

File Number:

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

DEMOCRACY WATCH

Applicant

- and -

CONFLICT OF INTEREST AND ETHICS COMMISSIONER

Respondent

**MEMORANDUM OF ARGUMENT OF THE APPLICANT
(FOR LEAVE TO APPEAL)**

PART I – OVERVIEW AND SUMMARY OF THE FACTS

A. Overview

1. The Applicant seeks leave to appeal from a January 21, 2009 decision of the Federal Court of Appeal denying the Applicant’s judicial review of the January 7, 2008 written decision of the federal Conflict of Interest and Ethics Commissioner (“the Ethics Commissioner”). The Ethics Commissioner decided not to examine a complaint by the Applicant alleging that the involvement of the Rt. Hon. Prime Minister Stephen Harper (“Prime Minister Harper”) and various Prime Minister appointees in decisions concerning the investigation into:

- the relationship and actions of the Right Hon. Mr. Brian Mulroney (“Mr. Mulroney”) and Mr. Karlheinz Schreiber (“Mr. Schreiber”), and;
- the actions of Prime Minister Harper, Attorney General Rob Nicholson and other Prime Minister appointees with regard Mr. Mulroney and Mr. Schreiber;

constitutes a conflict of interest in violation of the *Conflict of Interest Act* (“the Act”).

2. The Federal Court of Appeal erred in dismissing the Applicant’s judicial review application when it concluded that the Ethics Commissioner had no legal duty to respond to the Applicant and

that her written response was not a legally reviewable decision. The Federal Court of Appeal also declined to consider a *Charter* issue raised by the Applicant that directly related to the legal duties of the Ethics Commissioner and reviewability of her decision.

3. The Ethics Commissioner, in her detailed seven-page decision, provided the first interpretation of the scope of conflict of interest and her legal duties under the Act. The Applicant's complaint also raised, for the first time, the question of whether a member of the public has a constitutional right to make a complaint to the Ethics Commissioner that she is required to examine.

4. The Applicant applies to this Honourable Court for leave to determine the issues of national and public importance raised by the interpretation of the Act, the judicial assessment of the Ethics Commissioner's legal duties, the judicial assessment of whether a written response that is consistent with a tribunal's statutory power is a reviewable decision, and whether subsections 44(1) to (6) of the *Conflict of Interest Act* which require the Ethics Commissioner to examine complaints only if they are filed by an Member of the House of Commons or Senate of Canada violate the *Charter*-protected right of association of the Applicant and members of the public.

B. Summary of the Facts

5. The Applicant filed a complaint ("the Complaint") with the Ethics Commissioner on November 26, 2007.

Applicant's November 26, 2007 Complaint, at Tab A

6. The Complaint requested that the Ethics Commissioner fulfill her mandate under the Act by examining the Complaint, by issuing a ruling on the alleged violations, and by issuing orders that Prime Minister Harper and various Prime Minister appointees recuse themselves from further decisions concerning the investigation into the Mulroney-Schreiber matter and their own actions by reason of conflict of interest.

7. The Ethics Commissioner is required under subsections 44(1) to (4) of the Act to examine complaints filed by a Member of the House of Commons or Senate of Canada. The purpose of the

Act in subsection 3(1) is, among others things, to “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.” Under subsection 45(1), “If the Commissioner has reason to believe that a public office holder or former public office holder has contravened this Act, the Commissioner may examine the matter on his or her own initiative” and under section 30 the Ethics Commissioner “may” make compliance orders. In all cases, the Ethics Commissioner is required to issue a public report of the conclusions of an examination or a compliance order. It is under the statutory mandate pursuant to subsections 3(1) and 45(1), and section 30 of the Act, that the Applicant expected an examination of its complaint.

Conflict of Interest Act, (2006, c. 9, s. 2)

8. On January 7, 2008, the Ethics Commissioner issued a 7-page written decision (“the Decision”) in response to the Applicant’s Complaint, refusing to examine the matters raised therein for the reason that she concluded that none of the public office holders complained about had a “private interest” and therefore none were in a “conflict of interest” as defined by the Act.

Ethics Commissioner’s January 7, 2008 Decision, at Tab B

9. The Applicant sent a letter January 9, 2008 requesting that the Ethics Commissioner reconsider her Decision for various reasons, but the Ethics Commissioner responded with a letter stating that she did not “find any reason” to change her Decision.

