

OVERVIEW

1. This Application asks the Court to review the September 18, 2017 decision of former Commissioner of Lobbying Karen Shepherd (“**Lobbying Commissioner**” or “**Commissioner**”) not to investigate an allegation that a violation of the federal *Lobbyists’ Code of Conduct* (“*Lobbyists’ Code*” or “*Code*”) occurred when Shah Karim Al Hussein Aga Khan (“**the Aga Khan**”), during the same time period he and his Aga Khan Foundation Canada (“**Aga Khan Foundation**”) was lobbying Prime Minister Justin Trudeau, gave a gift to the Prime Minister of a family vacation on the Aga Khan’s private island in the Bahamas. This Application asks the Court to determine whether the Lobbying Commissioner’s decision was contrary to the *Lobbying Act*, the *Conflict of Interest Act* (“*CofI Act*”) and/or the common law of procedural fairness.

2. The Applicant, as a representative of the public interest, maintains, given the Lobbying Commissioner was serving a third six-month, renewable term (as appointed by the Prime Minister through the Governor in Council) at the time the decision was made, and given the Commissioner’s decision concerned a situation involving the Prime Minister, that the Commissioner contravened sections 4, 6 and 21 of the *CofI Act* by making a decision that provided an opportunity to further the Commissioner’s private interest in pleasing the Prime Minister who had the power to further extend her appointment. In doing so, Commissioner Shepherd also improperly furthered the Prime Minister’s private interest in having the investigation stopped.

3. The Applicant also maintains that the Lobbying Commissioner denied the Applicant, procedural fairness in the process of making the decision, by acting in a biased manner when making the decision and contrary to the legitimate expectations of the Applicant.

4. Finally, the Applicant maintains that the Commissioner’s decision to stop the investigation was unreasonable and violated the *Lobbying Act* because the available evidence gave the Commissioner clear “reason to believe...that an investigation is necessary to ensure compliance with” the *Lobbyists’ Code* (the threshold in subsection 10.4(1) of the *Lobbying Act* that requires an investigation).

5. The Lobbying Commissioner’s decision was contrary to the common law, as well as the express terms and the objects and purposes of both the *Lobbying Act*, *Lobbyists’ Code*, and the

CofI Act. Those objects and purposes are: to ensure that lobbying conforms fully with the spirit of the highest ethical standards; and to promote and enhance public confidence in the integrity of government and avoidance of conflicts of interest in furtherance of the public interest.

PART I – STATEMENT OF FACTS

A. Public Interest Standing of Democracy Watch

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

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

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

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

¹ Applicant’s Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 2.

² Applicant’s Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 3, Exhibit A.

- f. Drafting and amendment of the *Conflict of Interest and Post-Employment Code for Public Office Holders* (establishing the position of Ethics Counsellor in 1994, and amendments in 2000, 2003, 2004 and 2006).³

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

10. Democracy Watch actively participates in proceedings before the various bodies created by the legislative regimes noted above. Democracy Watch further 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 50 government ethics-related petitions with the Commissioner of Lobbying the Conflict of Interest and Ethics Commissioner, and their predecessors.⁵ Democracy Watch has also pursued the advancement of accountability in democratic governance before the courts. Democracy Watch appeared as an intervener before the Supreme Court of Canada, in *Harper v. Canada (Attorney General)*, [2004] 1 SCR 827, 2004 SCC 33, and has brought proceedings concerning the Lobbying Commissioner, the Ethics Commissioner, and their predecessors including:

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

³ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, paras. 4 and 10, Exhibits C and D.

⁴ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 5.

⁵ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 6.

⁶ Applicant's Record, Vol.1, Tab 2, Affidavit of Duff Conacher, para. 7.

B. The Establishment of the Lobbying Commissioner as an Independent Officer

11. The Lobbying Commissioner position was established as an Officer of Parliament by the enactment of Bill C-2 in 2006 to ensure, according to the responsible minister at the time, the Hon. John Baird, President of the Treasury Board, that “all Canadians will know that this commissioner has genuine independence from government...”⁷ The Commissioner is appointed for a renewable seven-year term by the Governor in Council following consultation with the leaders of every recognized party in the House of Commons and Senate, and upon resolution of the House of Commons and Senate, in accordance with subsection 4.1(1) of the *Lobbying Act*.⁸

12. The Lobbying Commissioner’s mandate under the *Lobbying Act* and the *Lobbyists’ Code* established under that *Act* is to ensure transparency, ethics and accountability in the lobbying of federal public office holders, including Members of Parliament (“MPs”) and senators from all political parties. The Lobbying Commissioner is the sole decision-maker concerning whether the *Lobbyists’ Code* has been violated, as well as the front-line enforcer of the *Lobbying Act* who decides whether to refer allegations of violations of the *Act* to the RCMP and Crown prosecutors for possible prosecution.⁹

13. Through the decision-making process under subsection 4.1(1) *Lobbying Act* (which was proclaimed into law in mid-2008), Karen Shepherd was appointed as the Lobbying Commissioner and served from July 2009 on for an initial seven-year term. Ms. Shepherd was then reappointed solely by the Governor-in-Council under Prime Minister Justin Trudeau (the “**Trudeau Cabinet**”), on the recommendation of the Prime Minister each time, for two successive six-month “interim” terms under subsection 4.1(4) of the *Lobbying Act* (which unlike subsection 4.1(1) does not require consultation with leaders of opposition parties before the interim appointment).¹⁰

14. The Lobbying Commissioner has frequently emphasized since 2009 the importance of the independence of her position, highlighting the importance of the change from the previous position of Registrar of Lobbyists (chosen solely by Cabinet and under the control of Cabinet) to

⁷ Applicant’s Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, paras. 8-9, Exhibit B.

⁸ *Lobbying Act*, RSC 1985, c.44 (4th Supp.), subsection 4.1(1), Applicant’s Book of Authorities, Tab A5.

⁹ Applicant’s Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 11, Exhibit E. *Lobbying Act*, subsection 4.2(2) and section 10.4, Applicant’s Book of Authorities, Tab A5. *Lobbyists’ Code*, Introduction and Preamble, Applicant’s Book of Authorities, Tab A6.

¹⁰ Applicant’s Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, paras. 13-14, Exhibits L-P.

a Lobbying Commissioner under the *Lobbying Act* chosen only after consultation with the leaders of every recognized party in the House and Senate and resolution passed in both chambers.¹¹

C. Concerns About Conflicts of Interest, Including About the Prime Minister's Repeated Reappointments of the Lobbying Commissioner

15. In September 2016, the Trudeau Cabinet initiated the process of searching for a new Lobbying Commissioner. The process was extended in October and November of 2016, and again in January 2017, and again in June 2017.

16. In early January 2017, Prime Minister Trudeau's office confirmed that he and his family and friends had accepted from the Aga Khan the gift of a vacation on the Aga Khan's private island in the Bahamas.¹² Soon afterwards, federal Conflict of Interest and Ethics Commissioner Mary Dawson ("Ethics Commissioner") initiated investigations, based on complaints filed by two Members of Parliament, of whether the Prime Minister had violated the *CofI Act*.¹³

17. On January 11, 2017, soon after the Trudeau Cabinet reappointed Lobbying Commissioner Karen Shepherd for her second successive, six-month, renewable interim term as Commissioner, someone sent a complaint to the Lobbying Commissioner alleging that the Aga Khan had violated the *Lobbyists' Code* by giving Prime Minister Trudeau and his family and friends the trip gift.¹⁴

18. On March 1, 2017, Democracy Watch filed a petition with the Lobbying Commissioner alleging violations of the *Lobbyists' Code* by Mickey MacDonald, board member of Clearwater Seafoods Inc., because he organized and hosted a fundraising event attended by then-Liberal Party of Canada Leader Trudeau in August 2014, and because Clearwater Seafoods Inc. was registered to lobby the Office of the Prime Minister.¹⁵ The petition was issued publicly to the media.

