Court File No.: T-1324-20

FEDERAL COURT

BETWEEN:

DEMOCRACY WATCH and DUFF CONACHER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION UNDER SECTION 18.1 OF THE FEDERAL COURTS ACT, RSC 1985, C F-7

APPLICANTS' MEMORANDUM OF FACT AND LAW

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OVERVIEW

1. This is a unique matter. The Applicants have filed this Application to challenge the constitutionality of the federal judicial appointments and promotions process (the "Appointments System" the "Promotions System" and collectively the "Systems").

2. The Applicants' position is that the Systems are unconstitutional because they are subject to too much discretionary political control, influence and interference by the Minister of Justice and the Governor in Council ("GIC"). The Systems therefore undermine the structural independence and impartiality of the judiciary in ways that violate s. 96 of the *Constitution Act, 1867*, and ss. 7, 11(d) and 24(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), and/or the constitutional principles of judicial independence and/or the rule of law. The Systems have also produced a judiciary membership in which women, visible minorities and Indigenous people are woefully under-represented. Given the over-representation of some groups who are tried in the courts, such as Black people and Indigenous people, a judiciary in which these groups are significantly under-represented also risks undermining or actually undermines public confidence in the impartiality of the judiciary.

3. This does not mean that the Applicants are claiming that any specific judge appointed or promoted through the Systems lacks independence or impartiality. As has been established in Supreme Court of Canada rulings,[1] that issue is left to individual litigants to raise on a case-by-case basis, if they have reason to believe it can be shown, in any specific application or action or motion to be heard by a judge.

[1] *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R 3 ("*Reference re: Provincial Court*"); *Wewaykum Indian Band v. Canada*, 2003 SCC 45 ("*Wewaykum*").

PART I – STATEMENT OF FACTS

A. Public Interest Standing of Duff Conacher

4. Duff Conacher ("Conacher") is a Ph.D. student at the University of Ottawa's Faculty of Law, and a Vanier scholar. He was a part-time professor at the University of Toronto Faculty of Law from 2011-14, a visiting professor at the University of Ottawa from 2014-16, and a cross-appointed part-time professor at the University of Ottawa from 2016-19 at the Faculty of Law and the School of Political Studies.[2]

5. Through that time, he taught courses based on his research, including *Law of Good Governance and Ethics in Government and Business*, *Law, Politics and the Constitution in Canada*, and *Law of Good Government*. All courses included a section on the statutes and case law concerning judicial independence.[3]

6. Duff Conacher is the Coordinator of Democracy Watch. In that role, he has monitored developments concerning cabinet appointments, conflicts of interest and judicial independence in Canada for several years. He has also made several written submissions concerning cabinet appointment processes, conflicts of interest issues, and the independence of law enforcement in Canada to House of Commons committees, and legislative committees in various provinces.[4]

B. Public Interest Standing of Democracy Watch

7. Democracy Watch is a not-for-profit organization founded and incorporated in 1993 that advocates for democratic reform, citizen participation in public affairs, and ethical behaviour in government and business in Canada. Democracy Watch is governed by its Coordinator, Directors, and Advisory Committee. Democracy Watch advocates on behalf of numerous organizations and represents the interests of a large number of Canadians.[5]

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[2] Affidavit of Duff Conacher, at para. 1.
[3] *Ibid*.
[4] Affidavit of Duff Conacher, at para. 2.
[5] *Ibid*.

8. Democracy Watch articulates its mandate as "20 Steps towards a modern, working democracy", including changes to the information governments and businesses provide to citizens; changes in the ways citizens participate in government and business decision-making; and changes to the ways in which citizens can hold governments and businesses accountable.[6]

9. In pursuit of this mandate, Democracy Watch actively participates in public policy-making and legislative processes in matters relating to government accountability. In particular, Democracy Watch has made submissions and appeared before parliamentary committees in legislative proceedings, some of which have led to the enactment or amendment of statutes, including:[7]

i. changes to Canada's judicial appointments system in 2007 and 2016;

ii. amendments to the *Canada Elections Act* (S.C. 2000, c. 9) in 2000 2003, 2006, 2014 and 2018;

iii. amendments to the *Lobbying Act*, RSC 1985, c.44 (4th Supp.), its predecessor the *Lobbyist Registration Act*, and the *Lobbyists Registration Regulations*, SOR/2008-116 (1994, 1997, 2000, 2003, 2006, 2010, 2012, 2020);

iv. creation of the position of Ethics Commissioner as an independent Officer of Parliament and subsequent changes to the enforcement powers and title of this position to Conflict of Interest and Ethics Commissioner through amendments to the *Parliament of Canada Act*, RSC 1985, c.P-1 (2002-2007, 2013, 2020);

v. enactment of the *Conflict of Interest Act*, SC 2006, c.9, s.2;

vi. drafting and amendment of the *Conflict of Interest Code for Members of the House of Commons* in (2004; am. 2009);

[6] *Ibid*, at para. 3, Exhibit A.
[7] *Ibid*, at para. 4.

vii. drafting and amendment of the *Lobbyist Code of Conduct* (1997 and 2015 versions); and

viii. drafting and amendment of the *Conflict of Interest and Post-Employment Code for Public Office Holders* (establishing the position of Ethics Counsellor in 1994, and amendments in 2000, 2003, 2004 and 2006).

10. Democracy Watch pursues its mandate of advancing accountability in democratic governance by utilizing these mechanisms, initiating complaints and participating in proceedings before the various bodies created by these legislative regimes. In particular, Democracy Watch has filed more than 75 government ethics-related petitions with the federal Commissioner of Lobbying, the Ethics Commissioner, and their predecessors, and also with provincial ethics commissioners in British Columbia and Ontario.[8]

11. Democracy Watch has also pursued the advancement of accountability in democratic governance before the courts. Democracy Watch appeared as an intervener before the Supreme Court of Canada, in *Harper v Canada (Attorney General)*[9] and has brought several proceedings concerning the Ethics Commissioner, the Commissioner of Lobbying, and their predecessors. Most recently, Democracy Watch has filed proceedings concerning the snap election calls by the Premier of British Columbia, and the Premier of New Brunswick.[10]

12. Democracy Watch has pursued or intervened in a number of proceedings and has been granted standing and public interest standing by the courts in a number of cases.[11]

[8] *Ibid*, at para. 5.
[9] 2004 SCC 33.
[10] Affidavit of Duff Conacher, at para. 6.
[11] *Ibid*, at paras. 7-8.

C. The Government of Canada's Judicial Appointments System and Promotions System

13. Canada's federal judicial Appointments System is the process by which judges are appointed to provincial and territorial superior courts, provincial and territorial courts of appeal, the Federal Court of Canada, and the Federal Court of Appeal.[12]

14. The Appointments System involves Judicial Advisory Committees ("JACs") for each province and territory that review applications and recommend long lists of qualified candidates to the federal Minister of Justice (the "Minister").[13] The Commissioner for Federal Judicial Affairs, which office is established under s. 73 of the *Judges Act*[14] also serves at the pleasure of the GIC.[15]

15. The Minister, who is a political appointee as a member of the federal GIC and a political appointee, appoints six of the seven members of each JAC.[16] The Chair and the members of each JAC "are appointed by the federal Government for 2 year terms with the possibility of renewal at the Government's discretion."[17]

16. The Minister, in his/her sole discretion, appoints three of the seven members of each JAC. The Minister also appoints three other members of each JAC from lists of candidates submitted by (i) the provincial or territorial Law Society; (ii) the Canadian Bar Association, and; (iii) the provincial Attorney General or territorial Minister of Justice.[18] The chief judge of the jurisdiction chooses the last member of each committee.

