

Federal Court



Cour fédérale

Date: 20190329

Docket: T-115-18

Citation: 2019 FC 388

Ottawa, Ontario, March 29, 2019

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

DEMOCRACY WATCH

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Democracy Watch [DW], seeks judicial review of the September 18, 2017 decision of Karen Shepherd, the former interim Commissioner of Lobbying [Commissioner], responding to a written complaint alleging a breach of the *Lobbyists' Code of Conduct* (Ottawa: Office of the Commissioner of Lobbying, 2015) [Lobbyists' Code]. The complaint alleged that Prince Sha Karim Al Hussaini Aga Khan [the Aga Khan] was in breach of the Lobbyists' Code

as a consequence of having hosted the Right Honourable Justin Trudeau and his family and friends on a private island in the Caribbean.

[2] The Commissioner concluded that an investigation was not necessary to ensure compliance with the Lobbyists' Code or the *Lobbying Act*, RSC 1985, c 44 (4th Supp) [*Lobbying Act*] as the Code did not apply to the Aga Khan's interactions with the Prime Minister.

[3] DW did not initiate the complaint resulting in the impugned decision; however, it argues that it should be granted public interest standing to advance its arguments on judicial review. In seeking judicial review, DW argues that the Commissioner's participation in a matter involving the Prime Minister, where the Commissioner held the position on an interim basis, was contrary to the conflict of interest provisions of the *Conflict of Interest Act*, SC 2006, c 9, s 2 [*COI Act*]. DW further argues that the process was procedurally unfair: there was a legitimate expectation that an interim commissioner would not participate in consideration of the complaint and the Commissioner's failure to recuse herself in this circumstance raises a real apprehension of bias. Finally, DW argues the decision was wrong in law. DW seeks an order quashing the decision and directing the Commissioner to proceed with a full investigation of the alleged breach of the Lobbyists' Code. In the alternative, the applicant seeks an order remitting the matter back to the Commissioner for redetermination.

[4] The respondent submits that DW should not be given public interest standing, that the alleged breach of the *COI Act* is not a matter that is justiciable, and that the Commissioner's decision is not reviewable. The respondent further submits that neither the *COI Act* nor the

common law create an expectation that the Commissioner would recuse herself, that there is no reasonable apprehension of bias, and that the process was fair. The respondent argues the Commissioner's finding that the Lobbyists' Code did not apply was reasonable.

[5] For the reasons that follow, DW is granted standing to bring the judicial review application and the application is granted.

II. Background

A. *The Complaint*

[6] In early January 2017, the media reported that the Prime Minister's Office had confirmed that the Prime Minister, his family, and some friends had accepted, from the Aga Khan, the gift of a vacation on the Aga Khan's private island in the Bahamas.

[7] On January 11, 2017, a private citizen sent a complaint to the Commissioner alleging that the Aga Khan had violated the Lobbyists' Code by gifting the vacation to the Prime Minister.

[8] The Commissioner's office acknowledged receipt of the complaint, and the Directorate of Investigations initiated an administrative review. The identity of the complainant is not disclosed in the record before me.

B. *The Commissioner's Decision*

[9] In a memorandum to the Commissioner dated September 13, 2017, the Director of Investigations addressed whether the Aga Khan's gift violated rules 8 (preferential access) or 10 (gifts) of the Lobbyists' Code. It briefly detailed the content of media reports relating to the gifted vacation and the complaint that had triggered the administrative review. It then reviewed the role of the Aga Khan Foundation of Canada [Foundation], noting that the Aga Khan is a member of its Board of Directors and that the Foundation has an active in-house return in the Registry of Lobbyists. It noted the Aga Khan is not registered as a lobbyist.

[10] The memorandum to the Commissioner concluded that the Lobbyists' Code did not apply to the Aga Khan's interactions with the Prime Minister as there was no evidence indicating that the Aga Khan was remunerated for his work at the Foundation. Consequently, the allegations of a breach of the Lobbyists' Code were unfounded. The memo recommended that the administrative review be closed.

[11] The memorandum states in part:

ISSUE

Whether the Aga Khan was in breach of Rule 8 (Preferential Access) and/or Rule 10 (Gifts) of the *Lobbyists' Code of Conduct* (2015) as a consequence of hosting the Right Honourable Justin Trudeau and his family on a private island in the Caribbean.

BACKGROUND

Media Reports

On January 6, 2017, media reports stated that Mr. Justin Trudeau, Prime Minister of Canada, his family "and a few friends" had

celebrated the new year on a private island in the Bahamas as guests of Prince Shah Karim Al Hussaini, known Aga Khan IV, a religious leader.

Complaint

On January 11, 2017, [name redacted], a private citizen, sent a complaint to the Commissioner related to this matter. On January 16, 2017, the Directorate sent an acknowledgement letter to the complainant.

The Aga Khan Foundation of Canada (AKFC)

The AKFC is a charitable organization which intervenes in the poorest regions of the world. His Highness the Aga Khan is listed as a member of the foundation's Board of Directors on the AKFC's website.

The foundation has an active in-house (organizations) return in the Registry of Lobbyists. During the Prime Minister's vacation in the Bahamas, the Aga Khan Foundation of Canada had an active return. The Aga Khan is not registered as a lobbyist.

...

ANALYSIS

The Directorate has found no evidence to indicate that Prince Shah Karim Al Hussaini, Aga Khan IV, is remunerated for his work with the AKFC and, therefore, that he was engaged in registrable lobbying activity during the Prime Minister's Christmas vacation.

Consequently, the *Lobbyists' Code of Conduct* does not apply to the Aga Khan's interactions with the Prime Minister.

RECOMMENDATION

The Investigations Directorate recommends that the administrative review be closed as there is no basis to conclude that the Aga Khan engaged in registrable lobbying activities, on behalf of the AKFC. The Directorate has a basis to conclude that the *Lobbyists' Code of Conduct* does not apply to the Aga Khan's interactions with the Prime Minister.

[12] On September 18, 2017, the Commissioner accepted the Director of Investigation's recommendation. That decision is the subject of this judicial review.

C. *The Record before the Court*

[13] The case-specific documentation before me is limited to a single document, the September 13, 2017 memorandum to the Commissioner. The record before the Commissioner contained at least the complaint letter and presumably material gathered and generated in the course of the administrative review. The respondent objected to the production of a more extensive record, and the applicant did not take issue with the respondent's position.

D. *The Interim Appointment*

[14] In June 2009, Ms. Karen Shepherd was appointed as Commissioner for a seven-year term. In anticipation of the expiration of Ms. Shepherd's mandate, the Privy Council Office commenced a process to appoint a new Commissioner in May of 2016.

[15] The process to select and appoint a new Commissioner was ongoing in June 2016 when Ms. Shepherd's mandate expired. At that time, Ms. Shepherd was appointed to the position for a six-month interim term commencing in June 2016. It was reported in November 2016 that Ms. Shepherd was not seeking reappointment to the Commissioner's position.

[16] As a result of an extended selection process, Ms. Shepherd was appointed to a second six-month interim term in December 2016 and then a third in June 2017.

[17] A new Commissioner of Lobbying, Ms. Nancy Bélanger, was appointed by the Governor in Council on December 14, 2017 after consultation with recognized party leaders and groups in the Senate and House of Commons and approval of the appointment by the House of Commons and the Senate.

III. Relevant Legislation

[18] The *Federal Accountability Act*, SC 2006, c 9, enacted the *COI Act* and amended several other statutes including the *Lobbyists Registration Act*, renaming it the *Lobbying Act*. The *COI Act* and *Lobbying Act* are described below, and relevant extracts are reproduced in the Annex to these reasons for ease of reference.

A. *COI Act*

[19] The *COI Act* has several purposes, which include: (1) establishing clear conflict of interest and post-employment rules for public office holders; (2) minimizing the possibility of conflicts of interest and providing resolution mechanisms should conflicts arise; and (3) mandating the Conflict of Interest and Ethics Commissioner [Ethics Commissioner] to determine the measures necessary to avoid conflicts and to determine whether a contravention of the *COI Act* has occurred (*COI Act*, s 3).

[20] The *COI Act* prohibits public office holders from making decisions or participating in decision making related to the exercise of an official power, duty, or function if they know or ought to know that they would be in a conflict of interest in doing so (*COI Act*, s 6(1)).

[21] Public office holders are in a conflict of interest when they exercise an official power, duty, or function that provides an opportunity to further their own private interests or that of their relatives, friends, or another person (*COI Act*, s 4). A “private interest” is defined in subsection 2(1) of the *COI Act* by way of exclusion:

private interest does not include an interest in a decision or matter

intérêt personnel N’est pas visé l’intérêt dans une décision ou une affaire :

(a) that is of general application;

a) de portée générale;

(b) that affects a public office holder as one of a broad class of persons; or

b) touchant le titulaire de charge publique faisant partie d’une vaste catégorie de personnes;

(c) that concerns the remuneration or benefits received by virtue of being a public office holder. (*intérêt personnel*)

c) touchant la rémunération ou les avantages sociaux d’un titulaire de charge publique. (*private interest*)

[22] Public office holders are required to recuse themselves from any discussion, decision, debate, or vote on any matter in which a conflict of interest would arise (*COI Act*, s 21).

[23] The Ethics Commissioner is responsible for administering and enforcing the *COI Act*.

[24] A member of the Senate or the House of Commons may request in writing that the Ethics Commissioner examine an alleged contravention. The Ethics Commissioner shall comply with the request unless he or she determines the request is frivolous, vexatious, or made in bad faith.

The Ethics Commissioner may also examine a matter on his or her own initiative (ss 44(1), 44(3), 45(1)).

[25] Where the Ethics Commissioner undertakes an examination, he or she shall complete a report setting out his or her factual findings, analysis, and conclusions. The report is to be provided to the Prime Minister, the public officer holder who is the subject of the report, and the public. In those cases where the Ethics Commissioner is acting upon a request from a member of Parliament, a copy is also provided to that member (ss 44(7), (8) and 45(2), (4)).

[26] The Ethics Commissioner's conclusions in a report relating to whether a public office holder has or has not contravened the *COI Act* are final, but the report is not determinative of the measures to be taken as a result (s 47). The *COI Act* also provides that the Ethics Commissioner's orders and decisions are only subject to review on the grounds set out in paragraphs 18.1(4)(a), (b), or (e) of the *Federal Courts Act*, RSC 1985, c F-7 (s 66).

B. The *Lobbying Act*

[27] The *Lobbying Act*'s preamble sets out four underlying principles: (1) free and open access to government is an important matter of public interest; (2) lobbying public office holders is a legitimate activity; (3) public office holders and the public should be able to know who is engaged in lobbying activities; and (4) a system for registration of paid lobbyists should not impede free and open access to government.

[28] Section 4.1 of the Act provides for the appointment of the Commissioner by the Governor in Council for a renewable term of seven years, after consultation with the leader of every recognized party in the Senate and House of Commons and a resolution of the Senate and House of Commons approving the appointment (ss 4.1(1), (2)). A Commissioner is eligible to be reappointed (s 4.1(3)).

