Federal Court  Cour fédérale

**Date: 20181219**

**Docket: T-78-18**

**Citation: 2018 FC 1290**

**Ottawa, Ontario, December 19, 2018**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**DEMOCRACY WATCH**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

## JUDGMENT AND REASONS

[1] This is an application for judicial review of the appointment of Mario Dion as the Conflict of Interest and Ethics Commissioner. The appointment was made by the Governor in Council ("GIC") on December 14, 2017, pursuant to s 81(1) of the *Parliament of Canada Act*, RSC 1985, c P-1.

[2] Democracy Watch, the Applicant, challenges the appointment on the basis that it was made in contravention of the consultation requirement contained in s 81(1) of the *Parliament of Canada Act* and in contravention of s 4 and s 6(1) of the *Conflict of Interest Act*, SC 2006, c 9, s 2, as well as on the basis that the appointment process was procedurally unfair.

[3] This matter was heard consecutively with a companion application for judicial review brought by the Applicant in *Democracy Watch v Attorney General of Canada* in T-80-18.

**Background**

[4] The position of the Conflict of Interest and Ethics Commissioner ("Ethics Commissioner" or "Commissioner") was created in 2006 under the *Federal Accountability Act*, SC 2006, c 9. The Ethics Commissioner is an Officer of Parliament who reports to Parliament by way of the Speakers of the House of Commons and the Senate. The mandate of the Commissioner is set out in the *Parliament of Canada Act.* The Commissioner is also required to perform the duties and functions assigned under the *Conflict of Interest Act*.

[5] Section 81(1) of the *Parliament of Canada Act* states that the GIC shall appoint an Ethics Commissioner after consultation with the leader of every recognized party in the House of Commons, and approval of the appointment by resolution of the House of Commons. The Ethics Commissioner holds office during good behaviour for a term of seven years (s 82(1)) and is eligible for reappointment for one or more terms of up to seven years each (s 81(3)).

[6] Mary Dawson was appointed as Canada's first Ethics Commissioner effective July 9, 2007 for an initial seven year term. She was reappointed for an additional two year term effective July 9, 2014. She was then reappointed on an interim basis for three successive six-month terms effective, respectively, from July 9, 2016, January 9, 2017 and July 9, 2017.

[7] Pursuant to the *Conflict of Interest Act*, upon written request by a Member of the Senate or the House of Commons who has reasonable grounds to believe that a public officer holder has contravened that Act, the Ethics Commissioner shall examine the matter described in the request (s 44(1)). The Ethics Commissioner may also examine a matter on his or her own volition (s 45(1)). In each case, the Commissioner shall provide any report detailing the facts as well as his or her analysis and conclusions (ss 44(7), 44(8), 45(3), 45(4)).

[8] In January 2016, the CBC reported that the then Ethics Commissioner, Mary Dawson, had commenced an examination under s 44(3) of the *Conflict of Interest Act* to determine if Prime Minister Trudeau had contravened ss 11 and 12 of that Act in connection with his family's post-Christmas vacation stay and travel to the Aga Khan's private island in the Bahamas. The Commissioner was also examining whether the Prime Minister may have contravened his obligations under ss 6 and 21 of that Act.

[9] On May 15, 2017, the CBC reported that the Prime Minister's director of communications had issued a statement advising that, given the ongoing inquiry by the then Commissioner into the Prime Minister's family Christmas vacation, effective immediately, the Prime Minister had recused himself from all matters related to the appointment of the new Ethics

Commissioner. The Prime Minister designated the Leader of the Government in the House of Commons, Minister Bardish Chagger, to fulfill any relevant obligations in relation to that appointment process.

[10] In July 2017, Minister Chagger wrote to both Mr. Andrew Scheer, M.P., Leader of the Conservative Party of Canada/Leader of the Opposition, and Mr. Thomas Mulcair, P.C., M.P., Leader of the New Democratic Party, concerning the government's ongoing process to select a new Ethics Commissioner. The letters noted that the Notice of Appointment Opportunity for the position was available on the provided Government of Canada website and stated Minister Chagger's hope that Mr. Scheer and Mr. Mulcair would consider sharing this with Canadians who might be interested in the opportunity. Additionally, if Mr. Scheer and Mr. Mulcair believed that specific stakeholders should be consulted about the position, Minister Chagger asked that they be brought to the government's attention.

[11] On November 10, 2017, CBC reported that then Ethics Commissioner Mary Dawson had confirmed that she was conducting an examination under s 44(1) of the *Conflict of Interest Act* concerning Finance Minister Bill Morneau's sponsorship of Bill C-27, *An Act to amend the Pension Benefits Standards Act, 1985*, while holding shares in Morneau Shepell Inc., which entity administers private pension funds. It is not apparent from the record before me when the request for an examination was made or by which Member of Parliament. However, apparently related to it, on October 25, 2017, the Applicant wrote to Commissioner Dawson requesting that she recuse herself from any examination of Minister Morneau's shareholdings on the basis that she had, in the course of her duties, advised him on the implementation of a conflict of interest

screen for the administration of the shares, and because her term of office had been extended for six months by the current government, thereby giving rise to an apprehension of bias. The Applicant also sought an independent examination of whether Minister Morneau violated s 25(1) of the *Conflict of Interest Act*.

[12] On December 5, 2017, Minister Chagger wrote to both Mr. Scheer and Mr. Mulcair stating that, in accordance with the *Parliament of Canada Act*, she was writing with regard to the Act's requirement for consultation on the appointment of an Ethics Commissioner. The letter noted that, as each of the recipients were aware, the Prime Minister and certain senior officials in his office had recused themselves from all matters related to the appointment and had deliberately not participated in any matters relating to the appointment. In that respect, Minister Chagger was writing in her capacity as the Minister delegated by the Prime Minster as responsible for the appointment. Minister Chagger proposed the nomination of Mario Dion, enclosed his biography, and described some of Mr. Dion's professional background. The letter concluded by stating that, as the recipients knew, this was a critical role, and it was important that a permanent Ethics Commissioner be in place. Minister Chagger stated that she would appreciate the recipient's thoughts on the proposed nomination by no later than December 11, 2017 at 12:00. At the top of that letter was the annotation "PROTECTED B- SENSITIVE PERSONAL INFORMATION SUBJECT TO RECUSAL BY THE PRIME MINISTER".

[13] On December 11, 2017, the Certificate of Nomination for Mario Dion to the Position of Conflict of Interest and Ethics Commissioner was tabled in the House of Commons, and Minister Chagger publically announced the nomination.

[14] On the same date Mr. Guy Caron, Parliamentary Leader for the NDP, wrote to Minister Chagger in response to her December 5, 2017 letter. The letter asserted an apparent conflict of interest despite the Prime Minister's recusal, sought a list of the short listed candidates and their qualifications as well as a list of the Members of the selection committee, and expressed concern with consultation process.

[15] On December 12, 2017, Mr. Dion appeared before the House of Commons Standing Committee on Access to Information, Privacy and Ethics ("ETHI Committee") to present his qualifications for the Ethics Commissioner position and to respond to questions from the Committee, whose members represented the three recognized parties of the House of Commons.

[16] On December 13, 2017, the ETHI Committee tabled its report in the House of Commons. The ETHI Committee reported that it had considered the Certificate of Nomination of Mario Dion to the Position of Conflict of Interest and Ethics Commissioner, referred on December 11, 2017, and that it recommended that Mr. Dion be confirmed as such by the House of Commons. On that same day, the House of Commons passed a motion stating that, in accordance with s 81 of the *Parliament of Canada Act*, it approved the appointment of Mr. Dion as Ethics Commissioner for a term of seven years.

[17] By way of Order in Council P.C. 2017-1557 dated December 14, 2017, Mario Dion was appointed Ethics Commissioner. The Order in Council states that after consultation with the leader of every recognized party in the House of Commons, and by resolution of the House of Commons dated December 13, 2017, the House of Commons had approved the appointment of

Mr. Dion as the Ethics Commissioner; therefore, the Committee of the Privy Council, on the recommendation of the Leader of the Government in the House of Commons, pursuant to ss 81(1) and 82(1) of the *Parliament of Canada Act*, made the appointment.

[18] Subsequently, by letter of December 21, 2017, Minister Chagger responded to Mr. Caron's December 11, 2017 letter. Minister Chagger described the selection process followed and provided the names of the selection committee members, but she declined to provide the short listed candidates on privacy grounds.

**Relevant Legislation**

[19] Two acts make up the legislative framework relevant to this application, the *Parliament of Canada Act* and the *Conflict of Interest Act*. The most relevant aspects of this legislation are described below.

*The Parliament of Canada Act*

[20] Section 81(1) of the *Parliament of Canada Act* requires that the GIC, prior to appointing an Ethics Commissioner, consult with the leader of every recognized party in the House of Commons, and obtain approval of the appointment by resolution of the House of Commons:

> **81 (1)** The Governor in Council shall, by commission under the Great Seal, appoint a Conflict of Interest and Ethics Commissioner after consultation with the leader of every recognized party in the House of Commons and approval of the appointment by resolution of that House.

