Federal Court  Cour fédérale

Date: 20230109

Docket: T-1324-20

Citation: 2023 FC 31

Ottawa, Ontario, January 9, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

DEMOCRACY WATCH AND DUFF CONACHER

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This decision relates to an application brought by the Applicants, Democracy Watch and Duff Conacher, under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Act], challenging the constitutional validity of the Government of Canada's federal judicial appointments system and judicial elevations system.

[2] The Applicants assert that these systems are unconstitutional, because they are subject to too much discretionary political control, influence and interference by the Minister of Justice and the Governor in Council. Specifically, the Applicants allege that these systems therefore undermine the structural independence and impartiality of the judiciary in ways that violate section 96 of the *Constitution Act, 1867* [Constitution], sections 7, 11(d), and 24(1) of the *Canadian Charter of Rights and Freedoms* [Charter], and/or the constitutional principles of judicial independence and/or the rule of law.

[3] As explained in greater detail below, this application is dismissed because, applying the constitutional principles of judicial independence and impartiality as informed by the authorities and analysis set out in these Reasons, I find no constitutional violation.

II. **Factual Background**

[4] The Applicant, Duff Conacher, is a Ph.D. student at the University of Ottawa Faculty of Law. He has previously served as a part-time or visiting professor at the University of Toronto Faculty of Law and the University of Ottawa, including a cross appointment at the University of Ottawa Faculty of Law and School of Political Studies. Mr. Conacher is the Coordinator of the other Applicant, Democracy Watch, a not-for-profit organization that advocates for democratic reform, citizen participation in public affairs, and ethical behaviour in government and business in Canada.

[5] The Applicants challenge the constitutionality of the process leading up to federal judicial appointments to provincial/territorial superior and appellate courts, the Federal Court of Appeal,

the Federal Court, and the Tax Court of Canada. They also challenge the process for elevation of judges to appellate courts (both provincial/territorial appellate courts and the Federal Court of Appeal). They do not challenge appointments to the Court Martial Appeal Court of Canada (presumably because its members are judges who have already been appointed to another court) or the Supreme Court of Canada (presumably because it is subject to a different appointment process).

[6] Later in these Reasons, I will address a motion by the Respondent, the Attorney General of Canada, seeking to strike portions of the Applicants' affidavit evidence. As is apparent from that motion, the parties disagree on the record that should inform the Court's analysis of their respective positions on the merits of this application. However, much of the factual background surrounding the federal judicial appointments and elevations processes is not controversial.

[7] The Respondent has filed in this application an affidavit of Philippe Lacasse, the Executive Director, Judicial Appointments and Senior Counsel in the Judicial Appointments Secretariat within the Office of the Commissioner for Federal Judicial Affairs Canada [FJA]. As described in Mr. Lacasse's affidavit, FJA was created in 1978 to safeguard the independence of the judiciary and provide support for federally appointed judges. While the Commissioner acts as a deputy to the Minister of Justice for the purposes of carrying out Part I of the *Judges Act*, RSC 1985, c J-1, FJA is separate and independent from the Department of Justice. The following summary of the federal judicial appointments and elevations processes is derived largely from the explanation of those processes contained in Mr. Lacasse's affidavit. I do not understand the following factual background to be contested by the Applicants.

[8] The federal judicial appointments system is the process by which judges are appointed to the courts identified above. The authority to appoint judges to the superior courts (for example, the Ontario Superior Court of Justice or the Alberta Court of King's Bench) is assigned to the Governor General under section 96 of the Constitution. In addition to these superior courts, section 101 of the Constitution empowers the Parliament of Canada to create courts for the better administration of the laws of Canada. Acting on this authority, Parliament created the Federal Court, the Federal Court of Appeal, and the Tax Court of Canada. These courts are referred to as statutory courts. In accordance with the Act and the *Tax Court of Canada Act*, RSC 1985, c T-2, the Governor in Council [GIC] is responsible for appointing judges to these statutory courts.

[9] By constitutional convention, when appointing judges to provincial superior courts, the Governor General acts on the advice of the Committee of the Privy Council of Canada. Similarly, the GIC, which appoints judges to the Federal Court, the Federal Court of Appeal, and the Tax Court of Canada, is defined in the *Interpretation Act*, RSC 1985, c I-21, as the Governor General acting on the advice or consent of the Privy Council for Canada. The Privy Council is composed of all the ministers of the Crown, who meet in the body known as Cabinet (see *League for Human Rights of B'Nai Brith Canada v Attorney General (Canada)*, 2010 FCA 307 [*B'Nai Brith*] at para 77). As such, all federal judicial appointments are made by the Governor General on the advice of Cabinet. In turn, Cabinet acts on the advice of the Minister of Justice [Minister]. (In the case of appointment of Chief Justices and Associate Chief Justices, it is the Prime Minister who provides the advice to Cabinet. For simplicity, these Reasons will refer to the advice to Cabinet being provided by the Minister.)

[10] Turning from constitutional and statutory provisions to current practice, the federal judicial appointments process involves the Minister receiving a list of recommendations from a Judicial Advisory Committee [JAC]. Across Canada, there are 17 JACs, which communicate to the Minister their recommendations for judicial appointments in their respective regions of responsibility. Each province and territory has at least one JAC, as does the Tax Court of Canada. The following explanation relates to the functioning of the JACs under the practice as in place since 2016.

[11] The provincial and territorial JACs each have seven members, comprised of:

A. One nominee from the provincial or territorial Law Society;

B. One nominee from the provincial or territorial branch of the Canadian Bar Association [CBA];

C. One judge nominated by the Chief Justice of the province or territory;

D. One nominee from the provincial Attorney General or the territorial Minister of Justice; and

E. Three nominees of the Government of Canada [the Government] representing the general public.

[12] The nominees of the Government representing the general public are selected by the Minister in their sole discretion following an application process that is open to anyone. While

the applicable Law Society, CBA branch, and provincial Attorney General or territorial Minister of Justice is each responsible for putting forward a list of three nominees for the JAC, the individuals appointed to the JAC are ultimately selected by the Minister from those nominees. JAC members are appointed for a two-year term, with the possibility of one term renewal.

[13] The JAC that provides recommendations for appointments to the Tax Court of Canada is comprised of five members, consisting of one judge nominated by the Chief Justice of the Court and four Government nominees.

[14] FJA has responsibility for administering the 17 JACs, including providing orientation training to new JAC members, consulting the JAC chairs, attending JAC meetings, drafting committee reports to the Minister outlining JAC findings, and acting as the contact person to address any questions from prospective candidates or other individuals concerning the federal judicial appointments process. Applications for judicial appointment are submitted to the FJA, following which such applications are assessed by the applicable JAC.

[15] After the applicable JAC completes its review of the candidates and their applications, including potentially consulting with members of both the legal and non-legal community, it will prepare a report of its assessment of each candidate and indicate whether the candidate is “recommended” or “highly recommended” or whether the JAC is “unable to recommend” the candidate. This report is provided to the Minister.

[16] It is common ground between the parties that, before recommending that Cabinet make a particular judicial appointment, the Minister may consult with others. However, much of the disputed evidence in this application surrounds the nature of those consultations. I will therefore address those details later in these Reasons.

[17] Once a candidate is appointed to the bench, the JACs are not involved in any subsequent decision to elevate the judge to an appellate court (either a provincial/territorial Court of Appeal or the Federal Court of Appeal). As with initial judicial appointments, elevations are made by the Governor General on the advice of Cabinet, which acts on the advice of the Minister.

III. **Procedural Background**

[18] In support of their application, the Applicants have filed two affidavits sworn by Mr. Conacher, the first on December 17, 2020 [the First Conacher Affidavit] and the second on August 26, 2021 [the Second Conacher Affidavit]. These affidavits reference and append as exhibits a number of media articles that refer to statements by Government officials related to the judicial appointments process, as well as media articles and articles and public statements by lawyers, legal academics, and other sources. This evidence is intended to support the Applicants' position that the extent of the discretionary political control, exerted by the Minister and Cabinet over the judicial appointments and elevations systems, violates the constitutional protection of judicial independence and impartiality at issue in this application.

[19] The Respondent takes the position that significant portions of the First Conacher Affidavit and the entirety of the Second Conacher Affidavit are inadmissible as impermissible

hearsay and/or opinion evidence. In respect of the Second Conacher Affidavit, the Respondent also asserts delay on the Applicants' part in seeking to adduce that evidence.

[20] The parties' arguments on these issues were initially presented to Justice Aylen in her capacity as Case Management Judge. In respect of the First Conacher Affidavit, Justice Aylen concluded that the parties had not satisfied her that exceptional circumstances existed that would warrant an early determination of the issue. In respect of the Second Conacher Affidavit, Justice Aylen noted that its admissibility was inextricably linked to the admissibility of the Frist Conacher Affidavit. As such, she held that determination of the admissibility of both affidavits should be left to the judge hearing the application on its merits.