[29] A qualified individual may be appointed on an interim basis for a term not to exceed six months where, among other reasons, the office is vacant (s 4.1(4)). In the case of an interim appointment, the *Lobbying Act* does not impose a prior requirement to consult with the leaders of recognized parties in Parliament or require that the interim appointment be approved by resolution of the Senate and House of Commons.

[30] The Act requires that the Commissioner, among other things, develop the Lobbyists' Code; establish and maintain a registry open to public inspection; and conduct investigations, where necessary, to ensure compliance with the Act and the Lobbyists' Code (ss 9, 10.2, 10.4).

[31] The Commissioner reports directly to Parliament through the Speaker of the House of Commons and the Speaker of the Senate (ss 10.5, 11, 11.1).

[32] The Act requires the Commissioner to conduct investigations where there is reason to believe, including based on information received from a member of the House of Commons or the Senate, that an investigation is necessary to ensure compliance with the Lobbyists' Code or the Act (s 10.4(1)). The Commissioner can refuse to investigate or cease an investigation if he or

she is of the opinion that: (a) the matter would be more appropriately dealt with under a procedure in another Act of Parliament; (b) the matter is not sufficiently important; (c) dealing with the matter would serve no useful purpose as too much time has passed; or (d) there is any other valid reason not to deal with the matter (s 10.4(1.1)).

[33] Upon concluding an investigation, the Commissioner must prepare a report to include his or her findings, conclusions, and the reasons for the conclusions reached and submit the report to the Speakers of the Senate and the House of Commons. The Speakers shall, in turn, table the report in each House (ss 10.5(1), (2)). Certain contraventions of the Act constitute offences (s 14).

[34] The Act recognizes two categories of lobbyists: in-house lobbyists and consultant lobbyists. Both in-house lobbyists and consultant lobbyists are required to file returns with the Commissioner setting out various details relating to their activities (ss 5, 7).

[35] A consultant lobbyist is an individual who, on behalf of any person or organization, for payment, communicates with public office holders for enumerated purposes or arranges meetings between a public officer holder and any other individual (s 5).

[36] An individual is an in-house lobbyist where: (1) he or she is employed for a corporation or organization; (2) his or her duties include communication with public office holders for enumerated purposes; and (3) that activity constitutes a significant part of their duties or would

constitute a significant part of the duties of one employee if it was performed by only one employee (s 7).

[37] A public office holder is defined as including members of the Senate and members of the House of Commons (s 2(1); *Designated Public Office Holder Regulations*, SOR/2008-117, schedule).

C. The Lobbyists' Code

[38] The Lobbyists' Code came into force on December 1, 2015, replacing the initial version of the Code that had come into effect in 1997. The Code's introduction states its purpose is to "assure the Canadian public that when lobbying of public office holders takes place, it is done ethically and with the highest standards with a view to enhancing public confidence and trust in the integrity of government decision making." The introduction further states the Code applies where the Act requires an individual to register, whether or not a registration has been filed.

[39] The Lobbyists' Code identifies four principles upon which it was developed: respect for democratic institutions; integrity and honesty; openness; and professionalism. The Code sets out ten rules that address the broad issues of transparency, use of information, and conflicts of interest. Rule 6 provides that a lobbyist shall not propose or take action that will place a public office holder in a real or apparent conflict of interest. Rules 7 through 10 provide more specific guidance on the avoidance of real or apparent conflicts of interest:

Conflict of Interest

6. A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest.

In particular:

Preferential access

7. A lobbyist shall not arrange for another person a meeting with a public office holder when the lobbyist and public office holder share a relationship that could reasonably be seen to create a sense of obligation.

8. A lobbyist shall not lobby a public office holder with whom they share a relationship that could reasonably be seen to create a sense of obligation.

Political activities

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

Conflit d'intérêts

6. Un lobbyiste ne doit proposer ni entreprendre aucune action qui placerait un titulaire d'une charge publique en situation de conflit d'intérêts réel ou apparent.

Plus particulièrement :

Accès préférentiel

7. Un lobbyiste ne doit pas organiser pour une autre personne une rencontre avec un titulaire d'une charge publique lorsque le lobbyiste et le titulaire d'une charge publique entretiennent une relation qui pourrait vraisemblablement faire croire à la création d'un sentiment d'obligation.

8. Un lobbyiste ne doit pas faire de lobbying auprès d'un titulaire d'une charge publique avec lequel il entretient une relation qui pourrait vraisemblablement faire croire à la création d'un sentiment d'obligation.

Activités politiques

9. Si un lobbyiste entreprend des activités politiques pour le compte d'une personne qui pourraient vraisemblablement faire croire à la création d'un sentiment d'obligation, il ne peut pas faire de lobbying auprès de cette personne pour une période déterminée si cette personne est ou devient un titulaire d'une charge

their office(s).

publique. Si cette personne est un élu, le lobbyiste ne doit pas non plus faire de lobbying auprès du personnel du bureau dudit titulaire.

Gifts

10. To avoid the creation of a sense of obligation, a lobbyist shall not provide or promise a gift, favour, or other benefit to a public office holder, whom they are lobbying or will lobby, which the public office holder is not allowed to accept.

Cadeaux

10. Afin d'éviter la création d'un sentiment d'obligation, un lobbyiste ne doit pas offrir ou promettre un cadeau, une faveur ou un autre avantage à un titulaire d'une charge publique, auprès duquel il fait ou fera du lobbying, que le titulaire d'une charge publique n'est pas autorisé à accepter.

[40] The legal status of the Code has been judicially considered. This Court has recognized that the Code is not an enactment of Parliament, nor is it a statutory instrument pursuant to the *Statutory Instruments Act*, RSC 1985, c S-22 (*Lobbying Act*, s 10.2(4); *Democracy Watch v Canada (Attorney General)*, 2004 FC 969 at para 23 [*Democracy Watch 2004*]; *Makhija v Canada (Attorney General)*, 2010 FC 141 at para 15 [*Makhija FC 2010*]). However, the Act requires that the Code be developed in consultation with interested parties, that it be referred to a Committee of the House of Commons prior to being published, and that it be published in the *Canada Gazette* (s 10.2). Although breaches of the Code are not sanctioned by charges and penalties, lobbyists must comply with the Code (s 10.3; *Makhija v Canada (Attorney General)*, 2010 FCA 342 at para 7 [*Makhija FCA 2010*]).

[41] The Code provides that anyone who suspects the Code has been violated should forward information to the Commissioner (Lobbyists' Code, Introduction).

IV. Issues

[42] The applicant has raised a series of issues: (1) whether DW should be granted standing; (2) whether the Commissioner breached the *COI Act*; (3) whether the Commissioner was required to recuse herself; and (4) whether the Commissioner erred in deciding not to investigate the complaint.

[43] The respondent raises the following additional issues: (1) whether the Commissioner's alleged breach of the *COI Act* is justiciable, and (2) whether the Commissioner's decision not to investigate is reviewable within the meaning of subsection 18.1(3) of the *Federal Courts Act*.

[44] I have framed the issues as follows:

- A. Does DW meet the test for public interest standing?
- B. Is the alleged breach of the *COI Act* justiciable?
- C. Is the Commissioner's decision not to investigate reviewable?
- D. What is the standard of review?
- E. Does a reasonable apprehension of bias arise?
- F. Does the doctrine of legitimate expectation apply?
- G. Was the decision reasonable?

V. Analysis

A. *Does DW meet the test for public interest standing?*

[45] The Supreme Court of Canada reviewed and refined the test for public interest standing in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*].

[46] In that decision, the Court noted that despite long recognized and needed limitations on standing, there are occasions in the public law context where public interest litigation is an appropriate vehicle by which to bring matters of public interest and importance before the courts (para 22). In determining whether to grant standing, courts must balance the underlying rationale for restricting standing with the important role courts play in assessing the legality of government action (para 23).

[47] The Supreme Court addressed the traditional reasons underlying the limitations on standing. These reasons include the proper allocation of scarce judicial resources, a factor that is concerned with the effective operation of the court system as a whole; the screening out of the mere busybody; ensuring that courts have the benefit of the contending points of view of those most directly affected by the determination of the matters in issue; and preserving the proper role of the courts and their constitutional relationship to the other branches of government (paras 25–30). The Court further stated that the principle of legality—a principle that encompasses the notions that state action must conform to the Constitution and statutory authority and that there must be a practical and effective means to challenge the legality of state action—informs the

careful exercise of the court's discretion when considering the question of public interest standing (paras 31–35).

[48] In exercising discretion a court is to consider the following: (1) whether a serious justiciable issue is raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts (para 37). The Supreme Court emphasized that these factors are not to be applied as a “rigid checklist”; rather, they should be “assessed and weighed cumulatively, in light of the underlying purposes limiting standing and applied in a flexible and generous manner that best serves those underlying purposes” (para 20).

[49] In considering the first factor, the Court defined a “justiciable question” as “a question that is appropriate for judicial determination” (para 30). It stated that for a question to be a “serious issue,” it must be a “substantial constitutional issue” or an “important one,” and the claim must be “far from frivolous”; however, a court “should not examine the merits of the case in other than a preliminary manner” (para 42).

[50] The second factor entails a consideration of “whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise” (para 43).

[51] Finally, at the third stage, a court should take a purposive approach and consider “whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether

permitting the proposed action to go forward will serve the purpose of upholding the principle of legality” (para 50). The Court noted a list of illustrative factors to consider at the third stage: the plaintiff’s capacity to bring forward a claim; whether the case is of public interest; whether there are realistic alternative means favouring a more efficient and effective use of judicial resources; and the potential impact on granting public interest standing on others who are equally or more directly affected (para 51).

[52] DW argues it meets the test for public interest standing. First, it contends that issues of compliance with the *COI Act* and the common law and the application of the *Lobbying Act* and Lobbyists’ Code are serious justiciable issues. Second, it argues it has a “genuine interest” and “real stake” in the proceedings, as demonstrated by its mandate, experience, expertise, and active involvement in policymaking and legislative processes in the areas of lobbying and conflicts of interest. Finally, DW argues it is likely the only interested party with the ability to bring this application before the Court.

[53] The respondent argues DW does not meet the test. It asserts there is no serious issue as the alleged breach of the *COI Act* is a matter for the Ethics Commissioner to determine and is therefore not justiciable. In effect, the applicant is attempting to involve the Court in matters that are properly left to Parliament and in which the applicant is not directly engaged. The respondent also takes the position that the application is not a reasonable and effective means to bring the case before the Court as only the Ethics Commissioner can investigate any alleged conflict of interest. It also notes that the private citizen who made this complaint has not brought this application.

[54] Applying the factors from *Downtown Eastside*, I am persuaded that the circumstances warrant the exercise of discretion in favour of granting DW public interest standing.

(1) A serious issue is raised

[55] The issues raised in this application engage questions that involve the interpretation of the *COI Act*, the *Lobbying Act*, and the Lobbyists' Code as well as the application of common law principles relating to bias and legitimate expectations. The legislation and instruments in issue are intended to contribute to public confidence, trust, and transparency in the conduct of public office holders and those who engage with them.

