Federal Court  Cour fédérale

Date: 20210615

Dockets: T-915-20
T-916-20

Citation: 2021 FC 613

Ottawa, Ontario, June 15, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

DEMOCRACY WATCH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matters

[1] There are two issues before the Court. The first is a procedural request to allow Democracy Watch to continue two applications for judicial review it previously agreed to and, on consent, was ordered to discontinue. The Attorney General does not object, and the motion is granted. The second is the Attorney General's motion to strike the applications as bereft of any chance of success. Democracy Watch opposes. The motion to strike is dismissed. Democracy

Watch is granted public interest standing but not to re-litigate issues concerning bias and the appointment process of the current Lobbying Commissioner.

[2] An underlying issue is whether a Parliamentary Secretary (Honourable David Lametti) to a Minister (Honourable Chrystia Freeland) or his staff may be considered staff of the Minister with whom the Parliamentary Minister works.

II. Motion to continue

[3] The procedural motion is brought by Democracy Watch to continue two judicial review applications namely T-915-20 and T-916-20 [Applications]. The Applications involve the same two parties and the same subject matter although they concern two different but similarly situated individuals. At Democracy Watch's request, and on consent of the Attorney General, both Applications were placed in abeyance by Order of Prothonotary Molgat in two separate but identical Orders dated September 18, 2020, pending the Supreme Court of Canada's decision on leave to appeal of the Federal Court of Appeal's decision in *Attorney General of Canada v Democracy Watch*, 2020 FCA 69 [*DW 2020*] [Rennie JA]. In *DW 2020*, the Federal Court of Appeal concluded a decision by the Commissioner of Lobbying [Lobbying Commissioner] not to investigate a complaint brought by a member of the public is not a decision or order subject to judicial review.

[4] Democracy Watch's position before Prothonotary Molgat was that if leave was refused in *DW 2020* it would discontinue the Applications. The Supreme Court of Canada refused leave to appeal on October 15, 2020.

[5] Notwithstanding its previous position, Democracy Watch (this time through counsel, which it did not have at the time of Prothonotary Molgat's Order) now asks for leave to continue and to consolidate the two Applications. Mr. Duff Conacher, Democracy Watch's principal, deposed he did not have legal advice and mistakenly thought that if the Supreme Court of Canada refused to grant leave in *DW 2020,* its legal issues in the Applications would be resolved. This evidence is not contested.

[6] Democracy Watch submits the Federal Court of Appeal's decision in *DW 2020* did not dispose of the legal issues in the Applications, which it says are distinct and based on different factual circumstances. It says the Applications should not be barred by a procedural irregularity. Further, it submits the Attorney General would not be prejudiced by continuance of the Applications.

[7] The Attorney General does not object to continuing and consolidating the two Applications, although it brings a cross motion to strike the Applications submitting they are bereft of any chance of success.

[8] Given the position of the parties, I granted the procedural relief at the beginning of the hearing, allowing the Applications to continue, consolidating them, and removing paragraph 2 from each of Prothonotary Molgat's Orders. In doing so, I am persuaded this course of action would accomplish the ends of justice and efficiency on the merits per Rule 3 of the *Federal Courts Rules,* SOR/98-106 [*Federal Courts Rules*]. Therefore, these Reasons will speak to both T-915-20 and T-916-20, and a copy of these Reasons will be placed on both Court files.

III. Motion to strike

A. *Facts*

[9] On March 12, 2020, the Lobbying Commissioner tabled two reports [Reports] before Parliament regarding an investigation by her office into whether Mr. Benjamin Bergen and Ms. Dana O'Born, respectively, both registered in-house organization lobbyists employed by the Council of Canadian Innovators [CCI], contravened the *Lobbyists' Code of Conduct* [*Code*].

[10] Democracy Watch filed the initial requests (which it called "petitions" although they are simply letters) asking the Lobbying Commissioner to investigate and rule on whether the actions of Mr. Bergen and Ms. O'Born violated Rules 6, 7, 8 or 9 of the *Code.*

[11] Rules 6, 7, 8, 9 of the *Code* state:

> **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 their office(s).

[12] The Lobbying Commissioner conducted its assessment pursuant to Rules 6 and 9 of the *Code.* The Reports concluded neither Mr. Bergen nor Ms. O'Born contravened the *Code*.

[13] The Report for Mr. Bergen is the decision under review in Court file T-915-20. Mr. Bergen had previously volunteered for the Honourable Chrystia Freeland's by-election campaign in 2013 and acted as co-campaign manager of her re-election campaign in 2015. He also was an executive of Ms. Freeland's electoral district association. The Lobbying Commissioner conducted an investigation "on whether Mr. Bergen contravened Rule 6 (Conflict of Interest) or Rule 9 (Political Activities) of the [*Code*] by lobbying the Honourable Chrystia Freeland or members of her ministerial staff after undertaking political activities on behalf of Ms. Freeland". The investigation found no evidence of lobbying Ms. Freeland, however, "while Ms. Freeland was Minister of International Trade, Mr. Bergen attended a meeting with the Honourable David Lametti, in his former capacity as Parliamentary Secretary to the Minister of International Trade, and with a member of his constituency (MP) staff. CCI reporting this communication in the Registry of Lobbyists."

[14] Pursuant to Rule 9 the Lobbying Commissioner found neither Mr. Lametti in his capacity as Parliamentary Secretary, nor the member of Mr. Lametti's constituency staff, were "staff" in

Ms. Freeland's office for the purposes of Rule 9. Therefore, Mr. Bergen did not contravene Rule 9.

[15] The Lobbying Commissioner also found no basis to conclude Mr. Bergen placed Ms. Freeland in a "real" or "apparent" conflict of interest contrary to Rule 6.