¹¹ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 12, Exhibits F-K.

¹² Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 25, Exhibit Y.

¹³ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 26, Exhibit Z.

¹⁴ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 27, Exhibit AA.

¹⁵ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 16, Exhibit Q.

19. In its March 1, 2017 petition, Democracy Watch requested that Lobbying Commissioner Shepherd recuse herself from investigating the situation described in the petition, and from investigating two other similar situations of a lobbyist organizing fundraising events for the Liberal Party (including one event attended by Prime Minister Trudeau) about which Democracy Watch had filed petitions on October 25, 2016 and November 4, 2016, and from investigating any situation concerning the Trudeau Cabinet. Democracy Watch requested Lobbying Commissioner Shepherd's recusal because she was serving under her second sole-source, six-month, interim-term, renewable appointment handed to her by the Trudeau Cabinet, on the recommendation of Prime Minister Trudeau, which caused a reasonable apprehension of bias on her part.

20. On May 15, 2017, Prime Minister Trudeau's office issued a statement that claimed he was recusing himself from the decision-making process concerning the appointment of the next Conflict of Interest and Ethics Commissioner ("**Ethics Commissioner**") because the Ethics Commissioner was investigating him for alleged violations of the *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2 – the "*CofI Act*"). The statement said: "Effective immediately, the Prime Minister has recused himself from all matters related to the appointment of the Conflict of Interest and Ethics Commissioner, given the ongoing inquiry into the Prime Minister's family vacation this past Christmas." The vacation in question was the trip to the Aga Khan's private island given by the Aga Khan as a gift to the Prime Minister. In the statement Prime Minister Trudeau designated Bardish Chagger, Leader of the Government in the House of Commons and Minister of Small Business and Tourism ("Minister Chagger") "to fulfil any relevant obligations in relation to the appointment process for the Conflict of Interest and Ethics Commissioner."¹⁶

21. Even though Lobbying Commissioner Shepherd, like the Ethics Commissioner, was investigating situations involving Prime Minister Trudeau, including the same Bahamas trip gift from the Aga Khan that the Ethics Commissioner was investigating, as well as the two situations set out in Democracy Watch's petitions described above in paragraphs 15 and 16, Prime Minister Trudeau did not recuse himself from the decision-making processes concerning the reappointment of Commissioner Shepherd or the appointment of a new Lobbying Commissioner.

¹⁶ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, paras. 18-19, Exhibits R and S.

22. On March 31, 2017, Ethics Commissioner Dawson presented at a public seminar offered by the Canadian Study of Parliament Group entitled “The Relationship Between Parliament and the Agents of Parliament.” During her presentation, Commissioner Dawson stated:

“I have had reason to wonder whether the Commissioner’s term should be made non-renewable, like those of the Auditor General and the Chief Electoral Officer, in order to forestall any doubts about the incumbent’s independence. Without the possibility of reappointment, there would not be any suggestion that the Commissioner might be in a conflict of interest when making determinations about the government.

Repeated use of the interim appointments for the same position can also create perceptions of a lack of independence and becomes problematic.”¹⁷

23. In June of 2017, Conservative Party of Canada (“CPC”) Leader Andrew Scheer and then-New Democratic Party (“NDP”) Leader Thomas Mulcair wrote a joint letter to Prime Minister Trudeau expressing their concern about the Trudeau Cabinet’s failure to consult them on appointments of officers of Parliament.¹⁸

24. On June 12, 2017, the NDP introduced a motion to change the appointment process for officers of Parliament calling for the establishment of a special all-party House of Commons subcommittee, which would review the government’s nominees for officers of Parliament and other parliamentary positions. The committee would include one member from each of the recognized parties in the House, with a deputy Speaker serving as its chair.¹⁹

25. In June 2017, despite the many publicly stated concerns about conflicts of interest caused by the Prime Minister and Cabinet choosing the Lobbying Commissioner and Ethics Commissioner (especially when either commissioner is investigating the Prime Minister), and despite the Prime Minister’s public recusal from choosing the Ethics Commissioner because of those conflicts of interest, the Trudeau Cabinet, on the recommendation of the Prime Minister, appointed Karen Shepherd for a third six-month, renewable term as Lobbying Commissioner.²⁰

D. The Investigation of the Aga Khan’s Gift to Prime Minister Trudeau, and the Lobbying Commissioner’s Secret Decision

¹⁷ Applicant’s Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 22, Exhibit V.

¹⁸ Applicant’s Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 23, Exhibit W.

¹⁹ Applicant’s Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 24, Exhibit X.

²⁰ Applicant’s Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 21, Exhibit U.

26. After receiving the complaint in January 2017, the Investigations Directorate of the Lobbying Commissioner's office undertook what the office calls an "administrative review" of the complaint, including reviewing the website of the Aga Khan Foundation which identifies the Aga Khan as a member of the Board of Directors of the Foundation.²¹

27. The Investigations Directorate of the Lobbying Commissioner's office also reviewed the registration in the federal Registry of Lobbyists for the Aga Khan Foundation at the time the Aga Khan gave the trip gift to Prime Minister Trudeau, and found that the Foundation was registered in the federal Registry of Lobbyists to lobby the Government of Canada at the time, including Prime Minister Trudeau's office. The senior officer of the Foundation, Khalil Shariff, is registered as a lobbyist for the Foundation in the Registry.²²

28. On September 13, 2017, the Investigations Directorate reported its findings to Lobbying Commissioner Shepherd. On September 18, 2017, the decision at issue in this Application was made by Lobbying Commissioner Shepherd, who decided not to conduct an investigation of the Aga Khan's trip gift to Prime Minister Trudeau. Commissioner Shepherd decided to agree with the Investigations Directorate's recommendation to close the review and not conduct an investigation because: 1. there was no evidence that the Aga Khan was paid by the Aga Khan Foundation to lobby the federal government; 2. he was therefore not required to be nor was listed in the Foundation's registration in the Registry of Lobbyists and; 3. therefore, even if the Aga Khan was lobbying the Prime Minister he was not required to comply with the rules in the *Lobbyists' Code* (as only paid lobbyists are required to be registered, and only lobbyists who are registered (or who should be registered) are required to comply with the *Code*).²³

29. Despite communications between the Investigations Directorate and someone at the Aga Khan Foundation during the administrative review, there is no evidence that the investigators or Lobbying Commissioner considered that an investigation should be conducted to determine whether Khalil Shariff, senior officer and registered lobbyist for the Aga Khan Foundation, violated the *Lobbyists' Code* by allowing the Aga Khan to give the gift to the Prime Minister.

²¹ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, paras. 27-28, Exhibits AA, BB and CC.

²² Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 29, Exhibits AA and DD.

²³ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 30, Exhibit AA.