17. Once a JAC submits its long list of candidates for each position in the judiciary, the Minister submits proposed candidates to members of the GIC and Members of the House of Commons ("MPs") who represent the ruling party only and are from the

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[12] *Ibid*, at para. 9.
[13] *Ibid*, at para. 10.
[14] R.S.C., 1985, c. J-1.
[15] Affidavit of Duff Conacher, at para. 11.
[16] *Ibid*.
[17] *Ibid*, at para. 12.
[18] *Ibid*, at para. 11, Exhibit C.

province or territory in which an appointment is to be made, and to ruling party national officials as well as members in that jurisdiction.[19]

18. The Minister ultimately chooses to recommend whomever the Minister wishes, in their sole discretion, for each position in the judiciary, based at least in part on the opinions of these politicians and members of the ruling party, and based on the recommendations of the members of the JAC, a majority of whom are handpicked by the Minister. Appointments are then made by Order in Council of the Committee of the Privy Council.[20]

19. There is no application process, and there are no JACs involved in Canada's federal system of appointing and promoting to appellate courts. The Minister promotes and appoints to appellate courts (excluding the Supreme Court of Canada) whomever the Minister chooses from among sitting judges without any type of advisory committee involvement or other restriction on the Minister's discretion to promote whomever they want.[21]

D. Concerns about Political Interference in Canada's Judicial Appointments System and Promotions System

20. Concerns have been expressed by many members of the public, including lawyer associations, lawyers, academics, and media, about political interference in Canada's judicial Appointments System and Promotions System.[22]

21. One statement that elicited such concerns was the statement by Prime Minister Harper in 2007, in which he stated: "We're bringing forward laws to make sure that we crack down on crime – that we make our streets and communities safer. We want to make sure our selection of judges is in correspondence with those objectives."[23]

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[19] *Ibid*, at paras. 14-19, Exhibits D to H,
[20] *Ibid*, at para. 21, Exhibits K and L.
[21] *Ibid*, at para. 22.
[22] *Ibid*, at para. 23.
[23] *Ibid*, at para. 23, Exhibits N and O.

22. The International Commission of Jurists Canada ("ICJ Canada") also found that concerns about political interference were expressed in response to a questionnaire and interviews it conducted. It found a widespread "perception that judicial appointments were political, in the sense that political affiliations and an applicant's views on such matters as criminal justice policy, as an example, were important." It also found that the screening process by the JACs and the Minister was "described by some responses as a 'back room' process" (pp. 9-10). ICJ Canada recommended changes to restrict the discretion of the Minister in appointing members of the JACs and in appointing and promoting judges (p. 19).[24]

23. Lawyers and law professors have expressed concern about political influence and interference in federal judicial appointments,[25] and pointed to the reformed system in the United Kingdom that greatly restricts the discretion of Cabinet ministers by having advisory committees nominate only one candidate for each vacancy in the judiciary.[26]

24. According to a 2019 briefing note from Deputy Minister of Justice Nathalie Drouin to Minister of Justice David Lametti quoted in a media article:

> Under the current framework, there are no formal constraints placed on the manner in which the minister of justice decides which candidates to recommend for appointment, nor on the degree to which he involves cabinet colleagues in scrutinizing the candidates.[27]

25. In addition to consulting with MPs and members of the ruling party only from the jurisdiction where an appointment is to be made,[28] the Minister and/or the Prime Minister's Office ("PMO") and members of the GIC also consult with others connected to the ruling party concerning nominated candidates.[29] In 2018, then-Liberal Minister of Natural Resources Jim Carr (subsequently Minister of International

[24] *Ibid*, at para. 24, Exhibit P.
[25] *Ibid*, at para. 26, Exhibits S, T and U.
[26] *Ibid*, at para. 25, Exhibits Q and R.
[27] *Ibid*, at para. 14, Exhibit D.
[28] *Ibid*, at paras. 15-16.
[29] Supplemental Affidavit of Duff Conacher, at paras. 2-3, Exhibits A-F.

Trade Diversification) asked his spouse, Justice Colleen P. Suche of the Court of Queen's Bench for Manitoba, for recommendations for candidates for federal judicial appointments, and then they both submitted the same list of recommendations to the federal Liberal Minister of Justice.[30]

26. The current Liberal Prime Minister's Office checks the background of nominated candidates for the judiciary using the Liberal Party of Canada's database. A study found that 25 percent of judges appointed from 2016-2019 had, since 2000, donated to the Liberal Party of Canada while only approximately six percent of the total number of appointees had donated to the Conservative Party of Canada, the New Democratic Party of Canada or the Green Party of Canada. The study also found that 90.9 percent of the total amount donated was donated to the Liberal Party, 4.2 percent to the Conservative Party, 4.7 percent to the NDP, and 0.1 percent to the Green Party.[31]

27. Another study found that according to the database of political donations maintained by Elections Canada, 28 percent of judges appointed or promoted by the Liberal GIC from 2016 through 2020 had donated solely to the Liberals in the past, compared to seven percent who had donated solely to the Conservatives, and one percent who were solely NDP donors.[32]

28. Lawyers, professors and public commentators have also expressed concern more recently about this political influence and interference in the current federal judicial appointments system.[33] An October 31, 2020 article published in *LaPresse* provides even more basis for the identified concerns.[34]

29. On November 6, 2020, the Canadian Bar Association ("CBA") President issued a statement on federal judicial appointments expressing concern that the Minister's "political vetting" of judicial appointment applicants after the JACs have made their recommendations "risks eroding the confidence of the public in the

[30] *Ibid*, at para 17.
[31] *Ibid*, at para. 19, Exhibits H and I.
[32] *Ibid*, at para. 20, Exhibit J.
[33] *Ibid*, at para. 26, Exhibits S, T, U and V.
[34] Supplemental Affidavit of Duff Conacher, at paras, 2-3, Exhibits A-F.

independence and fairness of the justice system itself – particularly in marginalized communities that already feel the system doesn't work for them." The CBA's statement concluded that: "It is time to make the system less open to manipulation."[35]

30. A study of federal judicial appointments from 1972 to 2013 found that a system that allows the connection of nominated candidates as donors to the ruling party to be a factor that is considered when making appointments to the judiciary negatively affects the appointment of women to provincial superior courts. To counter this negative effect, the study recommended a system with a more independent advisory committee that nominates a very short list of candidates to the Minister, as in Ontario's pre-2021 system for appointing provincial court judges.[36]

31. The lack of diversity of the federally appointed courts compared to the demographic makeup of the Canadian population has been confirmed by the Government of Canada.[37]

32. The Chief Justice of the Supreme Court of Canada has expressed concern about the lack of diversity in the federally appointed courts, stating that: "All Canadians should be able to see themselves reflected in their justice system. Justice should not make a person feel like an outsider or an 'other' when they confront it" and that: "I also think there is a growing awareness of the need for our courts, including our highest court, to reflect the diversity of Canadians."[38]

33. In September 2020, 36 bar associations, legal clinics and advocacy groups submitted an open letter to the Minister calling for the appointment of Black, Indigenous and People of Colour as judges to the federal courts.[39]

[35] *Ibid*, at para. 27, Exhibit W.
[36] *Ibid*, at para. 29, Exhibit Y.
[37] *Ibid*, at para. 28, Exhibit X.
[38] *Ibid*, para. 30, Exhibit Z.
[39] *Ibid*, para. 31, Exhibits AA and BB.