[21] Based on this reasoning, Justice Aylen issued an Order dated August 16, 2021 [the Aylen Order], dismissing the Respondent's motion to strike the impugned portions of the First Conacher Affidavit and provisionally allowing the Applicants' motion for leave to file the Second Conacher Affidavit. This relief was ordered without prejudice to the Respondent's ability to challenge the admissibility of the two affidavits before the judge hearing the application.

[22] The parties presented arguments on the Respondent's motion to strike in the course of the hearing of this application. As such, these Reasons will address that motion before turning to the merits of the application.

IV. **Relief Sought**

[23] In this application, the Applicants seek the following relief:

A. An order and/or declaration stating that the Government's federal judicial appointments system and federal judicial elevations system fail to comply or accord with section 96 of the Constitution, sections 7, 11(d), and 24(1) of the Charter, and/or the principles of fundamental justice, including the unwritten constitutional principles of judicial independence and/or the rule of law; and

B. Directions with respect to changes to the federal judicial appointments system and federal judicial elevations system necessary to make them constitutionally compliant.

V. **Issues**

[24] Taking into account the parties' respective arguments on the Respondent's motion to strike and the main application, I would characterize the issues for the Court's determination as follows:

A. Should portions of the First Conacher Affidavit and the entirety of the Second Conacher Affidavit be struck as impermissible hearsay?

B. Should portions of the First Conacher Affidavit be struck as impermissible opinion evidence?

C. Should the Second Conacher Affidavit be struck because of delay?

D. Should the Applicants be granted public interest standing to bring the application?

E. Do the federal judicial appointments system and federal judicial elevations system violate section 96 of the Constitution, sections 7, 11(d), and/or 24(1) of the Charter, and/or the unwritten constitutional principles of judicial independence and/or the rule of law?

F. If the federal judicial appointments system and federal judicial elevations system violate the Charter, whether the infringement can be saved by section 1 of the Charter?

G. To what remedy, if any, are the Applicants entitled?

VI. **Analysis**

A. *Should portions of the First Conacher Affidavit and the entirety of the Second Conacher Affidavit be struck as impermissible hearsay?*

[25] The Respondent takes the position that paragraphs 13 to 20, the first clause of the first sentence of paragraph 21, paragraphs 23 to 27, paragraphs 30 to 31, and Exhibits D to J, N to W, and Z to BB of the First Conacher Affidavit, and the entirety of the Second Conacher Affidavit, should be struck as impermissible hearsay.

[26] At the hearing of this application, the Applicants' counsel acknowledged that they seek to rely on the challenged evidence for a hearsay purpose, *i.e.*, to establish the truth of the contents of the statements made or referenced in the impugned paragraphs and exhibits. However, the Applicants argue that the evidence is admissible under the principled exception to the hearsay rule, which allows for the admission of hearsay evidence if it is reliable and necessary to the case

(see, *e.g.*, *R v Smith*, [1992] 2 SCR 915 [*Smith*] at pp 930-934; *Telus Communications Inc v Telecommunications Workers Union*, 2005 FCA 262 at paras 25-26; *Cabral v Canada (Citizenship and Immigration)*, 2018 FCA 4 at para 30).

[27] As explained in *Coldwater First Nation v Canada (Attorney General)*, 2019 FCA 292 at paragraphs 52-55 and 59, necessity must be given a flexible definition, which can potentially extend to expediency, such as promoting speed and efficiency by avoiding an impractically large number of affidavits. The Applicants argue that it is necessary that they introduce the evidence in the manner they have, because if every single source of the hearsay evidence were required to provide an affidavit speaking to their first-hand knowledge, the Court would be faced with an impractically large number of affidavits that would undermine the expeditious hearing of the application. The Applicants also argue that many of the media articles quote directly from Government documents, which are not available to the Applicants.

[28] The Respondent submits that none of the hearsay evidence is necessary, because the Court has the benefit of direct evidence from Mr. Lacasse, who has first-hand knowledge of the procedures and policies that apply to federal judicial appointments. I am not convinced that this argument engages with the meaning of necessity as prescribed by the jurisprudence. As explained in *Smith*¸ it would be illogical if uncorroborated hearsay evidence would be admissible, but could become inadmissible if corroborated by another source (at p 933). Rather, the question is whether the particular hearsay evidence that is impugned could not be otherwise made available as direct evidence (see *Smith* at p 934).

[29] However, I find more compelling the Respondent's argument that there is no evidence before the Court to the effect that the Applicants made efforts to obtain direct evidence, for instance by approaching the relevant journalists, and were unable to do so. The Applicants' argument on necessity rests principally on the assertion that it would have been unduly burdensome to attempt to assemble direct evidence. In *Canada (Citizenship and Immigration) v Canadian Counsel for Refugees*, 2021 FCA 72 [*Canadian Counsel for Refugees*], the Federal Court of Appeal expressed concern about relying on media reports to prove country conditions where other better types of evidence were readily available (at para 150). In the case at hand, the Applicants have not met their burden to establish that direct evidence is unavailable or would have been unduly difficult to obtain.

[30] Turning to reliability, the Applicants argue that much of the evidence comes from well-respected media outlets that hold themselves to the highest standards of journalistic integrity, in many cases quoting directly from material authored by individuals within the Government. They submit that both the particular journalists and their employers' outlets have an interest in protecting their reputations, which provides a guarantee of reliability.

[31] The Respondent emphasizes that it is not challenging the integrity of any of the media outlets responsible for the articles upon which the Applicants seek to rely. Rather, admitting media reports to prove the truth of their contents raises the sorts of dangers identified in *Canadian Counsel for Refugees* surrounding inaccuracy, partiality, and lack of opportunity for it to be tested and assessed. I agree with those concerns. As expressed by the Federal Court of

Appeal, constitutional cases with wide implications should not be decided based on what one finds in a newspaper (at para 150).

[32] One of the documents challenged by the Respondent is not a media article but rather a letter from the Canadian Judicial Council reporting on an investigation it had conducted. While the nature of that body assists with the reliability analysis, the Applicant has still offered no evidence to support a conclusion of necessity, particularly given that the complaint that was the subject of the investigation appears to have resulted from an article published in the Globe and Mail. Again, there is no evidence before the Court to the effect that the Applicants made efforts to obtain direct evidence, for instance by approaching the relevant journalist.

[33] In my view, this analysis results in exclusion of the articles attached as Exhibits D, E, F, G, H, I, J, N, O, S, T, U, V, Z, and BB to the First Conacher Affidavit and Exhibit A to the Second Conacher Affidavit because they are inadmissible hearsay. Paragraphs 14, 15, 16, 17, 18, 19, 20, 21 (first clause of first sentence), 23, 26, 30, and the last sentence of paragraph 31 of the First Conacher Affidavit and paragraph 2 of the Second Conacher Affidavit, which reference or rely on these excluded exhibits, are also inadmissible.

[34] The Respondent also seeks to strike as hearsay paragraph 13 of the First Conacher Affidavit, in which Mr. Conacher states that, after reviewing applications from people who apply to be judges, each jurisdiction's JAC submits a long list of nominated candidates to the Minister. I agree with the Applicants' position that paragraph 13 simply repeats the information set out in paragraph 10 of the affidavit, which the Respondent's own written representations state is not

contentious because it is based on a description from the FJA website. I will not strike this paragraph.

[35] Exhibit B to the Second Conacher Affidavit is also inadmissible, as the Applicants' counsel confirmed at the hearing that the Applicants would not seek to rely on this exhibit, because it is illegible.

[36] Turning to the other exhibits to the Second Conacher Affidavit, in my view, three of these documents (Exhibits C, D and E) are admissible for a non-hearsay purpose - to demonstrate the fact that the communications reflected in those documents took place. Each of these documents is an email communication that the Applicants submit represents a request, or a response to a request, for input on one or more candidates for judicial appointments.

[37] As an example to illustrate this analysis, the email attached as Exhibit E is from the office of a Government minister stating that she does not know particular lawyers. The relevance of this document to the Applicants' arguments in this application is not whether the content of the email is true (i.e. that the minister does not know the lawyers) but rather the fact that the email reflects the consultation with the minister having taken place.

[38] Exhibit F, however, does not fall into the same category, as it is a chart capturing the results of various alleged consultations and is therefore itself a hearsay statement by the unidentified author of the chart.

[39] To summarize the result of this aspect of the Respondent's motion, in relation to the Second Conacher Affidavit, Exhibits A, B and F, and the paragraphs that reference them (2, 3a and 3e), are inadmissible.