Applicant’s January 9, 2008 Letter, at Tab C

Ethics Commissioner’s January 11, 2009 Letter, at Tab D

10. Under clause 28(1)(b.1) the *Federal Courts Act*, applications for judicial review of the Ethics Commissioner’s decisions are required to be filed directly to the Federal Court of Appeal, and the Applicant filed its application in February 2008.

11. The Federal Court of Appeal refused to review the Ethics Commissioner’s Decision for the reasons that it concluded the Decision was not a reviewable decision or matter because, despite the purpose of the Act and statutory mandate of the Ethics Commissioner, Democracy Watch has “no statutory right to have its complaint investigated by the Commissioner and the Commissioner has no statutory duty to act on it”. The Court of Appeal also held that, and because the Decision “does

not have any binding legal effect” and so 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”.

Decision of the Federal Court of Appeal, at Tab 4, para. 11 and 12

12. In its ruling, the Federal Court of Appeal also refused to consider Democracy Watch’s request for a declaration that the complaint filing system under the Act violates its right to freedom of association under the *Canadian Charter of Rights and Freedoms* because it requires that members of the public associate with a partisan member of the House of Commons or Senate of Canada in order to file a complaint that the Ethics Commissioner is required to examine, for the reason 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”.

Decision of the Federal Court of Appeal, at Tab 4, para. 11 and 12

PART II – ISSUES

13. The Applicant submits that the issues in this application for leave to appeal are as follows:
- a) Does the instant appeal raise a question of public importance?
 - b) Did the Federal Court of Appeal err in law by ruling that the Ethics Commissioner’s Decision was not a legally reviewable decision or matter under the *Federal Courts Act* (“FCA”);
 - c) Do subsections 44(1) to (6) of the Act violate the Applicant’s right of association in forcing it to file a complaint through a Member of the House of Commons or the Senate of Canada?

PART III – ARGUMENT

ISSUE A: Public Importance of the Appeal

14. Section 40 of the *Supreme Court Act* establishes that an appeal may lie to the Supreme Court for an issue of public importance meriting this Court’s intervention. In other words, the case must raise an important legal or factual issue or issue of mixed fact and law that goes beyond the immediate interests of the parties to the case.

Supreme Court Act, R.S., 1985, c. S-26, s. 40

(i) General Public Importance of Proper Enforcement of Government Ethics Laws

15. The instant appeal is the first court case concerning the scope of the jurisdiction and legal mandate, and exercise of enforcement powers within that jurisdiction and under that mandate, by the Ethics Commissioner under the *Conflict of Interest Act* (the “Act”), and the interpretation and application of key provisions of the act, namely concerning what constitutes a “private interest” and what constitutes a “conflict of interest”. The Act is one of the key federal good government laws, given that it sets out the fundamental conflict of interest rules for the Prime Minister, Cabinet ministers, senior Cabinet staff and senior government officials. Ethics standards and the importance of conflict of interest legislation have been recognized by this Court and the Federal Court of Appeal; however, the interpretation and scope of these standards have never been the subject of judicial consideration by this court.

16. In *R. v. Hinchey*, the Supreme Court of Canada’s leading authority on government ethics, the court considers the standards set by federal conflict of interest legislation and concludes:

“Protecting the integrity of government is crucial to the proper functioning of a democratic system” and “given the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe.”

R. v. Hinchey , [1996] 3 S.C.R. 1128, paras. 15 and 18

17. In a very recent ruling, the Federal Court of Appeal considers the ethics standards set by the federal lobbying law and code and, in concluding that those standards had not been properly enforced by the Registrar of Lobbyists, states:

“It can hardly advance public confidence in the integrity and transparency of government

decision-making to condone certain conflicts of interest, while prohibiting others. Any conflict of interest impairs public confidence in government decision-making.”

Democracy Watch v. Barry Campbell and the Attorney General of Canada (Registrar of Lobbyists), 2009 FCA 79, para. 48

18. Therefore, this case is of public importance because it involves questions, considered for the first time by the Supreme Court of Canada, concerning the statutory conflict of interest standard for the most powerful politicians and government officials in the federal government, and the proper enforcement of one of the fundamental good government laws for the federal government.

(ii) Public Importance of Ensuring Ethics Officers Fulfill Their Law Enforcement Mandate When Presented With Reasonable Evidence of a Violation

19. Beyond the general public importance of proper enforcement of government ethics laws, this appeal is of public importance because it has effect as a precedent on the scope of jurisdiction and statutory mandate, or lack thereof, to enforce the laws the Ethics Commissioner, several provincial “ethics commissioners” (and, other administrative tribunals) are mandated to enforce.