30. Lobbying Commissioner Shepherd's decision was not made public until December 22, 2017 when it was mentioned in an article on CBCNews.ca.²⁴

²⁴ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 31, Exhibit DD.

PART II – ISSUES RAISED BY THIS APPLICATION

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

Issue 2: The appropriate standard of review.

Issue 3: Whether the Lobbying Commissioner violated section 4, subsection 6(1) and section 21 of the *Conflict of Interest Act* by making a decision that provided an opportunity to further the Commissioner’s private interest, and therefore to improperly further the Prime Minister’s interest.

Issue 4: Whether the common law on reasonable apprehension of bias and legitimate expectations required the Lobbying Commissioner to recuse herself.

Issue 5: Whether the Lobbying Commissioner erred in law in deciding not to conduct an investigation under subsection 10.4(1) of the *Lobbying Act* of whether the situation involving the Aga Khan’s gift to the Prime Minister caused a violation of the *Lobbyists’ Code*.

PART III – LAW AND ARGUMENT

A. Democracy Watch has Standing to Bring this Application

i) The Test for Public Interest Standing

31. Granting public interest standing is a discretionary power within the jurisdiction of the Court. When exercising this discretion, the test for public interest standing must be applied contextually, liberally, and generously, with reference to the policy rationales for granting standing.²⁵ The test for was most recently refined by the Supreme Court of Canada in *Downtown Eastside*:

In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has 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[.]²⁶

²⁵ *Canada v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (“*Downtown Eastside*”) at paras 35-36, 44-52, Applicant’s Book of Authorities, Tab B2; *Sierra Club of Canada v Canada (Minister of Finance)*, [1999] 2 FC 211 (“*Sierra Club*”) at 13, Applicant’s Book of Authorities, Tab B12.

²⁶ *Downtown Eastside*, para. 37, Applicant’s Book of Authorities, Tab B2.

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

ii) A Serious Justiciable Issue has been Raised

33. The present case raises serious justiciable issues concerning compliance by a key public official with the conflict of interest regime under the *CofI Act* and the common law, as well as the proper interpretation and application of a *Lobbying Act* and *Lobbyists' Code*. The failure of the Lobbying Commissioner to recuse herself from ruling on a situation involving Prime Minister Trudeau after he appointed her to a position that lacked tenure, and was renewable by him, is contrary to the requirements of the *CofI Act* and the common law. And the Lobbying Commissioner's conflict of interest compounded her errors of law in deciding not to conduct an investigation of the situation. These matters raise issues of public confidence in the integrity of government.

iii) Democracy Watch has a Genuine Interest in the Matter

34. The applicant has a “genuine interest,” a “real stake” in the proceedings, and is firmly “engaged with the issues” raised by the Application. The applicant has a “real and continued interest” in the issue, and is not a “mere busybody”. The Applicant's experience and expertise and its involvement in the issue makes it an appropriate body to bring the case in the public interest.²⁷

35. The Applicant's *raison d'être* is to advocate for democratic reform, citizen participation, and ethical behaviour in government by actively participating in public policymaking and legislative processes in matters relating to government accountability.²⁸ In pursuit of these objectives, Democracy Watch has played an important role in the development of government oversight and accountability legislation and in the subsequent use of these mechanisms to continue promoting and advancing transparency and accountability in government.

²⁷ *Downtown Eastside, supra* at para. 43, Applicant's Book of Authorities, Tab B2.

²⁸ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, paras. 3, Exhibit A.

36. Democracy Watch maintains a strong “track record” and “degree of involvement” with the subject matter of the application. Indeed, Democracy Watch actively participated in the legislative processes leading to creation of the *Lobbyists’ Code* and the amendment of the *Lobbying Act* in 2006 that created the Lobbying Commissioner position.²⁹ Democracy Watch also has a record of engaging these mechanisms, initiating public complaints and participating in proceedings before the various bodies created by these regimes, and by pursuing the advancement of accountability in democratic governance before the courts.³⁰

37. As in *Sierra Club*, where the Court recognized involvement in the development and enforcement of a legislative system as relevant to establishing a general understanding and genuine interest in a matter, the Applicant’s active participation in the legislative development and subsequent operation of these regimes demonstrates it has the requisite interest and record of engagement in the issues raised by this application.³¹

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

38. The third factor in the public interest standing analysis is “whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court.”³² 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.³³ As noted in *Downtown Eastside*:

[B]y taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.³⁴

²⁹ Applicant’s Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, paras. 4, 5 and 10, Exhibits C and D.

³⁰ Applicant’s Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, paras. 6, 7.

³¹ *Sierra Club*, paras. 66-68, Applicant’s Book of Authorities, Tab B12.

³² *Downtown Eastside*, para 52, Applicant’s Book of Authorities, Tab B2.

³³ *Downtown Eastside*, para. 49.

³⁴ *Downtown Eastside*, para. 50.

39. Public interest standing will be granted where individual litigants are not reasonably likely to bring an issue before the Court. In this case, Democracy Watch is likely the only interested party having the experience and ability to initiate legal proceedings to ensure that the Lobbying Commissioner and lobbyists comply with their statutory obligations. There is no other “directly affected” party who could launch an application for judicial review, and no other reasonable and effective way to bring this matter before the Court.³⁵

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

B. The Appropriate Standard of Review

41. Failure of procedural fairness is at the heart of this Application. Correctness is the appropriate standard of review where procedural fairness is concerned. The duty of procedural fairness is “flexible and variable, and depends upon an appreciation of the particular statute and rights affected.”³⁶ This approach, with some modification, has been adopted by the Federal Court of Appeal in at least one judgment. The Court held that while it remains a “black-letter rule” that allegations of procedural unfairness are to be reviewed on a standard of correctness, some deference is called for in certain procedural matters, particularly where a decision-maker has sought to “balance maximum participation” and “efficient decision-making” and has particular expertise in a given procedure that differs from a reviewing court’s expertise.³⁷ It is submitted that those factors have little application to the present Application.

42. The conclusion on the correctness standard is reinforced by a number of additional factors: the nature and importance of the interests to be protected – maintaining public confidence in the integrity of government and ensuring the effective functioning of our

³⁵ *Sierra Club*, para. 20, Applicant’s Book of Authorities, Tab B12.

³⁶ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, paras. 22-27, (hereinafter *Baker*), Applicant’s Book of Authorities, Tab B1.

³⁷ *Re: Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, paras. 34-36 (hereinafter *Sound*), Applicant’s Book of Authorities, Tab B11.

democratic institutions; the issues to be addressed in this Application require interpretation of a complex statutory regime in which the Lobbying Commissioner's expertise is no greater than that of the Courts (and arguably lesser given that the issues concern the interpretation of general legal principles); and the Application raises questions of law of "central importance to the legal system."³⁸

C. The Lobbying Commissioner Breached the *Conflict of Interest Act*

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

43. The *Conflict of Interest Act* ("**CofI Act**") was enacted in 2006 as part of the *Federal Accountability Act*, and came into force in 2007. It contained some new rules and some of the rules that were in the *Conflict of Interest and Post-Employment Code for Public Office Holders* issued by Prime Ministers from 1985 on ("**PM Code**"). The *PM Code* (which continues to exist) may be described as a "soft law" instrument intended to guide public office holders in the conduct of their affairs.³⁹ The *CofI Act* thus placed the federal conflict of interest regime on a "hard law" statutory footing where previously it had only been a guideline not capable of judicial control.

