Federal Court  Cour fédérale

Date: 20181219

Docket: T-80-18

Citation: 2018 FC 1291

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 Nancy Bélanger as the Commissioner of Lobbying. The appointment was made by the Governor in Council ("GIC") on December 14, 2017, on the recommendation of the Prime Minister and pursuant to ss 4.1 and 4.2(3) of the *Lobbying Act*, RSC 1985, c 44.

[2] Democracy Watch, the Applicant, challenges the appointment on the basis that it was made in contravention of the consultation requirement contained in s 4.1(1) of the *Lobbying 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-78-18.

Background

[4] The Office of the Commissioner of Lobbying (or "Commissioner") was established in 2006 under the *Federal Accountability Act*, SC 2006, c 9. The Commissioner is an independent Agent of Parliament and reports to Parliament by way of the Speakers of the House of Commons and the Senate. The Office of the Commissioner of Lobbying describes the purpose of the *Lobbying Act* as being to ensure transparency and accountability in the lobbying of public office holders in order to increase the public's confidence in the integrity of government decision-making. The duties and functions of the Commissioner of Lobbying are set out in the *Lobbying Act* and include developing and implementing educational programs to foster public awareness of the requirements of that Act, particularly on the part of lobbyists, their clients and public office holders (s 4.2(2)); maintaining a registry of lobbyists (s 9(1)); and, conducting investigations to ensure compliance with the Act or the Lobbyists' Code of Conduct (s 10.4(1)).

[5] Section 4.1(1) of the *Lobbying Act* states that the GIC shall appoint a Commissioner of Lobbying after consultation with the leader of every recognized party in the Senate and the House of Commons, and approval of the appointment by resolution of the Senate and the House of Commons. The Commissioner holds office during good behaviour for a term of seven years (s 4.1(2)) and is eligible for reappointment for one or more terms of up to seven years each (s 4.1(3)).

[6] Karen Sheppard was appointed as Canada's first Commissioner of Lobbying, effective June 30, 2009, for an initial seven-year term. She was reappointed on an interim basis for three successive six-month terms effective, respectively, from June 30, 2016, December 30, 2016 and June 30, 2017.

[7] On October 25, 2016, the Applicant filed a petition with the Commissioner of Lobbying alleging violations of the Lobbyists' Code of Conduct by Mr. Barry Sherman, Chairman of Apotex Inc., because, according to media reports, he had assisted in organizing a fundraising event to be attended by the Minister of Finance, Mr. Bill Morneau, scheduled for November 7, 2016, and because Apotex Inc. was registered to lobby Finance Canada. By letter of the same date, the Office of the Commissioner of Lobbying advised that the Applicant's letter had been referred to the Investigations Directorate.

[8] On November 4, 2016, the Applicant filed a second petition with the Commissioner of Lobbying alleging violations of the Lobbyists' Code of Conduct by Mr. Sherman because he organized and hosted a fundraising event attended by then-Liberal Party Leader Justin Trudeau

in August 2015, and because Apotex Inc. was registered to lobby the Office of the Prime Minister. By letter of November 18, 2016, the Office of the Commissioner of Lobbying advised that the Applicant's letter had been referred to the Investigations Directorate.

[9] On March 1, 2017, the Applicant filed a third petition with the Commissioner of Lobbying alleging violations of the Lobbyists' Code of Conduct by Mr. Mickey Sherman, board member of Clearwater Seafoods Inc., because he organized and hosted a fundraising event attended by then-Liberal Party Leader Justin Trudeau in August 2014 and because Clearwater Seafoods Inc. was registered to lobby the Office of the Prime Minister. By letter of March 3, 2017, the Office of the Commissioner of Lobbying acknowledged receipt of the Applicant's letter.

[10] On July 12, 2017, the Applicant filed a fourth petition with the Commissioner of Lobbying alleging violations of the Lobbyists' Code of Conduct by staff members of the Council of Canadians Innovators ("CCI") because they had assisted the 2015 federal election campaign of Minister of Foreign Affairs, Ms. Chrystia Freeland, and because CCI was registered to lobby Global Affairs Canada. By letter of July 20, 2017, the Office of the Commissioner of Lobbying acknowledged receipt of the Applicant's letter.

[11] In June 2017, the Prime Minister Trudeau wrote to each of Mr. Andrew Scheer, M.P., Leader of the Conservative Party of Canada/Leader of the Opposition; Mr. Thomas Mulcair, P.C., M.P., Leader of the New Democratic Party; Mr. Peter V. Harder, P.C., Senator/Government Representative in the Senate; Mr. Larry W. Smith, Q.C. Senator/Leader of

the Opposition; Mr. Joseph A. Day, Senator; and, Ms. Ealin McCoy, Senator, concerning the government's ongoing process to select a new Commissioner of Lobbying. The letters noted that the Notice of Appointment Opportunity for the position was available on the provided Government of Canada website and stated the Prime Minister's hope that the recipients would consider sharing this with Canadians who might be interested in the opportunity. Additionally, if the recipients believed that specific stakeholders should be consulted about the position, the Prime Minister asked that they be brought to the government's attention.