20. This specific legal issue has never been ruled upon by the Supreme Court of Canada.

21. The main purposes of the *Conflict of Interest Act* (the “Act”) set out in subsection 3(1) are as follows:

- “(a) establish clear conflict of interest and post-employment rules for public office holders;
- (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;
- (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; . . .” [emphasis added]

22. In addition to the “mandate” set out in clause 3(1)(b) of the Act, the Ethics Commissioner is required under subsections 44(1) to (4) to examine complaints filed by a Member of the House of Commons or Senate of Canada, and under subsection 45(1) the Ethics Commissioner “may” initiate examinations, and under section 30 the Ethics Commissioner “may” make compliance orders, and in all cases, the Ethics Commissioner is required to issue a public report.

23. Similar to the federal enforcement system under the Act, only members of the legislature are

specifically allowed to file a complaint with the “ethics commissioners” in Ontario and Prince Edward Island, and some provincial ethics commissioners (Alberta, B.C, New Brunswick, Manitoba, Ontario, P.E.I. and Quebec (its Lobbyists Commissioner)) have essentially full discretion in deciding to examine a complaint even if it is filed by a member of the legislature. Provisions in the statutes that govern these commissioners state that they “may” but are not required to examine a complaint, similar to how ss. 45(1) of the federal Act states that the Ethics Commissioner “may” but is not required to examine a matter if it is brought to the her attention by anyone other than a member of Parliament, and “may” make a compliance order under s.30.

Conflicts of Interest Act, Chapter C-23, s. 24 and ss. 25(1) and (4) (Alberta)

Members’ Conflict of Interest Act, [RSBC 1996] CHAPTER 287, s. 19 and ss. 21(1) (British Columbia)

The Legislative Assembly and Executive Council Conflict of Interest Act, C.C.S.M. c. L112, s. 20 (Manitoba)

Members’ Conflict of Interest Act, Chap. M-7.01, s. 36 and ss. 37(1) and (4) (New Brunswick)

Members Integrity Act, S.O. 1994, Chapter 38, s. 23.1 and 30, ss. 31(1) and (5) (Ontario)

Conflict of Interest Act, Chapter C-17.1, ss. 28(1) and 29(1) (Prince Edward Island)

Lobbying Transparency and Ethics Act, R.S.Q., chapter T-11.011, s. 39 (Quebec)

24. Therefore if, as the Applicant submits, the Federal Court of Appeal erred in ruling that the Ethics Commissioner’s Decision is not reviewable, it has set a precedent that the federal and provincial ethics enforcement officers may use to refuse to enforce the government ethics statute they are mandated to enforce, even when they are presented with clear evidence of a violation of the statute. This precedent directly contradicts the purpose of the statutes, the mandate of the ethics enforcement officers, and the public interest in ensuring good government standards (and other administrative law standards) are strictly enforced in all cases.

25. To be clear, the precedent set by the Federal Court of Appeal’s ruling is that if a good government enforcement officer (or, presumably, any similar administrative tribunal) has discretion to examine a complaint or matter, the officer may disregard the rules of natural justice in exercising his or her discretion to refuse to examine a complaint or matter, and the complainant will not have the right to have that improper exercise of discretion judicially reviewed.

26. In addition, in making the ruling that a member of the public has no statutory right to have a complaint examined by the Ethics Commissioner, and the Ethics Commissioner has no statutory duty to examine such a complaint, the Federal Court of Appeal relied upon rulings of the Federal Court, Federal Court of Appeal and Tax Court of Canada concerning other administrative tribunals. The Supreme Court of Canada has never considered the general issues addressed in these rulings.

(iii) Public Importance of Ensuring that the Ethics Commissioner is Upholding a Correct Conflict of Interest Standard

27. It is of public importance that the legally correct interpretations of “private interest” and “conflict of interest” under the Act be determined as soon as possible, and therefore it is of public importance that this appeal be allowed because the interpretations of those two key provisions in the Act are core issues in this appeal.

28. As a result of the Federal Court of Appeal’s ruling that the Ethics Commissioner’s Decision on Democracy Watch’s Complaint is not a decision (and therefore can not be judicially reviewed), the interpretation of the what is a “private interest” and what is a “conflict of interest” under the Act remain in question.

29. Democracy Watch’s Complaint questioned the actions of the Prime Minister and Prime Minister appointees based upon these key provisions in the Act which state that:

“6.(1) No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest”;

with “conflict of interest” defined in s. 4 as “a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person’s private interests”, and;

with the definition of “private interest” in the Act unlimited except to exclude “an interest in a decision or matter (a) that is of general application; (b) that affects a public office holder as one of a broad class of persons; or (c) that concerns the remuneration or benefits received by virtue of being a public office holder.” (subsection 2(1))

30. Until these key provisions are interpreted in a public and legally correct manner, no federal public office holder can be sure whether they are acting in compliance with the Act.