[56] As noted above, the respondent argues that the alleged breach of the *COI Act* is not justiciable and that the decision the applicant seeks to challenge is not reviewable by this Court. I address both of these matters in greater detail below. However, the application also raises questions of fairness and bias, questions that in my view arise independently of, even if nourished by, the statutory frameworks in issue.

[57] The applicant also argues that the Commissioner erred in applying the test set out in the *Lobbying Act* for determining when an investigation is necessary. This raises a matter of the interpretation and application of the Act, and the respondent acknowledges the Court's "obvious role in the interpretation and enforcement of statutory obligations."

[58] I am satisfied that the application raises a "serious issue" or an "important one" that is "far from frivolous" and that the issues are justiciable (*Downtown Eastside* at para 42).

(2) Does DW have a real stake or genuine interest in the proceedings?

[59] The respondent argues that the applicant is seeking to involve the Court in matters that are left to Parliament and that “[a]s an outsider, the applicant is not directly engaged in Parliamentary matters and does not satisfy the second branch of the test.” This position fails to adequately address whether the applicant has a real stake or genuine interest in the proceedings. The record sets out in some detail what the applicant describes in written submissions as its “important role in the development of government oversight and accountability legislation and in the subsequent use of these mechanisms to continue promoting and advancing transparency and accountability in government.”

[60] I am satisfied, based on DW’s history of active participation in public policymaking and legislative processes—including amendments to the *Lobbying Act* and its predecessors, the creation of the position of the Ethics Commissioner, the enactment of the *COI Act*, and the drafting and amendment of the Lobbyists’ Code—that DW has a genuine interest in the matters raised in this application.

(3) Is the application a reasonable and effective way to bring the issues before the Court?

[61] The respondent argues the applicant should fail on this prong. The respondent submits that only the Ethics Commissioner can investigate alleged breaches of the *COI Act*; that complaints were not initiated alleging a conflict of interest by the Commissioner of Lobbying; and that the accountability mechanisms built into the *COI Act* do not involve the courts.

[62] As stated above and addressed in greater detail below, the issues raised in this application extend beyond the question of an alleged breach by the Commissioner of the *COI Act*. The respondent's position that this single issue leads to the conclusion that the application is not a reasonable and effective way to bring the series of issues raised before the Court is not persuasive.

[63] The respondent also notes that there is a more directly affected party, the private citizen who initiated the complaint, who has chosen not to pursue this matter. This is a relevant consideration in applying the third prong of the test, but it is not determinative (*Downtown Eastside* at paras 50, 51).

[64] This third prong of the public interest standing test is not to be applied rigidly, but in a liberal and generous fashion (*Downtown Eastside* at paras 47, 48). In this case, the identity of the complainant has not been disclosed on the record. There is no evidence indicating the nature or extent of the complainant's interest or of the complainant's circumstances.

[65] I have concluded that the other two prongs of the test have been met: a serious issue is raised and the applicant has a genuine interest in the application. The Court has received extensive submissions on issues that engage the public interest, and those issues have been presented in a context suitable for judicial determination. As the Federal Court of Appeal recently noted, DW brings a "useful and distinctive perspective" to the issues, issues unlikely to otherwise be raised before the courts (*Democracy Watch v Canada (Attorney General)*, 2018 FCA 194 at para 21 [*Democracy Watch 2018*]).

[66] Considering all the circumstances and approaching this prong of the test in a pragmatic and practical manner, I am satisfied that the application is a reasonable and effective means of bringing the issues before the Court.

B. *Is the alleged breach of the COI Act justiciable?*

[67] The respondent argues that the alleged breach of the *COI Act* is not justiciable. The respondent submits that it was open to Parliament to reserve for itself the sole enforcement role as it related to the obligations imposed by the *COI Act* and that Parliament has vested in the Ethics Commissioner the sole jurisdiction to investigate any alleged breaches of the *COI Act*.

[68] Justiciability essentially asks whether it is appropriate for the courts to decide a particular issue (*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 32 [*Wall*]). Questions of justiciability involve “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” (*Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 at 90–91 [*Auditor General*]).

[69] As the Supreme Court recently noted in *Wall* at paragraph 34:

There is “no single set of rules” for determining justiciability. It depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter... In determining this, courts should consider “that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a

sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute."

[Emphasis added]

[70] While justiciability is a flexible and contextual concept, trends have emerged in the case law. Some matters have been held not to be justiciable by virtue of the separation of powers; these include the exercise of prosecutorial discretion, questions of parliamentary privilege, and the legislative process. Other matters are purely political, such as the designation of a person as a *persona non grata*, the bestowing of a political honour, or the making of treaties. Still others involve statutory provisions that the legislature intends to be enforceable through the legislature itself rather than the courts (Robert W Macaulay, James LH Sprague & Lorne Sossin, *Practice and Procedure before Administrative Tribunals* (Toronto: Thomson Reuters, 2018) (loose-leaf updated 2019, release 2019-2), 28.3(c)(i)–(iii)). It is this final category upon which the respondent relies in contending that the decision is not justiciable.

[71] In considering questions of justiciability, courts must be sensitive to the separation of functions between the legislative, judicial, and executive branches of government and must not usurp the role of other branches (*Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62 at paras 33–36).

[72] In *Auditor General*, the Supreme Court considered a statutory scheme that purported to confine remedies to Parliament. In that case, the Auditor General was unable to obtain documents from Cabinet. The relevant statute provided for a reporting process in which the

Auditor General reported annually to the House of Commons on whether all required information had been provided, and the Auditor General had made two such reports.

[73] The Court noted that Parliamentary sovereignty empowered Parliament to “make its intention known as to the role the courts are to play in interpreting, applying and enforcing its statutes” (*Auditor General* at 91). However, if a statute provides for an alternative remedy, the court must still inquire into the adequacy of the alternative remedy, and “when Parliament fails to state explicitly that a statutory remedy is the sole or exclusive remedy, it will always be the case that exclusivity cannot be automatically assumed” (*Auditor General* at 96).

[74] In considering exclusivity, the Court identified a number of factors leading to the conclusion that Parliament intended for the provisions at issue to be an exclusive remedy. First, there was a “linkage” between the statutory right and the statutory remedy in that similar language was used to describe entitlements and the corresponding remedies (*Auditor General* at 99). Second, the relevant sections of the Act had been added when the Auditor General’s rights and duties were consolidated in the *Auditor General Act*, SC 1976-77, c 34, for the first time, which was “consistent with Parliament having designated itself as final arbiter of any disputes over the Auditor General’s access to information” (*Auditor General* at 99–100). Third, the provisions were part of a comprehensive remedial code, as there were other provisions governing the Auditor General’s ability to obtain information (*Auditor General* at 100).

[75] In *Representative for Children & Youth v British Columbia (Office of the Premier)*, 2010 BCSC 697, the Court noted at paragraph 31 that a three-part test emerged from *Auditor General*.

First, the court must determine if there is a remedial provision in the statute. Second, it must consider whether Parliament intended for that statutory remedy to be the exclusive remedy. Finally, it must examine the adequacy of that remedy.

[76] In written submissions, the applicant sets out a brief history of the *COI Act*, stating its enactment in 2006 as part of the *Federal Accountability Act*, SC 2006, c 9, was the culmination of several decades of attempted reforms to a conflict of interest regime at the federal level. The applicant notes that the regime is enforced and administered by the Ethics Commissioner, who reports directly to Parliament, is granted broad investigative and enforcement powers, and exercises quasi-judicial functions.

[77] The applicant submits that the *COI Act* imposes demanding standards on public office holders and is but one of several pieces of legislation designed to maintain ethical conduct in government at the federal level, the others being the *Criminal Code*, RSC 1985, c C-46, and the *Lobbying Act*. The applicant notes that this broad regime serves “the important goal of preserving the integrity of government” (*R v Hinchey*, [1996] 3 SCR 1128 at para 13). The regime was intended to be, and has been, interpreted as encompassing situations of both real and apparent conflicts of interest where there is potential to compromise the appearance of integrity (*Hinchey* at para 17; see also *Democracy Watch v Campbell*, 2009 FCA 79 at para 49 [*Campbell*]).

[78] In this case, the applicant alleges that in deciding not to investigate the alleged breach of the Lobbyists’ Code arising from the Aga Khan’s gift, the Commissioner of Lobbying was in a

conflict of interest and thereby breached the *COI Act*. This is because the Commissioner was seized with matters, including this matter, in which the Prime Minister had a private interest, and the Commissioner in turn had a real or apparent private interest in having her interim position renewed, a decision that rested with the Prime Minister and the Governor in Council.

[79] In identifying the alleged conflict of interest, the applicant describes a number of alternative processes for the appointment of a Commissioner that it submits would have avoided the alleged conflict. These alternative policy options are of limited relevance and assistance in the context of a judicial review.

[80] The respondent argues that in enacting the *COI Act*, Parliament has reserved for itself the role of investigating and enforcing the *COI Act* and has in turn vested that authority in the Ethics Commissioner, an Officer of Parliament. As a result, the alleged breach of the *COI Act* is not justiciable. I agree with the respondent.

[81] At the first stage of the *Auditor General* analysis, I must determine if the *COI Act* contains remedial provisions. It does. One of the purposes of the Act is to “provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred” (*COI Act*, s 3(c)). It is the Commissioner who reviews the confidential reports of public office holders and the measures taken to comply with the Act (*COI Act*, s 28). The Commissioner also determines the compliance measures to be taken by a public office holder (*COI Act*, s 29).

Finally, the Commissioner has the authority to order a public office holder to undertake any compliance measure he or she deems necessary to comply with the Act (*COI Act*, s 30).

[82] Together, these sections demonstrate that the Ethics Commissioner determines when breaches of the *COI Act* have occurred and is empowered to order public office holders to take compliance measures if necessary.

[83] In addressing the second part of the test, I must consider whether Parliament intended for these provisions to be an exclusive remedy. Such intention is derived through the interpretation of the statute (*Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183 at para 26, aff'd 2009 FCA 297). As the Supreme Court noted, if there is no explicit statement to the effect that a statutory remedy is the sole or exclusive remedy, exclusivity should not be assumed (*Auditor General* at 96).

[84] As discussed above, the Court in *Auditor General* identified a number of factors leading to the conclusion that Parliament intended for the provisions at issue to be an exclusive remedy: the “linkage” between the statutory right and statutory remedy; the timing of the introduction of the provisions at issue; and the fact that the provisions were part of a comprehensive remedial code (*Auditor General* at 99–100).

[85] In this case, Parliament, through the *COI Act*, has vested in the Ethics Commissioner, an Officer of Parliament, the authority to ensure compliance with the *COI Act* through a comprehensive reporting and review regime. This regime empowers the Ethics Commissioner to

impose compliance measures upon those subject to the *COI Act*. The *COI Act* also establishes a complaint and investigation mechanism in which the Ethics Commissioner is responsible for the receipt and investigation of complaints (s 44). The Ethics Commissioner is also granted the authority to initiate an examination on his or her own initiative (s 45).