PART II – ISSUES

34. This Application raises the following issues:

A. Do the Applicants have public interest standing to bring the present application?

B. Does the Government of Canada's federal judicial Appointments System and Promotions System violate s. 96 of the *Constitution*, and ss. 7, 11(d) and/or s. 24(1) of the *Charter* because they infringe the unwritten constitutional principles of judicial independence and the rule of law?

C. If the Systems violate ss. 7, 11(d) and/or s. 24(1), can the infringement be saved by s. 1?

PART III – LAW AND ARGUMENT

A. The Applicants Have Public Interest Standing to Bring this Application

35. Duff Conacher and Democracy Watch both fulfill the requirements of the test for granting public interest standing to bring the present application. Granting public interest standing is a discretionary power within the jurisdiction of the Court. When exercising this discretion, the three-element test for public interest standing must be applied contextually, liberally, and generously, with reference to the policy rationales for granting standing.[40] The third element in particular must be treated in a flexible and generous manner, taking into account the realities of litigation and overall resource considerations.

36. The test for public interest standing was most recently refined by the Supreme Court of Canada in *Downtown Eastside*:

[40] *Canada v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at paras. 35-36, 44-52 ("*Downtown Eastside*"); *Sierra Club of Canada v. Canada (Minister of Finance),* [1999] 2 FC 211 at 13 ("*Sierra Club*").

> In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts[.][41]

i. A Serious Justiciable Issue has Been Raised

37. This factor involves two requirements: justiciability and seriousness. The justiciability of an issue is linked to the "concern about the proper role of the courts and their constitutional relationship to the other branches of government", such that courts can ensure their exercise of discretion is consistent with the court staying within the bounds of its proper constitutional role.[42] A "serious issue" will exist where the question raised is a "substantial constitutional issue" or an "important one", and the claim is "far from frivolous" on preliminary examination.[43]

38. There is no question that the present case raises serious justiciable issues, involving important questions concerning public office holders' compliance with the constitutional principles of judicial independence and the rule of law, and provisions of the *Constitution* and the *Charter*, the proper interpretation of those requirements, and the impartiality of the federal judicial appointments and promotions system – issues that are well-suited to being determined by this court.

39. While the issues themselves are clearly justiciable, a difficulty arises when *Charter* violations are raised in the absence of individuals whose *Charter* rights are engaged in the proceeding. This should not act as a bar to granting standing in the present case because "some constitutional rights are more general in their application and pleadings regarding the particular factual context of a specific individual's case need not always be pleaded for a constitutional claim to disclose a reasonable cause of action."[44]

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[41] *Downtown Eastside*, at para. 37.
[42] *Ibid*, at paras. 39-40.
[43] *Ibid*, at para. 42.
[44] *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241, at para. 95.

40. In granting standing in *Downtown Eastside*, the Supreme Court recognized the validity of granting standing to address systemic rather than individual issues. Here, the *Charter* violations raised are similarly systemic and not based on an individual. The issue is that the Systems are not aligned with the constitutional principles of judicial independence and the rule of law, such that any individual whose s. 7 or 11(d) rights are engaged is denied their protection. Similarly, any individual seeking a remedy under s. 24(1) of the *Charter* is denied access to an independent judiciary, governed by the rule of law, as guaranteed in the preamble to the *Charter*. These are serious justiciable issues even in the absence of individual litigants whose *Charter* rights are presently engaged.

ii. The Applicants have a Genuine Interest in the Matter

41. The second branch of the test for public interest standing is to determine whether the applicant has a "genuine interest," a "real stake" in the proceedings, or is otherwise "engaged with the issues" raised by the application. This is determined by weighing whether the applicant has a "real and continued interest" in the issue or if it is simply a "mere busybody".[45] This analysis takes into account the applicant's experience and expertise, and whether its involvement in the issue makes it an appropriate body to bring the case in the public interest.[46]

42. The Applicant Democracy Watch fulfills this requirement. Democracy Watch is an independent organization whose purpose is centered on government accountability, including transparent and accountable enforcement of Canada's ethics rules.[47] It actively participates in public policy-making and legislative processes in matters relating to government ethics rules and other areas of democratic reform and government accountability.[48]

43. As well, Democracy Watch regularly participates in judicial proceedings engaging these topics, including initiating proceedings with respect to the

[45] *Downtown Eastside*, *supra* at para. 43.
[46] *Ibid*.
[47] Affidavit of Duff Conacher, at para. 3, Exhibit B.
[48] *Ibid*, at paras. 4-8.

independence and rulings of federal and provincial law enforcement bodies.[49] Democracy Watch has also been granted public interest standing in previous applications, including judicial reviews before the Federal Court concerning the appointment process for the federal Conflict of Interest and Ethics Commissioner and the federal Commissioner of Lobbying in which, as in the present Application, Democracy Watch was not the directly affected party.[50]

44. Conacher similarly fulfills this requirement. As in *Turp*, Conacher is a professor and scholar, as well as Coordinator of Democracy Watch, and is therefore a person for whom the principles of the rule of law, judicial independence, and fundamental rights "are of particular concern."[51] He has shown himself "to be an engaged citizen with a genuine interest" in the issues before the court in this application in his own work and by virtue of his position as the Coordinator of Democracy Watch.

45. In short, neither Democracy Watch nor Conacher are a "mere busybody" – they both have a real stake in this proceeding, and a strong "track record" and "degree of involvement" in the issues raised by this application.[52] Indeed, Democracy Watch and Conacher have both actively participated in public policy processes and judicial review applications concerning the appointment process for federal law enforcement officials.[53] Democracy Watch and Conacher also have a record of pursuing the advancement of accountability in democratic governance before the courts.[54]

46. In *Sierra Club*, the court recognized involvement in the development and enforcement of a legislative system as relevant to establishing a general understanding and genuine interest in a matter. The Applicants' active participation in legislative development, and subsequent operation of the resultant regimes, demonstrates they

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[49] *Ibid*, at para. 7.
[50] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290; *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291.
[51] T*urp c. Canada (Ministre des Affaires Étrangères)*, 2017 FC 84, at para. 28; Affidavit of Duff Conacher, at paras. 1-2.
[52] *Sierra Club*, *supra* at paras. 52, 54, 57-58, 66 and 68.
[53] Affidavit of Duff Conacher, paras. 2, 6-8.
[54] *Ibid*, paras. 6-8.

have the requisite interest and record of engagement in the issues raised by this application.[55]

