

Court File No.: T-78-18

FEDERAL COURT

DEMOCRACY WATCH

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

(pursuant to sections 18 and 18.1 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: January 15, 2018

Issued by:

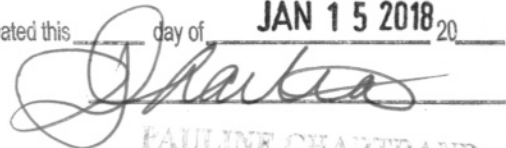
ORIGINAL SIGNED BY
PAULINE CHARTRAND
A SIGNÉ L'ORIGINAL

(Registry Officer)

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the _____

day of **JAN 15 2018** A.D. 20____

Dated this _____ day of **JAN 15 2018** 20____



PAULINE CHARTRAND
REGISTRY OFFICER
AGENT DU GREFFE

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Office of the Deputy Attorney General of Canada
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APPLICATION

THIS IS AN APPLICATION FOR JUDICIAL REVIEW in respect of a decision of the Governor in Council (the "Cabinet").

The decision was an Order in Council, dated December 14, 2017 (the "Decision"), by which Mario Dion was appointed for a first seven-year term as the new Conflict of Interest and Ethics Commissioner ("Ethics Commissioner") under subsection 81(1) of the *Parliament of Canada Act*, R.S.C., 1985, c. P-1 (the "PofC Act").

The application seeks an order quashing the Decision because:

1. the Cabinet failed to consult with the leader of every recognized party in the House of Commons before making the Decision, as required under subsection 81(1) the *PofC Act*;
2. all members of the Cabinet were in violation of the *Conflict of Interest Act* ("*Cofl Act*"), section 4 and subsection 6(1), which prohibit Cabinet ministers from exercising an "official power, duty or function that provides an opportunity" to further a private interest or to "improperly further another person's private interests." Since the predecessor Ethics Commissioner was investigating the Prime Minister and the Minister of Finance at the time of the appointment, all members of Cabinet were complicit in furthering another person's private interests;
3. the Cabinet had a reasonable apprehension of bias that prohibited it from advising on the appointment because all members of Cabinet stood to gain personally from making that determination; and
4. the Prime Minister's *Open and Accountable Government* code ("*PM's Code*") gives rise to a legitimate expectation that the Cabinet would recuse itself from deciding upon or advising upon the appointment of the Ethics Commissioner.

THE APPLICANT MAKES APPLICATION FOR:

1. An order quashing the Decision of December 14, 2017 and remitting the matter back to the Governor in Council in accordance with the Directions of this Court;
2. Costs, and;
3. Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE APPLICATION ARE:

A. Cabinet failed to consult with recognized party leaders, contrary to the *Parliament of Canada Act* ("*PofC Act*")

1. The appointment by the Cabinet of Mario Dion as Ethics Commissioner violates subsection 81(1) of the *PofC Act* because the Cabinet failed to fulfill the requirement not to make the appointment until "after consultation with the leader of every recognized party in the House of Commons" had occurred;
2. Representatives of the Conservative Party and the New Democratic Party both made several statements that the Cabinet had not consulted with them before making the appointment of the new Ethics Commissioner;

B. Cabinet breached a statutory duty in the *Conflict of Interest Act* ("*Cofl Act*")

3. In early January 2017, two Members of Parliament ("MPs") filed petitions with the outgoing Ethics Commissioner alleging violations of the *Conflict of Interest Act* (S.C. 2006, c. 9, s. 2 – the "*Cofl Act*") by Prime Minister Trudeau as he had accepted a gift of a trip from the Aga Khan;
4. In mid-January 2017, the Ethics Commissioner confirmed that she was investigating the situation and allegations described in the petition filed by one of the MPs;
5. In mid-February 2017, the Ethics Commissioner confirmed that she was investigating the situation and allegations described in the petition filed by the other MP;
6. On May 15, 2017, the office of Prime Minister Justin Trudeau (the "Prime Minister") issued a statement that said he was recusing himself from the decision-making process for appointing the next Ethics Commissioner because the Ethics Commissioner was investigating him for his alleged violations of the *Cofl Act*. The statement said: "The Prime Minister has designated the Leader of the Government in the House of Commons, Minister Bardish Chagger, to fulfil any relevant obligations in relation to the appointment process for the Conflict of Interest and Ethics Commissioner;"
7. On October 16, 2017, NDP MP Nathan Cullen sent a letter to the Ethics Commissioner requesting an examination of whether the actions of Minister of Finance Bill Morneau ("Minister Morneau") in developing and

introducing *Bill C-27, An Act to amend the Pension Benefits Standards Act, 1985* ("*Bill C-27*") violated the *Cofl Act* given that, at the time *Bill C-27* was introduced on October 19, 2016, Minister Morneau owned shares in Morneau Shepell Inc. which administers private pension plans.