[86] Following an examination, the Ethics Commissioner has a number of reporting obligations, including an obligation to make the report available to the public (ss 44(8), 45(4)). The *COI Act* also establishes procedures for consultation with the public office holder prior to the finalization of a report and provides that the Commissioner's conclusion as to whether a public office holder has contravened the *COI Act* is final (ss 46, 47).

[87] In addition, the *COI Act* expressly addresses the circumstances in which a decision of the Ethics Commissioner is to be subject to judicial review and limits review to issues of jurisdiction; a failure to observe a principle of natural justice, procedural fairness, or other procedure required at law; or an action or failure to act by reason of fraud or perjured evidence (*COI Act*, s 66; *Federal Courts Act*, ss 18.1(4)(a), (b), (e)). This privative clause is not determinative but is a relevant factor when considering the respondent's position that Parliament has reserved for itself the role of investigating and enforcing the *COI Act* (*Auditor General* at 99, 100).

[88] The *COI Act* demonstrates a clear linkage between the obligations imposed on public office holders and the Ethics Commissioner's duties to, on the one hand, ensure and enforce compliance, and on the other, to investigate and address alleged breaches of the *COI Act*. In my

opinion, the *COI Act* does establish a “comprehensive remedial code” that is aimed at identifying, preventing, and, where allegations of conflict arise, investigating and addressing those conflicts in a manner that is complete and transparent. Parliament has reserved to itself the right to investigate and determine breaches of the *COI Act*.

[89] The final part of the analysis asks whether the alternative remedies are adequate.

[90] The *COI Act* establishes a “comprehensive remedial code” that includes the imposition of administrative monetary penalties where a contravention of prescribed sections of the *COI Act* has occurred (s 52). In addition to the prescribed monetary penalties, the *COI Act* provides for matters to be brought to the public’s attention (ss 44(8), 45(4)).

[91] In *Auditor General* at page 104, the Supreme Court recognized that the reporting remedy, described as a “political remedy,” alone can be adequate; it brings a matter to public attention:

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

[92] The same reasoning is applicable here. The remedy under the *COI Act*, whereby reports are made available to the public, is an adequate alternative remedy.

[93] In the face of the scheme established by Parliament, it is not for the Court to step into the role of the Ethics Commissioner to consider whether the Commissioner of Lobbying was in breach of the *COI Act*. In the absence of prior consideration of the matter and a decision of the Ethics Commissioner, the alleged breach of the *COI Act* is not a matter that is justiciable.

C. *Is the Commissioner's decision reviewable?*

[94] Relying on *Democracy Watch v Conflict of Interest and Ethics Commissioner*, 2009 FCA 15 [*Democracy Watch 2009*], the respondent argues that the Commissioner of Lobbying's decision is not reviewable, as the Commissioner did not issue a decision or order within the meaning of subsection 18.1(3) of the *Federal Courts Act* (*Democracy Watch 2009* at para 9).

[95] *Democracy Watch 2009* concerned a decision of the Ethics Commissioner not to investigate actions by Prime Minister Stephen Harper, the Attorney General, and other Cabinet ministers in relation to the Mulroney-Schreiber Airbus affair. In brief reasons, the Court of Appeal held the decision was not judicially reviewable as it was not a decision or order within the meaning of section 66 of the *COI Act* (which refers to a "decision or order" of the Commissioner) or of subsection 18.1(3) of the *Federal Courts Act* (*Democracy Watch 2009* at para 9). The Supreme Court refused leave to appeal (*Democracy Watch v Canada (Conflict of Interest and Ethics Commissioner)*, [2009] SCCA No 139).

[96] In finding the directives in issue were not judicially reviewable, the Federal Court of Appeal found the absence of a decision or order to be fatal. It also noted that "[w]here administrative action does not affect an applicant's rights or carry legal consequences, it is not

amenable to judicial review” and that Democracy Watch “has no statutory right to have its complaint investigated by the Commissioner and the Commissioner has no statutory duty to act on it” (*Democracy Watch 2009* at paras 10, 11). It also noted the Commissioner’s decision was not binding, as the Commissioner retained the discretion to investigate the matter later (at para 12).

[97] In coming to this conclusion, the Court of Appeal addressed the decision of this Court in *Democracy Watch 2004*, where four decisions of the then Ethics Counsellor were reviewed. The Court of Appeal took no position on whether the decisions in issue were properly reviewable in *Democracy Watch 2004* but noted they arose in the context of a different statutory scheme (*Democracy Watch 2009* at para 13). I also note that in *Democracy Watch 2004*, the parties did not dispute “that, at all relevant times, the Ethics Counsellor was a federal board, commission or other tribunal whose rulings or decisions were subject to judicial review by this Court” (*Democracy Watch 2004* at para 21).

[98] In *Air Canada v Toronto Port Authority*, 2011 FCA 347 [*Air Canada*], the Federal Court of Appeal again addressed and clarified the circumstances in which administrative action will be susceptible to judicial review.

[99] In that case, Air Canada brought applications for judicial review of two bulletins issued by the Toronto Port Authority. In finding the bulletins were not subject to judicial review, the Court clarified that a “decision” or “order” is not a prerequisite for judicial review. The Court noted that subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial

review can be made regarding any “matter in respect of which relief is sought.” Further, “[a] ‘matter’ that can be [the] subject of judicial review includes not only a ‘decision or order,’ but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*.” The Court further noted that subsection 18.1(3) of the *Federal Courts Act* “refer[s] to relief for an ‘act or thing,’ a failure, refusal or delay to do an ‘act or thing,’ a ‘decision,’ an ‘order’ and a ‘proceeding.’” The Court finally noted that Rule 300 of the *Federal Court Rules*, SOR/98-106, refers to “applications for judicial review of administrative action,” not just judicial review of orders and decisions (*Air Canada* at paras 23–24).

[100] The Court held that the issue to be addressed was not whether the bulletins in issue were reflective of a “decision” or “order,” but rather whether the Toronto Port Authority had done something to trigger Air Canada’s right to bring a judicial review. Citing *Democracy Watch 2009*, the Court noted that the jurisprudence recognized many situations where an administrative body’s conduct will not trigger the right to judicial review, including where the impugned conduct “fails to affect legal rights, impose legal obligations, or cause prejudicial effects” (*Air Canada* at paras 26–29). The Court found that neither bulletin had affected Air Canada’s legal rights, imposed legal obligations, or caused it prejudicial effects (*Air Canada* at paras 37, 39).

[101] I am satisfied that the absence of a “decision or order” cannot be taken as the test for determining if a matter is reviewable. Rather, the factors to consider include whether an administrative body’s conduct or actions affected an applicant’s legal rights, imposed legal obligations, or caused prejudicial effects.

[102] The Federal Court of Appeal's recent decision in *Democracy Watch 2018* does not alter this conclusion. In that case, the Court considered whether two compliance measures under section 29 of the *COI Act* were reviewable, noting factors that pointed both to reviewability and non-reviewability (*Democracy Watch 2018* at paras 25–36). It confirmed that *Democracy Watch 2009* has “been used in support of the idea that ‘an application for judicial review cannot be brought where the conduct attacked in the application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects’” (*Democracy Watch 2018* at para 29). The Court did not find it necessary to finally decide whether the measures were reviewable, finding that even if they were, the Commissioner's interpretation and application of the Act were reasonable (*Democracy Watch 2018* at para 37).

[103] Considering the *Air Canada* factors in the context of the *Lobbying Act* and Lobbyists' Code, I am satisfied that the Commissioner's decision not to investigate the alleged breach is reviewable.

[104] The Lobbyists' Code acknowledges and encourages “anyone” suspecting non-compliance to forward information to the Commissioner (Lobbyists' Code, Introduction). Where a member of the public provides information to the Commissioner relating to compliance, the Commissioner is required to consider that information and determine whether an investigation is necessary (*Lobbying Act*, s 10.4(1)).

[105] The *Lobbying Act* and Lobbyists' Code impose a broader obligation upon the Commissioner to receive and consider information from members of the public than is imposed

on the Ethics Commissioner, who need only receive information from or through members of Parliament (*COI Act*, s 44(4); see also *Democracy Watch 2018* at para 22, where the Federal Court of Appeal noted that “[n]o direct mechanism exists for a member of the public to request an investigation into such issues”). This broader obligation to receive and consider information is consistent with the purposes of the Act and the Code, which include “assuring the Canadian public that when lobbying of public office holders takes place, it is done ethically and with the highest standards with a view to enhancing public confidence and trust in the integrity of government decision making” (Lobbyists’ Code, Introduction). It also reflects the wider breadth of application; the *Lobbying Act* and Lobbyists’ Code impose obligations on Canadians who engage in lobbying whereas the application of the *COI Act* is limited to public office holders.

[106] The ability to provide information or initiate a complaint coupled with the Commissioner’s duty to review, consider, and render a decision on that information leads me to conclude that legal rights are affected by a decision under subsection 10.4(1) of the Act. If that decision is reached in a manner contrary to the principles of fairness or if it fails to reflect the elements of reasonableness articulated by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], the decision can also be presumed to have a prejudicial effect.

[107] In finding the decision of the Ethics Commissioner was not reviewable in *Democracy Watch 2009*, the Federal Court of Appeal examined the question within the context of a different statutory regime. As noted, the *COI Act* expressly excludes the possibility that a member of the public can directly transmit information to the Ethics Commissioner in circumstances that obligate the Ethics Commissioner to either consider the information or render a decision in

respect of that information (*COI Act*, ss 44 and 45; also see *Democracy Watch 2018* at para 22).

The circumstances in this case are clearly distinguishable. I am satisfied that the Commissioner's decision not to investigate the complaint is reviewable.

D. *What is the standard of review?*

[108] The applicant submits that the correctness standard applies to issues of procedural fairness. The respondent submits that reasonableness applies throughout.

[109] It has been generally held that a correctness standard of review is to be applied where questions of procedural fairness arise; however, the jurisprudence has acknowledged that in assessing fairness, the court must afford some deference to the decision maker's procedural choices. This question was recently addressed by the Federal Court of Appeal in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69.

[110] In that case, the Court held that the notion that procedural fairness is assessed on a correctness standard with deference to the tribunal's procedural choices was both "confusing and unhelpful." The question a reviewing court must answer is "*whether* fairness has been met" (at paras 44, 46 [emphasis in original]). In the end, the Court found at paragraph 54 that "even though there is awkwardness in the use of terminology, the reviewing exercise is 'best reflected in the correctness standard.'" However, in this context, correctness requires the Court to assess whether it is satisfied, in light of the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], that the process followed achieved the standard of

fairness required in the circumstances (*Lv v Canada (Citizenship and Immigration)*, 2018 FC 935 at para 16).