47. As has been recognized by Federal Court of Appeal in another proceeding, Democracy Watch's considerable experience, expertise, and ongoing active participation in the issues make it an appropriate body to bring this application in the public interest.[56] The same can be said of Conacher.

iii. This Application is a Reasonable and Effective Means of Bringing the Issues Before the Court

48. The third factor in the public interest standing analysis is "whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court." [57] This factor is closely linked to the principle of legality, as courts should consider whether granting standing is desirable from the point of view of ensuring lawful action by government actors.[58] As noted in *Downtown Eastside*:

> A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing.[59]

49. Public interest standing will be granted where individual litigants are not reasonably likely to bring an issue before the court. In this case, the Applicants are likely the only interested parties having the experience and ability to initiate legal proceedings on this systemic issue. There is no other "directly affected" party who could launch such an application and, more importantly, no other reasonable and effective way to bring this matter before the court.[60]

50. The Applicants submit that the present Application is a reasonable and effective means of bringing this important matter before the court. As parties with an established track record and a real and continued interest in issues of ethics,

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[55] *Sierra Club*, *supra* at paras. 66-68.
[56] *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194, at para. 19
[57] *Downtown Eastside*, *supra* at para. 52.
[58] *Ibid*, at para. 49.
[59] *Ibid*, at para. 50.
[60] *Sierra Club*, *supra* at para. 20.

transparency, and accountability of government institutions, the Applicants have public interest standing to bring this application.

B. The Government of Canada's Federal Judicial Appointments System and Promotions System are Unconstitutional

51. The Applicants submit that the Systems are too far and too much under the discretionary political control of the Minister and Cabinet. The Systems are therefore subject to political influence and interference that violates s. 96 of the *Constitution Act, 1867* and ss. 7, 11(d) and 24(1) of the *Charter* because they infringe the principles of judicial independence and the rule of law. When read together and separately, these sections of the *Constitution Act, 1867* and the *Charter* all require and depend on an independent and impartial judiciary. The interpretation of each of these sections requires the interpreter to look to the rest of the *Constitution Act, 1867* and the *Charter* for context – the requirements of each of these sections should be understood to inform the demands of the others.[61] Further underpinning this interpretive exercise are the unwritten principles of judicial independence and the rule of law, which can be used to give meaning and effect to the text.[62]

52. The Minister's involvement in the appointment of the majority of the members of the JACs, the subsequent involvement of members and supporters of the ruling party, the background checks based on the Liberal Party database, and the statistics demonstrating a higher percentage of Liberal donors receiving judicial appointments, among other things, demonstrates a degree of political interference that violates the principles of judicial and independence and the rule of law.

53. The Applicants submit that this court should find that each of the listed sections of the *Constitution Act, 1867* and *Charter* have been violated because there is an appearance of institutional bias, and arguably actual bias, in the Appointments System and Promotions System. This does not mean that the Applicants are claiming that any specific judge appointed or promoted under the Systems lacks independence or

[61] *Quebec (Attorney General) v. 9147-0732 Québec inc*., 2020 SCC 32, at paras. 8-9.
[62] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, at para. 65 ("*Toronto City*").

impartiality, but that the judiciary as an institution, and as a whole, lacks the required independence and/or impartiality.

i. Section 96 of the *Constitution Act, 1867* and ss. 7, 11(d), and 24(1) of the *Charter* demand Judicial Independence and Impartiality

54. The principle of the rule of law is captured in the preamble to both the *Constitution Act, 1867* and the *Charter*, and requires the separation of powers.[63] The independence of the judiciary is thus a requirement underlying the whole of the constitution. However, s. 96 of the *Constitution Act, 1867* and ss. 7, 11(d), and 24(1) make the need for judicial independence and impartiality even more explicit.

a. Section 96 of the *Constitution Act, 1867*

55. Part VII of the *Constitution Act, 1867* establishes the judicature and thereby identifies the constitutional commitment to the separation of powers and an independent judiciary. Section 96 of the *Constitution* reads:

> The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

56. The federal judicial Appointments System and Promotions System are the means by which s. 96 is fulfilled and judges are appointed. The courts have ruled that s. 96, and the other related judicature sections in Part VII of Canada's *Constitution*, establish the independence of federally appointed judges from the government as a fundamental principle of our constitutional system, rooted in the unwritten constitutional principles described below.[64]

b. Sections 7 and 11(d) of the *Charter*

57. Section 11(d) of the *Charter* explicitly requires an "independent and impartial tribunal". The principles of fundamental justice under s. 7 of the *Charter* ensure that any limitation on an individual's right to life, liberty or security of the person will

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[63] *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at 750.
[64] *McEvoy v. Attorney General for New Brunswick et al.*, [1983] 1 S.C.R. 704, at 720; *Reference re: Provincial Court*, at paras. 84-85 and 89.

conform with the principles of fundamental justice. The principles of fundamental justice are "the basic principles that underlie our notions of justice and fair process", which includes that any hearing be "before an independent and impartial" adjudicator.[65] The requirements of the principles of fundamental justice have been held to be "inextricably intertwined with the requirements of s. 11(d).[66]

58. The principles of fundamental justice and judicial independence are undermined by a judicial Appointments System and Promotions System that have an appearance of, or actual, institutional bias. In the same vein, these Systems prevent any individual charged with an offence from accessing their right, under s. 11(d) to "be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal" (emphasis added).

c. Section 24(1) of the *Charter*

59. Section 24(1) guarantees that "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances". The Minister's political control of the Appointments System and Promotions System creates at least the perception of institutional bias and a lack of judicial independence, which thereby precludes or inhibits persons from defending their *Charter* rights through s. 24(1) in a court of competent jurisdiction that is truly independent.

ii. The Systems Violate the Unwritten Constitutional Principles of Judicial Independence and the Rule of Law

60. The recognized principles of judicial independence and the rule of law act as interpretive tools and can be used to fill doctrinal gaps in the *Constitution*.[67] These principles are interrelated through their mutual reliance on the separation of powers to achieve their purposes. The demands of these two interrelated principles should be used in this case to inform the interpretation of s. 96 of the *Constitution Act, 1867*, and

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[65] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, at paras. 19 and 29.
[66] *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 95.
[67] *Toronto City*, *supra* at paras. 54-56.

ss. 7, 11(d), and 24(1) of the *Charter*. These unwritten principles have a further role here, which is to assist this court in developing the structural doctrine required by s. 96 but left unstated in the constitution.[68]

61. Judicial independence has been a cornerstone of the United Kingdom's constitutional structure. The preamble to the *Constitution Act, 1867* provides for Canada to have "a Constitution similar in Principle to that of the United Kingdom". This is an affirmation of the unwritten principle of judicial independence in Canada that acknowledges judicial independence to be one of the pillars upon which our constitutional democracy rests.[69] Judicial independence is a foundational principle of fundamental justice, which represents the cornerstone of the common law duty of procedural fairness. This principle protects the judiciary from arbitrary interference by the executive and the legislature.[70]

62. In *Reference re: Provincial Court*, Lamer C.J., writing for the majority, discussed the important relationship between the constitutional principle of judicial independence to the constitutional convention of separation of powers.[71] The separation of powers, he explained, "depoliticizes" the relationship between the branches, ensuring that the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary.[72]

63. The rule of law, which functions in symbiosis with the principle of judicial independence, and is enshrined in the preamble to the *Constitution Act, 1867* and the *Charter*, similarly relies on the separation of powers and the maintenance of an independent judiciary. Ensuring that individuals are not subject to arbitrary state action relies on an independent judiciary by which the state can be held to account.[73]

64. The basis for the protections of the constitutional guarantee of judicial independence from the executive and legislative branches has both "individual" and

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[68] *Ibid*, at para. 56.
[69] *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at 750.
[70] *The Queen v. Beauregard*, [1986] 2 S.C.R. 56, at 75 ("*Beauregard*").
[71] *Reference re: Provincial Court*, *supra* at paras. 138-146.
[72] *Ibid*, at para. 140.
[73] *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, at para. 46.