[40] Returning to the First Conacher Affidavit, the above analysis has not yet addressed Exhibits P, Q, R, W and AA, which are not media reports but which the Respondent argues are also inadmissible hearsay. Exhibit P is a document entitled "Interim Report: The Canadian Federal Judicial Appointments Process and Opportunities for Reform", dated August 2016, prepared by the International Commission of Jurists Canada [ICJ]. This report sets out findings drawn from responses to questionnaires prepared by ICJ in relation to the Canadian federal judicial appointments process. Exhibits Q, R and W are documents authored by lawyers, legal academics and the CBA, expressing views on judicial appointments processes. Exhibit AA is a document authored by a large number of bar associations and legal organizations in Canada advocating for the appointment of Black, Indigenous and People of Colour [BIPOC] judges.

[41] While there are undoubtedly hearsay elements to each of these documents, they are of a different nature than the media reports, and the Applicants seek to rely upon them for purposes that arguably extended beyond the truth of their contents. As such, their admissibility is best examined in the next section of these Reasons, which addresses the Respondent's arguments that portions of the Applicants' evidence represent inadmissible opinion.

B. *Should portions of the First Conacher Affidavit be struck as impermissible opinion evidence?*

[42] The Respondent takes the position that paragraphs 19 to 20, 24 to 27, the first two sentences of paragraph 28, paragraphs 29 to 31, and Exhibits H to J, P to W, and Y to BB of the First Conacher Affidavit should be struck as impermissible opinion evidence.

[43] These exhibits represent a subset of the media reports submitted by the Applicants, as well as Exhibits P, Q, R, W and AA, described immediately above in these Reasons. The Respondent that takes the position that each of these documents represents an effort by the Applicants to introduce studies or other forms of opinion evidence related to the judicial appointments process.

[44] The Applicants do not dispute this characterization of the evidence. Rather, they take the position that such evidence is admissible under the principles that permit the admission of lay opinion evidence in limited circumstances and/or as evidence that is directly relevant and necessary to what the Applicants describe as the central issue in this application. The Applicants argue that the test for judicial independence and impartiality is whether the public perceives that a court enjoys the essential objective conditions or guarantees for such independence and impartiality. They say that such perception cannot be analysed without the benefit of evidence as to public opinion on the conditions and guarantee of judicial independence.

[45] I accept the Applicants' description of the test for judicial independence. As explained by the Supreme Court of Canada in *R v Valente*, [1985] 2 SCR 673 [*Valente*] at page 689, the test for judicial independence and impartiality is whether the court may be reasonably perceived as independent, with the perception to be assessed being a perception of whether the court enjoys

the essential objective conditions or guarantees of judicial independence. I will return to the details of this assessment later in these Reasons.

[46] However, I agree with the Respondent's position that this assessment is not intended to be performed by recourse to evidence of subjective public opinion. As expressed by the Supreme Court in *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick,* 2002 SCC 13 at para 38 (relying on *Valente* at p 689), the test for independence asks whether a reasonable person, who is fully informed of all the circumstances, would consider that a particular court enjoys the necessary independent status. As emphasized below, this test involves an objective analysis.

[47] As recognized in *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 [*Matsqui*], the analysis is akin to the classic test for a reasonable apprehension of bias, which asks whether the apprehension of bias is a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information (at para 81, relying on *Committee for Justice and Liberty v National Energy Board,* [1978] 1 SCR 369 at p 394). Expressed differently but to similar effect in *R v RDS*, [1997] 2 SCR 474, the reasonable apprehension of bias test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must be reasonable in the circumstances of the case. Further, the reasonable person must be an informed person, with knowledge of the relevant circumstances (para 111).

[48] These articulations of the required analysis all emphasize its objective nature. The reasonable perception of independence is not intended to be assessed through survey evidence or expressions of opinion, regardless of how voluminous or how arguably well-informed the individuals or bodies that express those opinions may be. Rather, applying the prescribed test requires an objective analytical exercise, to be conducted based on the relevant circumstances including in particular the conditions intended to achieve judicial independence.

[49] The analysis performed by the Supreme Court in *Matsqui* serves to illustrate the nature of the required assessment. *Matsqui* involved a challenge to the independence of appeal tribunals established under First Nations bands' property tax bylaws. Applying the principles derived from *Valente*, the Court explained its conclusion that a reasonable and right-minded person, viewing the whole procedure in the assessment bylaws, would have a reasonable apprehension that members of the appeal tribunals were not sufficiently independent (at para 98). In other words, the Court performed an objective analysis based on the conditions existing under the applicable bylaws.

[50] I therefore agree with the Respondent's position that the opinion evidence the Applicants seek to adduce is irrelevant to the issue in this application. With respect to those components of that evidence that seek to introduce the results of surveys or other studies, I agree with the Respondent that this evidence is also inadmissible based on the principles explained in *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at paragraph 43. Even where relevant to an analysis the Court is required to perform, evidence of a survey of public opinion must be presented as expert evidence. Finally, to the extent that opinion evidence represents an opinion on the specific legal

issue to be decided by the Court, it is also admissible on that basis (see *Boily v Canada*, 2017 FC 1021 at para 32; *Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43 at para 18). This last point applies in particular to Exhibit Q, the opinion piece authored by three lawyers entitled "Why we need a constitutional challenge on judicial appointments".

[51] Applying these principles, I find the exhibits and related paragraphs of the First Conacher Affidavit, challenged by the Respondent as opinion evidence, to be inadmissible as evidence in this application. In addition to exhibits and paragraphs found inadmissible through the hearsay analysis earlier in these Reasons, this conclusion applies to Exhibits P, Q, R, W, Y and AA of the First Conacher Affidavit and paragraphs 24, 25, 27, 29 and the last sentence of paragraph 31 therein that reference and rely on these exhibits. The first two sentences of paragraph 28 of the affidavit represent Mr. Conacher's own opinion and are also inadmissible.

[52] In arriving at this conclusion, I have considered the Applicants' argument that, in its analysis in the seminal case of *Valente*, the Supreme Court cited opinion evidence of the sort upon which the Applicants seek to rely. The Applicants refer to paragraphs of *Valente* that reference what appear to be legal academic books and articles, publications and declarations of international bodies, and a then recent report of a CBA committee on judicial independence (see *Valente* at pp 686-687, 691-692, 696-698, 700, 701, and 708-711).

[53] I agree with the Respondent's submission that the Supreme Court's references to this material does not represent reliance on opinion evidence relevant to findings of fact, but rather recourse to this material to inform its legal analysis and in particular its conclusions as to the

content of the principle of judicial independence. In that respect, it is of course acceptable and not uncommon for a court to rely not only upon judicial authorities but also upon academic commentary to inform its analysis of the law including advancements therein.

[54] Viewed through that lens, I consider a limited number of the documents that will be excluded from evidence as inadmissible opinion to be appropriate for the Applicants to rely upon to support their submissions on what the law requires to secure judicial independence. In my view, the documents that are amenable to consideration in this manner are the following:

A. Article by Joanna Harrington, a professor of law at the University of Alberta, entitled “From the U.K., a lesson on judicial appointments” (originally attached as Exhibit R to the First Conacher Affidavit) [Harrington Article];

B. Statement from the CBA President on judicial appointments, dated November 6, 2020 (originally attached as Exhibit W to the First Conacher Affidavit) [CBA Statement]; and

C. Letter dated September 14, 2020 to Hon. David Lametti, described as on behalf of 36 bar associations and legal organizations from across Canada, with the subject line “Appointment of BIPOC judges to Canada’s federal courts” (originally attached as Exhibit AA to the First Conacher Affidavit) [BIPOC Letter].

[55] To be clear, while the previous paragraph identifies these documents by reference to exhibits to the First Conacher Affidavit, so as to situate them in the record, it remains my

conclusion is that they are inadmissible as evidence. However, the Applicants are entitled to rely upon them in support of their legal submissions.

C. *Should the Second Conacher Affidavit be struck because of delay?*

[56] The Respondent notes the Aylen Order observes that, in order for a party to obtain leave to file additional evidence, it must first establish that the evidence is admissible and relevant. Given Justice Aylen's determination that the admissibility of the Second Conacher Affidavit was linked to the admissibility of the First Conacher Affidavit, she provisionally allowed the evidence, without prejudice to the Respondent's right to raise objections to its admissibility at the hearing of the application.

[57] Against that backdrop, the Respondent argues that, even if the Applicants establish that any portion of the Second Conacher Affidavit is otherwise admissible, they still bear the onus of establishing that the Court should exercise its discretion to admit that evidence, having regard to the Applicants' delay in filing it. They refer to the applicable test: (a) whether the evidence sought to be adduced was available when the party filed its affidavits or could have been available with the exercise of due diligence; (b) whether the evidence is sufficiently probative that it could affect the result; and (c) whether the evidence will cause substantial prejudice to the other party (see *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 [*Forest Ethics*] at para 6).

[58] These three factors are not mandatory elements of a conjunctive test, such that each must be satisfied. Rather, they are factors that must be considered and balanced in the exercise of the

Court's discretion under Rule 312 (see *Smart Cloud Inc v International Business Machines Corporation*, 2021 FC 236 at para 39). The Respondent submits that the Applicants fail on the first two of these factors.