[111] A reasonableness standard of review presumptively applies where the Commissioner's interpretation of the *Lobbying Act*, her home statute, arises (*Democracy Watch 2018* at para 39). The application of the *Lobbying Act* to the circumstances before the Commissioner engages questions of mixed fact and law that are also reviewable against a standard of reasonableness (*Campbell* at para 24).

[112] Reasonableness is a deferential standard. A reviewing court is to be concerned with whether (1) the decision-making process reflects the elements of justification, transparency, and intelligibility; and (2) the decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law (*Dunsmuir* at para 47).

E. *Does a reasonable apprehension of bias arise?*

[113] The Supreme Court summarized the key principles relating to reasonable apprehension of bias in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25. It affirmed that the applicable test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly” (para 20, citing *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 394). The Court noted that this test is meant to ensure both the reality and the appearance of a fair adjudicative process and that it is essential for

maintaining public confidence in the legal system (paras 22–23). The strong presumption of impartiality is not easily displaced; a “real likelihood or probability of bias” is required, and there is a high burden on the party alleging bias. The inquiry is inherently contextual and fact-specific (paras 25–26).

[114] A reasonable apprehension of bias may also result where questions of institutional independence and impartiality arise (*Bell Canada v Canadian Telephone Employees Association*, 2003 SCC 36 at para 17 [*Bell Canada*]). As the Supreme Court explained in *Bell Canada* at paragraph 19, these components are not to be conflated:

[T]he requirement of independence “pertains to the structure of tribunals, and to the relationship between their members and others, including members of other branches of government, such as the executive. The test does not have to do with independence of thought. A tribunal must certainly exercise independence of thought, in the sense that it must not be unduly influenced by improper considerations. But this is just another way of saying that it must be impartial. [Emphasis in original]

[115] The applicant argues that a reasonable apprehension of bias arises as the Commissioner lacked security of tenure—she was serving at the pleasure of the Prime Minister at the time the decision in issue was made. In advancing this argument, the applicant relies on *Democracy Watch 2004*, where Justice Frederick Gibson held that the then Ethics Counsellor position gave rise to institutional or structural bias because it did not benefit from a security of tenure and the incumbent was appointed by the Prime Minister (paras 41–45, 50–56). The Court further noted that the Ethics Counsellor fulfilled differing roles that in themselves placed him and his office in a “constant state of potential conflict of interest” (para 54).

[116] The respondent submits that the mere possibility of a renewal of an interim appointment does not establish a reasonable apprehension of bias. The test requires a “real likelihood or probability” of bias, not the mere “possibility of mischief.” The respondent argues there is no evidence that the Commissioner based her decision on anything other than the law. In addition, she had publicly stated she was not seeking reappointment. The respondent distinguishes *Democracy Watch 2004* on the basis that the appointment process in that case, which was described as “informal in the extreme,” did not require consultation with Parliamentary leaders or fixed tenure. Meanwhile, the appointment of the Commissioner of Lobbying requires consultation with the leaders of the recognized political parties in Parliament, is for a fixed term, and must be confirmed by Parliamentary approval.

[117] The applicant’s argument in this case is based on a simple assertion: Ms. Shepherd’s interim appointments would cause an informed person, viewing the matter realistically and practically and having thought the matter through, to conclude that it is more likely than not that Ms. Shepherd, consciously or unconsciously, would not decide the issue fairly.

[118] Unlike courts, administrative tribunals do not have constitutional guarantees to individual and institutional independence, as they “lack [a] constitutional distinction from the executive” (*Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at paras 23–24 [*Ocean Port*]). As tribunals are created with the purpose of implementing government policy, Parliament and the legislatures determine a tribunal’s composition and structure; therefore, “the degree of independence required of a particular

tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected” (*Ocean Port* at para 24).

[119] The areas of concern leading to the finding in *Democracy Watch 2004* do not arise here. The Commissioner’s role is to implement and enforce the *Lobbying Act*. Through the *Lobbying Act*, Parliament has made the Commissioner accountable to Parliament and required that the Commissioner not hold any other office or employment (ss 4.1, 4.2(1)). Parliament has provided Cabinet with the authority to appoint an interim Commissioner (s 4.1(4)). The Act formally sets out the Commissioner’s duties and responsibilities and establishes reporting mechanisms in respect of those duties and functions. In choosing to enact the legislative regime it has, Parliament is presumed to have foreseen the possibility that the Commissioner would be called upon to address matters that would be of interest to individual members of Parliament and Cabinet. Parliament’s choice in this regard should be respected (*Ocean Port* at para 24).

[120] Ms. Shepherd’s interim appointments were made in accordance with the *Lobbying Act*. The parties do not dispute that Ms. Shepherd had publicly announced she was not seeking reappointment to the position. There is no evidence on the record to suggest Ms. Shepherd’s decision was driven by improper considerations. The applicant has fallen well short in advancing the view that the strong presumption of impartiality has been displaced in this case. A reasonable apprehension of bias does not arise.

F. *Does the doctrine of legitimate expectation apply?*

[121] The doctrine of legitimate expectation was addressed by the Supreme Court in *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 [Agraira]:

[94] [...] If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.

[95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:

The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. [Emphasis added.]

(D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §7:1710; see also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 29; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68.)

[96] In *Mavi*, Binnie J. recently explained what is meant by “clear, unambiguous and unqualified” representations by drawing an analogy with the law of contract (at para. 69):

Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

[97] An important limit on the doctrine of legitimate expectations is that it cannot give rise to substantive rights (*Baker*, at para. 26; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557). In other words, “[w]here the conditions for its application are satisfied, the Court may [only] grant appropriate procedural remedies to respond to the ‘legitimate’ expectation” (*C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 131 (emphasis added)).

[122] The applicant argues it had a legitimate expectation arising from the objects and purposes of the *COI Act* that the Commissioner of Lobbying, a public office holder subject to the *COI Act*, would recuse herself from ruling on the Aga Khan’s gift.

[123] The respondent submits the applicant is essentially seeking to use the doctrine of legitimate expectations to obtain substantive rights, which the doctrine does not support. Moreover, the applicant has not identified words or actions that would create a legitimate expectation. The *Lobbying Act* sets out clear parameters for the interim appointment of the Commissioner and the standards for conducting an investigation, neither of which can be said to have taken the applicant by surprise. The respondent makes no representations in respect of the applicant’s position that it is the *COI Act*, not the *Lobbying Act*, that gives rise to the expectation.

[124] The doctrine of legitimate expectation has repeatedly been described in relation to the conduct, representations, promises, and past practices of an administrative actor (*Baker* at para 26; *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 78 [*Moreau-Bérubé*]; *Agraira* at para 94; Donald JM Brown & The Honourable John M Evans with the assistance of David Fairlie, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters, 2017) (loose-leaf updated 2018, release 2018-4), ¶7:1710). It has been raised in cases involving guidelines (e.g. *Agraira*), treaties (e.g. *Baker*), letters from officials (e.g. *dela Fuente v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 186), non-binding reports (e.g. *Moreau-Bérubé*), and the like.

[125] The applicant's position that a legitimate expectation may arise from the stated objects and purposes of legislation appears to be novel and the applicant cites no authority in support of the proposition. The jurisprudence suggests such expectations arise from the conduct, past practices, representations, etc. of an administrative actor, which may be gleaned from a non-statutory instrument but not the statute itself.

[126] However, even if I were to assume that the doctrine may arise in the circumstances relied upon by the applicant, the applicant identifies no clear and unambiguous representation, practice, or assurance that certain procedures would be followed. Reliance on the objects and purposes of the *COI Act* is insufficient to trigger the doctrine.

G. *Was the decision reasonable?*

[127] The applicant submits the Commissioner erred in law in deciding not to further investigate the circumstances raised in the private citizen's complaint.

[128] In advancing its position, the applicant argues that the *Lobbying Act* does not require evidence of an actual violation of the Act or the Code to trigger an investigation. Rather, the Act requires that the Commissioner need only be satisfied that an investigation is necessary to ensure compliance with the Act or Code. The applicant submits that in conducting the administrative review, the Commissioner unreasonably and unlawfully narrowed the issue to a consideration of a "breach" of rule 8 or rule 10 of the Code.

[129] The applicant submits the Commissioner should have considered whether *any* registered lobbyist at the Foundation may not have complied with the Code or whether the circumstances triggered obligations under the Code for registered lobbyists within the Foundation. She should have also considered that as a board member of the Foundation, the Aga Khan was directly and legally connected to the Foundation and was acting as its representative in giving a gift to the Prime Minister. In the applicant's view, the decision "creates a loophole that the Code does not intend or permit, a loophole that allows any organization to use unpaid officers to do things for, and give things to, public office holders to place them in a conflict of interest."

[130] In support of its arguments, the applicant relies upon:

- A. the Lobbyists' Code's stated purpose: "to assure the Canadian public that when lobbying of public office holders takes place, it is done ethically and with the

highest standards with a view of enhancing public confidence and trust in the integrity of government decision making”;

- B. the Integrity and Professionalism principles contained in the Code;
- C. the Code’s rules addressing conflicts of interest (rules 6–10), citing in particular rule 6, which prohibits lobbyists from proposing or undertaking action that would place a public office holder in a real or apparent conflict of interest, and rule 10, which addresses the provision or promise of gifts, favours, or other benefits to public office holders; and
- D. subsection 10.4(1) of the *Lobbying Act*, which requires the Commissioner to conduct an investigation where he or she believes an investigation is necessary to ensure compliance with the Code or the Act.

[131] The respondent notes that the Commissioner’s jurisdiction is limited to investigating activities regulated by the *Lobbying Act*. Here, the Commissioner lacked jurisdiction as there was no evidence the Aga Khan was engaged in activities on behalf of the Foundation. The Act applies to consultant lobbyists and in-house lobbyists, individuals who are in receipt of some kind of remuneration. In the respondent’s submission, “[a] person acting in a volunteer capacity is not a lobbyist under the Lobbying Act.” As the Aga Khan did not receive remuneration for the activities he undertook on the Foundation’s behalf, he was not a registered lobbyist and the Code did not apply. The Commissioner reasonably concluded an investigation was not necessary.

[132] The applicant’s submissions are essentially to the effect that in deciding an investigation was not necessary, the Commissioner committed a reviewable error by limiting her consideration to a single circumstance—whether the Aga Khan was a remunerated member of the Foundation’s Board of Directors and was therefore subject to the *Lobbying Act*. I agree.

[133] The memorandum reporting on the administrative review discloses that the Foundation had “an active in-house (organizations) return in the Registry of Lobbyists,” that the Aga Khan

was listed as member of the Board of Directors, and that the Aga Khan was not a registered lobbyist. As submitted by the applicant, the background set out in the memorandum raises potential compliance questions in respect of the Foundation's senior officer, the officer responsible for the filing of returns, and other lobbyists at the Foundation. Potential compliance questions relating to the Aga Khan also arise.

[134] The analysis undertaken in the administrative review memorandum is limited to a single sentence, stating in part that “[t]he Directorate has found no evidence to indicate [the Aga Khan] is remunerated for his work with the AKFC.” This limited analysis undermines both the intelligibility and justifiability of the decision not to investigate and renders the decision unreasonable.