"institutional" aspects. This is so because courts, "are not charged solely with the adjudication of individual cases" but also have "a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it – rule of law, fundamental justice, equality, preservation of the democratic process."[74]

65. In *Valente*, Le Dain J., writing on behalf of the majority for the Supreme Court of Canada, wrote concerning two key aspects of judicial independence, independence and impartiality, that:

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" ... connotes absence of bias, actual or perceived. The word "independent" in s. 11(*d*) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.[75] [Emphasis added.]

66. Also in *Valente*, Le Dain J. stated that the test for judicial independence and impartiality is whether the public perceives that a court enjoys the essential objective conditions or guarantees of judicial independence and impartiality:

> Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for purposes of s. 11(d) of the *Charter* should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I

[74] *Beauregard*, at 70.
[75] *R. v. Valente*, [1985] 2 S.C.R. 673, at 685 ("*Valente*").

> have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.[76]

67. In 1991, the Supreme Court of Canada held that there are also both institutional and individual aspects to impartiality, both (as in *Valente*) based on satisfying the test of whether a reasonable person, well-informed, would conclude that an apprehension of institutional bias on the part of the tribunal, or individual bias on behalf of a member of the tribunal, exists.[77]

68. The Supreme Court has also stated that:

> Judicial independence is valued because it serves important societal goals — it is a means to secure those goals. One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law[.][78]

69. Judicial independence and the rule of law are not only violated if the judicial Appointments System and Promotions Systems are actually structurally biased. These principles are also violated if there is a reasonable apprehension of structural bias on the part of the Systems. The Supreme Court of Canada has stated:

> [P]ublic confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.[79]

70. The key concern underlying the appearance of, or actual, bias in the Appointments System and/or Promotions System is how it undermines confidence in the integrity of the administration of justice. As the Supreme Court of Canada has stated, the basis of the concern is:

> Lord Hewart C.J.'s aphorism that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be

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[76] *Ibid*, at 689.
[77] *R. v. Lippé*, [1991] 2 S.C.R. 114, at 140-141.
[78] *Reference re Provincial Court*, *supra* at paras. 9-10.
[79] *Wewaykum*, *supra* at para. 57.

> done"… [T]he relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. In that sense, the reasonable apprehension of bias is not just a surrogate for unavailable evidence, or an evidentiary device to establish the likelihood of unconscious bias, but the manifestation of a broader preoccupation about the image of justice. As was said by Lord Goff in *Gough*, supra, at p. 659, 'there is an overriding public interest that there should be confidence in the integrity of the administration of justice.'[80] [Emphasis added.]

71. The maintenance of public confidence in the administration of justice is therefore central to concerns relating to judicial independence. Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry. The principle requires the judiciary to be independent both in fact and perception.[81]

72. Reasonable apprehension of bias was defined in the seminal Supreme Court of Canada judgment in *Committee for Justice and Liberty v. National Energy Board*:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.[82]

73. The Supreme Court of Canada has ruled that appearance of or actual institutional bias in the appointment process must be taken into account when assessing the protection of the independence and impartiality of administrative tribunals.[83] The Applicants submit that, by analogy, appearance of or actual institutional bias in the Appointments System must also be taken into account when assessing the protection of the independence and impartiality of the judiciary.

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[80] *Ibid*, at para. 66.
[81] *Ibid*, at para. 57.
[82] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at 394.
[83] *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at paras. 73-85, 92-94, 98-100, and 116-123 (esp. paras. 95, 98-100, and 120-121).

74. In *Valente*, the Supreme Court also addressed the issue of reappointments, making it clear that the reappointment process and conditions of a reappointment are connected to the issue of security of tenure, and therefore to judicial independence.[84] The Applicants submit that the Promotions System is analogous to the reappointment process.

75. In *MacBain*, the Federal Court of Appeal held that, concerning an administrative tribunal, the "offensive portion of the statutory scheme" was "the appointment of the Tribunal by the Commissioner since the Commission is also the prosecutor."[85] This concern also applies to the federal judicial Appointments System – the federal Public Prosecution Service is also the prosecutor, and judges are appointed by the Minister after consultation with other Cabinet ministers, MPs and members of only the ruling party, and the Minister also appoints the head of the Prosecution Service.

76. The Canadian Judicial Council has cautioned that the federal judicial appointment process lacks sufficient independence from the GIC and that poses a danger to judicial independence:

> Because the majority of voting members are now appointed by the Minister, the advisory committees may neither be, nor seen to be, fully independent of the government. This puts in peril the concept of an independent body that advises the government on who is best qualified to be a judge. Judicial independence is not the private right of judges but the foundation of judicial impartiality and a constitutional right of all Canadians.[86]

77. The Canadian Judicial Council again recently expressed concern about the current federal judicial appointment process in its April 28, 2020 ruling reprimanding Justice Colleen P. Suche of the Court of Queen's Bench for Manitoba. In its ruling letter, the Council cited its publication *Ethical Principles for Judges* that states:

> [j]udicial independence is not the private right of judges but the foundation of judicial impartiality and a constitutional right of all Canadians. Independence of the judiciary refers to the necessary individual and collective or institutional independence required for

[84] *Valente*, *supra* at 698 and 700-703.
[85] *MacBain v. Lederman*, [1985] 1 FC 856 (FCA), at para. 38.
[86] Canadian Judicial Council, *Judicial Appointments: Perspective from the Canadian Judicial Council*, February 20, 2007, p. 6.

> impartial decisions and decision making. Judicial independence thus characterizes both a state of mind and a set of institutional and operational arrangements. The former is concerned with the judge's impartiality in fact; the latter with defining the relationship between the judiciary an others (sic), particularly the other branches of government, so as to ensure both the reality and the appearance of independence and impartiality.
>
> …
>
> [and concluded that] as a sitting judge married to a Cabinet Minister, Madam Justice Suche ought to have refrained from communication with the Executive Branch of government on the subject of judicial appointments.[87]

78. In *R. v. Généreux*, concerning appointments in Canada's military courts, the Supreme Court stated:

> Secondly, the appointment of the judge advocate by the Judge Advocate General (art. 111.22 Q.R. & O.), undermines the institutional independence of the General Court Martial. The close ties between the Judge Advocate General, who is appointed by the Governor in Council, and the executive, are obvious. To comply with s. 11(d) of the *Charter*, the appointment of a military judge to sit as judge advocate at a particular General Court Martial should be in the hands of an independent and impartial judicial officer. The effective appointment of the judge advocate by the executive could, in objective terms, raise a reasonable apprehension as to the independence and impartiality of the tribunal.