[59] In relation to the availability of the evidence, the Respondent notes that the media article attached as Exhibit A to the Second Conacher Affidavit was published on October 31, 2020. The Respondent further submits that, in his affidavit in the original motion for leave to adduce this evidence, Mr. Conacher stated that the article first came to his attention in December 2020 before the First Conacher Affidavit was sworn on December 17, 2020. However, he chose not to include this evidence. In addition, the Applicants do not set out any efforts they made to obtain the article or supporting information prior to December 17, 2020. Nor have the Applicants provided an explanation why the Second Conacher Affidavit was not sworn until August 2021, long after the Respondent's evidence was provided in February 2021.

[60] The Respondent also argues that the evidence is not sufficiently probative that it could affect the result, as there is no dispute that the Minister is permitted to consult on candidates following receipt of recommendations from a JAC. The Respondent submits that, at its highest, the Second Conacher Affidavit provides examples where the Minister may have engaged in such consultations.

[61] Under the first of the *Forest Ethics* factors, the Applicant responds that, while the media article attached as Exhibit A to the Second Conacher Affidavit could have been included in the First Conacher Affidavit, Mr. Conacher chose not to do so because he did not have confirmation

of the information in the article until late January 2021, when he received from the journalist copies of the emails that are attached as the other exhibits to the affidavit.

[62] Regardless of the merit of this argument surrounding Exhibit A, it is clear that the emails were not available to Mr. Conacher when he filed the First Conacher Affidavit. It is only certain of those emails (Exhibits C, D, and E) that remain at issue, as I have found the others to be inadmissible hearsay. I accept the Respondent's argument that that the Applicants have not explained the delay between the January 2021, when the emails were provided to Mr. Conacher, and August 2021, when the Second Conacher Affidavit was sworn. However, in my view, this further delay goes to prejudice, and the Respondent has not asserted any prejudice arising from the delay in filing the Second Conacher Affidavit, either from the time when the First Conacher Affidavit was filed or thereafter. As such, I find that the first and third *Forest Ethics* factors favour the Applicants.

[63] With respect to the second factor, I find that the evidence at issue will assist the Court, because it is relevant to the Applicants' position that the nature of the consultations conducted by the Minister, before recommending that Cabinet make a particular judicial appointment, undermines judicial independence. I understand the Respondent's argument questioning the probative value of this evidence, as the Respondent acknowledges that the process involves ministerial consultation. However, as the emails attached as the Exhibits C, D, and E represent examples of the particular sort of consultation that the Applicants argue to be problematic, admitting that evidence will assist the Court in considering the substantive issue raised in this application.

[64] In conclusion on this point, I find that the Second Conacher Affidavit should not be struck because of delay.

D. *Should the Applicants be granted public interest standing to bring the application?*

[65] Because neither of the Applicants asserts a personal interest in the judicial appointments or elevations process that they wish to challenge, they seek public interest standing to bring the present application. As explained in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*] at paragraphs 35 to 37, granting public interest standing involves an exercise of discretion that considers three factors: (a) whether there is a serious justiciable issue raised; (b) whether the party seeking standing has a real stake or a genuine interest in that issue; and (c) whether, in all the circumstances, the proposed proceeding is a reasonable and effective way to bring the issue before the courts. These factors are intended to be applied purposively and flexibly.

(1) Real Stake or Genuine Interest

[66] As the Respondent does not advance arguments under the second of these factors, I will address it only briefly. Considering whether an applicant has a genuine interest or real stake in a proceeding is determined by weighing whether the applicant is genuinely engaged with the issue raised as opposed to being a "mere busybody." In performing this assessment, a court will take into account the applicant's mandate and experience (see *Downtown Eastside* at paras 43, 58).

[67] The Applicant, Democracy Watch, submits that it fulfils this requirement, as it is an independent organization whose purpose is focused on government accountability, including transparent and accountable enforcement of Canada's ethics rules. It actively participates in public policymaking and legislative processes in matters relating to government ethics rules and other areas of democratic reform and government accountability. Democracy Watch also regularly participates in judicial proceedings engaging these topics. While not binding on my decision whether to grant it public interest standing in the present application, I note that Democracy Watch has been granted public interest standing in previous applications, including judicial reviews before the Federal Court concerning the appointment process for the federal Conflict of Interest and Ethics Commissioner and the federal Commissioner of Lobbying in which, as in the present application, it was not the directly affected party (*Democracy Watch v Canada (Attorney General)*, 2018 FC 1290; *Democracy Watch v Canada (Attorney General)*, 2018 FC 1291).

[68] The individual Applicant, Mr. Conacher, is a professor and scholar, as well as the Coordinator of Democracy Watch. In this role, he has monitored developments concerning Cabinet appointments, conflicts of interest, and judicial independence in Canada for several years. He has also made several written submissions concerning Cabinet appointment processes, conflict of interest issues, and the independence of law enforcement in Canada to House of Commons committees, Senate committees, and legislative committees in various provinces. Along with Democracy Watch, he has previously sought declaratory relief in this Court on constitutional issues surrounding the separation of powers (*Conacher v Canada (Prime Minister),* 2009 FC 920, aff'd 2010 FCA 131 [*Prime Minister*]).

[69] I am satisfied that both Applicants have a genuine interest in the issue raised in this application.

(2) Serious Justiciable Issue

[70] As the Applicants note, this factor involves two requirements: seriousness and justiciability. Seriousness involves consideration of whether the question raised represents a substantial or important constitutional issue and is far from frivolous on preliminary examination (see *Downtown Eastside* at para 42). The Respondent does not contest the seriousness of the question raised. The constitutional issue surrounding judicial independence raised by this application is clearly an important one and satisfies the seriousness requirement.

[71] With respect to justiciability, the Applicants submit that, as this application surrounds constitutional principles of judicial independence and the rule of law, informed by the Constitution and the Charter, it raises issues that are well suited to being determined by this Court. The Respondent disagrees. The Respondent submits that the Applicants are asking this Court to sanction their view as to how a constitutional democracy should address the appointment of judges, which is not a matter suitable for adjudication by the Court [Respondent's emphasis]. Rather, it is a matter for political debate and, if determined advisable, for legislative or constitutional reform.

[72] To assess the Respondent's argument, it is useful first to canvass general principles surrounding the concept of justiciability, as set out in the Respondent's Memorandum of Fact and Law, and with which principles I agree. The three branches of government (the legislature,

the executive, and the judiciary) are distinct (see *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 [*BC Judges*] at para 65). The legislature and executive balance competing political, economic and social considerations. Courts do not have the institutional capacity, nor is it their role, to perform this function. As expressed by the Supreme Court of Canada in *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 pages 90 to 91:

> … An inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue or, instead, deferring to other decision-making institutions of the polity.

[73] In considering the appropriateness of judicial involvement in particular matters, Canadian courts have considered questions such as the following: (a) whether the case has a sufficient legal component that it can be resolved by the application of a legal standard (see *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at p 545); (b) whether the case is argued solely in the hypothetical and abstract sense (see *Page v Mulcair*, 2013 FC 402 at paras 60-62); (c) whether the Court is being asked to express its opinion on the wisdom of governmental action (see *Operation Dismantle v The Queen*, [1985] 1 SCR 441 [*Operation Dismantle*] at p 472); (d) whether there are moral or political dimensions to the case that are inappropriate for the Court to decide (see *Operation Dismantle* at p 465); (e) whether the relief sought impinges upon policy-making responsibilities of other branches of government (see *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 [*Tanudjaja*] at paras 33-34); and (f) whether the relief sought would have any practical effect (see *Tanudjaja* at para 34).

[74] Against this jurisprudential backdrop, the Respondent submits that this application has every hallmark of a non-justiciable case. The Respondent argues that the Applicants are asking the Court to opine on the entire process by which federally appointed judges are appointed and to issue directions to the executive concerning what the Applicants or the Court may consider would be a better appointments process. The Respondent submits that such an inquiry extends well beyond the proper purview of the judiciary.

[75] While I take no issue with any of the jurisprudential principles upon which the Respondent relies, I disagree with the Respondent's position that their application supports a conclusion that the issue before the Court is not justiciable. There may be merit to the Respondent's argument insofar as it extends to the details of the remedies the Applicants are seeking in this application. If the Court found that the current federal judicial appointments or elevations process was unconstitutional, it would clearly not be the Court's role to provide detailed direction as to how the process should be redesigned. Rather, I would regard the Court's role in such a situation to be the identification of the basis for the unconstitutionality, following which any resulting redesign of the appointments process would fall to other branches of government, with the benefit of the Court's reasons.

