File Number:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

DEMOCRACY WATCH

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

MEMORANDUM OF ARGUMENT
(FOR LEAVE TO APPEAL)
from the judgment of the Federal Court of Appeal
File No. A-142-19 / A-143-19 made January 28, 2020

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. This first-ever proceeding about the appointment processes used by the Governor in Council ("GIC") for the appointment of the federal Conflict of Interest and Ethics Commissioner ("Ethics Commissioner") under provisions in the *Parliament of Canada Act* ("*PofC Act*" – R.S.C., 1985, c. P-1), and for the appointment of federal Commissioner of Lobbying under provisions in the *Lobbying Act* (R.S.C., 1985, c. 44 (4th Supp.)), is of public and national importance, and of such a nature and significance as to warrant decision by the Supreme Court of Canada, because it raises questions concerning:

d) upholding the constitutional principles of democracy and the rule of law;
e) the protection of our democratic system;

f) the independence and impartiality of the commissioners who are quasi-judicial adjudicators of key laws and codes that protect government integrity, and;

g) the protection of the right to due process for the public office holders, lobbyists, and members of the public who are subject to the commissioners' adjudication processes.

2. The proceeding raises fundamental questions about the institutional independence from the GIC due in law to the Ethics Commissioner and Commissioner of Lobbying given they are quasi-judicial administrative tribunals who enforce key laws and codes aimed at ensuring the integrity of every decision-making process of the Government of Canada and Parliament[1] and are, therefore, defenders of the constitutional principles of democracy and the rule of law. The Ethics Commissioner enforces the *Conflict of Interest Act* ("*CofI Act*" – S.C. 2006, c. 9, s. 2) and the *Conflict of Interest Code for Members of the House of Commons* ("*MPs Code*" – *Standing Orders of the House of Commons, Appendix I*). The Commissioner of Lobbying enforces the *Lobbying Act* and *Lobbyists' Code of Conduct* ("*Lobbyists' Code*" in force under that *Act*).

3. As a result, this proceeding also raises fundamental questions about the impartiality of both commissioners and, therefore, whether the members of GIC, their staff and appointees, Members of the House of Commons ("MPs") from all parties, former public office holders, and lobbyists who are subject to the laws and codes, and members of the public who file complaints alleging violations, are being deprived of their right under subsection 2(e) of the *Canadian Bill of Rights* (S.C. 1960, c. 44) to a fair hearing in accordance with the principles of fundamental justice.

4. Properly answering fundamental questions about the scope, interpretation and application of the commissioner appointment provisions in the *PofC Act* and the *Lobbying Act* is essential to determining whether the provisions restrict members of the GIC from choosing their own judges – judges (the commissioners) who enforce laws and codes that apply to them and other office holders, including opposition MPs.

5. Similar appointment processes are used for other federal commissioners and commissioners in several provinces and, therefore, the proposed appeal has a wide impact across the country and across the federal government beyond the particular parties to the appeal.

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[1] *R. v. Hinchey* [1996] 3 S.C.R. 1128, paras. 13-18.

B. STATEMENT OF FACTS

a) The Selection Process for the New Conflict of Interest and Ethics Commissioner

6. The Ethics Commissioner is an Officer of Parliament, appointed for a renewable seven-year term by the GIC after consultation with the leaders of every recognized party in the House of Commons ("opposition leaders"), and approval by resolution of the House, required by ss. 81(1) of the *PofC Act*. After Mary Dawson served a few terms as Ethics Commissioner from July 2007 to July 2016, the GIC began a search process for candidates for the position in September 2016.[2]

7. From September 2016 through until after the Ethics Commissioner appointment process in December 2017, the GIC did not disclose to opposition party leaders that the members of its selection advisory committee all served at the pleasure of the GIC.[3]

8. From September 2016 to the end of the process the GIC did not disclose to opposition party leaders the fact that 55 applicants had applied for the Commissioner position in fall 2016, some of whom met the statutory requirements.[4] The GIC also did not disclose to opposition party leaders in December 2017 that it received 56 applications for the position from July 2017 to November 2017, and that four to six candidates reached the final interview stage.[5]

9. The notice by which the GIC purported to comply with the consultation requirements in ss. 81(1) of the *PofC Act* was a letter by Minister Chagger sent December 5, 2017 to opposition party leaders that provided only six days to respond to the GIC's sole nominee Mario Dion.[6]

10. From June 2017 through to the end of the Ethics Commissioner appointment process, through letters to the Prime Minister and the Leader of the Government in the House of Commons, Minister Bardish Chagger ("Minister Chagger" – who was designated by the PM to oversee the

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[2] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, paras. 1-6.
[3] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, paras. 10, 12 and 18. Affidavit of Duff Conacher, sworn March 26, 2020, paras. 5, 7 and 9, Exhibits G and H. *Financial Administration Act*, R.S.C., 1985, c. F-11, subsection 6(3) re: Comptroller General (hereinafter *FAA*). *Public Service Employment Act*, (S.C. 2003, c. 22, ss. 12, 13), s. 128 re: Chiefs of Staff, s. 127.1, re: Deputy Secretaries to PCO (hereinafter *PSEA*).
[4] Affidavit of Duff Conacher, sworn March 26, 2020, para. 16, Exhibit K.
[5] Affidavit of Duff Conacher, sworn March 26, 2020, paras. 19-20, Exhibits L and M.
[6] Affidavit of Duff Conacher, sworn March 26, 2020, paras. 9 and 21, Exhibit F.