[21] Section 81(2) speaks to the qualifications required for such an appointment:

> **(2)** In order to be appointed under subsection (1), a person must be
>
> > **(a)** a former judge of a superior court in Canada or of any other court whose members are appointed under an Act of the legislature of a province;
> >
> > **(b)** a former member of a federal or provincial board, commission or tribunal who, in the opinion of the Governor in Council, has demonstrated expertise in one or more of the following:
> >
> > > **(i)** conflicts of interest,
> > >
> > > **(ii)** financial arrangements,
> > >
> > > **(iii)** professional regulation and discipline, or
> > >
> > > **(iv)** ethics; or
> >
> > **(c)** a former Senate Ethics Officer or former Ethics Commissioner.

[22] The Ethics Commissioner is eligible to be reappointed for one or more terms of up to seven years (s 81(3)). As to tenure,

> **82 (1)** The Commissioner holds office during good behaviour for a term of seven years but may be removed for cause by the Governor in Council on address of the House of Commons.
>
> **(2)** In the event of the absence or incapacity of the Commissioner, or if that office is vacant, the Governor in Council may appoint any qualified person to hold that office in the interim for a term not exceeding six months, and that person shall, while holding office, be paid the salary or other remuneration and expenses that may be fixed by the Governor in Council.

[23] The Ethics Commissioner has the rank of a deputy head of a department in the Government of Canada and has the control and management of the office of the Commissioner (s 84).

[24] The Commissioner's mandate is described in ss 85 to 87:

> **85** The mandate of the Commissioner is to
>
> > **(a)** carry out the functions of the Commissioner referred to in sections 86 and 87; and
> >
> > **(b)** provide confidential policy advice and support to the Prime Minister in respect of conflict of interest and ethical issues in general.
>
> **86 (1)** The Commissioner shall perform the duties and functions assigned by the House of Commons for governing the conduct of its members when they are carrying out the duties and functions of their office as members of that House.
>
> **(2)** The duties and functions of the Commissioner under subsection (1) are carried out within the institution of the House of Commons. The Commissioner enjoys the privileges and immunities of the House of Commons and its members when carrying out those duties and functions.
>
> **(3)** The Commissioner shall carry out those duties and functions under the general direction of any committee of the House of Commons that may be designated or established by that House for that purpose.
>
> **(4)** For greater certainty, the general direction of the committee referred to in subsection (3) does not include the administration of the *Conflict of Interest Act* in respect of ministers of the Crown, ministers of state or parliamentary secretaries acting in their capacity as ministers of the Crown, ministers of state or parliamentary secretaries.
>
> **(5)** For greater certainty, this section shall not be interpreted as limiting in any way the powers, privileges, rights and immunities of the House of Commons or its members.
>
> **87** The Commissioner shall, in relation to public office holders, perform the duties and functions assigned to the Commissioner under the *Conflict of Interest Act*.

[25] The Commissioner may delegate any of the powers, duties or functions of the Commissioner under the *Parliament of Canada Act* or the *Conflict of Interest Act*, except the power to delegate (s 89).

[26] The Commissioner must annually report to the Speaker of the House of Commons on the Commissioner's s 86 activities, and the Speaker, in turn, must table the report in the House. Similarly, the Commissioner must report on his or her s 87 activities to the Speaker of the Senate and the Speaker of the House of Commons who must table the report in their respective Houses (s 90(1)).

*The Conflict of Interest Act*

[27] The purposes of the *Conflict of Interest Act* are set out in s 3 of that Act:

> **3** The purpose of this Act is to
>
> **(a)** establish clear conflict of interest and post-employment rules for public office holders;
>
> **(b)** minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise;
>
> **(c)** provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred;
>
> **(d)** encourage experienced and competent persons to seek and accept public office; and
>
> **(e)** facilitate interchange between the private and public sector.

[28] Part I deals with conflict of interest rules (s 4–19). For purposes of this application, I note that section 4 defines a conflict of interest in terms of a private interest:

> **4** For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.

[29] A private interest is defined in s 2(1) in terms of what it is not:

> ***private interest*** does not include an interest in a decision or matter
>
> **(a)** that is of general application;
>
> **(b)** that affects a public office holder as one of a broad class of persons; or
>
> **(c)** that concerns the remuneration or benefits received by virtue of being a public office holder. (*intérêt personnel*)

[30] Section 5 places a general duty on every public office holder to arrange his or her private affairs in a manner that will prevent the public office holder from being in a conflict of interest.

[31] Section 6(1) precludes participation in decision making where it would place a public office holder in a conflict of interest:

> **6 (1)** No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest.

[32] Sections 7 to 17 identify specified conflicts of interest, such as preferential treatment and insider information.

[33] Part II deals with compliance measures (ss 20–32). This includes s 21, which mandates that a public office holder shall recuse him or herself where he or she would be in a conflict of interest:

> **21** A public office holder shall recuse himself or herself from any discussion, decision, debate or vote on any matter in respect of which he or she would be in a conflict of interest.

[34] Subsection 2(1) defines a public office holder to include Ministers and a GIC appointee, other than the exceptions noted. A reporting public office holder is also defined and includes a Minister and a GIC appointee as set out.

[35] If a reporting public official has recused themselves, they are required to make a public declaration in that regard.

> **25 (1)** If a reporting public office holder has recused himself or herself to avoid a conflict of interest, the reporting public office holder shall, within 60 days after the day on which the recusal took place, make a public declaration of the recusal that provides sufficient detail to identify the conflict of interest that was avoided.

[36] Similar declarations are required with respect to certain assets, liabilities and other matters set out in s 25. Divestment of controlled assets on appointment to office is dealt with in s 27. The functions of the Commissioner in this regard are also set out in ss 28–30:

> **28** The Commissioner shall review annually with each reporting public office holder the information contained in his or her confidential reports and the measures taken to satisfy his or her obligations under this Act.
>
> **29** Before they are finalized, the Commissioner shall determine the appropriate measures by which a public office holder shall comply with this Act and, in doing so, shall try to achieve agreement with the public office holder.

> **30** In addition to the specific compliance measures provided for in this Part, the Commissioner may order a public office holder, in respect of any matter, to take any compliance measure, including divestment or recusal, that the Commissioner determines is necessary to comply with this Act.

[37] Part 4 deals with administration and enforcement. Upon receipt of a request in writing from a Member of the Senate or the House of Commons, the Commissioner shall examine the alleged potential contravention of the Act. The Commissioner may also do so of his or her own initiative (ss 44(1), 45(1)). In conducting an examination, the Commissioner may consider information from the public that a Member of the Senate or the House of Commons brings to the Commissioner's attention (s 44(4)):

> **44 (1)** A member of the Senate or House of Commons who has reasonable grounds to believe that a public office holder or former public office holder has contravened this Act may, in writing, request that the Commissioner examine the matter.
>
> **(2)** The request shall identify the provisions of this Act alleged to have been contravened and set out the reasonable grounds for the belief that the contravention has occurred.
>
> **(3)** If the Commissioner determines that the request is frivolous or vexatious or is made in bad faith, he or she may decline to examine the matter. Otherwise, he or she shall examine the matter described in the request and, having regard to all the circumstances of the case, may discontinue the examination.
>
> **(4)** In conducting an examination, the Commissioner may consider information from the public that is brought to his or her attention by a member of the Senate or House of Commons indicating that a public office holder or former public office holder has contravened this Act. The member shall identify the alleged contravention and set out the reasonable grounds for believing a contravention has occurred.
>
> **…….**
>
> **45 (1)** If the Commissioner has reason to believe that a public office holder or former public office holder has contravened this

> Act, the Commissioner may examine the matter on his or her own initiative.

[38] If the examination is in response to a request from a Member of Parliament, the Commissioner shall provide the Prime Minister with a report setting out the Commissioner's factual findings, analysis and conclusions, and shall provide a copy to the Member who made the request, the public office holder who is the subject of the report, and the public (ss 44(7)–44(8)). Similarly, if the examination is conducted on the Commissioner's own initiative, unless the examination is discontinued, the Commissioner shall provide a report to the Prime Minister, to the public officer holder who is the subject of the report and to the public (ss 45(2)–45(4)). The Commissioner's conclusions are final, but are not determinative of the measures to be taken as a result of the report (s 47).

[39] Public officer holders who contravene specified provisions of the Act commit a violation and are liable to an administrative monetary penalty not exceeding $500 (s 52). Failing to file a public declaration of recusal as required by s 25(1) is such a violation.

[40] Part 5, general, includes a provision whereby the Commissioner's orders and decisions are only subject to review on the grounds set out in sections 18.1(4)(a), (b), or (e) of the *Federal Courts Act*, RSC 1985, c F-7. Specifically, s 66 of the Act states as follows:

> **66** Every order and decision of the Commissioner is final and shall not be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(a), (b) or (e) of that Act.

[41] Further, s 67 deals with a five-year review of the Act:

> **67 (1)** Within five years after this section comes into force, a comprehensive review of the provisions and operation of this Act shall be undertaken by such committee of the Senate, of the House of Commons or of both Houses of Parliament as may be designated or established by the Senate or the House of Commons, or by both Houses of Parliament, as the case may be, for that purpose.
>
> **(2)** The committee referred to in subsection (1) shall, within a year after a review is undertaken pursuant to that subsection or within such further time as may be authorized by the Senate, the House of Commons or both Houses of Parliament, as the case may be, submit a report on the review to Parliament, including a statement of any changes that the committee recommends.