31. In its ruling on the conflict of interest situation involving former Cabinet minister Sinclair Stevens, the Federal Court ruled that Mr. Stevens was not guilty of violating the then-in-force *Conflict of Interest and Post-Employment Code for Public Office Holders* on the sole basis that the key provisions of the *Code* were not defined in the *Code*, and had not been defined through any other legally binding manner.

Stevens v. Canada (Attorney General) 2004 FC 1746, para. 47

32. The 2004 ethics code for Members of the House of Commons and 2005 ethics code for members of the Senate of Canada both limit the definition of “furthering private interests” to include only furthering their or another person’s assets, liabilities, financial interests, income, directorships or partnerships. And, under both codes it is not, by definition, furthering a private interest if the politician is dealing with their own remuneration and benefits, or is dealing with a matter “of general application” or that affects them or another person “as one of a broad class of the public”. Essentially, these exceptions allow parliamentarians to discuss and vote on bills, regulations, policies and regulations that are of general application to broad classes of the public even if their financial interests will be affected.

Conflict of Interest Code for Members of the House of Commons, ss.3(2) and (3)
Conflict of Interest Code for Senators, ss.13(1) and (2)

33. However, as set out above in paragraph 29, the Act’s ss. 2(1) only exempts from the definition of “private interest” situations in which public office holders are dealing with their own remuneration and benefits, or dealing with a matter “of general application” or that affects them or another person “as one of a broad class of the public”. The definition does not in any way limit “private interest” to financial and business interests.

34. Given that the MPs’ and senators’ codes preceded the 2007 Act, Parliamentarians, (including Cabinet ministers who are public office holders and were directly responsible for the Act) therefore were clearly aware of the implications of the definition of “private interest” on the conflict of interest regime under the Act, and within this legislative context they deliberately chose not to limit the definition of “private interest” in the Act to only financial and business interests.

35. The Ethics Commissioner agrees with this conclusion, as she states in her Decision that “a financial or business interest or some other interest” constitutes a “private interest” under the Act. However, her Decision does not define the vague phrase “some other interest” and the Ethics Commissioner’s conclusion that neither Prime Minister Harper nor any Prime Minister appointee are in a conflict of interest was based primarily on her finding that none of them have a financial interest in the Mulroney-Schreiber situation.

Ethics Commissioner’s Decision, at Tab B, p. 4, para. 3 and p. 6, para.1

36. The legislative context and common law on the meaning of the term “private interest” both point to a very broad interpretation of the term, a conclusion also supported by the main purposes of the Act of avoiding or at least minimizing conflicts of interest and, in any situation in which they arise, resolving them in the public interest, as set out in subsection 3(1) of the Act.

37. The 2003 federal *Value and Ethics Code for the Public Service* does not define “private interest” but states in Chapter 2 that “Conflict of interest does not relate exclusively to matters concerning financial transactions and the transfer of economic benefit.” In one of its first rulings on conflict of interest in government, the Supreme Court of Canada established that a “private interest” of a public official is any interest that a reasonably well-informed person would consider “might have an influence on the exercise of the official’s public duty”. And the 2003 *OECD Guidelines For Managing Conflict of Interest in the Public Service* state that

“private interests’ are not limited to financial or pecuniary interests, or those interests which generate a direct personal benefit to the public official. A conflict of interest may involve otherwise legitimate private-capacity activity, personal affiliations and associations, and family interests, if those interests could reasonably be considered likely to influence improperly the official’s performance of their duties.”

Values and Ethics Code for the Public Service (2003), Chapter 2

Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170

OECD Guidelines For Managing Conflict of Interest in the Public Service, OECD, June 2003, p.4

38. Therefore, the Applicant submits that the Ethics Commissioner erred when she decided that Prime Minister Harper and Attorney General Nicholson, being public office holders under the Act in a situation in which their own specific actions are in question, have no “private interest” in the

Mulroney-Schreiber situation within the meaning of the Act and therefore do not fall within the jurisdiction of the Commissioner.

Ethics Commissioner's Decision, at Tab B, p. 5, paras. 2 and 5; p. 6, paras. 2, 5 and 7, and; p. 7, para. 3)

39. The Applicant also submits that the Ethics Commissioner erred when she stated in her Decision that to exercise her jurisdiction under the Act, she must have "evidence" that a public office holder is actually "furthering a private interest, either his own or any others, in the discharge of his duties" and have "evidence of impropriety" in the furthering of the private interest.