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

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

³⁸ *Dunsmuir v. New Brunswick*, 2008 SCC 9, paras. 54-56, (hereinafter *Dunsmuir*), Applicant's Book of Authorities, Tab B7.

³⁹ L. Sossin and C. W. Smith, "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of Courts in Regulating Government," *Alberta Law Review* 40, April 2003, pp. 867-893, Applicant's Book of Authorities, Tab C9 (hereinafter, Sossin and Smith).

and Ethics Commissioner to reflect the new mandate to enforce *CofI Act*, and;⁴⁰
 ■ 2015: Prime Minister Trudeau issues his updated version of the *PM Code*.

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

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

46. The *CofI Act* is remedial legislation. The *Interpretation Act* requires that the Act be “given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”⁴¹ This was the approach adopted by the Oliphant Commission.⁴² The *CofI Act*’s objects can be gleaned from various provisions of the statute, supplemented by judicial sources. They may be summarized as avoidance, minimizing and prevention of conflicts, and enhancing or maintaining public confidence in the integrity of government. Section 3 identifies minimizing the possibility of conflicts, avoidance of conflicts, and resolution of those conflicts “in the public interest” among its purposes:

3 The purpose of this Act is to

....
 (b) **minimize the possibility of conflicts** arising between the private interests and public duties of public office holders and provide for the **resolution of those conflicts in the public interest** should they arise;

(c) provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to **avoid conflicts of interest** and to determine whether a contravention of this Act has occurred;

.... [emphasis added]

47. Section 5 of the *CofI Act* requires public office holders to arrange their personal affairs

⁴⁰ I. Green, D. P. Ed., Shugarman, R. Shepherd, “Ethical Problems in Public Life,” in I. Green and D. P. Shugarman, Eds., *Honest Politics Now: What Ethical Conduct Means in Public Life*, (J. Lorimer Publishers, 2017), p. 74-79. Applicant’s Book of Authorities, Tab C6.

⁴¹ *Interpretation Act*, R.S.C., 1985, c. I-21, section 12, Applicant’s Book of Authorities, Tab A3.

⁴² Canada, *Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney*, 2010, Vol. 3, Policy and Consolidated Findings and Recommendations, p. 485, (hereinafter, Oliphant Commission). Applicant’s Book of Authorities, Tab C1.

“in a manner that will **prevent the public office holder from being in a conflict of interest.**”

[emphasis added] Section 6 speaks to having knowledge or reasonably knowing of being in a conflict of interest position:

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

48. The *CofI Act* defines a conflict of interest with reference to furthering “private interests,” whether one’s own or those of another. Significantly, none of the *PM Codes* that preceded the enactment of the *CofI Act* contained a definition of conflict of interest. It was the lack of such a definition that rendered enforcement of conflict of interest rules so difficult. The Federal Court of Canada, for example, was compelled to declare of no force and effect the report of the Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair Stevens because the Commission developed on its own initiative a definition of conflict of interest.⁴³ The text of section 4 of the *CofI Act* is set out for ease of reference:

4 For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person’s private interests.

49. Nothing in the *CofI Act* restricts the definition of private interests to financial or pecuniary matters, and “private interest more broadly construed is the growing norm in government ethics law in Canada.”⁴⁴ Instead, subsection 2(1) only defines what a private interest is *not* (and none of the exemptions apply to the Lobbying Commissioner’s decision at issue in this application):

private interest does not include an interest in a decision or matter

- (a) that is of general application;
- (b) that affects a public office holder as one of a broad class of persons; or
- (c) that concerns the remuneration or benefits received by virtue of being a public office holder.

⁴³ Canada, *Commission of Inquiry into the Facts of Allegations of Conflicts of Interest Concerning the Honourable Sinclair M. Stevens*, 1987 (hereinafter, Parker Commission), Applicant’s Book of Authorities, Tab C2. *Stevens v. Canada (Attorney General)* 2002 FC 1746, paras. 46, 47, Applicant’s Book of Authorities, Tab B13.

⁴⁴ G. J. Levine, *The Law of Government Ethics: Federal, Ontario and British Columbia*, 2nd Ed., Canada Law Books, 2015, p. 10, Applicant’s Book of Authorities, Tab C8.

50. In contrast to the *CofI Act*, the *Conflict of Interest Code for Members of the House of Commons* (“*MP Code*”) expressly defines furthering a private interest in financial terms.⁴⁵ The differences between the two bodies of rules reinforces the notion that the *CofI Act* requires a broad definition of the meaning of private interest that goes beyond financial or pecuniary interest. It was open to Parliament to enact provisions in the *CofI Act* to limit the concept of private interest to financial or pecuniary interest. The fact that it did not do so suggests that Parliament’s intention was to cast a broad net in defining private interest. The implied exclusion rule of statutory interpretation may serve to assist the Court in this instance. The rule provides that where there is reason to believe that a legislature “had meant to include a particular thing within its legislation, it would have referred to that thing expressly.”⁴⁶

51. On a more fundamental level, this Court has expressed the purposes of the conflict of interest regime at the federal level as enhancing public confidence in the integrity of public office holders, noting the public interest in promoting trust in the integrity of government decision-making. The Court in *Democracy Watch v. Canada (Attorney General)* expressed this principle in articulating the test for bias in decisions of the Ethics Counsellor, the predecessor to the Lobbying Commissioner. The principle still holds in understanding the objects and purposes of the *CofI Act*. The relevant passage from the judgment states:

[39] I favour the test for determination of bias, whether specific or institutional, urged on behalf of Democracy Watch given the critical role of the Ethics Counsellor in enhancing “...public confidence in the integrity of public office holders and the decision making process in government...”⁴⁷ [emphasis added]

iii) **The *Conflict of Interest Act* Imposes “Demanding Standards”**

52. The *CofI Act* is one of the critical pieces of a regime designed to maintain ethical conduct in government. It is a companion to a series of statutes related to ethics at the federal level, including: the *Criminal Code of Canada* provisions dealing with the most egregious of ethical contraventions such as corruption and influence peddling, and the *Lobbying Act*, as well as codes such as the *PM’s Code*, the *MP Code*, and the *Lobbyists’ Code*. Given the strong public interest

⁴⁵ House of Commons, *Standing Orders of the House of Commons, Appendix I, Conflict of Interest Code for Members of the House of Commons*, subsection 3(2), Applicant’s Book of Authorities, Tab A2.

⁴⁶ R. Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed., Lexis-Nexis, 2014, p. 248, Applicant’s Book of Authorities, Tab C10.