79. The Appointments System and the Promotions System similarly blur the lines between the judiciary and the executive and legislative branches of government, and both call into question both the independence of the judiciary and the integrity and impartiality of the rule of law.

80. All of the above rulings clearly establish that the federal judicial Appointments System and Promotions System must comply with the requirements of judicial independence, and establish a clear test for whether the Systems violate the fundamental constitutional guarantees of judicial independence and the rule of law, namely: Would a reasonable, well-informed person conclude that there is an

[87] Affidavit of Duff Conacher, at para. 18, Exhibit F.

appearance of institutional bias in the Appointments System? and; Would a reasonable, well-informed person conclude that there is an appearance of institutional bias in the Promotions System?

81. In *Valente*, Le Dain J., writing on behalf of the majority for the Supreme Court of Canada, observed that there is no absolute standard of judicial independence, and that public conceptions of what ideally may be required to guarantee independence have changed over the years. He wrote:

> Conceptions have changed over the years as to what ideally may be required in the way of substance and procedure for securing judicial independence in as ample a measure as possible. Opinions differ on what is necessary or desirable, or feasible. This is particularly true, for example, of the degree of administrative independence or autonomy it is thought the courts should have. It is also true of the extent to which certain extra judicial activity of judges may be perceived *as* impairing the reality or perception of judicial independence. There is renewed concern about the procedure and criteria for the appointment of judges as that may bear on the perception of judicial independence. Professional and lay concern about judicial independence has increased with the new power and responsibility given to the courts by the *Charter*. Reports and speeches on the subject of judicial independence in recent years have urged the general adoption of the highest standards or safeguards, not only with respect to the traditional elements of judicial independence, but also with respect to other aspects now seen as having an important bearing on the reality and perception of judicial independence. These efforts, particularly by the legal profession and the judiciary, to strengthen the conditions of judicial independence in Canada may be expected to continue as a movement towards the ideal.[88]

82. The Applicants submit that this Honourable Court should take this important point into account when considering what a reasonable, well-informed person would conclude today concerning the federal judicial Appointments System and Promotions System.

iii. Conclusion

[88] *Valente*, *supra* at 692.

83. With six of the seven members of the JACs appointed by the Minister, the Applicants submit that there is a clear partisan component to the JACs that a reasonable, well-informed person would conclude would influence which candidates are placed on the long lists provided to the Minister.

84. Beyond the Minister's political, partisan influence over the JACs that search for and nominate the candidates on the long lists submitted by each JAC to the Minister, the involvement of MPs and supporters of the ruling party in the Appointments System is also actual and potential political influence and interference, as is the background check conducted using the Liberal Party database. The appearance of partisanship and politicization is rendered real by the statistics showing that the overwhelming majority of judicial appointees who had made political donations since the Liberal Party was elected in 2015 donated to the Liberal Party.

85. As a result, a reasonable, well-informed person would conclude that there is an appearance of institutional bias in the Appointment System.

86. Given there is no JAC involvement and the Minister is solely responsible for the promotion of judges to appellate courts, a reasonable, well-informed person would also conclude that partisan and political influence and interference is part of the Promotions System, giving rise to an appearance of institutional bias in the System.

87. In fact, several reasonable, well-informed people have concluded that the current Systems are tainted by institutional bias, including professors, lawyers, lawyer associations and media outlets.[89]

C. No Violation Can be Saved by Section 1 of the *Charter*

88. If this court finds that ss. 7, 11(d) and/or 24(1) of the *Charter* have been violated, no violation can be saved by s. 1. As the Supreme Court has ruled, "an infringement of judicial independence can only be justified where there are 'dire and exceptional financial emergencies caused by extraordinary circumstances such as the

[89] Affidavit of Duff Conacher, at paras. 26-27 and 31, Exhibits S-W, AA and BB.

outbreak of war or imminent bankruptcy'"[90] No such circumstances exist that could justify the *Charter* violations articulated herein.

89. Should a full s. 1 analysis be required, despite the above-noted conditions not being present, the Applicant submits that the Systems cannot be found to be minimally impairing, as other systems are available that more fully uphold the rights guaranteed in ss. 7, 11(d) and/or 24(1), as summarized below.

i. Alternative Systems are Available and Enacted in Other Jurisdictions

90. There are alternative judicial appointment and promotion systems available that would respect the unwritten constitutional principles of judicial independence and the rule of law, and which would not violate s. 96 of the *Constitution*, or ss. 7, 11(d), and 24(1) of the *Charter*.

91. Prime Minister Trudeau and the GIC did not have to create the federal judicial appointments process as it is currently constituted. The GIC could use an appointment process more independent of themselves that constrains and restricts their political discretion more fully.

92. It is true that the processes for appointing Federal Court, Federal Court of Appeal and provincial and territorial superior court judges involve the JAC selection committees administered by the Commissioner of Federal Judicial Affairs[91] appointed under the *Judges Act*.[92] JACs are composed of members who served fixed terms, are not members of the GIC nor do they serve at the pleasure of or under the control of the GIC.

93. However, the federal Minister of Justice appoints six of the seven members of the JACs. The JACs all conduct searches and then submit a long list of qualified

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[90] *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, at para. 97.
[91] Canada, Office of the Commissioner for Federal Judicial Affairs, *Welcome to the Website of the Office of the Commissioner for Federal Judicial Affairs Canada*, (website of the Office of the Commissioner for Federal Judicial Affairs).
[92] *Judges Act*, *supra* s. 73.

nominees for each judicial position, about which the Minister consults with other ministers, MPs and members of the ruling party only, and then makes each appointment. The Minister also has complete and sole control over the Promotions System – there are no JACs involved.

94. In contrast to the federal Appointments System, in Quebec the minister does not appoint any members of the judicial appointments selection committee searches for and provides recommendations to the minister for the appointment of provincial court judges and municipal court judges.[93] Further, the selection committee proposes only three candidates to the minister, and the secretary to the secretariat for judicial appointments is the person who, for each proposed candidate, "makes the necessary verifications with disciplinary bodies, professional orders, police authorities and credit agencies."[94]

95. In Manitoba the Cabinet chooses only three of the seven members of the judicial appointment advisory committee that searches for and provides recommendations to the minister for the appointment of provincial court judges.[95]

96. In British Columbia the Cabinet chooses only four of the nine members of the judicial council that searches for and provides recommendations to the minister for the appointment of provincial court judges.[96]

97. In the United Kingdom, the Judicial Appointments Commission recommends at the first stage only one candidate to the Lord Chancellor for each open position in the judiciary, and the Lord Chancellor must provide written reasons to the Commission if he/she rejects the candidate or requires the Commission to reconsider the candidate. At the second stage, the Commission may propose the same candidate again to the Lord Chancellor, who may again reject or require reconsideration of the candidate. At the third stage, the Commission may propose the same candidate to the Lord

[93] *Courts of Justice Act* (c. T-16), r. 4.1 - Regulation respecting the selection procedure of candidates for the office of judge of the Court of Québec, municipal court judge and presiding justice of the peace, Chapter III, Division III, sections 14 to 18 ("T-16, r. 4.1 Regulation").
[94] T-16, r. 4.1 Regulation, Chapter III, Division VI, ss. 26-29.
[95] *The Provincial Court Act*, C.C.S.M. c. C275, s. 3.3.
[96] *Provincial Court Act*, RSBC 1996, c. 379, s. 21.

