioner of Lobbying to maintain the public's confidence and trust in government integrity, under a statute (the *Conflict Act*) with similar objects and purposes, conducted a full investigation that allowed the gathering of a more complete factual record, and concluded that the Prime Minister placed himself in a conflict of interest by accepting the gifts from the Aga Khan who was lobbying him.[104]

7. Conclusion

81. The Court below committed no error in concluding that the inquiry was narrowly focused, highly circumscribed, and failed to give effect to the objects and purposes of the legislative scheme, and reflected a "narrow, technical, and targeted analysis that is lacking in transparency, justification, and intelligibility when considered in the context of the Commissioner's functions and duties."[105]

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[103] Lobbying Commissioner, Five-Year Review of the *Lobbying Act*, Appeal Book, Tab 4, p. 224 (p. 28 in the report).
[104] *The Trudeau Report* (Executive Summary and excerpt (pp. 32-43), Ethics Commissioner.
[105] *Democracy v. Attorney General of Canada*, 2019 FC 388, para. 146.

82. The Commissioner's decision fails to further the objects and purposes of the legislative scheme of lobbying. First, it forecloses an inquiry into compliance or non-compliance with the *Lobbying Act* and the *Lobbyists' Code*, thus permitting wrongdoing to go undetected and unpunished. This causes harm to public confidence and trust in the integrity of government decision-making, and harm to the democratic process. Secondly, the determination undermines the public's interest and right to know who is lobbying whom, undermining Parliament's purpose of transparency. It sends a signal that it is acceptable for corporations and organizations to use members of a board of directors, who may have some influence, wealth or other resources, to give prohibited gifts to a public office holder while lobbying the office holder, and while the corporation or organization is also registered to lobby the public office holder. This places other organizations, charitable or not, at a considerable disadvantage. As well, the Commissioner's narrow and technical decision facilitates former public office holders lobbying without registering, in direct contradiction to the intent of the prohibition in the *Act* on office holders lobbying during the five-year period after they have left their positions. Finally, the decision endorses conduct that has the effect of placing a public office holder in a conflict of interest, undermining the objects of the *Conflict of Interest Act*.

PART IV – RELIEF SOUGHT

83. The Respondent seeks the following relief:

a) An order denying the Appeal;

b) Costs for the application in the Federal Court, and for responding to the Appeal, and;

c) Such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa this 8th day of August, 2018

Sebastian Spano
Counsel for Respondent, Democracy Watch

PART V – LIST OF AUTHORITIES

Legislation

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2. *Criminal Code of Canada*, R.S.C. 1985, c. C-46
3. *Lobbying Act*, RSC 1985, c.44 (4th Supp.)
4. *Lobbyists Registration Act*, RSC 1985 c.44 (4th Supp), 1988 Vol II 1359
5. *Bill C-43, An Act to amend the Lobbyists Registration Act and the make related amendments to other Acts*, S.C. 1995, C. 12
6. *Bill C-15, An Act to amend the Lobbyists Registration Act*, S.C. 2003, C. 10
7. *Bill C-2, An Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability*, S.C. 2006, C. 9.

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8. *Air Canada v. Toronto Port Authority*, 2011 FCA 347
9. *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49
10. *Canada (National Revenue) v. Conseil central des syndicats nationaux du Saguenay/Lac St-Jean*, 2009 FCA 375
11. *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58
12. *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2
13. *Democracy Watch v. Canada (Attorney General)* 2004 FC 969
14. *Democracy Watch v. Canada (Attorney General)*, 2019 FC 388
15. *Democracy Watch v. Canada (Attorney General) and Dominic Leblanc*, 2018 FCA 194
16. *Democracy Watch v. Campbell*, 2009 FCA 79
17. *Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15

18. *Dunsmuir v. New Brunswick*, 2008 SCC 9

19. *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29

20. *Makhija v. Canada (Attorney General)*, 2008 FCA 402

21. *McLean v British Columbia (Securities Commission)*, 2013 SCC 67

22. *Morneault v. Canada (Attorney General)*, [2001] 1 FC 30 (FCA)

23. *Page v. Mulcair*, 2013 FC 402

24. *R. v. Carson*, [2018] 1 SCR 269, 2018 SCC 12

25. *R. v. Carson*, 347 CCC (3d) 164, [2017] OJ No 1223 (QL) (Ont. C.A.)

26. *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at para. 14

27. *Reference Re Senate Reform*, 2014 SCC 32

28. *Sturgeon Lake Cree Nation v. Hamelin*, 2018 FCA 131

29. *Taylor v. Hoskin*, 2006 BCCA 39

30. *The Queen v. Nisker*, 2008 FCA 37

31. *Tremblay v. Canada*, 2000 CanLII 16142 (FCA)

32. *Wilson v. Atomic Energy of Canada Ltd*, 2016 SCC 29

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33. Canada, *Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities* (Justice John H. Gomery), Volume 1, 2005 & Volume 2, 2006

34. Canada, Office of the Commissioner of Lobbying, *Lobbyists' Code of Conduct* (2015)

35. Canada, Office of the Commissioner of Lobbying, *Annotated Lobbyists Code of Conduct (2015)*

36. Canada, Office of the Conflict of Interest and Ethics Commissioner, *The Trudeau Report made under the Conflict of Interest Act and the Conflict of Interest Code for Members of the House of Commons*, (December 20, 2017)

37. House of Commons, Debates, 33rd Parliament, 2nd Session: Vol. 11, (March 8, 1988)

38. House of Commons, Debates, 35th Parliament, 1st Session, Vol. 4, (June 16, 1994)

39. House of Commons, Debates, 39th Parliament, 1st Session, Vol. 141, No.49, (September 20, 2006)

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