8. On October 25, 2017, Democracy Watch sent a letter to the Ethics Commissioner requesting an examination of whether Minister Morneau violated subsection 25(1) of the *Cofl Act* that requires public office holders to issue a public declaration every time they are recused from a discussion or decision-making process;
9. On October 26, 2017, the Commissioner sent a letter to NDP MP Cullen stating that she had "concerns in relation to Minister Morneau's involvement in *Bill C-27*" and was following up with Minister Morneau;
10. On October 26, 2017, the Commissioner sent a letter to Democracy Watch acknowledging receipt of Democracy Watch's October 25, 2017 letter;
11. On November 8, 2017, Conservative MP Pierre Poilievre sent a letter to the Ethics Commissioner similar to the letter sent by NDP MP Cullen;
12. On November 10, 2017, the Commissioner sent letters to MP Cullen and MP Poilievre stating that the Ethics Commissioner was initiating an examination of whether Minister Morneau's actions concerning *Bill C-27* violated the *Cofl Act*;
13. As of December 14, 2017, the Office of the Ethics Commissioner had not concluded its investigation of the two petitions filed by the MPs alleging violations of the *Cofl Act* by Prime Minister Trudeau continued, nor had it concluded its investigation of the petition filed by Democracy Watch or the two petitions filed by the MPs which all allege violations of the *Cofl Act* by Minister Morneau;
14. On December 14, 2017, the Cabinet issued Order in Council 2017-1557, pursuant to section 81(1) of the *PofC Act*, appointing Mario Dion for his first seven-year term as the new Ethics Commissioner, effective January 9, 2018;
15. The Cabinet is appointed by, and serves at the pleasure of, the Prime Minister;
16. Section 4 and subsection 6(1) of the *Cofl Act* prohibit a Cabinet minister from participating in or making a decision that exercises his/her powers "that provides an opportunity to further his or her private interests... or to improperly further another person's private interests;"

C. Bias of Cabinet in making the Ethics Commissioner appointment

17. In addition, in the *PM's Code* under Annex A, Part I: Ethical Guidelines and Statutory Standards of Conduct, members of Cabinet are required as "a term and condition of appointment" to "uphold the highest ethical standards so that public confidence and trust in the integrity, objectivity and impartiality of the government are conserved and enhanced" and "to perform their official duties... in a manner that will bear the closest public scrutiny... [an] obligation that is not fully discharged by simply acting within the law;"
18. Cabinet ministers choosing the judge who has the power to rule on whether the Prime Minister violated a law -- the Prime Minister who can remove them from Cabinet at any time for any reason -- is a decision in which the ministers have an opportunity to further their own private interests (and/or improperly further the Prime Minister's private interests and the interests of a fellow Cabinet Minister), a decision in which they are neither impartial nor objective, and in which they have a reasonable apprehension of bias;

D. The Public has a legitimate expectation as a rule of procedural fairness that the Cabinet would respect the *PM's Code*

19. The public, including individual stakeholders whose interests may be affected by the Cabinet's choice of Ethics Commissioner, have a legitimate expectation created by the *PM's Code* that the Cabinet would recuse itself in making this appointment of the Ethics Commissioner;

E. The public interest in a decision that complies with statutory obligations and the rules of procedural fairness

20. The nature of the Decision and its impact directly affect the public's right to legally proper statutory decisions by members of Cabinet, and to impartial and proper enforcement of the *COI Act*;
21. Democracy Watch has standing to bring the present application as it had filed a petition with the Ethics Commissioner that was being investigated at the time of the Cabinet's Decision, and as a public interest litigant in view of its special interest and public role within Canadian civil society in addressing issues of ethics, transparency and accountability of government institutions, which includes matters of conflicts of interest. The Applicant has a real stake in the outcome of the proceeding and the

issues raised by it. The present application also represents a reasonable and effective means of bringing the Applicant's concern to Court;

22. The Cabinet's December 14, 2017 Decision violated the *PofC Act* requirement to consult with the leaders of recognized parties in the House of Commons before making the Ethics Commissioner appointment, and violated the *Cofl Act* rules that require them to recuse themselves when they have an opportunity to further their own private interest or to improperly further another person's private interest;
23. The Cabinet, in issuing its Decision of December 14, 2017, failed to observe the principles of procedural fairness, namely that decision-makers are required to recuse themselves if they have a reasonable apprehension of bias, and that the public has a reasonable expectation that the Cabinet would respect the *PM's Code* and recuse themselves;
24. Therefore, all members of Cabinet, under the rules of the *Cofl Act*, under the rules of the *PM's Code*, and in accordance with the rules of procedural fairness, are prohibited from making or advising any decisions concerning the Ethics Commissioner at the same time the Ethics Commissioner is investigating the Prime Minister, or another minister;
25. The Federal Court has jurisdiction to issue orders in response to this application for the relief sought based on the ground that the Cabinet's December 14, 2017 Decision was contrary to various statutory duties and contrary to duties under the law of procedural fairness;
26. *Parliament of Canada Act*, R.S.C., 1985, c. P-1;
27. *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2;
28. *Federal Courts Act*, R.S.C., 1985, c. F-7;
29. *Federal Court Rules*, 1998, SORJ98-106
30. *Open and Accountable Government 2015*, and;
31. Such further and other grounds as counsel may advise and this Honourable Court may accept.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL

1. The affidavit of Duff Conacher or such other affidavit as counsel may advise;

2. Order in Council 2017-1557 (dated December 14, 2017), and;
3. Such further material as counsel may advise and this Honourable Court may permit.

DEMOCRACY WATCH REQUESTS, pursuant to Rule 317, the Attorney General of Canada to send a certified copy of all documents related to the Cabinet's December 14, 2017 Decision, including documents concerning communications with the leader of every recognized party in the House of Commons that preceded the Decision.

January 15, 2018

Sebastian Spano

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