Chancellor, and the Lord Chancellor must then accept and appoint the proposed candidate. If the Commission proposes a different candidate at stage two or stage three than the candidate proposed at stage one or two, after the Lord Chancellor required the Commission to reconsider the Commission's other recommended candidate, then the Lord Chancellor may choose at stage three to accept and appoint the candidate recommended earlier instead of the candidate recommended at stage three.[97]

98. Also in contrast to the federal Appointments System, in Ontario prior to changes made in spring 2021 by the current government, the Judicial Appointments Advisory Committee sent a list of only two or three candidates for each open position in the provincial court.[98]

99. The Applicants submit that, in order to prevent political and partisan influence and interference in the appointment of the judiciary that violates the unwritten constitutional principles of judicial independence and the rule of law or the sections of the *Constitution* and *Charter* that guarantee an independent and impartial judiciary, as in Quebec the minister/Cabinet/government should not choose any members of any judicial appointment advisory committee. And, as in the United Kingdom, each committee should submit one candidate for each open position in the judiciary, and the minister should be required to provide (and only permitted to provide) written reasons to the committee if the minister rejects or requires reconsideration of the candidate, and the committee's recommendation should, in the end, prevail over the minister's objections. Lay members of the JACs, in addition to the justices and representatives of lawyer associations, should be chosen by consensus by a committee made up of MPs from all parties represented in the legislature or by the other members of the JACs from professional associations (as in Quebec). All the current provisions should be continued that give JAC members the protection of a fixed term, and require the JACs to conduct a public, open, merit-based search for qualified candidates, and

[97] *Constitutional Reform Act 2005*, (UK Public General Acts, 2005, c. 4), ss. 70(3), 72, 73, 74 and 75.
[98] *Courts of Justice Act*, R.S.O. 1990, c. C.43, Historical version for the period March 1, 2021 to April 18, 2021, s. 43(9)2.

require confidentiality (but allow the JACs to check references of applicants), and prohibit members of the JACs to have even the appearance of a conflict of interest.

100. The Applicants also submit that, in order to prevent political and partisan influence and interference in the promotion of members of the judiciary that violates the constitutional guarantees of judicial independence, judicial promotion advisory committees should be constituted and operate in the same way as recommended above for judicial appointment advisory committees.

PART IV – ORDER SOUGHT

101. The Applicants seek the following order from this Honourable Court:

i. an order and/or declaration stating that the Government of Canada's federal Appointments System and Promotions System fail to comply or accord with s. 96 of the *Constitution*, ss. 7, 11(d), and 24(1) of the *Charter* and/or the principles of fundamental justice, including the unwritten Constitutional principles of judicial independence and/or the rule of law;

ii. direction(s) with respect to what changes to the Appointments System and Promotions System are necessary to make it compliant with the *Constitution*, *Charter*, and/or the unwritten Constitutional principles of judicial independence and/or the rule of law;

iii. costs of this application and related proceedings on a substantial indemnity basis; and

iv. such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of October, 2021

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Ashley Wilson (LSO#: 82988A)
awilson@rossmcbride.com

PART V - AUTHORITIES

Legislation

1. *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.).
2. *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. *Constitutional Reform Act 2005*, (UK Public General Acts, 2005, c. 4).
3. *Courts of Justice Act*, R.S.O. 1990, c. C.43, Historical version for the period March 1, 2021 to April 18, 2021, s. 43(9)2.
4. *Courts of Justice Act* (c. T-16), r. 4.1 - Regulation respecting the selection procedure of candidates for the office of judge of the Court of Québec, municipal court judge and presiding justice of the peace.
5. *Judges Act*, R.S.C., 1985, c. J-1.
6. *Provincial Court Act*, RSBC 1996, c. 379.
7. *The Provincial Court Act*, C.C.S.M. c. C275.

Jurisprudence

1. *Canada v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45.
2. *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3.
3. *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9.
4. *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369.
5. *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39.
6. *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241.
7. *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194.
8. *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290.
9. *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291.
10. *Harper v Canada (Attorney General)*, 2004 SCC 33.
11. *MacBain v. Lederman*, [1985] 1 FC 856 (FCA).

12. *McEvoy v. Attorney General for New Brunswick et al.*, [1983] 1 S.C.R. 704.
13. *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27.
14. *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R 3.
15. *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32.
16. *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721.
17. *R. v. Lippé*, [1991] 2 S.C.R. 114.
18. *R. v. Rose*, [1998] 3 S.C.R. 262.
19. *R. v. Valente*, [1985] 2 S.C.R. 673.
20. *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 FC 211.
21. *The Queen v. Beauregard*, [1986] 2 S.C.R. 56.
22. *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34.
23. *Turp c. Canada (Ministre des Affaires Étrangères)*, 2017 FC 84.
24. *Wewaykum Indian Band v. Canada*, 2003 SCC 45.

Other Authorities

1. Canadian Judicial Council, *Judicial Appointments: Perspective from the Canadian Judicial Council*, February 20, 2007.
2. Canada, Office of the Commissioner for Federal Judicial Affairs, *Welcome to the Website of the Office of the Commissioner for Federal Judicial Affairs Canada*, (website of the Office of the Commissioner for Federal Judicial Affairs).

APPENDIX A – STATUTES AND REGULATIONS

1. *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.).

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

Appointment of Judges

96 The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

2. *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Life, liberty and security of person

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Proceedings in criminal and penal matters

11 Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

3. *Constitutional Reform Act 2005*, (UK Public General Acts, 2005, c. 4).

70 Selection process

(1) On receiving a request the Commission must appoint a selection panel.

(2) The panel must—

(a) determine the selection process to be applied,

(b) apply the selection process, and

(c) make a selection accordingly.

(3) One person only must be selected for each recommendation to which a request relates.

(4) Subsection (3) applies to selection under this section and to selection under section 75.

(5) If practicable the panel must consult, about the exercise of its functions under this section, the current holder of the office for which a selection is to be made.

(6) A selection panel is a committee of the Commission.

72 Report

(1) After complying with section 70(2) the selection panel must submit a report to the Lord Chancellor.

(2) The report must—

(a) state who has been selected;

(b) contain any other information required by the Lord Chancellor.

(3) The report must be in a form approved by the Lord Chancellor.

(4) After submitting the report the panel must provide any further information the Lord Chancellor may require.

73 The Lord Chancellor's options

(1) This section refers to the following stages—

Stage 1:	where a person has been selected under section 70
Stage 2:	where a person has been selected following a rejection or reconsideration at stage 1
Stage 3:	where a person has been selected following a rejection or reconsideration at stage 2.

(2) At stage 1 the Lord Chancellor must do one of the following—

(a) accept the selection;

(b) reject the selection;

(c) require the selection panel to reconsider the selection.