process), and through resolutions and statements in the House of Commons and committees, and through abstaining from votes to approve the GIC's nominee, opposition party leaders and their representatives stated clearly and repeatedly that the GIC had not consulted them on the appointment of the Ethics Commissioner.[7]

11. On December 13, 2017, the House of Commons voted to approve Mr. Dion's nomination, but on division as some MPs voted against the appointment.[8] The next day, December 14, 2017, by Order in Council number 2017-1557, the GIC appointed Mr. Dion as the new Ethics Commissioner with his appointment taking effect on January 9, 2018.[9]

b) Matters Before Ethics Commissioner Dawson During New Commissioner Selection Process, and Failure of Ministers to Recuse Themselves

12. Through 2017, Ethics Commissioner Mary Dawson was conducting two investigations into allegations that Prime Minister Trudeau had violated the *CofI Act* by accepting the gift of a trip to the Aga Khan's private island in Bahamas.[10] In the House of Commons on January 31, 2017, on April 4, 2017, April 11th, and April 13th, Minister Chagger defended the Prime Minister's trip.[11]

13. On May 15, 2017, Prime Minister Trudeau issued a statement recusing himself from the Ethics Commissioner appointment process due to the investigations, and designating Minister Chagger "to fulfil any relevant obligations in relation to the appointment process..."[12]

14. In November 2017, Ethics Commissioner Dawson began an investigation requested by two MPs into whether Minister of Finance Bill Morneau ("Minister Morneau") breached the *CofI Act* by overseeing *Bill C-27, An Act to amend the Pension Benefits Standards Act, 1985* given that, at that time, he owned shares in his family's pension management company which could benefit from the Bill.[13] Minister Chagger defended Minister Morneau in the House on October 17, 2017.[14]

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[7] Affidavit of Duff Conacher, sworn March 26, 2020, paras. 2, 3, 6, 9, Exhibits A, B, E and G. *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, para. 86.
[8] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, para. 16.
[9] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, paras. 1 and 17.
[10] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, para. 8.
[11] Affidavit of Duff Conacher, sworn March 26, 2020, para. 23, Exhibit N.
[12] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, para. 9.
[13] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, para. 11.
[14] Affidavit of Duff Conacher, sworn March 26, 2020, para. 24, Exhibit O.

15. In November 2017, Ethics Commissioner Dawson also had before her a request from Democracy Watch re: whether Minister Morneau had failed to issue a recusal declaration.[15] As well, on November 30, 2017, Ethics Commissioner Dawson initiated a process of engaging with Minister Morneau concerning his November 2015 sale of shares he held in Morneau Sheppell Inc., just before Minister Morneau announced tax changes affecting share sales.[16]

16. None of the matters listed above were concluded by Ethics Commissioner Dawson before the GIC made the ultimate decision in early December 2017 to appoint Mario Dion.

d) The Selection Process for the New Commissioner of Lobbying

17. The Commissioner of Lobbying is an Officer of Parliament, appointed for a renewable seven-year term by the GIC following consultation with the leaders of every recognized party in the House of Commons and Senate ("party leaders"), and approval by resolution of the House and the Senate, in accordance with subsection 4.1(1) of the *Lobbying Act*.[17] After Karen Shepherd served two terms as the Commissioner of Lobbying from July 2009 to July 2016, the GIC began a search process for candidates for the position in September 2016.[18]

18. From September 2016 through to the end of the Commissioner of Lobbying appointment process in December 2017, the GIC did not disclose to party leaders that the members of its selection advisory committee all served at the pleasure of the GIC.[19]

19. From September 2016 to the end of the process in December 2017, the GIC did not disclose to party leaders the fact that 58 applicants had applied for the Commissioner of Lobbying position in fall 2016, and that "many met various qualifications." The GIC also did not disclose to party leaders that it had interviewed more than six candidates for the position in fall 2016.[20]

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[15] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, para. 11.
[16] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, para. 11.
[17] *Lobbying Act*, RSC 1985, c.44 (4th Supp.), subsection 4.1(1).
[18] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291, para. 6. Affidavit of Duff Conacher, sworn March 26, 2020, para. 16, Exhibit K.
[19] Affidavit of Duff Conacher, sworn March 26, 2020, para. 16, Exhibit K.
[20] Affidavit of Duff Conacher, sworn March 26, 2020, para. 16, Exhibit K.