[16] The Report for Ms. O'Born is the decision under review in file T-916-20. Ms. O'Born previously acted as co-campaign manager for Ms. Freeland's re-election campaign in 2015. She also was an executive of Ms. Freeland's electoral district association. The Lobbying Commissioner conducted an investigation "on whether Ms. O'Born contravened Rule 6 (Conflict of Interest) or Rule 9 (Political Activities) of the [*Code*] by lobbying the Honourable Chrystia Freeland or members of her ministerial staff after undertaking political activities on behalf of Ms. Freeland". The investigation found no evidence of lobbying Ms. Freeland, however, "while Ms. Freeland was Minister of International Trade, Ms. O'Born had two logistical telephone conversations to finalize arrangements in relation to CCI's lobby day meeting with the Honourable David Lametti in his former capacity as Parliamentary Secretary to the Minister of International Trade. One of these logistical conversations was with Ms. Gillian Nycum, a member of Mr. Lametti's constituency (MP) staff, on October 13, 2016. The other was with Ms. Megan Buttle, Special Assistant to Mr. Lametti, on October 17, 2016. Ms. O'Born also arranged and attended CCI's lobby day for the clean technology industry on October 20, 2016, which was attended by Mr. Lametti and Ms. Buttle. CCI reported these communications in the Registry of Lobbyists."

[17] Pursuant to Rule 9 the Lobbying Commissioner found neither Mr. Lametti nor Ms. Nycum qualify as "staff" in Ms. Freeland's office for the purposes of Rule 9, and found Ms. Buttle was identified to Ms. O'Born as Special Assistant to Mr. Lametti in his capacity at Parliamentary Secretary. The Lobbying Commissioner found Ms. O'Born did not contravene Rule 9.

[18] The Lobbying Commissioner also found no basis to conclude Ms. O'Born placed Ms. Freeland in a "real" or "apparent" conflict of interest contrary to Rule 6 of the *Code*.

[19] In both Reports, the Lobbying Commissioner included the following identical comments under the heading "Observations". These comments call upon Parliament to consider amending Rule 6, and to consider expanding Rule 9:

> Although I determined that Rule 6 had not been contravened in the factual circumstances at issue in this investigation, I observed that the analysis required by Rule 6 raises concerns about the manner in which this provision is currently drafted.
>
> My jurisdiction as Commissioner of Lobbying is confined to regulating the conduct of lobbyists. However, by prohibiting lobbyists from placing federal public office holders in real and apparent conflicts of interest, Rule 6 requires the Commissioner of Lobbying to make conclusions that implicate the conduct of public office holders who may be subject to separate ethical regimes, including those overseen by the Senate Ethics Officer and the Conflict of Interest and Ethics Commissioner. These concerns with Rule 6 should be addressed as part of any future amendments to the Code, which will require stakeholder consultations as contemplated by the Lobbying Act. In doing so, it will be necessary to consider amending the rules of conduct to focus exclusively on the specific behaviours of lobbyists without importing the regime governing the ethical conduct of public office holders by implied reference.
>
> In determining that Rule 9 had not been contravened in the circumstances of this investigation, I found that parliamentary

> secretaries do not qualify as "staff" in a minister's office for the purposes of Rule 9. However, parliamentary secretaries share the same political commitments as the minister they are appointed to assist.
>
> For this reason, I am of the view that the scope of application of Rule 9 should be expanded to include individuals, such as parliamentary secretaries, who do not qualify as political staff in the office of an elected official, but who share the same political commitments as the elected official under whose purview they operate. This issue should also be addressed as part of any future stakeholder consultations aimed at revising the Code.

[20] On or about August 7, 2020, Democracy Watch issued separate Notices of Application requesting judicial review of the two Reports.

[21] In each Notice of Application, Democracy Watch submits the following summary of its position, which is later amplified in a statement of grounds for the Applications:

> The application seeks an order quashing the Decision because:
>
> 1. A reasonable apprehension of bias exists on the part of the Lobbying Commissioner Nancy Bélanger in making the Decision given that she was appointed by Order in Council 2017-1564 dated December 14, 2017 of the Governor-in-Council ("Trudeau Cabinet") on the recommendation of the Prime Minister after a process that was secretive and controlled by the Trudeau Cabinet, and that failed to consult with opposition party leaders as required under subsection 4.1(1) of the *Lobbying Act*, an appointment decision in which Minister Freeland participated;
>
> 2. a reasonable apprehension of bias also exists on the part of the Lobbying Commissioner due to public statements she has made concerning lobbyists and lobbying;
>
> 3. the Commissioner's reasonable apprehension of bias gives rise to a legitimate expectation that the Lobbying Commissioner would recuse herself from making the Decision;
>
> 4. the Lobbying Commissioner erred in fact and in law in concluding that [Mr. Bergen/Ms. O'Born] did not lobby Minister

Freeland, and erred in law in concluding that [Mr. Bergen/Ms. O'Born] did not violate Rules 6, 7, 8 and 9 of the *Lobbyists' Code*, and the "Respect for democratic institutions" and "Integrity and honesty" Principles of the *Code*, by lobbying Minister Freeland, and;

5. the Lobbying Commissioner erred in law and the Decision was patently unreasonable given the rules in the *Lobbyists' Code* that require the senior officer of any organization to ensure the company complies with the *Code* and given that the purpose of the *Code* 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" and given that the Lobbying Commissioner's mandate is to ensure lobbyists "conform fully with the letter and the spirit of the Lobbyists' *Code* as well as all relevant laws, including the *Lobbying Act* and its regulations".

B. *Issues*

[22] The issues in these motions are:

a) Whether these Applications for judicial review should be struck as bereft of any chance of success?

b) In the alternative, whether these Applications should be struck on the basis that Democracy Watch does not have standing because it is not directly affected and does not meet the test for public interest standing? and

c) In the further alternative, should all or part of the Notices of Application be struck as an abuse of process of this Court?

C. *Analysis*

(1) *Test on a motion to strike*

[23] The Attorney General submits the Applications for judicial review have no chance of success, and therefore this Court should use its discretion and strike out the Applications. The Attorney General also argues the Applications should be struck because they constitute an abuse of process.