Ethics Commissioner's January 7, 2008 Decision, at Tab B, p. 5, para. 2; p. 4, para. 4 and p. 6, para. 1

40. There is nothing in the Act that supports the Commissioner's claims, nor any legislative context or case law that supports the addition of these factors to the consideration of whether a public office holder is in violation of the Act.

41. The Supreme Court of Canada ruled in *Old St. Boniface* that public officials are in a conflict of interest when they have an opportunity to further a private interest that "might have an influence" on their decisions. A recent Federal Court of Appeal ruling states that "the rule against conflicts of interest is a rule against the possibility that a public office holder may prefer his or her own private interests to the public interest" and that to require action that furthers a private interest "mistakes conflict of interest for corruption." And the 2003 *OECD Guidelines* state that actually furthering a private interest "is better regarded as an instance of misconduct or 'abuse of office', or even an instance of corruption, rather than as a 'conflict of interest'."

Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170

Democracy Watch v. Barry Campbell and the Attorney General of Canada (Registrar of Lobbyists), 2009 FCA 79, paras. 49 and 51

OECD Guidelines For Managing Conflict of Interest in the Public Service, OECD, June 2003, p.4

42. The Commissioner herself directly contradicted these claims in her May 2008 ruling concerning what Liberal Member of the House of Commons Robert Thibault ("MP Thibault") did as a member of a House of Commons Committee after he became aware on November 21, 2008 that

Mr. Mulroney had filed a libel lawsuit against him. In ruling that MP Thibault's situation required him to recuse himself, the Commissioner stated that his "participation in the work of the Committee could reasonably be seen to be potentially influenced by his private interest, thus interfering with his public duties and functions and clearly creating a situation of real or apparent conflict of interest" and "a Member cannot act in a way that could result in the furthering of his private interest."

The Thibault Inquiry Pursuant to the Conflict of Interest Code for Members of the House of Commons, Conflict of Interest and Ethics Commissioner (May 2008), pp. 20 and 22

43. The Applicant also submits that the Ethics Commissioner erred in her Decision by failing to consider the issue of whether Mr. Mulroney qualifies as a "friend" (within the meaning of the Act) of Prime Minister Harper or various Prime Minister appointees (despite the Applicant specifically petitioning the Ethics Commissioner to consider this issue in its Complaint).

44. Given that:

- specific allegations of misconduct by Mr. Mulroney were made by Mr. Schreiber in an application in court against Mr. Mulroney;
- Mr. Mulroney hired a lobbyist in January 2008 to advocate his interests specifically with regard to how the federal Conservative government would have Mr. Schreiber's allegations investigated, and;
- Mr. Mulroney or his agents have made several public statements about the scope and type of investigation he wanted into the allegations,

the Applicant submits that Mr. Mulroney clearly has a "private interest" as defined by the Act. And the Applicant submits that there is ample evidence that Mr. Mulroney is or was at the time a friend of Prime Minister Harper and some Prime Minister appointees.

Applicant's November 26, 2007 Complaint, Tab A

Applicant's January 9, 2008 Letter, at Tab C

45. Finally, the Applicant also submits that the Ethics Commissioner erred by rejecting (without giving any reasons) the Applicant's submissions that "at pleasure" staff and appointees of politicians should also be considered "friends" within the meaning of the Act.

Ethics Commissioner's Decision, at Tab B, p. 6, paras.1 and 6-7

46. To avoid the complete undermining of the purpose and enforcement of the Act, and to

uphold the convention of ministerial responsibility, the Applicant submits that “at pleasure” staff or appointees of a federal politician must be considered within the meaning of the Act to be either “friends” of the politician or, in the alternative, to be improperly furthering “another’s private interests” so that they do not thwart the purpose and enforcement of the Act by acting on behalf of the politician at whose pleasure they serve when that politician has a private interest.

47. In other words, if the politician is in a conflict of interest and therefore must recuse himself or herself from taking part or making decisions about a situation, the politician’s “at pleasure” staff and appointees automatically share the conflict of interest and must also recuse. The Federal Court supported this conclusion when it ruled that the former federal Ethics Counsellor, who served “at pleasure” of The Rt. Hon. Prime Minister Jean Chrétien, was biased when investigating the actions of the Prime Minister and Cabinet ministers, even though the Ethics Counsellor’s primary role was to conduct such investigations.