[12] By letter of July 4, 2017, Mr. Mulcair responded, stating that it was the NDP's view that the current appointment process should be replaced by a Parliamentary appointments committee, which he described and suggested would be ideal for the selection of a new Commissioner of Lobbying. He recommended that the Prime Minister consider adopting the proposed appointment process.

[13] On November 22, 2017, the Prime Minister wrote to the leaders of the recognized parties in the House of Commons and the leaders of the recognized parties and groups in the Senate, Mr. Andrew Scheer, M.P., Leader of the Conservative Party of Canada/Leader of the Opposition; Mr. Jagmeet Singh, Leader of the New Democratic Party; Mr. Peter V. Harder, P.C., Senator/Government Representative in the Senate; Mr. Larry W. Smith, Q.C, Senator/Leader of the Opposition; Mr. Joseph A. Day, Senator/Senate Liberal Leader; and, Mr. Yuen Pau Woo Q.C., Senator, Facilitator, Independent Senators Group, stating that in accordance with the *Lobbying Act*, he was writing with regard to its requirement for consultation on the appointment of the Commissioner of Lobbying. The Prime Minister stated that, following an open,

transparent and merit-based selection process, he proposed the nomination of Ms. Bélanger as the next Commissioner of Lobbying, and enclosed her curriculum vitae. The Prime Minister requested a reply no later than seven days from the date of his letter.

[14] On November 22, 2017, Mr. Harder wrote to the Prime Minister acknowledging the Prime Minister's letter of November 22, 2017, and advising that he fully supported the nomination of Ms. Bélanger as Commissioner of Lobbying and that he looked forward to her appearance before the Senate's Committee of the Whole. By letter of November 28, 2017, Mr. Day advised that he was unaware of any reason why Ms. Bélanger's nomination should not proceed. By letters of the same date, Mr. Smith advised that Ms. Bélanger's education and work experience qualified her as an excellent candidate and, as the Official Opposition in the Senate, he looked forward to questioning her when she appeared before the Senate's Committee of the Whole; Mr. Yuen Pau Woo advised that he had no objection to the nomination and looked forward to Ms. Bélanger's appearance before the Senate Committee of the Whole. By letter of November 29, 2017, Mr. Andrew Scheer advised that, at that point, his party had found no reason to object to the nomination of Ms. Bélanger as the next Commissioner of Lobbying. By letter of the same date, Mr. Guy Caron, M.P., Parliamentary Leader of the New Democratic Party in the House of Commons, responded to the Prime Minister's letter taking issue with the government's unilateral determination that the consultation process that it had established satisfied s 4.1(1) of the *Lobbying Act*. Mr. Caron stated his view that consultation required the forming an opinion, which necessitated having information to make an evidence-based opinion, and accordingly requested a list of the shortlisted candidates, their qualifications, and a list of the selection committee members, stating that the process must be truly open and transparent to

ensure the confidence of the public and parliamentarians. Mr. Caron demanded a consultation process that reflected the importance of the *Lobbying Act*, and respected s 4.1(1) of that Act. He stated that the NDP could not respond to the proposed nomination until it was provided with the requested information.

[15] On November 30, 2017, the Certificate of Nomination of Nancy Bélanger to the Position of Commissioner of Lobbying was tabled in the Senate and the House of Commons. On that same date, the Prime Minister issued a news release publically announcing the nomination.

[16] On December 6, 2017, Ms. Bélanger appeared before the Standing Committee on Access to Information, Privacy and Ethics ("ETHI Committee") to present her qualifications for the Office of the Commissioner of Lobbying and to respond to questions from the Committee, whose members represented the three recognized parties of the House of Commons.

[17] On December 8, 2017, Ms. Bélanger appeared before the Senate Committee of the Whole to present her qualifications for the office of the Commissioner of Lobbying and to respond to questions from the Committee, which was comprised of the entire Senate.

[18] By way of Order in Council PC 2017-1564 dated December 14, 2017, Ms. Bélanger was appointed Commission of Lobbying. The Order in Council stated that after consultation with the leader of every recognized party in the Senate and House of Commons, and by resolution of the Senate dated December 11, 2017, and by the House of Commons dated December 13, 2017, the Senate and the House of Commons had approved the appointment. Therefore, the Committee of

the Privy Council, on the recommendation of the Prime Minister, pursuant to s.4.1 and subsection 4.2(3) of the *Lobbying Act*, made the appointment.