[24] The Attorney General submits, and I agree, the Court may strike Applications where they are "so clearly improper as to be bereft of any possibility of success" (*David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (FCA) at page 600 [Strayer JA]). He submits there must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the Applications (*Rahman v Public Service Labour Relations Board*, 2013 FCA 117 at para 7 [Stratas JA]). It is also the case that the Court is not to assess whether the case, if allowed to continue, will cross the finish line, see *Wenham v Canada (Attorney General)*, 2018 FCA 199 [*Wenham*] [Stratas JA]:

> [29] The phrase "reasonable cause of action" is not an invitation to a court to assess the odds of a cause of action ultimately succeeding, and to let it go forward if there is only, say, a 3:1 chance against evidence coming forward that will clinch the claim. Wagering on whether the cause of action will cross the finish line is no part of the court's task.

[25] In assessing a motion to strike, the Court must give a full and fair reading of the Notices of Application to assess the true essence of the Applications, accepting the facts pled as true. The Federal Court of Appeal in *Wenham* instructs the Court must determine whether the applications are doomed to fail:

> [33] ... In motions to strike applications for judicial review, this Court uses the same threshold. It uses the "plain and obvious" threshold commonly used in motions to strike actions, sometimes

also called the "doomed to fail" standard. Taking the facts pleaded as true, the Court examines whether the application:

> …is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, 1994 CanLII 3529 (FCA), [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf. Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959.
>
> (*Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at para. 47.)

[34] To determine whether an application for judicial review discloses a cause of action, the Court must first read the notice of application to get at its "real essence" and "essential character" by "reading it holistically and practically without fastening onto matters of form": *JP Morgan* at paras. 49-50.

[26] Rule 221 of the *Federal Courts Rules* provides where this Court may strike out pleadings:

Striking Out Pleadings	**Radiation d'actes de procédure**
Motion to strike	**Requête en radiation**
221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	**221 (1)** À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	**a)** qu'il ne révèle aucune cause d'action ou de défense valable;

(b) is immaterial or redundant,	**b)** qu'il n'est pas pertinent ou qu'il est redondant;
(c) is scandalous, frivolous or vexatious,	**c)** qu'il est scandaleux, frivole ou vexatoire;
(d) may prejudice or delay the fair trial of the action,	**d)** qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(e) constitutes a departure from a previous pleading, or	**e)** qu'il diverge d'un acte de procédure antérieur;
(f) is otherwise an abuse of the process of the Court,	**f)** qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
Evidence	**Preuve**
(2) No evidence shall be heard on a motion for an order under paragraph (1)(a).	**(2)** Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)(a).

[27] The Attorney General submits all issues raised by Democracy Watch have already been determined by various decisions of the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada. The Attorney General notes Democracy Watch originally acknowledged proceedings before the Supreme Court of Canada would dispose of the matters raised in the present Applications and agreed to Orders placing these proceeding in abeyance pending results of the application for leave to appeal in *DW 2020*; I consider this argument spent given the procedural order I granted as outlined above. Although the Attorney General did not object to allowing the Applications to continue, it gave notice it would move to strike both applications once continued, as it has now done.

(2) *Are the Reports reviewable decisions?*

[28] The Attorney General submits there is an obvious fatal flaw with these Applications for judicial review, namely the Reports of the Lobbying Commissioner are not decisions or orders within the meaning of subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*] and, therefore, not judicially reviewable by this Court:

Application for judicial review	**Demande de contrôle judiciaire**
Time limitation	**Délai de présentation**
18.1 (2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	**18.1 (2)** Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

[29] In this connection, the Attorney General submits and I agree the Reports do not affect Democracy Watch's rights or carry any legal consequences. No one suggests otherwise, although Democracy Watch has participated in numerous legal challenges relating to lobbying and conflict of interest in the Federal sphere.

[30] The Attorney General bases his submission in large part on the Federal Court of Appeal's decisions in *Democracy Watch v Conflict of Interest and Ethics Commissioner*, 2009 FCA 15 [*DW 2009*] [Richard CJA] and in *DW 2020* [Rennie JA].

[31] In *DW 2009*, Democracy Watch asked the Conflict of Interest and Ethics Commissioner [Ethics Commissioner] to investigate and rule on decisions, and participation in decisions, by former Prime Minister Stephen Harper and then Minister of Justice and Attorney General Robert Nicholson, and for a recusal ruling for all Cabinet ministers concerning certain matters involving the Mulroney-Schreiber situation. When the Ethics Commissioner declined to investigate the complaint (due to insufficient grounds to begin an examination), Democracy Watch sought judicial review. On appeal directly to it, the Federal Court of Appeal determined the decision not to investigate was not judicially reviewable because no order or decision had been rendered pursuant to section 66 of the *Conflict of Interest Act*, SC 2006, c 9, s 2 [*Conflict of Interest Act*], nor was the Ethics Commissioner's refusal to investigate a decision within the meaning of section 18.1 of the *Federal Courts Act*:

> [9] We are all of the view that the Commissioner's letter is not judicially reviewable by this Court, since the Commissioner did not issue a decision or order within the meaning of section 66 of the Act or subsection 18.1(3) of the *Federal Courts Act.*
>
> …
>
> [14] Since we find that the Commissioner's letter was not a reviewable decision or order under section 66 of the Act, this Court does not have the jurisdiction to grant the remedies requested by the applicant.

[32] In my view, *DW 2009* is distinguishable. In that case, no decision or order was made, nor was an investigation undertaken. However, in the case at bar, not only were investigations

undertaken, but two Reports were prepared and tabled with Parliament. In addition, as Democracy Watch submits in its memorandum:

> 13. In DW 2009, the judicial review application was of the commissioner's letter to the Applicant, denying its request to start an investigation. In finding that this letter was not a reviewable decision, the court considered that members of the public do not have a statutory right to request investigations by the commissioner. Further, the commissioner's letter was not legally binding or final, and was discretionary.[Footnote: *Democracy Watch v Conflict of Interest and Ethics Commissioner*, 2009 FCA 15, at paras 1-2, 11-12]. Indeed, the decision was rendered under subsection 45(1) of the *Conflict of Interests Act*, which contains permissive language: "may examine the matter on his or her own initiative."12 14. By contrast, the decisions in the present Applications are different to the letter in DW 2009 because:
>
> a. The Commissioner initiated investigations;
>
> b. The investigations were not discretionary, as subsection 10.4(1) of the Lobbying Act provides that the Commissioner "shall conduct an investigation if he or she has reason to believe…that an investigation is necessary"; and
>
> c. The Commissioner issued final decisions through the Investigation Reports, after completing the investigations.

