

FEDERAL COURT OF APPEAL

DEMOCRACY WATCH

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondents

NOTICE OF APPLICATION

(pursuant to clauses 18.1(4)(a) and (b), and clause 28(1)(b.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: September 13, 2019

Issued by:

(Registry Officer)

Address of local office:

Registries of the Federal Courts
Thomas D'Arcy McGee Building
90 Sparks Street, 5th floor
Ottawa, Ontario
K1A 0H9

TO:

Attorney General of Canada
c/o Nathalie G. Drouin, Deputy Attorney General of Canada
Office of the Deputy Attorney General of Canada
284 Wellington Street
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APPLICATION

THIS IS AN APPLICATION FOR JUDICIAL REVIEW in respect of a decision of the Conflict of Interest and Ethics Commissioner (the “Ethics Commissioner”) appointed under subsection 81(1) of the *Parliament of Canada Act* (R.S.C., 1985, c. P-1 – the “*PofC Act*”).

The date of the decision (the “Decision”) was August 14, 2019 in the form of a ruling, the *Trudeau II Report*, by the Ethics Commissioner Mario Dion under the *Conflict of Interest Act* (S.C. 2006, c. 9, s. 2 – the “*Cofl Act*”) concerning whether Prime Minister Justin Trudeau (“Prime Minister” or “PM”), the Clerk of the Privy Council (“Clerk”), staff persons of the Office of the Prime Minister (“Prime Minister’s Office” or “PMO”); other members of the Governor in Council (GIC), and their staff, violated section 9 of the *Cofl Act* by trying to influence the decision of the Attorney General of Canada not to stop the prosecution of SNC Lavalin Inc.

The Ethics Commissioner claimed in the Decision that the Decision was the result of an examination conducted on the Ethics Commissioner’s own initiative under section 45 of the *Cofl Act*. In fact, the Ethics Commissioner received a petition from Elizabeth May, Honourable Member of Parliament, Saanich-Gulf Islands (“MP May”) in April 2019, and a subsequent petition in June 2019. Therefore, the Ethics Commissioner was required to issue the Decision under section 44 of the *Cofl Act*.

By not acknowledging the petitions from MP May in the Decision, the Ethics Commissioner improperly refused to exercise its jurisdiction, and failed to observe a principle of natural justice, procedural fairness and section 44 of the *Cofl Act*.

In addition, in the Decision the Ethics Commissioner improperly refused to exercise its jurisdiction over staff of the PMO and other government officials who are subject to the *Cofl Act*. The Ethics Commissioner concluded in the Decision that only the Prime Minister violated section 9 of the *Cofl Act*, none of the others involved in trying to influence the Attorney General.

Furthermore, the Ethics Commissioner had a reasonable apprehension of bias when making the Decision as he was selected through a process entirely controlled by the GIC, and the GIC failed to consult with opposition party leaders as required by law before making the appointment.

Therefore, the application seeks an order quashing these parts of the Decision because of the Ethics Commissioner’s appearance of bias, and because the Ethics Commissioner’s refusal to exercise jurisdiction and comply with procedural fairness and section 44 of the *Cofl Act* concerning the petitions from MP May,

and the Ethics Commissioner's refusal to exercise jurisdiction over staff of the Prime Minister's Office and other government officials who are subject to the *Coff Act*, were unlawful actions.

THE APPLICANT MAKES APPLICATION FOR:

1. An order quashing the part of the Ethics Commissioner's Decision that refused to exercise jurisdiction and comply with principles of natural justice, procedural fairness, and section 44 of the *Coff Act* concerning the petitions submitted by MP May, in accordance with the Directions of this Court;
2. An order quashing the part of the Ethics Commissioner's Decision that refused to exercise jurisdiction over the staff of the PMO, the Clerk of the Privy Council Office, other members of the GIC and their staff, in accordance with the Directions of this Court;
3. Costs, and;
4. Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE APPLICATION ARE:

A. Refusal to exercise jurisdiction, and failure to observe procedural fairness and section 44 of the *Coff Act*, in response to MP petitions

1. On February 4, 2019, the *Globe and Mail* reported that senior officials in the PMO had tried to influence the Attorney General of Canada decision not to intervene to stop the prosecution of SNC-Lavalin Inc.;
2. On February 8, 2019, Democracy Watch sent a petition by email to the Ethics Commissioner requesting an examination into members of the PMO for trying to influence the Attorney General of Canada in violation of section 9, and possibly also sections 8 and 7, of the *Coff Act*;
3. On February 26, 2019, the Ethics Commissioner sent a letter to Democracy Watch in response to its petition, stating that the Ethics Commissioner had commenced an examination into the matter;
4. On March 4, 2019, Democracy Watch sent a petition by email to the Ethics Commissioner requesting an examination into everyone named by then-Attorney General Jody Wilson-Raybould in her testimony on