[76] However, the determination of whether a particular matter offends constitutional principles is very much in the Court's wheelhouse. Such a determination involves the application of a legal standard, informed by the relevant constitutional provisions or common law principles and applicable jurisprudence. In assessing the constitutionality of activity of the executive branch, the Court is not being asked to express an opinion informed by moral, political, or other

policy considerations. Nor would I regard the resulting relief as necessarily devoid of practical effect. Depending upon the nature of a constitutional violation identified in a particular matter, the Court can identify and dimension that violation so as to inform subsequent work by other branches of government to remedy the violation.

[77] As for whether the Court is being asked to address arguments that are advanced solely in the hypothetical and abstract sense, I do not regard this application as raising this sort of concern. As explained in *Council of Canadians with Disabilities v British Columbia (Attorney General)*, 2020 BCCA 241 at paragraph 95, some constitutional principles are more general in their application than others, such that pleadings regarding the particular factual context of a specific individual's case is not always required for a matter to be justiciable.

[78] I have also considered the Respondent's argument that the process at issue in this application, leading to recommendations for appointments or elevations, lacks a sufficient legal component amenable to judicial review. The Respondent submits that recommendations made by the JACs to the Minister, and in turn by the Minister to Cabinet, can be reviewable only to the extent they affect the legality of the ultimate decision to appoint or elevate a particular judge. Simply put, the Respondent argues that while decisions relying on recommendations have legal effect, the recommendations themselves do not.

[79] This argument engages consideration of the Court's jurisdiction to conduct judicial review of Government activity. The Applicants' Amended Notice of Application states that they are bringing this application under section 18.1 of the Act. Subsection 18.1(1) provides that an

application for judicial review may be made by anyone directly affected by the "matter" in respect of which relief is sought. Applicable jurisprudence has broadly defined a "matter", for purposes of this subsection, to embrace more than a decision and to include administrative action and anything in respect of which relief may be sought, including policy decisions and ongoing policies, where the allegation is that the policy is unlawful or unconstitutional (see *Fortune Dairy Products Limited v Canada (Attorney General)*, 2020 FC 540 [*Fortune Dairy*] at para 83; *May v CBC/Radio Canada*, 2011 FCA 130 [*May*] at para 10).

[80] Based on the Respondent's submissions at the hearing of this application, I understand its arguments to be based at least in part on the position that the process that the Applicants seek to challenge does not represent a written policy. However, while the Applicant seeks to rely on evidence as to the manner in which the process has been followed in particular instances, the general operation of the process is documented, as evidenced by exhibits attached to the affidavit of the Respondent's affiant, Mr. Lacasse.

[81] Mr. Lacasse explains that, as noted on the FJA's website, the federal judicial appointments process has been in place since 1988 and has been revised over the years. His affidavit includes several excerpts from FJA's website, including an excerpt from the webpage entitled *Overview of Federal Judicial Appointments*, a *Guide to Candidates* that summarizes the process, a *Questionnaire for Federal Judicial Appointments* that candidates must complete and submit to be considered for appointment, a *Code of Ethics* applicable to the operations of the JACs, and a set of *Guidelines for Judicial Advisory Committee Members*.

[82] The *Guide to Candidates* includes the following explanation of how federal judicial appointments are made following provision of recommendations by the relevant JAC:

> Federal judicial appointments are made by the Governor General acting on the advice of the federal Cabinet. A recommendation for appointment is made to Cabinet by the Minister of Justice with respect to the appointment of puisne judges, and by the Prime Minister with respect to the appointment of Chief Justices and Associate Chief Justices.
>
> The recommendation to Cabinet is made from amongst the names which have been previously reported by the committees to the Minister.
>
> Before recommending an appointment to Cabinet, the Minister may consult with members of the judiciary and the bar, with his or her appropriate provincial or territorial counterparts, as well as with members of the public. With respect to provincial and territorial court judges who apply for appointment to a superior court, the Minister may consult with that candidate's current Chief Judge, colleagues on the bench, as well as with the Chief Justice of the court for which the candidate is being considered. The Minister also welcomes the advice of any group or individuals on the considerations which should be taken into account when filling current vacancies.

[83] I appreciate that the Applicants' submissions in support of their application rely on consultations by the Minister that arguably extend beyond those referenced in the above passage. Indeed, Mr. Lacasse's own affidavit evidence is expressed somewhat more broadly, stating that before recommending an appointment the Minister may consult with anyone, including members of the judiciary and the bar, provincial or territorial counterparts, colleagues, and members of the public [my emphasis]. I also note that the Respondent's written representations in support of its motion to strike describe Mr. Lacasse's affidavit as having provided a fulsome explanation of the applicable procedures and policies for federal judicial appointments. Regardless of whether fully documented in the portions of the FJA website in the record before the Court, I see no reason

why the process at issue in this application is not amenable to judicial review under the principles explained in *Fortune Dairy* and *May.* Moreover, the Applicants' arguments also focus significantly upon the role of the JACs, and the Minister's role in appointing the members of the JAC, which are well documented in the material published by FJA.

[84] Finally, in support of their position on justiciability, the Respondent argues that adjudication of the issue raised by this application would undermine the rule of law in Canada. The Respondent notes that the Applicants assert they are not seeking to impugn any current federal judicial appointment or invalidate any decision by a federally appointed judge. However, the Respondent argues that the Applicants' position contains an irreconcilable contradiction. The Respondent submits that, if the federal judicial appointments process is unconstitutional, then logically this defect cannot be cured in a manner that effectively grandfathers past appointments and past judicial decisions made by those judges.

[85] The Respondent notes that the federal judicial appointments process has been in place since 1988 and that the most recent changes made in 2016 were aimed at increasing diversity and transparency. The Applicants' record includes criticism and commentary of aspects of the process in place both before and after 2016. Accordingly, the Respondent argues that the declarations the Applicants seek would necessarily have implications for all federal judicial appointments since 1988 and their decisions, such that the declaration sought by the Applicants would undermine the rule of law in Canada and upend our constitutional democracy.

[86] I find little merit to the Respondent's argument that the potential implications of the issue raised by the Applicants serve to make the issue non-justiciable. Such arguments might be relevant to the remedy that the Court would fashion if it identified a constitutional violation. However, I would not conclude based on such arguments that the question as to whether a constitutional violation exists is not a justiciable question.

[87] Before leaving this point, I wish to observe that the Respondent's argument raises the possibility that the issue raised in this application could have personal and professional implications for all individual judges currently serving on the courts to which this application relates. Obviously, this includes me, the Federal Court judge to whom adjudication of the application happens to have been assigned, which could raise concerns about my impartiality. Neither party has raised any suggestion that I should recuse myself from adjudication of this application. However, I do wish that these Reasons reflect that I am conscious of this point.

[88] It is nevertheless my view that, subject to the Applicants being granted public interest standing after addressing the remaining factor of the test in the next portion of these Reasons, I am permitted, and arguably obliged, to adjudicate this application. This result follows from the doctrine of necessity, a principle explained by the Supreme Court of Canada in *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 [*PEI Judges*]. Although there is a general rule that a judge who is not impartial is disqualified from hearing a case, there is an exception to this rule that allows a judge who would otherwise be disqualified to hear the case nonetheless, if there is no impartial judge who

can take their place (at para 4). Referred to as the doctrine of necessity, *PEI Judges* (at para 6) adopted the following articulation of the doctrine from *Halsbury's Laws of England* (4th ed 1989), vol 1(1) at para 93:

> If all members of the only tribunal competent to determine the matter are subject to disqualification, they may be authorized and obliged to hear and determine the matter by virtue of the operation of the common law doctrine of necessity.

[89] This doctrine should not be applied mechanically and will not apply in circumstances where its application would involve positive and substantial injustice or beyond the extent that necessity justifies (see *PEI Judges* at para 7).

[90] Under section 18(1) of the Act, the Federal Court has exclusive jurisdiction in this matter. Any current member of the Federal Court would be equally subject to the impartiality concerns articulated above. As such, the doctrine of necessity applies to the case at hand.

(3) Reasonable and Effective Way to Bring the Issue Before the Courts

[91] Turning to the last factor of the test for public interest standing, the Respondent argues that this application is not a reasonable or effective way to address the issue the Applicants seek to raise. In particular, the Respondent argues that the Applicants have failed to put forward a proper evidentiary record, such that there are no concrete facts for the Court to adjudicate. The Respondent submits that the Court is being asked to address this application in a factual vacuum, contrary to the guidance in *MacKay v Manitoba*, [1989] 2 SCR 357 at pages 361-362.

[92] I disagree with the Respondent's position that the Court is without a factual matrix to support adjudication of the issue raised by the Applicants. I appreciate that the bulk of the Applicants' proposed evidence has been ruled inadmissible. However, in addition to the evidence that has survived the Respondent's motion to strike, the Court has the benefit of the Respondent's evidence, including Mr. Lacasse's affidavit explaining the judicial appointments and elevations processes and the exhibits thereto, which speak in some detail to the functioning of the JACs. As previously noted, the Respondent's submissions on the motion to strike included the argument that the Applicants' evidence was unnecessary, because Mr. Lacasse has direct knowledge of the applicable procedures and policies for federal judicial appointments and has provided a fulsome explanation thereof.