⁴⁷ *Democracy Watch v. Canada (Attorney General)* 2004 FC 969, para. 39, Applicant’s Book of Authorities, Tab B6.

in maintaining integrity in government, “demanding” standards of conduct must be imposed on public office holders governed by ethics legislation.⁴⁸

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

“Suffice it to say that our democratic system would have great difficulty functioning efficiently if its integrity was constantly in question. ... [T]he importance of preserving integrity in the government has arguably increased given the need to maintain the public’s confidence in government in an age where it continues to play an ever increasing role in the quality of everyday people’s lives.”⁴⁹

iv) Conflicts of Interest May be Real or Apparent

a) Real Conflict of Interest

54. The various concepts of conflict of interest have deep roots in Canadian ethics law, with guidance on their meaning found in a number of sources. One important source is the “Parker Commission report.”⁵⁰ The Parker Commission defined a real conflict of interest as one where: there exists a private interest; that is known to the public office holder; and that has a connection with his or her public duties sufficient to influence the exercise of those duties or responsibilities.⁵¹ Moreover, the focus is “on the situation, not the decision.”⁵²

b) Apparent Conflict of Interest

55. In articulating the concept of an apparent conflict of interest, the Parker Commission emphasized the underlying objectives of conflict of interest rules as maintaining and enhancing trust and confidence in government and the importance of public perception that government business is being conducted in an “impartial and even-handed manner.”⁵³ To this end, the Parker Commission adopted this definition of an apparent conflict of interest:

⁴⁸ Oliphant Commission, pp. 485-486, Applicant’s Book of Authorities, Tab C1.

⁴⁹ *R. v. Hinchey*, [1996] 3 S.C.R. 1128, 1996 CanLII 157, at para. 14, Tab B10.

⁵⁰ Parker Commission, Applicant’s Book of Authorities, Tab C2.

⁵¹ Parker Commission, p. 25.

⁵² Parker Commission, p. 26.

⁵³ Parker Commission, p. 31. Applicant’s Book of Authorities, Tab C2.

An apparent conflict of interest exists where there is a reasonable apprehension, which reasonably well-informed persons could properly have, that a conflict of interest exists.⁵⁴

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

"... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically, and having thought the matter through would conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.'"⁵⁵

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

No such actual knowledge is necessary for an apparent conflict because appearance depends on perception. However, the perception must be reasonable, fair and objective. An appearance of conflict of interest should not be found unless a reasonably well-informed person could reasonably conclude as a result of the surrounding circumstances that the public official must have known about his or her private interest.⁵⁶

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

"Where such [a personal] interest is found, at both common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest."⁵⁷

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

59. The definitions of conflict of interest developed by the Parker Commission have had "a

⁵⁴ Parker Commission, p. 35.

⁵⁵ *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369 at p. 394, Applicant's Book of Authorities, Tab B3.

⁵⁶ Parker Commission, p. 32.

⁵⁷ *Old St. Boniface Residents Association Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, at 1196. Applicant's Book of Authorities, Tab B9.

critical influence on the development of government ethics laws in Canada.”⁵⁸ Those definitions, particularly the definition of apparent conflict, are embedded in the *CofI Act* and must serve to inform the interpretation of the meaning of conflict of interest.

60. As L’Heureux-Dubé, J. wrote for the majority in *Hinchey*: "The need to preserve the appearance of integrity..." requires that the statutory provisions at issue in *Hinchey* be interpreted so as to prohibit actions "...which can potentially compromise that appearance of integrity" (para. 16).⁵⁹ That reasoning is equally applicable to similar government ethics statutes like the *CofI Act*. As Justice L’Heureux-Dubé also noted in *Hinchey*: "...it is not necessary for a corrupt practice to take place in order for the appearance of integrity to be harmed. Protecting these appearances is more than a trivial concern".⁶⁰

61. In a similar vein, the Federal Court of Appeal has ruled unanimously that the phrase "a conflict of interest" means a situation in which a public office holder has "competing loyalties" or "a real or seeming incompatibility between one's private interests and one's public or fiduciary duties" that "might reasonably be apprehended to give rise to a danger of actually influencing the exercise of a professional duty."⁶¹

62. The regime of the *CofI Act* and the broad, comprehensive language used in the operative provisions makes clear that it was intended to apply to real and apparent conflicts of interest. As noted out above in paragraph 43, section 3 of the *CofI Act* articulates among its purposes prevention and avoidance of "conflicts of interest" generally, without any limiting language that would confine it to "real" conflicts of interest. More expressly, subsection 6(1) applies to decision-making where the "public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest." [emphasis added] Similarly, section is directed at prevention of conflicts of interest.

63. Section 8 of the *CofI Act* prohibits the use of insider information not only to further private interests, but also to "seek to further" private interests, while section 9 prohibits the use of a public office holder's position to "seek to influence a decision of another person so as to

⁵⁸ Levine, p. 10, Applicant's Book of Authorities, Tab C8.

⁵⁹ *Hinchey*, para. 16, Applicant's Book of Authorities, Tab B10.

⁶⁰ *Hinchey*, para. 17.

⁶¹ *Democracy Watch v. Campbell*, [2010] 2 F.C.R. 139, 2009 FCA 79, para. 49, quoting from *Cox v. College of Optometrists of Ontario* (1988), 65 O.R. (2d) 461 (Div. Ct.), Applicant's Book of Authorities, Tab B6.

further” a private interest. In addition, subsection 11(1) of the *CofI Act* bans the acceptance of gifts and other advantages “that might reasonably be seen to have been given to influence the public office holder in the exercise of an official power, duty or function.” [emphasis added]

vi) Alternative Appointment Processes Were Available to the Trudeau Cabinet

64. Prime Minister Trudeau and the Governor in Council (“**Trudeau Cabinet**”) did not have to create the conflict of interest for Lobbying Commissioner Shepherd by controlling the appointment decision for the six-month renewable term granted to Commissioner Shepherd in June 2017. The Prime Minister and his Cabinet could have used an appointment process independent of themselves. The most analogous non-statutory processes to the appointment process for the quasi-judicial Lobbying Commissioner, which the Trudeau Cabinet has modified since the 2015 election (before the search began for the new Lobbying Commissioner), are the processes for appointing Federal Court, Federal Court of Appeal and provincial superior court judges, and for appointing Supreme Court of Canada justices.⁶² All of these processes involve selection committees administered by the Commissioner of Federal Judicial Affairs appointed under the *Judges Act*.⁶³ Selection committees are composed of members who (in direct contrast to the selection committee for the Lobbying Commissioner) served fixed terms, are not members of the Trudeau Cabinet nor serve at the pleasure of or under the control of the Trudeau Cabinet. The committees all conduct searches for a qualified short list of nominees for each judicial position from which the Trudeau Cabinet makes appointments.

65. Another model is the non-statutory body, the Independent Advisory Board for Senate Appointments (Board), created to give effect to a desire to minimize the role that partisanship plays in the appointment of senators, undermining the independence of senators. Board members are selected from outside the Trudeau Cabinet and the Government of Canada and are required to “observe the highest standards of impartiality, integrity and objectivity in their consideration of all potential candidates.” They served fixed terms and are required to undertake broad consultations and select qualified individuals who meet various prescribed merit-based criteria, including a commitment to independence and non-partisanship. They are responsible for submitting the names of up to five qualified individuals for each Senate vacancy to the Prime Minister, who then selects one nominee to present to the Governor General for appointment.⁶⁴

66. A third model is that adopted by the Trudeau Cabinet for the selection of the new

⁶² Canada, Office of the Commissioner for Federal Judicial Affairs, *Welcome to the Website of the Office of the Commissioner for Federal Judicial Affairs Canada*, (website of the Office of the Commissioner for Federal Judicial Affairs), Applicant’s Book of Authorities, Tab C4.

⁶³ *Judges Act*, R.S.C., 1985, c. J-1, section 73, Applicant’s Book of Authorities, Tab A4.