[135] At the outset, I note that “remuneration” is not a term that is used in the *Lobbying Act* in reference to either consultant lobbyists or in-house lobbyists. Consultant lobbyists incur obligations under the Act when they undertake prescribed activities on behalf of a person or organization “for payment” (s 5). The Act also imposes obligations on employees of an organization who engage in prescribed activities as in-house lobbyists, as well as their employers (s 7). I note that “employee” is defined to include an officer of the corporation or organization who is compensated for the performance of his or her duties (s 7(6)).

[136] “Payment” is broadly defined in subsection 2(1) of the *Lobbying Act* as follows:

payment means money or anything of value and includes a contract, promise or agreement to pay money or	paiement Argent ou autre objet de valeur. Y est assimilée toute entente ou promesse de paiement. (<i>payment</i>)
---	--

anything of value; (*paiement*)

[137] “Remunerate” is defined in the *Concise Oxford English Dictionary* as “pay for services rendered or work done.” “Pay” in turn denotes the giving of money in return for a service: “give (someone) money due for work, goods, or a debt incurred”: Angus Stevenson & Maurice Waite, eds, *Concise Oxford English Dictionary*, 12th ed (Oxford: Oxford University Press, 2011) sub verbos “remunerate” and “pay”.

[138] It goes without saying that “remuneration” is narrower in scope than “payment” as that term is used in section 5 of the Act.

[139] The Act’s definition of “payment” might reasonably encompass things of value that fall outside the scope of “remuneration.” For example, and without expressing any view on the question, “anything of value” might reasonably include a directorship within a corporation or organization, even in circumstances where the position is voluntary. Parliament’s broad definition of “payment” is consistent with the overarching purpose and intent of the *Lobbying Act* and the Lobbyists’ Code of enhancing public confidence and trust in the integrity of government decision making.

[140] The Commissioner’s analysis does not consider whether the Aga Khan may have received “anything of value”; it begins and ends with the simple question of monetary payment. Restricting the analysis to this narrow question is inconsistent with both the wording of the Act and the objects and purposes of the Code.

[141] In recommending the administrative review be closed, the review memorandum states “[t]he Directorate has a basis to conclude the Lobbyists’ Code of Conduct does not apply...”

This mischaracterizes the question Parliament has charged the Commissioner with considering—is “an investigation ... necessary to ensure compliance with the Code or this Act” (*Lobbying Act*, s 10.4(1)).

[142] The decision indicates that it was made with reference to the Commissioner’s “Advisory Opinions on Board of Directors.”

[143] The *Lobbying Act* empowers the Commissioner to issue “advisory opinions and interpretation bulletins with respect to the enforcement, interpretation or application of this Act” (s 10(1)). These opinions and bulletins are not statutory instruments pursuant to the *Statutory Instruments Act* and are not binding (s 10(2)). The content of the advisory opinion might well explain the limited nature of the Commissioner’s analysis, but it cannot have the effect of limiting the provisions of the Act or the Code. The Commissioner’s limited analysis excluded any consideration of potential compliance issues relating to the Foundation, its senior officer, or its other registered lobbyists. The Aga Khan’s status as a board member, coupled with the Foundation’s active in-house return, flag all of these as areas for review.

[144] A reviewing court may look to the record for the purpose of assessing the reasonableness of an outcome (*Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15). In this case, access to the original complaint from the private citizen may well have assisted in assessing the reasonableness of the Commissioner’s

decision. However, the complaint is not before me, and the remaining record is of little assistance in this regard.

[145] As previously noted, subsection 10.4(1) requires the Commissioner to broadly consider whether there may have been a lack of compliance with the Act or the Code. The Act imposes no limitations on this initial inquiry. In this regard, it is important to recognize that it is the activities an individual undertakes, not whether they have registered as a lobbyist, that triggers compliance obligations under the Act and the Code (*Makhija v Canada (Attorney General)*, 2008 FCA 402 at paras 5–6).

[146] I am of the view, in light of the purposes and objectives of the *Lobbying Act* and the Code and the investigative obligation imposed by section 10.4 of the Act, that the Commissioner was required to take a broad view of the circumstances in addressing the complaint. Instead, the record before the Court reflects a narrow, technical, and targeted analysis that is lacking in transparency, justification, and intelligibility when considered in the context the Commissioner's duties and functions. The decision is unreasonable.

VI. Relief

[147] Having concluded that the Commissioner's decision is unreasonable, I now turn to the relief sought. The applicant seeks an order directing the Commissioner to proceed with a full investigation. A court requiring an administrative decision maker to pursue a specific course of action is a form of *mandamus* (*Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55 at para 13 [*LeBon*]). An order of *mandamus* is only appropriate in very limited

circumstances (*LeBon* at paras 14, 15). No submissions have been made to justify the awarding of the remedy sought. Instead, the decision is quashed and returned for redetermination in accordance with the reasons above.

[148] In written submissions, both parties sought costs. In oral submissions, the applicant took the position that as a public interest litigant, costs should not be awarded against it. The public interest nature of the application coupled with the applicant's position that it should not be subject to a costs award are considerations to which I attach significant weight. I decline to exercise my discretion to order costs.

JUDGMENT IN T-115-18

THIS COURT'S JUDGMENT is that:

1. The application is granted;
2. The matter is returned for redetermination; and
3. There shall be no award of costs.

"Patrick Gleeson"

Judge

ANNEX

Conflict of Interest Act, SC 2006, c 9, s 2,

Loi sur les conflits d'intérêts, LC 2006, ch 9, art 2

Definitions

2 (1) The following definitions apply in this Act.

private interest does not include an interest in a decision or matter

(a) that is of general application;

(b) that affects a public office holder as one of a broad class of persons; or

(c) that concerns the remuneration or benefits received by virtue of being a public office holder. (*intérêt personnel*)

Purpose of the Act

3 The purpose of this Act is to

(a) establish clear conflict of interest and post-employment rules for public office holders;

(b) minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise;

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

intérêt personnel N'est pas visé l'intérêt dans une décision ou une affaire :

a) de portée générale;

b) touchant le titulaire de charge publique faisant partie d'une vaste catégorie de personnes;

c) touchant la rémunération ou les avantages sociaux d'un titulaire de charge publique. (*private interest*)

Objet de la présente loi

3 La présente loi a pour objet :

a) d'établir à l'intention des titulaires de charge publique des règles de conduite claires au sujet des conflits d'intérêts et de l'après-mandat;

b) de réduire au minimum les possibilités de conflit entre les intérêts personnels des titulaires de charge publique et leurs fonctions officielles, et de prévoir les moyens de régler de tels conflits, le cas échéant, dans l'intérêt public;

(c) provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred;

(d) encourage experienced and competent persons to seek and accept public office; and

(e) facilitate interchange between the private and public sector.

Conflict of interest

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

[...]

Decision-making

6 (1) No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably

c) de donner au commissaire aux conflits d'intérêts et à l'éthique le mandat de déterminer les mesures nécessaires à prendre pour éviter les conflits d'intérêts et de décider s'il y a eu contravention à la présente loi;

d) d'encourager les personnes qui possèdent l'expérience et les compétences requises à solliciter et à accepter une charge publique;

e) de faciliter les échanges entre les secteurs privé et public.

Conflits d'intérêts

4 Pour l'application de la présente loi, un titulaire de charge publique se trouve en situation de conflit d'intérêts lorsqu'il exerce un pouvoir officiel ou une fonction officielle qui lui fournit la possibilité de favoriser son intérêt personnel ou celui d'un parent ou d'un ami ou de favoriser de façon irrégulière celui de toute autre personne.

[...]

Prise de décision

6 (1) Il est interdit à tout titulaire de charge publique de prendre une décision ou de participer à la prise d'une décision dans l'exercice de sa charge s'il sait ou devrait raisonnablement savoir que, en

should know that, in the making of the decision, he or she would be in a conflict of interest.

[...]

Duty to recuse

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

[...]

Annual review

28 The Commissioner shall review annually with each reporting public office holder the information contained in his or her confidential reports and the measures taken to satisfy his or her obligations under this Act.

Determination of appropriate measures

29 Before they are finalized, the Commissioner shall determine the appropriate measures by which a public office holder shall comply with this Act and, in doing so, shall try to achieve agreement with the public office holder.

Compliance order

30 In addition to the specific

prenant cette décision, il pourrait se trouver en situation de conflit d'intérêts.

[...]

Devoir de récusation

21 Le titulaire de charge publique doit se récuser concernant une discussion, une décision, un débat ou un vote, à l'égard de toute question qui pourrait le placer en situation de conflit d'intérêts.

[...]

Examen annuel

28 Le commissaire et le titulaire de charge publique principal examinent chaque année les renseignements contenus dans les rapports confidentiels ainsi que les mesures prises par le titulaire pour satisfaire les obligations qui incombent à ce dernier en vertu de la présente loi.

Détermination des mesures pertinentes

29 Le commissaire détermine, avant qu'elle ne soit définitive, la mesure à appliquer pour que le titulaire de charge publique se conforme aux mesures énoncées dans la présente loi, et tente d'en arriver à un accord avec le titulaire de charge publique à ce sujet.

Ordonnance

30 Outre les mesures

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

[...]

Request from parliamentarian

44 (1) A member of the Senate or House of Commons who has reasonable grounds to believe that a public office holder or former public office holder has contravened this Act may, in writing, request that the Commissioner examine the matter.

Content of request

44 (2) The request shall identify the provisions of this Act alleged to have been contravened and set out the reasonable grounds for the belief that the contravention has occurred.

Examination

44 (3) If the Commissioner determines that the request is frivolous or vexatious or is made in bad faith, he or she may decline to examine the matter. Otherwise, he or she shall examine the matter described in the request and, having regard to all the

d'observation prévues dans la présente partie, le commissaire peut ordonner au titulaire de charge publique de prendre, à l'égard de toute affaire, toute autre mesure qu'il estime nécessaire pour assurer l'observation de la présente loi, y compris le dessaisissement ou la récusation.

[...]

Demande émanant d'un parlementaire

44 (1) Tout parlementaire qui a des motifs raisonnables de croire qu'un titulaire ou ex-titulaire de charge publique a contrevenu à la présente loi peut demander par écrit au commissaire d'étudier la question.

Contenu

44 (2) La demande énonce les dispositions de la présente loi qui auraient été enfreintes et les motifs raisonnables sur lesquels elle est fondée.

Étude

44 (3) S'il juge la demande futile, vexatoire ou entachée de mauvaise foi, le commissaire peut refuser d'examiner la question. Sinon, il est tenu de procéder à l'étude de la question qu'elle soulève et peut, compte tenu des circonstances, mettre fin à

circumstances of the case, may
discontinue the examination.

Information from public

44 (4) In conducting an examination, the Commissioner may consider information from the public that is brought to his or her attention by a member of the Senate or House of Commons indicating that a public office holder or former public office holder has contravened this Act. The member shall identify the alleged contravention and set out the reasonable grounds for believing a contravention has occurred.