**Codes and Guidelines**

[42] In addition to the above legislation, there is a code and a guideline that are relevant to this matter.

*Conflict of Interest Code for Members of the House of Commons*

[43] *The Conflict of Interest Code for Members of the House of Commons* ("Members' Code") is appended to the Standing Orders of the House of Commons and applies to all elected Members of Parliament. A fact sheet issued by the Office of the Ethics Commission states that the Commission administers the *Conflict of Interest Act* and the Members' Code, and that the two regimes seek to prevent conflicts between private interests and public duties by appointed and elected officials. The Members' Code prohibits Members from using their public office to further their private interests or those of their family, or from improperly furthering the private interests of another person or entity.

*Ethical and Political Activity Guidelines for Public Officer Holders*

[44] A document entitled *Open and Accountable Government 2015* is published on the Prime Minister's webpage and by the Privy Council Office. The document addresses Ministerial responsibility and accountability; portfolio responsibilities and support; Ministerial relations with Parliament; and standards of conduct, appending related Annexes A to J. Annex A contains the *Ethical and Political Activity Guidelines for Public Office Holders* ("EPA Guidelines"). Part I of Annex A, Ethical Guidelines and Statutory Standards of Conduct, applies to all public office holders as defined in the *Conflict of Interest Act*, and includes, with respect to ethical standards, that public office holders shall act with honesty and uphold the highest ethical standards so that public confidence and trust in the integrity, objectivity and impartiality of the government are conserved and enhanced. As to public scrutiny, Part I states that public office holders have an obligation to perform their official duties and arrange their private affairs in a manner that will bear the closest public scrutiny. Further, in decision making, public office holders, in fulfilling their official duties and functions, shall make decisions in the public interest and with regard to the merits of each case. Part I also states that public office holders are subject to the requirements of the *Conflict of Interest Act* and that before appointment a public office holder shall certify that he or she will comply with the EPA Guidelines, which are a term and condition of appointment.

**Issues**

[45] The Applicant submits that the main issue before the Court is procedural fairness during the appointment process and identifies five issues raised by the application.

[46] In my view, the issues arising in this application can be framed as follows:

1. Does the Applicant have standing to bring the application;

2. Did the GIC fail to consult with the leaders of every recognized party in the House of Commons as required by s 81(1) the *Parliament of Canada Act*;

3. Did the GIC contravene the *Conflict of Interest Act* thereby bringing the validity of the appointment into question;

4. Does the common law concerning reasonable apprehension of bias apply and, if so, did it preclude the GIC from making the appointment; and

5. Did the Applicant have a legitimate expectation that the GIC would recuse itself from the appointment process?

**Standard of Review**

[47] The Federal Court of Appeal in *Tsleil-Waututh Nation v Canada*, 2018 FCA 153 ("*Tsleil-Waututh*") noted its prior decision *Gitxaala Nation v Canada*, 2016 FCA 187 in which it held that the standard of review must be assessed in light of relevant legislative provisions, the structure of the legislation and the overall purpose of the legislation (*Tsleil-Waututh* at para 204). In assessing the administrative law component of a decision of the GIC, the Federal Court of Appeal in *Tsleil-Waututh* applied the reasonableness standard, concluding that the Court was required to be satisfied that the decision of the GIC was lawful, reasonable and constitutionally valid. To be lawful and reasonable, the GIC must comply with the purview and rational of the legislative scheme (also see *Globalive Wireless Management Corp. v Public Mobile Inc.*, 2011 FCA 194, at para 31).

[48] In my view, this is also analogous to circumstances where an administrative tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. There it is presumed that questions of statutory interpretation are subject to deference on judicial review (*Alberta Teachers*, 2011 SCC 61 at para 30; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 22). Here, the GIC is interpreting s 81(1) of the *Parliament of Canada Act*, the statutory procedural requirements necessary to appoint an Officer of Parliament, which is concerned with the internal affairs of the legislature. On the same analysis, this attracts the standard of review of reasonableness.

[49] Whether the GIC correctly applied the legislation is really a question of statutory interpretation (*Globalive* at para 34). Although in *Globalive* the Federal Court of Appeal found there may be some question as to whether this attracts the reasonableness or correctness standard (*Globalive* at para 35), in my view, considered in the context of this legislative regime, which is discussed below, and applying the *Dunsmuir* factors, the reasonableness standard applies to the GIC's interpretation of s 81(1) of the *Parliament of Canada Act*.

[50] To the extent that the Applicant's arguments are based on a breach of the duty of procedural fairness, it is well-established that issues of procedural fairness are reviewable on the correctness standard *(Mission Institute v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). Issue 1: Does the Applicant have standing to bring the application?

**Issue 1: Does the Applicant have standing to bring the application?**

[51] The Applicant is not directly affected by the issues it raises in this application. Therefore, it may only bring the application if this Court exercises its discretion to grant it public interest standing.

[52] The test for public interest standing is not in dispute. The parties agree that the test is set out by the Supreme Court of Canada in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 ("*Downtown Eastside*").

[53] There the Supreme Court stated that the traditional approach of the courts had been to limit standing to persons whose private rights were at stake or who were specially affected by the issue. However, in public law cases, such as the one before it, those limitations have been relaxed and a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations, has now been taken.

[54] The Court acknowledged some of the traditional concerns underlying limitations on standing, including the need to preserve scarce judicial resources, and the screening out of mere busy bodies, as well as ensuring that there are contending points of view before the court, and ensuring that the proper role of the courts and their constitutional relationship to other branches of government is respected by requiring that the proceeding raise a justiciable issue – being a question that is appropriate for judicial determination (*Downtown Eastside* at paras 27–30). The principle of legality, which holds that state action should conform to the *Constitution* and to

statutory authority and that there must be practical and effective ways to challenge the legality of state action, also informs the standing inquiry (*Downtown Eastside* at paras 31, 33).

[55] In exercising the discretion to grant public interest standing, three factors must be considered:

> (i) whether there is a serious justiciable issue raised;
>
> (ii) whether the plaintiff has a real stake or a genuine interest in it; and
>
> (iii) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.

[56] A party seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred (*Downtown Eastside* at para 37).

[57] These factors should not be viewed as a checklist, but rather are interrelated considerations to be assessed and weighed cumulatively, not individually, in light of the underlying purposes of limiting standing (*Downtown Eastside* at para 20). They are to be applied in a flexible and generous manner that best serves those underlying purposes (*Downtown Eastside* at paras 20, 35, 36). In determining whether to grant standing in public law cases, courts should exercise their discretion and balance the underlying rationale of restricting standing with the important role of the Court in assessing the legality of government action. "At the root of the law of standing is the need to strike a balance 'between ensuring access to the Courts and

preserving judicial resources': *Canadian Council of Churches*, [1992] 1 SCR 236 at p 252" (*Downtown Eastside* at para 23).

[58] To constitute a serious justiciable issue, the question raised must be a substantial constitutional issue or an important one, and the claim must be far from frivolous, although the courts should not examine the merits of the case other than in a preliminary manner (*Downtown Eastside* at para 42). By insisting on the existence of a justiciable issue, courts ensure that their exercise of discretion with respect to standing is consistent with the court staying within the bounds of its proper constitutional role. Where there is an issue that is appropriate for judicial determination, the court should not decline to determine it on the ground that, because of its policy context or implications, it is better left for review and determination by the legislative or executive branches of government (*Downtown Eastside* at para 40). Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of determining standing (*Downtown Eastside* at para 42).

[59] The second factor entails a consideration of whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise. A genuine interest has been found to have been established where the applicant had the highest possible reputation and demonstrated a real and continuing interest in the issue at hand (*Downtown Eastside* at para 43 referencing *Council of Churches* at p 254).

[60] Finally, at the third stage, a court should take a purposive approach and consider "whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality". This consideration calls for a flexible, discretionary approach and there is no binary yes or no analysis possible. Whether a means of proceeding is reasonable, effective, and will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances (*Downtown Eastside* at para 50). The Supreme Court of Canada noted a list of illustrative, but not exhaustive, factors to consider at the third stage: the plaintiff's capacity to bring forward a claim, whether the case is of public interest, whether there are realistic alternative means favouring a more efficient and effective use of judicial resources, and the potential impact of granting public interest standing on others who are equally or more directly affected (*Downtown Eastside* at para 51). In short, whether the proposed matter is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court (*Downtown Eastside* at para 52).

[61] In this matter, the Applicant submits that it meets all three branches of the test for public interest standing. Specifically, that the Application raises serious justiciable issues concerning compliance by key public officials with statutes that govern ethical conduct by members of the executive (MFL at para 28). These issues are the failure to meaningfully consult with the leaders of each recognized party in the House of Commons on the selection of the Ethics Commissioner, violation of *Conflict of Interest Act*, and the failure of members of the GIC to recuse themselves

from the decision-making process contrary to the requirements of the *Conflict of Interest Act* and the common law. These matters raise issues of public confidence in the integrity of government.

[62] Further, that the Applicant has a genuine interest in the proceeding given its mandate to advocate for democratic reform, citizen participation and ethical behaviour in government; by actively participating in public-policy making and legislative processes in matters relating to government accountability; its strong degree of involvement in the development and enforcement of the Parliamentary ethical obligations; and its active pursuit of government accountability before the courts.