Democracy Watch v. The Attorney General of Canada (Office of the Ethics Counsellor)
[2004 FC 969] and [2004] 4 F.C.R. 83, paras.36 to 45, 50 to 56

48. The new federal *Conflict of Interest Act* (“Act”), and a recently changed Ontario law, are the only conflict of interest laws in Canada that apply to “at pleasure” staff and appointees of politicians, and so there are no past Canadian ethics commissioner or court decisions concerning how a politician being in a conflict of interest affects his or her “at pleasure” staff or appointees.

49. For all of the above reasons, it imperative that this Honourable Court intervene to provide clarity on the Act concerning the scope of the definition of “private interest” and “friend” and as these terms bear on a determination of whether a “conflict of interest” exists. If these terms are not properly interpreted and applied, public office holders in Canada will escape accountability for fundamentally unethical actions, despite the existence of the well-intentioned Act.

ISSUE B: The Court of Appeal Erred in Ruling That the Ethics Commissioner's Decision Was Not a Reviewable Decision

50. The Supreme Court of Canada has never considered the issue of what is a reviewable decision. Therefore, if this appeal is allowed it will provide an excellent opportunity for the Supreme Court of Canada to rule on what type of decisions by federal tribunals actually constitute judicially reviewable decisions.

51. The Federal Court of Appeal's ruling states that "Where administrative action does not affect an applicant's rights or carry legal consequences, it is not amenable to judicial review" (para. 10) and then concludes that the Ethics Commissioner's Decision did not affect the Applicant's rights for the reason that "The applicant has no statutory right to have its complaint investigated by the Commissioner and the Commissioner has no statutory duty to act on it" (para. 11).

52. The specific reason the Federal Court of Appeal gives, which is true, is that "There is no provision in the Act that allows a member of the public to request that the Commissioner begin an examination" (para. 10).

(i) Ethics Commissioner Has Statutory Duty To Review All Complaints

53. However, this does not mean that the Ethics Commissioner has no statutory duties at all concerning the Applicant's complaint or any complaint filed by a member of the public. The Ethics Commissioner has a "mandate" to "determine whether a contravention of [the] Act has occurred" and to enforce the Act under clause 3(1)(b), is required under subsections 44(1) to (4) to examine complaints filed by a Member of the House of Commons or Senate of Canada, and under subsection 45(1) the Ethics Commissioner "may" initiate examinations, while under section 30 the Ethics Commissioner "may" make compliance orders. In all cases, the Ethics Commissioner is required to issue a public report.

54. The Applicant submits that these statutory duties prohibit the Ethics Commissioner from refusing to review allegations and evidence placed before her that the Act has been contravened. To fulfill the purpose and mandate of the Act, the Ethics Commissioner must at least properly exercise

her jurisdiction to decide, after reviewing an allegation of a contravention, whether or not to conduct an examination or issue a compliance order.

(ii) Ethics Commissioner's Decision Has Significant Legal Consequences

55. The Ethics Commissioner's Decision on the Applicant's Complaint was issued by her in her role as Ethics Commissioner, on letterhead of the Officer of the Ethics Commissioner, and so was clearly issued under her mandate under subsection 3(1) of the Act to "determine whether a contravention of [the] Act has occurred." As a result, the Decision has a binding legal effect on her. Furthermore, given that the Decision set out the Ethics Commissioner's interpretations of the key provisions in the Act, namely the definitions of "private interest" and "conflict of interest", the Decision establishes precedents that will be applicable in almost every future examination that the Ethics Commissioner will conduct under the Act.

56. It is simply impossible that in the future the Ethics Commissioner could change her belief, set out in her January 7, 2008 Decision that the Applicant's Complaint did not provide reason to believe that the Act had been contravened. The Federal Court of Appeal does not explain how her belief could change, and it is clear that it could not change because it is based entirely upon interpretation of key provisions of the Act, as the facts of the situation were not in dispute in any way. The Ethics Commissioner herself showed that she considered her Decision binding when she stated in her January 11, 2008 letter (responding to the Applicant's January 9, 2008 letter to her that set out many different reasons why the Ethics Commissioner should re-consider her Decision) that she did "not find any reason to change my views."

Ethics Commissioner's January 7, 2008 Decision, at Tab B

Applicant's January 9, 2008 Letter, at Tab C

Ethics Commissioner's January 11, 2009 Letter, at Tab D

57. In her Decision, the Ethics Commissioner did not dispute that the basis of the Applicant's Complaint was that the Prime Minister and Prime Minister appointees were in a situation in which they had an opportunity to exercise their official powers to determine the scope of the investigation into the actions of the Prime Minister, Attorney General Rob Nicholson, and their (alleged) friend

Mr. Mulroney. No new information could ever come to the Ethics Commissioner's attention at any time in the future that would in any way change the basis of the Applicant's Complaint.