[...]

Report

44 (7) The Commissioner shall provide the Prime Minister with a report setting out the facts in question as well as the Commissioner's analysis and conclusions in relation to the request. The report shall be provided even if the Commissioner determines that the request was frivolous or vexatious or was made in bad faith or the examination of the matter was discontinued under subsection (3).

Making report available

44 (8) The Commissioner shall, at the same time that the report is provided under

l'étude.

Renseignements provenant du public

44 (4) Dans le cadre de l'étude, le commissaire peut tenir compte des renseignements provenant du public qui lui sont communiqués par tout parlementaire et qui portent à croire que l'intéressé a contrevenu à la présente loi. Le parlementaire doit préciser la contravention présumée ainsi que les motifs raisonnables qui le portent à croire qu'une contravention a été commise.

[...]

Suivi

44 (7) Le commissaire remet au premier ministre un rapport énonçant les faits, son analyse de la question et ses conclusions, même s'il juge la demande futile, vexatoire ou entachée de mauvaise foi, ou s'il a mis fin à l'étude en vertu du paragraphe (3).

Communication

44 (8) En même temps qu'il remet le rapport, le commissaire en fournit un

subsection (7), provide a copy of it to the member who made the request — and the public office holder or former public office holder who is the subject of the request — and make the report available to the public.

double à l'auteur de la demande et à l'intéressé, et le rend accessible au public.

Examination on own initiative

Étude de son propre chef

45 (1) If the Commissioner has reason to believe that a public office holder or former public office holder has contravened this Act, the Commissioner may examine the matter on his or her own initiative.

45 (1) Le commissaire peut étudier la question de son propre chef s'il a des motifs de croire qu'un titulaire ou ex-titulaire de charge publique a contrevenu à la présente loi.

[...]

[...]

Report

Suivi

45 (3) Unless the examination is discontinued, the Commissioner shall provide the Prime Minister with a report setting out the facts in question as well as the Commissioner's analysis and conclusions.

45 (3) À moins qu'il n'ait interrompu l'étude, il remet au premier ministre un rapport énonçant les faits, son analyse de la question et ses conclusions.

Making report available

Communication

45 (4) The Commissioner shall, at the same time that the report is provided under subsection (3) to the Prime Minister, provide a copy of it to the public office holder or former public office holder who is the subject of the report and make the report available to the public.

45 (4) En même temps qu'il remet le rapport, il en fournit un double à l'intéressé visé et le rend accessible au public.

Presentation of views

46 Before providing confidential advice under paragraph 43(a) or a report under section 44 or 45, the Commissioner shall provide the public office holder or former public office holder concerned with a reasonable opportunity to present his or her views.

Conclusion in report final

47 A conclusion by the Commissioner set out in a report under section 44 or 45 that a public office holder or former public office holder has or has not contravened this Act may not be altered by anyone but is not determinative of the measures to be taken as a result of the report.

[...]

Violation

52 Every public office holder who contravenes one of the following provisions commits a violation and is liable to an administrative monetary penalty not exceeding \$500:

(a) subsections 22(1), (2) and (5);

(b) section 23;

(c) subsections 24(1) and (2);

Point de vue

46 Avant de remettre son avis au titre de l'alinéa 43a) ou son rapport au titre des articles 44 ou 45, le commissaire donne à l'intéressé visé la possibilité de présenter son point de vue.

Caractère définitif

47 Est inattaquable la conclusion tirée par le commissaire, dans le rapport prévu aux articles 44 ou 45, sur la question de savoir si le titulaire ou l'ex-titulaire de charge publique a contrevenu ou non à la présente loi. Elle n'est toutefois pas décisive lorsqu'il s'agit de déterminer les mesures à prendre pour donner suite au rapport.

[...]

Violations

52 Le titulaire de charge publique qui contrevient à l'une des dispositions ci-après de la présente loi commet une violation pour laquelle il s'expose à une pénalité d'au plus 500 \$:

a) les paragraphes 22(1), (2) et (5);

b) l'article 23;

c) les paragraphes 24(1) et (2);

- | | |
|---------------------------------------|----------------------------------|
| (d) subsections 25(1) to (6); | d) les paragraphes 25(1) à (6); |
| (e) subsections 26(1) and (2);
and | e) les paragraphes 26(1) et (2); |
| (f) subsection 27(7). | f) le paragraphe 27(7). |

[...]

[...]

Orders and decisions final

Ordonnances et décisions définitives

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

66 Les ordonnances et décisions du commissaire sont définitives et ne peuvent être attaquées que conformément à la *Loi sur les Cours fédérales* pour les motifs énoncés aux alinéas 18.1(4)a), b) ou e) de cette loi.

Lobbying Act, RSC 1985, c 44 (4th Supp)

Loi sur le lobbying, RSC 1985, c 44 (4e suppl)

Interpretation

Définitions

2(1) In this Act,

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

payment means money or anything of value and includes a contract, promise or agreement to pay money or anything of value; (*paiement*)

paiement Argent ou autre objet de valeur. Y est assimilée toute entente ou promesse de paiement. (*payment*)

public office holder means any officer or employee of Her Majesty in right of Canada and includes

titulaire d'une charge publique Agent ou employé de Sa Majesté du chef du Canada. La présente définition s'applique notamment :

(a) a member of the Senate or

a) aux sénateurs et députés

the House of Commons and any person on the staff of such a member,

(b) a person who is appointed to any office or body by or with the approval of the Governor in Council or a minister of the Crown, other than a judge receiving a salary under the Judges Act or the lieutenant governor of a province,

(c) an officer, director or employee of any federal board, commission or other tribunal as defined in the *Federal Courts Act*,

(d) a member of the Canadian Armed Forces, and

(e) a member of the Royal Canadian Mounted Police; (titulaire d'une charge publique)

[...]

Commissioner of Lobbying

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

Tenure of office and removal

fédéraux ainsi qu'à leur personnel;

b) aux personnes nommées à des organismes par le gouverneur en conseil ou un ministre fédéral, ou avec son approbation, à l'exclusion des juges rémunérés sous le régime de la Loi sur les juges et des lieutenants-gouverneurs;

c) aux administrateurs, dirigeants et employés de tout office fédéral, au sens de la *Loi sur les Cours fédérales*;

d) aux membres des Forces armées canadiennes;

e) aux membres de la Gendarmerie royale du Canada. (public office holder)

[...]

Commissaire au lobbying

4.1 (1) Le gouverneur en conseil nomme le commissaire au lobbying par commission sous le grand sceau, après consultation du chef de chacun des partis reconnus au Sénat et à la Chambre des communes et approbation par résolution du Sénat et de la Chambre des communes.

Durée du mandat et révocation

4.1 (2) Subject to this section, the Commissioner holds office during good behaviour for a term of seven years, but may be removed for cause by the Governor in Council at any time on address of the Senate and House of Commons.

Further terms

4.1 (3) The Commissioner, on the expiry of a first or any subsequent term of office, is eligible to be reappointed for a further term not exceeding seven years.

Interim appointment

4.1 (4) In the event of the absence or incapacity of the Commissioner, or if that office is vacant, the Governor in Council may appoint any qualified person to hold that office in the interim for a term not exceeding six months, and that person shall, while holding office, be paid the salary or other remuneration and expenses that may be fixed by the Governor in Council.

Rank and powers

4.2 (1) The Commissioner has the rank and powers of a deputy head of a department, shall engage exclusively in the duties of the office of Commissioner under this Act or any other Act of Parliament and shall not hold any other

4.1 (2) Sous réserve des autres dispositions du présent article, le commissaire occupe sa charge à titre inamovible pour un mandat de sept ans, sauf révocation motivée par le gouverneur en conseil sur adresse du Sénat et de la Chambre des communes.

Renouvellement du mandat

4.1 (3) Le mandat du commissaire est renouvelable pour des périodes maximales de sept ans chacune.

Intérim

4.1 (4) En cas d'absence ou d'empêchement du commissaire ou de vacance de son poste, le gouverneur en conseil peut confier l'intérim à toute personne compétente pour un mandat maximal de six mois et fixer la rémunération et les indemnités auxquelles cette personne aura droit.

Rang et pouvoirs

4.2 (1) Le commissaire a rang et pouvoirs d'administrateur général de ministère. Il se consacre exclusivement à la charge que lui confèrent la présente loi ou toute autre loi fédérale, à l'exclusion de tout autre charge ou emploi

office or employment for reward.

rétribué.

Duties and functions

4.2 (2) The Commissioner's duties and functions, in addition to those set out elsewhere in this Act, include developing and implementing educational programs to foster public awareness of the requirements of this Act, particularly on the part of lobbyists, their clients and public office holders.

Attributions

4.2 (2) En plus des autres attributions que lui confère la présente loi, il élabore et met en oeuvre des programmes d'éducation relatifs aux exigences prévues par celle-ci, en vue de sensibiliser le public et en particulier les lobbyistes, leurs clients et les titulaires d'une charge publique.

Requirement to file return

5 (1) An individual shall file with the Commissioner, in the prescribed form and manner, a return setting out the information referred to in subsection

(2), if the individual, for payment, on behalf of any person or organization (in this section referred to as the "client"), undertakes to

(a) communicate with a public office holder in respect of

(i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons,

(ii) the introduction of any Bill or resolution in either House of

Déclaration obligatoire

5 (1) Est tenue de fournir au commissaire, en la forme réglementaire, une déclaration contenant les renseignements prévus au paragraphe

(2) toute personne (ci-après « lobbyiste-conseil ») qui, moyennant paiement, s'engage, auprès d'un client, d'une personne physique ou morale ou d'une organisation :

a) à communiquer avec le titulaire d'une charge publique au sujet des mesures suivantes :

(i) l'élaboration de propositions législatives par le gouvernement fédéral ou par un sénateur ou un député,

(ii) le dépôt d'un projet de loi ou d'une

Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament,

résolution devant une chambre du Parlement, ou sa modification, son adoption ou son rejet par celle-ci,

(iii) the making or amendment of any regulation as defined in subsection 2(1) of the *Statutory Instruments Act*,

(iii) la prise ou la modification de tout règlement au sens du paragraphe 2(1) de la *Loi sur les textes réglementaires*,

(iv) the development or amendment of any policy or program of the Government of Canada,

(iv) l'élaboration ou la modification d'orientation ou de programmes fédéraux,

(v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada, or

(v) l'octroi de subventions, de contributions ou d'autres avantages financiers par Sa Majesté du chef du Canada ou en son nom,

(vi) the awarding of any contract by or on behalf of Her Majesty in right of Canada; or

(vi) l'octroi de tout contrat par Sa Majesté du chef du Canada ou en son nom;

(b) arrange a meeting between a public office holder and any other person.

b) à ménager pour un tiers une entrevue avec le titulaire d'une charge publique.

[...]

[...]