(3) At stage 2 the Lord Chancellor must do one of the following—

(a) accept the selection;

(b) reject the selection, but only if it was made following a reconsideration at stage 1;

(c) require the selection panel to reconsider the selection, but only if it was made following a rejection at stage 1.

(4) At stage 3 the Lord Chancellor must accept the selection, unless subsection (5) applies and he accepts a selection under it.

(5) If a person whose selection the Lord Chancellor required to be reconsidered at stage 1 or 2 was not selected again at the next stage, the Lord Chancellor may, at stage 3, accept the selection made at that earlier stage.

74 Exercise of powers to reject or require reconsideration

(1) The power of the Lord Chancellor under section 73 to reject a selection at stage 1 or 2 is exercisable only on the grounds that, in the Lord Chancellor's opinion, the person selected is not suitable for the office concerned.

(2) The power of the Lord Chancellor under section 73 to require the selection panel to reconsider a selection at stage 1 or 2 is exercisable only on the grounds that, in the Lord Chancellor's opinion—

(a) there is not enough evidence that the person is suitable for the office concerned, or

(b) there is evidence that the person is not the best candidate on merit.

(3) The Lord Chancellor must give the selection panel reasons in writing for rejecting or requiring reconsideration of a selection.

4. *Courts of Justice Act*, R.S.O. 1990, c. C.43, Historical version for the period March 1, 2021 to April 18, 2021, s. 43(9)2.

Manner of operating

43 (9) The Committee shall perform its function in the following manner:

1. When a judicial vacancy occurs and the Attorney General asks the Committee to make a recommendation, it shall advertise the vacancy and review all applications.

2. For every judicial vacancy with respect to which a recommendation is requested, the Committee shall give the Attorney General a ranked list of at least two candidates whom it recommends, with brief supporting reasons.

3. The Committee shall conduct the advertising and review process in accordance with criteria established by the Committee, including assessment of the professional excellence, community awareness and personal characteristics of candidates and recognition of the desirability of reflecting the diversity of Ontario society in judicial appointments.

4. The Committee may make recommendations from among candidates interviewed within the preceding year, if there is not enough time for a fresh advertising and review process. 1994, c. 12, s. 16.

5. *Courts of Justice Act* (c. T-16), r. 4.1 - Regulation respecting the selection procedure of candidates for the office of judge of the Court of Québec, municipal court judge and presiding justice of the peace.

DIVISION III
SELECTION COMMITTEE

14. Following publication of the notice, the Minister of Justice establishes the selection committee and appoints the members.
The function of the committee is to assess the applications for judicial office and make a report. The committee may be established to perform its duties in view of more than one competition.
O.C. 14-2012, s. 14.

15. Where a person is to be appointed to the office of judge of the Court of Québec or the office of presiding justice of the peace, the committee is composed of

(1) the chief judge of the Court of Québec or a judge designated by the chief judge from among the judges of the Court of Québec or presiding justices of the peace, who will act as chair of the committee;

(2) two persons designated by the Barreau du Québec,

(a) where one person is an advocate, and

(b) one person works in law and the person's professional activities do not include representation before the courts, promoting the presence of representatives of Québec universities where possible to do so;

(3) two persons who are not judges or members of the Barreau du Québec or the Chambre des notaires du Québec, designated by the Office des professions du Québec.

O.C. 14-2012, s. 15.

16. Where a person is to be appointed to the office of municipal court judge, the committee is composed of

(1) the associate chief judge of the Court of Québec who is responsible for municipal courts or of a judge designated by the associate chief judge from among municipal court judges, who will act as chair of the committee;

(2) two persons designated by the Barreau du Québec,

(a) where one person is an advocate, and

(b) one person works in law and the person's professional activities do not include representation before the courts, promoting the presence of representatives of Québec universities where possible to do so;

(3) two persons who are not judges or members of the Barreau du Québec or the Chambre des notaires du Québec, designated by the Office des professions du Québec.

O.C. 14-2012, s. 16.

17. For the purposes of paragraphs 2 and 3 of sections 15 and 16, the Barreau du Québec and the Office des professions du Québec must, on a yearly basis and where

possible to do so, tend towards gender parity and promote the representation of cultural communities and that of the population of the region covered by the position of judge to be filled.
O.C. 14-2012, s. 17.

18. Where a member is absent or disqualifies himself or herself, the Minister may appoint a person to act as a substitute, following the mode of appointment prescribed for the appointment of the member to replace.
O.C. 14-2012, s. 18.

6. *Judges Act*, R.S.C., 1985, c. J-1.

Commissioner for Federal Judicial Affairs

73 There shall be an officer, called the Commissioner for Federal Judicial Affairs, who shall have the rank and status of a deputy head of a department and who shall be appointed by the Governor in Council after consultation by the Minister with the Council or such committee thereof as is named for the purpose by the Council.

Création du poste

73 Est créé le poste de commissaire à la magistrature fédérale dont le titulaire est nommé par le gouverneur en conseil après consultation par le ministre du Conseil ou du comité constitué à cet effet par ce dernier. Le commissaire a rang et statut d'administrateur général de ministère.

7. *Provincial Court Act*, RSBC 1996, c. 379.

Judicial council

21 (1) The judicial council of the court is continued.

(2) The members of the council are the following:

(a)the chief judge as presiding member;
(b) the associate chief judge as alternate presiding member or, if 2 or more associate chief judges are designated, the associate chief judge designated as alternate presiding member by the Lieutenant Governor in Council;

(c) the president of the Law Society of British Columbia or a person nominated by the president;
(d) the president of the British Columbia Branch of the Canadian Bar Association or a person nominated by the president;
(d.1) the president of the Provincial Court Judges' Association of British Columbia or a judge nominated by the president;
(e) by appointment of the Lieutenant Governor in Council for a term of not longer than 3 years, not more than 4 other persons.

(3) If the chief judge does not attend a meeting of the judicial council, the alternate presiding member must preside.

(4) If in a proceeding before the council there is no majority decision, the presiding member must cast a second and deciding vote.

(5) The Lieutenant Governor in Council may authorize payment to council members who are not judges an allowance for their duties on the council in an amount the Lieutenant Governor in Council considers appropriate.

8. *The Provincial Court Act*, C.C.S.M. c. C275.

Judicial appointment committee

3.3(1)

The judicial appointment committee is hereby established.

Composition of committee

3.3(2)

The committee consists of the following:

(a) the Chief Judge, who is the chair of the committee;

(b) three persons, who are not lawyers, judges or retired judges, appointed by the Lieutenant Governor in Council;

(c) a judge designated by the judges of the Provincial Court;

(d) the president of the Law Society of Manitoba, or a member of the Law Society of Manitoba designated by the president;

(e) the president of the Manitoba Branch of the Canadian Bar Association, or a member of the Manitoba Branch of the Canadian Bar Association designated by the president.

Appointment considerations

3.3(3)

When appointing or designating persons under clauses (2)(b), (d) and (e), the diversity of Manitoba must be taken into account.

Term

3.3(4)

Committee members under clauses (2)(b), (d) and (e) are to be appointed or designated for a term not exceeding three years and may be re-appointed or designated for an additional term not exceeding three years.

APPENDIX B – BOOK OF AUTHORITIES