

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20210705**

**Docket: A-331-19**

**Citation: 2021 FCA 133**

**CORAM: DE MONTIGNY J.A.  
RIVOALEN J.A.  
LOCKE J.A.**

**BETWEEN:**

**DEMOCRACY WATCH**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard by online video conference hosted by the Registry

on June 23, 2021.

Judgment delivered at Ottawa, Ontario, on July 5, 2021.

**REASONS FOR JUDGMENT BY:**

**RIVOALEN J.A.**

**CONCURRED IN BY:**

**DE MONTIGNY J.A.  
LOCKE J.A.**

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**REASONS FOR JUDGMENT**

**RIVOALEN J.A.**

I. Introduction

[1] Democracy Watch (the applicant) applies for judicial review of the Conflict of Interest and Ethics Commissioner's (the Commissioner) decision rendered on August 14, 2019, in the *Trudeau II Report 2019* (the Report). The Commissioner, on his own initiative pursuant to subsection 45(1) of the *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2 (the *Act*), commenced an

investigation in relation to allegations of undue influence exercised upon the Attorney General of Canada, the Honourable Jody Wilson-Raybould (as she then was), to halt a criminal prosecution involving SNC-Lavalin. The applicant submits that the Commissioner fettered his discretion and unreasonably refused to exercise his jurisdiction under the *Act* when he stated that he did not have reasonable grounds to pursue concurrent examinations of eight public office holders who acted under the direction or authority of the Prime Minister. The applicant argues that the Commissioner ought to have applied section 9 of the *Act* to the actions of the eight public office holders involved in this attempt to influence the Attorney General of Canada.

[2] The applicant requests an order quashing the part of the Report concerning the Commissioner's refusal to exercise his jurisdiction over the eight public office holders.

[3] In addition, the applicant attempts to add to its notice of application for judicial review the request for an examination of the same matter made on April 4, 2019, by former Member of Parliament Elizabeth May (MP May) to the Commissioner pursuant to subsection 44(1) of the *Act*.

[4] In Court File A-434-19, the applicant filed a separate application for judicial review in which it sought an order to quash a refusal by the Commissioner to examine these same eight public office holders in response to the request made by MP May. This Court dismissed the application for judicial review by Order dated February 18, 2020, because it was out of time and this Court was not persuaded that an extension of time was in the interest of justice, or that the applicant had a unique perspective that would justify granting public interest standing in that

case. In the Order, this Court advised the applicant that if it wished to raise the Commissioner's refusal of the request made by MP May as a ground to invalidate the Report in the present application, it could move for an amendment of its notice of application in the present proceeding. The applicant did not move to amend its notice of application. I am of the view that the notice of application currently before this Court is insufficient to bring into question the request made by MP May. Though it refers to said request, it is not based on any shortcomings in the Commissioner's response thereto, but rather alleges (incorrectly) that there has been no response. Therefore, the only matter that is currently the subject of this application for judicial review is the Report issued by the Commissioner on his own initiative, pursuant to subsection 45(1) of the *Act*.

[5] It is useful to state some of the facts to provide context to these reasons.

A. *Facts*

[6] On February 4, 2019, the *Globe and Mail* reported that officials in the Prime Minister's Office had pressured the Minister of Justice and Attorney General of Canada, the Honourable Jody Wilson-Raybould (the AG), to instruct the Prosecution Service to negotiate a remediation agreement with SNC-Lavalin Inc.

[7] On February 8, 2019, the applicant sent a petition to the Commissioner requesting an examination into members of the Prime Minister's Office for trying to influence the AG in violation of several sections of the *Act*, including section 9. The petition also asked the Commissioner to recuse himself. On February 26, 2019, the Commissioner answered that he had

already started an examination into the matter. The applicant sent another petition on March 4, 2019, requesting that everyone named by the AG in her testimony before the House of Commons Standing Committee on Justice be examined.

[8] On April 4, 2019, MP May sent a letter to the Commissioner also requesting that these individuals be examined by the Commissioner. On April 11, 2019, the Commissioner replied to MP May that he had already commenced an investigation of the matter, and asked that she list specifically whom she wanted investigated. She replied with a list on May 2, 2019, containing the names of eight public office holders.

