Court File No. A-174-08

FEDERAL COURT OF APPEAL

BETWEEN:

Democracy Watch

Applicant

- And –

Conflict of Interest and Ethics Commissioner

Respondent

MEMORANDUM OF FACT AND LAW
OF THE APPLICANT DEMOCRACY WATCH

PART I – FACTS

A. Overview

1. The instant application arises out of a complaint filed the Applicant with the Conflict of Interest and Ethics Commissioner (hereafter the "Commissioner") on November 26, 2007 requesting a ruling under the *Conflict of Interest Act* (hereafter the "Act") on the actions of the Rt. Hon. Prime Minister Stephen Harper and his Cabinet ministers, their staff and "at pleasure" senior officials (hereafter "PM Harper and his staff") with regard to the ongoing situation involving the Rt. Hon. Brian Mulroney and Mr. Karlheinz Schreiber. On January 7, 2008, the Commissioner issued a ruling refusing to investigate the Complaint or to issue orders pursuant to her authority under the Act. The Applicant seeks to judicially review the Commissioner's decision to refuse to investigate the Complaint and issue orders.

2. The Applicant submits that the Commissioner committed a jurisdictional error in refusing to investigate the Complaint, which related to public office holders being in a situation in which they have an opportunity to advance their and their friend's private interests. In the alternative, the Commissioner's decision was unreasonable

in narrowly and artificially defining the scope of a "private interest" and "conflict of interest" to exclude consideration of a situation of clear conflict of interest regarding the involvement and decision-making of PM Harper and his staff in the investigation of the Mulroney-Schreiber matter. The Applicant also challenges sections 44(1) to (6) of the Act, which 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) and (d) of the Charter. 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 pp.4-5; Applicant's Record, Tab A
Affidavit of Duff Conacher, Applicant's Record, Tab C, #1

B. Facts

3. The Applicant, Democracy Watch, is a not-for-profit corporation founded and incorporated pursuant to federal law in September 1993. It is a strictly 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.

4. Democracy Watch's Complaint is based upon the fact that PM Harper and at least some of his Cabinet ministers' and staff members' own actions are in question, the ample evidence that Mr. Mulroney is a friend of PM Harper and at least some of his Cabinet ministers, and that PM Harper and at least some of his Cabinet ministers and staff members' are taking part in decisions concerning the Mulroney-Schreiber situation.

Affidavit of Duff Conacher, Applicant's Record, Tab C, #10-21
Affidavit of Duff Conacher, Applicant's Record, Tab C, paras. 3-12, 38-57

5. The Complaint relies upon provisions with regard to conflicts of interest in the Act. Democracy Watch's requests to the Commissioner to 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:

> "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.";
>
> "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;
>
> "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."

Conflict of Interest Act, 2006 c. 9 s. 2, Affidavit of Duff Conacher, Applicant's Record, Tab C, #2

C. The Commissioner's Decision

6. The Commissioner responded to the Complaint by issuing a ruling dated January 7, 2008 which stated that she refused to exercise her jurisdiction to examine the situation complained about based upon her claim that neither PM Harper nor any of his Cabinet ministers had a "private interest" in the situation that was within her jurisdiction even though there own actions are in question, and that, in order for them to have such a private interest "a financial or business or other interest, would be necessary along with the general desire to protect one's personal reputation and position".

Affidavit of Duff Conacher, Applicant's Record, Tab C, #3 p. 4 and para. 13

7. 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 PM Harper and/or his staff had made decisions in their official capacity that furthered their own private interests or the private interests of Mulroney or others, and that there would have to be "impropriety" in their relationship with Mulroney and/or Schreiber. These decisions were made despite the fact that s.4 of the Act states that all that is needed for public

office holders to be in a conflict of interest is for them to have an "opportunity" to further their or another's interests.

Affidavit of Duff Conacher, Applicant's Record, Tab C, #3 p. 5 and para. 14

8. The Commissioner's Decision failed to consider the issue of Mulroney being a "friend" within the meaning of the Act of PM Harper and/or his staff, and also failed to consider the issue of whether PM Harper and his staff are also "friends" within the meaning of the Act, and as a result, the Commissioner refused to exercise her jurisdiction to examine the situation, let alone to find anyone in violation of the Act or to issue orders of recusal.

Conflict of Interest Act, 2006 c. 9 s. 2, Affidavit of Duff Conacher, Applicant's Record, Tab C, #2, sections 30, 35

PART II – POINTS AT ISSUE

10. The issues are as follows:

A. Is the Commissioner's Decision a reviewable decision or matter within the jurisdiction of the *Federal Courts Act?*

B. What is the appropriate standard of review of the Commissioner's Decision?

C. Did the Commissioner improperly refuse to exercise her jurisdiction in refusing to examine Democracy Watch's Complaint?

D. Are PM Harper, Attorney General Nicholson, Senator LeBreton, Defence Minister MacKay, and all other Cabinet ministers, their staff, and other "at pleasure" government officials in a conflict of interest, and/or in violation of the Act, with regard to the Mulroney-Schreiber situation?