Requirement to file return

Déclaration obligatoire

7 (1) The officer responsible for filing returns for a corporation or organization shall file with the Commissioner, in the

7 (1) Est tenu de fournir au commissaire, en la forme réglementaire, une déclaration contenant les renseignements prévus au paragraphe (3) le

prescribed form and manner, a return setting out the information referred to in subsection (3) if

(a) the corporation or organization employs one or more individuals any part of whose duties is to communicate with public office holders on behalf of the employer or, if the employer is a corporation, on behalf of any subsidiary of the employer or any corporation of which the employer is a subsidiary, in respect of

(i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons,

(ii) the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament,

(iii) the making or amendment of any regulation as defined in subsection 2(1) of the *Statutory Instruments Act*,

(iv) the development or amendment of any policy or program of the Government of Canada, or

déclarant d'une personne morale ou d'une organisation si :

a) d'une part, celle-ci compte au moins un employé dont les fonctions comportent la communication, au nom de l'employeur ou, si celui-ci est une personne morale, au nom d'une filiale de l'employeur ou d'une personne morale dont celui-ci est une filiale, avec le titulaire d'une charge publique, au sujet des mesures suivantes :

(i) l'élaboration de propositions législatives par le gouvernement fédéral ou par un sénateur ou un député,

(ii) le dépôt d'un projet de loi ou d'une résolution devant une chambre du Parlement, ou sa modification, son adoption ou son rejet par celle-ci,

(iii) la prise ou la modification de tout règlement au sens du paragraphe 2(1) de la *Loi sur les textes réglementaires*,

(iv) l'élaboration ou la modification d'orientation ou de programmes fédéraux,

(v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada; and

(v) l'octroi de subventions, de contributions ou d'autres avantages financiers par Sa Majesté du chef du Canada ou en son nom;

(b) those duties constitute a significant part of the duties of one employee or would constitute a significant part of the duties of one employee if they were performed by only one employee.

b) d'autre part, les fonctions visées à l'alinéa a) constituent une partie importante de celles d'un seul employé ou constitueraient une partie importante des fonctions d'un employé si elles étaient exercées par un seul employé.

Definitions

Définitions

7 (6) In this section,

7 (6) Les définitions qui suivent s'appliquent au présent article.

employee includes an officer who is compensated for the performance of their duties; (employé)

employé Lui est assimilé le cadre dûment rémunéré pour ses fonctions. (employee)

[...]

[...]

Registry

Registre

9 (1) The Commissioner shall establish and maintain a registry in which shall be kept a record of all returns and other documents submitted to the Commissioner under this Act and of any information sent under subsection 9.1(1) and responses provided relative to that information.

9 (1) Le commissaire tient un registre contenant tous les documents — déclarations ou autres — qui lui sont fournis en application de la présente loi de même que l'information transmise en vertu du paragraphe 9.1(1) et les réponses données pour faire suite à cette transmission d'information.

[...]

[...]

Access to registry

9 (4) The registry shall be open to public inspection at such place and at such reasonable hours as the Commissioner may determine.

Accès

9 (4) Le public peut consulter le registre au lieu et aux heures que fixe, dans des limites raisonnables, le commissaire.

Interpretation bulletins

10 (1) The Commissioner may issue advisory opinions and interpretation bulletins with respect to the enforcement, interpretation or application of this Act other than under sections 10.2 to 10.5.

Bulletins d'interprétation

10 (1) Le commissaire peut publier des bulletins d'interprétation et fournir des avis portant sur l'exécution, l'interprétation ou l'application de la présente loi, à l'exception des articles 10.2 à 10.5.

Interpretation bulletins not statutory instruments

10 (2) The advisory opinions and interpretation bulletins are not statutory instruments for the purposes of the and are not binding.

[...]

Nature des bulletins et des avis

10 (2) Les bulletins d'interprétation et les avis ne sont pas des textes réglementaires au sens de la et ne sont pas contraignants.

[...]

Lobbyists' Code of Conduct

10.2 (1) The Commissioner shall develop a Lobbyists' Code of Conduct respecting the activities described in subsections 5(1) and 7(1). Code not a statutory instrument

[...]

10.2 (4) The Code is not a statutory instrument for the purposes of the Statutory Instruments Act, but the Code

Code de déontologie

10.2 (1) Le commissaire élabore un code de déontologie des lobbyistes portant sur toutes les activités visées aux paragraphes 5(1) et 7(1). Le code n'est pas un texte réglementaire

[...]

10.2 (4) Le code n'est pas un texte réglementaire pour l'application de la Loi sur les textes réglementaires. Il doit

shall be published in the Canada Gazette.

cependant être publié dans la Gazette du Canada.

Compliance with Code

Conformité

10.3 (1) The following individuals shall comply with the Code:

10.3 (1) Doivent se conformer au code :

(a) an individual who is required to file a return under subsection 5(1); and

a) la personne tenue de fournir une déclaration en application du paragraphe 5(1);

(b) an employee who, in accordance with paragraph 7(3)(f) or (f.1), is named in a return filed under subsection 7(1).

b) l'employé qui, aux termes des alinéas 7(3) f) ou f.1), est nommé dans une déclaration fournie en application du paragraphe 7(1).

Investigation

Enquête

10.4 (1) The Commissioner shall conduct an investigation if he or she has reason to believe, including on the basis of information received from a member of the Senate or the House of Commons, that an investigation is necessary to ensure compliance with the Code or this Act, as applicable.

10.4 (1) Le commissaire fait enquête lorsqu'il a des raisons de croire, notamment sur le fondement de renseignements qui lui ont été transmis par un parlementaire, qu'une enquête est nécessaire au contrôle d'application du code ou de la présente loi.

Exception

Refus d'intervenir

10.4 (1.1) The Commissioner may refuse to conduct or may cease an investigation with respect to any matter if he or she is of the opinion that

10.4 (1.1) Le commissaire peut refuser d'enquêter ou de poursuivre une enquête s'il estime, selon le cas :

(a) the matter is one that could more appropriately be dealt with according to a procedure provided for under another Act of Parliament;

a) que l'affaire visée pourrait avantageusement être traitée en conformité avec la procédure prévue par une autre loi fédérale;

(b) the matter is not sufficiently important;

b) que les conséquences de cette affaire ne sont pas

suffisamment importantes;

(c) dealing with the matter would serve no useful purpose because of the length of time that has elapsed since the matter arose; or

c) que cela serait inutile en raison de la période écoulée depuis le moment où l'affaire a pris naissance;

(d) there is any other valid reason for not dealing with the matter.

d) que cela est opportun pour tout autre motif justifié.

Report on investigation

Rapport d'enquêtes

10.5 (1) After conducting an investigation, the Commissioner shall prepare a report of the investigation, including the findings, conclusions and reasons for the Commissioner's conclusions, and submit it to the Speaker of the Senate and the Speaker of the House of Commons, who shall each table the report in the House over which he or she presides forthwith after receiving it or, if that House is not then sitting, on any of the first fifteen days on which that House is sitting after the Speaker receives it.

10.5 (1) Le commissaire prépare un rapport d'enquête dans lequel il motive ses conclusions et le remet au président de chaque chambre, qui le dépose immédiatement devant la chambre qu'il préside ou, si elle ne siège pas, dans les quinze premiers jours de séance ultérieurs.

Annual report

Rapport annuel

11 The Commissioner shall, within three months after the end of each fiscal year, prepare a report with regard to the administration of this Act during that fiscal year and submit the report to the Speaker of the Senate and the Speaker of the House of Commons, who shall each table the report in the House over which he or she presides

11 Dans les trois mois suivant la fin de chaque exercice, le commissaire prépare un rapport sur l'application de la présente loi au cours de cet exercice et le remet au président de chaque chambre, qui le dépose immédiatement devant la chambre qu'il préside ou, si elle ne siège pas, dans les quinze premiers jours de séance ultérieurs.

forthwith after receiving it or, if that House is not then sitting, on any of the first fifteen days on which that House is sitting after the Speaker receives it.

Special reports

11.1 (1) The Commissioner may, at any time, prepare a special report concerning any matter within the scope of the powers, duties and functions of the Commissioner if, in the opinion of the Commissioner, the matter is of such urgency or importance that a report on it should not be deferred until the next annual report.

Tabling of special report

11.1 (2) The Commissioner shall submit the special report to the Speaker of the Senate and the Speaker of the House of Commons, who shall each table the report in the House over which he or she presides forthwith after receiving it or, if that House is not then sitting, on any of the first fifteen days on which that House is sitting after the Speaker receives it.

Contravention

14 (1) Every individual who fails to file a return as required under subsection 5(1) or (3) or 7(1) or (4), or knowingly makes any false or misleading statement in any return or other document submitted to the Commissioner under this Act or in any response provided relative to information sent

Rapport spécial

11.1 (1) Le commissaire peut, à tout moment de l'année, préparer un rapport spécial sur toute question relevant de ses attributions et dont l'urgence ou l'importance sont telles, selon lui, qu'il serait contre-indiqué d'en différer le compte rendu jusqu'au rapport annuel suivant.

Dépôt du rapport spécial

11.1 (2) Le commissaire remet son rapport spécial au président de chaque chambre, qui le dépose immédiatement devant la chambre qu'il préside ou, si elle ne siège pas, dans les quinze premiers jours de séance ultérieurs.

Infraction

14 (1) Quiconque omet de fournir la déclaration prévue aux paragraphes 5(1) ou (3) ou 7(1) ou (4) ou donne sciemment, dans tout document — déclaration ou autre — transmis au commissaire, sous forme électronique ou autre, en application de la présente loi ,

under subsection 9.1(1), whether in electronic or other form, is guilty of an offence and liable

ou dans toute réponse donnée relativement à l'information transmise en vertu du paragraphe 9.1(1), des renseignements faux ou trompeurs commet une infraction et encourt, sur déclaration de culpabilité :

(a) on summary conviction, to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding six months, or to both; and

a) par procédure sommaire, une amende maximale de 50 000 \$ et un emprisonnement maximal de six mois, ou l'une de ces peines;

(b) on proceedings by way of indictment, to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding two years, or to both.

b) par mise en accusation, une amende maximale de 200 000 \$ et un emprisonnement maximal de deux ans, ou l'une de ces peines.

Federal Courts Act, RSC 1985, c F-7

Loi sur les Cours fédérales, LRC 1985, ch F-7

Powers of Federal Court

Pouvoirs de la Cour fédérale

(3) On an application for judicial review, the Federal Court may

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de

federal board, commission or other tribunal.

l'office fédéral.

Grounds of review

Motifs

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

(f) acted in any other way that was contrary to law.

f) a agi de toute autre façon contraire à la loi.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-115-18

STYLE OF CAUSE: DEMOCRACY WATCH v THE ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: NOVEMBER 6, 2018

JUDGMENT AND REASONS: GLEESON J.

DATED: MARCH 29, 2019

APPEARANCES:

Sebastian Spano

FOR THE APPLICANT

Alexander Gay
Davie Aaron

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Spano Law
Barrister and Solicitor
Ottawa, Ontario

FOR THE APPLICANT

Attorney General of Canada
Ottawa, Ontario

FOR THE RESPONDENT