[9] On August 14, 2019, the Commissioner issued the Report. On the same day, he sent a letter to MP May referring her to the Report.

B. *Trudeau II Report 2019*

[10] The Commissioner, because he had reason to believe that a possible contravention of section 9 of the *Act* had occurred, commenced an examination under subsection 45(1) of the *Act*. On February 8, 2019, he wrote to the Prime Minister of Canada, the Right Honourable Justin Trudeau, to inform him that he was initiating an examination of his conduct (Applicant's Record, Affidavit of Duff Conacher sworn on October 25, 2019, Exhibit H, p.78, Report at para. 6). The Commissioner's office received documentation from fourteen witnesses and conducted interviews with six of those witnesses.

[11] In the Report, the Commissioner canvassed Mr. Trudeau's submissions, considered the documents and testimony provided by the witnesses, including the actions of the eight public office holders named by MP May, and analysed all of the evidence he gathered. He found that, as Prime Minister, Mr. Trudeau was the only public office holder who, by virtue of his position, could clearly exert influence over the AG (Applicant's Record, Affidavit of Duff Conacher sworn on October 25, 2019, Exhibit H, p.78, Report at para. 282).

[12] The Commissioner found that "the individuals who acted under the direction or authority of the Prime Minister in this matter, as well as those who were involved in this matter on behalf of other ministers, could not have influenced the Attorney General simply by virtue of their position" (Applicant's Record, Affidavit of Duff Conacher sworn on October 25, 2019, Exhibit H, p. 78, Report at para. 285). Therefore, he found no reasonable grounds to pursue concurrent examinations of their conduct and no reason to believe that they may have breached the *Act*.

## II. Issues

[13] The power of the Court to review the orders and decisions of the Commissioner is restricted by a privative clause. Section 66 of the Act provides that 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*, R.S.C. 1985, c. F-7, on the grounds referred to in paragraph 18.1(4)(a), (b) or (e) of that Act. Errors of law are specifically excluded as a ground of review.

[14] Here, the applicant relies on paragraph 18.1(4)(a) of the *Federal Courts Act* when requesting judicial review of the Report. It submits that the Commissioner's decision to apply section 9 to the Prime Minister only, and not to the other eight public office holders, was a failure to properly exercise his jurisdiction under the *Act*, rendering the Report unreasonable.

[15] The applicant is not directly affected by the issues it raises in this application. Three questions must be answered before this Court can consider the merits of the application for judicial review, the applicant's submissions regarding the Commissioner's exercise of his jurisdiction and the reasonableness of the Report. Those questions are:

- A. Is there a reasonable apprehension of bias on the part of the Commissioner?
- B. Is the matter justiciable?
- C. Should the applicant be granted public interest standing?

[16] If this Court finds no bias, then we must consider whether the matter is justiciable. If we find the matter justiciable, then we must turn our minds to whether we should exercise our discretion to grant public interest standing to the applicant. If we grant public interest standing, then we can consider the applicant's arguments surrounding the exercise of the Commissioner's jurisdiction.

### III. Legislative Framework

[17] The legislative provisions at issue in the present judicial review are reproduced below, for ease of reference.

**Conflict of Interest Act, S.C. 2006,  
c. 9, s. 2**

**Influence**

**9** No public office holder shall use his or her position as a public office holder to seek to influence a decision of another person so as to further the public office holder's private interests or those of the public office holder's relatives or friends or to improperly further another person's private interests.

...

**Examination on own initiative**

**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.

**Discontinuance**

**45 (2)** The Commissioner, having regard to all the circumstances of the case, may discontinue the examination.

**Making report available**

**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.

**Presentation of views**

**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.

**Loi sur les conflits d'intérêts (L.C.  
2006, ch. 9, art. 2)**

**Influence**

**9** Il est interdit à tout titulaire de charge publique de se prévaloir de ses fonctions officielles pour tenter d'influencer la décision d'une autre personne dans le but 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.

[...]

