

Court File No.:

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F I L E D	FEDERAL COURT COUR FÉDÉRALE
	November 05, 2020 05 novembre 2020
Jacqueline Smith	
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FEDERAL COURT

DEMOCRACY WATCH and DUFF CONACHER

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION
(pursuant to section 17 of the *Federal Courts Act*)

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at (place where Federal Court of Appeal (or Federal Court) ordinarily sits).

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: November 3, 2020

Issued by:

(Registry Officer)

Address of local office:

Registries of the Federal Courts
180 Queen Street West
Suite 200
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TO:

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APPLICATION

THIS IS AN APPLICATION in respect of the Government of Canada's federal judicial appointment system (the "Appointments System").

The Minister of Justice and Attorney General of Canada (the "AG") exercises discretionary political control of the Appointments System through the facts that the AG:

1. In his or her dual role as Minister of Justice, is ultimately a member of the federal Cabinet and a political appointee;
2. Appoints the majority of the members of each provincial Judicial Appointment Advisory Committee ("JAAC");
3. Receives a long list of candidates from each JAAC;
4. Submits the lists to members of the Governor in Council ("GIC") and Members of the House of Commons ("MPs") who represent the ruling party and are from the province or territory in which an appointment is to be made, and to political party members in that jurisdiction and;
5. Appoints essentially whomever the AG chooses from those longlisted based, at least in part, on the opinions of these politicians from and members of the ruling party and hand-picked AG appointees.

The Applicant states that the AG's discretionary and ultimately political role in the Appointments System creates and perpetuates actual bias or the reasonable apprehension of bias and thereby violates:

1. Section 96 of the *Constitution Act, 1867* (the "*Constitution*");
2. Section 7 of the *Constitution Act, 1982* and the *Canadian Charter of Rights and Freedoms* (collectively the "*Charter*");
3. Subsection 11(d) of the *Charter*;
4. Subsection 24(1) of the *Charter*, and/or;
5. The principles of fundamental justice, including the unwritten Constitutional principles of judicial independence and/or the rule of law.

The Applicant seeks:

1. An Order declaring that the Appointments System is unconstitutional; and
2. Direction from this Honourable Court concerning how the system must be changed in order to comply with the *Constitution*.

THE APPLICANT MAKES APPLICATION FOR:

1. An Order and/or Declaration stating that the Government of Canada's federal judicial appointments system fails to comply or accord with Section 96 of the *Constitution*; Section 7 and Subsections 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;

2. Direction(s) from this Honourable Court with respect to what changes to the Appointments Systems are necessary to make it compliant with the *Constitution*, *Charter*, and/or the principles of fundamental justice, including the unwritten Constitutional principles of judicial independence and/or the rule of law;
3. Costs of this Application and related proceedings on a substantial indemnity basis; and
4. Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE APPLICATION ARE:

A. The AG's control of Appointments System creates a politicized and partisan system that is actually biased or gives rise to a reasonable apprehension of bias

1. The AG, in his or her sole discretion, appoints three of the seven members of each provincial JAAC, which is responsible recommending individuals for appointment to their respective judiciaries, without any restriction;
2. The AG also appoints three other members of each seven-member JAAC 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;
3. Each JAAC submits a long list of candidates for each position in the judiciary to the AG;
4. The AG sends those lists to members of the GIC, to MPs who represent the ruling party and are from the province or territory in which an appointment is to be made, and to members of the political party in that jurisdiction;
5. The AG ultimately chooses whomever the AG wishes, in his or her 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 JAAC, a majority of whom are handpicked by the AG;

6. This amounts to a politicized and partisan system that is actually biased or gives rise to a reasonable apprehension of bias, which in turn risks destroying or actually destroys public confidence in the independence and impartiality of the judiciary; and
7. This Appointments System has 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 risks undermining public confidence in the impartiality of the judiciary.

B. The federal judicial appointments system thereby violates the Constitution, the Charter, the principles of fundamental justice, and/or the rule of law

8. As one of the three branches of government, the judiciary has an important duty toward every person who comes before the Courts: to impartially hear and resolve disputes, to interpret the laws of the country and to uphold the *Constitution*, *Charter*, and the principles of fundamental justice;
9. Judicial independence is a foundational principle of fundamental justice. that represents the cornerstone of the common law duty of procedural fairness and is an unwritten principle of the *Constitution*;
10. Judicial independence has been a cornerstone of the United Kingdom's constitutional structure. The preamble to the *Constitution* 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;
11. The principle of judicial independence is essential to the preservation of the fundamental normative order of a society founded on the principles of constitutionalism and the rule of law. Judicial independence effectively ensures the maintenance of public confidence in the administration of justice, which is itself an essential precondition for respect for and acceptance of the justice system and the rule of law;
12. 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;

13. One of the fundamental principles upon which our justice system operates is that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Public confidence in our justice 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. Any reasonable apprehension of bias is this as harmful as actual bias;
14. Without institutional independence—and without the appearance of a clear separation of powers between the judicial, executive and legislative branches—judicial independence cannot be said to exist. Preserving the appearance of a separation of powers is a necessary condition for concluding that judicial independence exists;
15. Section 96 of the *Constitution* and the Preamble thereto as well as the jurisprudence thereunder, including that concerning the unwritten constitutional principles of judicial independence and the rule of law, guarantee the independence and perception of independence of the judiciary;
16. The control exercised by the AG, ultimately a political appointee and member of the federal Cabinet, over the Appointments System violates that independence guarantee, and therefore violates Section 96 as well as the foundational principles of judicial independence and the rule of law;
17. Section 7 of the *Charter* guarantees everyone 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”, while Section 11(d) of the *Charter* guarantees any person charged with an offence “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”;
18. The AG’s political control of the Appointments System violates judicial independence and removes the guarantee of due process before an independent and impartial tribunal or decision-maker, thereby violating the principles of fundamental justice;
19. Furthermore, Subsection 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”;
20. The principles of fundamental justice require that any such court of competent jurisdiction must actually have and be perceived to have utmost independence, impartiality, and freedom from bias;

21. The AG's political control of the Appointments System creates at least the perception of a lack of judicial independence, which thereby precludes or inhibits persons from vindicating their *Charter* rights through Subsection 24(1) in a court of competent jurisdiction that is truly independent and free from the reasonable apprehension of bias;
22. *Judges Act*, R.S.C., 1985, c. J-1;
23. *Constitution Act, 1867*;
24. *Constitution Act, 1982*;
25. *Federal Courts Act*, R.S.C., 1985, c. F-7;
26. *Federal Court Rules*, 1998, SORJ98-106; and
27. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL

1. The affidavit of Duff Conacher and the exhibits appended thereto;
2. Such other affidavit evidence and exhibits appended thereto as counsel may advise; and
3. Such further material as counsel may advise and this Honourable Court may permit.

November 3, 2020



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DEMOCRACY WATCH and DUFF CONACHER
Applicant

vs

ATTORNEY GENERAL OF CANADA
Respondent

Court File No.

FEDERAL COURT
PROCEEDING COMMENCED AT
TORONTO

NOTICE OF APPLICATION

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