[33] I note that in *DW 2009* the Federal Court of Appeal referred to *Democracy Watch v Canada (Attorney General)*, 2004 FC 969 [*DW 2004*] [Gibson J], a decision of this Court in which Democracy Watch asked the Ethics Counsellor to investigate four decisions. The Ethics Counsellor (a position since abolished by statute) had certain responsibilities under both subsection 5(1) of the *Conflict of Interest and Post-Employment Code for Public Office Holders,* and as a person designated by the Governor in Council pursuant to section 10.1, of the *Lobbyists Registration Act,* at a time when there was no statutory equivalent of a *Conflict of Interest Act*.

[34] In *DW 2004*, Justice Gibson granted judicial review, quashed all four decisions refusing to investigate, but declined to grant requested declaratory relief because the matters were moot:

> [1] …In the petitions or complaints underlying three of the rulings or decisions under review, Democracy Watch requested a "full and detailed investigation", essentially to determine whether ethics rules for lobbyists and public office holders were violated. In the fourth application, Democracy Watch requested a "clear", public ruling under the *Lobbyists' Code of Conduct* (the Lobbyists' Code), once again dealing with an issue as to whether a violation of the Lobbyists' Code had occurred….
>
> …
>
> [94] In summary, the four applications for judicial review that are before the Court will each be allowed by reason of my finding that, on the totality of the evidence before the Court, there existed grounds for a reasonable apprehension of bias, on the part of the Ethics Counsellor and his office, both specific against Democracy Watch and institutional or structural, and that such bias resulted in a breach of the principles of procedural fairness in arriving at the rulings or decisions under review.

[35] In essence, *DW 2004* is a case where this Court actually conducted judicial review of a number of rulings under the *Code*. In *DW 2009*, the Federal Court of Appeal noted Justice Gibson's decision in *DW 2004* had been argued before it, but took no position on reviewability, stating:

> [13] The applicant submits that a similar decision made by the Ethics Counsellor, the predecessor to the Ethics Commissioner, was deemed to be judicially reviewable by the Federal Court in *Democracy Watch v. Canada (Attorney General)*, [2004] 4 F.C. 83, 2004 FC 969. While we take no position as to whether the Ethics Counsellor's decision was properly reviewable by the Federal Court, it is nonetheless clear that this decision was made pursuant to a different regime than the one with which we are concerned. The Ethics Counsellor was not acting pursuant to the legislation with which we are presently concerned.

[36] The Attorney General also relies on *DW 2020* to support its motion to strike. In that case, Democracy Watch asked the Lobbying Commissioner to investigate a complaint concerning the Aga Khan gifting a private trip to Prime Minister Justin Trudeau. The Lobbying Commissioner refused to investigate, leading Democracy Watch to seek judicial review in the Federal Court. Judicial review was granted in *Democracy Watch v Attorney General*, 2019 FC 388 [*DW 2019*] [Gleeson J]. However, the Federal Court of Appeal allowed an appeal and dismissed the application for judicial review because the lobbying regime does not establish a public complaints process nor does it affect the rights of Democracy Watch. It found the receipt of information from the public, does not, in and of itself, create rights for those who provide information where they are not directly affected by the outcome:

> [28] It is apparent that the *Lobbying Act* does not create a right for a member of the public to have a complaint investigated. There is nothing in the language of the statute to suggest that the Commissioner must investigate the public's complaints. Parliament has established no process, procedures, mechanisms or obligations for disposing of complaints from the public.
>
> [29] To the contrary, an investigation is required where the Commissioner 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 Lobbyists' Code or the *Lobbying Act*. The *Lobbying Act* does not specify that the Commissioner must take into account information received from the public. In fact, the *Lobbying Act* does not mention the public in the investigations section at all.
>
> …
>
> [38] In light of the language in these statutes, and in light of the fact that similar language is notably absent from the *Lobbying Act* and the Lobbyists' Code, I conclude that the lobbying regime does not establish a public complaints process. The solicitation of information from the general public, does not, in and of itself, create rights for those who provide information where they are not directly affected by the outcome.

[37] The Attorney General submits there is no material difference between the Applications in this case and *DW 2009* and *DW 2020*. With respect, I disagree. In my view, the present Applications involve publicly available decisions arising from an investigation both initiated and concluded – the facts are quite different from *DW 2020* where neither was the case. I also agree that just because a decision not to investigate a complaint is not reviewable, does not mean investigative decisions themselves are not reviewable. These seem to be very different matters.

[38] I say "seem to be" keeping in mind that *Wenham* at para 29 instructs courts on a motion to strike not to decide the merits of the cause of action in terms of whether these Applications will cross the finish line, but to decide whether the Applications are bereft of any chance or possibility of success or are doomed to fail because of a knock out punch or an obvious, fatal flaw striking at the root of this Court's power to entertain the Applications.

[39] The position of the Attorney General seems to be opposed to the general proposition that administrative decisions, generally, are amenable to judicial review as an aspect of the rule of law. See *Girouard v Canada (Attorney General)*, 2018 FC 865 [Noël J]:

> [161] Also, in the *Secession Reference*, the Supreme Court reiterated that the rule of law and constitutionalism are among the underlying principles animating the Constitution and that they therefore transcend all of our institutions:
>
> > **72**. The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all

> government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

[162] For the Minister and the Cabinet to be able to fulfill their constitutional role of deciding whether to submit the issue of the removal of a judge to Parliament under section 99 of the CA 1867, their authority to do so must be grounded in a process that is consistent with the Constitution. As mentioned above, natural justice and procedural fairness, principles stemming from the rule of law, ensure that judicial independence is maintained in the course of an inquiry. If there is a violation of procedural fairness, as alleged by Justice Girouard in his application for judicial review in this case and also according to the dissenting views of three chief justices, the Minister cannot act on the basis of a potentially flawed report without running the risk of acting in an unconstitutional manner. Judicial review of a recommendation by the CJC provides the Minister, and ultimately the two Houses of Parliament, that the process is consistent with the underlying constitutional principles. If the CJC were not subject to the superintending power of this Court, the Minister and Parliament would be forced to evaluate these legal issues, thereby overlapping with the judicial sector and threatening the separation of powers. It was precisely this situation that Parliament wished to avoid in establishing the CJC as it did.