**Étude de son propre chef**

**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.

**Interruption**

**45 (2)** Il peut, compte tenu des circonstances, interrompre l'étude.

**Suivi**

**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.

**Point de vue**

**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.



...

### **Orders and decisions final**

**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.

### **Federal Courts Act, R.S.C. 1985, c. F-7**

#### **Application for judicial review**

**18.1 (1)** An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

...

#### **Grounds of review**

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

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

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

...

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

[...]

### **Ordonnances et décisions définitives**

**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.

### **Loi sur les Cours fédérales, L.R.C. 1985, ch. F-7**

#### **Demande de contrôle judiciaire**

**18.1 (1)** Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

[...]

#### **Motifs**

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

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

(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;

[...]

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

IV. Applicant's Submissions and Analysis

A. *Is there a reasonable apprehension of bias on the part of the Commissioner?*

[18] On the question of whether there is a reasonable apprehension of bias on the part of the Commissioner, the applicant puts forward essentially the same arguments of bias it made before the Federal Court in *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, in which that applicant challenged the appointment of the Commissioner. In that case, the Federal Court dismissed the application in its entirety. The Federal Court found that the consultation process to appoint the current Commissioner met the statutory requirements of subsection 81(1) of the *Parliament of Canada Act*, R.S.C. 1985 c.P-1, and that the appointment process was reasonable. This Court affirmed that decision (2020 FCA 28), and leave to appeal to the Supreme Court of Canada was dismissed (2020 CanLII 50448).

[19] My view is that the Commissioner did not err when he refused to recuse himself. Here, whether one challenges the process whereby the Commissioner was appointed or the impartiality of the Commissioner himself as a result of the appointment process, the allegation is essentially the same. I see no reason to depart from this Court's previous conclusion.

[20] Further, the *Act* provides that the Commissioner will examine possible contraventions by "public office holders". The definition of "public officer holders" includes members of ministerial staff and ministers of the Crown. Therefore, the examination of members of the Governor in Council is contemplated. I see no circumstances set out in the *Act* in which the Commissioner would be required to recuse himself. Further, Section 89 of *the Parliament of*

*Canada Act* specifically permits the Commissioner to delegate some of his powers, but does not require such delegation.

[21] I rely on the decision of *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, 2 S.C.R. 781, at paragraphs 22-24, which confirms that like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. In my view, the regime established in the *Act* by Parliament contemplates that the Commissioner may examine complaints against members of the Governor in Council. The applicant's submissions cannot stand.

B. *Is the matter justiciable?*

[22] Next, I turn to the question of whether the matter is justiciable, that is, whether it is subject to judicial review.

[23] This Court has found that if the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects, there is no right to bring a judicial review (*Air Canada v. Toronto Port Authority et al.*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 29 [*Toronto Port Authority*] as adopted in the decision *Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15, at para.10, 387 N.R. 365 [*Democracy Watch 2009*]).

(1) Applicant's Submissions

[24] The applicant argues that the matter at hand is justiciable. It states that the Commissioner exercised his jurisdiction because he stated that he commenced an examination of the matter, and made a final decision on the actions of the eight public office holders. Even if this Court finds that the decision was only an exercise of discretion under subsection 45(1) of the *Act*, the applicant contends that it is subject to judicial review.

[25] The applicant submits that the prerequisite for the challenged act to affect rights, impose legal obligations, or cause prejudicial effects set out in *Toronto Port Authority* as adopted in *Democracy Watch 2009*, is contested within this Court, is not present in the text of subsection 18.1(1) of the *Federal Courts Act*, and does not accord with Parliament's intent.

[26] The applicant submits that this Court has jurisdiction to review the Commissioner's Report in this case because it is a decision and an exercise of government authority in the area of public law. The Report and the Commissioner's inaction against the eight public office holders in question has legal consequences and prejudicial effects: it permitted potential wrongdoing to go unpunished, caused harm to public confidence and trust in the integrity of government decision-making, and harm to the democratic process. The applicant argues that had the Commissioner investigated, there would have been a prejudicial effect for the public office holders.