[93] Having considered the parties' arguments on the factors relevant to the test for public interest standing, I am satisfied that such standing should be granted to the Applicants.

E. *Do the federal judicial appointments system and federal judicial elevations system violate section 96 of the Constitution, sections 7, 11(d), and/or 24(1) of the Charter, unwritten constitutional principles of judicial independence and/or the rule of law?*

[94] This brings me to adjudication of the substantive issue raised by this application. While the above articulation of the issue identifies several sources of constitutional law on the subject of judicial independence, the Applicants rely on the sources simply to support their assertion that the Constitution, the Charter, and related common law principles all require and depend on an independent and impartial judiciary. I do not understand the Respondent to take issue with the assertion that the requirement for judicial independence and impartiality is a constitutional

imperative in Canada. Indeed, the Respondent describes judicial independence as a cornerstone of Canadian democracy. It is accordingly not necessary for the Court to engage in any detailed analysis of the particular provisions of the Constitution or the Charter referenced by the Applicants in order to arrive at this conclusion.

[95] I will shortly turn to applicable jurisprudence that has dimensioned the principles of judicial independence and impartiality and how they are applied in Canadian law. However, it is useful first to articulate with some precision my understanding of how the Applicants frame their position that the federal judicial appointments and elevations systems infringe these principles. I will then canvass the evidence relevant to the Applicant's arguments. To the extent that their position relies on evidence that has been excluded, I will not include those aspects of the Applicants' arguments.

[96] The Applicants submit that the Minister's involvement in the appointment of the majority of the members of the JACs, and the subsequent involvement of members of the ruling party in the consultations conducted by the Minister in developing recommendations to Cabinet, demonstrate a degree of political interference in the federal judicial appointments process that violates the principles of judicial independence and impartiality. The Applicants also emphasize that, as there is no JAC involvement in the judicial elevations process, the Minister is solely responsible for developing recommendations to Cabinet for elevations. The Applicants argue that, as a result of these characteristics of the appointments and elevations processes, a reasonable, well-informed person would conclude that partisan and political influence and interference form part of the processes, giving rise to an appearance of institutional bias.

[97] The Applicants also submit that these systems have produced a judiciary membership in which women, visible minorities, and Indigenous people are underrepresented. They argue that, particularly given the overrepresentation of groups such as Black and Indigenous people before the courts, a judiciary in which these groups are significantly underrepresented risks undermining or actually undermines public confidence in the impartiality of the judiciary.

[98] Turning to the evidence, there appears to be little substantive controversy between the parties on the role and operation of the JACs. The Applicants' submissions focus on the fact that three members (from the general public) of each seven-member JAC are appointed outright by the Minister, without the benefit of any nomination process other than the applications by the members of the public who are interested in participating on the JAC. The Applicants further emphasize that three other members of each JAC, while chosen from a list of nominations by each of the provincial or territorial law society, the provincial or territorial branch of the CBA, and the provincial Attorney General or territorial Minister of Justice, are also ultimately appointed by the Minister. I do not understand the Respondent to dispute any of this evidence, although the Respondent emphasizes that, although the Minister appoints the latter three JAC members referenced above, the Minister must choose from the list provided by the nominating body.

[99] There is perhaps greater controversy between the parties related to the process that occurs between the Minister's receipt of JAC recommendations and the Minister making a recommendation to Cabinet on a judicial appointment (or the Minister making a recommendation

to Cabinet on a judicial elevation). However, on the evidence before the Court, this controversy relates more to the parties' characterization of the process than to the underlying facts.

[100] It is common ground between the parties that, between receiving JAC recommendations and deciding whom to recommend to Cabinet for appointment, the Minister may consult with anyone. The Applicants argue that this stage of the process introduces concerns about political interference and influence in the appointment process. To support this concern, the Applicants rely on Exhibits C, D, and E of the Second Conacher Affidavit as demonstrating consultation with persons connected to the ruling party. These exhibits demonstrate the following:

A. Exhibit C - On April 12, 2018, the Policy and Parliamentary Affairs Advisor in the Office of the Minister sent an email to an individual who appears to be Counsel with the Canada Revenue Agency, asking him to check with his boss as to whether she has any issues with a particular candidate for an appointment. The Second Conacher Affidavit describes this individual as the Senior Communications Advisor and Issues Manager for the Minister of National Revenue. The email chain demonstrates that this individual agreed to check with his boss and revert.

B. Exhibit D - On August 14, 2018, an individual whom the Second Conacher Affidavit describes as the Advisor, Public Appointments at the Prime Minister's Office sent an email to individuals described in the Second Conacher Affidavit as the Judicial Appointment Coordinator and the Regional and Parliamentary Affairs Advisor at the Minister's office, identifying what is referred to as missing "caucus feedback" concerning certain candidates for judicial appointments. The Second Conacher

Affidavit describes this email as requesting an update on consultations with Liberal Party Members of Parliament. One of the persons, from whom the email identifies feedback to be missing, is expressly described as an "MP".

C. Exhibit E - On November 23, 2018, the Office Director and Political Attaché for the Minister of International Development sent an email to an individual described in the Second Conacher Affidavit as the Parliamentary Affairs Advisor and Parliamentary Secretary Assistant at the Minister's office, stating that the Minister of International Development does not know any of the three lawyers mentioned yesterday. The subject line of this email suggests that the inquiry relates to candidates for a judicial appointment.

[101] Based on these exhibits, I accept that there is evidence before the Court supporting the Applicants' position that consultations conducted before the Minister makes a recommendation to Cabinet on a judicial appointment can include consultations with other ministers and Members of Parliament in the caucus of the ruling party. However, my understanding is that the Respondent does not particularly dispute that consultations of this nature may occur. As previously noted, the Respondent's evidence acknowledges that the Minister may consult with anyone. Moreover, in oral submissions the Respondent did not take the position that the Minister's consultations do not extend to other politicians. Rather, the Respondent argues that, as Cabinet appoints judges and as Cabinet is a political body, there is necessarily some level of political involvement in the appointment process.

[102] The question for the Court's determination is whether these features of the process offend the principles of judicial independence and impartiality. Both for its explanation of these principles and in support of their position that these principles are violated, the Applicant relies significantly on the analysis in *Valente*. In that case, the Supreme Court was tasked to determine what was meant by an independent tribunal for purposes of section 11(d) of the Charter (the right of a person charged with an offence to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal). In arriving at that determination, Justice Le Dain (writing for the Court) canvassed in considerable detail the meaning of judicial independence. As the Applicants note, the Court explained as follows the distinction between the related concepts of judicial impartiality and judicial independence (at p 685):

> … Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" as Howland C.J.O. noted, connotes absence of bias, actual or perceived. The word "independent" in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

[103] As identified earlier in these Reasons, Justice Le Dain's subsequent analysis confirmed that, as with impartiality, the test for judicial independence requires assessment of the public perception, that is whether the public would perceive that a court enjoys essential objective conditions or guarantees of such independence (at p 689):

> Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or

> attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for purposes of s. 11(d) of the *Charter* should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

[104] As observed earlier in these Reasons, the test for independence therefore asks (similar to the classic test for a reasonable apprehension of bias) whether a reasonable person, who is fully informed of all the circumstances, would consider that a particular court enjoys the necessary independent status.

[105] As the Applicants note, both judicial independence and judicial impartiality have individual and institutional aspects (see *R v Lippé*, [1991] 2 SCR 114 [*Lippé*] at p 140). It is in relation to the institutional aspect that the Applicants assert their position in the case at hand. As with institutional independence, the test for institutional impartiality is that described in *Valente* (see *Lippé* at p 143).

[106] After identifying the applicable test, *Valente* analysed what should be considered as the essential conditions of judicial independence. Noting that the concept of judicial independence has been an evolving one, Justice Le Dain reviewed relevant constitutional and statutory provisions, academic commentary, and reports (including the report of a CBA committee on

judicial independence mentioned earlier in these Reasons) and identified the following three essential conditions or core characteristics of judicial independence (at pp 691-712):

A. security of tenure - a tenure that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner (at p 698);

B. financial security - security of salary or other remuneration and, where appropriate, security of pension, established by law and not subject to arbitrary interference by the executive (at p 704); and

C. administrative independence - institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function (p 708).

[107] These conditions have been confirmed and applied in numerous subsequent authorities (see, *e.g.*, *PEI Judges* at paras 115-117; *Ell v Alberta*, 2003 SCC 35 at para 28; *Provincial Court Judges' Association of New Brunswick v New Brunswick (Minister of Justice)*, 2005 SCC 44 at para 7; *BC Judges* at para 31).