Relevant Legislation

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

The Lobbying Act

[20] Section 4.1(1) of the *Lobbying Act* requires that the GIC, prior to appointing a Commissioner of Lobbying, consult with the leader of every recognized party in the Senate and House of Commons:

> **Commissioner of Lobbying**
>
> **4.1 (1)** The Governor in Council shall, by commission under the Great Seal, appoint a Commissioner of Lobbying after consultation with the leader of every recognized party in the Senate and House of Commons and approval of the appointment by resolution of the Senate and House of Commons.

[21] The Commissioner of Lobbying holds office for a seven year term during good behaviour and may be reappointed for one or more further terms, each not to exceed seven years (ss 4.1(2) and (3)).

[22] The Commissioner's duties include developing and implementing educational programs to foster public awareness of the requirements of this Act, particularly on the part of lobbyists, their clients and public office holders (s 4.2(2)), to maintain a registry of lobbyists (s 9(1)), and to develop a Lobbyists' Code of Conduct (s 10.2(1)). The Commissioner also investigates potential contraventions of the *Lobbying Act* or the Lobbyists' Code of Conduct:

> **10.4 (1)** The Commissioner shall conduct an investigation if he or she has reason to believe, including on the basis of information received from a member of the Senate or the House of Commons, that an investigation is necessary to ensure compliance with the Code or this Act, as applicable.
>
> **(1.1)** The Commissioner may refuse to conduct or may cease an investigation with respect to any matter if he or she is of the opinion that
>
> > **(a)** the matter is one that could more appropriately be dealt with according to a procedure provided for under another Act of Parliament;
> >
> > **(b)** the matter is not sufficiently important;
> >
> > **(c)** dealing with the matter would serve no useful purpose because of the length of time that has elapsed since the matter arose; or
> >
> > **(d)** there is any other valid reason for not dealing with the matter.

[23] After conducting an investigation, the Commissioner is required to prepare a report including his or her findings, conclusions and reasons, and submit it to the Speaker of the Senate and the Speaker of the House of Commons, who shall each table the report in their respective houses (s 10.5(1)).

[24] The Commissioner must also prepare an annual report concerning the administration of the Act and submit it to the Speaker of the Senate and the Speaker of the House of Commons, who shall each table the report in the House over which he or she presides (s 11). The Commissioner may also, at any time, prepare a special report concerning any matter within the scope of his or her powers, duties and functions, which shall be similarly submitted and tabled (s 11.1).

[25] The *Lobbying Act* also sets out the offences and punishments for contraventions of the Act by lobbyists (s 14).

[26] The Act is also subject to review every five years:

> **14.1 (1)** A comprehensive review of the provisions and operation of this Act must be undertaken, every five years after this section comes into force, by the committee of the Senate, of the House of Commons, or of both Houses of Parliament, that may be designated or established for that purpose.
>
> **(2)** The committee referred to in subsection (1) must, within a year after the review is undertaken or within any further period that the Senate, the House of Commons, or both Houses of Parliament, as the case may be, may authorize, submit a report on the review to Parliament that includes a statement of any changes to this Act or its operation that the committee recommends.

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 to 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 alleged potential contraventions 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 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 ((s 45(2) and 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 s 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 are two codes and a guideline that are relevant to this matter.

The Lobbyist's Code of Conduct

[43] The preamble of the Lobbyists' Code of Conduct ("Lobbyists' Code" or "Code") describes its foundation in the *Lobbying Act* as follows:

> The *Lobbying Act* is based on four principles:
>
> > • Free and open access to government is an important matter of public interest;
> >
> > • Lobbying public office holders is a legitimate activity;• It is desirable that public office holders and the public be able to know who is engaged in lobbying activities; and
> >
> > • A system for the registration of paid lobbyists should not impede free and open access to government.
>
> The *Lobbying Act* provides the Commissioner with the authority to develop and administer a code of conduct for lobbyists. The Commissioner has done so, with these four principles in mind. The *Lobbyists' Code of Conduct* is an important instrument for promoting public trust in the integrity of government decision-making. The trust that Canadians place in public office holders to make decisions in the public interest is vital to a free and democratic society.
>
> Public office holders, when they deal with the public and with lobbyists, are required to adhere to the standards set out for them in their own codes of conduct. For their part, lobbyists communicating with public office holders must also abide by standards of conduct, which are set out below.
>
> These codes complement one another and together contribute to public confidence in the integrity of government decision-making.

[44] The Lobbyists' Code states that its principles are that lobbyists should act in a manner that demonstrates respect for democratic institutions, including the duty of public office holders to serve the public interest; conduct with integrity and honesty all relations with public office holders; be open and frank about their lobbying activities; and observe the highest professional

and ethical standards. In particular, lobbyists should conform fully with the letter and the spirit of the Lobbyists' Code of Conduct as well as with all relevant laws, including the *Lobbying Act* and its regulations.

[45] The Code then sets out ten rules. For the purposes of this Application, rules 6 to 9 are most relevant.

