

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

NOTICE OF APPLICATION FOR LEAVE TO APPEAL
pursuant to section 40 of the Supreme Court Act

TAKE NOTICE that the Applicant, Democracy Watch, applies for an order granting leave to appeal to the Court, pursuant to section 40 of the *Supreme Court Act*, from the judgment of the Federal Court of Appeal in consolidated File Nos. A-142-19 / A-143-19 made January 28, 2020;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. That 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: upholding the constitutional principles of democracy and the rule of law; the protection of our democratic

system; the independence and impartiality of the adjudicators of key laws that protect government integrity, and; the protection of the fundamental right to due process;

2. That 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 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;
3. That, given this proceeding raises fundamental questions about the institutional independence of the Ethics Commissioner and the Commissioner of Lobbying, it also raises fundamental questions about the impartiality of both commissioners, and whether both commissioners have an appearance of bias;
4. That, 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 preserving government integrity and our democracy. *R. v. Hinchey* states that "Protecting the integrity of government is crucial to the proper functioning of a democratic system" (para. 15) and that "preserving the appearance of integrity, and the fact that the government is fairly dispensing justice, are, in this context, as important as the fact that the government possesses actual integrity and dispenses actual justice" (para. 17 – emphasis in original);
5. That the 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 public office holders including GIC staff and appointees, and Members of the House of Commons (“MPs”) from all parties, and ensure democratic accountability of these office holders to the public;

6. That 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, all ministerial advisers, the Chief Electoral Officer and the Parliamentary Budget Officer and all other GIC and ministerial appointees (except a lieutenant governor; officers and staff of the Senate, the House of Commons and the Library of Parliament; heads of missions; judges; military judges; Deputy Commissioner of the RCMP, and; a member of the National Security and Intelligence Committee of Parliamentarians). 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;
7. That 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 public office holders listed above, as well as senators, and some staff of the Office of the Leader of the Opposition in the House of Commons, and in the Senate of Canada;
8. That 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;

9. That 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;
10. That, 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;
11. That, therefore, the proposed appeal has a wide impact across the country and across the federal government beyond the particular parties to the appeal;
12. That the Federal Court of Appeal erred 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 ruling in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 (CanLII), [2001] 2 SCR 781;
13. That 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.
14. That the Federal Court of Appeal erred in fact and in 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 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*.

15. For all these reasons, this proceeding, which raises questions about the effect of the GIC's appointment processes on the independence and impartiality of the quasi-judicial, constitution-defending federal Ethics Commissioner and Commissioner of Lobbying, is of public and national importance, and is of such a nature and significance as to warrant a decision by the Supreme Court.

Dated at Ottawa, Ontario this 27th day of March 2020.

SIGNED BY

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NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after service of the application. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 40 of the *Supreme Court Act*