[27] Finally, the applicant submits that it was unreasonable for the Commissioner to refuse to exercise his jurisdiction under section 45 of the *Act* and to avoid applying section 9 to the actions of the eight public office holders. The applicant contends that the Commissioner's exercise of discretion under subsection 45(1) cannot be unfettered. It maintains that under section 9, the public office holder who is seeking to influence another person could occupy a subordinate position to the other person. The applicant points to the Commissioner's *Wright Report*, in which the Chief of Staff of former Prime Minister Stephen Harper was found to have violated section 9 of the *Act* by attempting to influence a Senator over whom he held no authority.

[28] In summary, the applicant submits that the present case raises serious justiciable issues involving important questions concerning public office holders' compliance with conflict of interest requirements under the *Act*, the proper interpretation of those requirements, and the impartiality of the Commissioner.

(2) Analysis

[29] Turning to the application of subsection 18.1(1) of the *Federal Courts Act*, while I agree that a reviewable "matter" is broader than a "decision", the matter must nonetheless include something in respect of which a remedy may be available under subsection 18.1(3). The criteria to find that the matter is justiciable, as affirmed in *Democracy Watch 2009*, must be applied here. A matter that fails to affect legal rights, impose legal obligations, or cause prejudicial effects is not reviewable (*Democracy Watch 2009* at para. 10; *Toronto Port Authority*).

[30] In *Democracy Watch 2009*, this Court was asked to consider the Commissioner's refusal to investigate allegations against former Prime Minister Stephen Harper and others at the request of the applicant, because the Commissioner found that she did not have sufficient grounds to begin an examination pursuant to subsection 45(1) of the *Act*. This Court found, at paragraphs 9 and 14 of the decision, that the Commissioner's refusal to investigate, including the letter communicating the decision not to investigate, was not a reviewable decision or order. This Court held that the applicant had no legal right to have its complaint investigated and the Commissioner had no duty to act on it. Therefore, the Commissioner's letter was not a reviewable decision or order under section 66 of the *Act*. In conclusion, this Court determined in *Democracy Watch 2009*, that a decision not to investigate a public complaint under the *Act* does not give rise to a reviewable decision.

[31] Indeed, subsection 45(2) of the *Act* grants the Commissioner the power to discontinue an examination commenced on his own initiative. Even when the Commissioner has an obligation to inquire about an alleged contravention of the *Act* under section 44, it has been held that "the fact that a determination has to be made does not necessarily translate into a reviewable order or decision" (*Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194, at para. 29).

[32] This Court recently applied this principle regarding whether the public has a right to initiate a complaint in the analogous case of *Canada (Attorney General) v. Democracy Watch*, 2020 FCA 69 [*Democracy Watch 2020*]). In that case, at paragraphs 37, 38 and 40, this Court determined that, like the *Act*, the *Lobbying Act*, R.S.C. 1985, c. 44 (4<sup>th</sup> Supp.), does not create a

public complaints process and the decision of the Lobbying Commissioner not to investigate a complaint brought by a member of the public is not a reviewable decision.

[33] The applicant argues that the test from *Democracy Watch 2009* does not apply here because it is outmoded and too restrictive. It says that in 1990, Parliament enacted a unified section 18.1 of the *Federal Courts Act*, replacing the “decisions or orders” limitation in the former section 28.1 with “matter” in the current section 18.1.

[34] Further, the applicant contends that there is a divide among the justices of this Court concerning the correct test to be applied for the availability of judicial review. Since 2018, it says, at least three different panels of this Court have acknowledged or applied the test enunciated by the Supreme Court at paragraph 14 of its decision in *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 [2018] 1 S.C.R. 750 [Wall].

[35] I must disagree with the applicant’s contention.

[36] First, to overrule *Democracy Watch 2009*, the applicant must show that it is “manifestly wrong, in the sense that the Court overlooked a relevant statutory provision or a case that ought to have been followed” (*Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4<sup>th</sup>) 149, at para. 10). The applicant’s argument based on the 1990 legislative amendments to the *Federal Court Acts* does not meet this high bar. In *Toronto Port Authority*, this Court found that even though judicial review applies to a “matter” and not just a “decision or order”, there are “situations where, by its nature or substance, an administrative body’s conduct does not trigger

rights to bring a judicial review” (at paras. 24 and 28). Therefore, the fact that “matters” can be subject to judicial review does not mean that all matters are subject to it, and the test still applies.