[108] The Respondent notes that the Applicants do not allege that the judicial appointments or elevations processes compromise any of these three core characteristics or conditions of judicial independence. Rather, the Applicants ask the Court to find an additional condition that, unlike the characteristics identified in the jurisprudence that achieve independence through their operation following judicial appointment, would apply to the particular process leading up to the appointment. The Respondent submits that there is no authority supporting the imposition of

such a condition and that such a condition would be contrary to the role the Constitution assigns to the Cabinet in the appointment of judges.

[109] The Applicants argue that there is authority for their position, found both in applicable jurisprudence and in other sources of the sort canvassed in *Valente*. Indeed, they submit that *Valente* itself supports their position, citing the following passage from Justice Le Dain's analysis (at p 692):

> Conceptions have changed over the years as to what ideally may be required in the way of substance and procedure for securing judicial independence in as ample a measure as possible. Opinions differ on what is necessary or desirable, or feasible. This is particularly true, for example, of the degree of administrative independence or autonomy it is thought the courts should have. It is also true of the extent to which certain extra-judicial activity of judges may be perceived as impairing the reality or perception of judicial independence. <u>There is renewed concern about the procedure and criteria for the appointment of judges as that may bear on the perception of judicial independence.</u> Professional and lay concern about judicial independence has increased with the new power and responsibility given to the courts by the Charter. Reports and speeches on the subject of judicial independence in recent years have urged the general adoption of the highest standards or safeguards, not only with respect to the traditional elements of judicial independence, but also with respect to other aspects now seen as having an important bearing on the reality and perception of judicial independence. … [Emphasis added]

[110] Turning first to the non-judicial sources upon which the Applicants rely, I note that, in addition to the Harrington Article, the CBA Statement, and the BIPOC Letter, the Applicants seek to rely on a document they included in their Book of Authorities - a press release by the Canadian Judicial Council [CJC] dated February 20, 2007 and entitled "Judicial Appointments: Perspective from the Canadian Judicial Council" [CJC Press Release]. The Respondent takes issue with the Applicants' inclusion of this document as an authority when it is not in evidence. I

disagree with the Respondent's position, as I regard the role of this document to be the same as those identified above - *i.e.*, to potentially inform an assessment of the legal content of the principle of judicial independence the Court is required to apply in adjudicating this application.

[111] It appears from the CJC Press Release that it was prompted by changes made in 2006 to the composition and functioning of the JACs. In particular, the changes eliminated the distinction between "recommended" and "highly recommended" for the assessment of candidates. These changes also increased the number of members serving on a JAC and eliminated the vote previously afforded to the member representing the judiciary, such that the Government was appointing a majority of the voting members. In that context, the CJC expressed concerns that the JACs may neither be, nor be seen to be, fully independent of the Government.

[112] Obviously, commentary from a body such as the CJC, which is composed of Chief Justices and Associate Chief Justices across Canada, is worthy of attention. However, I agree with the Respondent's position that, because the CJC Press Release is 15 years old and was commenting upon an earlier version of the federal judicial appointments process, its persuasiveness for purposes of the issue presently before the Court is necessarily limited. The Court does not have the benefit of evidentiary details surrounding the detailed composition and functioning of the JACs before and after the 2006 changes referenced by the CJC. For instance, it is not clear whether the then new structure upon which the CJC was commenting involved appointments by Government from a short list of nominees by independent bodies such as provincial or territorial law societies, the CBA, or a relevant provincial government.

[113] The other non-judicial sources upon which the Applicants rely are more current. The CBA Statement is dated November 6, 2020, and advocates for an open, transparent and apolitical process for the appointment of qualified candidates to the bench. The CBA welcomed the changes to the appointments process introduced in 2016, including an open application process, publicized selection criteria, and advisory committees that are more diverse and less ideological, with stakeholders, including nominees of the Minister, the Courts, the legal communities, and the public. However, the CBA noted that, no matter how independent the shortlist of candidates, vetting those candidates for party support makes the decision a political one. The CBA expressed that prior political involvement should not exclude prospective applicants from the bench, as such involvement is one indication of community engagement that may point to a good judge. However, it expressed concern about partisan activity becoming the deciding factor in an appointment.

[114] As previously noted, the BIPOC Letter, dated September 14, 2020, was written on behalf of a number of legal organizations. These include bar associations (*e.g.*, the Canadian Association of Black Lawyers and the Indigenous Bar Association), legal organizations (*e.g.*, the Canadian Association of Refugee Lawyers and the Canadian Environmental Law Association) and specialty and community clinics (*e.g.*, Black Legal Action Centre (Ontario) and Clinique juridique de Saint-Michel). This letter advocates for the appointment of candidates from BIPOC communities to then present vacancies on the Federal Court, emphasizing that a significant volume of this Court’s docket is composed of immigration, refugee and Indigenous cases, in which almost all applicants are from BIPOC communities. The letter also advocates for revised

assessment criteria for judicial appointments to recognize systemic barriers that prevent the appointment of BIPOC judges.

[115] Finally, the Applicants rely on the explanation in the Harrington Article, described in the First Conacher Affidavit as dated July 2, 2015, for its explanation of changes that were made approximately 10 years previously to the judicial appointments process in England and Wales. Prof. Harrington explains that, with the passage of the Constitutional Reform Act of 2005, an independent body for the appointment of judges and tribunal members was created to ensure that those holding judicial office are selected solely based on merit, through a fair and open competition. The members of the Judicial Appointments Commission are themselves selected through open competition, other than three members from the judiciary. Prof. Harrington prefaces her explanation of these changes with a comment that there is a lesson in here for Canada.

[116] I note that the Applicants' written submissions also include references to the provisions of the *Constitutional Reform Act 2005* (UK Public General Acts, 2005, c 4) that implemented the changes described in the Harrington Article. The Applicants also refer the Court to variations in the judicial appointment process in various Canadian provincial jurisdictions.

[117] While it was almost 40 years ago that Justice Le Dain made the comment referenced by the Applicants (*Valente* at p 692) about having identified expressions of concern surrounding the procedure and criteria for the appointment of judges as that may bear on the perception of judicial independence, the CBA Statement clearly represents a relatively recent expression of

similar concern. The BIPOC Letter does not speak directly to the subject of judicial independence. However, as the Respondent notes in its materials, the Government has recognized that diversity on the bench is important, and I accept the logic of the Applicants' argument that a judiciary that reflects the diversity of the country it serves can enhance public confidence in the institution.

[118] I also recognize that the details of the judicial appointment processes in other jurisdictions vary from the process for federal appointments to Canadian superior courts. However, whether those variations represent better processes, in pursuit of the objectives identified in the other sources canvassed above or otherwise, is not the question before the Court in this application. Consistent with the Respondent's position on its motion to strike, as analyzed earlier in these Reasons, the design of the appointment process is not within the Court's purview, other than to the extent the current design renders it unconstitutional. In determining constitutionality, while I take into account the non-judicial sources upon which the Applicants rely, I must be principally guided by authorities that have considered, dimensioned, and applied the principles of judicial independence and impartiality when such matters have arisen before the courts.

[119] Returning to *Valente,* as previously noted, the Applicants submit that, by virtue of Justice Le Dain's analysis at page 692 (quoted above), this seminal authority itself supports their position in this application. I accept that Justice Le Dain refers to the potential for pre-appointment considerations to affect the perception of judicial independence. However, notwithstanding that comment, such considerations did not form part of the essential conditions

for judicial independence identified by the Supreme Court in that case. I will therefore review the other judicial authorities upon which the Applicants rely to support their position.

[120] The Applicants note that, in *MacBain v Lederman*, [1985] 1 FC 856 (FCA) [*MacBain*], which considered the independence of the Canadian Human Rights Tribunal, the Federal Court of Appeal held that the offensive portion of the relevant statutory scheme was the appointment of the tribunal by the Canadian Human Rights Commission, as the Commission was also the prosecutor (at p 884). The Applicants argue that this analysis similarly applies to the federal judicial appointment system, because the Minister appoints both judges and the head of the federal Public Prosecution Service.

[121] I do not find this argument particularly compelling. In *MacBain*, the Federal Court of Appeal relied on the decision of the Court of Appeal for Ontario that was affirmed in *Valente* and distinguished it on two bases: (a) unlike the appointment of judges on a permanent basis in most Canadian jurisdictions, the *Canadian Human Rights Act* contemplated the appointment of temporary "judges" on a case-by-case basis; and (b) the lack of independence in adjudicative administrative matters including the assignment of judges to cases (at pp 870-871). While the Court's analysis referred to the Commission both appointing tribunal members and prosecuting the cases before those tribunal members, the lack of independence turned significantly on tribunal members' security of tenure and the lack of administrative independence, two of the essential conditions for judicial independence subsequently articulated in *Valente*.