[63] As to the third factor, the Applicant submits that it is likely the only interested party with the experience and ability to bring this challenge. There is no other directly affected party who could launch an application for judicial review, and that no other reasonable and effective means exists to bring this matter before the court.

[64] Conversely, the Respondent submits that the Applicant fails to meet the three-part test for public interest standing. I note here that the Respondent deals with justiciability both in the context of standing and as a stand-alone issue. It submits that this case raises issues that are neither justiciable nor serious. They are not justiciable because any concern relating to the process of appointment of Mr. Dion is for the domain of Parliament, not the courts. As for allegations of a conflict of interest by Ministers, it is for the Commissioner to address these in his role of administering and enforcing the *Conflict of Interest Act*. Here Parliament has reserved for itself the sole enforcement of matters in relation to the conflicts of interest of public office

holders (*Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1982] 2 SCR 49 ("*Auditor General*"). The issues raised are also not serious as they lack merit (RMFL at paras 19–20). Additionally, the Court should consider Parliament's intention in s 66 of the *Conflict of Interest Act*, to limit court review of issues of statutory interpretation by the Commissioner. The Court should not undermine Parliament's intent by liberally granting judicial review.

[65] Nor does the Applicant have a genuine interest because it has no real stake in the proceeding and it is not engaged with the issues that it raises. The Commissioner is entitled to commence an investigation, but no complaints with respect to the appointment of Mr. Dion were made by a Member of Parliament, nor did the Commissioner commence an investigation of his own accord. The conflict of interest regime is an alternative means of addressing the concerns raised by Applicant, which has never been invoked and cannot be ignored when deciding whether to grant standing. The Applicant is not entitled to rely on the *Conflict of Interest Act* to commence an independent review of a matter that is left to the exclusive jurisdiction of the Commissioner.

[66] Finally, the Respondent submits that this application is not a reasonable and effective means of bringing the issue before the Court because there are alternative parliamentary procedures for resolving the issues this Application raises. In essence, the Applicant seeks to have the Court dictate a different process for an appointment of an Officer of Parliament, an appointment for which Parliament has already created a process. There are accountability

measures built into the *Conflict of Interest Act* and the *Parliament of Canada Act* that do not involve the Courts and must be considered when assessing standing.

*Analysis*

[67] As to the first factor of the test for public interest standing, I am satisfied that the issues raised by the Applicant are serious. They allege a failure to comply with the s 81(1) requirement under the *Parliament of Canada Act* to consult with the leaders of every recognized party in the House of Commons prior to appointment of the Ethics Commissioner. Further, that the Prime Minister and the Minister of Finance were both under examination by the previous Ethics Commissioner during the time that the appointment process for a new Commissioner was in progress and that both failed to file declarations of recusal as required by s 25(1) of the *Conflict of Interest Act*. Additionally, by participating in the decision-making process in which he had an opportunity to further his private interest, Minister Morneau also violated ss 4 and 6(1) of the *Conflict of Interest Act*. The Applicant also asserts that because the other members of the GIC had an opportunity to further their real private interest of keeping their jobs as Ministers by protecting the private interest of the Prime Minister at whose pleasure they serve, and by controlling the selection process, they too violated ss 4 and 6(1) of the *Conflict of Interest Act*. Given this, and the importance of public confidence in integrity of government, in my view, these allegations raise serious issues.

[68] The Respondent asserts that because the allegations lack merit, they are not serious. However, as stated by the Supreme Court in *Downtown Eastside*, when determining standing, the courts should not examine the merits of the case other than in a preliminary manner. Here, if the

Applicant's claim that the GIC failed to consult is valid, this breach of the appointment requirement in s 81(1) of the *Parliament of Canada Act* could potentially bring the validity of Mr. Dion's appointment as Ethics Commissioner into question. This is sufficient to ground a serious issue without the need of closely examining every other allegation (*Downtown Eastside* at para 42).

[69] More difficult is the question of whether the questions raised are justiciable. I have below, when considering this matter on the merits, more fully addressed the question of whether certain of the matters raised by the Applicant are justiciable. For the purpose of standing, I note that in its Notice of Application the Applicant claims that it seeks to have the decision quashed because Cabinet failed to consult with the leader of every recognized party in the House of Commons, as required by s 81(1) of the *Parliament of Canada Act*, before the GIC made the appointment of Commissioner Dion. It seems clear that a failure by the GIC to comply with a statutory requirement would be justiciable. However, in its written representations, the Applicant takes the position that although the *Parliament of Canada Act* does not set out consultation criteria, applying a broad and purposive interpretation of the Act that gives effect to its objects and purposes, this Court should find that it was not sufficient to satisfy s 81(1) that there was some level of consultation, rather that the consultation must be meaningful. Based on this view, the Applicant asserts that the level of consultation under the Act was insufficient. In my view, this raises an issue of statutory interpretation, which is also justiciable. However, the question of the sufficiency of the selection process beyond the statutory precondition for consultation on the nominee for appointment and, similarly, whether there were breaches of the

*Conflict of Interest Act*, may not be justiciable issues. I have addressed this concern below in the assessment of the merits.

[70] As to the second factor, while I agree with the Respondent that the mere fact that Democracy Watch has previously been granted public interest standing is not sufficient to establish that it has the requisite real stake or a genuine interest in the matter it now seeks to bring before this Court, I am satisfied that the evidence establishes that the Applicant has a genuine interest in and that it is engaged with the appointment and the role of the Ethics Commissioner. In support of this application, the Applicant filed an affidavit of Mr. Duff Conacher, Coordinator of Democracy Watch, sworn on March 1, 2018 ("Conacher Affidavit"). Amongst other things, this affidavit describes Democracy Watch as a not-for-profit organization founded in 1993, which advocates for democratic reform, citizenship participation in public affairs, government accountability and ethics. It states that in pursuant of its mandate, Democracy Watch has participated in policy-making and legislative processes in matters relating to government accountability. Its participation includes making submissions and appearances before Parliamentary committees in legislative proceedings leading to the enactment or amendment of measures relating to government ethics, including the creation of the Ethics Commissioner position and the enactment of the *Conflict of Interest Act*. It has also initiated more than 50 government ethics-related petitions with the Ethics Commissioner and Lobbying Commissioner and their predecessors, and has brought proceedings concerning those Commissioners in this Court. I conclude that the content of the Conacher Affidavit is sufficient to meet the second branch of the test.

[71] As to whether the application is a reasonable and effective way to bring the matter before the Court, the Applicant has the resources and knowledge to bring the matter forward. As framed, the issues it raises – statutory compliance, breach of procedural fairness and conflicts of interest – are matters of public interest in that they are related the integrity of government. However, as will be discussed below, it is not clear to me that the Applicant is the only party who can bring this matter forward as I see no reason why the leaders of the other recognized parties, who are the entities who are required to be consulted, could not do so if they were of the view that s 81(1) of the *Parliament of Canada Act* had not been complied with. If a duty of procedural fairness is owed, it is owed to them. That said, it is at least arguable that the Applicant brings a different and useful perspective to the issues. However, there is also a concern as to realistic alternatives available for the resolution of the issues the Applicant raises (*Downtown Eastside* at para 50). Specifically, the available processes set out under the *Conflict of Interest Act*, and the parliamentary accountability mechanisms in place under the *Parliament of Canada Act*. Where relevant, I have addressed these alternatives in deciding the issues on the merits.

[72] Viewed in whole, and balancing these factors, I have elected to exercise my discretion and grant the Applicant public interest standing. However, as will be seen below, there is a live issue as to the justiciability of aspects of the Applicant's claim, which I have addressed in the context of the merits of the issues raised.

**Issue 2: Did the GIC fail to consult with the leaders of every recognized party in the House of Commons as required by s 81(1) the *Parliament of Canada Act*?**

[73] The Applicant states in its Notice of Application that it seeks to have the decision appointing Commissioner Dion quashed because Cabinet failed to consult with the leaders of every recognized party in the House of Commons as required by s 81(1) of the *Parliament of Canada Act*, before the GIC made the appointment of Commissioner Dion.

[74] However, in my view, it is clear from the record that there was consultation. The July letters from Minister Chagger to the leaders of the Conservative and NDP parties advised of the government's ongoing process to select a new Ethics Commissioner and of the existence of the Notice of Appointment Opportunity, which they were encouraged to share with any interested Canadians. It is true that the affidavit of Levente-Adrian Balint, legal assistant with the Department of Justice, sworn on March 26, 2018 describes the July 2017 letters as letters of engagement in the selection process, which she states were not required by statute. However, Minister Chagger's December 5, 2017 letter was clearly stated to be written in accordance with the s 81(1) requirement, it proposed the nomination of Mr. Dion, provided his professional credentials, and asked for any thoughts on the nominations by December 11, 2017. Additionally, Mr. Dion appeared before the all-party ETHI Committee on December 12, 2017, which recommended his appointment.

