

ETHICS

Judicial review of decision by interim Commissioner of Lobbying (Commissioner) concluding that investigation not necessary to ensure compliance with *Lobbyists' Code of Conduct* (Lobbyists' Code) or *Lobbying Act*, R.S.C., 1985 (4th Supp.), c. 44 in response to complaint alleging that Prince Shah Karim Al Hussaini, Aga Khan IV (Aga Khan) in breach of Lobbyists' Code for having hosted Right Honourable Justin Trudeau, family and friends on private island — Memorandum of Director of Investigations addressing whether Aga Khan's gift violating Lobbyists' Code, rr. 8 (preferential access) or 10 (gifts) — Noting Aga Khan not registered as lobbyist — Director of Investigations concluding that Lobbyists' Code not applying to Aga Khan's interactions with Prime Minister as no evidence indicating that Aga Khan remunerated for his work at Aga Khan Foundation of Canada — Commissioner accepting Director of Investigation's recommendation that administrative review be closed — Applicant submitting, *inter alia*, Commissioner's participation in matter involving Prime Minister, where Commissioner holding position on interim basis, contrary to conflict of interest provisions of *Conflict of Interest Act*, S.C. 2006, c. 9 (COI Act), s. 2 — Applicant further arguing there was legitimate expectation that interim commissioner would not participate in consideration of complaint, Commissioner's failure to recuse herself raising real apprehension of bias — Main issues whether alleged breach of COI Act justiciable; Commissioner's decision not to investigate reviewable; reasonable apprehension of bias arising; doctrine of legitimate expectation applying — Alleged breach of COI Act not justiciable — COI Act containing remedial provisions — Conflict of Interest and Ethics Commissioner (Ethics Commissioner) determining when breaches of COI Act occurring, empowered to order public office holders to take compliance measures if necessary — Parliament intending for provisions at issue to be exclusive remedy — Vesting in Ethics Commissioner, through COI Act, authority to ensure compliance with COI Act through comprehensive reporting, review regime — COI Act expressly addressing circumstances in which decision of Ethics Commissioner to be subject to judicial review — COI Act establishing "comprehensive remedial code" aimed at identifying, preventing, investigating, and addressing conflicts — Parliament reserved to itself right to investigate, determine breaches of COI Act — Remedy under COI Act, whereby reports made publicly available, adequate alternative remedy — Not for Court to step into role of Ethics Commissioner to consider whether Commissioner of Lobbying in breach of COI Act — Commissioner's decision not to investigate complaint reviewable — Absence of "decision or order" cannot be taken as test for determining if matter reviewable — Factors to consider including whether administrative body's conduct or actions affecting applicant's legal rights, imposing legal obligations, or causing prejudicial effects — Commissioner required to consider information on non-compliance, determine whether investigation necessary — Legal rights affected by decision under *Lobbying Act*, s. 10.4(1) — Circumstances herein distinguishable from decision in *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15 — Reasonable apprehension of bias not arising herein — Reliance by applicant on objects, purposes of COI Act insufficient to trigger doctrine of legitimate expectation — Commissioner's decision unreasonable — Commissioner committing reviewable error by limiting her consideration to single circumstance, i.e. whether Aga Khan remunerated member of Foundation's Board of Directors, therefore subject to *Lobbying Act* — Potential compliance questions relating to Foundation's senior officer, officer responsible for filing of returns, other lobbyists at Foundation, Aga Khan arising — Analysis undertaken in memorandum limited to single sentence — This limited analysis undermining intelligibility, justifiability of decision not to investigate, rendering decision unreasonable — Term "remuneration" not used in *Lobbying Act* in reference to either consultant lobbyists or in-house lobbyists — "Payment" broadly defined in *Lobbying Act*, s. 2(1) to mean "money or anything of value" — Commissioner's analysis not considering whether Aga Khan may have received "anything of value" — Beginning, ending with simple question of monetary payment

— Restricting analysis to this narrow question inconsistent with both wording of *Lobbying Act*, objects, purposes of Lobbyists' Code — Memorandum mischaracterizing question Parliament charged Commissioner with considering under *Lobbying Act*, s. 10.4(1) — Commissioner required to take broad view of circumstances in addressing complaint — Application allowed.

DEMOCRACY WATCH V. CANADA (ATTORNEY GENERAL) (T-115-18, 2019 FC 388, Gleeson J., reasons for judgment dated March 29, 2019, 70 pp.)