[122] The Applicants also rely on *R v Généreux* , [1992] 1 SCR 259 [*Généreux*], a case concerning appointments to Canada's military courts, in which the Supreme Court concluded that the appointment of the judge advocate by the Judge Advocate General undermined the institutional independence of the General Court Martial (at p 309):

> Secondly, the appointment of the judge advocate by the Judge Advocate General (art. 111.22 Q.R. & O.), undermines the institutional independence of the General Court Martial. The close ties between the Judge Advocate General, who is appointed by the Governor in Council, and the executive, are obvious. To comply with s. 11(d) of the Charter, the appointment of a military judge to sit as judge advocate at a particular General Court Martial should be in the hands of an independent and impartial judicial officer. The effective appointment of the judge advocate by the executive could, in objective terms, raise a reasonable apprehension as to the independence and impartiality of the tribunal. However, as I have concluded above, I consider that the new arts. 4.09 and 111.22 of the amended Q.R. & O. have largely remedied this defect to the extent required in the context of military tribunals.

[123] While this passage refers to the process for appointment of judge advocates (i.e. military judges), it is clear from reading both this passage and the broader decision that the concern expressed by the Court was with the *Valente* factor of administrative independence surrounding the adjudicative function. Like *Valente,* this case concerned compliance with section 11(d) of the Charter, and the Court concluded that such compliance required the appointment of a military judge to sit as judge advocate at a particular General Court Marshal to be in the hands of an independent and impartial judicial officer (at p 309).

[124] In other words, administrative independence requires that the selection of the judge who will hear and decide a particular matter must be made by the administration of the relevant court or tribunal, not by the executive. This interpretation of the Court's reasoning is also clear from its

conclusion that the new article 111.22 of the amended Queen's Regulations and Orders (which provided to the Chief Military Trial Judge the authority to appoint a judge advocate at a General Court Martial) had remedied the defect the Court identified (at pp 305, 309). The Applicants' position is not supported by its reliance on *Généreux*.

[125] The Applicants also refer the court to *Matsqui*, arguing that the Supreme Court ruled in that case that appearance of or actual institutional bias in the appointment process must be taken into account when assessing the protection of the independence and impartiality of administrative tribunals. This case involved an assessment of the independence of tribunals appointed under First Nations bands' bylaws governing the levying of taxes against real property on reserve lands. However, as with the other authorities on which the Applicants rely, this decision turned on application of the essential conditions of independence identified in *Valente*. The Court identified a lack of financial security and lack of security of tenure on the part of tribunal members, as well as the fact that the Chiefs and Band Council select the members of their tribunals (at paras 92-95).

[126] I return to the fundamentals of the Applicants' argument and the guiding authorities. The Applicants submit that the Minister's role in appointing members to the JACs, as well as political influence upon the role of the Minister and ultimately the Cabinet in appointing judges following receipt of recommendations from the JACs and in elevating judges without the benefit of JAC involvement, render the federal judicial appointments and elevations processes unconstitutional. In assessing these arguments, I must consider whether the public would perceive that a court

whose members are selected through these processes enjoy the essential objective conditions or guarantees of such independence.

[127] The nature of such objective conditions or guarantees has been canvassed in numerous authorities, which invariably focus upon post-appointment conditions as the means by which judicial independence is secured. As the Respondent puts it, the Applicants' arguments seek to add a further pre-appointment condition. However, the authorities upon which they rely do not support their arguments. The Applicants have identified no precedents in which appointment processes resulted in a finding of constitutional violation in the absence of a problem with the post-appointment *Valente* conditions.

[128] The lack of jurisprudential support for the Applicant's position is perhaps not surprising given the particular constitutional structure that governs judicial appointments in Canada. As previously noted, the provision of the Constitution most fundamental to this structure is section 96, which provides as follows:

> 96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

[129] As canvassed earlier in these Reasons, the effect of section 96 is that superior court judges are appointed by Cabinet and, as the Respondent submits, Cabinet is inherently a political body. As expressed by Justice Stratas in *B'nai Brith* in reliance on relevant academic authorities, Cabinet is "to a unique degree the grand co-ordinating body for the divergent provincial, sectional, religious, racial and other interests throughout the nation" (para 77). As the Respondent expressed the point at the hearing of this application, there is a political element

"baked" into the appointments process by the Constitution's designation of Cabinet as the appointing authority. I note that the legislation, which the Applicants cite as enacting the changes to the United Kingdom judicial appointments process explained by Prof. Harrington, is styled the *Constitutional Reform Act 2005*. At least on its face, the title of this legislation suggests that those changes required amendment of the constitutional structure as it is understood in the United Kingdom.

[130] Of course, as with the changes to the appointments process that were made in 2016, changes can be made that are not so fundamental as to require a constitutional amendment. It may be that there would be merit to further changes and that a government that implements such changes may be rewarded at the ballot box. However, consistent with the separation of powers underlying the justiciability analysis set out earlier in these Reasons, it is not the Court's role to comment on such possibilities. Applying the constitutional principles of judicial independence and impartiality as informed by the authorities and analysis set out above, I find no constitutional violation, and this application for judicial review must therefore be dismissed.

F. *If the federal judicial appointments system and federal judicial elevations system violate the Charter, whether the infringement can be saved by section 1 of the Charter?*

[131] Given my finding above, this issue does not arise.

G. *To what remedy, if any, are the Applicants entitled?*

[132] Similarly, as this application will be dismissed, there is no need for the Court to consider remedies.

VII. **Costs**

[133] Typically, costs in an application for judicial review follow the result, meaning that the successful party receives an award of costs intended to provide some measure of compensation for legal expenses incurred in advancing its position in the matter. Consistent therewith, the Respondent explained at the hearing of this application that, if the Court decided to dismiss the application, the Respondent would be claiming costs calculated in accordance with Column III of Tariff B of the *Federal Courts Rules*, SOR/98-106.

[134] The Applicants explained that they would not be seeking costs regardless of the outcome of the application. They take the position that, given the nature of this matter as a piece of public interest litigation, no costs should be awarded to either party. The Applicants refer the Court to other examples of public interest litigation in which no costs were awarded against them, notwithstanding that they were unsuccessful in the position advanced (see, *e.g.*, *Democracy Watch v Canada (Attorney General)*, 2018 FCA 194 at para 50).

[135] The Respondent recognizes the existence of jurisprudential support for the Court declining to award costs in the context of public interest litigation. However, it argues that, in the circumstances of this particular matter, costs should be imposed, because the Applicants have previously advanced unsuccessful litigation surrounding separation of powers and, in light of the explanations in the resulting first instance and appellate decisions (see *Prime Minister*), the

Applicants should not have pursued the matter now before the Court. The Respondent also relies on *Democracy Watch v Canada (Attorney General)*, 2021 FCA 133, in which an issue raised by the Applicants on judicial review was found not to be justiciable and the application was dismissed with costs against the Applicants.

[136] The latter authority cited by the Respondent does not apply to the case at hand, as I have found that the issue raised by the Applicants is justiciable. Nor do I consider the Applicants' involvement in the former authority to support the Respondent's position, as the issue surrounding separation of powers advanced in that matter was quite different from that raised in the present application.

[137] In its recent decision in *British Columbia (Attorney General) v Trial Lawyers Association of British Columbia*, 2022 BCCA 354, the British Columbia Court of Appeal applied the following factors in assessing whether a public interest litigant should be insulated from an adverse costs award (at para 21):

> (a) The proceeding involves issues the importance of which extend beyond the immediate interests of the parties involved;
>
> (b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if they have an interest, it clearly does not justify the proceeding economically;
>
> (c) The issues have not been previously determined by a court in a proceeding against the same defendant.
>
> (d) The defendant has a clearly superior capacity to bear the costs of the proceeding.
>
> (e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.

[138] In my view, these factors all favour the Court declining to award costs against the Applicants in this matter. My Judgment will accordingly make no order as to costs.

JUDGMENT IN T-1324-20

THIS COURT'S JUDGMENT is that:

1. The Respondent's motion is granted in part and the following evidence is struck from the record:

    a. Paragraphs 14, 15, 16, 17, 18, 19, 20, 21 (first clause of first sentence), 23, 24, 25, 26, 27, 28 (first two sentences), 29, and 31 of the First Conacher Affidavit;

    b. Exhibits D, E, F, G, H, I , J, N, O, P, Q, R, S, T, U, V, W, Y, Z, AA, and BB to the First Conacher Affidavit;

    c. Paragraphs 2, 3a, and 3e of the Second Conacher Affidavit; and

    d. Exhibits A, B and F to the Second Conacher Affidavit.

2. The Applicants are granted public interest standing in this application.

3. This application is dismissed.

4. There is no order as to costs.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1324-20
STYLE OF CAUSE:	DEMOCRACY WATCH AND DUFF CONACHER v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD VIA VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 7, 2022
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	JANUARY 9, 2023

APPEARANCES:

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