[46] Rule 6 precludes a lobbyist from proposing or undertaking any action that would place a public office holder in a real or apparent conflict of interest. Rules 7 to 9 outline specific situations that rule 6 encapsulates. Specifically, rules 7 and 8 preclude a lobbyist from taking actions that may be seen as an office holder giving preferential access to the lobbyist or another person. Rule 9 precludes a lobbyist from undertaking political activities that could be seen to create a sense of obligation:

> **Conflict of Interest**
>
> 6. A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest.
>
> In particular:
>
> **Preferential access**
>
> 7. A lobbyist shall not arrange for another person a meeting with a public office holder when the lobbyist and public office holder share a relationship that could reasonably be seen to create a sense of obligation.
>
> 8. A lobbyist shall not lobby a public office holder with whom they share a relationship that could reasonably be seen to create a sense of obligation.

> **Political activities**
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> 9. When a lobbyist undertakes political activities on behalf of a person which could reasonably be seen to create a sense of obligation, they may not lobby that person for a specified period if that person is or becomes a public office holder. If that person is an elected official, the lobbyist shall also not lobby staff in their Office(s).

[47] For the purpose of the Lobbyists' Code, a public officer holder is as defined in s 2(1) of the *Lobbying Act*, being any officer or employee of Her Majesty in Right of Canada and including:

> **(a)** a member of the Senate or the House of Commons and any person on the staff of such a member,
>
> **(b)** a person who is appointed to any office or body by or with the approval of the Governor in Council or a minister of the Crown, other than a judge receiving a salary under the *Judges Act* or the lieutenant governor of a province,
>
> **(c)** an officer, director or employee of any federal board, commission or other tribunal as defined in the *Federal Courts Act*,
>
> **(d)** a member of the Canadian Armed Forces, and
>
> **(e)** a member of the Royal Canadian Mounted Police (*titulaire d'une charge publique*)

Conflict of Interest Code for Members of the House of Commons

[48] *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

[49] 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.

[50] Annex B, Fundraising and Dealing with Lobbyists: Best Practices for Ministers and Parliamentary Secretaries, states that those officer holders must avoid conflict of interest, the appearance of conflict of interest and situations that have the potential to involve conflicts of interest. It sets out a summary of best practices expected to be followed in that regard. The practices are stated to compliment other rules that Ministers and Parliamentary Secretaries must observe including the *Conflict of Interest Act*, the Members' Code and the *Lobbying Act*. (Conacher p 23).

Issues

[51] 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.

[52] 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 Senate and the House of Commons as required by s 4.1(1) the *Lobbying 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

[53] 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 components 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 rationale of the legislative scheme (also see *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 194, at para 31).

[54] 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 4.1(1) of the *Lobbying Act*, the statutory procedural requirements necessary for the GIC to appoint an Agent of Parliament, which is concerned with the internal affairs of the legislature. On the same analysis, this attracts the standard of review of reasonableness.

[55] 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 4.1(1) of the *Lobbying Act*.

[56] 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?

[57] 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.

[58] 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*").

[59] 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.

[60] 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).

[61] 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.

[62] 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).

[63] 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).

[64] 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).

[65] 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).

[66] 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).

[67] 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 33). These issues are the failure to meaningfully consult with the leaders of each recognized party in the Senate and the House of Commons on the selection of the Commissioner of Lobbying in violation of *Lobbying 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.

[68] 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.

[69] 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.

[70] 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 standalone issue. It submits that a serious justiciable issue does not arise because the statutory consultation requirements of the *Lobbying Act* were met. Nor does the record contain any evidence to support an improper exercise of authority by the various Cabinet Ministers, or that the collective will of Cabinet was compromised in the context of the alleged conflicts of interest.

[71] Further, the issues of the sufficiency of consultation and any alleged breaches of the *Conflict of Interest Act* are not justiciable as they are matters for which Parliament has affected processes that provide appropriate review mechanisms. By addressing these issues, the Court would overstep the judicial sphere and foray into that which was reserved by Parliament for itself. No complaints were filed with the Ethics Commissioner by Members of Parliament, nor did the Ethics Commissioner commence an investigation of his own volition. There is nothing in the *Conflict of Interest Act* or the *Lobbying Act* that grants the Applicant the right to seek independent legal recourse mechanisms for review of the issues raised which have been left to the exclusive jurisdiction of the respective Commissioners. Further, it must be recalled that review by the Commissioner is an alternative way of addressing the concerns that the Applicant raises. The Respondent also submits that, in the circumstances of this matter, nor is the application a reasonable and effective means to pursue the issues raised. The Applicant seeks to

have the Court dictate additional or different processes for an appointment of an Officer of Parliament in circumstances in which Parliament has already created a process.