[75] In its written representations, the Applicant takes a different approach, challenging the sufficiency of consultation. Specifically, that although the *Parliament of Canada Act* does not set out consultation criteria, applying a broad and purposive interpretation of the Act that gives

effect to its objects and purposes, this Court should find that it was not sufficient to satisfy s 81(1) that there was some level of consultation, rather that the consultation must be meaningful. The Applicant submits that this "duty of consultation" may properly be regarded as an aspect of procedural fairness. And, as the Act is silent on the content of that duty, resort must be had to the common law principles of procedural fairness. The Court can assess what is required to satisfy meaningful consultation by applying the factors articulated in *Baker v Canada (Minister of Citizenship and Immigration*, [1999] 2 SCR 817 ("*Baker*"). The Applicant does not analyse these factors but it submits that, given the intent of Parliament and the critical parliamentary functions performed by the Ethics Commissoner, a very high degree of procedural fairness is required. At best, however, the GIC engaged in cursory consultation. The GIC therefore failed to fulfill its statutory duty to consult by failing to engage in meaningful consultation.

[76] Conversely, the Respondent argues that it is not the *Baker* factors that determine the level of consultation required by s 81(1) of the *Parliament of Canada Act*. Rather, to determine this issue, the Court must apply the principles of statutory interpretation (*Lakeland College*, 1998 ABCA 221 at paras 33–35.)

[77] In my view, the Applicant's submissions somewhat conflate the statutory requirement with the common law duty of fairness. Here the requirement to consult is a statutory requirement. Because the *Parliament of Canada Act* does not define what comprises "consultation", the principles of statutory interpretation can be applied to determine if, in the context of this matter, the consultation as required by the Act has occurred. This, implicitly,

speaks to the required level of consultation. Another question is whether the duty of procedural fairness applies to the GIC appointment decision and, if so, the content of any duty of procedural fairness owed to the Applicant in these circumstances.

[78] The Supreme Court of Canada has held that the preferred approach to statutory interpretation is that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at p 41 quoting Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983).

[79] For the reasons below, in applying that analysis, I am unable to conclude that s 81(1) requires a level of consultation such that the steps taken in appointing the Ethics Commissioner were insufficient to meet that statutory requirement.

[80] First, as to the intention of Parliament, the Applicant submits that Parliament expressed its intention as to consultation in the House of Commons Standing Committee on Procedure and House Affairs, *Report 27 – Code of Conduct* (10 April 2003), attached as Exhibit C of the Conacher Affidavit, in which the Committee reported on Bill C-34, the precursor to Bill C-4, which created the predecessors to the Conflict of Interest and Ethics Commissioner. However, in my view, that report provides little to illustrate an intention of Parliament as to the scope of consultation. Rather, it discussed how the Ethics Commissioner should be appointed, his or her tenure and various other matters. It also stated that the majority of the Committee agreed that the

proposed manner of appointment in the draft bill then under discussion did not allow Members a meaningful role, which was followed by the statement that:

> We have discussed various mechanisms for involving all Members of the House in this decision. It is clear to the Committee that any appointee must have widespread support from this House if he or she is to carry out the duties of the position effectively. We recommend that any bill provide for a consultation process with the leaders if the recognized parties in the House, to be followed by a confirming vote in the Chamber. We intend to recommend that Standing Order 111.1 be amended to require a nominee to appear before a House committee before that vote is held. We also recommend that the models now used for appointing the existing officers of Parliament be carefully considered.

[81] Those recommendations appear to be largely reflected in what is currently s 81(1) of the *Parliament of Canada Act*. If anything, this report suggests that consultation with the other leaders was included in response to the concerns raised at that time, and in recognition of the fact that the Ethics Commissioner deals with issues that pertain not just to the Members of Parliament who are members of the governing party, but to all Members.

[82] The Applicant also points to parliamentary debates relating to Bill C-34. However, these debates acknowledged that the meaning of the word consult is ambiguous, that it does not mean participation or approval, and that it could be read to mean a very low level of consultation (see for example: House of Commons, *Debates* 37:2, May 2, 2003 (Official Report: Hansard) at pp 5745, 5765–5766 (*Debate* 37:2)). These debates also show that the legislature was aware of alternative selection processes that involve greater participation from Members outside of the governing party (see for example *Debate* 37:2 at pp 5765–5766, 5769.) Yet, having considered this, as enacted, the *Parliament of Canada Act* only requires consultation as described and does not put any other procedural requirements or criteria in place. And while the Conacher Affidavit

attaches as exhibits many news reports and portions of Parliamentary debates in which NDP and Conservative Members of Parliament express discontent with the current selection and appointment process, this does not speak to the intent of the legislators when the *Parliament of Canada Act* was effected. In short, none of the evidence submitted by the Applicant demonstrates an intent by the legislature that a level of consultation, beyond that which it stipulated in s 81(1), was intended.

[83] As to the objects and purposes of the *Parliament of Canada Act*, none are stated in that legislation and, therefore, this does not inform an intention of Parliament concerning the level of consultation required or otherwise assist in interpreting s 81(1). However, s 87 does state that the Commissioner shall, in relation to public office holders, perform the duties and functions assigned to the Commissioner under the *Conflict of Interest Act*. The purposes of that legislation are stated to be: to establish clear conflict of interest rules, to minimize the possibility of conflicts and provide for their resolution should they arise, and to permit the Commissioner to determine what measures are needed to avoid conflicts and whether a contravention has occurred. These purposes speak only to the role of the Ethics Commissioner, and are not concerned with his or her appointment, nor do they reflect legislative intent as to consultation in that regard.

[84] The grammatical and ordinary meaning of the word "consultation" is defined in Katherine Barber ed, *Canadian Oxford Dictionary*, 2nd ed (Don Mills, Ontario: Oxford University Press, 2004) *sub verbo* "consult", as a meeting arranged to consult or the act or instance of consulting. "Consult" is defined as to seek information or advice; to refer to a person

for advice, an opinion; to seek permission or approval for a proposed action; or, to take into account or to consider.

[85] In this matter, Minister Chagger gave notice of the commencement of the appointment process and invited the other leaders to share this with potentially interested persons. There is no evidence that either leader proposed candidates in response. The December 5, 2017, letter identified Mr. Dion as the nominee proposed for the position as a result of that process. While the time period allocated for response was short, six days, an opportunity for response was provided. There is no evidence that either leader responded with concerns as to the proposed nominee, although Mr. Caron did express concerns with the process. The ETHI Committee hearings afforded those leaders, or their representatives, with an opportunity to address with the nominee any concerns that they may have had with his candidacy, such as qualifications or impartiality, which opportunity was availed of. Indeed, the very concern raised in this application by the Applicant, the ongoing investigations by the Ethics Commissioner, was directly raised with Mr. Dion by Mr. Kent during the ETHI Committee hearing.

[86] The Applicant also points to excerpts of debates in the House of Commons on December 12, 2017, during which Caron and Cullen Members of the NDP expressed dissatisfaction with the selection process whereby only the name of the nominee was provided, and asserted that this did not amount to meaningful consultation. The Prime Minister responded including stating that it was important that officers of Parliament have the confidence of the House and, if the officer appointed did not have the confidence of the NDP, that it should say so. A similar debate was held on December 13, 2017. As seen from the December 12, 2017 ETHI

Committee hearing in which all parties had an opportunity to put questions and concerns to Mr. Dion, Mr. Cullen's concern was that the other parties were not engaged in the selection process for the nominee, either in composition of the members of the selection committee or in reviewing the candidates who applied. In light of these concerns, Mr. Cullen abstained from voting on the motion nominating Mr. Dion for appointment as Ethics Commissioner. Mr. Kent, committee member for the Conservatives, also took issue with the selection process and asserted lack of meaningful consultation in that regard, but separated this from his party's belief that a vote should be held and that Mr. Dion should be recommended for a vote in the House of Commons for appointment.

[87] Two things arise from these debate excerpts. First, the expressed concerns with consultation were actually aimed at the selection process – the constitution of the selection committee and the list of candidates – rather than with consultation as to the appointment of the proposed nominee. Second, while those selection process concerns were raised in the House of Commons, neither of the leaders of the other parties, to whom a statutory obligation of consultation is owed, sought judicial review of the appointment of Mr. Dion on the basis of inadequate consultation or otherwise.

[88] In conclusion, considered in context and in the overall scheme of the Act, the intent or purpose of the prescribed consultation is to afford Members, who are not part of the governing party, an opportunity to speak to the appointment of the nominated appointee. That is, to the suitability of the candidate and to address any concerns they may have as to qualification, impartiality or otherwise, as was done in this matter. This is because all Members must have

confidence in the Ethics Commissioner as an Officer of Parliament. In my view, had the legislator's intent been to require consultation on the appointee selection process, as opposed to consultation concerning the nominated appointee, this would be reflected in the *Parliament of Canada Act* or would be otherwise discernable from its context and objects, which I do not find to be the case.

[89] Accordingly, while the Applicant does not agree with the consultation process, including its timing and the lack of involvement of the other parties in the nominee selection process, in interpreting s 81(1), I am not persuaded that the GIC's interpretation of the required level of consultation as to the appointment was unreasonable. And, therefore, I do not conclude that the consultation undertaken failed to meet the statutory requirement.

[90] I would add that if the leaders of the other recognized parties in the House of Commons did have concerns as to the suitability of Mr. Dion, then they would presumably have caused them to be raised at the ETHI Committee hearing. They then would have raised these substantive concerns in the subsequent debate on the appointment held in the House of Commons. They did not do so but, had that been the course of events, "that the executive though the control of a House of Commons majority may in practice dictate the position the House of Commons takes is not cognizable to the Court" (*Auditor General* at p 103).