[163] To conclude, I cannot accept the CJC's argument to the effect that an alleged appeal de novo obviates the need for judicial review. Neither the JA nor the By-laws include any of the characteristics of an appeal de novo, and, furthermore, such a proposal would undermine the rule of law, "a fundamental postulate of our constitutional structure" (*Roncarelli v Duplessis*, 1959 CanLII 50 (SCC), [1959] SCR 121 at p 142; *Secession Reference* at paras 70-78).

[Emphasis added]

[40] Democracy Watch also notes it is the party that made the request which resulted in the investigations and two Reports in this case. In my view, it makes no difference to the right to apply for judicial review who made the initiating request for an investigation leading to a Report. While Democracy Watch may submit it has provided a useful, service by having made the requests resulting in the Reports to Parliament, that does not create a right to judicially review the Reports.

[41] Democracy Watch submits its Applications are not doomed to fail based and points to *Makhija v Canada (Attorney General)*, 2008 FCA 402 [Pelletier JA] [*Makhija*]. With respect, I disagree. There, the Federal Court of Appeal held a final decision of the Registrar of Lobbyists (i.e. the Lobbying Commissioner's previous title) after investigating a lobbyist's alleged Code violation was a justiciable matter for judicial review. In fact, it set aside the challenged decision. However, this does not assist Democracy Watch because, as is made clear in both *DW 2009* and *DW 2020*, a member of the public may seek judicial review of decisions by the Lobbying Commissioner that affects their rights or obligations, or causes prejudicial effects or legal consequences to them. In *Makhija* it was the lobbyist himself that challenged the decision. Democracy Watch is not in this position at all.

[42] That said, I also note the Federal Court of Appeal's decision in *Democracy Watch v Canada (Attorney General)*, 2018 FCA 194 [*DW 2018 1*] [per de Montigny JA] in which the Federal Court of Appeal found a decision of the Ethics Commissioner's decision was justiciable:

> [17] Counsel for the respondents submits that the applicant fails on the first and third branches of the public interest standing test. The application allegedly does not raise a justiciable issue, insofar as it concerns Parliament's own means of holding the government to account. Relying on *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, 1989 CanLII 73 (SCC), [1989] 2 S.C.R. 49 and *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, the respondents argue that the Court should not overstep the bounds of its constitutional role when deciding whether to grant public interest standing. Moreover, the respondents claim that the present application is not a reasonable and effective way to raise the issue, as it relates to a non-adversarial process between the Commissioner and public office holders to reach agreement on compliance measures, thereby not resulting in a "decision" or "order". Equally relevant is the fact that section 44 of the *Act* provides another review mechanism, allowing parliamentarians who have reasonable grounds to believe a public office holder has contravened the *Act* to request that the Commissioner examine the matter.
>
> [18] There is no doubt in my mind that the issues raised by the applicant are serious. Specifically, the question raised in regard to the reasonableness of the Commissioner's interpretation of section 29 of the *Act* constitutes an important question that is far from frivolous. The same is true of the question of whether or not the establishment of a conflict screen circumvents the requirement, pursuant to section 25, to report each recusal arising due to a conflict of interest. These issues are also clearly justiciable, for the purpose of assessing public interest standing, as <u>they concern the correct interpretation to be given to provisions of the *Act*.</u> The Court is not called upon to play the role of an arbiter between various branches of government, but to ensure that a parliamentary servant does not stray beyond its proper legislative mandate. <u>This is clearly and eminently a judicial function.</u>
>
> [Emphasis added]

[43] It seems to me these comments also speak to the justiciability of the decision in the case at bar: there is the question of who is and who is not staff of the Minister, a question concerning the correct interpretation of provisions of the *Lobbying Act*, RSC 1985, c 44 (4th Supp) [*Lobbying Act*]. Again, it seems more likely that the Court is not called upon to play the role of

an arbiter between various branches of government, but to ensure that a parliamentary servant does not unreasonably constrain her legislative mandate. As Justice de Montigny said, so too here: "[t]his is clearly and eminently a judicial function." The Lobbying Commissioner herself has called for review; that review would likely be aided by judicial input.

[44] I also note the judgment in *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 [per Laskin JA] [*DW* 2018 2] where the Federal Court of Appeal declined to deal with the issue of standing not because the issue was not justiciable, but because the matter was moot. In that case, Democracy Watch sought to judicially review a decision of the Ethics Commissioner and submitted, contrary to the Ethics Commissioner's position, that shares of Morneau Shepell held through two private companies constituted "controlled assets" of then Minister of Finance William Morneau. Democracy Watch argued the Ethics Commissioners failure to require Minister Morneau to divest the shares was a refusal to exercise her jurisdiction:

> [6] Democracy Watch, a not-for-profit organization that advocates on matters relating to government accountability, commenced this application for judicial review on November 16, 2017. It named only the Attorney General, and not Minister Morneau, as a respondent. It argues that the Commissioner's letter constitutes a "decision or order" subject to judicial review, that contrary to the Commissioner's position, the shares of Morneau Shepell held through the two private companies constituted "controlled assets" of Minister Morneau, and that the Commissioner's failure to require Minister Morneau to divest these shares was a refusal to exercise her jurisdiction. It also submits in support of these arguments that there is no authority under the Act to establish a conflict of interest screen.
>
> [7] The Attorney General responds to each of these arguments on the merits. She also raises three preliminary objections as grounds on which the Court should dismiss the application without entering into the merits: that there is no reviewable "decision or order," that Democracy Watch lacks standing to bring the application, and that the application is moot.

> [8] In my view, the application can and should be dismissed on the ground that it is moot, and that in all of the circumstances the Court should not exercise its discretion to decide a moot proceeding. It is therefore not necessary to deal with the Attorney General's other preliminary objections. This Court has addressed some of the issues raised in this case in its decision in *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194, in which judgment is also being delivered today. The applications in the two cases were heard one after the other by the same panel of the Court.