⁶⁴ Applicant’s Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 35, Exhibit KK.

Commissioner of the Royal Canadian Mounted Police. Under this model a selection committee was struck composed of 10 members, seven out of whom had no connection to the Trudeau Cabinet or the Government of Canada. Members of this committee were subject to strict conflict of interest requirements to reinforce the need for an open, transparent and merit-based process of selection of candidates for the position.⁶⁵

67. The processes for selection of similar commissioners in British Columbia is also instructive. A special committee composed of members from all the political parties represented in the Legislative Assembly must unanimously recommend to the Assembly a nominee for the position. The nomination is approved by a two-thirds majority vote of the members of the Assembly.⁶⁶ Although the process is prescribed in a statute, the *Members' Conflict of Interest Act*, it was open to the Trudeau Cabinet to adopt a similar process for choosing a Lobbying Commissioner for any of the three six-month interim terms Commissioner Shepherd was appointed to by the Prime Minister. The Trudeau Cabinet could have: issued an order of reference to an existing committee of the House of Commons; created a special committee of the House for the specific purpose of the appointment (as has happened for other issues); or created a special extra-governmental committee as it has for the processes for the appointment of judges, the RCMP Commissioner, and even senators.

68. The Lobbying Commissioner occupies a quasi-judicial position when enforcing the *Lobbyists' Code*. The Prime Minister and his Cabinet appointing Karen Shepherd to the interim position in June 2017 did not accord due respect to the judicial nature of the position. In 2007, the Canadian Judicial Council cautioned on the danger that a selection process that lacks sufficient independence from the Governor in Council poses 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.⁶⁷

vii) Recusal Option Was Available to the Lobbying Commissioner

⁶⁵ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 36, Exhibit LL, MM and NN.

⁶⁶ Applicant's Record, Affidavit of Duff Conacher, paras. 38-39, Exhibits PP, QQ.

⁶⁷ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 51, Tab OO; Canadian Judicial Council, *Judicial Appointments: Perspective from the Canadian Judicial Council*, February 20, 2007, p. 6.

69. As Democracy Watch requested in its March 1, 2017 petition to the Lobbying Commissioner, the Commissioner could have recognized that she was in a conflict of interest when making decisions in relation to situations involving the Prime Minister, and recused herself.

70. On November 13, 2012, B.C.'s Conflict of Interest Commissioner Paul Fraser recused himself from investigating and ruling on a situation involving the B.C. Premier because his son was an Assistant Deputy Minister in the Government of B.C. and a friend of the Premier. He delegated the investigation and ruling powers concerning the situation to an out-of-province lawyer named Gerald L. Gerrand.⁶⁸

71. On April 5, 2016, Alberta's Ethics Commissioner Marguerite Trussler recused herself from ruling on a situation because she was friends with two of the people involved in the situation, and delegated ruling on the situation to Paul Fraser, Conflict of Interest Commissioner in British Columbia.⁶⁹

viii) The Lobbying Commissioner Breached the *Conflict of Interest Act*

72. When Prime Minister Trudeau and his Cabinet appointed Lobbying Commissioner Shepherd to her third six-month term as Commissioner in June 2017 (a position that had been renewed by the Prime Minister twice, and could be renewed again by him), she had before her at least three petitions requesting investigations of situations involving the Prime Minister to determine if violations of the *Lobbyists' Code* had occurred. They were Democracy Watch's November 4, 2006 and March 1, 2017 petitions (described above in paragraphs 15-16) requesting an investigation of fundraising events attended by the Prime Minister that had been held by people each of whom was on the board of a company registered to lobby the Prime Minister, and the January 11, 2017 petition (described above in paragraph 14) filed by someone that requested an investigation of the Bahamas trip gift given to the Prime Minister by the Aga Khan, who is on the board of a foundation registered to lobby the Prime Minister.

73. The Prime Minister therefore had a real private interest, as defined by the *CofI Act*, in the Lobbying Commissioner's investigation and the ruling. The Prime Minister admitted his real

⁶⁸ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 32, Tabs FF and GG.

⁶⁹ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 33, Tabs HH and II.

conflict of interest when he issued a public statement recusing himself from participating in the parallel appointment process for the Ethics Commissioner because the Ethics Commissioner was investigating a situation involving him. There is no record showing that the Prime Minister recused himself from the decision-making process to appoint Commissioner Shepherd to the six-month, renewable term in June 2017. In fact, Prime Minister Trudeau nominated Commissioner Shepherd for the appointment despite the fact that she was also examining situations involving him.

74. Before Prime Minister Trudeau appointed Commissioner Shepherd in June 2017, the Trudeau Cabinet had also demonstrated that it recognized the conflict of interest and bias created when it chooses people for positions that enforce laws that apply to the Cabinet, as it had already made changes to effectively remove the Prime Minister and Cabinet from the selection processes that developed short lists of qualified nominees for judges, the Commissioner of the RCMP, and senators (as described above in paragraphs 61-64).

75. When making the decision in September 2017 not to investigate the situation involving the Aga Khan's trip gift to the Prime Minister, Lobbying Commissioner Shepherd had an opportunity to further her real private interest of keeping her job as Commissioner for another six-month term by protecting the private interest of the Prime Minister. Commissioner Shepherd was therefore in a conflict of interest when making the decision, and violated subsection 6(1) and section 4 of the *CofI Act*. In addition, by making this decision while in this conflict of interest, Commissioner Shepherd improperly furthered the interests of the Prime Minister, also contrary to subsection 6(1) and 4 of the *CofI Act*.

76. Even if the Court determines that the Lobbying Commissioner only had an apparent conflict of interest when making the decision at issue in this application, the conclusion must still be that Lobbying Commissioner violated subsection 6(1), and sections 4 and 21, of the *CofI Act* as those sections apply also to apparent conflicts of interest.

77. The Prime Minister and Trudeau Cabinet would not have created the conflict of interest for Commissioner Shepherd if its only involvement in the appointment of the Commissioner Shepherd in June 2017 had been to choose her from a short list of qualified candidates proposed by a selection committee that was sufficiently removed from the Trudeau Cabinet. If the

Governor in Council had recused itself in the same way it distanced itself from the search processes for the short list of qualified candidates for the positions of federal judges, the RCMP Commissioner, and even senators, then its conflict of interest and bias would not be at issue.

78. Similarly, Commissioner Shepherd would not have violated the *CofI Act* if she had recused herself from making the decision not to investigate the Aga Khan's gift to the Prime Minister, as two provincial commissioners recused themselves from ruling on situations when they were in a conflict of interest (as described above in paragraphs 66 to 68).

D. The Common Law Required the Lobbying Commissioner to Recuse Herself from Ruling on a Situation Involving the Prime Minister

79. While statute law and the common law on conflict of interest may converge or overlap, it is necessary to seek a common law remedy as a stand-alone remedy in the event it is determined that there are gaps or omissions in the *CofI Act* that the common law may fill. The common law duty of procedural fairness has evolved such that it is applicable to every public authority whose decisions are not legislative in nature.⁷⁰

i) Apprehension of Bias, Institutional Bias and Lack of Independence

80. Decision-making without bias or the appearance of bias by public office holders is a fundamental principle of law, one that promotes public confidence in the legal process. As expressed by the Supreme Court of Canada: "public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so."⁷¹

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

... reasonable apprehension of bias is not just ... an evidentiary device to establish the likelihood of unconscious bias, but the manifestation of a broader preoccupation about the image of justice. As was said by Lord Goff in *Gough*, supra, at p. 659, 'there is an overriding public interest that there should be confidence in the integrity of the administration of justice.'⁷²

⁷⁰ *Dunsmuir*, paras. 87-90, Applicant's Book of Authorities, Tab B7.