E. Does the Application meet the standard for an order of *mandamus*?

F. Do sections 44(1) to 44(6) of the Act violate sections 2(b) and 2(d) of the *Charter*?

PART III – SUBMISSIONS

A. The Commissioner's Decision is a "Decision" or "Matter" within the meaning of the *Federal Courts Act* (FCA) and is, therefore, subject to judicial review

(i) The Commissioner's Decision is a "decision" within the meaning of the FCA

11. The Respondent Commissioner's Decision was issued by letter dated January 7, 2008 to the Applicant and included many decisions (as summarized in above paragraphs 7 to 9) all of which are based on the meaning of the provisions of the Act.

Affidavit of Duff Conacher, Applicant's Record, Tab C, #3

12. The Decision was made at the administrative review stage of the exercise of the Commissioner's powers under the Act, as a first-level, "reasonable grounds to believe" decision to refuse to examine the Complaint. Such a decision by the former Ethics Counsellor, the 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 "matters of public importance" because they involved the interpretation of federal political 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, paras.21 to 31, Applicant's Record, Tab E, #1**

13. The Decision clearly affects and determines the Applicant's substantive right to have its Complaint examined by the Commissioner. The Applicant is a non-partisan organization and the only way its complaints can only remain non-partisan by filing a complaint with the Commissioner directly, as opposed to associating with a partisan MP or Senator and operate under section 44 of the Act. 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.

14. The Commissioner's Decision affects and determines the Applicant's substantive right to have its Complaint examined. The Decision is based upon unreasonable and improper limits the Commissioner puts on the scope of her jurisdiction, it also affects and determines the rights of anyone else to have any similar complaint examined by her. As a result, the Decision did much more than merely notify the Applicant to explain the basis of her opinion that there were not sufficient grounds to believe that the Act had been contravened.

15. The Commissioner's Decision is an explanatory opinion that has no binding legal effect on her, or 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, as these claims ignore the following relevant considerations:

    (a) The Commissioner is the only decision-maker with regard to the Act, and therefore anything she says or writes about the Act is a decision that has binding legal effect on the Commissioner;

    (b) The decisions made in the Decision as summarized above in paragraphs 7 to 9 could never in any way be affected by "new or evolving information" about the actions of a public office holder because they are all with regard to the scope of the jurisdiction of the Commissioner;

    (c) In other words, no other information, new, evolving or otherwise, about the actions or situation of the public office holders mentioned in the 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." In fact, the Commissioner did not question any of the facts presented in the Complaint, nor did she make any findings in the Decision that are subject of the Application based upon the facts of the situation. Instead, the Decision was that the situation described in the Complaint was not in her jurisdiction within the meaning of the provisions in the Act, and;

(d) The Application is based solely upon the Commissioner's improper refusal to exercise her jurisdiction to examine the situation, 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 section 18.1(4) of the FCA.

16. Subsidiarily, the Applicant submits that the 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 will deny the right of anyone who in the future files a similar complaint to have their complaint examined by the Commissioner.

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

17. 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 *FCA*. 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), Applicant's Record, Tab E, #2**

18. 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] **Applicant's Record, Tab E, #3**

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

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

> "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."

20. 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; …"

21. 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.

22. The Applicant seeks declarations with regard to the 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. 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).

B. The Appropriate Standard of Review is Correctness

24. The Supreme Court of Canada has set out an analysis for determining whether the standard of review is correctness or reasonableness. As stated in *Dunsmuir:*

> "A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> - The nature of the question of law. A question of law that is of "central importance to the legal system . . . and outside the . . . specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate."

> "'Jurisdiction' is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be ultra vires or to constitute a wrongful decline of jurisdiction."

***Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), paras. 55, 59, Applicant's Record Tab E, #4**

25. With regard to the presence of a privative clause, *Dunsmuir* states the following:

> "This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction."

***Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), para. 52, Applicant's Record Tab E, #4**

26. Applying the the *Dunsmuir* standard of review approach to the present case, first, there is no privative clause in the Act and, second, the expertise of the tribunal relative to the reviewing court is neutral. While the Commissioner is an experienced lawyer, the Commissioner was in this position for only six months when the

Decision was made. There is no evidence that she spent any of that time period interpreting the Act as the Decision is the first ruling of that nature. No previous commissioner interpreted the provisions of the Act that are at issue in the Application.

27. The third factor, the nature of the question of law at issue, supports a correctness standard. The issue of ethics in government is not only a matter of central public and legal importance, but also it is very important to take into account that the Decision not to exercise her jurisdiction is based upon the first interpretations of the Act's fundamental provisions, namely what is a "private interest" and what is a "conflict of interest." As a result, the answer to the question of law at issue in the present case will set a precedent that will be determinative for every future situation examined by the Commissioner and future Commissioners. As well, the interpretation of these provisions to determine the jurisdiction of the Commissioner is not an issue which gives rise to experience or expertise in the hands of the decision maker greater than that of the courts on like issues.