[37] Second, I do not accept the applicant’s argument regarding the *Wall*-test, and the panels of this Court that have acknowledged or applied this test instead of the one from *Democracy Watch 2009*. The purpose of the *Wall*-test is to determine whether the nature of an application is the subject of a public law matter, which is uncontested in this case. *Wall* is about justiciability based on the subject matter of the dispute. Further, paragraph 38 of *Wall* confirms that justiciability requires that a legal right be at stake. Therefore, I cannot agree with the applicant that this Court in *Democracy Watch 2020* “reverted back to an outmoded and more restrictive test”. The test in *Democracy Watch 2009* remains the applicable test.

[38] The applicant submits that even if the *Democracy Watch 2009* test applies, its prerequisites are met in this case. I disagree.

[39] In the present case, I am of the view that the decision of the Commissioner not to commence an examination of the eight public office holders is not a reviewable matter.

[40] Here, the Commissioner stated that he did “not have reasonable grounds to pursue concurrent examinations of [the office holder’s] conduct, nor [did he] have reason to believe that they may have breached another substantive rule under the Act” (Applicant’s Record, Affidavit of Duff Conacher sworn on October 25, 2019, Exhibit H, p. 78, Report at para. 285). It must be



determined if the conduct targeted by this application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects.

[41] In my view, the Report, when read as a whole, does not affect legal rights, impose legal obligations or cause prejudicial effects to these eight public office holders. The Report clearly concerns an investigation of Mr. Trudeau's conduct, through his own actions or those of his agents. At paragraph 6 of the Report, the Commissioner states that he "wrote to Mr. Trudeau to inform him that [he] was initiating an examination of his conduct". The Commissioner received documents from the public office holders and interviewed them, but the examination was into Mr. Trudeau's conduct (Applicant's Record, Affidavit of Duff Conacher sworn on October 25, 2019, Exhibit H, p. 78, Report at para. 9). The Commissioner found that the other individuals' actions would establish Mr. Trudeau's contravention of the *Act*. Therefore, the legal rights and prejudicial effects relate solely to Mr. Trudeau's liability and not his agents'.

[42] Further, the Commissioner found that "the evidence shows that Mr. Trudeau knowingly sought to influence Mrs. Wilson-Raybould both directly and through the actions of his agents" (Applicant's Record, Affidavit of Duff Conacher sworn on October 25, 2019, Exhibit H, p. 78, Report at para. 284). Therefore, it cannot be said that the Commissioner is permitting potential wrongdoing to go unpunished or to cause harm to public confidence, as he found that the wrongdoing emanated from Mr. Trudeau, through the actions of his agents.

[43] Lastly, the requirement of a "prejudicial effect" asks whether the impugned act *caused* prejudicial effects. In this case, the question is whether the decision not to investigate caused

prejudicial effects, and not whether an investigation would cause prejudicial effects to the office holders. Moreover, even after having decided not to investigate violations by the eight office holders in the current circumstances, the Commissioner would retain the discretion later to commence an investigation should new information come to light.

[44] Therefore, in my view, the issue raised in this application is not justiciable because it does not affect rights, impose legal obligations or cause prejudicial effects. The application should be dismissed on this basis.

C. *Should the applicant be granted public interest standing?*

[45] In light of my conclusion regarding the issue of justiciability, I need not consider the question of whether we should exercise our discretion to grant public standing to the applicant.

V. Conclusion

[46] For these reasons, I would propose to dismiss the application for judicial review, with costs.

"Marianne Rivoalen"

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J.A.

"I agree.

Yves de Montigny J.A."

"I agree.

George R. Locke J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-331-19

**STYLE OF CAUSE:** DEMOCRACY WATCH v.  
ATTORNEY GENERAL OF  
CANADA

**PLACE OF HEARING:** BY ONLINE VIDEO  
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**CONCURRED IN BY:** DE MONTIGNY J.A.  
LOCKE J.A.

**DATED:** JULY 5, 2021

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