⁷¹ *Wewaykum Indian Band v. Canada*, [2003] S.C.J. No. 50, para. 57 (hereinafter, *Wewaykum*), Applicant's Book of Authorities, Tab B14.

⁷² *Wewaykum*, para. 66 citing *King v. Sussex Justices, ex parte McCarthy*, [1924] 1 K.B. 256 at p. 259.

82. If a decision or the process leading up to the issuance of the decision is tainted by a reasonable apprehension of bias the appropriate remedy is to set aside or quash the decision. “The damage created by apprehension of bias cannot be remedied.”⁷³

83. The Prime Minister’s appointment of Karen Shepherd to a six-month, renewable term as Lobbying Commissioner created a reasonable apprehension of bias for her when she made the decision not to investigate a situation involving the Prime Minister. Commissioner Shepherd lacked security of tenure and was essentially serving at the pleasure of the Prime Minister when she made the decision. An informed person, viewing the matter realistically and practically, “and having thought the matter through would conclude” that it is “more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”⁷⁴

84. In 2004, the Federal Court quashed a *Lobbyists’ Code* ruling because the then-enforcer of the Code, the Ethics Counsellor was appointed by the Prime Minister and lacked security of tenure and was therefore institutionally or structurally biased.⁷⁵ When making the decision at issue in this application, the Lobbying Commissioner had similarly been appointed by the Prime Minister and lacked security of tenure, and therefore also was institutionally or structurally biased.

ii) **Legitimate Expectations of the Applicant**

85. Democracy Watch, as a representative of the public interest, had, and continues to have, a legitimate expectation that the Lobbying Commissioner would recuse herself from ruling on the situation involving the Prime Minister (who appointed her to a short-term position that lacked tenure, and could be renewed by the Prime Minister). This expectation is founded upon the objects and purposes of the *Coff Act*, which governs ethical conduct among public office holders such as the Commissioner. A party’s legitimate expectations will entitle it to “more extensive procedural rights than would otherwise be accorded” by decision-makers.⁷⁶

86. Notwithstanding any discretion the Lobbying Commissioner may have had in deciding

⁷³ *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, at p. 645, Applicant’s Book of Authorities, Tab B8.

⁷⁴ *Committee for Justice and Liberty*, p. 394, Applicant’s Book of Authorities, Tab B3.

⁷⁵ *Democracy Watch v. Canada (Attorney General)*, paras. 36-45, and 50-56, 2004 FC 969, Applicant’s Book of Authorities, Tab B6.

⁷⁶ *Baker*, para. 26, Applicant’s Book of Authorities, Tab B1.

whether to conduct an investigation into the situation involving the Prime Minister and the Aga Khan, that discretion is constrained by the objects and purposes of the relevant statute.⁷⁷

87. Those public office holders who are subject to the *Cofl Act* are held to a higher standard than other public office holders because of the crucial positions they occupy in the democratic process. To recall the observations of the majority in *Hinchey*: "...given the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe."⁷⁸ Lobbying Commissioner Shepherd did not meet that "demanding" standard when she ruled on the situation involving the Prime Minister after he appointed her to a position that lacked tenure, and could be renewed by him.

E. The Lobbying Commissioner Erred in Law in Deciding Not to Conduct an Investigation

88. The *Lobbying Act* regulates the conduct of lobbyists in their relationships with members of the Governor in Council and other federal public office holders, including by mandating the Lobbying Commissioner as front-line enforcer of the *Lobbying Act*, and sole enforcer of the *Lobbyists' Code*.

89. The *Lobbyists' Code* regulates lobbying activities generally, most specifically in the area of integrity and ethics of lobbying. Lobbyists who are registered or who are required to be registered are required by the *Lobbying Act* to comply with the *Code*, including: anyone paid as a consultant on contract by any entity to communicate with public office holders in respect of their decisions; anyone paid as an employee of any type of organization who spends a significant amount of their work time lobbying; any officer of any organization who spends any of their time lobbying, and; the senior officer of any organization.⁷⁹

90. The Introduction to 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 the integrity of government decision-making." The Preamble to the *Code* states: "The *Lobbyists' Code of*

⁷⁷ *C.U.P.E.*, para. 184, Applicant's Book of Authorities, Tab B4.

⁷⁸ *Hinchey*, para. 18, Applicant's Book of Authorities, Tab B10.

⁷⁹ *Lobbying Act*, section 10.3, 2(1) "organization" and "public office holder", 4(2), 5(1), 5(6), 7(1) and 7(6).

Conduct is an important instrument for promoting public trust in the integrity of government decision making.”⁸⁰

91. The *Lobbyists’ Code* sets out four Principles that reinforce the importance of the regime of regulation of lobbying to the democratic process and to safeguarding the integrity of government. These Principles are: Respect for Democratic Institutions; Integrity and Honesty; Openness; and Professionalism. The *Code* then sets out 10 Rules with requirements concerning: Transparency (Rules 1 to 4); Use of Information (Rule 5), and; Conflict of Interest (Rules 6 to 10). The Introduction to the *Lobbyists’ Code* states: “Lobbyists, when engaging in lobbying activities, shall meet the standards set out in the principles and rules of the Code.”⁸¹

92. The “Integrity” Principle of the Lobbyists’ Code states “Integrity and Honesty: Lobbyists should conduct with integrity and honesty all relations with public office holders.” The “Professionalism” Principle in the *Lobbyists’ Code* states:

Professionalism

Lobbyists should observe the highest professional and ethical standards. In particular, lobbyists should conform fully with the letter and the spirit of the Lobbyists’ Code of Conduct as well as with all relevant laws, including the Lobbying Act and its regulations.

93. Rule 6 of the *Lobbyists’ Code* prohibits a lobbyist from proposing or undertaking “any action that would place a public office holder in a real or apparent conflict of interest.” Rule 10 of the *Code* states:

“To avoid the creation of a sense of obligation, a lobbyist shall not provide or promise a gift, favour, or other benefit to a public office holder, whom they are lobbying or will lobby, which the public office holder is not allowed to accept.”

94. The *Lobbying Act* states at subsection 10.4(1) that “The Commissioner shall conduct an investigation if he or she has reason to believe...that an investigation is necessary to ensure compliance with the Code or this Act.”⁸² By this standard, evidence that an actual violation has occurred is not needed to trigger the requirement that the Commissioner investigate – all that is required is the less onerous standard of a need to ensure compliance.

95. Given the above legal requirements in the *Lobbying Act* and the *Lobbyists’ Code*, in the

⁸⁰ *Lobbyists’ Code of Conduct*, Applicant’s Book of Authorities, Tab A5.

⁸¹ *Lobbyists’ Code of Conduct*, Applicant’s Book of Authorities, Tab A5.