***Democracy Watch* v. *The Attorney General of Canada (Office of the Ethics Counsellor)* [2004 FC 969] and [2004] 4 F.C.R. 83, paras.21 to 31, 63, Applicant's Record, Tab E, #1**

28. In addition, the question of law at issue is the Commissioner's failure to exercise her jurisdiction properly under the Act and, as set out above, *Dunsmuir* requires that issues with regard to jurisdiction must be reviewed on the basis of correctness. Therefore, the application of the *Dunsmuir* standard of review approach yields a standard of review of correctness in the present case.

30. Although a correctness standard should be applied, it is submitted that the Decision is, in fact, unreasonable because in many ways it does not show, as required under the *Dunsmuir* approach, "justification, transparency and intelligibility within the decision-making process" that is "defensible in respect of the facts and law." Therefore, the Decision should be rectified under both the "correctness" and the "reasonableness" standards.

***Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), para. 47, Applicant's Record Tab E, #4**

C. The Commissioner Improperly Refused to Exercise Her Jurisdiction to Investigate Democracy Watch's Complaint

(i) The Commissioner's jurisdiction includes "private interest" of public office holders facing allegations about their own actions, such as Prime Minister Harper and his Cabinet

31. With regard to the situation underlying the Applicant's Complaint, the key question is whether it is legal under the Act for PM Harper and his staff to decide how and by whom the PM's and some Cabinet minister own actions (and the actions of their friend Mulroney, as well as Schreiber) will be investigated, and to decide the scope of the investigation. If PM Harper and AG Nicholson (hereafter "AG Nicholson") have a "private interest" in the Mulroney-Schreiber situation that they can further through their official decisions, then they are in a "conflict of interest" and it is not legal for them to make or take part in decisions concerning the situation.

32. The ethics code for MPs and Senators 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. 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), Applicant's Record, Tab E, #14**
***Conflict of Interest Code for Senators*, ss.13(1) and (2), Applicant's Record, Tab E, #15**

33. However, 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 Act, Parliamentarians, were evidently 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. There is no reference in Hansard when the Act was being reviewed by Parliament to any definition limiting "private interest" to financial or business matters. The Commissioner agrees with this conclusion, as she states in her Decision (at p.4, para.3 and p.6, para.1) that "a financial or business interest or some other interest" constitutes a "private interest" under the Act. However, the Decision does not define the vague phrase "some other interest".

37. The *Value and Ethics Code for the Public Service* is a policy of the Treasury Board of Canada Secretariat, which is headed up by the Treasury Board Minister. The Code does not define "private interest" but states in Chapter 2 that public servant "should not have private interests, other than those permitted pursuant to these measures, that would be affected particularly or significantly by government actions in which they participate." The Code also states in the same chapter that:

> "Conflict of interest does not relate exclusively to matters concerning financial transactions and the transfer of economic benefit. While financial activity is important, it is not the sole source of potential conflict of interest situations."

***Values and Ethics Code for the Public Service* (2003), Chapter 2, Applicant's Record, TabE, #16**

40. In its leading case on conflict of interest in government, the Supreme Court 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".

***Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, Applicant's Record, Tab E, #6**

41. The then-B.C. Conflict of Interest Commissioner The Hon. E.N. Hughes, issued a leading ruling in 1993 in what is called the "Blencoe" case, and stated the following about the term "private interest" in the B.C. *Members' Conflict of Interest Act*:

> "Our legislature, which made no reference to "pecuniary interest" in the Members' Conflict of Interest Act, is not unfamiliar with the use of that term when legislating on conflict of interest matters. In particular, in part 5 of the School Act under the heading "Conflict of Interest" it defines the phrase "pecuniary interest" and then spells out the duty of school trustees when they find they have a pecuniary interest in any matter coming before the school board for consideration.
>
> In the absence of a definition of the phrase "private interest" in the Members' Conflict of Interest Act as it appears in our statute of the 1990's I decline to interpret it in the manner formulated four centuries ago. I believe it has to be interpreted in the climate in which it was enacted. I believe that climate to be as expressed in the passages of Hansard from which I have quoted. That leads to a definition that is not limited to pecuniary or financial interests. It was open to the Legislature to have placed words of limitation on "private interest". It did not do so.
>
> ... private interest is not limited to a pecuniary or economic advantage. It can include any real or tangible benefit that inures to the personal benefit of the Member.

***Opinion Of The Commissioner Of Conflict Of Interest On A Citizen's Complaint Of Alleged Contravention Of The Members' Conflict Of Interest Act By The Honourable Robin Blencoe, Minister Of Municipal Affairs, Recreation And Housing*, August 16, 1993, pp. 27-28, Applicant's Record, Tab E, #7**

42. The Alberta Ethics Commissioner ruled in a 2007 case about the term "private interest" in the Alberta *Conflicts of Interest Act* that:

> "Taking actions to obtain the extra salary and benefits accorded to Cabinet Ministers should, in my view, be considered an attempt to further a private interest. In any event, the status and decision-making responsibilities associated with a Cabinet position do constitute a private interest."