20. The notice by which the GIC purported to comply with the consultation requirements in ss. 4.1(1) of the *Lobbying Act* was a November 22, 2017 letter by the Prime Minister delivered to party leaders that provided only six days to respond to the GIC's sole nominee Nancy Bélanger.[21]

21. From June of 2017 through to the end of the Commissioner of Lobbying appointment process on December 13, 2017, through letters to the Prime Minister, and through resolutions and statements in the House of Commons and committees, and through abstaining from votes to approve the GIC's nominee, opposition party leaders and their representatives stated clearly and repeatedly that the GIC had not consulted them on the appointment of the Commissioner.[22]

22. On December 13, 2017, the House of Commons approved the appointment of Ms. Bélanger, but on division as some MPs voted against the appointment.[23] The next day, the GIC issued Order in Council 2017-1564 appointing Ms. Bélanger as the new Commissioner of Lobbying with her appointment taking effect on December 30, 2017.[24]

d) Matters Before Commissioner of Lobbying Shepherd During New Commissioner Selection Process, and Failure of Ministers to Recuse Themselves

23. Between October 25, 2016 and July 12, 2017, the Commissioner of Lobbying confirmed that it was investigating four petitions Democracy Watch filed alleging violations of the *Lobbyists' Code*.[25] The petitions all alleged that lobbyists had violated rules by putting members of the GIC in a conflict of interest.[26]

24. Commissioner Shepherd had not issued rulings on any of Democracy Watch's four petitions alleging violations of the *Lobbyists' Code* in situations involving the Prime Minister or other ministers before the new Commissioner was appointed by the GIC on December 14, 2017.

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[21] Affidavit of Duff Conacher, sworn March 26, 2020, para. 10, Exhibit I.
[22] Affidavit of Duff Conacher, sworn March 26, 2020, paras. 2, 3, 6, Exhibit A, B, E and J. *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291, paras. 91 and 95.
[23] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291, para. 18.
[24] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291, para. 18.
[25] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291, paras. 7-10.
[26] *Lobbyists' Code of Conduct*, Rule 6, Rule 8, Rule 9.

25. Even though Commissioner of Lobbying Shepherd, like the Ethics Commissioner, was investigating situations involving the Prime Minister Trudeau (and other ministers), neither Prime Minister Trudeau nor the ministers recused themselves from the decision-making process concerning the appointment of the next Commissioner of Lobbying.

PART II: STATEMENT OF THE QUESTIONS AT ISSUE

Issue 1: Is this first-ever proceeding concerning the appointments by the GIC of the Ethics Commissioner and Commissioner of Lobbying of public and national importance, and of such a nature and significance as to warrant decision by the Supreme Court of Canada?

Issue 2: Did the Federal Court of Appeal err in law in its January 28, 2020 judgment when it concluded that the GIC was biased when it appointed the Ethics Commissioner and Commissioner of Lobbying, but that the bias is allowed based on the Supreme Court of Canada's 2001 *Ocean Port* ruling?

Issue 3: Did the Federal Court of Appeal err in law in its January 28, 2020 judgment when it concluded that the standard of review for the GIC's appointment decisions for the Ethics Commissioner and the Commissioner of Lobbying was reasonableness?

Issue 4: Did the Federal Court of Appeal therefore err in fact and law in its January 28, 2020 judgment when it upheld the Federal Court's finding that the GIC's appointment process for the Ethics Commissioner complied with the *PofC Act*, and that the GIC's appointment process for the Commissioner of Lobbying complied with the *Lobbying Act*?

PART III: STATEMENT OF ARGUMENT

Issue 1: This first-ever proceeding concerning the appointments by the GIC of the Ethics Commissioner and Commissioner of Lobbying is of public and national importance, and of such a nature and significance as to warrant decision by the Supreme Court of Canada

26. This proceeding raises fundamental questions about the institutional independence from the GIC due in law to the Ethics Commissioner and Commissioner of Lobbying given they are quasi-judicial administrative tribunals who enforce key laws aimed at ensuring the integrity of every decision-making process of the Government of Canada and Parliament and are, therefore, defenders of the constitutional principles of democracy and the rule of law. As a result, this proceeding also raises fundamental questions about the impartiality of both commissioners, and whether both commissioners have an appearance of bias due to the GIC's appointment process.

27. As set out in the Supreme Court of Canada's ruling in *R. v. Hinchey* [1996] 3 S.C.R. 1128, paras. 13-18, the *Conflict of Interest Act* ("*CofI Act*" – S.C. 2006, c. 9, s. 2) and the *Conflict of Interest Code for Members of the House of Commons* ("*MPs Code*") which are enforced by the Ethics Commissioner, and the *Lobbying Act* and *Lobbyists' Code of Conduct* ("*Lobbyists' Code*" in force under the *Lobbying Act*) which are enforced by the Commissioner of Lobbying, are among the key federal laws and codes ("the myriad ways" – para. 13) aimed at "the important goal" (para. 13) of protecting our democratic system by not only preserving government integrity and justice, but just as importantly preserving the appearance of integrity and justice (paras. 15 and 17).

28. This proceeding thereby raises fundamental questions about the proper scope, interpretation and application of the commissioner appointment provisions in the *PofC Act* and the *Lobbying Act*. Properly answering these questions is essential to determining whether the provisions restrict the Prime Minister and members of the GIC from choosing their own judges who enforce key government integrity rules that apply to the GIC and to other office holders including GIC staff and appointees, and MPs from all parties, on behalf of the public.

29. The *CofI Act* applies to every decision-making process of the public office holders who have the most decision-making power in the federal Canadian political system, namely the Prime Minister, all GIC members and Parliamentary Secretaries, all ministerial staff and advisers, the Chief Electoral Officer and the Parliamentary Budget Officer and almost all other GIC and

ministerial appointees. The *CofI Act* also applies to all of the above public office holders after they have left office. The *MPs' Code* applies to every member of the House of Commons.