[91] The Applicant also submits that in other contexts, the courts have been prepared to grant remedies for failure of consultation where obliged by statute or the common law. In this regard, it refers to *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 ("*CUPE*"), *Bezaire v Windsor*

*Roman Catholic Separate School Board* (1992), 9 OR (3d) 737 (ONSC Div Crt) ("*Bezaire*"), and *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 ("*Haida*").

[92] In my opinion, what these cases demonstrate is that the duty to consult is contextual and fact specific. The factual circumstances or the scheme of the relevant Act, here the *Parliament of Canada Act*, determine whether, and what, remedy may be owed in any given circumstances. Thus, the mere fact that courts were prepared to grant a remedy in the cases that the Applicant cites has limited relevance. Nor does the Applicant elaborate on this point.

[93] I would note, however, that in *CUPE* the Supreme Court of Canada was tasked with reviewing a Minister's appointment of the third member of an arbitration panel, pursuant to s 6(5) of the Ontario *Hospital Labour Disputes Arbitration Act* ("HLDAA"). The Minister appointed four retired judges and the union complained that the judges were not appointed by mutual agreement nor from an agreed list, that it had not been consulted about this this change of process, and that the judges lacked expertise and independence from government. The union sought declarations that the Minister's actions denied natural justice and lacked institutional independence and impartiality. The Supreme Court held that the Minister was not required to proceed with the selection of by way of mutual agreement, nor from a roster. Nor were retired judges reasonably seen as biased against labour. However, the Minister was required by the HLDAA, properly interpreted, to select arbitrators from candidates who were qualified not only by their impartiality, but by their expertise. In that regard, the Minister, as a matter of law, was required to exercise his power of appointment in a manner that was consistent with the purpose and objects of the HLDAA, fundamental of which was to provide an adequate substitute for

strikes and lock outs, which required that the parties perceive the compulsory arbitration as neutral and credible.

[94] The Supreme Court also found, if it were assumed that a duty to consult existed with respect to a change in the appointments process, that the Minister had satisfied any duty to consult with the unions as there had been notice and an opportunity to respond. As to remedy, it varied the order of the court below to declare that the Minister was required, in his exercise of his power of appointment under s 6(5), to be satisfied that prospective chairpersons were not only independent and impartial but possessed appropriate labour relations expertise and were generally recognized in the labour relations community as generally acceptable to both management and labour.

[95] In *CUPE*, the Supreme Court stated that given the role and function of the HLDAA, as confirmed by its legislative history, it had "looked in vain" for some indication in the record that the Minister was alive to the labour relations requirements. Instead, the evidence was that the Minister had rejected both expertise and broad acceptability as qualifications for arbitrators. The Court concluded that this approach was contrary to the HLDAA process being perceived as neutral and credible and, given that the legislation was intended to operate to secure industrial peace, it was unreasonable. As to remedy, as the judicial review did not focus on the circumstances of individual appointments, the Supreme Court declined to give effect to the union's request to set aside the Minister's appointments.

[96] Thus, CUPE is factually distinct from the matter before me. There is no suggestion in this matter that the GIC refused to adopt qualifications for the position of the Ethics Commissioner that were consistent with his role as set out in the *Parliament of Canada Act* or the *Conflict of Interest Act*. Indeed, s 81(2) of the *Parliament of Canada Act* sets out the qualifications required to be appointed as Ethics Commissioner and there is no suggestion that the nominated appointee failed to meet those qualifications. Additionally, s 6(5) of the HLDAA, unlike s 81(1) of the *Parliament of Canada Act*, did not speak to consultation. Further, here there is little in the scheme or purpose of the *Parliament of Canada Act* that would assist in construing the intent of Parliament as to the process or level of consultation required by s 81(1). Moreover, the s 81(1) consultation requirement serves to ensure that the other recognized party leaders had an opportunity to raise any concerns about the nominee, which would include concerns as to impartiality. Viewed in whole, *CUPE* does not demonstrate a need for similar declaratory remedy in this case.

[97] Nor does *Bezaire* assist the Applicant. There the Ontario Divisional Court concluded, in the context of a school closure, that failure to follow a consultation procedure required by policy resulted in a breach of procedural fairness. In this matter, and unlike in *Bezaire*, there is no guideline or policy detailing the specifics of the appointment process beyond s 81(1) itself. Finally, in *Haida*, the Supreme Court of Canada addressed the spectrum of consultation that may be required under s 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Given the constitutional source of the duty to consult owed to First Nations, that jurisprudence has limited relevance here.

[98] At the end of the day, in the circumstances of this matter, I am not persuaded that there was a failure to consult as required by s 81(1) of the *Parliament of Canada Act*. While the consultation for the appointment of the Ethics Commissioner was not extensive, I agree with the Respondent that it must be viewed in the context of the *Parliament of Canada Act*. The consultation at issue occurred within the parliamentary system and with respect to the nomination of an Officer of Parliament, who is accountable to Parliament.

[99] Moreover, to the extent that the Applicant's challenge to the appointment process goes beyond the statutorily mandated consultation requirement, in my view this is not a justiciable issue. It is for Parliament to decide that process. Generally a court will not involve itself in the review of the actions or decisions of the executive or legislative branches where the subject matter of the dispute is either inappropriate for judicial involvement or where the court lacks the capacity to properly resolve it (*Friends of the Earth – Les Ami(e)s de la Terre v Canada (Governor in Council)*, 2008 FC 1183 at para 25 ("*Friends of the Earth*")). For the Court to dictate a selection process to Parliament absent clear statutory authority would be inappropriate and would overstep the Court's constitutional role.

[100] The Applicant also submits that the duty of consultation is properly regarded as an aspect of procedural fairness, thus permitting the Court to rely on the common law *Baker* factors to determine the content of that duty of fairness. The Applicant does not refer to any case law to support that a statutory consultation requirement of this nature attracts an analysis of the content of the statutory requirement on this basis.

[101] However, in considering this submission, I note that in *Baker* the Supreme Court of Canada held that the fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the duty of fairness (citing *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at p 653 (*Cardinal*)). There, the Supreme Court stated at p. 643:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.

[102] *Baker* also found that the existence of a duty of fairness does not determine what requirements will be applicable in a given set of circumstances as "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at p 682). The duty of fairness is flexible and variable and "depends on an appreciation of the context of the particular statute and the rights affected" (*Baker* at para 22).

[103] In these circumstances, given the nature of the statute and the wording of s 81(1) of the *Parliament of Canada Act*, any common law duty of procedural fairness concerning consultation about the appointment of an Ethics Commissioner is owed to the leaders of every recognized party in the House of Commons and is owed within the context of the parliamentary process for the appointment of an Officer of Parliament. Those leaders are the elected representatives of the public. The Applicant offers no supporting jurisprudence and I am not persuaded that any such duty can be extended to the Applicant on the basis of its public interest standing, the fact of which cannot afford the Applicant or the public whose interests it says that it represents, a

participatory role in the parliamentary appointment process (see *P&S Holdings Ltd v Canada* 2017 FCA 41).

**Issue 3: Did the GIC contravene the *Conflict of Interest Act* thereby bringing the validity of the appointment into question?**

[104] The Applicant provides a history of the *Conflict of Interest Act* and describes its objects and purposes. It submits that the *Conflict of Interest Act* is one of the critical pieces of a regime designed to maintain ethical conduct of government. In that regard, the Act is a companion to the *Lobbying Act* and the *Criminal Code of Canada* provisions dealing with the most egregious of contraventions such as corruption and influence peddling. Also part of this regime are the *1985 Conflict of Interest and Post-Employment Code for Public Office Holders*, the Members Code, and the Lobbyists' Code of Conduct. Referencing the *Commission of Inquiry into Certain Allegations respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney*, which, in turn, referenced the Supreme Court of Canada's decision in *R v Hinchey*, [1996] 3 SCR 1128, the Applicant asserts that given the strong public interest in maintaining the integrity of government, demanding standards of conduct must be imposed on public office holders governed by ethics legislation.

[105] The Applicant also submits that conflicts of interest may be real or apparent and that the test for a reasonable apprehension of bias is as set out in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at p 394, as modified by the *Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens*, May 15, 1986, being that an apparent conflict of interest exists when there is a

reasonable apprehension, which reasonably well informed persons could properly have, that a conflict of interest exists. According to the Applicant, this definition is embedded in the *Conflict of Interest Act.* Its regime and the broad and comprehensive language used in its operative provisions make it clear that it was intended to apply to both real and apparent conflicts of interest.

[106] Although the Applicant makes many submissions, including proposing alternate selection processes that it views as preferable and available to the GIC, the crux of its position is that the Prime Minister and Minister Morneau were under investigation by the former Ethics Commissioner during the selection process for the new Ethics Commissioner. Because they were under investigation, they had a real private interest as defined in s 4 of the *Conflict of Interest Act*, in the (new) Ethics Commissioner's investigation and ruling. The Applicant submits that the Prime Minister admitted his real conflict of interest when he issued a public statement recusing himself from that process. Further, that there is no record that Minister Morneau recused himself and, by participating in the appointment process, he therefore violated ss 6(1), 4 and 21 of the *Conflict of Interest Act*. Further, the other members of the GIC had an opportunity to further their real private interests of keeping their jobs as Ministers by protecting the private interest of the Prime Minster, at whose pleasure they serve, through their control over and participation in the selection process. In this way, all of the members of the GIC violated s 4 and s 6(1) of the *Conflict of Interest Act*. Even if the GIC only had an apparent conflict of interest, the same conclusion must be reached. The selection process lacked sufficient safeguards against a biased decision that would further the interests of the GIC, particularly the Prime Minister and Minister Morneau. The Applicant submits that the GIC should have

recognized its bias and conflict of interest and removed itself from the selection process that developed shortlists of qualified persons, as it has done in the nomination for judges, the RCMP Commissioner and senators.