***Report to the Speaker of the Legislative Assembly of Alberta of the Investigation by Donald M. Hamilton, Ethics Commissioner into allegations involving Mr. Harvey Cenaiko, Member of the Legislative Assembly for Calgary-Buffalo*, January 30, 2007, p.3, para.4, Applicant's Record, Tab E, #7**

43. In June 2003, the Organization of Economically Developed Countries (OECD), to which Canada belongs, issued the "OECD Guidelines For Managing Conflict of Interest in the Public Service." The Guidelines define " conflict of interest" and "private interest" as follows:

"10. . . . These Guidelines adopt a definitional approach which is deliberately simple and practical to assist effective identification and management of conflict situations, as follows:

A 'conflict of interest' involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities.

11. Defined in this way, 'conflict of interest' has the same meaning as 'actual conflict of interest'. A conflict of interest situation can thus be current, or it may be found to have existed at some time in the past.

12. By contrast, an *apparent* conflict of interest can be said to exist where it *appears* that a public official's private interests could improperly influence the performance of their duties *but this is not in fact the case*. A *potential* conflict arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future. . .

14. In this definition, '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."

***OECD Guidelines For Managing Conflict of Interest in the Public Service*, OECD, June 2003, p.4, Applicant's Record, Tab E, #13**

44. In *R. v. Hinchey,* the Supreme Court of Canada's leading authority on ethical government behaviour, the court considers the standards set by 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, Applicant's Record, Tab E, #5**

45. 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.

46. PM Harper acknowledged his and his staff's interest, and conflict of interest, in the Mulroney-Schreiber situation when he stated on Friday, November 9, 2007 that "it's impossible, frankly, for the government to make an impartial judgement on how to proceed" in responding to the affidavit.

Affidavit of Duff Conacher, para. 43, Applicant's Record, Tab C, #10

47. In the situation raised by the Complaint, PM Harper faces questions about his own actions, namely did he discuss a letter written to Mulroney by Schreiber when he met with Mulroney in the summer of 2006 at his official residence at Harrington Lake? Schreiber claims that the letter (which exonerates Mulroney of all wrongdoing alleged by Schreiber) was written at the request of Mulroney's agent expressly so that in return Mulroney would show the letter to PM Harper and request of him that the Government of Canada negotiate a deal favourable to Schreiber with regard to his extradition to Germany.

Affidavit of Duff Conacher, para. 39, Applicant's Record, Tab C, #9

48. PM Harper and AG Nicholson also both face questions about whether they saw documents sent to them in March 2007 by Schreiber, and if they did what they did or did not do as a result of seeing those documents? The documents alleged that Mulroney had violated the law by negotiating a personal services contract with Schreiber while he was still PM, and accepting money from Schreiber while still a Member of the House of Commons. David Johnston, the advisor chosen and given terms of reference by, and serving at the pleasure of, PM Harper and his Cabinet who examined the Mulroney-Schreiber situation concluded that these questions were worthy of examination by a judicial inquiry.

***Report of the Independent Advisor into the Allegations Respecting Financial Dealings Between Mr. Karlheinz Schreiber and the Right Honourable Brian Mulroney*, (January 9, 2008), Applicant's Record, Affidavit of Duff Conacher, Tab C, #15**

49. If PM Harper discussed making a deal with Schreiber in return for his letter to Mulroney it would clearly seriously harm PM Harper's standing and reputation as it would amount to preferential treatment which is prohibited under s.7 of the Act, as

would either PM Harper or AG Nicholson seeing the documents sent to them by Schreiber and doing nothing or instructing that the documents be ignored.

50. Therefore, the Court should quash as legally incorrect the part of the Commissioner's Decision that claims, without any defensible justification, that PM Harper and AG 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.

(ii) Commissioner's has jurisdiction over "friends" including "at pleasure" appointees of public office holders

51. The Act, which became law in July 2007, 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 ethics commissioner decisions concerning how a politician being in a conflict of interest affects his or her "at pleasure" staff or appointees.

52. As a result of the lack of laws and codes that apply to "at pleasure" staff and appointees, and the fact that this Application is the first case concerning the Act, there is also no Canadian case law directly considering this issue.

53. Section 4 of the Act states that public office holders are in a conflict of interest when they are in a situation that provides an opportunity to further their own or their relatives' interests, or to further the interests of their "or friends or to improperly further another's private interests."

54. The Applicant submits that if the "at pleasure" staff or appointees of a federal politician can act when the politician has a private interest in a matter, the purpose and enforcement of the Act will be easily thwarted simply by politicians having their "at pleasure" staff or appointees act for them whenever such situations arise. Given that these staff or appointees would know that they could be dismissed by the

politician from their position at any time for any reason, they would have a very compelling incentive to protect the politician's private interest in every situation.

55. 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 to be either "friends" of the politician or, in the alternative, to be improperly furthering "another's private interests" if they act on behalf of the politician at whose pleasure they serve when that politician has a private interest.

56. In other words, if the politician is in a conflict of interest and 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 upheld 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 PM 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, Applicant's Record, Tab E, #1**

57. This conclusion is similar to that reached by the courts considering situations in which a junior lawyer in a firm (which is a partnership similar to the partnership shared by a politician and his or her "at pleasure" staff and appointees) is in a conflict of interest the entire firm is in a conflict of interest.