30. The *Lobbying Act* and *Lobbyists' Code* applies to anyone who is paid to lobby the above public office holders in respect of their decisions, and other office holders including senators, and all Government of Canada employees. As well, a prohibition in the *Act* on lobbying federal office holders for five years after leaving office applies to all of the above office holders, senators, and some staff of the Office of the Leader of the Opposition in the House, and in the Senate.

31. Issuing rulings on alleged violations of the respective acts and codes they enforce is the primary, quasi-judicial function of the Ethics Commissioner and Commissioner of Lobbying, and therefore this proceeding questioning whether the commissioners have an appearance of bias due to the process used by the GIC to appoint them also raises the question of whether the above listed public office holders, former public office holders, and lobbyists, and anyone who files a complaint with either commissioner, are being deprived of their right under subsection 2(e) of the *Canadian Bill of Rights* (S.C. 1960, c. 44) to a fair hearing in accordance with the principles of fundamental justice when allegations of violations of the *CofI Act* or *Lobbying Act* are made.

32. Similar appointment processes are used for other federal commissioners who enforce laws that apply to the GIC and other senior public office holders in the areas of access to information, protection of privacy, and financial accountability.

33. In several provinces, similar appointment processes are used for similar ethics/integrity, lobbying, information, privacy and budget commissioners who enforce similar government ethics, lobbying, access-to-information, privacy and financial accountability laws and codes that apply to, and establish the rights of, similar lists of public office holders, lobbyists, and the public, all with the aim of ensuring government integrity and protection of our democratic system, and upholding the constitutional principles of democracy and the rule of law.

34. The proposed appeal therefore has a wide impact across the country and across the federal government beyond the particular parties to the appeal.

Issue 2: The Federal Court of Appeal erred in law when it concluded that the GIC was biased when it appointed the Ethics Commissioner and Commissioner of Lobbying, but that the bias is allowed based on the Supreme Court of Canada's 2001 *Ocean Port* ruling

35. The common law duty of procedural fairness has evolved such that it is applicable to every public authority that makes decisions that are not legislative in nature.[27] The Supreme Court of Canada has stated 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.[28]

36. Reasonable apprehension of bias was defined in the seminal Supreme Court of Canada judgment in *Committee for Justice and Liberty v. National Energy Board*.[29] 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.[30]

37. The Federal Court of Appeal's judgment states:

> As for the argument that the Governor in Council was biased, the nature of the scheme makes such a situation inevitable: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 at para. 22.[31]

38. The paragraph in *Ocean Port* that the FCA referred to in concluding that the statutory schemes for the appointment of the Ethics Commissioner and Commissioner of Lobbying override the bias of the GIC in making the appointments states:

> "…like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication…. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question."

39. However, this is not an all-encompassing rule, as *Ocean Port* also sets out characteristics of an administrative tribunal that will require it to be independent from the executive, and to adhere to other principles of natural justice, as follows:

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[27] *Dunsmuir v. New Brunswick*, 2008 SCC 9, paras. 87-90.
[28] *Wewaykum Indian Band v. Canada*, 2003 SCC 45, para. 57.
[29] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369 at p. 394, ("*Committee for Justice and Liberty*").
[30] *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, at p. 645.
[31] *Democracy Watch v. Canada (Attorney General)*, 2020 FCA 28, para. 5.

a) If there are "constitutional constraints" (paras. 20 and 24);
b) If there is a "quasi-constitutional" statute that requires a tribunal that exercises quasi-judicial functions to comply with the principles of natural justice (para. 28);[32]
c) If the tribunal does not operate "as part of the executive branch of government" (para. 32) or exercise a power that "falls squarely within the executive power" (para. 33);
d) Overall, if the tribunal approaches "the constitutional role of the courts" (para. 33).

40. Since *Ocean Port*, the courts have extended constitutional protection for judicial independence and established constitutional "administrative independence" requirements for tribunals that approach the constitutional role of the courts, as the Ethics Commissioner does.[33]

41. In a speech in 2012, Honourable Mr. Justice Louis LeBel expressed support for the constitutional principle of administrative independence while addressing *Ocean Port* in relation to "institutional independence in adjudicative tribunal settings," stating:

> …given the importance of administrative justice, we should perhaps question whether administrative adjudicative administration [sic] should not be given a stronger constitutional protection after all.
> … The goal of strengthening the independence of administrative tribunals is not only to eliminate a reasonable apprehension of bias, but also to create a reasonable apprehension that the system works efficiently and transparently, while being accessible to every citizen.[34]

42. The Supreme Court of Canada has ruled that the appointment process must be taken into account when assessing the independence of an administrative tribunal, and whether there is a reasonable apprehension of bias on the part of a tribunal.[35]

43. In its 1999 ruling in *Wells v. Newfoundland***,**[36] the Supreme Court stated that "There are also certain offices that survive because their historical roots are still nourished by functional