Analysis

[72] 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 4.1(1) requirement under the *Lobbying Act* to consult with the leaders of every recognized party in the Senate and the House of Commons prior to appointment of the Commissioner of Lobbying. Further, that situations involving the Prime Minister, Ministers Morneau and Minister Freeland were under investigation by the Commissioner of Lobbying during the period when the GIC was conducting the selection process for the new Commissioner of Lobbying and that by participating in the decision-making process, in which they had an opportunity to further their private interests, they violated ss 4, 6(1) and 21 of the *Conflict of Interest Act*. Further, the Prime Minster was furthering a private interest, and all members of Cabinet were complicit in furthering another's private interest. The Applicant also asserts that the duty of procedural fairness was breached in the appointment process. Given this, and the importance of public confidence in integrity of government, in my view, these allegations raise serious issues.

[73] 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 of s 4.1(1) of the *Lobbying Act* could potentially bring the validity of Ms. Bélanger's appointment as the Commissioner of Lobbying into question. This is sufficient to ground a serious issue without the need of closely examining every other allegation (*Downtown Eastside* at para 42).

[74] 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 4.1(1) of the *Lobbying Act*, before the GIC made the appointment of Commissioner Bélanger. 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 *Lobbying 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 4.1(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.

[75] 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 Commissioner of Lobbying. 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 amendments to the *Lobbying Act*, the creation of the Ethics Commissioner position, the enactment of the *Conflict of Interest Act*, and amendments of the Lobbyists' Code and the *Conflict of Interest and Post-Employment Code for Public Office Holders*. 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.

[76] 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 4.1(1) of the *Lobbying Act* had not been complied with. If a duty of procedural fairness is owed, it is owed to them. That said, it is also 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 *Lobbying Act* and the *Conflict of Interest Act*. Where relevant, I have addressed these alternatives in deciding the issues on the merits.

[77] 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 Senate and the House of Commons as required by s 4.1(1) the *Lobbying Act*?

[78] The Applicant asserts in its Notice of Application that it seeks to have the decision appointing Commissioner Bélanger quashed because Cabinet failed to consult with the leader of every recognized party in the House of Commons – and presumably the Senate although not

mentioned in the Notice of Application – as required by s 4.1(1) of the *Lobbying Act*, before the GIC made the appointment.

[79] However, in my view, it is clear from the record that there was consultation. The June letters from the Prime Minister to the leaders of the Senate and the House of Commons advised of the government's ongoing process to select a new Commissioner of Lobbying 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 June 2017 letters as letters of engagement in the selection process, which he states were not required by statute. However, the Prime Minister's November 2017, letters were clearly stated to be written in accordance with the *Lobbying Act*, proposed the nomination of Ms. Bélanger, provided her curriculum vitae, and requested a reply within seven days. Those responses are described above. Additionally, Ms. Bélanger appeared before the Senate Committee of the Whole on December 8, 2017 and the all-party ETHI Committee on December 6, 2017, both of which recommended her appointment.

[80] In its written submission and when appearing before me, the Applicant takes a different approach challenging the sufficiency of consultation. Specifically, that although the *Lobbying 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 4.1(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 analyze these factors but submits that, given the intent of Parliament and the critical parliamentary functions performed by the Commissioner of Lobbying, 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.

[81] Conversely, the Respondent submits that the common law duty of fairness has no application. That duty is triggered when a decision-maker makes a decision affecting rights, privileges or interests. It is not triggered when the GIC makes an appointment as there is no vested interest at stake causing the duty to arise (*Wells v Newfoundland*, [1999] 3 SCR 199 at para 62 (*"Wells"*)). Similarly, as the Applicant has no vested interest in the outcome of this proceeding, it is not owed procedural fairness. In the result, bias and legitimate expectations are not in issue in this application.

[82] 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 *Lobbying 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.

[83] 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).

[84] For the reasons below, in applying that analysis, I am unable to conclude that s 4.1(1) required a level of consultation such that the steps taken in this matter were insufficient to meet that statutory requirement.

[85] 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), 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. I would first note that this report appears to concern the appointment of the predecessors to the Ethics Commissioner, not the Commissioner of Lobbying. Further, a copy of that report is not found in the record before me in this matter. That said, a copy was attached as Exhibit C of the affidavit of Mr. Conacher filed in T-78-18. In that matter, I found that the report provided 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.

[86] I found that those recommendations appeared to be largely reflected in what is currently s 81(1) of the *Parliament of Canada Act*, RSC 1985, c P-1. If anything, the report suggested 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.

[87] Indeed, in its written submissions in this matter, the Applicant states that government responded to the concern by adding the consultation requirement in the bill, which was enacted in 2004, with the consultation requirement now found in s 81(1) of the *Parliament of Canada Act.* Given this, I do not see how this evidence assists the Applicant's submission that the legislators' intent was for a higher level or different form of consultation than is now set out in s 81(1). Nor how this evidence supports the Applicant's submission that the process that led to the

enactment of the consultation requirement for the Ethics Commissioner serves to define what consultation means in relation to the Lobbying Commissioner.