***MacDonald Estate v. Martin* (1990), 77 D.L.R. (4th) 249, Applicant's Record, Tab E, #9**

58. Given that the PM appoints all members of Cabinet and many other senior government officials, all of whom serve at the PM's pleasure, the Applicant submits that the standard set by PM Harper in his November 9, 2007 statement with regard to the Mulroney-Schreiber situation is the legally correct standard, namely that when the Prime Minister faces questions about his own actions, no one who serves

in the government can "make an impartial judgement on how to proceed". They all share the PM's conflict of interest under the Act, and therefore all must recuse themselves.

Affidavit of Duff Conacher, para. 43, Applicant's Record, Tab C, #10

59. While it may seem that such a standard would make decision-making impossible when such a situation arises, there is in fact a clearly legal and proper process that a PM could follow. The Applicant submits that, in order to be in compliance with the Act, PM Harper should have recused himself immediately after delegating his decision-making powers to an appropriate official who serves not "at pleasure" but instead holds office for a fixed term and can only be dismissed "for cause" and therefore has independence from the Cabinet. For example, the new federal Director of Public Prosecutions could have been delegated the powers of the Cabinet, including the power to establish an inquiry under the *Inquiries Act*, and could have then made all of the decisions in response to the situation free of any conflict of interest.

60. For all these reasons, the Court should quash as legally incorrect the part of the Commissioner's Decision (Decision, p. 6, paras.1 and 6-7) which claims without any justification that "at pleasure" staff and appointees are not within her jurisdiction when the public office holder who appointed them and at whose pleasure they serve has a "private interest" as a result of questions about the public office holder's own personal actions.

(iii) Commissioner's jurisdiction includes "private interests" of political "friends" of public office holders

61. Given that:

- specific allegations of misconduct by Mulroney have been made by Schreiber in an application in court against Mulroney;

- Mulroney hired a lobbyist in January 2008 to advocate his interests specifically with regard to how the federal Conservative government would have Schreiber's allegations investigated, and;

- Mulroney or his agents have made several public statements about the scope and type of investigation he wants into the allegations,

Mulroney clearly has a "private interest" in the situation under the Act.

Affidavit of Duff Conacher, paras. 51-53, Applicant's Record, Tab C, #9, 17-19

62. In her Decision, the Commissioner did not even consider the issue of whether Mulroney qualifies as a "friend" of PM Harper, AG Nicholson, Senator LeBreton, Defence Minister MacKay, and by extension the whole government.

63. There is ample evidence from the statements of PM Harper and other Cabinet ministers that Mulroney is their friend. According to public statements by PM Harper, Mulroney acted until November 2007 as his unpaid advisor; AG Nicholson was appointed as a parliamentary secretary by Mulroney when he was PM and served in his government; Senator LeBreton has stated publicly that she is a close friend of Mulroney; and Defence Minister MacKay's father is a friend and was appointed to Cabinet by Mulroney, and Mulroney also advised Defence Minister MacKay when he was leader of the federal Conservative Party.

Affidavit of Duff Conacher, para. 54, Applicant's Record, Tab C, #20

64. Therefore, the Court should rule that Mulroney is a "friend" within the meaning of the Act of PM Harper and his government.

(iv) Commissioner's jurisdiction includes "opportunity" to further private interest – actual furthering of interest not required, nor is impropriety

65. Section 4 of the Act states that public office holders are in a conflict of interest when they are in a situation that provides an "opportunity" to further their own or their relatives' interests, or to further the interests of their "or friends or to improperly further another's private interests."

66. Although no rationale is provided, the Commissioner stated that in order for a public office holder's actions to be within her jurisdiction, she 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 have

"evidence of impropriety" in the furthering of the private interest (Decision, p.4, para.4, p.6, para.1).

67. There is nothing in the Act that supports this argument, 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.

68. The Commissioner contradicts her Decision's claims in her May 2008 ruling in response to the request for an examination filed with her on November 27, 2007 by Conservative Member of the House of Commons David Tilson concerning what MP Robert Thibault did after he became aware on November 21, 2008 that Mulroney had filed a libel lawsuit against him in response to statements he had made about the Mulroney-Schreiber situation. Though the ruling concerns violations of the *Conflict of Interest Code for Members of the House of Commons* ("MPs Code"), the MPs Code is very similar to the Act in that it states that MPs are in a conflict of interest when they are in a situation in which they could further their or others' private interest -- they do not actually have to do anything further their or others' private interests. In ruling that MP Thibault's situation required him to recuse himself (even though he was just one member of a parliamentary committee, with much less power than PM Harper and his Cabinet have with regard to the investigation of the Mulroney-Schreiber situation), the Commissioner stated that:

- "The proceedings before the Standing Committee clearly related to Mr. Thibault's private interest. From the moment the motion to inquire into the Mulroney Airbus Settlement was proposed on November 22, 2007, Mr. Thibault should not have participated in any debates or votes of the Committee related to that study." (p.20)
- "His [MP Thibault's] 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." (p.20), and;
- "a Member cannot act in a way that <u>could result</u> in the furthering of his private interest." (p.22)

***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), Applicant's Record, Tab E, #10**

69. The Supreme Court 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 (see above para.41). Actually making a decision to further a private interest would itself be impropriety, especially if furthering the interest was done in a way that involved impropriety. The 1993 ruling in the *Blencoe* case (see above para.42) by The Hon. E. N. Hughes, then-B.C.'s Conflict of Interest Commissioner, supports the same interpretation.