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[32] *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, 1996 CanLII 153 (SCC), [1996] 3 SCR 919, paras. 17-25, and 39-45, as cited in *Ocean Port*, para. 28.
[33] *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, para. 21. *McKenzie v. Minister of Public Safety and Solicitor General et al.*, 2006 BCSC 1372 (CanLII), paras. 144-152. *Walter v. British Columbia*, 2019 BCCA 221, paras. 110 and 113.
[34] Hon. Justice Louis LeBel, "Notes for an Address: Reflections on Natural Justice and Procedural Fairness in Canadian Administrative Law," *Canadian Journal of Administrative Law & Practice* (February 2013: Scarborough), Vol. 26, Issue 1, 51 at 57.
[35] *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 SCR 3, paras. 73-85, 92-94, 98-100, and 116-123 (esp. paras. 95, 98-100, and 120-121).
[36] *Wells v. Newfoundland*, 1999 CanLII 657 (SCC), [1999] 3 SCR 199, at para. 32.

consideration, e.g., the independent "office" of a police officer." The *Wells* ruling cites the Supreme Court's *R. v. Campbell* ruling in which the Court set out in broader terms (citing many other past cases) the constitutionally protected independence of police officers, and the RCMP Commissioner, from the executive.[37]

44. Even more than the RCMP Commissioner, who does not make decisions alone concerning prosecutions or exercise a quasi-judicial function, both the Ethics Commissioner and the Commissioner of Lobbying fulfill all the criteria set out in *Ocean Port* of a law enforcement tribunal deserving a higher degree of independence from the executive branch, with "constitutional constraints" applying to the GIC's relationship with the Commissioner, including to the appointment process, because both commissioners are defenders of the important constitutional principles of democracy and the rule of law, and make quasi-judicial decisions and therefore approach the constitutional role of the courts, and because they do not operate as part of the executive branch of government or exercise executive branch powers.

45. The Ethics Commissioner deserves this independence protection from the GIC because the Commissioner:

a) is an adjudicator of disputes concerning alleged violations of the *CofI Act*;
b) is an interpreter of the law, and enforcer of the *CofI Act* which has the objects of ensuring the integrity of every decision-making process of the Government of Canada and Parliament, and of ensuring public confidence in government, thereby making the Commissioner a defender of the constitutional principles of rule of law and democracy;
c) is required by ss. 81(2) of the *PofC Act* to be a judge or tribunal decision-maker;
d) has the court-like powers to subpoena witnesses to testify and produce evidence under ss. 48(1) and (2) of the *CofI Act*, with the offence of perjury applying (under clause 49(5)(b)) to testimony provided to the Commissioner;
e) is required to use court-like procedures under section 46 of the *CofI Act*;
f) imposes orders in a court-like manner under sections 30 and 41 of the *CofI Act*;
g) imposes penalties in a court-like manner under sections 53-59 of the *CofI Act*;
h) makes public decisions under sections 44(8), 45(9) and 62 of the *CofI Act* that are protected by a strong privative clause in section 66 of the *CofI Act*, making the position effectively a court of last resort on government integrity.

46. The Commissioner of Lobbying also deserves this independence protection from the GIC because the Commissioner:

a) is the adjudicator of disputes concerning alleged violations of the *Lobbyists' Code*;

[37] *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 SCR 565, at paras. 29-34, esp. para. 33.

b) is an interpreter of the law, including the *Lobbying Act* and *Code* which have the object of ensuring government integrity and public confidence in government, making Commissioner a defender of the constitutional principles of rule of law and democracy;
c) has the court-like powers to subpoena witnesses to testify and produce evidence under ss. 10.4(2) of the *Lobbying Act*, with the offence of perjury applying (under ss. 10.4(4) of the *Act*) to testimony provided to the Commissioner;
d) is required to follow court-like procedures under ss. 10.4(5) of the *Lobbying Act*, and;
e) makes public decisions under subsection 10.5 of the *Lobbying Act*.

47. In addition, another independence criterion set out in *Ocean Port* is whether (as in *Régie*)[38] a quasi-constitutional statute guarantees a fair hearing or other natural justice right to those subject to the laws that the tribunal enforces. Subsection 2(e) of the *Canadian Bill of Rights* (S.C. 1960, c. 44), a quasi-constitutional provision, guarantees current and former office holders, lobbyists, and anyone who files a complaint, a right to a fair hearing in accordance with the principles of fundamental justice by both commissioners' respectively when allegations of violations of the *CofI Act* or *MPs' Code* or *Lobbying Act* or *Lobbyists' Code* are made.

48. In *MacBain*, the FCA held that, concerning an administrative tribunal, the "offensive portion of the statutory scheme" was "the appointment of the Tribunal by the Commissioner since the Commission is also the prosecutor."[39] In this appeal, the offensive actions are the appointments of the Ethics Commissioner and Commissioner of Lobbying by the GIC when members of the GIC were the defendants in cases of allegations of violations of the *CofI Act*, and/or were parties to situations involving alleged violations of the *Lobbying Act* or *Lobbyists' Code*, which both appointees would have to adjudicate. The GIC chose its own judges.

49. In 2007, the Canadian Judicial Council cautioned about the dangers of judicial selection committees that lacked sufficient independence from the GIC, even though the GIC made the final judicial appointment decision:

> 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.[40]

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[38] *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, 1996 CanLII 153 (SCC), [1996] 3 SCR 919, paras. 17-25, and 39-45, as cited in *Ocean Port*, para. 28.
[39] *MacBain v. Lederman*, [1985] 1 FC 856, 1985 CanLII 3160 (FCA), para. 38 (hereinafter *MacBain*).
[40] Affidavit of Duff Conacher, sworn March 26, 2020, para. 25, Exhibit P.