[45] It is notable the Federal Court of Appeal did not dismiss because the decision under judicial review was not a decision or order – instead that question was left open and the only determination made was that the application had become moot.

[46] On balance, I have determined the Applications should not be struck on the ground it is clear and obvious they are not reviewable or judiciable. Both in my view are open questions: *DW 2009* and *DW 2020* may point in one direction, but *DW 2004*, *DW 2018 1*, and *DW 2018 2* point in another. These are issues for the Court hearing judicial review to consider; I reach no conclusion one way or the other.

D. *Does Democracy Watch have standing and if not should it be given public interest standing?*

[47] In the alternative, if this Court finds the Reports are decisions capable of being judicially reviewed, the Attorney General submits Democracy Watch does not have the requisite standing to bring this matter before the Court because the issues raised do not directly affect Democracy Watch and the Court should not exercise its judicial discretion to grant public interest standing to Democracy Watch.

[48] Democracy Watch at present does not have standing, so the question is really should Democracy Watch be afforded public interest standing? In my view, the answer is yes.

[49] The Attorney General submits Democracy Watch does not have private interest standing, under subsection 18.1(1) of the *Federal Courts Act*, only those who are "directly affected" can ask this Court to review a decision. It is not disputed that Democracy Watch is not directly affected by the Lobbying Commissioner's decisions. However, that is far from the end of this issue; public interest standing is a form of standing available in the Court's discretion to those without private interest standing.

[50] The Supreme Court of Canada explains the underlying purpose of limiting standing is the need for courts to have the benefit of a contending point of view of the persons most directly affected by an issue, and that the issue of standing may be dealt with on a motion to strike, *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 [*Finley*] [Le Dain J]:

> 16. Finally, before examining the question of standing, something should perhaps be said concerning the assumption underlying the judgments below and the argument in this Court that the issue of standing can be properly determined with final effect in this case as a preliminary matter on a motion to strike. This question, which involves the relationship between standing and the merits of a case, was briefly alluded to by Thurlow C.J., who noted that no objection had been taken to the determination of standing as a preliminary matter, based on the view expressed by Collier J. in *Carota v. Jamieson*, [1977] 1 F.C. 19, at p. 25. There, on a motion to strike under Federal Court Rule 419(1), Collier J. expressed the opinion that the question of standing should not be determined on a preliminary motion of that kind, but should be "the subject of full evidence, argument and deliberation at trial" or at least of "a formal hearing on a point of law, after all relevant facts for determination of that point have been established". The stage of the proceedings at which the issue of standing is best considered had earlier been the subject of comment by this Court in *McNeil*, *supra*, where, the

question of standing to bring an action for a declaration of legislative invalidity having been raised and determined in the courts below as a preliminary matter, Laskin C.J. said at p. 267: "In granting leave, this Court indicated that where, as here, there is an arguable case for according standing, it is preferable to have all the issues in the case, whether going to procedural regularity or propriety or to the merits, decided at the same time. A thoroughgoing examination of the challenged statute could have a bearing in clarifying any disputed question on standing." A similar view was expressed by the House of Lords in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.*, [1982] A.C. 617. There the question arose in the context of an application for judicial review under R.S.C. Ord. 53, r. 3(5), which required that an applicant have "a sufficient interest in the matter to which the application relates". The members of the House of Lords were of the view that it was necessary to consider the merits of the application in order to determine the matter to which the application related. This question was also considered by the High Court of Australia in *Australian Conservation Foundation Inc. v. Commonwealth of Australia* (1980), 28 A.L.R. 257, where the opinion was expressed that it is a matter of judicial discretion, having regard to the particular circumstances of a case, whether to determine the question of standing with final effect as a preliminary matter or to reserve it for consideration on the merits. The Court held that for reasons of cost and convenience the judge had properly exercised that discretion in dealing with the question of standing as a preliminary matter and striking out the statement of claim. Assuming that the question whether an issue of standing to sue may be properly determined as a preliminary matter in a particular case is one which a court should consider, whether or not it has been raised by the parties, I agree with the view expressed in the *Australian Conservation Foundation* case. It depends on the nature of the issues raised and whether the court has sufficient material before it, in the way of allegations of fact, considerations of law, and argument, for a proper understanding at a preliminary stage of the nature of the interest asserted. In my opinion the present case is one in which the question of standing can be properly determined on a motion to strike. The nature of the respondent's interest in the substantive issues raised by his action is sufficiently clearly established by the allegations and contentions in the statement of claim and the statutory and contractual provisions relied on without the need of evidence or full argument on the merits.

[Emphasis added]

[51] There are a number of factors to consider. As the Attorney General submits, in considering whether to grant public interest standing, courts should be concerned that applicants with a personal stake in the outcome of a case get priority in the allocation of scarce judicial resources. For this reason, one of the purposes of the law of standing is to prevent a flood of "busybody litigants" from overwhelming the court system (*Finley* at paras 24, 32 and 34), and I agree.

[52] In addition, the Court must remember in this case that private individuals, members of the public, are involved. Indeed the two individuals involved were duly registered under the *Lobbying Act* and had dutifully reported their activities to the Lobbying Commissioner. These individuals have been essentially accused by Democracy Watch of breaches of the Code. This complaint was then followed up and investigated by the Lobbying Commissioner, who then filed Reports with Parliament – Reports in this case, finding the allegations were not founded in law. I note Democracy Watch sent its initial request or petition to the Lobbying Commissioner regarding Mr. Bergen and Ms. O'Born on July 12, 2017 and the Lobbying Commissioner issued the Reports in March 2020 – a delay of almost three years in which those alleged to have breached the Code had to wait under a cloud, as it were, to have the allegations considered and determined.