70. The OECD Guidelines contrast the definition of conflict of interest versus actual misconduct or corruption in a similar way, as follows:

> "13. Where a private interest has *in fact* compromised the proper performance of a public official's duties, that specific situation 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'."

71. Therefore, the Court should quash as legally incorrect and unreasonable the part of the Decision which claims that to be within the Commissioner's jurisdiction a public office holder must actually further his or her or another person's private interests, and/or act in a way that involves impropriety. The Court should establish that a public office holder that only presents an "opportunity" to further a private interest is in a conflict of interest clearly within the Commissioner's jurisdiction.

72. If this Court finds that the errors in question addressed above are not jurisdictional, the Applicant submits, for the above reasons, that the decision is also unreasonable in the interpretation of what is a "private interest" and what constitutes a "conflict of interest" under the Act and should too, on this basis, be quashed.

D. Prime Minister Harper, Attorney General Nicholson, Other Cabinet Ministers, and "At Pleasure" Government Officials Are in a Conflict of Interest and in Violation of the Act With Regard To the Mulroney-Schreiber Situation

73. Overall, between early November 2007 and January 11, 2008, PM Harper and his Cabinet made at least six decisions, all exercises of their official powers, duties and functions, concerning the Mulroney-Schreiber situation, each of which provided

PM Harper and his Cabinet with an "opportunity" to further his and their friend Mulroney's private interests as each decision concerned how and by whom the allegations concerning PM Harper's and AG Nicholson's and Mulroney's actions would be investigated, and the scope of the investigation.

Affidavit of Duff Conacher, paras. 41-50, Applicant's Record, Tab C, #8-16

74. As of the date of this Memorandum, PM Harper and his Cabinet had made the further decisions of giving David Johnston a second mandate to review the parliamentary committee's conclusions and refine his recommendations for the terms of reference for an inquiry, and of appointing Justice Jeffrey Oliphant as the inquiry commissioner, with the final decisions still to come concerning the exact terms of reference for the inquiry. Each of these decisions have also provided PM Harper and his Cabinet an "opportunity" to further their and their friend Mulroney's private interests.

75. Since March 2007 when Schreiber sent the letters to PM Harper containing the same information as contained in his Affidavit, the Government has been involved in ongoing legal proceedings concerning the extradition of Schreiber to Germany, and AG Nicholson has been the Cabinet minister responsible for these proceedings and has made or taken part in decisions concerning the proceedings. Each decision has provided AG Nicholson with an opportunity to further the private interests of his friend Mulroney, and possibly to further his own private interests.

Affidavit of Duff Conacher, para. 55-56, Applicant's Record, Tab C, #11, 21

76. Therefore, by definition, PM Harper and AG Nicholson have been in a conflict of interest with regard to the Mulroney-Schreiber situation at least since early November 2007, and possibly since March 2007. Further, because of their "friend" relationship with Mulroney, PM Harper, AG Nicholson, Senator LeBreton and Defence Minister MacKay have been in a conflict of interest with regard to the Mulroney-Schreiber situation at least since early November 2007, and possibly since March 2007. Likewise, because of their relationship with PM Harper and the above listed Cabinet ministers, ministerial staff and other "at pleasure" appointees

have also been in a conflict of interest with regard to the Mulroney-Schreiber situation at least since early November 2007, and possibly since March 2007.

77. Also by definition, by continuing to take part in and make decisions about the Mulroney-Schreiber situation after the conflict of interest arose, PM Harper and AG Nicholson have been in violation of subsection 6(1) of the Act since early November 2007, and possibly since March 2007. Whether other Cabinet ministers or public office holders took part in or made official decisions with regard to the Mulroney-Schreiber situation, in particular Senator LeBreton and Defence Minister MacKay, could only be determined after a thorough, independent investigation, the results of which would determine whether they also have violated subsection 6(1) of the Act.

78. Therefore, the Court should quash as legally incorrect and unreasonable:

- the part of the Commissioner's Decision that claims she has no "reasonable grounds to believe" that anyone in the Conservative government is in a conflict of interest with regard to the Mulroney-Schreiber situation (Decision, p.5, para. 2; p.6, paras. 2 and 7);

- the part of the Commissioner's Decision in which she refuses to initiate an examination under her powers set out in subsection 45(1) of the Act (Decision, p.5, para.5; p.6, paras. 5 and 7, and; p.7, para.3), and;

- the part of the Commissioner's Decision in which she refuses to issue orders of recusal under her powers set out in section 30 of the Act situation (Decision, p.5, para.5; p.6, paras. 5 and 7, and; p.7, para.3).

E. This Court Should Intervene To Provide An Order in the Nature of Mandamus

79. The Applicant seeks a declaration that the Commissioner improperly refused to exercise her jurisdiction to examine the Complaint and issue required orders under the Act, as well as an order of mandamus that the Commissioner find various public office holders in violation of the Act, or in a "conflict of interest", and order these public office holders to recuse themselves from further decisions with regard to the Mulroney-Schreiber situation.