50. In the situation at issue in this appeal, members of the selection committees for both commissioners were chosen by and serve at the pleasure of the GIC. This compounds the bias that tainted the GIC's appointment process, a bias the statute does not override given the constitutional protection due by law to the independence of both commissioner positions, as both positions fulfill the criteria set out in *Ocean Port* for such independence from the executive.

51. Finally, Democracy Watch, as a representative of the public, has a legitimate expectation that the GIC would avoid an appearance of bias when appointing both commissioners. This expectation is founded upon the objects, purposes and provisions of the *CofI Act* and the expectations created by the *Open and Accountable Government* code ("*PM Code*").[41] A party's legitimate expectations will entitle it to "more extensive procedural rights than would otherwise be accorded" by decision-makers.[42]

52. As noted by the Oliphant Commission, the *CofI Act* is "augmented" by the *PM Code*.[43] Compliance with the *PM Code* by GIC members is a "term and condition of appointment" with members required to "certify that he or she will comply with these Guidelines."[44] The *PM Code* requires GIC members 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 act "in a manner that will bear the closest scrutiny, an obligation that is not fully discharged by simply acting within the law" and avoid even the appearance of a conflict of interest.[45]

53. Even as soft law, ethics codes like the *PM Code* have been recognized as crucial elements in the process of judicial scrutiny of decision-makers, particularly in limiting the exercise of discretionary power. They serve to "bridge law and policy."[46] Any discretion GIC may have had in selecting the Ethics Commissioner and Commissioner of Lobbying is constrained by the objects and provisions of the *CofI Act* and the *PM Code*.[47]

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[41] *Open and Accountable Government*, Prime Minister of Canada.
[42] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para. 26.
[43] *Oliphant Commission*, p. 473.
[44] *Open and Accountable Government*, Prime Minister of Canada, Annex A, Administration subsection.
[45] *Open and Accountable Government*, Prime Minister of Canada, section IV.1, and Annex B.
[46] 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, at p. 892.
[47] *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 SCR 539, 2013 SCC 29, paras. 49, 94 and 184.

54. The Respondent contended before the Court below that the doctrine of necessity overrides the apprehension of bias on the part of the selection advisory committee and the GIC.[48] In contrast to the situation at issue in *Re Manitoba Language Rights*, [1985] 1 SCR 721, there was no state of emergency that required the GIC to appoint either of the commissioners as it did. In fact, the GIC was appealed to in writing by the Conservative and the NDP leaders in June 2017, five months before it chose its nominee, to use a process involving representatives from all the parties, as the British Columbia legislature uses to appoint similar good-government watchdogs.[49]

55. In addition, the GIC had modified, and deployed, appointment processes for other legal decision-makers in order to neutralize its bias in the two years prior to its appointment of the Ethics Commissioner. The GIC modified the processes for appointing justices to federal and provincial courts and to the Supreme Court to ensure selection committees (administered by the Commissioner of Federal Judicial Affairs appointed under the *Judges Act*)[50] served fixed terms,[51] and produce short lists of candidates from which the GIC is required to choose appointees.

56. The GIC also modified the selection process for the new Commissioner of the Royal Canadian Mounted Police (RCMP) with most members on the selection committee having no connection to the GIC or the government, all members subject to conflict of interest requirements, and the committees sending a short list of candidates to the GIC.[52]

57. The GIC's appearance of bias would have been effectively avoided if its only involvement in the selection of the new Ethics Commissioner and Commissioner of Lobbying was the same as it has in the appointment of federal judges and the RCMP Commissioner – that is, to choose one person from a short list of qualified candidates proposed by a selection committee that was sufficiently removed from the GIC.[53]

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[48] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, para. 125.
[49] Affidavit of Duff Conacher, sworn March 26, 2020, para. 2, Exhibit A.
[50] *Judges Act*, R.S.C., 1985, c. J-1, section 73.
[51] Canada, Office of the Commissioner for Federal Judicial Affairs, *Welcome to the Website of the Office of the Commissioner for Federal Judicial Affairs Canada*.
[52] Affidavit of Duff Conacher, sworn March 26, 2020, para. 27, Exhibit R.
[53] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, para. 106. *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291, para. 116.

Issue 3: The Federal Court of Appeal erred in law in its January 28, 2020 judgment when it concluded that the standard of review for the GIC's appointment decisions for the Ethics Commissioner and the Commissioner of Lobbying was reasonableness

58. The Federal Court of Appeal held that the standard of review for this proceeding is reasonableness.[54] The Supreme Court of Canada recently revised the standard of review framework and set reasonableness is the presumptive standard of review.[55] That presumption is rebutted, and a correctness standard applied, where (a) the legislature has indicated it intends a different standard or standards to apply, or (b) the rule of law requires the correctness standard.[56]

59. With respect to (b), the rule of law will require courts to apply a correctness standard for constitutional questions, questions of law of central importance to the legal system as a whole and questions regarding jurisdictional boundaries between two or more administrative bodies. This "ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary",[57] to "resolve general questions of law that are of 'fundamental importance and broad applicability', with significant legal consequences for the justice system as a whole or for other institutions of government".[58]

60. This proceeding raises questions of law of central importance to the legal system as a whole. It engages issues of the constitutional principles of democracy and the rule of law, and how those principles manifest in the context of the appointment of commissioners who enforce rules aimed at ensuring the integrity of all decision-making processes of the Government of Canada and Parliament. The resolution of these issues has fundamental importance and consequences, and broad applicability, in respect of the independence of these commissioners from the executive, and how they fulfill their statutory mandates. It is crucial for our democratic system, and the rule of law, for the requirements of these appointment processes to be interpreted and applied correctly.