- February 27, 2019 before the House of Commons Standing Committee on Justice who, according to her testimony, had participated in trying to influence her decision;
5. In early April 2019, MP May sent a petition by email to the Ethics Commissioner requesting an examination into everyone named by then-Attorney General Jody Wilson-Raybould in her testimony on February 27, 2019 before the House of Commons Standing Committee on Justice who, according to her testimony, had participated in trying to influence her decision;
 6. In early June 2019, MP May sent another petition by email to the Ethics Commissioner requesting an examination into everyone named by the Attorney General in her testimony on February 27, 2019 before the House of Commons Standing Committee on Justice who, according to her testimony, had participated in trying to influence her decision;
 7. On August 14, 2019, the Ethics Commissioner issued the Decision in the form of the *Trudeau II Report*, and claimed in the Preface, and on page 3 of the Decision, that the Ethics Commissioner had commenced an examination of the matter on February 8, 2019 on his own initiative under subsection 45(1) of the *Cofl Act*;
 8. The Ethics Commissioner did not mention in the Decision the petitions submitted by MP May, petitions filed properly under subsection 44(1) of the *Cofl Act* that, therefore, required the Ethics Commissioner to conduct an examination of the matter;
 9. The Ethics Commissioner therefore failed to exercise jurisdiction, and failed to observe a principle of natural justice, procedural fairness and section 44 of the *Cofl Act*;

B. Refusal to exercise jurisdiction over office holders under the *Cofl Act*

10. In addition, on page 44 of the Decision, paragraphs 282-285, the Ethics Commissioner concluded that the Prime Minister was the only person subject to the *Cofl Act* who could, by virtue of his position, clearly influence the Attorney General. The Ethics Commissioner also concluded, by virtue of their position, that the PMO staff, Clerk, other members of the GIC and their staff could not be found in violation of section 9 of the *Cofl Act*. Therefore, the Ethics Commissioner decided not to exercise his jurisdiction to examine the actions of these public office holders.
11. Section 9 of the *Cofl Act* prohibits a public office holder from seeking to influence another person for a prohibited or improper purpose as defined

- by the *Act*. Section 9 nor any other provision in the *Cofl Act* requires that the office holder be in a position to influence the other person;
12. The Ethics Commissioner's Decision therefore unlawfully refused to exercise jurisdiction over the PMO staff, Clerk, other members of the GIC and their staff;

C. Apprehension of bias on the part of the Ethics Commissioner

12. The appointment by the GIC of Mario Dion for his first seven-year term as the new Ethics Commissioner created a reasonable apprehension of bias for him as Ethics Commissioner when making the Decision about a situation involving PMO staff, the Clerk, members of the GIC and their staff because:
- (a) the GIC controlled the selection process, including establishing a partisan appointment advisory committee made up only of people who served and/or served at the pleasure of the GIC;
 - (c) the GIC 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, as required under subsection 81(1) of the *Parliament of Canada Act* ("*PofC Act*");
13. Representatives of the Conservative Party and the New Democratic Party both made several public statements that the GIC had not consulted with them before making the appointment of Mr. Dion as Ethics Commissioner;
14. The GIC choosing Mario Dion as Ethics Commissioner to make the Decision is analogous to a situation of the GIC choosing the specific judge who would hear a case concerning whether members of the GIC and their staff acted in a way that violates a federal law;
15. Therefore, by making the Decision concerning the office holders who are members of the GIC or serve at the pleasure of the GIC, the Ethics Commissioner appearance of bias violated principles of natural justice and procedural fairness;

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

16. The nature of the Decision and its impact directly affect the public's right to legally correct enforcement of the *Cofl Act*;
17. Democracy Watch has standing to bring the present application as a public interest litigant in view of its special interest and public role within

- Canadian civil society in addressing issues of ethics, accountability and transparency 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;
18. Section 4 and subsection 6(1) of the *Cofl Act* prohibit public office holders like the Ethics Commissioner from participating in or making a decision that exercises any powers "that provides an opportunity... to improperly further another person's private interests";
 19. The Ethics Commissioner's Decision was an opportunity to the private interests of the PMO staff, the Clerk, other members of the GIC and their staff, as they have an interest in never being found to acted in a way that violates the *Cofl Act*;
 20. Given that GIC selected Mr. Dion the Ethics Commissioner, thereby creating a reasonable apprehension of bias on the part of the Mr. Dion as Ethics Commissioner, it was improper for him to make the Decision that affected these public office holders' private interests.
 21. The Federal Court of Appeal has jurisdiction to issue orders in response to this application for the relief sought based on ground that these parts of the Ethics Commissioner's Decision were unlawful refusals to exercise jurisdiction and/or failed to observe principles of natural justice, procedural fairness, and section 44 of the *Cofl Act*;
 22. *Parliament of Canada Act*, R.S.C., 1985, c. P-1;
 23. *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2;
 24. *Federal Courts Act*, R.S.C., 1985, c. F-7;
 25. Section 66 of the *Conflict of Interest Act*;
 26. Section 28(1)(b.1) of the *Federal Courts Act*;
 27. *Federal Court Rules*, 1998, SORJ98-106, and;
 28. 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. The August 14, 2019 Decision of the Conflict of Interest and Ethics Commissioner, and;
3. Such further material as counsel may advise and this Honourable Court may permit.

DEMOCRACY WATCH REQUESTS, pursuant to Rule 317, the Office of the Conflict of Interest and Ethics Commissioner to send a certified copy of all documents related to the relevant parts of the Ethics Commissioner's August 14, 2019 Decision (the *Trudeau II Report*).

September 13, 2019

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