⁸² *Lobbying Act*, R.S.C. 1985, c. 44 (4th Supp.), subsection 10.4(1), Applicant’s Book of Authorities, Tab A6.

situation addressed by the Lobbying Commissioner decision, the reasonable and legally correct question that the Commissioner should have asked to determine if she was required to conduct an investigation “to ensure compliance with” the *Lobbyists’ Code* was:

“Do I have reason to believe that anyone at the Aga Khan Foundation who was registered as a lobbyist may have failed to conduct government relations with integrity and to uphold the highest ethical standards or may have failed to fully conform with the spirit of the *Code* (Integrity and Professionalism Principles), including by possibly allowing anyone at the Foundation to do anything for or give anything to the Prime Minister that would create even the appearance of a conflict of interest (Rule 6) or a “sense of obligation” (Rule 10)?”

96. The administrative review by the Investigations Directorate confirmed that the Aga Khan Foundation was registered to lobby the Prime Minister at the time the Aga Khan, a board member of the Foundation, gave the Bahamas trip gift to the Prime Minister. The Commissioner agreed with the Investigations Directorate’s recommendation to close the review and not conduct an investigation because: 1) there was no evidence that the Aga Khan was paid by the Aga Khan Foundation to lobby the federal government; 2) he was therefore not required to be nor was listed in the Foundation’s registration in the Registry of Lobbyists and; 3) therefore, even if the Aga Khan was lobbying the Prime Minister he was not required to comply with the *Lobbyists’ Code* (as only paid lobbyists are required to be registered, and only lobbyists who are registered (or who should be registered) are required to comply with the *Code*).⁸³

97. The Ethics Commissioner issued a ruling on December 20, 2017 that it was a violation of the *CofI Act* for the Prime Minister to accept the vacation gift from the Aga Khan, and that the gift created a conflict of interest for the Prime Minister.⁸⁴

98. The principal error of law is that the Commissioner failed to consider that, as a board member of the Aga Khan Foundation, the Aga Khan is directly and legally connected to the Foundation. As a result, as the Ethics Commissioner correctly concluded,⁸⁵ no matter what his intentions, the Aga Khan was not acting as an individual when he gave the gift to the Prime Minister but as a representative of the Foundation.

⁸³ Applicant’s Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 30, Exhibit AA.

⁸⁴ *The Trudeau Report* (Executive Summary and excerpt (pp. 32-43), Ethics Commissioner, Applicant’s Book of Authorities, Tab A6.

⁸⁵ *The Trudeau Report*, page 2, and 33-43.

99. A related error of law is that the Commissioner's decision failed to consider the fact that the senior officer of the Foundation, Khalil Shariff, who was registered as a lobbyist for the Foundation at the time the Aga Khan gave the gift to the Prime Minister, is required to comply with the *Lobbyists' Code*.⁸⁶ Under section 7 of the *Lobbying Act*, the senior officer of any corporation or organization is responsible for the compliance of everyone in the organization with the registration requirements under the *Act*. By extension, it is reasonable to conclude that the senior officer is also responsible for the compliance of everyone in the organization with the requirements of the *Lobbyists' Code*.

100. Allowing such an act by a board member of an organization that is lobbying the federal government is contrary to the fundamental purpose of the *Code* to ensure ethical lobbying and government integrity. The Lobbying Commissioner's decision creates a loophole that the *Code* does not intend nor permit, a loophole that allows any organization to use unpaid officers to do things for, and give things to, public office holders to place them in a conflict of interest.

101. The Preamble to the *Lobbyists' Code* states:

Public office holders, when they deal with the public and with lobbyists, are required to adhere to the standards set out for them in their own codes of conduct. For their part, lobbyists communicating with public office holders must also abide by standards of conduct, which are set out below.

These codes complement one another and together contribute to public confidence in the integrity of government decision making.

102. The Ethics Commissioner correctly ruled that the Aga Khan's gift to the Prime Minister violated gift rules in the *CofI Act* and created a conflict of interest for the Prime Minister given the lobbying of the Prime Minister by both the Aga Khan and the Aga Khan Foundation. The Lobbying Commissioner erred in law by not connecting the Aga Khan with the Aga Khan Foundation as required to further the objects and purposes of the *Lobbyists' Code*.

103. Given the Purpose, Principles and Rules of the *Lobbyists' Code*, the reasonable and correct conclusion is that Khalil Shariff, the senior officer and registered lobbyist for the Aga Khan Foundation, breached the *Lobbyists' Code* Integrity Principle and Professionalism Principle by failing to conduct with integrity all relations with public office holders, and failing

⁸⁶ Applicant's Record, Vol. 1, Tab 2, Affidavit of Duff Conacher, para. 29, Exhibits AA and DD.

to uphold the highest ethical standards and the spirit of the *Code*, in allowing the Aga Khan, a board member of the Foundation, to give a gift to a public office holder (the Prime Minister) that created a conflict of interest or a sense of obligation in violation of Rules 6 and 10 of the *Code*. At the very least, there was ample evidence to form a reasonable belief that an investigation of Mr. Shariff's action "to ensure compliance" with the *Lobbyists' Code*.

104. Therefore, the Lobbying Commissioner erred in law by deciding not to investigate the situation further "to ensure compliance" with the *Lobbyists' Code*.

PART IV – ORDER SOUGHT

105. The Applicant seeks the following relief:

- a) An order quashing the Lobbying Commissioner's Decision of September 21, 2017 and substituting its own decision directing the Lobbying Commissioner to proceed with a full investigation of the situation;
- b) In the alternative, an order quashing the Lobbying Commissioner's Decision of September 21, 2017 and remitting the matter back to the Commissioner in accordance with the Directions of this Court;
- c) Costs, and;
- d) Such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa this 8th day of June, 2018

Duff Conacher

Executive Director,
Democracy Watch

PART V – LIST OF AUTHORITIES

Legislation

Conflict of Interest Act, S.C. 2006, c. 9, subsection 2(1), paragraph 3(a) section 4, section 5, subsection 6(1), section 21

Conflict of Interest Code for Members of the House of Commons, subsection 3(2), being Appendix I of the *Standing Orders of the House of Commons*

Interpretation Act, R.S.C., 1985, c. I-21, section 12

Judges Act, R.S.C., 1985, c. J-1, section 73

Lobbying Act, R.S.C., 1985, c. 44, (4th Supp), sections 2(1) “organization” and “public office holder”, 4(2), 4.1(1) and (4), 5(1), 5(6), 7(1) and 7(6), 10.2, 10.3, and 10.4

Lobbyists’ Code of Conduct, Principles, Rule 6, Rule 8

Parliament of Canada Act, R.S.C., 1985, c. P-1, sections 81, 82

Jurisprudence

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817

Canada v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45

Committee for Justice and Liberty v. National Energy Board, [1978] 1 SCR 369

C.U.P.E. v. Ontario (Minister of Labour), [2003] 1 SCR 539, 2013 SCC 29

Democracy Watch v. Campbell, [2010] 2 F.C.R. 139, 2009 FCA 79

Democracy Watch v. Canada (Attorney General) 2004 FC 969

Dunsmuir v. New Brunswick, 2008 SCC 9

Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 SCR 623

Old St. Boniface Residents Association Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170

R. v. Hinchey, [1996] 3 S.C.R. 1128

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

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

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

Other Authorities

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

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

Conflict of Interest and Ethics Commissioner, *The Trudeau Report (Executive Summary)*, December 2017.

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

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

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