61. In the alternative, even if the presumption of a reasonableness standard is not rebutted in this application, the GIC's appointment decisions were not reasonable.

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[54] *Democracy Watch v. Canada (Attorney General)*, 2020 FCA 28, para. 2.
[55] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*").
[56] *Vavilov*, at paras 16-17.
[57] *Vavilov*, at para 53.
[58] *Vavilov*, at para 59.

Issue 4: The Federal Court of Appeal erred in fact and law when it concluded that the GIC's appointment process for the Ethics Commissioner complied with the provisions of the *PofC Act*, and that the GIC's appointment process for the Commissioner of Lobbying complied with the provisions of the *Lobbying Act*

62. The Federal Court of Appeal's judgment states at para. 3:

> The appellant has a view as to what the statute requires. The Governor in Council has another. Reasonableness contemplates precisely this possibility. We have not been persuaded that the Governor in Council's view is unreasonable.

63. Subsection 81(1) of the *PofC Act* does not set out criteria on what should constitute consultation. Parliament's intention was expressed by the House of Commons Committee that reviewed a draft of the bill that created the position. It recommended requiring consultation with opposition leaders before the appointment of the Ethics Commissioner.[59] The House passed a resolution supporting that change, and the GIC amended the bill to include it.[60]

64. The Commissioner of Lobbying position was created by the enactment of Bill C-2 in 2006 as an officer of Parliament. The Commissioner has frequently emphasized the independence of the position, highlighting the importance of the change from a Registrar of Lobbyists chosen solely by the GIC (pre-2006) to a Commissioner of Lobbying chosen after consultation with party leaders and approval of both Houses of Parliament (post-2006).

65. Subsection 4.1(1) of the *Lobbying Act* does not set out criteria on what should constitute consultation. Parliament's intention was expressed by the responsible minister, the Hon. John Baird, President of the Treasury Board, when Bill C-2 was introduced for second reading in the House of Commons on April 25, 2006. He stated that the Bill created:

> "…a new commissioner of lobbying with the power to investigate violations and enforce the rules. Our proposal is to take this out of the executive branch, out of the Treasury Board, and make this commissioner an officer of the House so that all Canadians will know that this commissioner has genuine independence from government…"[61]

66. The consultation required by the *PofC Act* and the *Lobbying Act* is subject to the duty of

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[59] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, paras. 80-81.
[60] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, paras. 80-81.
[61] Affidavit of Duff Conacher, sworn March 26, 2020, para. 26, Exhibit Q.

procedural fairness. Given the statutes are silent on the content of that duty, the principles of procedural fairness apply.[62] Given the constitutional objects of both statutes, the intent of Parliament, and both commissioners' critical role of adjudicating on alleged violations of government integrity, a very high degree of procedural fairness is required.

67. As the Federal Court noted, the dictionary definition of "consultation" includes, at the low end, seeking "advice" or an "opinion" and, at the high end, "permission" or "approval" and, in any case, taking into account and considering advice given.[63] The Supreme Court of Canada's formulation of that duty in the aboriginal law context is that consultation includes, at the low end, "to give notice, disclose information, and discuss any issues raised in response to the notice" and, at the high end, "the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show" that concerns were considered and had an impact on the decision.[64]

68. Consultation must be meaningful and "anticipates bi-lateral communication in which the person consulted has the opportunity to question, to receive explanation and to provide comment" – it must go beyond "paying lip service to the requirement."[65] Providing a "pro forma" opportunity to present views and alternatives does not amount to consultation.[66]

69. The GIC's actions did not constitute a consultation even at the lowest end of the spectrum. The nominees for both commissioner appointments were selected solely by the GIC, using search committees made up solely of people who serve at the GIC's pleasure. The GIC hid the fact that several candidates reached the interview stage, and opposition leaders were essentially told with little notice that the GIC's nominee would be appointed. That's not consultation, that's dictation.

70. Beyond its complete control, how much the GIC intervened in the appointment processes is unclear as the Privy Council Office ("PCO") refuses to disclose almost all records of the process

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[62] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC), at paras. 21-28 (hereinafter "*Baker*")
[63] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, paras. 80-84, and 91-98.
[64] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, at paras. 43-45.
[65] *Gardner v. Williams Lake (City)*, 2006 BCCA 307, paras. 29-30. *Lakeland College Faculty Association v. Lakeland College*, 1998 ABCA 504, paras. 37-38.
[66] *Bezaire v. Windsor Roman Catholic Separate School Board*, 1992, CanLII 7675 (ON SC), pp. 15-16.

for the Commissioner of Lobbying as the PCO deems all those records a "Cabinet confidence." The PCO also continues to refuse to disclose the records of communications between members of the selection advisory committee for the Ethics Commissioner. The Applicant has requested that the Information Commissioner rule that the refusals violate the *Access to Information Act*.[67]

71. An actual consultation would have: disclosed the fact that dozens of applicants applied for the commissioner positions in the fall of 2016; included the short list of applicants the GIC had found to be qualified and had interviewed, and; asked opposition party leaders for their opinion concerning the suitability of those applicants.

