Federal Court of Appeal | Cour d'appel fédérale

Date: 20090121

Docket: A-174-08

Ottawa, Ontario, January 21, 2009

CORAM: **RICHARD C.J.**
DÉCARY J.A.
NOËL J.A.

BETWEEN:

DEMOCRACY WATCH

Applicant

and

CONFLICT OF INTEREST AND ETHICS COMMISSIONER

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervener

JUDGMENT

The application for judicial review is dismissed with costs to the respondent.

"J. Richard"
Chief Justice

Federal Court of Appeal | Cour d'appel fédérale

CANADA

Facsimile Transmittal Form/Formulaire d'acheminement par télécopieur

TO/A
Name/Nom: **Mr. Hameed & Mr. Rosenthal (613) 232-2680 ; Mr. Lunau (613) 563-9689 ; Ms. Nancy Bélanger (613) 995-7308 ; Mr. Rupar (613) 954-1920**

Location/Endroit: **Facsimile No./Télécopieur:**

Court No: **A-174-08 DEMOCRACY WATCH v. CONFLICT OF INTEREST AND ETHICS COMMISSIONER ET AL.**

FROM/DE
Name/Nom: Élise Benoit
Registry Officer/Agente du greffe
Federal Court of Appeal/Cour d'appel fédérale
4th Floor, 90 Sparks Street
Ottawa, Ontario
K1A 0H9

Telephone No./
Téléphone: (613) 996-6795

Facsimile No./
Télécopieur: (613) 952-7226

Date: January 21, 2009 **Time/Heure:**

TOTAL NUMBER OF PAGES/NOMBRE DE PAGES: 2
(Including this cover page/incluant le présent formulaire)

Comments/Commentaires

Judgment of the Court (Richard C.J., Décary, Noël JJ.A.) rendered on January 21, 2009.

E.A.B.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20090121

Docket: A-174-08

Citation: 2009 FCA 15

CORAM: **RICHARD C.J.**
DÉCARY J.A.
NOËL J.A.

BETWEEN:

DEMOCRACY WATCH

Applicant

and

CONFLICT OF INTEREST AND ETHICS COMMISSIONER

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervener

Heard at Ottawa, Ontario, on January 21, 2009.

Judgment delivered from the Bench at Ottawa, Ontario, on January 21, 2009.

REASONS FOR JUDGMENT OF THE COURT BY: RICHARD C.J.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20090121

Docket: A-174-08

Citation: 2009FCA 15

CORAM: **RICHARD C.J.**
DÉCARY J.A.
NOËL J.A.

BETWEEN:

DEMOCRACY WATCH

Applicant

and

CONFLICT OF INTEREST AND ETHICS COMMISSIONER

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervener

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on January 21, 2009)

RICHARD C.J.

[1] This is an application for judicial review by Democracy Watch pursuant to section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 arising out of a request to the Conflict of Interest and Ethics Commissioner (the 'Commissioner) dated November 26, 2007 for an investigation of and ruling on decisions and participation in decisions by Prime Minister Stephen Harper and Minister of Justice

and Attorney General Robert Nicholson, and for a recusal ruling for all Cabinet ministers concerning the Mulroney-Schreiber situation.

[2] On January 7, 2007, the Commissioner responded to the applicant, explaining that she did not have sufficient credible evidence to suggest that Mr. Harper, Mr. Nicholson, or any other individual mentioned in the applicant's letter was in a conflict of interest in violation of the *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2 (the 'Act'). Accordingly, the Commissioner found that she did not have sufficient grounds to begin an examination pursuant to subsection 45(1) of the Act.

[3] The applicant requests the following in its notice of application:

- An order quashing the decision of the Commissioner and directing the Commissioner to proceed with a full investigation into the applicant's complaint or, in the alternative, an order quashing the decision of the Commissioner and sending it back with directions for reconsideration by the Commissioner;
- A declaration that Democracy Watch was deprived of its right to a fair hearing; and
- A declaration that subsections 44(1) to 44(6) of the *Conflict of Interest Act* violate sections 2(b) and 2(d) of the *Canadian Charter of Rights and Freedoms*

Legislative Scheme

[4] *An Act to establish conflict of interest and post-employment rules for public office holders* (the *Conflict of Interest Act*) was introduced on April 11, 2006 during the first session of the

39th Parliament as part of Bill C-2, now entitled the *Federal Accountability Act*, S.C. 2006, c. 9. This legislation was given Royal Assent in December 2006.