58. The Ethics Commissioner's Decision was made solely on the basis that to decide who would conduct the investigation into the actions of oneself and one's friend, and to decide the scope of the investigation, did not constitute a "private interest" under the Act, and therefore the Prime Minister and Prime Minister appointees having the opportunity to make those decisions did not place them in a "conflict of interest" under the Act.

59. The Federal Court of Appeal may have been thinking that if a Member of the House of Commons or Senate of Canada filed the same complaint as the Applicant's Complaint with the Ethics Commissioner, then the Ethics Commissioner may make a different decision. However, it would clearly be legally improper for the Ethics Commissioner to change her interpretation of the Act based upon the identity of the person filing the complaint.

60. In fact, the only way that the Ethics Commissioner's interpretation of the key provisions of the Act could change is if the courts judicially review her interpretations and reject them as unreasonable and/or incorrect, which is exactly what the Applicant sought in its application.

(iii) Jurisprudence cited by the Federal Court of Appeal In Its Ruling on Reviewability of Ethics Commissioner's Decision Not Applicable

61. In ruling that the Ethics Commissioner's Decision did not constitute a reviewable decision because it did not affect the Applicant's rights or have legal consequences, the Court of Appeal cites (in para.10): *Pieters v. Canada (Attorney General)*, 2007 FC 556 at paragraph 60; *Rothmans, Benson & Hedges Inc. v. Canada (Minister of National Revenue)* (1998), 148 F.T.R. 3 at paragraph 28, and; *Canadian Institute of Public and Private Real Estate Cos. v. Bell Canada*, 2004 FCA 243 at paragraphs 5 & 7.

62. In direct contrast to these three cases (and related cases cited by those cases), in this case the Ethics Commissioner's Decision was a binding ruling in writing (as opposed to the recommendations made by the tribunal in *Pieters* (para. 68)) that she will not conduct an examination of the Applicant's specific Complaint about a specific factual context (as opposed to

the abstract comments about future situations made by the tribunal in *Canadian Institute* (paras. 7 and 9)). As well, the Ethics Commissioner's Decision settled the matter finally as it was based on interpretation of provisions of the Act that no new information could ever change (as opposed to the advance ruling issued by the tribunal in *Rothmans* that did not settle the matter (paras. 27-28)).

63. Given that this case differs significantly and substantively in every way from the three cases cited by the Federal Court of Appeal, it erred in law in relying on the rulings in these three cases to make its determination in this case.

(v) The Commissioner's Decision is a "matter" within the meaning of the FCA, and therefore is judicially reviewable

64. The Applicant submits that the Ethics Commissioner's Decision is a "matter" which explicitly can be subject to an application for judicial review under sections 18 and 18.1 of the FCA because it has binding legal effect concerning the scope of the jurisdiction of the Commissioner, which thereby denies the Applicant's rights to have the Complaint examined in ways that fail to observe principles of natural justice, and which thereby will deny the right of anyone who in the future files a complaint to have their complaint examined by the Commissioner.

65. In *Krause v. Canada*, the Federal Court of Appeal confirmed that the reference in section 18.1(1) to "matter" covers a variety of administrative actions. The term "matter" embraces not only a decision or order but any matter in respect of which a remedy may be available under section 18 of the Federal Courts Act. Section 18 does not depend on the existence of a decision or order.

Krause v. Canada, [1999] F.C.J. No. 179 at paras. 11, 21, 24 (FCA)

66. Similarly in *Nunavut Tunngavik Inc. v. Canada*, the Court confirmed that its role under section 18.1 extends beyond formal decisions and includes review of:

"a diverse range of administrative action that does not amount to a decision or order such as subordinate legislation, reports or recommendations made pursuant to statutory powers, policy statements, guidelines and operating manuals, or any of the myriad forms that administrative action may take in the delivery by a statutory agency of a public programme"

Nunavut Tunngavik Inc. v. Canada (A.G.) [2004] F.C.J. No. 138 at para. 8 [FC]

67. Section 66 of the *Conflict of Interest Act* (the "Act") states:

“Orders and decisions final

66. Every order and decision of the Commissioner is final and shall not be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(a), (b) or (e) of that Act.”