[107] As a starting point in addressing this submission, I note that it is important to recall that the role of this Court is to assess the legality of a decision, in this case, the decision of the GIC to appoint Mr. Dion as the Ethics Commissioner. It is not the role of this Court to make a determination of whether the Prime Minister or Minister Morneau were in conflict of interest positions, and thereby in breach of s 6(1), by participating in the appointment decision, or by failing to recuse themselves pursuant to s 21. I agree with the Respondent that that role has been entrusted exclusively to the Ethics Commissioner by Parliament. In this matter, there is no evidence of any complaints having been filed by any Members of Parliament, with the Commissioner, concerning the decision to nominate Mr. Dion, which is perhaps unsurprising given that the motion before the all-party ETHI Committee recommending the appointment was passed. Thus, the *Conflict of Interest Act* has never been engaged either by Members of Parliament or by the Commissioner of his own volition. Further, had there been such a request for an examination, and had Commissioner Dion been of the view that, to avoid any apparent conflict of interest or reasonable apprehension of bias arising from that the fact that he had been appointed by the government whose members' conduct he was to examine, then the Commissioner could have authorized another person to perform his investigative function pursuant to s 89 of the *Parliament of Canada Act*. That is to say, if needed, a safeguard exists within the *Parliament of Canada Act* to address the Applicant's concern.

[108] While I recognize that it is only Members of the Senate or the House of Commons who may request the Commissioner to examine a matter (*Conflict of Interest Act* at s 44(1)) and that, with respect to such a request from a Parliamentarian, information from the public can be considered only if it is brought to the attention of the Commissioner by that Member (s 44(4)), there is nothing to prevent members of the public from directly providing such information to the Commissioner and requesting, based on this, that he or she examine the matter on his or her own volition (s 45(1)). That course of action was taken by Democracy Watch in this matter by way of its letter to the Commissioner dated October 25, 2017 seeking a ruling on whether Minister Morneau violated s 25(1) of the *Conflict of Interest Act*. That letter was acknowledged by a senior investigator by letter dated October 26, 2017, which advised that the matter would be brought to the Commissioner's attention and that she would respond in due course (the Applicant's record does not contain any further correspondence from the Commissioner and it is unknown what, if any, further communications followed). I find it difficult to believe that if the Ethics Commissioner was provided with information by a member of the public that the Commissioner determined comprised "reason to believe" that the public office holder had contravened the Act, that the Commissioner would not then examine the matter on his or her own initiative.

[109] In sum, in my view, it is not open to the Applicant, by way of judicial review, to have this Court step into the role of the Commissioner to find, as the foundation of the Applicant's challenge to the appointment of Commissioner Dion, that there have been breaches of provisions of the *Conflict of Interest Act*. This speaks to the justiciability of the issue.

[110] Recently, in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 ("*Wall*"), the Supreme Court of Canada considered the availability of judicial review of voluntary associations, including religious groups, on the basis of procedural fairness. In doing so, it noted that even when judicial review is available, the courts will consider only those issues which are justiciable. Justiciability relates to the subject matter of the dispute, the general question being whether the issue is one that is appropriate for a court to decide (at para 32) and:

> [34] There is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter: see Sossin, at p. 294. In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" (*ibid.*).

[111] I also note that in determining whether a question is justiciable, courts must be sensitive to the separation of function within Canada's constitutional matrix so as not to inappropriately intrude into the spheres of the executive or the legislature (*Friends of the Earth* at para 25 citing *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62 at paras 33–36 ("*Doucet-Boudreau*")).

[112] When addressing justiciability before me, the Applicant referred to *Doucet-Boudreau* in relation to the bounds of the separation of powers between the legislative, judicial and executive branches. In *Doucet-Boudreau*, the Court quoted its prior decision in *New Brunswick*

*Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at p 389, which found that it is fundamental to the working of government as a whole that the legislative branch, the executive branch, and the courts play their proper role and that, "It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other." The Court concluded as follows:

> 34 In other words, in the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited. Concern for the limits of the judicial role is interwoven throughout the law. The development of the doctrines of justiciability, and to a great extent mootness, standing, and ripeness resulted from concerns about the courts overstepping the bounds of the judicial function and their role *vis-à-vis* other branches of government.

[113] The Applicant submits that while the Supreme Court held that respect by the courts for the legislative and executive role is important, it also stated that "deference ends, however, where the constitutional rights that the courts are charged with protecting begin" (*Doucet-Boudreau* at para 36). The Applicant acknowledges that the matter before me is not a constitutional case but submits that as the integrity of government is at issue, deference is similarly not owed to the executive and legislative branches. Further, that *Doucet-Boudreau* demonstrates that creative remedies that vindicate rights are permissible. Here the right at issue is a public right to ensure ethical conduct in Parliament.

[114] For its part, the Respondent relies on *Doucet-Boudreau*, as well as this Court's decision in *Friends of the Earth*, the latter of which held that a court will generally not involve itself in the review of actions or decisions of the executive or legislative branches where the subject matter of

the dispute is either inappropriate for judicial involvement or where the court lacks the capacity to properly resolve it.

[115] In my view, *Doucet-Boudreau* and *Wall* support that where, as here, Parliament has enacted legislation, the purpose of which is to create a comprehensive scheme governing conflicts of interest as they concern public office holders, including the conduct by the Ethics Commissioner of examinations into allegations of such conflicts to determine if they are well founded, for this Court to step in and make such a determination would clearly be usurping the role of and taking over the tasks of the Ethics Commissioner as they are assigned and defined by the *Parliament of Canada Act* and the *Conflict of Interest Act*. Moreover, this Court, on judicial review, lacks a sufficient factual and evidentiary basis to make such a determination.

[116] Further, even if the Ethics Commissioner finds and reports that a public office holder has contravened the *Conflict of Interest Act*, s 47 of that Act states that the conclusion is not determinative of the measures to be taken as a result of the report. In other words, Parliament reserves to itself what, if any, measures are to be taken as a result the Ethics Commissioner's finding. Relatedly, decisions of the Ethics Commissioner are also subject to judicial review only in limited circumstances, specifically where the Commissioner acted without, beyond or refused to exercise his or her jurisdiction; failed to observe a principle of natural justice, procedural fairness or other procedure required at law; or acted or failed to act, by reason of fraud or perjured evidence (*Conflict of Interest Act* at s 66; *Federal Courts Act* at ss 18.1(4)(a),(b) and (e)). These provisions also demonstrate the limited role of the Court within the regime.

[117] In that regard, I would also note that in *Auditor General*, the Auditor General had been denied access to a Crown corporation's records and to Cabinet documents. The issue before the Supreme Court was whether under s 13(1) of the *Auditor General Act*, the Auditor General had a judicially enforceable right of access to information. The Court stated that what was really at issue in that case was the appropriateness of the Court assuming the role of arbiter in resolving a dispute between parliament and a parliamentary servant, albeit one of high rank. It found that the linkage between s 13(1) (the asserted right) and s 7(1)(b) (the statutory remedy), and the extent to which reporting was part of a comprehensive remedial code, indicated that the Auditor General's requirement to report annually to the House of Commons on whether in carrying out the work of his office, he had received all of the information he required, was an exclusive remedy. Once the Auditor General reported that he had not obtained all of the information that he required, the issue was left to the House of Commons to be resolved politically. In those circumstances, a political remedy of that nature was an adequate alternative remedy and the Court stated as follows at p 104:

> The adequacy of the s. 7(1)(*b*) remedy must not be underestimated. A report by the Auditor General to the House of Commons that the government of the day has refused to provide information brings the matter to public attention. It is open to the Opposition in Parliament to make the issue part of the public debate. The Auditor General's complaint that the government has not been willing to provide all the information requested may, as a result, affect the public's assessment of the government's performance. Thus, the s. 7(1)(*b*) remedy has an important role to play in strengthening Parliament's control over the executive with respect to financial matters.

[118] Similarly, in this case, not only has Parliament reserved to itself what measures are to be taken in the event of a finding of a conflict of interest by the Ethics Commissioner, but the public

reporting of a conflict of interest by the Ethics Commissioner can serve as an alternate available, albeit political, remedy.

[119] The completeness of the conflict of interest regime and the remedies thereunder are also demonstrated by the procedural safeguards in place under the *Parliament of Canada Act* and the *Conflict of Interest Act*.

[120] For example, the *Parliament of Canada Act*, in addition to the consultation requirement, includes the parliamentary reporting mechanism (s 90), the ability for the Commissioner to delegate his or her duties (s 89), as well as institutional guarantees of independence of the Ethics Commissioner. These guarantees include the fixed term of office that exceeds that of the maximum term of any Parliament and precludes removal of the Commissioner other than for cause (s 82(1)); the requirement for the Commissioner to exclusively engage in the duties and functions of the Commissioner (s 83(2)); and, designates the Commissioner as a separate employer (s 84(1)).