[5] Section 3 of the *Conflict of Interest Act* (the 'Act') declares that the purpose of the Act is to:

(a) establish clear conflict of interest and post-employment rules for public office holders;	a) d'établir à l'intention des titulaires de charge publique des règles de conduite claires au sujet des conflits d'intérêts et de l'après-mandat;
(b) minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise;	b) de réduire au minimum les possibilités de conflit entre les intérêts personnels des titulaires de charge publique et leurs fonctions officielles, et de prévoir les moyens de régler de tels conflits, le cas échéant, dans l'intérêt public;
(c) provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred;	c) de donner au commissaire aux conflits d'intérêts et à l'éthique le mandat de déterminer les mesures nécessaires à prendre pour éviter les conflits d'intérêts et de décider s'il y a eu contravention à la présente loi;
(d) encourage experienced and competent persons to seek and accept public office; and	d) d'encourager les personnes qui possèdent l'expérience et les compétences requises à solliciter et à accepter une charge publique;
(e) facilitate interchange between the private and public sector.	e) de faciliter les échanges entre les secteurs privé et public.

[6] The Conflict of Interest and Ethics Commissioner was created to replace the positions of the Ethics Commissioner and the Senate Ethics Officer. In addition to certain supervisory and

enforcement roles, the Act gives the Commissioner investigatory powers to determine whether a contravention of the Act has occurred.

[7] Specifically, the Act contemplates two mechanisms by which an investigation may be commenced by the Commissioner. First, under subsection 44(3) of the Act, the Commissioner must examine possible contraventions of the Act if a member of the Senate or the House of Commons so requests, as long as the Commissioner does not determine that the request is frivolous, vexatious, or is made in bad faith. Second, subsection 45(1) provides that the Commissioner may conduct an examination on his or her own initiative if he or she has reason to believe that the Act has been contravened.

[8] Section 66 states that all decisions and orders of the Commissioner are final and are not reviewable in any court except in accordance with the *Federal Courts Act*.

Analysis

[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*.

[10] Where administrative action does not affect an applicant's rights or carry legal consequences, it is not amenable to judicial review (*Pieters v. Canada (Attorney General)*, 2007 FC 556 at paragraph 60; *Rothmans, Benson & Hedges Inc. v. Canada (Minister of National Revenue)*

a member of the public to request that the Commissioner begin an examination. Indeed, the Act specifically contemplates the route which a member of the public should take if it wishes to present information to the Commissioner:

44. ...	**44.** [...]
(4) In conducting an examination, the Commissioner may consider information from the public that is brought to his or her attention by a member of the Senate or House of Commons indicating that a public office holder or former public office holder has contravened this Act. The member shall identify the alleged contravention and set out the reasonable grounds for believing a contravention has occurred. ...	(4) Dans le cadre de l'étude, le commissaire peut tenir compte des renseignements provenant du public qui lui sont communiqués par tout parlementaire et qui portent à croire que l'intéressé a contrevenu à la présente loi. Le parlementaire doit préciser la contravention présumée ainsi que les motifs raisonnables qui le portent à croire qu'une contravention a été commise. [...]

[12] Furthermore, any statement made by the Commissioner in her letter does not have any binding legal effect. The Commissioner retains the discretion to commence an investigation into the applicant's complaint if, in the future, she has reason to believe that there has been a contravention of the Act.

[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.

[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.

[15] With respect to the applicant's request for a declaration that subsections 44(1) to 44(6) violate their section 2(b) and 2(d) Charter rights, we find that while this Court can properly hear constitutional challenges within applications for judicial review, the applicant cannot simply tack a constitutional challenge onto an application for judicial review which was inappropriately brought.

[16] Accordingly, the application for judicial review will be dismissed with costs to the respondent only.

"J. Richard"
Chief Justice

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 21, 2009
REASONS FOR JUDGMENT OF THE COURT BY:	(Richard C.J., Décary J.A. and Noël J.A.)
DELIVERED FROM THE BENCH BY:	Richard C.J.

APPEARANCES:

Peter Rosenthal and Yavar Hameed	FOR THE APPLICANT
Ronald D. Lunau and Nancy Bélanger	FOR THE RESPONDENT
Christopher Rupar	FOR THE INTERVENER

SOLICITORS OF RECORD:

Hameed Farrokhzad St-Pierre	FOR THE APPLICANT
Gowling Lafleur Henderson LLP	FOR THE RESPONDENT
Office of the Conflict of Interest and Ethics Commissioner	FOR THE RESPONDENT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE INTERVENER