[88] As to the objects and purposes of the *Lobbying Act*, these do not inform an intention of the legislature concerning the level of consultation required.

[89] The Applicant's general proposition is that the *Lobbying Act* should be considered as one of the statutes that further a number of unwritten principles of the constitution of Canada, including democracy, constitutionalism and the rule of law. In support of this position it cites para 25 of *Reference re Senate Reform*, 2014 SCC 32:

> [25] The Constitution implements a structure of government and must be d by reference to "the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning": *Secession Reference*, at para. 32; see generally H. Cyr, "L'absurdité du critère scriptural pour qualifier la constitution" (2012), 6 *J.P.P.L.* 293. The rules of constitutional interpretation require that constitutional documents be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136; *R. v. Big M Drug Mart Ltd.*,[1985] 1 S.C.R. 295, at p. 344; *Supreme Court Act Reference*, at para. 19. Generally, constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism and the rule of law: *Secession Reference*; *Provincial Court Judges Reference*; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

[90] While the *Lobbying Act* undoubtedly plays an important role in the democratic process by ensuring transparency in the lobbying of public office holders and by conducting reviews and

investigations to ensure compliance by lobbyists with the Act and the Lobbyists' Code and, in that way, ensuring the integrity of government, it is not a constitutional document, and I am not persuaded that it is to be afforded a different standard of statutory interpretation. In my view, this submission is not supportive of the Applicant's arguments that the intent of the legislators concerning the level of consultation required by s 4.1(1) of the *Lobbying Act* exceeded the measures taken with respect to the appointment of Commissioner Bélanger.

[91] 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 selection and appointment process. For example, the Affidavit attaches a June 8, 2017 article of the Canadian Press, which states that the leaders of both the NDP and the Conservatives were of the view that a new system of choosing Officers of Parliament was needed and that they had written to the Prime Minister in that regard. Also attached are debates in the House of Commons on December 12, 2017 during which Mr. Caron and Mr. 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 the 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. Many similar news reports and debates are provided, however, these speak only to disagreement with the existing process, not the intent of the legislators as to the level of consultation required when affecting the *Lobbying Act*.

[92] 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.

[93] In this matter, by way of his June letters, the Prime Minister gave notice of the commencement of the appointment process and invited the leaders of the Senate and the House of Commons to share this with potentially interested persons. There is no evidence that any leader proposed candidates in response. The July letters identified Ms. Bélanger 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 and was availed of. The Senate Committee of the Whole and the ETHI Committee appearances afforded those leaders, or their representatives, with an opportunity to address with the nominee any concerns that they may have had with her candidacy, such as qualifications or impartiality, which opportunity was also availed of.

[94] In that regard, the December 8, 2017, report of the Senate Committee of the Whole demonstrates that all committee members had an opportunity to put questions and concerns to Ms. Bélanger. Mr. Smith asked about the process surrounding her nomination. Ms. Bélanger stated that she had initially applied only for the Information Commission appointment and had done so on July 12, 2017, two days before the deadline. On August 10, 2017, she was invited to

an interview that was held on August 16, 2017 after which she was asked if she would consider appointment as the Commissioner of Lobbying. On August 17, 2017, she was invited to an interview that was held on August 28, 2017, for the Lobbying Commissioner position. She underwent psychometric testing on September 5, 2017, and on November 14, 2017, had a very quick call from the President of the Treasury Board asking if she was still interested in the position. On November 22, 2017, she had a call from the Privy Council Office advising that her name was going to be submitted through consultation letters. All other questions put to Ms. Bélanger by Mr. Smith and other Committee members concerned her qualifications and how she would approach the position, if appointed.

[95] Similarly, at the December 6, 2017, ETHI Committee appearance, through their committee representatives, all party leaders had an opportunity to put questions and concerns to Ms. Bélanger. Mr. Cullen stated that he knew Ms. Bélanger, that she seemed very well qualified and that she should not take his concerns personally. Rather, it was the appointment process with which he was concerned. He asked Ms. Bélanger about the appointment process, which she again described, adding that she had applied online and that in the original interview for the Information Commissioner position she had been interviewed by a selection committee of four. At the end of the appearance, Mr. Cullen sought to add to the record that the only consultation had been a single letter with Ms. Bélanger's name on it. He did not view this as consultation, and that "it's difficult to vote for or against a process that is clearly in contravention of the spirit and, I would argue, the actual rule of law in this particular case".

