

Federal Court



Cour fédérale

Ottawa, January 9, 2023 – The Honourable Justice Richard Southcott of the Federal Court issued a decision today in file T-1324-20:

**IN THE MATTER OF DEMOCRACY WATCH AND DUFF CONACHER v.
ATTORNEY GENERAL OF CANADA**

Summary: The Applicants, Democracy Watch and Duff Conacher, brought an application challenging the constitutional validity of the Government of Canada’s federal judicial appointments and judicial elevations systems. They asserted that these systems are unconstitutional because they are subject to too much discretionary political control, influence and interference by the federal Minister of Justice and the federal Cabinet and therefore violate the constitutional principles of judicial independence and impartiality.

In support of their application, the Applicants filed affidavits that referenced, and appended as exhibits, a number of media articles and public statements related to the judicial appointments process. The Respondent, the Attorney General of Canada, challenged the admissibility of this evidence as either impermissible hearsay or opinion evidence. The Court found that some, but not all, of the Applicants’ evidence was inadmissible.

On the merits of the application, the parties agreed that the Minister may consult with anyone when deciding whom to recommend to Cabinet for judicial appointment or elevation. In combination with the evidence the Applicants put forward, they argued the appointment and elevation processes introduced concerns about political interference and influence. The Respondent argued that, as Cabinet appoints judges and as Cabinet is a political body, there is necessarily some level of political involvement in the appointment and elevation processes.

The question for the Court was therefore whether these features of the processes offend the principles of judicial independence and impartiality. The test for independence, as with impartiality, asks whether a reasonable person, who is fully informed of all the circumstances, would consider that a particular court enjoys the essential objective conditions that guarantee the necessary independent status.

The Court identified that the authorities recognize three essential conditions of judicial independence – security of tenure, financial security, and administrative independence. These are all post-appointment conditions, none of which the Applicants alleged were violated by the judicial appointments or elevations processes. Rather, the Applicants asked the Court to find an additional condition that would apply to the process leading up to the appointment or elevation.

In reviewing the authorities upon which the Applicants relied, the Court found that they invariably focused upon post-appointment conditions as the means by which judicial independence is secured. The Court further found that, within Canada’s constitutional structure, there is a political element inherent in the judicial appointment process, resulting from the designation of Cabinet as the appointing authority.

Applying the constitutional principles of judicial independence and impartiality as informed by the authorities and analysis in the decision, the Court found no constitutional violation and therefore dismissed the application.

A copy of the decision can be obtained via the [website](#) of the Federal Court:

<https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/522754/index.do>.