[53] One might expect these individuals to think that was the end of the matter. In my view, they are entitled to some respect had they reached such a conclusion. While I am far from persuaded Democracy Watch is a legal "busybody", it is plain to see why judicial restraint is required in determining whether public interest standing should be granted. In my respectful

view, the interests of the subjects of an investigation and Reports by the Lobbying Commissioner must, in the interest of basic fairness, be considered. I note neither Mr. Bergen nor Ms. O'Born are named in these pleadings, which is not unexpected, but the Court has no information whether either has been afforded even as much as a courtesy copy of these Applications so they might consider advancing a position should they wish, particularly if the Applicant wishes to revisit and upset the facts underlying the Reports. I will address this in the Judgment to issue in this case.

[54] The Attorney General submits, and the parties agree, this Court must consider three additional factors in exercising its discretion to grant public interest standing: (a) whether there is a serious justiciable issue raised; (b) whether Democracy Watch has a real stake or a genuine interest in it; and (c) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts *(Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside Sex Workers*] [Cromwell J] at paras 23 and 37).

[55] Democracy Watch submits it should be granted public interest standing and says it is well-established that, even if a specific member of the public is not affected by an administrative action, an entity can receive public interest standing. I note the test for public interest standing is to be applied purposively and flexibly *(Downtown Eastside Sex Workers; Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116 [Evans JA] at para 34, citing *Sunshine Village Corp v Superintendent of Banff National Park*, (1996), 202 NR 132 (FCA) [Desjardins JA] at paras 66–68).

[56] Democracy Watch notes that in a series of cases involving similar administrative tribunal decisions to those at issue in these Applications, the Federal Court of Appeal and Federal Court have granted it public interest standing: *DW 2018 1*, *DW 2019*, and *Democracy Watch v Canada (Attorney General)*, 2018 FC 1291 [Strickland J] [*DW 2018 FC 1*].

[57] Further, Democracy Watch says it satisfies the criteria for public interest standing because: the Applications raise serious justiciable issues; Democracy Watch has a real stake or genuine interest in the Applications' issues; and the Applications are a reasonable and effective means of bringing the issues before the courts.

(1) Serious justiciable issue

[58] The Attorney General submits there is no serious justiciable issue. I disagree, and would refer back to my reasons for declining to strike these Applications in the first place, found at paras 23 to 46.

[59] As noted before, the jurisprudence does not squarely rule out either reviewability or justiciability. In fact, the weight of jurisprudence supports both. In my view, there is merit in a judicial determination of who is and who is not staff of a Minister of the Crown including the legal position and relationship between a Minister and her Parliamentary Secretary in terms of the *Lobbying Act* and its *Code*. These are questions of the interpretation of the *Lobbying Act* and its *Code*. In addition, these are important questions as demonstrated by the Lobbying Commissioner's "Observations" that each should be reviewed, albeit by Parliament at some not precisely known future time.

[60] In the meantime however, some might possibly perceive a form of loophole has been created by which, while it is or may be forbidden to lobby a Minister, it is perfectly acceptable to lobby his or her Parliamentary Secretary and or the staff of that Parliamentary Secretary. That in part is a key question for judicial review.

[61] But, and with respect, moving from the general to the specific, what may be a justiciable issue in one case is no longer justiciable once the Courts have determined that issue. Re-litigating the same point is generally not permitted (see *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 [Arbour J]), and must be controlled in considering the conferring of public interest standing. In my view, these Applications impermissibly make some of the same bias related allegations regarding the appointment of the Lobbying Commissioner already considered and rejected by the Federal Court in *DW 2018 FC 1* per Justice Strickland. Justice Strickland considered allegations by Democracy Watch that the Governor in Council failed to consult with leaders of every recognized party in the house as required by the *Lobbying Act* when appointing the Lobbying Commissioner, allegedly rendering the decision invalid. This Court also considered whether the principle of reasonable apprehension of bias required the Governor in Council to recuse itself from making the appointment.

[62] Justice Strickland held that proper consultation consistent with the requirements in the *Lobbying Act* did occur, that allegations regarding the appointment process beyond the statutory requirements was not justiciable, and that the appointment process did not give rise to a reasonable apprehension of bias requiring the Governor in Council to recuse itself.

[63] In my respectful view, these conclusions stand and are binding and conclusive until overturned on appeal, which has not occurred. Justice Strickland also reviewed and rejected a companion application regarding the appointment of Mario Dion as the Conflict of Interest and Ethics Commissioner and rejected Democracy Watch's application *(Democracy Watch v Canada (Attorney General)*, 2018 FC 1290 [*DW 2018 FC 2*]). Both *DW 2018 FC 1* and *DW FC 2* were appealed. Both appeals were dismissed in one set of reasons by the Federal Court of Appeal: *Democracy Watch v Canada (Attorney General)*, 2020 FCA 28 [Pelletier JA]; subsequently the Supreme Court of Canada dismissed leave to appeal in *Democracy Watch v Attorney General of Canada*, 2020 CarswellNat 3033.

[64] Therefore, I am not persuaded this Court should permit Democracy Watch to challenge, directly or indirectly, the same bias and appointment-related conclusions which in my view it seeks to do in points 1 to 3 reported above, namely in its allegations that:

> 1. A reasonable apprehension of bias exists on the part of the Lobbying Commissioner Nancy Bélanger in making the Decision given that she was appointed by Order in Council 2017-1564 dated December 14, 2017 of the Governor-in-Council ("Trudeau Cabinet") on the recommendation of the Prime Minister after a process that was secretive and controlled by the Trudeau Cabinet, and that failed to consult with opposition party leaders as required under subsection 4.1(1) of the *Lobbying Act*, an appointment decision in which Minister Freeland participated;
>
> 2. A reasonable apprehension of bias also exists on the part of the Lobbying Commissioner due to public statements she has made concerning lobbyists and lobbying;
>
> 3. The Commissioner's reasonable apprehension of bias gives rise to a legitimate expectation that the Lobbying Commissioner would recuse herself from making the Decision; ….

[65] With respect, these bias and appointment-related issues have already been decided, and may not be re-litigated no matter how artfully they are or may be re-pleaded in these Applications.

[66] In my respectful view, and with this caveat, Democracy Watch should be granted public interest standing under this aspect of the test.