80. The Applicant's main contention is that as a result of the Commissioner incorrectly and unreasonably: deciding that none of the public office holders themselves had a "private interest" 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" 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 the Complaint under subsection 45(1) of the Act.

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

81. The Application meets all of the prerequisites for an order of mandamus.

***Apotex Inc. v. Canada (A.G.)*, [1994] 1 F.C. 742 (C.A.), aff'd [1994] 3 S.C.R. 1100, para.45, Applicant's, Record, Tab E, #11**

82. The purpose of the Act is to ensure enforcement of a meaningful standard of ethics and conflict of interest for public office holders in the Government of and specifically in subsection 3(1) states that a main purpose of the Act is to

> "(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; . . ."

83. 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.

84. If Parliament intended public office holders to determine for themselves whether they are in contravention of the Act, and to determine 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..."

85. 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 that reasonable grounds exist to believe that the Act has been contravened, the fundamental purposes of the Act set out in subsection 3(1) 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.

86. Second, if the Commissioner does not owe this public legal duty to anyone who, like the Applicant, files a complaint with the Commissioner which demonstrates clearly that reasonable grounds exist to believe that the Act has been contravened, then not onlywill 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. Therefore, the Applicant has a right to the performance of this duty by the Commissioner.

87. Third, the Applicant contends that, in addition to the Commissioner's discretion under subsection 45(1) and 30 of the Act being fettered by the main purposes set out in 3(1) of the Act, and sections 6 and 21 of the Act, the Commissioner also acted legally incorrectly and unreasonably when the Commissioner refused to examine the Applicant's Complaint and refused to issue orders of recusal. For this

reason also, the Applicant has a right to the performance of the Commissioner's duty to enforce the Act properly.

88. Fourth, 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.

89. Given that:

- the Commissioner's Decision repeatedly ignored rules of interpretation, evidence, and common law standards of conflict of interest, as well as created legal thresholds for conflict of interest that have no basis in the Act, and;

- the Act prohibits a review of the Commissioner's on the basis of error of law (and, as a result, if the Commissioner ignores the Court's ruling quashing any part of her Decision, a subsequent failure by the Commissioner to uphold the law cannot be reviewed by the Court);

the Applicant submits that the only way to ensure that the Commissioner will properly enforce the Act regarding the situation set out in the Complaint is if the Court issues an order of *mandamus* for an examination report under her powers under sections 45(3) and (4) finding that PM Harper and AG Nicholson in violation of section 6(1) of the Act, and other Cabinet ministers, their staff and other "at pleasure" officials in a conflict of interest under section 4, and ordering them all to recuse themselves from further decisions with regard to the Mulroney-Schreiber situation.

90. Fifth, the order of mandamus will have the practical effect of resolving, without any further delay, the conflict of interest situation PM Harper and his staff find themselves in with regard to the Mulroney-Schreiber situation.

91. Sixth, there is no equitable bar to an order of *mandamus*, and in effect such an order will establish a legally correct precedent for the scope of the Commissioner's

jurisdiction under the Act and the interpretation of the Act's key provisions of "private interest" and "conflict of interest".

92. Seventh, given the delay in legally correct enforcement of the Act that has already resulted from the Commissioner's Decision, and to prevent further delay, on a balance of convenience the Court should issue an order of *mandamus*.

93. For these reasons, the application for an order of *mandamus* that the Commissioner examine the Complaint, find public office holders in contravention of the Act, and issue orders of recusal meets all of the prerequisites for such an order.

F. Subsections 44(1) to 44(6) of the Act violate sections 2(b) and 2(d) of the Charter

94. Subsections 44(1) to 44(4) require a member of the public, such as Democracy Watch, to associate with a member of a Senator or an MP to file a request with the Commissioner that she is required to examine. The Commissioner has the discretion to refuse to examine a request filed by a member of the public.

95. In addition, under subsections 44(5) and (6), the member of the public, although forced to associate with a Senator or an MP in order to file a request that the Commissioner is required by the Act to examine, has no right to know whether such member has filed the request with the Commissioner.

96. By requiring a member of the public to associate with a Senator or an MP, in this case to require Democracy Watch a non-partisan organization, the public's right to freedom of association, and in this case specifically the Applicant's rights under section 2(d) of the *Charter*, is violated.

97. The Supreme Court has established that the right to freedom of association in the *Charter* includes the right not to be compelled to associate with anyone unless the forced association is reasonable in a free and democratic society.

***Lavigne v. Ontario Public Service Employees Union*, 1991 CanLII 68 (S.C.C.), Applicant's Record, Tab E, #12**

98. The test in *Lavigne* was that the compelled association must serve the objective of contributing to democracy, and the means of compelling the association must be rationally connected to this objective.

99. This requirement does not contribute to democracy, but instead undermines it in the following significant ways:

- it establishes an unnecessary barrier to the public filing complaints about its own employees, thereby decreasing their accountability in one of the most fundamental areas of democratic governance, namely ethics;

- it establishes a system in which the public can easily be thwarted from challenging an activity that parliamentarians all view as ethical, but that the public views as unethical, and;

- it ensures that every complaint is unnecessarily tainted by partisanship, which undermines the legitimacy of the entire ethics enforcement system.