[96] What all of this illustrates is that the concerns with consultation are actually aimed at the selection process – the constitution of the selection committee and list of candidates – rather than with consultations as to the appointment of the proposed nominee. Further, while those selection process concerns were raised, neither of the leaders of the Senate and the House of Commons, to whom a statutory obligation of consultation is owed, sought judicial review of the appointment of Ms. Bélanger on the basis of inadequate consultation or otherwise. Indeed, the very concern by the Applicant, the ongoing investigations, was directly raised with Ms. Bélanger by Mr. Cullen during the ETHI Committee hearing. He noted that there were ongoing investigations before the Commissioner of Lobbying and asked if by law Ms. Bélanger was required to continue those investigations or if she had discretion in that regard. She replied that she did not believe that she had discretion and that if an investigation had begun then it should continue. When asked by Mr. Tilson, she again stated that she did not believe that a new Commissioner had the discretion to not proceed with an ongoing investigation. While uncertain of the legal considerations, she stated that if she had the statutory authority to continue, then she was committed to do so.

[97] In conclusion, considered in context and in the overall scheme of the *Lobbying Act*, the purpose or intent of the prescribed consultation is to afford Members of the Senate and the House of Commons, not all of whom are 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 Commissioner of Lobbying 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 *Lobbying Act* or would be otherwise discernable from its context and objects, which I do not find to be the case.

[98] 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 4.1(1) of the *Lobbying Act*, 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 consider that the consultation undertaken failed to meet the statutory requirement.

[99] I would add that if those leaders did have concerns as to the suitability of Ms. Bélanger, then they would presumably have caused them to be raised at the Senate Committee of the Whole or the ETHI Committee hearing and would not have voted in favour of the motion to appoint the nominated candidate. They then would have raised these substantive concerns in the subsequent debates on the appointment held in the Senate and the House of Commons. They did not do so, and the debates do not reveal any concerns with the suitability or merits of the nominee. If anything, they reflect satisfaction with her qualifications and experience. Ultimately, however, even if they had, the Supreme Court has previously held "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" (*Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 at p 103 (*"Auditor General"*)).

[100] Further, under s 14.1 of the *Lobbying Act*, a comprehensive review of the provisions and operation of the *Lobbying Act* must be undertaken every five years and a report prepared for submission to Parliament. The report must include a statement of any recommended changes to the Act or its operation. Therefore, to extent that Members are dissatisfied with the consultation process used to appoint the Commissioner of Lobbying, the issue may be raised on selection or review. The merit of their concerns can then be determined in the political arena.

[101] 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"*).

[102] 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 *Lobbying 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.

[103] 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.

[104] 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.

[105] 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.

[106] 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 Commissioner of Lobbying that were consistent with her role as set out in the *Lobbying Act*. Additionally, s 6(5) of the HLDAA, unlike s 4.1(1) *Lobbying Act*, did not speak to consultation. Further, here there is little in the scheme or purpose of the *Lobbying Act* that would assist in construing the intent of Parliament as to the process or level of consultation required by s 4.1(1). Moreover, the s 4.1(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.

[107] 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 5.4.1(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.

[108] 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 4.1(1) of the *Lobbying Act*. While the consultation for the appointment of the Commissioner of Lobbying was not extensive, I agree with the Respondent that it must be viewed in the context of the *Lobbying Act*. The consultation at issue occurred within the parliamentary system and with respect to the nomination of an Agent of Parliament, who is accountable to Parliament.

[109] Moreover, to the extent that the Applicant's challenge to the appointment process goes beyond the statutorily mandated consultation requirements, 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.

[110] 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.

[111] 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.

[112] *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).

[113] In these circumstances, given the nature of the statute and the wording of s 4.1(1) of the *Lobbying Act*, any common law duty of procedural fairness concerning consultation about the

appointment of a Commissioner of Lobbying is owed to the leaders of every recognized party in the Senate and 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?

[114] 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, it 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.

[115] 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.

[116] 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, Minister Morneau and Minister Freeland were under investigation by the former Commissioner of Lobbying during the period when the GIC conducted the selection process for the new Commissioner of Lobbying. 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 the selection process for the Ethics Commissioner. Further, that there is no record that the Prime Minister, Minister Morneau or Minister Freeland recused themselves from the Commissioner of Lobbying appointment process and, by participating in that process, they 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 interest of keeping their jobs as Ministers by protecting the private interest of the Prime Minister, 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, Minister Morneau and Minister Freeland. The GIC should have recognized its bias and conflict of interest and removed itself from the selection process. According to the Applicant, the GIC has demonstrated that it recognizes its conflict of interest and bias in such selection processes as it has effectively removed itself from the selection processes that have developed shortlists of qualified candidates for judges, the RCMP Commissioner, and senators.

