



## ETHICS

Judicial review of Conflict of Interest and Ethics Commissioner's decision rendered in *Trudeau II Report 2019* (Report) concluding no reasonable grounds existing to pursue concurrent examinations of eight public office holders who acted under direction or authority of Prime Minister — Commissioner, on his own initiative pursuant to *Conflict of Interest Act*, S.C. 2006, c. 9 (Act), s. 45(1), commenced investigation in relation to allegations of undue influence exercised upon Attorney General of Canada, Honourable Jody Wilson-Raybould (as she then was) to halt criminal prosecution involving SNC-Lavalin — Applicant submitted that Commissioner fettered his discretion, unreasonably refused to exercise his jurisdiction under Act — Applicant argued that Commissioner ought to have applied Act, s. 9 to actions of eight public office holders involved in this attempt to influence Attorney General — Requesting order quashing part of Report concerning Commissioner's refusal to exercise his jurisdiction over eight public office holders — On February 4, 2019, *Globe and Mail* reported that officials in Prime Minister's Office had pressured Minister of Justice/Attorney General of Canada, to instruct Prosecution Service to negotiate remediation agreement with SNC-Lavalin — Applicant then sent petition to Commissioner requesting examination into members of Prime Minister's Office for trying to influence Attorney General in violation of several sections of Act, including s. 9 — Petition also asked Commissioner to recuse himself — Commissioner answered that he had already started examination into matter — Applicant then sent another petition requesting that everyone named by Attorney General in her testimony before House of Commons Standing Committee on Justice be examined — Former Member of Parliament Elizabeth May (MP May) also requested that these individuals be examined by Commissioner — Commissioner asked that she list specifically whom she wanted investigated — MP May provided list containing names of eight public office holders — Commissioner later issuing report — Commissioner, because he had reason to believe that possible contravention of s. 9 had occurred, commenced examination under s. 45(1) — Wrote to Prime Minister of Canada, Right Honourable Justin Trudeau, to inform him that he was initiating examination of his conduct — Commissioner's office received documentation from witnesses, conducted interviews with some of those witnesses — Commissioner found that, as Prime Minister, Mr. Trudeau was only public office holder who, by virtue of his position, could clearly exert influence over Attorney General — Found that individuals who acted under direction or authority of Prime Minister in this matter, as well as those who were involved in this matter on behalf of other ministers, could not have influenced Attorney General simply by virtue of their position — Therefore, he found no reasonable grounds to pursue concurrent examinations of their conduct, no reason to believe that they may have breached Act — Applicant submitted that Commissioner's decision to apply s. 9 to Prime Minister only, not to other eight public office holders, was failure to properly exercise his jurisdiction under Act, rendering Report unreasonable — Applicant not directly affected by issues it raised in present application — Three questions had to be answered before Court could consider, in particular, merits of present application for judicial review — Issues: whether there was reasonable apprehension of bias on Commissioner's part; whether matter justiciable; whether applicant should be granted public interest standing — Applicant put forward same arguments of bias it made before Federal Court in *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, in which appointment of Commissioner challenged — Application in that case dismissed in entirety; Federal Court found that consultation process to appoint current Commissioner met statutory requirements provided in *Parliament of Canada Act*, R.S.C., 1985, c. P-1; that appointment process reasonable — Decision affirmed by Federal Court of Appeal (2020 FCA 28), leave to appeal to Supreme Court of Canada dismissed — Commissioner not erring when he refused to recuse himself — No reason to depart from Federal Court of Appeal's previous conclusion — Further, Act provides that Commissioner will examine possible contraventions by "public office

holders”, which includes members of ministerial staff, ministers of Crown — Therefore, examination of members of Governor in Council contemplated — No circumstances set out in *Act* in which Commissioner would be required to recuse himself — Regime established in *Act* by Parliament contemplating that Commissioner may examine complaints against members of Governor in Council — Applicant’s submissions could not stand — If conduct attacked in application for judicial review failing to affect legal rights, impose legal obligations, or cause prejudicial effects, there is no right to bring judicial review — Regarding application of subsection 18.1(1) of *Federal Courts Act*, R.S.C., 1985, c. F-7, while reviewable “matter” broader than “decision”, matter must nonetheless include something in respect of which remedy may be available under *Federal Courts Act*, s. 18.1(3) — Criteria to find that matter is justiciable must be applied here — Matter that fails to affect legal rights, impose legal obligations, or cause prejudicial effects not reviewable — Commissioner’s decision not to commence examination of eight public office holders not reviewable matter — Report, when read as whole, not affecting legal rights, imposing legal obligations or causing prejudicial effects to eight public office holders at issue — Report clearly concerned investigation of Mr. Trudeau’s conduct, through his own actions or those of his agents — Commissioner found that evidence showed that Mr. Trudeau knowingly sought to influence Attorney General both directly, through actions of his agents — Therefore, it could not be said that Commissioner was permitting potential wrongdoing to go unpunished or to cause harm to public confidence given finding that wrongdoing emanated from Mr. Trudeau, through actions of his agents — Concerning prejudicial effect, question here was whether decision not to investigate caused prejudicial effects, not whether investigation would cause prejudicial effects to office holders — Therefore, issue raised in this application not justiciable because not affecting rights, imposing legal obligations or causing prejudicial effects — Application dismissed.

DEMOCRACY WATCH V. CANADA (ATTORNEY GENERAL) (A-331-19, 2021 FCA 133, Rivoalen J.A., reasons for judgment dated July 5, 2021, 17 pp.)