68. Clauses 18.1(4)(a), (b) and (e) of the FCA state:

“18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

. . . (e) acted, or failed to act, by reason of fraud or perjured evidence; . . .”

69. Clause 28(1)(b.1) of the FCA states that the Federal Court of Appeal has jurisdiction to hear applications for judicial review over the Commissioner, and section 28(2) of the FCA states that the almost all of the sections that apply to judicial reviews by the Federal Court also apply to the Federal Court of Appeal.

Federal Courts Act, R.S.C. 1985, c.F-7, section 28

70. The Applicant Democracy Watch seeks declarations with regard to the Commissioner’s Decision to refuse to exercise jurisdiction and failure to observe principles of natural justice and procedural fairness, by way of an application for judicial review under subsections 18(1), and 18.1(1) and (3) of the FCA.

Federal Courts Act, R.S.C. 1985, c.F-7, sections 18 and 18.1

71. And, indeed, under section 18(3) of the FCA, Democracy Watch is obliged to use the judicial review process to obtain the remedies available under subsection 18(1).

Federal Courts Act, R.S., 1985, c. F-7, section 18(3)

72. Therefore, the Federal Court of Appeal erred in ruling that the Ethics Commissioner’s Decision was not reviewable, because it was reviewable as a matter even if it was not a reviewable decision.

ISSUE C: Federal Court of Appeal Erred in Not Considering *Charter* Issue

73. The Federal Court of Appeal ruled that:

“With respect to the applicant’s request for a declaration that subsections 44(1) to 44(6) [of the Act] 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.” (para. 15)

74. This is an error because, as the Federal Court of Appeal admits, it can properly hear constitutional challenges within applications for judicial review.

75. The Applicant submitted that the complaint filing and examining system set out in subsections 44(1) to 44(6) of the Act violated its *Charter* rights, and had the effect of allowing the Ethics Commissioner to refuse to examine the Applicant’s Complaint. By failing to consider the *Charter* issue, the Federal Court of Appeal thereby failed to fully consider a core issue of the judicial review application, namely whether the Ethics Commissioner has a legal duty to examine all complaints. This failure fettered the Court of Appeal improperly, as it precluded a full consideration of the issue of the reviewability of the Ethics Commissioner’s Decision.

PART IV – SUBMISSIONS ON COSTS

76. The Applicant submits that the question of costs on this leave to appeal application be left to the discretion of this Honourable Court. Any costs award, however, should consider the public interest nature of the application, and the fact that the issues in the case have never been considered by the Court.

PART V – ORDER SOUGHT

77. The Applicant requests the following:

- a) That the Applicant be granted leave to appeal to this court in accordance with the directions of this court;
- b) Such further and other relief as counsel may advise and this Honourable Court deems just.

Dated at Ottawa, Ontario this 23rd day of March, 2009.

Signed by

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PART VI - TABLE OF AUTHORITIES

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- SEE para. 16 of Memorandum
2. *Democracy Watch v. Barry Campbell and the Attorney General of Canada (Registrar of Lobbyists)* 2009 FCA 79, para. 48
- SEE paras.17 and 41 of Memorandum
3. *Stevens v. Canada (Attorney General)* 2004 FC 1746, para. 47
- SEE para. 31 of Memorandum
4. *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170
- SEE para. 37 and 41 in Memorandum
5. *The Thibault Inquiry Pursuant to the Conflict of Interest Code for Members of the House of Commons*, Conflict of Interest and Ethics Commissioner (May 2008), Commissioner's website
- SEE para. 42 in Memorandum
6. *Democracy Watch v. The Attorney General of Canada (Office of the Ethics Counsellor)* [2004 FC 969] and [2004] 4 F.C.R. 83, paras.36 to 45, 50 to 56
- SEE para. 47 in Memorandum
7. *Pieters v. Canada (Attorney General)* 2007 FC 556 at paragraph 60
- SEE paras. 61-62 of Memorandum
8. *Rothmans, Benson & Hedges Inc. v. Canada (Minister of National Revenue)* (1998) 148 F.T.R. 3 at paragraph 28
- SEE paras. 61-62 of Memorandum
9. *Canadian Institute of Public and Private Real Estate Cos. v. Bell Canada*, 2004 FCA 243 at paragraphs 5 & 7
- SEE paras. 61-62 of Memorandum
10. *Krause v. Canada*, [1999] F.C.J. No. 179 at paras. 11, 21, 24 (FCA)
- SEE para. 65 of Memorandum
11. *Nunavut Tunngavik Inc. v. Canada (A.G.)* [2004] F.C.J. No. 138 at para. 8 [FC]
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