[117] 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 Ms. Bélanger as the Commissioner of Lobbying. It is not the role of this Court to make a determination of whether the Prime Minister, Minister Morneau or Minister Freeland were in conflict of interest positions, and thereby in breach of s 6(1), by participating in the appointment decision, or in breach of s 21 for failing to recuse themselves. I agree with the Respondent that that role has been entrusted by Parliament exclusively to the Ethics Commissioner. In this matter, there is no evidence of any complaints having been filed with the Ethics Commissioner by any Member of the Senate or of Parliament concerning the decision to nominate Ms. Bélanger, which is perhaps unsurprising given that the motions before the Senate Committee of Whole and the all-party ETHI Committee recommending the appointment were passed. Thus,

the *Conflict of Interest Act* has never been engaged either by Members of the Senate or of Parliament, or by the Commissioner of her own volition.

[118] 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 in T-78-18 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.

[119] 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 Ethics Commissioner to find, as the foundation of the Applicant's

challenge to the appointment of Commissioner Bélanger, that there have been breaches of provisions of the *Conflict of Interest Act*. This speaks to the justiciability of the issue.

[120] Recently, in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 ("*Highwood*"), 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.*).

[121] 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"*)).

[122] 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.

[123] 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.

[124] 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.

[125] 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.

[126] 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* s 66; *Federal Courts Act* s 18.1(4)(a),(b) and (e)). These provisions also demonstrate the limited role of the Court within the regime.

[127] 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.

[128] 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.

[129] 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*.

[130] 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 81(1)); the requirement for the Commissioner to exclusively engage in the duties and functions of the Ethics Commissioner (s 83(2)); and, the fact that the Act designates the Commissioner as a separate employer (s 84(1)).

[131] 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 publicly 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)).

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

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

[133] The Applicant takes the position that a common law standalone 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 Ms. Bélanger as the nominee for appointment as the Commissioner of Lobbying created a reasonable apprehension of bias, which should have caused the GIC to recuse itself.

[134] For its part, the Respondent submits that the rules against bias are an important component of the doctrine of procedural fairness but that those rules do not apply to GIC appointments. The common law duty of fairness is triggered when a decision-maker makes a decision affecting rights, privileges and interests. It is not triggered by a GIC appointment because there is no vested interest at stake (*Wells* at para 62 ("*Wells*")). Similarly, the Applicant has no vested interest in the outcome of this proceeding and therefore it is not owed procedural

fairness. Alternatively, the doctrine of necessity allows the GIC to make the necessary appointment as Parliament has vested decision making authority in the GIC and there is no other entity that could lawfully fulfill the statutory duties under the *Lobbying 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*")).

[135] Here the Applicant is not challenging the appointment decision of the GIC on the basis of the choice of Ms. Bélanger, 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)). 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.

[136] 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 *Lobbying Act* by lobbyists which, if well founded, could potentially by lead to examinations of the actions of the Prime Minister, Minister Morneau and Minister Freeland under the *Conflict of Interest Act* and adverse findings by the Ethics Commission in that regard. As I have found above that the s 4.1(1) *Lobbying 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 upon which the Applicant grounds its claim of bias – I need not address this issue.

[137] And, to the extent that the Applicant is asserting that the process selected by the GIC for appointment of the Commissioner of Lobbying, in and of itself, created a reasonable apprehension of bias, it must be recalled that s 4.1(1) specifically conferred the appointment power on the GIC, following the consultation and approval of the appointment by resolutions of the Senate and 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.

[138] Similarly, here the GIC's power of appointment is clear and unequivocal. Further, the possibility of ongoing investigations by an outgoing Commissioner of Lobbying would not have been unanticipated. Thus, any possibility of bias, real or perceived, in the appointment of the new Commissioner was anticipated and addressed by the legislators by the s 4.1(1) consultation requirement, the requirement for resolutions by the Senate and the House of Commons, as well as procedural fairness safeguards and accountability mechanisms built into the *Lobbying Act* and the *Conflict of Interest Act.* Given this, I do not agree with the Applicant that the GIC, in these circumstances, was required to recuse itself.

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

[139] 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 Commissioner of Lobbying, which expectation is based on the objects and purposes of the *Conflict of Interest Act* and the provisions of *Open and Accountable Government 2015,* and that any discretion the GIC may have had in selection the next Commissioner of Lobbying was constrained by the objects and purposes of the relevant statute.

[140] The Respondent submits that the common law doctrine of legitimate expectations has no application in this matter. Alternatively, 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 Commissioner of Lobbying. Here the Applicant identifies only general statements regarding Ministers obligations to avoid conflicts of interest and fails to identify any representation regarding the process to be followed in appointing the new Commissioner of Lobbying. Nor does the doctrine create substantive rights.

[141] 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 the Applicant identifies no clear and unambiguous representation made in

regard to the specifics of the decision making process that would be followed in making the Commissioner of Lobbying appointment.

[142] 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)).

[143] 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 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 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.

[144] I agree with the Respondent that the *Conflict of Interest Act* and Annexes A and B 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 Commissioner of Lobbying and make no representation in that regard.

JUDGMENT IN T-80-18

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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APPEARANCES:

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