72. The Federal Court erred in fact and law by deciding that the GIC began consulting with opposition leaders on the appointment of both commissioners as required by the *PofC Act* and *Lobbying Act* by sending letters in June-July 2017. As the Court's rulings state, the Respondent's own affidavit said that those letters were not consultation as required by the statutes.[68]

73. The Federal Court also erred in fact and law by deciding that the hearings by the House Ethics Committee (and, in the case of the Commissioner of Lobbying, also the Senate Committee of the Whole) were part of the GIC's consultation with the opposition leaders.[69] The House Ethics Committee and the Senate Committee of the Whole are constitutionally separate from the GIC, and their hearings were, therefore, in fact and law, only a step in the House of Commons' and Senate's procedures for approving the appointments.[70]

74. The Federal Court also erred in deciding that the common law duty of procedural fairness concerning consultation during the appointment processes for the Ethics Commissioner and Commissioner of Lobbying is owed by the GIC only to opposition party leaders.[71] Subsection

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[67] Affidavit of Duff Conacher, sworn March 26, 2020, paras. 11-12, 21-22.
[68] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, para. 74. *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291, para. 79.
[69] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, paras. 74, 85-86 and 90. *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291, paras. 79, 93-95 and 99. Note that, in para. 93, "July letters" is incorrect should read "November letters".
[70] *Constitution Act, 1867*, 30 & 31 Vict, c 3, sections 11-13 (re: GIC), 21-36 (re: Senate) and 37-52 (re: House of Commons).
[71] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, paras. 99-103. *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291, paras. 109-113.

86(4) of the *PofC Act* explicitly states that the Ethics Commissioner is not under the control or even oversight of MPs when enforcing the *CofI Act*. When enforcing the *CofI Act*, the Ethics Commissioner exercises statutory, quasi-judicial, rule of law, and democracy protection, enforcement public duties and powers aimed at maintaining the integrity of the Government of Canada, not just for MPs but for all Canadians.

75. Furthermore, during the appointment process, it was known that the new Ethics Commissioner would inherit investigations of a petition by Democracy Watch, and petitions by MPs.[72] The Federal Court of Appeal has decided that Democracy Watch has public interest standing to apply for judicial review of Ethics Commissioner rulings on petitions filed by MPs.[73]

76. The Commissioner of Lobbying rules on actions of lobbyists, not parliamentarians, including actions alleged by the public to have violated the *Lobbying Act* or *Code*. The Commissioner exercises statutory, quasi-judicial, rule of law, and democracy protection, enforcement public duties and powers – not just for parliamentarians but for all Canadians – aimed at maintaining the integrity of relations between lobbyists, the Government and parliamentarians.

77. The office of the Commissioner of Lobbying was reviewing four petitions filed by Democracy Watch at the time of the appointment of the new Commissioner.[74] The Federal Court has decided that Democracy Watch has standing for judicial review of Commissioner rulings.[75]

78. It is acknowledged that the principles of procedural fairness do not give Democracy Watch on its own behalf, or as the public's representative, a right to participate in the appointment processes for either commissioner. However, based on *Baker*,[76] both Democracy Watch in its role as a petitioner in an ongoing proceeding before both commissioners, and the public it represents, had a legitimate expectation that the GIC would consult with opposition party leaders as required by the statutes before appointing both commissioners.

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[72] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, para. 11.
[73] *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194, at paras. 15-23.
[74] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291, paras. 7-10.
[75] *Democracy Watch v. Canada (Attorney General)*, 2018 FC 388, at paras. 45-66.
[76] *Baker*, at paras. 21-28. Also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 SCR 281, 2001 SCC 41 (CanLII), paras. 21-33.

PART IV: SUBMISSIONS IN SUPPORT OF ORDER SOUGHT CONCERNING COSTS

79. Given that this is the first-ever proceeding considered by the Supreme Court of Canada concerning the appointments of the Ethics Commissioner and Commissioner of Lobbying, and that the proceeding is of public and national importance, and in the public interest, and given that the Applicant is a non-profit organization that is not seeking to benefit financially or otherwise from the proceeding, the Applicant submits that costs should not be awarded if it is unsuccessful in its application, but that the court should consider awarding costs at the basic level to the Applicant if it is successful in its application.

PART V: ORDERS SOUGHT

80. Based on the foregoing, the Applicant seeks the following relief:

a) That the applicant be granted leave to appeal to this Court in accordance with the directions of this Court;
b) Costs at the basic level if the Applicant is successful in this application, but not costs if the Applicant is unsuccessful in this application;
c) Such further and other relief as counsel may advise and this Honourable Court may order.

ALL OF WHICH IS SUBMITTED THIS 26th day of March 2020

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PART VI: TABLE OF AUTHORITIES

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