[121] Additional safeguards are found in the *Conflict of Interest Act*, such as the ability for judicial review in limited circumstances (s 66); the five year comprehensive review of the provisions and operations of the Act (s 67); the fact that the Commissioner's reports must be released publically at the same time as they are provided to the Prime Minister and the public office holder under investigation (ss 44(8), 45(4)); and, the provisions that protect the Commissioner from civil and criminal liability for the good faith performance of his or her duties under the Act (s 50(2)).

[122] In conclusion, based on the forgoing, I find that in the absence of a decision by the Ethics Commissioner, the issue of whether contraventions of the *Conflict of Interest Act* occurred, or were reasonably apprehended, is not justiciable.

[123] Given the above finding, I need not address the Respondent's argument made at the hearing of this matter that issues involving Mr. Morneau's alleged conflicts of interest are moot in light of the Court of Appeal's decision in *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195. In that case, the Court of Appeal refused to consider whether the *Conflict of Interest Act* required Minister Morneau to divest his shares in Morneau Sheppell Inc., as opposed to holding them in a blind trust. As Minister Morneau had subsequently divested himself of all of the shares, the Court of Appeal held that the issue was moot and refused to exercise its residual discretion to determine the issue. It held that Parliament's role, coupled with the potential political sensitivity of the issues raised in that application, called for an extreme measure of caution before the Court would decide an issue that need not be decided to resolve a live dispute. I would note, however, and as the Respondent acknowledged, that the issue in this matter is not whether Minister Morneau was required to divest his shares, but whether in holding the shares at the time he voted on *Bill C-27* he contravened the *Conflicts of Interest Act*. That, however, is an issue for determination by the Ethics Commissioner. And, while the Respondent also advised the Court that the Ethics Commissioner has subsequently made a ruling on that issue, that ruling was not before the Court.

**Issue 4: Does the common law concerning reasonable apprehension of bias apply and, if so, did it preclude the GIC from making the appointment?**

[124] The Applicant takes the position that a common law stand-alone remedy is available to fill any gaps or omissions in the *Conflict of Interest Act*. The common law duty of fairness is applicable to every public authority whose decisions are not legislative in nature. If a decision or process leading up to the issuance of the decision is tainted by a reasonable apprehension of bias, the only appropriate remedy is to quash the decision. Here, the process selected by the GIC for selecting Mr. Dion as the nominee for appointment as the Ethics Commissioner created a reasonable apprehension of bias, which should have caused the GIC to recuse itself.

[125] For its part, the Respondent submits that the doctrine of procedural fairness does not apply to the appointment decision of the GIC (*Wells v Newfoundland*, [1999] 3 SCR 199 at para 62 ("*Wells*")) and, accordingly, the common law as to the reasonable apprehension of bias is not relevant to the validity of the appointment. Alternatively, the doctrine of necessity allows the GIC to make the necessary appointments as Parliament has vested decision making authority in the GIC and there is no other entity that could lawfully fulfil the statutory duties under the *Parliament of Canada Act* to appoint a Commissioner (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 SCR 3 at para 6 ("*Reference re Remuneration*")).

[126] Here, the Applicant is not challenging the appointment decision of the GIC on the basis of the choice of Mr. Dion, as opposed to any other candidate. Such a challenge would be

unlikely to engage procedural fairness protections (*Wells*; see also *Griffin v R* (1997), 128 FTR 175 (TD), so long as the qualifications stipulated by the *Parliament of Canada Act* had been met. That is to say, just as a candidate would have no participatory rights in the GIC selection process for an appointment, nor would the Applicant.

[127] However, the Applicant's assertion is concerned with the choice of the selection process for the appointment. Its allegation of bias stems from its allegations of contraventions of the *Parliament of Canada Act* and the *Conflict of Interest Act*. As I have found above that the s 81(1) of *Parliament of Canada Act* consultation requirement was complied with, and that the challenged selection process is not justiciable – as it is based on the premise that the Court can make conflict of interest determinations, real or apprehended, upon which the Applicant grounds its claim of bias – I need not address this issue.

[128] And, to the extent that the Applicant is asserting that the process selected by the GIC for appointment of the Ethics Commissioner, in and of itself, created a reasonable apprehension of bias, it must be recalled that s 81(1) specifically conferred the appointment power on the GIC, following the consultation and approval of the appointment by resolution of the House of Commons. In *CUPE* the Supreme Court held that the legislature's choice of the Minister as the proper authority to exercise the power of appointment was clear and unequivocal and "[a]bsent a constitutional challenge, a statutory regime expressed in clear and unequivocal language on this specific point prevails over common law principles of natural justice as recently affirmed in *Ocean Port Hotel, supra*". Therefore, in that case, the Minister's perceived interest in the outcome of the s 6(5) arbitrations did not bar him from exercising a statutory power of

appointment conferred on him in clear and unequivocal language (*CUPE* at paras117-118, 126). In other words, while a perception of bias may be contrary to the common law principles of procedural fairness, those principles can be ousted by statute.

[129] Similarly, here the GIC's power of appointment is clear and unequivocal. Further, the possibility of ongoing examinations by an outgoing Ethics Commissioner would not have been unanticipated. Thus, any possibility of bias, real or perceived, in the appointment of the new Ethics Commissioner was anticipated and addressed by the legislators by the s 81(1) consultation requirement, the requirement for a resolution by the House of Commons, as well as procedural fairness safeguards and accountability mechanisms built into the *Parliament of Canada Act* and the *Conflict of Interest Act*. Given this, I do not agree with the Applicant that the GIC was in these circumstances, required to recuse itself.

**Issue 5: Did the Applicant have a legitimate expectation that the GIC would recuse itself from the appointment process?**

[130] The Applicant submits that, as a representative of the public interest, it had a legitimate expectation that the decision maker, the GIC, would recuse itself from the process of selecting the Ethics Commissioner, which expectation is based on the objects and purposes of the *Conflict of Interest Act* and the provisions of the *Open and Accountable Government 2015*, and that any discretion the GIC may have had in the selection of the next Ethics Commssioner was constrained by the objects and principles of the relevant statute.

[131] The Respondent submits that the doctrine of legitimate expectations only gives rise to procedural rights where a clear, unambiguous and unqualified representation has been made and that in this matter no representation was ever made in relation to the process to be used for appointing the Ethics Commissioner. Nor does the doctrine create substantive rights.

[132] As the doctrine of legitimate expectations is an aspect of the common law of procedural fairness, for the reasons set out above, I need not address this issue. However, in my view, even if the common law doctrine of legitimate expectations had application, it is of no assistance to the Applicant because no clear and unambiguous representation was made in regard to the specifics of the decision-making process that would be followed in making the Ethics Commissioner appointment.

[133] The Supreme Court of Canada addressed the law of legitimate expectations in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, stating as follows:

> [95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:
>
> The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. [Emphasis added.]

> (D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §7:1710; see also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 29; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68.)
>
> [96] In *Mavi*, Binnie J. recently explained what is meant by "clear, unambiguous and unqualified" representations by drawing an analogy with the law of contract (at para. 69):
>
> Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.
>
> [97] An important limit on the doctrine of legitimate expectations is that it cannot give rise to substantive rights (*Baker*, at para. 26; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557). In other words, "[w]here the conditions for its application are satisfied, the Court may [only] grant appropriate procedural remedies to respond to the 'legitimate' expectation" (*C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 131 (emphasis added)).

[134] The Applicant submits that the *Conflict of Interest Act*, the EPA Guidelines (Annex A – *Open and Accountable Government 2015*), and the *Fundraising and Dealing with Lobbyists: Best Practices for Ministers and Parliamentary Secretaries* (Annex B – *Open and Accountable Government, 2015*) place a demanding ethical standard on public office holders which, as I understand the argument, translates into a representation that the GIC would recuse itself from the process of selecting the Commissioner of Lobbying. This submission is not based on any reference in those document to recusal, but on the fact that the EPA Guidelines state that the public office holders shall act with honesty and uphold the highest ethical standard so that public confidence and trust in the integrity, objectivity and impartiality of the government are conserved and enhanced, as well as the introductory paragraph of Annex B, which states that Ministers and

Parliamentary Secretaries must avoid conflict of interest, the appearance of conflict of interest and situations that have the potential to involve conflicts of interest.

[135] I agree with the Respondent that the *Conflict of Interest Act* and the EPA Guidelines are instruments of general application that do not speak to the specifics of a process that would be followed in the appointment process for the Ethics Commissioner and make no representation in that regard.

**JUDGMENT IN T-78-18**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed; and

2. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-78-18 |
| **STYLE OF CAUSE:** | DEMOCRACY WATCH v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | NOVEMBER 14, 2018 |
| **JUDGMENT AND REASONS:** | STRICKLAND J. |
| **DATED:** | DECEMBER 19, 2018 |

**APPEARANCES:**

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|---|---|
| Sebastian Spano | FOR THE APPLICANT |
| Alexander Gay | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Spano Law<br>Ottawa, Ontario | FOR THE APPLICANT |
| Department of Justice Canada<br>Ottawa, Ontario | FOR THE RESPONDENT |