100. Under their respective statutes, the public can file complaints directly with the federal government's Auditor General of Canada, the Information Commissioner, the Privacy Commissioner, the Commissioner of Elections, and the Public Sector Integrity Commissioner, all of which have democratic governance enforcement functions very similar to the Conflict of Interest and Ethics Commissioner, providing further clear evidence that there is no reason to require that the public find a member of Parliament in order to file a complaint with the Commissioner.

101. The former federal Ethics Counsellor accepted and examined and ruled on complaints filed by Democracy Watch, providing further evidence that there is no acceptable rationale for adding the barrier to the new Act of having to associate with a member of Parliament in order to file a complaint.

102. The former Ethics Counsellor received only a few dozen complaints from the public during his ten-year tenure from 1994 to 2004, and the former Ethics Commissioner

received only a few complaints from the public during his three-year tenure from 2004 to 2007, so there is no evidence that removing the barrier from the Act and allowing the public to file complaints directly with the Commissioner will lead to a "flood" of complaints that will undermine the ethics enforcement system. Parliament could have instead included in the Act the fair barrier to complaints filed by the public.

103. The right to freedom of expression under section 2(b) of the *Charter* encompasses the right to express oneself about the actions of the PM and his staff, and can only be limited under the Charter if the limits are reasonable in a free and democratic society.

104. It is unreasonable in a free and democratic society to, in any way, limit the right of anyone to express themselves about the actions of public office holders in cases where those actions, a reasonable person would conclude, violate the Act. However, sections 44(5) and (6) of the Act prohibit a member of Parliament from disclosing information provided by a member of the public with the aim of having a complaint filed with the Commissioner.

105. The common law of defamation is enough of a barrier to thwart public statements and discussion about public office holders that are untrue and damaging. Subsection 44(5) therefore violates, as part of the overall complaints system under the Act, the right to freedom of expression under section 2(d) of the *Charter*.

106. For all these reasons, the Court should strike down subsections 44(4) to 44(6) of the Act as unconstitutional barriers to the public's rights to have complaints filed with the Commissioner examined fully, and to discuss those complaints publicly.

PART IV – ORDER REQUESTED

112. The Applicant requests the following orders:
    (a) An order quashing the Decision issued by the Commissioner under the *Conflict of Interest Act* (2006, c. 9, s. 2) arising from Democracy Watch's Complaint with regard to the conduct of public office holders Prime Minister Harper

Attorney General Nicholson and other Cabinet ministers and "at pleasure" staff and appointees, and substituting therefore its own decision directing that the Commissioner examine the Complaint pursuant to s.45(1) of the Act, and that the Commissioner issue recusal orders to Harper, Nicholson and, as appropriate, other public office holders pursuant to s.30 of the Act;

(b) In the alternative, an order 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;

(c) 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 contravention of common law requirements and principles of fundamental justice under s. 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44;

(d) 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;*

(e) its costs of this application on a substantial indemnity basis, and;

(f) such further and other relief as to this Honourable Court seems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 28, 2008

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HAMEED FARROKHZAD ST-PIERRE
Barristers and Solicitors
43 Florence Street
Ottawa, ON K2P 0W6

Per: Yavar Hameed (LSUC #44763A)
Peter Rosenthal (LSUC #33044O)
Tel: 613-232-2688 ext.228
Fax: 613-232-2680

Solicitors for the Applicant

PART V – LIST OF AUTHORITIES

Cases:

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

Krause v. Canada, [1999] F.C.J. No. 179 (FCA)

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

Dunsmuir v. New Brunswick, 2008 SCC 9 (CanLII)

R. v. Hinchey , [1996] 3 S.C.R. 1128

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

Opinion Of The Commissioner Of Conflict Of Interest On A Citizen's Complaint Of Alleged Contravention Of The Members' Conflict Of Interest Act By The Honourable Robin Blencoe, Minister Of Municipal Affairs, Recreation And Housing, August 16, 1993

Report to the Speaker of the Legislative Assembly of Alberta of the Investigation by Donald M. Hamilton, Ethics Commissioner into allegations involving Mr. Harvey Cenaiko, Member of the Legislative Assembly for Calgary-Buffalo, January 30, 2007

MacDonald Estate v. Martin (1990), 77 D.L.R. (4th) 249

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)

Apotex Inc. v. Canada (A.G.), [1994] 1 F.C. 742 (C.A.), aff'd [1994] 3 S.C.R. 1100

Lavigne v. Ontario Public Service Employees Union, 1991 CanLII 68 (S.C.C.)

Other:

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

Statutes:

Canadian Bill of Rights (S.C. 1960, c. 44)

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

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

Conflict of Interest Code for Members of the House of Commons

Conflict of Interest Code for Senators

Federal Courts Act (R.S.C. 1985, c.F-7)

Interpretation Act (R.S.C., 1985, c. I-21)

Values and Ethics Code for the Public Service (2003)