

FEDERAL COURT OF APPEAL

BETWEEN:

**Democracy Watch**

Applicant

- And -

**Conflict of Interest and Ethics Commissioner**

Respondent

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WRITTEN REPRESENTATIONS OF THE  
RESPONDING PARTY/APPLICANT, DEMOCRACY WATCH

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**OVERVIEW**

1. These written representations respond to the Notice of Motion (the "Motion") filed by the Respondent to strike out the Applicant Democracy Watch's Application for judicial review (the "Application") of the Conflict of Interest and Ethics Commissioner (the "Commissioner") on the grounds that the Commissioner did not make a "decision" within the meaning of the *Federal Courts Act*, and that the Application seeks only a remedy from the Court in the nature of *mandamus* but does not meet the prerequisites for such an order. The Applicant responds that the Motion is invalid for the following reasons: the Court has no jurisdiction under the Rules to consider a motion to strike out an application for judicial review; in any case the Motion does not meet the very high threshold of a motion to strike out an application; the description of the scope of the jurisdiction of the Commissioner is incorrect in fundamental ways, as is the description of the Commissioner's actions in response to the complaint brought by the Applicant, and the description of the relief sought in the Applicant's Application. Overall, the Motion seeks to prevent this Court from adjudicating upon the Application in a cost effective and expeditious manner by prejudicially delaying the hearing of the Application. For all these reasons, the Respondent's Motion should be dismissed.
2. The Applicant, Democracy Watch, is a not-for-profit corporation founded and incorporated pursuant to federal law in September 1993. Democracy Watch is a non-partisan organization that advocates democratic reform, citizen participation in public affairs, government and corporate accountability, and ethical behaviour in government and business in Canada. In pursuit of its mandate, Democracy Watch

has initiated various campaigns, including an ongoing campaign initiated in April 1994 relating to government and lobbyist ethics.

3. Through its Application filed on February 6, 2008, the Applicant seeks judicial review of the Commissioner's decision, and the following declarations:
  - (a) that the jurisdiction of, and proper exercise of jurisdiction by, the Commissioner under the *Conflict of Interest Act* (the "Act") includes any situation in which a public office holder has 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 any situation in which allegations are made about a public office holder's actions with regard to matters that are not of general application or that do not affect a broad class of persons and that the Commissioner's jurisdiction specifically includes the actions of The Rt. Hon. Prime Minister Stephen Harper ("Prime Minister Harper") and his Cabinet ministers, their staff and "at pleasure" senior officials with regard to the ongoing situation involving the Rt. Hon. Brian Mulroney ("Mr. Mulroney") and Mr. Karlheinz Schreiber ("Mr. Schreiber");
  - (b) that the Commissioner improperly refused to exercise her jurisdiction to examine the November 26, 2007 complaint (the "Complaint") filed by Democracy Watch about the actions of the public office holders in the situation described above in (a);
  - (c) that the Commissioner improperly refused to exercise her jurisdiction to determine that the public office holders had contravened the Act by taking part in and making decisions in the situation described above in (a);
  - (d) that the Commissioner improperly refused to exercise her jurisdiction to issue orders of recusal under her power in the Act to the public office holders listed above under (a) to prevent them from continuing to act in contravention of the Act, and;
  - (e) that the Commissioner failed to observe principles of natural justice and procedural fairness in making her decisions to refuse to exercise her jurisdiction as described above in (a) to (d).
4. In addition, the Applicant seeks a declaration that the provisions in the Act that require the Commissioner to examine a complaint filed by a Member of the House of Commons ("MP") or Member of the Senate of Canada ("Senator"), but give the Commissioner complete discretion to refuse to examine a complaint filed by a member of the public, violate the Applicant's and the public's rights under sections 2(b) "freedom of expression" and 2(d) "freedom of association" of the *Canadian Charter of Rights and Freedoms* (the "Charter") because they force the Applicant and the public to associate with a partisan MP or Senator in order to ensure that their complaints will be examined by the Commissioner.

*Canadian Charter of Rights and Freedoms, Part 1 of the Constitutional Act, 1982, being Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11*

5. The Applicant Democracy Watch filed and served its affidavit as required under the *Federal Courts Rules* (the "Rules"), and awaited service of the Respondent Commissioner's affidavit which, according to the Rules, should have happened within 30 days (ie. by April 16, 2008). Instead, on April 22, 2008 the Commissioner served the Applicant with the Motion to strike out the Applicant's Application, to which these written representations respond.

## **PART I – STATEMENT OF FACTS**

### **A. APPLICATION TO THE FEDERAL COURT OF APPEAL FOR JUDICIAL REVIEW**

#### **(i) The Application and Affidavit evidence served in support of the Application**

6. In its Notice of Application and accompanying evidence in the Affidavit of Duff Conacher, Coordinator of Democracy Watch (the "Affidavit"), the Applicant explains that it filed a complaint on November 26, 2007 (the "Complaint") with the Commissioner alleging that Prime Minister Harper and his Cabinet ministers, their staff, and "at pleasure" senior officials are in a conflict of interest as defined by the Act when dealing with the Mulroney-Schreiber situation and that any of them who had made decisions or participated in making decisions about the situation should be found by the Commissioner to be in violation of the Act, and that they should be ordered by the Commissioner to recuse themselves from further decision-making processes with regard to the situation.

Notice of Application at pp.4-5; Affidavit of Duff Conacher, Exhibit "A"

7. Democracy Watch's Complaint is based upon clear evidence that Mr. Mulroney is a friend of Prime Minister Harper and at least some of his Cabinet ministers, and the fact that Prime Minister Harper's and at least some of his Cabinet ministers' and staff members' own actions were in question, and that Prime Minister and at least some of his Cabinet ministers and staff members' had taken part in decisions, and would take part in decisions, concerning the Mulroney-Schreiber situation.

Affidavit of Duff Conacher, paras. 3 to 12 (pp. 1-3) and 38 to 57 (pp. 6-10),  
and Exhibit "T", and Exhibits "J" through "S", and Exhibit "U"

8. Democracy Watch's Complaint is also based upon provisions with regard to conflicts of interest in the Act which state that: "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" (s.6.(1)) with "conflict of interest" defined 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" (s.4) and

with "private interest" defined only as not including (s.2.(1)) "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."

**Affidavit of Duff Conacher, Exhibit "B"**

9. Democracy Watch's requests that the Commissioner examine the situation and rule on the alleged violations, and issue recusal orders, were based upon the provisions in the Act set out above, and the provisions which state that: "A public office holder shall recuse himself or herself from any discussion, decision, debate or vote on any matter in respect of which he or she would be in a conflict of interest." (s.21) and "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." (ss. 45. (1)) and that "In addition to the specific compliance measures provided for in this Part, the Commissioner may order a public office holder, in respect of any matter, to take any compliance measure, including divestment or recusal, that the Commissioner determines is necessary to comply with this Act." (s.30)

**Affidavit of Duff Conacher, Exhibit "B"**

10. The Commissioner responded by sending a letter dated January 7, 2008 (the "Decision") to Democracy Watch which stated that the Commissioner refused to exercise her jurisdiction to examine the situation complained about by Democracy Watch based upon her claim that neither Prime Minister Harper nor any of his Cabinet ministers had a "private interest" in the situation that was within her jurisdiction, and that in order for them to have a private interest within her jurisdiction "a financial or business or other interest, would be necessary along with the general desire to protect one's personal reputation and position" and there would have to be impropriety in their relationship with Mr. Mulroney and/or Mr. Schreiber.

**Affidavit of Duff Conacher, para. 13 (p. 3), and Exhibit "C", p.4**

11. In her Decision, the Commissioner also refused to exercise her jurisdiction to examine the situation based upon her claim that to be within her jurisdiction she would have to have "credible evidence" that Prime Minister Harper and/or his Cabinet ministers, their staff, and "at pleasure" officials had made decisions in their official capacity that furthered their own private interests, or the private interests of Mr. Mulroney or others, even though the Act states that these public office holders do not have to further their or others' private interests in order to be in a conflict of interest, all they have to do is be in a situation in their official capacity "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" (s.4).

**Affidavit of Duff Conacher, para. 14 (p. 3), and Exhibit "C", p.5**

12. In her Decision, the Commissioner also refused to exercise her jurisdiction to examine the situation based upon her discretion under ss. 45(1) of the Act which states that "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 her discretion under section 30 of the Act which states that "In addition to the specific compliance measures provided for in this Part, the Commissioner may order a public office holder, in respect of any matter, to take any compliance measure, including divestment or recusal, that the Commissioner determines is necessary to comply with this Act."

**(ii) Declaratory relief sought**

13. In its Notice of Application, the Applicant Democracy Watch seeks the following declarations:
- A declaration quashing the Decision issued by the Commissioner under the Act arising from Democracy Watch's Complaint and substituting therefore the Court's own decision directing that the Commissioner proceed with a full investigation into the Complaint pursuant to s.45(1) of the Act and directing that the Commissioner issue an order of recusal to the Prime Minister, and, as appropriate, other Cabinet ministers, pursuant to s.30 of the Act;
  - In the alternative, an declaration quashing the Decision and sending the Complaint back to the Commissioner for reconsideration with directions regarding the definition of the jurisdiction of, and proper exercise of jurisdiction by, the Commissioner under the Act;
  - A declaration that Democracy Watch was deprived of its right to a fair hearing by the Commissioner in accordance with the principles of fundamental justice in connection with its Complaint, in contravention of common law requirements and the principles of fundamental justice under s. 2(e) of the Canadian Bill of Rights, S.C. 1960, c. 44;
  - A declaration that sections 44(1) to 44(6) of the Act violate sections 2(b) "freedom of expression" and 2(d) "freedom of association" of the "Charter" because these provisions in the Act require the Commissioner to examine a complaint filed by a MP or Senator, but give the Commissioner complete discretion to refuse to examine a complaint filed by a member of the public, and therefore these provisions force the Applicant and the public to associate with a partisan MP or Senator in order to ensure that their complaints will be examined by the Commissioner.

Notice of Application at p. 3

14. The Applicant Democracy Watch is not seeking any relief other than those declarations. Specifically, no claim for damages is made in the Application.

## PART II – ISSUES

15. The Applicant Democracy Watch takes the following position on the issues raised by the Respondent Commissioner on this Motion:
  - A. The Motion is based upon Rule 221(1)(a) of the *Federal Courts Rules* (SOR/98-106 -- the "Rules") which does not apply to an application for judicial review such as the Applicant Democracy Watch's Application for Judicial Review, and therefore the Motion should be dismissed.
  - B. Even if the Court decides that the Motion is permitted under the Rules, the Motion does not meet the high threshold needed to have the Court dismiss the Application, namely that the Application must be "so clearly improper as to be bereft of any possibility of success", and therefore the Motion should be dismissed
  - C. In addition, the Commissioner's January 7, 2008 letter to Democracy Watch is a "decision" and/or a "matter" within the meaning of section 18.1 of the *Federal Courts Act* (R.S.C. 1985, c.F-7 -- the "FCA") that directly affects Democracy Watch's substantive rights, in particular as a public interest applicant, and therefore the Court has jurisdiction under subsections 18(1) and 18(4) of the FCA to grant the relief sought by the Applicant in the nature of *certiorari* or *mandamus* or to grant declaratory relief or other relief, and therefore the Motion should be dismissed.
  - D. Finally, Democracy Watch's Application is for a judicial review of the Commissioner's improper refusal, as a tribunal, to exercise its jurisdiction and failure to observe principles of natural justice (which grounds are explicitly permitted under section 66 of the *Conflict of Interest Act* (the "Act") and subsection 18.1(4)(a) and (b) of the FCA), and for declarations that the scope of the Commissioner's jurisdiction includes the situation involving the public office holders described in Democracy Watch's Complaint and, in the alternative, if the Court decides that the application is requesting a remedy in the nature of *mandamus*, the Application satisfies the prerequisites for that remedy. Therefore, the Motion should be dismissed.

## PART III – STATEMENT OF SUBMISSIONS

### A. ACCORDING TO THE FEDERAL COURT RULES, THE MOTION CANNOT BE FILED IN RESPONSE TO AN APPLICATION FOR JUDICIAL REVIEW

16. The Applicant Democracy Watch filed and served its Affidavit as required under the Rules and awaited service of the Respondent Commissioner's affidavit which, according to the Rules, should have happened within 30 days (ie. by April 16,



2008). Instead, on April 22, 2008 the Commissioner served the Applicant with the Motion to which these written representations respond. The Motion is for "an Order striking out the applicant's judicial review application for want of jurisdiction pursuant to Rule 221(1)(a) . . ." of the Rules.

Notice of Motion, para. 1

17. Rule 221(1)(a) of the Rules is contained in Part 4 of the Rules, beginning with Rule 169 which states:

"PART 4  
ACTIONS  
APPLICATION OF THIS PART

Application

169. This Part applies to all proceedings that are not applications or appeals . . ."

18. Democracy Watch filed an application with the Court, not an action.

19. Rule 221(1)(a) of the Rules states:

"STRIKING OUT PLEADINGS

Motion to strike

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be, . . ."

20. Rule 171 of Part 4 of the Rules lists the pleadings that may be filed in an Action (as opposed to an application), as follows:

"PLEADINGS IN AN ACTION

General

Pleadings

171. The following pleadings may be filed:

- (a) in respect of an action,
  - (i) a statement of claim, in Form 171A,
  - (ii) a statement of defence, in Form 171B, and
  - (iii) a reply, in Form 171C;
- (b) in respect of a counterclaim,
  - (i) a counterclaim, in Form 171D or 171E,,
  - (ii) a defence to counterclaim, in Form 171F, and
  - (iii) a reply to a defence to counterclaim, in Form 171G; and
- (c) in respect of a third party claim,
  - (i) a third party claim, in Form 171H or 171I,
  - (ii) a third party defence, in Form 171J, and
  - (iii) a reply to a third party defence, in Form 171K."

21. Democracy Watch filed a notice of application with the Court, not a statement of claim or any other type of pleading listed in Rule 171.

22. Rule 330(a) of the Rules states:

"PART 5  
APPLICATIONS  
APPLICATION OF THIS PART

Application

300. This Part applies to

(a) applications for judicial review of administrative action, including applications under section 18.1 or 28 of the Act, . . ."

23. The Applicant Democracy Watch filed an application for judicial review of administrative action, and the application is being considered by the Federal Court of Appeal under clause 28(1)(b.1) of the *Federal Courts Act* (the "FCA"), which gives the Federal Court of Appeal exclusive jurisdiction to hear and determine applications for judicial review made in respect of the Commissioner.
24. Subsection 28(2) of the FCA prohibits, without exception, the application of subsection 18.4(2) of the FCA to applications filed under subsection 28(1) of the FCA, and therefore the Federal Court of Appeal may not direct that Democracy Watch's Application for Judicial Review be treated or proceed as an action.
25. Therefore, Democracy Watch's Application for Judicial Review is incontrovertibly an application, not an action, and its Notice of Application is not a statement of claim, nor any other sort of pleading as defined in section 171 of the Rules.
26. Therefore, the Motion does not apply in any way to Democracy Watch's Application for Judicial Review of the Commissioner's Decision, and as a result the Motion should not have been filed, and should be dismissed.

*David Bull Laboratories (Can.) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (at Tab 1, Respondent's Motion Record Volume II)

**B. VERY HIGH THRESHOLD ON MOTIONS TO DISMISS JUDICIAL REVIEW APPLICATIONS**

27. With regard to judicial review applications, section 18.4(1) of the FCA instructs all parties and the Court to proceed to hearing as quickly as possible:

18.4(1) Hearings in a summary way – Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

*Federal Courts Act*, R.S.C. 1985, c.F-7, section 18.4

28. According to this Court, the proper way to contest a Notice of Application which a respondent thinks is inappropriate, without merit or capable of producing no practical consequence, is to appear and argue at the hearing of the application itself,

rather than bringing a motion to strike. As the Commissioner acknowledges at para.17 of her written representations in support of the Motion, Court will only dismiss an application in a summary manner if it is so clearly improper as to be bereft of any possibility of success. Such cases are very exceptional.

*David Bull Laboratories (Can.) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at paras. 10, 11, 15 (F.C.A) -- at Tab 1 of the Respondent's Motion Record - Volume II

29. In addition to the Motion being prohibited by the Rules (as made clear above in paras.16 to 26), this Motion clearly does not meet the high standard needed for the Court to dismiss the Application given the following:
- (a) the Applicant's Application is based on grounds clearly permitted under section 66 of the Act and clauses 18.1(4)(a) and (b) of the FCA (as set out below in paras.43 to 47),
  - (b) the Application is for a judicial review of many clear decisions, within the meaning of section 18 of the FCA, contained in the Respondent Commissioner's Decision (as made clear below in paras. 30 to 39), or at the very least an application for judicial review of a "matter" within the meaning of section 18 of the FCA (as made clear below in paras.40 to 42), and judicial review is the correct, and only, process available to the Applicant (as made clear below in paras.43 to 47);
  - (c) the Application is mainly for a declaration that the scope of the jurisdiction of the Commissioner includes the actions of the public office holders set out in the Complaint, but in any case the Application satisfies the prerequisites for the remedy of mandamus (as made clear below in paras.48 to 74);
  - (d) the Commissioner's Decision was her first public decision under the Act and, therefore, the Application raises *de novo* issues, issues that in other cases have been determined to be of national importance (as set out below in para.32), and;
  - (e) for all of the above reasons (a) to (d), the Application is not "bereft of any possibility of success".

**C. THE COMMISSIONER'S DECISION IS A "DECISION" OR "MATTER" WITHIN THE MEANING OF THE *FEDERAL COURTS ACT* (FCA) AND IS SUBJECT TO JUDICIAL REVIEW**

- (i) **The Commissioner's Decision is a "decision" within the meaning the FCA**
30. If the Court decides that, despite the clear prohibition in the Rules of the filing of the Motion, the Motion is permitted by the Rules, in the alternative the Commissioner's Decision is clearly a "decision" within the meaning of section 18.1 the FCA, and the first ground for the Motion, namely that Commissioner's Decision was only a non-legally binding expression of the Commissioner's opinion, should be rejected by the Court.
31. The Respondent Commissioner's Decision was issued by letter dated January 7, 2008 to the Applicant Democracy Watch and included the following decisions, all of

which (except (k) and (l)) constitute an improper refusal to exercise the Commissioner's jurisdiction to initiate an examination of the Applicant's Complaint based on the meaning of the provisions of the *Conflict of Interest Act* (the "Act"):

- (a) the decision that a public office holder's "private interest" as defined in the "Definitions" section 2 of the Act does not include, on its own, the personal interest in protecting his or her "personal reputation and position" and that, therefore, the Commissioner's jurisdiction does not include the interests of Prime Minister Harper nor Attorney General Nicholson nor any other Cabinet minister, their staff or "at pleasure" senior official (Decision, p.4, para.3);
- (b) the decision (directly related to the decision described above in (a)) that "Another interest, whether a financial or business interest or some other interest, would be necessary along with the general desire to protect one's personal reputation and position" in order for a public office holder's "private interest" to be affected in a way that comes within the jurisdiction of the Act, and therefore within the jurisdiction of the Commissioner, and the directly related decision to refuse to define in any way the completely vague phrase "some other interest" other than, as described above in (a), to make it clear that the Commissioner has decided that "some other interest" does not include an interest in protecting one's personal reputation and position (Decision, p.4, para.3; and p.6, para.1);
- (c) the decision to refuse to consider the provisions of section 4 of the Act which state clearly that the scope of the Commissioner's jurisdiction includes situations in which a public office holder is exercising "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's private interests." [emphasis added], and the directly related refusal to even consider the part of the Complaint addressing the issue of the opportunities Prime Minister Harper and other Cabinet ministers, their staff and "at pleasure" senior officials had and will have to further their private interests or those of their friend Mr. Mulroney (no page or paragraph reference as there is no mention in the Decision of this part of the Complaint, nor any discussion of the "provides an opportunity" part of section 4 of the Act);
- (d) the decision (which is directly related to the refusal to consider the actual scope of section 4 of the Act as set out above in (c)) that in order for a public office holder's actions to be within the jurisdiction of the Commissioner, the Commissioner must have "evidence" that a public office holder is actually "furthering a private, either his own or any others, in the discharge of his duties" (Decision, p.5, para.2);
- (e) the decision that, in addition to actually furthering his or her or other's private interests (as set out above in (d)), in order for a public office holder's actions to be within the jurisdiction of the Commissioner, the Commissioner must have "evidence of impropriety" in the furthering of the private interest (Decision, p.4, para.4, p.6, para.1);
- (f) the decision to refuse to consider the part of the Complaint concerning Mr. Mulroney being a "friend" of Prime Minister Harper, Attorney General Nicholson, other Cabinet ministers, their staff, and/or "at pleasure" senior

- officials within the meaning of the section 4 of the Act (no page or paragraph reference as there is no mention in the Decision of this part of the Complaint);
- (g) the decision that Attorney General Nicholson and other Cabinet ministers are not in a conflict of interest if Prime Minister Harper is in a conflict of interest, even though they are all "friends" within the meaning of the Act, and all serve at the pleasure of Prime Minister Harper and so can be dismissed at any time for any reason by Prime Minister Harper (Decision, p.6, paras.1 and 6-7);
  - (h) the decision that the staff of Cabinet ministers and "at pleasure" senior officials are not in a conflict of interest if Prime Minister Harper and/or their minister is in a conflict of interest, even though they they are all "friends" within the meaning of the Act, and all serve at the pleasure of Prime Minister Harper or their minister and so can be dismissed at any time for any reason by Prime Minister Harper or their minister (Decision, p.6, paras. 6-7);
  - (i) the decision, based upon all of the above decisions, that Prime Minister Harper, Attorney General Nicholson, other Cabinet ministers, their staff and "at pleasure" senior officials are all not in a "conflict of interest" within the meaning of section 4 of the Act when they are making decisions concerning the Mulroney-Schreiber situation and, therefore, they did not and will not violate subsection 6(1) of the Act by making decisions in the past or future about the Mulroney-Schreiber situation (Decision, p.5, para. 2; p.6, paras.2 and 7);
  - (j) the decision, based upon all of the above decisions, that Prime Minister Harper, Attorney General Nicholson, other Cabinet ministers, their staff and "at pleasure" senior officials are not required under section 21 of the Act to recuse themselves from any discussion, decision, debate or vote in respect of the Mulroney-Schreiber situation, and therefore that they did not and will not violate section 21 by taking part in, and continuing to take part in, such discussions and decisions (Decision, p.5, para. 2; p.6, paras.2 and 7);
  - (k) the decision that Prime Minister Harper and Attorney General Nicholson did not give preferential treatment to Mr. Mulroney within the meaning of section 7 of the Act (Decision, p.5, para.3; p.6, para.3);
  - (l) the decision that Prime Minister Harper and Attorney General Nicholson and other Cabinet ministers did not use their positions as public office holders to seek to influence a decision of another person so as to further their or another's private interests, within the meaning of section 9 of the Act (Decision, p.5, para.4; p.6, paras.4 and 7);
  - (m) the decision, based upon all of the above decisions, that therefore the Commissioner does not have the required "reasonable grounds to believe" that any public office holder has "contravened the Act" and that, therefore, the situation set out in the Applicant's Complaint is not within the jurisdiction of the Commissioner to initiate an examination under the power set out in subsection 45(1) of the Act, and that, therefore, the Commissioner will not initiate an examination (Decision, p.5, para.5; p.6, paras. 5 and 7, and; p.7, para.3);
  - (n) the decision, based upon the decision described above in (m), that it is not within the jurisdiction of the Commissioner to order, under the power set out in section 30 of the Act, any public office holder mentioned in the Complaint

to recuse themselves from taking part in or making or seeking to influence decisions with regard to the Mulroney-Schreiber situation (Decision, p.5, para.5; p.6, paras. 5 and 7, and; p.7, para.3), and;

- (o) the overall decision, in responding to the Complaint, to disregard the following main purposes of the Act set out in subsection 3(1), namely to: "(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 . . ."

**Commissioner's Decision at Exhibit "C" of Affidavit of Duff Conacher,  
or at Exhibit "B" in the Affidavit of Katherine MacCormick**

- 32. The Commissioner's Decision is a decision made at the administrative review stage of the exercise of the Commissioner's powers under the Act, in that it is a first-level, "reasonable grounds to believe" decision to refuse to examine the Complaint in which allegations have been made that public office holders have and will contravene the Act with their actions. Such a decision by the former federal Ethics Counsellor Howard Wilson, the direct predecessor to the Commissioner, also with regard to the enforcement of conflict of interest rules, was deemed a decision subject to judicial review by the Federal Court of Canada in the Court's ruling on *Democracy Watch v. The Attorney General of Canada (Office of the Ethics Counsellor)* [2004 FC 969] and [2004] 4 F.C.R. 83. In that same ruling, it was also determined that Democracy Watch's complaints at issue in the judicial review were so important as to be of "national interest" because they involved the interpretation of conflict of interest rules in ways that would determine fundamentally the scope of the jurisdiction of the Ethics Counsellor.

*Democracy Watch v. The Attorney General of Canada (Office of the Ethics Counsellor)* [2004 FC 969] and [2004] 4 F.C.R. 83

- 33. The Respondent Commissioner contends in "Written Representations" in support of the Motion that, in making her Decision, "the Commissioner has, in no way, acted to either affect or determine the applicant's substantive rights."

**Respondent's Motion Record Volume I, Tab C, p.18, para.32**

- 34. The Decision clearly affects and determines the Applicant Democracy Watch's substantive right to have its Complaint examined by the Commissioner.
- 35. As established by the Applicant's Application and Affidavit, Democracy Watch is a non-partisan organization and the only way in which it and its Complaint can remain non-partisan is to file a complaint with the Commissioner directly, as opposed to associating with a partisan MP or Senator to have them file a complaint on behalf of Democracy Watch through the process set out in section 44 of the Act which requirement, the Applicant contends, violates its substantive "freedom of association" rights under the Charter. As well, the Commissioner's Decision was that the situation described in the Complaint is not within her jurisdiction to examine, so even if Democracy Watch had associated with a partisan MP or Senator

to have them file the Complaint on Democracy Watch's behalf, the Commissioner clearly would have, in any case, refused to examine the Complaint.

36. Democracy Watch is a public interest Applicant, and the Commissioner's Decision not only affects and determines its substantive right to have its Complaint examined by the Commissioner, but also because the Decision is based upon unreasonable and improper limits the Commissioner puts on the scope of her jurisdiction, the Decision also affects and determines the rights of anyone else, including MPs and Senators, to have any similar complaint they may file examined by the Commissioner.
37. The Respondent Commissioner also contends her Decision "merely notified" the Applicant "explaining the basis of her opinion that there were not sufficient grounds to believe that the Act had been contravened."

**Respondent's Motion Record Volume I, Tab C, pp.18-20, paras.33 to 39**

38. The Respondent Commissioner also contends that her Decision, as an explaining opinion, has no binding legal effect on her in her role as Commissioner, and in particular that "in light of new or evolving information" the Commissioner could change her mind about whether she had "reason to believe" that the public office holders mentioned in the Applicant's Complaint had acted in a way that contravened the Act.

**Respondent's Motion Record Volume I, Tab C, pp.20-21, paras.40 to 50**

39. In making these claims, the Respondent Commissioner is ignoring the following very relevant facts:
- (a) The Commissioner is the only decision-maker with regard to the Act, and therefore anything the Commissioner says or writes about the Act (as opposed to about information presented to the Commissioner concerning the actions of a public office holder) is a decision that has binding legal effect on the Commissioner;
  - (b) The decisions made in the Decision as described in sub-paragraphs (a), (b), (d), (e), (g) and (h) in above paragraph 31 could never in any way be affected by "new or evolving information" about the actions of a public office holder because they are all decisions with regard to the scope of the jurisdiction of the Commissioner under the Act based solely on the meaning of the provisions in the Act;
  - (c) The decisions made in the Decision to refuse to consider very relevant factors which are clearly within the jurisdiction of the Commissioner, as described in sub-paragraphs (c) and (f) in above paragraph 31, could also never in any way be affected by "new or evolving information" about the actions of a public office holder, as they are also both decisions with regard to the jurisdiction of the Commissioner under the Act based solely on the meaning of the provisions in the Act;

- (d) In other words, no other information, new, evolving or otherwise, about the actions or situation of the public office holders mentioned in the Applicant's Complaint was needed by the Commissioner to determine whether reasonable grounds existed to believe that the public office holders had contravened the Act, because all of the public office holders mentioned in the Complaint were clearly in a situation that, factually, involved exercising "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's private interests." [emphasis added] And, in fact, the Commissioner did not question any of the facts presented in the Complaint, nor did the Commissioner make any of the decisions in the Decision that are subject of the Application based upon the facts of the situation. Instead, the Commissioner's Decision was that the situation described in the Complaint was not in the jurisdiction of the Commissioner within the meaning of the provisions in the Act, and;
- (e) The Applicant's Application is based solely upon the Commissioner's improper refusal to exercise her jurisdiction to examine the situation described in the Complaint, and failure to observe principles of natural justice, which are explicitly permitted bases for a judicial review application under section 66 of the Act and subsection 18.1(4) of the FCA.

**(ii) The Commissioner's Decision is a "matter" within the meaning the FCA, and no "decision" or "order" is necessary for a judicial review application**

40. If the Court determines that, despite the clear evidence that the Commissioner's Decision was a "decision" (in fact, many decisions) within the meaning of the FCA, in the alternative the Applicant submits that the jurisdiction for an application for judicial review under sections 18 and 18.1 of the FCA is not dependent upon there being a "decision or order" at issue. Rather, jurisdiction is dependent on there being a "matter", broadly defined as any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament, in respect of which a remedy may be available under section 18. If the Respondent Commissioner's Decision to refuse to exercise her jurisdiction to examine the situation set out in the Applicant's Complaint is not a "decision" within the meaning of section 18 of the FCA, it is clearly a "matter" subject to judicial review 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 similar complaint to have their complaint examined by the Commissioner.
41. In *Krause v. Canada*, the Federal Court of Appeal confirmed that section 18.1(1)'s reference 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)

42. 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]

**(iii) The Commissioner's Decision is subject to judicial review and a broad range of orders under the *Federal Courts Act* (FCA)**

43. 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."

44. 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; . . ."

45. 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, as follows:

"Judicial review

28. (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals: . . .

(b.1) the Conflict of Interest and Ethics Commissioner appointed under section 81 of the *Parliament of Canada Act*;

Sections apply

(2) Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal."

46. 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, as follows:

"18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

- (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
- (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal."

"18.1(1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the *matter* in respect of which relief is sought. . . .

(3) On an application for judicial review, the Federal Court may

- (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
- (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal."

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

47. 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).

"18(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1."

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

**D. APPLICATION SEEKS DECLARATION THAT THE COMMISSIONER IMPROPERLY REFUSED TO EXERCISE HER JURISDICTION TO EXAMINE THE COMPLAINT AND ISSUE REQUIRED ORDERS, BUT IN ANY CASE MEETS THE PREREQUISITES FOR AN ORDER OF *MANDAMUS***

48. The second ground of the Respondent Commissioner's Motion is that the Application is solely for an order of *mandamus* and does not meet the prerequisites for such an order. Again, if the Court decides that, despite the clear prohibition in the Rules of the filing of the Motion, the Motion is permitted by the Rules, the Applicant Democracy Watch contends in response to this ground for the Motion that its Application seeks a declaration that the Commissioner improperly refused to exercise her jurisdiction to examine Democracy Watch's Complaint and to issue required orders under the *Conflict of Interest Act* (the "Act"), and that in any case the Application meets the prerequisites for an order of *mandamus*. Therefore, the second ground for the Respondent's Motion should be rejected by the Court.

Respondent's Motion Record Volume I, Tab C, pp.21-26, paras.53 to 83

**(i) The Application seeks a declaration that the Commissioner improperly refused to exercise her jurisdiction to examine Democracy Watch's Complaint and to issue required orders under the *Conflict of Interest Act* (the "Act")**

49. As summarized above in para.2 and paras.6 to 13, and as detailed above in paras.30 to 39, the Applicant Democracy Watch's Application seeks a declaration that the Commissioner improperly refused to exercise her jurisdiction to examine Democracy Watch's Complaint and to issue orders of recusal under her powers in the Act.
50. As detailed above in paras. 30 to 39 (especially paras.31 and 39), the Commissioner's improper refusal to exercise her jurisdiction to examine the Complaint is based almost entirely on the meaning of provisions in the Act.
51. The meaning of these provisions establish the scope of the jurisdiction of the Commissioner -- the thresholds which, if met, either require action by the Commissioner to enforce the Act or, at the very least, require the Commissioner to consider in a legally correct manner whether the Commissioner is required to act to enforce the Act.
52. With regard to the situation subject to Democracy Watch's Complaint, the first provision that establishes the scope of the jurisdiction of the Commissioner is the definition of "private interest" in the "Definitions" section 2 of Act. The Commissioner's Decision narrowed the definition of "private interest" unreasonably and in ways that have no connection to its definition in section 2 of the Act, nor to the purposes of the Act, and this decision by the Commissioner led directly to the Commissioner deciding that the public office holders mentioned in the Complaint (namely Prime Minister Stephen Harper, Attorney General Rob Nicholson, other

Cabinet ministers, their staff, and "at pleasure" senior officials) did not have a "private interest" within the scope of the jurisdiction of the Commissioner (Decision, p.4, para.3).

53. The second provision in the Act that establishes the scope of the jurisdiction of the Commissioner is section 4, which states that a public office holder is in a conflict of interest in situations in which a public office holder is exercising "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's private interests." [emphasis added]. The Commissioner incorrectly and unreasonably failed to consider whether any of the public office holders were in a situation that provided such an opportunity (no page or paragraph reference as there is no mention in the Decision of this part of the Complaint, nor any discussion of the "provides an opportunity" part of section 4 of the Act).
54. In fact, not only did the Commissioner fail to consider the "provides an opportunity" threshold of her jurisdiction, the Commissioner also incorrectly and unreasonably created two thresholds that have no basis in the Act, namely that in order for a public office holder's actions to be within the jurisdiction of the Commissioner, the Commissioner must have "evidence" that a public office holder is actually "furthering a private, either his own or any others, in the discharge of his duties" (Decision, p.5, para.2), and must have "evidence of impropriety" in the furthering of the private interest (Decision, p.4, para.4, p.6, para.1).
55. Again concerning the situation set out in the Complaint, the third provision in the Act that establishes the scope of the jurisdiction of the Commissioner is the definition of the word "friend" within the meaning of the Act. The Commissioner's Decision incorrectly and unreasonably failed to consider whether Mr. Mulroney is a "friend" (within the meaning of the Act) of any of the public office holders who were the subject of the Complaint (no page or paragraph reference as there is no mention in the Decision of this part of the Complaint).
56. The Commissioner also incorrectly and unreasonably failed to consider whether all of the public office holders who were the subject of the Complaint are "friends" within the meaning of the Act, and therefore failed to consider whether one of them having a private interest (namely Prime Minister Harper) has the legal effect of all of them being in a conflict of interest concerning that private interest (no page or paragraph reference as there is no mention in the Decision of this part of the Complaint).
57. The fourth provision in the Act that establishes the scope of the jurisdiction of the Commissioner is subsection 45(1) of the Act which states:  
"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."

58. The Applicant's main contention in its Application -- the directly-linked chain of decisions in the Commissioner's Decision that it is seeking to have judicially reviewed -- is that as a result of the Commissioner incorrectly and unreasonably: deciding that none of the public office holders themselves had a "private interest" (within the meaning of the Act) in the Mulroney-Schreiber situation; refusing to consider the "provides an opportunity" to further a private interest threshold set out clearly in the Act; creating two thresholds which have no basis in the Act, and; refusing to consider whether Mr. Mulroney was a "friend" (within the meaning of the Act) of any of the public office holders, the Commissioner incorrectly and unreasonably concluded that there is no "reason to believe that a public office holder has contravened" the Act, which resulted in the Commissioner's final incorrect and unreasonable decision to refuse to exercise her jurisdiction to examine Democracy Watch's Complaint under subsection 45(1) of the Act.
59. The Commissioner does not have unfettered discretion to determine what are reasonable grounds "to believe that a public office holder has contravened" the Act. The Commissioner is bound by judicial authority.  
*Democracy Watch v. The Attorney General of Canada (Office of the Ethics Counsellor)* [2004 FC 969] and [2004] 4 F.C.R. 83
60. The fifth provision in the Act that establishes the scope of the jurisdiction of the Commissioner with regard to the Complaint is section 30 which states:  
"30. In addition to the specific compliance measures provided for in this Part, the Commissioner may order a public office holder, in respect of any matter, to take any compliance measure, including divestment or recusal, that the Commissioner determines is necessary to comply with this Act."
61. For the same reasons set out above in para.58, the Applicant contends that the Commissioner made a final incorrect and unreasonable decision to refuse to exercise her jurisdiction to issue recusal orders under section 30 of the Act.
62. The Commissioner clearly does not have unfettered discretion, nor even sole duty, to determine whether recusal or other actions are "necessary" to ensure compliance with the Act, as there are many other provisions in the Act that make these determinations, for example sections 6 and section 21, as follows:  
"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.  
(2) No minister of the Crown, minister of state or parliamentary secretary shall, in his or her capacity as a member of the Senate or the House of Commons, debate or vote on a question that would place him or her in a conflict of interest."

"Duty to recuse

21. A public office holder shall recuse himself or herself from any discussion, decision, debate or vote on any matter in respect of which he or she would be in a conflict of interest."

63. To be clear, the nature of the Application is such that the Commissioner may still choose not to examine the Complaint on his or her own initiative and may choose not to issue recusal orders under section 30 of the Act, even if the Court rules in favour of the main contention of the Applicant's Application as set out above in para.58 that there are not only reasonable grounds to believe, but actually in fact, one or more of the public office holders who are the subject of the Complaint contravened the Act by taking part in and making decisions, and will continue to contravene the Act by taking part in or making decisions, concerning the Mulroney-Schreiber situation.
64. As a result, the Application is not solely for an order of *mandamus*. A central component of the Application is simply seeking a judicial review of the Commissioner's refusal to exercise her jurisdiction to examine the Complaint and to issue orders of recusal, and a declaration that the Commissioner improperly refused to exercise her jurisdiction to examine the Complaint and issue orders of recusal.

**(ii) The Application meets the prerequisites for an order of *mandamus***

65. However, if the Court rules that there are reasonable grounds to believe (or that, in fact) one or more of the public office holders who are the subject of the Applicant's Complaint contravened the Act and will continue to contravene the Act by making decisions concerning the Mulroney-Schreiber situation, and that therefore the public office holders and situation set out in the Complaint fall within the jurisdiction of the Commissioner, it would, of course, be highly questionable in terms of legal correctness and reasonableness for the Commissioner not to use her powers under section 45(1) of the Act to examine the actions of the public office holder(s) actions, not to find the public office holder(s) in violation of the Act, and not to issue a recusal order to the public office holder(s) under section 30 of the Act (especially given the clear duties of public office holders under sections 6 and 20 of the Act to recuse themselves, as described in para.62 above).
66. Therefore, for the reasons set out in the following paragraphs, the Applicant contends that the Application meets the prerequisites for an order of *mandamus* from the Court that the Commissioner shall examine the Complaint, and shall issue recusal orders to the public office holders who are the subject of the Complaint (as appropriate).
67. The purposes of the Act in terms of enforcement of a meaningful standard of ethics and conflict of interest for public office holders in the Government of Canada are set out in subsection 3(1), namely to
- “(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]

68. This clear "mandate" for the Commissioner gives rise to her public legal duty to take necessary actions to enforce the Act when presented with reasonable grounds to believe that the Act has been contravened, and fetters the Commissioner's discretion under subsection 45(1) and section 30 of the Act.

69. If Parliament intended public office holders to determine for themselves whether they are in contravention of the Act, and to determine for themselves what actions are needed to be in compliance with the Act, the position of Commissioner would not have been created, nor would the Commissioner have the public legal duties set out in subsection 45(1) and section 30 of the Act, nor the duties under sections 43 and 53 of the Act, as follows:

"43. In addition to carrying out his or her other duties and functions under this Act, the Commissioner shall

(a) provide confidential advice to the Prime Minister, including on the request of the Prime Minister, with respect to the application of this Act to individual public office holders; and

(b) provide confidential advice to individual public office holders with respect to their obligations under this Act."

"53. (1) If the Commissioner believes on reasonable grounds that a public office holder has committed a violation, the Commissioner may issue, and shall cause to be served on the public office holder, a notice of violation. . . ."

70. If the Commissioner does not take action under subsection 45(1) and section 30 of the Act even when presented with a complaint which demonstrates clearly that reasonable grounds exist to believe that the Act has been contravened, the fundamental purposes of the Act set out in subsection 3(1) (to establish clear rules, to minimize the possibility of conflicts, and to resolve conflicts of interest in the public interest), will never be fulfilled simply because it will be left to each public office holders to determine for himself or herself (with, of course, their own self-interest in mind) whether they are in contravention of the Act, and how their conflicts of interest shall be resolved.

71. If the Commissioner does not owe this public legal duty to anyone who files a complaint with the Commissioner which demonstrates clearly that reasonable grounds exist to believe that the Act has been contravened, then not only (as the Applicant's Application sets out) will the public's rights under the Charter be

violated, but also the main purposes set out in subsection 3(1) of the Act will not be fulfilled.

72. The Applicant contends that, in addition to the Commissioner's discretion under subsection 45(1) and section 30 of the Act being fettered by the main purposes set out in subsection 3(1) of the Act, and sections 6 and 21 of the Act (as set out above in para.62), the Commissioner also acted unfairly and without regard to relevant considerations (as described in detail above in paras.49 to 62) when the Commissioner refused to examine the complaint and refused to issue orders of recusal.
73. Overall, no other remedy will be adequate to fulfill the purposes of the Act other than to have the Commissioner examine the Complaint correctly and reasonably and, as appropriate, to find public office holders in contravention of the Act and to issue orders of recusal to public office holders.
74. For these reasons, the part of the Application for an order of *mandamus* from the Court that the Commissioner examine the Complaint and issue orders of recusal meets all of the prerequisites for such an order.

#### **E. CONCLUSION AND COSTS**

75. The Respondent Commissioner's Motion to strike out the Applicant Democracy Watch's Application should be dismissed as invalid and without merit not only because it is clearly prohibited under the *Federal Court Rules* (the "Rules"), but also because it is based upon completely invalid grounds that fail completely to meet the high threshold needed for the Court to dismiss the Application, given that: the Application is clearly permitted and completely proper under the *Conflict of Interest Act* and the *Federal Courts Act*; the Application raises completely valid issues of national importance that warrant a ruling by the Court of Appeal; and the Application meets all of the prerequisites for the declarations it seeks.
76. Given that the Respondent Commissioner's Motion is clearly prohibited under the Rules, and is based upon completely invalid grounds, and was served on the Applicant Democracy Watch several days after the date, under the Rules, by which the Commissioner was required to have filed and served her Affidavit, therefore the Motion is unduly and prejudicially delaying the cost effective and expeditious manner provided for in the *Federal Courts Act* for the judicial review of the Applicant's Application. Therefore, the Applicant submits that the Court should grant the Applicant its costs of this Motion on a substantial indemnity scale.



#### **PART IV – ORDER SOUGHT**

77. The Applicant seeks an Order

- (a) dismissing the Motion to strike out the Applicant's Application;
- (c) awarding the Applicant its costs of this Motion, forthwith and in any event of the cause, on a substantial indemnity scale; and
- (d) such further and other relief as counsel may advise and this Honorable Court permit

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 2, 2008

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## SCHEDULE A – LIST OF AUTHORITIES

### Cases

1. *David Bull Laboratories (Can.) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at paras. 10, 11, 15 (F.C.A) -- **NOTE: at Tab 1 of the Respondent's Motion Record - Volume II**
2. *Democracy Watch v. The Attorney General of Canada (Office of the Ethics Counsellor)* [2004 FC 969] and [2004] 4 F.C.R. 83
3. *Krause v. Canada*, [1999] F.C.J. No. 179 at paras. 11, 21, 24 (FCA)
4. *Nunavut Tunngavik Inc. v. Canada (A.G.)* [2004] F.C.J. No. 138 at para. 8 [FC]