(2) Real stake or genuine interest

[67] The Attorney General submits this Court must consider whether Democracy Watch has a real stake in the proceedings or is engaged with the issues they raise. The Court must also consider the possible effect of granting public interest standing on others. I agree, but for example, it does not appear likely that granting standing may undermine the decision not to sue by those with a personal stake in the case, nor does it appear likely that granting standing for a challenge that ultimately fails may prejudice other challenges by parties with "specific and factually established complaints" *(Downtown Eastside Sex Workers at para 27, Beddows v Canada (Attorney General)*, 2019 FC 671 [*Beddows*] [Boswell J] at para 33).

[68] I note the Federal Court of Appeal in *DW 2018 1* per de Montigny JA said of the Applicant:

> [19] The respondents do not contest, and rightly so, the genuine interest of the applicant in the matter. Indeed, I am satisfied by the evidence on file that the applicant has demonstrated a real and continuing engagement with the issues it seeks to raise, and more generally with questions of democratic reform and ethical behaviour in government (see Affidavit of Duff Conacher, Application Record, Vol. 1, at pp. 25-26; Democracy Watch's "20

> Steps" Mandate, Application Record, Vol. 1, at p. 211). Accordingly, I am of the view that this second factor favours granting public interest standing.

[69] While it does not have the legal interest required by *DW 2009* and *DW 2020*, Democracy Watch in my view has a very long history as an advocate and participant in matters relating to lobbyists, lobbying law, conflict of interest law, and governance in general, including instances where it has been granted public interest standing by this Court including a series of cases involving similar administrative tribunal decisions: *DW 2018 1*, *DW 2019*, *DW 2018 FC 1*, and *DW 2018 FC 2*.

[70] On balance, I am persuaded Democracy Watch has the necessary degree of engagement to succeed on this aspect of the test.

(3) Reasonable and effective way to bring issues to Court

[71] Democracy Watch submits the Applications are a reasonable and effective way of bringing the issues before the Court, due to the following factors:

> (a) Democracy Watch has the capacity to bring forward the claim, including resources and expertise, a proposition I accept;
>
> (b) Because the Lobbying Commissioner's decisions found no fault in the lobbyists' actions there is no party to the dispute that will apply, or has applied, for judicial review of either decision, and I again agree;
>
> (c) Regarding the public interest transcending those most directly affected, because the Applications concern preventing unethical lobbying and maintaining government integrity, I am in agree;
>
> (d) Finally, the Federal Court of Appeal has questioned whether parliamentary accountability is sufficient alternative recourse in

> similar circumstances (*DW 2018 1* at paras 17-18, 22), which points in favour of granting public interest standing.

[72] In connection with (d) the Federal Court of Appeal per de Montigny JA in *DW 2018 1* held:

> [22] Finally, I am not convinced by the respondents' claim that the review mechanisms provided for by sections 44 and 45 of the Act constitute a more effective means by which the issues at hand could be raised. Admittedly, information from the public "may" be considered, under subsection 44(4) of the Act, by the Commissioner conducting an examination. But, as the text of the provision makes clear, this information from the public has to be brought to the attention of the Commissioner by a Member of Parliament. Moreover, for a compliance examination pursuant to these provisions to be commenced in the first place, it is necessary for a parliamentarian to make a request to that effect (subsection 44(1) of the Act), or for the Commissioner to do it on his or her own initiative (subsection 45(1) of the Act). No direct mechanism exists for a member of the public to request an investigation into such issues, as this Court made explicitly clear in *Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15 at para. 11, leave to appeal to SCC denied, 33086 (June 11, 2009) (*Democracy Watch, 2009*).
>
> [Emphasis added]

[73] In my view, granting the Applicant public interest standing, narrowed to carve out the improper attempt to re-litigate the bias and appointment related issues, is a reasonable and effective way to bring the remaining issues – those concerning the *Code* - to the Court.

[74] Therefore subject to not being allowed to re-litigate the bias or appointment-related issues, I will Order Democracy Watch be afforded public interest standing.

E. *Abuse of process*

[75] Finally, the Attorney General submits these Applications constitute an abuse of process because Democracy Watch is attempting to re-litigate claims the Court has already determined. As stated by the Supreme Court of Canada in *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 [Arbour J] at para 37, the doctrine of abuse of process precludes re-litigation in certain circumstances:

> [37] Canadian courts have applied the doctrine of abuse of process to preclude re-litigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

[76] The Attorney General submits Democracy Watch is abusing this Court's process such that all allegations related to bias should be struck from the Notices of Application.

[77] I have already agreed with this argument, and will so Order for the reasons set out above at paragraphs 61 to 65. In this way, these Applications may proceed without abusing the processes of the Court.

IV. Conclusion and costs

[78] In my view, the Attorney General's motion to strike the Applications should be dismissed in part; the bias and appointment-related issues and all related aspects of the Applications related thereto will be struck. Democracy Watch will be granted public interest standing. All-inclusive costs were agreed at a reasonable $900.00, which shall be awarded but given the divided result, to the successful party in the cause.

JUDGMENT in T-915-20 & T-916-20

THIS COURT'S JUDGMENT is that:

1. Paragraph 2 is struck from the Orders of Prothonotary Molgat dated September 18, 2020 in these two Applications.
2. Court files T-915-20 and T-916-20 are consolidated.
3. The Defendant's motion to strike is dismissed in part, except that the bias and appointment-related issues and all related submissions contained in the Applications are struck without leave to amend.
4. The Applicant is granted public interest standing.
5. The Applicant shall forthwith give the subjects of the two Reports, Mr. Bergen and Ms. O'Born, copies of the all pleadings to date together with a copy of these Reasons.
6. Costs are awarded to the successful party in the cause in the all-inclusive amount of $900.00.
7. A copy of these Reasons shall be placed in each Court file T-915-20, T-916-20.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-915-20, T-916-20
STYLE OF CAUSE:	DEMOCRACY WATCH v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 5, 2021
JUDGMENT AND REASONS:	BROWN J.
DATED:	JUNE 15, 2021

APPEARANCES:

Andrew Montague-Reinholdt	FOR THE APPLICANT
Alexander Gay Abigail Martinez	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nelligan O'Brien Payne LLP Barristers & Solicitors Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT