Court File No.: A-287-16

FEDERAL COURT OF APPEAL

DEMOCRACY WATCH

Applicant

- and -

ATTORNEY GENERAL OF CANADA and DOMINIC LEBLANC

Respondents

CONFLICT OF INTEREST COMMISSIONER

Intervenor

MEMORANDUM OF FACT AND LAW OF THE APPLICANT

Part 1: Overview and Nature of the Present Application

1. The nature of the present application relates to a matter of public interest and accountability in democratic governance, which is part of the core mandate of Democracy Watch. The Applicant has previously made application to this Court and has participated in legal cases, political issues and media commentary relating to conflict of interest of public officials in matters that fall within the jurisdiction of the Conflict of Interest and Ethics Commissioner **("the Ethics Commissioner" or "the Commissioner")**.

2. The Decisions under review in the present consolidated applications are that of the Ethics Commissioner **("the Conflict Screen decisions")**:

a. dated July 12, 2016, which establishes the terms for a conflict of interest screen that applies to a public office holder – in this case

Minister Dominic LeBlanc ("LeBlanc" or "Minister LeBlanc") (as he was in his portfolio as Minister for Department of Fisheries and Oceans and Leader of the Government of in the House of Commons);[1]

b. dated October 7, 2016 which reapplied the terms of the original Conflict Screen for Minister LeBlanc following the end of his tenure as Leader of Government in the House.[2]

3. As of June 14, 2017, the Ethics Commissioner had issued approximately 24 Conflict Screens for federal public office holders which are still active, four of which apply to current cabinet ministers.[3]

4. The Ethics Commissioner's Conflict Screens, which are imposed under section 29 of the *Conflict of Interest Act* **(*"the Act"*)** allow the public office holder to violate subsection 25(1) of the *Act* which requires a public office holder to issue a public declaration setting out the details of each and every recusal that arises for the public office holder.[4]

5. In contrast to the declaration required under subsection 25(1) of *the Act*, the Ethics Commissioner's screens are a generic, vague and preemptive notice to the public that the public office holder may not take part in future discussions, meetings or decision-making processes that may affect some private interest. The screens claim that they are a different process from the process of "recusal" (which is required under section 21 of *the Act*), and therefore claim that a public declaration under subsection 25(1) is not required when, under the screen process, the public office holder does not take part in a discussion or decision-making process in order to avoid a conflict of interest.

6. The Ethics Commissioner's decisions to develop and allow Minister LeBlanc to

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[1] Exhibit "A" to the Affidavit of Duff Conacher, affirmed October 13, 2017, **Applicant's Record ("AR"), Vol. 1, Tab 1A, page 1**.
[2] Exhibit "B" to the Conacher Affidavit, **AR, Vol. 1, Tab 1B, page 6**.
[3] Conacher Affidavit, para. 4, **AR, Vol. 1, Tab 3, page 22**.
[4] Conacher Affidavit, para. 5, **AR, Vol. 1, Tab 3, page 22**.

use the screens are, according to the Applicant, therefore unlawful and exceed the Ethics Commissioner's jurisdiction under *the Act*.

7. The Federal Court of Appeal has jurisdiction under section 66 of the *Parliament of Canada Act*, and clauses 28(1)(b.1) and 18.1(4)(a) of the *Federal Courts Act*, to review the Decision of the Ethics Commissioner on the grounds that the Ethics Commissioner has acted without jurisdiction or acted beyond her jurisdiction.

Part 2: Facts

A. History of the Proceeding

8. The first Notice of Application for this file was originally issued on July 14, 2016. However, through inadvertence, it was erroneously identified as a "T" file in the Federal Court rather than as an "A" file in the Federal Court of Appeal. The problem at the Federal Court level was resolved by order dated July 29, 2016 of Justice St-Louis in Court File No. T-1169-16. Accordingly, the Court of Appeal registry, took appropriate steps and issued the present Court File No. A-287-16 in the present application.[5]

9. By way of letter dated July 14, 2016, counsel for the Applicant made a request to the Ethics Commissioner pursuant to Rule 317 for the certified tribunal record relating to the decision under judicial review. The then-Respondent Ethics Commissioner responded by providing some information and generally opposing the request.[6]

10. On or about November 7, 2016, the Applicant filed a second application for judicial review, Court File No. A-424-16, in respect of a new compliance order issued by the Ethics Commissioner dated October 7, 2016 replacing the previous order dated July 12, 2016. The new order reflects the change of status of Minister LeBlanc, who stepped down from his role as Government House Leader on or about August 19, 2016, but

[5] Notice of Application (T-1169-16), AR, **Vol. 1, Tab 1A**.
[6] Affidavit of Duff Conacher filed with respect to status review ("Conacher Affidavit (status review), **AR, Vol. 2, Tab 4, page 218**.

maintained his role as Minister of Fisheries, Oceans and the Canadian Coast Guard.[7]

11. The second application for judicial review raised the same issues and is based on the same grounds as the first application issued on July 14, 2016 (A-287-16), but applied these grounds to the new compliance order of October 7, 2016 regarding Minister LeBlanc.[8]

12. After exchanges between the Applicant and Respondent concerning the Rule 317 request and other matters, by way of letter dated November 24, 2016, the Applicant alerted the Court to the filing of the new application and suggested options for simultaneous management of the two applications dealing with the same subject matter, including the possibility of a joinder of the applications.[9]

13. By way of direction, dated January 23, 2017, Justice Stratas indicated that it was for the parties to decide whether to discontinue, join or consolidate the two applications. Additionally, by way of order also dated January 23, 2017, Justice Stratas upheld the objection of the Respondent pursuant to Rule 318(2).[10]

14. Counsel for the Applicant filed a draft Motion to Consolidate the two applications on June 14, 2017. By way of order dated September 14, 2017, Chief Justice Noël: consolidated the two applications (Court File No. A-287-16 and No. A-424-16) under the present lead application (Court File No. A-287-16); removed the Ethics Commissioner as Respondent and added the Attorney General of Canada, and Minister LeBlanc as Respondents, and; added the Ethics Commissioner as an intervenor.[11]

B. Public Interest Standing of Democracy Watch

[7] Conacher Affidavit (status review), **AR Vol. 2, Tab 4, page 220**.
[8] Conacher Affidavit (status review) para. 17, **AR, Vol. 2, Tab 4, page 220**.
[9] Conacher Affidavit (status review), para. 19, **AR, Vol. 2, Tab 4, page 220**.
[10] Conacher Affidavit (status review), para. 21, **AR, Vol. 2, Tab 4, page 221**.
[11] Order of Justice Stratas (September 14, 2017), **AR Vol. 1, Tab 2A, page 13**.

15. Democracy Watch is a not-for-profit organization founded and incorporated in 1993 that advocates for democratic reform, citizen participation in public affairs, government and corporate accountability, and ethical behaviour in government and business in Canada. Democracy Watch is governed by its Coordinator (myself), Directors, and Advisory Committee. Democracy Watch has over 45,000 supporters from across Canada who are members of its Democracy Watcher Network, and has had more than 95,000 Canadians sign its online petitions for changes to federal and provincial laws.[12]

16. Democracy Watch articulates its mandate as "20 Steps towards a modern, working democracy", including changes to the information governments and businesses provide to citizens; changes in the ways citizens participate in government and business decision-making; and changes to the ways in which citizens can hold governments and businesses accountable for their decisions and activities.[13]

17. In pursuit of its mandate, Democracy Watch actively participates in public policy-making and legislative processes in matters relating to government accountability. In particular, Democracy Watch has made submissions and appeared before parliamentary committees in legislative proceedings leading to the enactment or amendment of measures including:

a. Amendments to the *Lobbying Act,* RSC 1985, c.44 (4th Supp.), its predecessor the *Lobbyist Registration Act*, and the *Lobbyists Registration Regulations*, SOR/2008-116 (1994, 1997, 2000, 2003, 2006, and 2010);

b. Creation of the position of Ethics Commissioner as an independent Officer of Parliament and subsequent changes to the enforcement powers and title of this position to Conflict of Interest and Ethics Commissioner through amendments to the *Parliament of Canada Act,* RSC 1985, c.P-1 (2002-2007);

c. Enactment of the *Conflict of Interest Act,* SC 2006, c.9, s.2;

[12] Conacher Affidavit, para. 12, **AR, Vol. 1 Tab 3, page 24**.
[13] Exhibit "H" of the Affidavit of Duff Conacher, **AR, Vol. 1, Tab 3H, page 210**.

d. Drafting and amendment of the *Conflict of Interest Code for Members of the House of Commons* in (2004; am. 2009);

e. Drafting and amendment of the *Lobbyist Code of Conduct* (1997 and 2015 versions); and

f. Drafting and amendment of the *Conflict of Interest and Post-Employment Code for Public Office Holders* (establishing the position of Ethics Counsellor in 1994, and amendments in 2000, 2003, 2004 and 2006).[14]

18. Democracy Watch welcomed the enactment and development of these statutes and codes as significant advances beyond the sanctions under the *Criminal Code*, which punish parties for actual cases of corruption and abuse of public office, as they help to prevent conflict from arising between the public duty and the private interests of public officials, to ensure public disclosure of key information concerning the decisions and actions of public office holders, and to ensure a full, independent investigation and ruling on such circumstances when and if they do arise.

19. Democracy Watch further pursues its mandate of advancing accountability in democratic governance by utilizing these mechanisms, initiating complaints and participating in proceedings before the various bodies created by these legislative regimes. In particular, Democracy Watch has filed more than 50 government ethics-related petitions with the Commissioner of Lobbying ("Lobbying Commissioner"), the Ethics Commissioner, and their predecessors.

20. Democracy Watch has also pursued the advancement of accountability in democratic governance before the courts. Democracy Watch appeared as an intervenor before the Supreme Court of Canada, in *Harper v Canada (Attorney General)*, [2004] 1 SCR 827, 2004 SCC 33, and has brought proceedings concerning the Ethics Commissioner, the Lobbying Commissioner, and their predecessors including: *Democracy Watch v Attorney General of Canada (Office of the Ethics Counsellor)*, 2004 FC 969, [2004] 4 FCR 83; and *Democracy Watch v Barry Campbell and the Attorney*

[14] Conacher Affidavit, para. 14, **AR, Vol. 1, Tab 3, page 25**.

General of Canada (Office of the Registrar of Lobbyists), 2009 FCA 79, [2010] 2 FCR 139.

Part 3: Issues raised by the present Application

Issue 1: Should the Applicant be granted public interest standing to bring the present application?

Issue 2: Does the Federal Court of Appeal have jurisdiction to adjudicate the present judicial review application?

Issue 3: What is the appropriate standard of review?

Issue 4: Did the Ethics Commissioner exceed her jurisdiction or make an unreasonable decision in rendering the conflict screen for Minister Leblanc?

Part 4: Law and Argument

Issue 1: Democracy Watch has Standing to Bring the present Application

21. Granting public interest standing is a discretionary power within the jurisdiction of the Court. When exercising this discretion, the three-element test for public interest standing must be applied contextually, liberally, and generously, with reference to the policy rationales for granting standing. The third element in particular must be treated in a flexible and generous manner, taking into account the realities of litigation and overall resource considerations.[15]

[15] *Canada v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 ("*Downtown Eastside*") at paras 35-36, 44-52 [Applicant's Book of Authorities **["BOA"] Tab 1]**; *Sierra Club of Canada v Canada (Minister of Finance),* [1999] 2 FC 211 ("*Sierra Club*") at para. 36 **[BOA, Tab 13]**. Also see: *Canadian Council of Churches v Canada*, [1992] 1 SCR 236 at paras 33, 35-37 **[BOA Tab 3]**

22. The test for public interest standing was most recently refined and articulated by the Supreme Court in *Downtown Eastside*:

> In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts[.][16]

23. Democracy Watch readily meets the requirements for public interest standing to bring this application for judicial review. The Applicant raises serious issues arising from a legislative regime in which it has played a significant and active role. The applicant has a genuine stake in ensuring the purpose and intent of these provisions is realised in practice, and is uniquely situated to bring this important issue of independence and accountability before the Court.

i) A serious justiciable issue has been raised

24. There is no question that the present case raises serious justiciable issues, involving important questions concerning a public official's compliance with conflict of interest requirements under the *Conflict of Interest Act*. Central to the effectiveness of any conflict of interest regime is not only the prevention of conflicts of interest from arising, but the dissemination of information relating to conflicts or potential conflicts. In a democracy, it is not palatable or consistent with an expectation of public accountability that a preemptive declaration be used to displace the communication to the public of the specific circumstances wherein a conflict of interest may arise. The Applicant submits that *the Act* requires communication of conflicts and that the establishment of "Conflict Screens" is contrary to *the Act*. This issue as presented to this Court on the present judicial review application is serious in nature and raises questions that affect every public office holder in the federal sphere.

ii) Democracy Watch has a genuine interest in the matter

25. The second branch of the test for public interest standing is to determine whether

[16] *Downtown Eastside, supra* at para. 37.

the applicant has a "genuine interest," a "real stake" in the proceedings, or is otherwise "engaged with the issues" raised by the application. This is determined by weighing whether the applicant has a "real and continued interest" in the issue, or if it is simply a "mere busybody". Other relevant factors in recognizing a genuine interest include the applicant's experience and expertise, and whether its involvement in the issue makes it an appropriate body to bring the case in the public interest.[17]

26. In this case, it is clear that the applicant has both a genuine, real, and continuing interest as well as considerable experience and expertise in the issues raised by this application. It is not a "mere busybody."

27. The Applicant's *raison d'etre* is to advocate for democratic reform, citizen participation, and ethical behaviour in government by actively participating in public policy making and legislative processes in matters relating to government accountability.[18] In pursuit of these objectives, Democracy Watch has played an important role in the development of government oversight and accountability legislation and in the subsequent use of these mechanisms to continue promoting and advancing transparency and accountability in government.

28. Democracy Watch maintains a strong "track record" and "degree of involvement" with the subject matter of the application.[19] Indeed, Democracy Watch actively participated in the legislative processes leading to the creation of the Ethics Commissioner position in 2004, and to changes to the enforcement powers and title of this position through subsequent amendments to the *Act*.[20] Democracy Watch also has a record of engaging these mechanisms, initiating public complaints and participating in proceedings before the various bodies created by these regimes, and by pursuing the

[17] *Downtown Eastside, supra* at para. 43.
[18] Conacher Affidavit, **AR, Vol. 1, Tab 3H, para 13**; "20 Steps toward a Modern, Working Democracy" from the website of Democracy Watch, accessed July 19, 2017, AR, **Vol. 1, Tab 3H, page 210**.
[19] *Sierra Club, supra* at paras 54-553
[20] Conacher Affidavit, para. 14, **AR, Vol. I, Tab 3, page 25**.
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advancement of accountability in democratic governance before the courts. [21]

29. Democracy Watch submits its track record demonstrates a real and continued interest in the matters at issue in the present application. As in *Sierra Club*, where the Court recognized involvement in the development and enforcement of a legislative system as relevant to establishing a general understanding and genuine interest in a matter, the Applicant's active participation in the legislative development and subsequent operation of these regimes demonstrates it has the requisite interest and record of engagement in the issues raised by this application.[22]

iii) A reasonable and effective means of bringing the issue before the Court

30. The third factor in the public interest standing analysis is "whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court."[23] This factor is closely linked to the principle of legality, as courts should consider whether granting standing is desirable from the point of view of ensuring lawful action by government actors.[24] As noted in *Downtown Eastside*:

> [B]y taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.[25]

31. Public interest standing will be granted where individual litigants are not

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[21] Conacher Affidavit, **AR, Vol. I, Tab 3, page 25**; See also: *Democracy Watch v Attorney General of Canada (Office of the Ethics Counsellor)*, 2004 FC 969, [2004] 4 FCR 83 **[BOA Tab 7]**; *Democracy Watch v Barry Campbell and the Attorney General of Canada (Office of the Registrar of Lobbyists)*, 2009 FCA 79, [2010] 2 FCR 139 **[BOA Tab 5]**; *Democracy Watch v Conflict of Interest and Ethics Commissioner* (Federal Court of Appeal File #A-287-16); *Democracy Watch v Conflict of Interest and Ethics Commissioner* (Federal Court of Appeal File #A-424-16).
[22] *Sierra Club, supra* at paras 66-68.
[23] *Downtown Eastside, supra* at para 52.
[24] *Downtown Eastside, supra* at para. 49.
[25] *Downtown Eastside, supra* at para. 50.

reasonably likely to bring an issue before the Court. In this case, Democracy Watch is likely the only interested party having the experience and ability to initiate legal proceedings to ensure that the Ethics Commissioner and public office holders comply with its statutory obligations. There is no other "directly affected" party who could launch an application for judicial review, and no other reasonable and effective way to bring this matter before the Court.[26]

32. Democracy Watch submits that its present application is a reasonable and effective means of bringing this important matter before the Court. As a party with an established track record and a real and continued interest in issues of ethics, transparency, and accountability of government institutions, Democracy Watch has standing to bring this application for judicial review.

Issue 2: The Federal Court of Appeal has jurisdiction to adjudicate the present judicial review application

33. The present application is readily distinguishable from a non-binding order or an order of no legal effect rendered by the Ethics Commissioner as previously determined by this Honourable Court.[27]

34. The Applicant submits that this Honourable Court has jurisdiction to adjudicate the present application for three main reasons: a) the Conflict Screens at issue have legal and binding effect on the public office holder, in this case Minister LeBlanc; b) the Conflict Screen results in a violation of the *Act* by circumventing the public officer holder's duty to report pursuant to section 25(1) of the *Act*; and c) any voluntary reporting that is made by the public office holder does not alter the underlying unlawfulness of the Conflict Screen itself, which effectively seeks to change the legal obligation of the office holder to report each conflict of interest as it arises.

[26] *Sierra Club, supra* at para. 54. Also see: *Lavoie v Canada (Minister of the Environment)*, 2000 CanLII 15896; [2000] FTR 181 at paras 82-83 **[BOA Tab 11]**.
[27] see for example: *Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15 (CanLII) **[BOA Tab 6]**.

35. As a preliminary matter and as referenced above, the present application concerns two Conflict Screens relating to Minister LeBlanc.[28] For the reasons set out above and in the Conacher Affidavit filed as part of the status review in the present case,[29] the two Conflict Screens in substance relate to the identical matter. However, given the change of portfolio of Minister LeBlanc after May 2016, the second Conflict Screen replaced the first screen. Given the procedural history of the file and the litigation regarding the scope of the Rule 317 record that transpired under file number A-287-16, the Applicant sought and obtained consolidating A-287-16 with file number A-424-16. The Applicant submits that this is a reasonable and appropriate approach that maintains the integrity of the litigation has avoided unnecessary duplication and allows the parties to address the substance of Conflict Screen relating to Minister Leblanc.

a) The screen has a binding legal effect

36. At the beginning of the public declaration of the screen for Minister LeBlanc, the statement indicates as follows:

> Statutory requirement(s):
>
> 29. Before they are finalized, the Commissioner shall determine the appropriate measures by which a public office holder shall comply with this Act and, in doing so, shall try to achieve agreement with the public office holder…

37. Section 29 of *the Act* which is entitled "Compliance Measures" and the marginal note in *the Act* for section 29 reads: "Determination of appropriate measures". The provision also includes the words that "Before they are finalized, the Commissioner shall determine the appropriate measures by which a public office holder shall comply with this Act…"[30]

38. The first paragraph of Minister LeBlanc's screen states "the Conflict of Interest and Ethics Commissioner has determined that a conflict of interest screen is necessary to assist with my obligation…" The third paragraph of the declaration states

[28] See: Exhibits A and B to the Conacher Affidavit, **AR, Vol. 1, Tabs 3A and 3B, pages 28 and 31**
[29] Conacher Affidavit (status review), **AR, Vol 2, Tab 4, pages 217-223**.
[30] See: Exhibits A and B to the Conacher Affidavit, **AR, Vol. 1, Tabs 3A and 3B, pages 28 and 31**.

"…accordingly, a conflict of interest screen has been established…"[31]

39. Based on the above, the reasonable conclusion is that the Ethics Commissioner determined on her own, under her compliance power set out under section 29 of *the Act*, that the Conflict Screen was a measure required for Minister LeBlanc to comply with t*he Act*. It is submitted that the Commissioner ordered Minister LeBlanc to establish the screen, and he established the screen showing clearly that the Ethics Commissioner's order was legally binding on him.

b) The screen directly interferes with part of LeBlanc's obligation to recuse

40. The Applicant submits that Minister LeBlanc's screen constitutes a decision or order of the Ethics Commissioner that interferes with the Minister's obligation to recuse. The first paragraph of Minister LeBlanc's screen statement says that the screen is "…in order to prevent a conflict of interest situation from arising…" Similarly, the third paragraph of the screen statement states that the screen is being established:

> …to ensure that I will abstain from any participation in any discussions or decision-making processes and any communication with government officials in relation to any matter or issue forming part of the subject matter of the conflict of interest screen.

41. Section 21 of the Act states:

> 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.

42. The above quoted portions from Minister LeBlanc's screen statement and section 21 of *the Act* use essentially the same words, with the same meaning and intent. The second last paragraph of the LeBlanc's screen statement states:

> In the event that any issue or matter subject to the conflict of interest screen is not caught by that screen and comes before me, I undertake to recuse myself

[31] *Ibid.*

> from that issue or matter as required by Section 21 of the Conflict of Interest Act and inform the Conflict of Interest and Ethics Commissioner.[32]

43. This paragraph clarifies that the Ethics Commissioner's conclusion is that the screen and recusal are separate processes. This is an unreasonable conclusion because the words of the screen statement regarding when and why Minister LeBlanc will be removed from a decision-making process and the words of section 21 of *the Act* regarding when and why public office holders must recuse themselves from a decision-making process are essentially the same, including in meaning and intent.

44. The reasonable conclusion is that the screen and recusal are the same process. However, Minister LeBlanc's screen does not require him to disclose when and why he has removed himself from a decision-making process as required by subsection 25(1) of *the Act*:

> Public Declaration
>
> 25 (1) If a reporting public office holder has recused himself or herself to avoid a conflict of interest, the reporting public office holder shall, within 60 days after the day on which the recusal took place, make a public declaration of the recusal that provides sufficient detail to identify the conflict of interest that was avoided."

45. Therefore, the screen directly interferes with this statutory requirement that is part of Minister LeBlanc's obligation to recuse. This is the main basis of Democracy Watch's application – that the screen allows Minister LeBlanc to violate subsection 25(1) of *the Act*.

c) Any voluntary public declaration of recusal is irrelevant

46. Minister LeBlanc may voluntarily, at his own discretion, issue a public declaration of recusal at any time. The Conflict Screen does not prohibit this and Democracy Watch's application does not challenge the screen on this basis. Democracy Watch's application challenges the Ethics Commissioner's order of the Conflict Screen because it does not require Minister LeBlanc to issue a declaration each time he recuses himself

[32] See: Exhibits A and B to the Conacher Affidavit, **AR, Vol. 1, Tabs 3A and 3B, pages 29 and 32**.

as is required by subsection 25(1) of *the Act*.

Issue 2: What is the appropriate standard of review?

47. Generally, a review of a decision involving interpretation of a context specific legal determination by the Ethics Commissioner informed by the enabling provisions of her powers should be reviewed on the standard of reasonableness.[33]

48. For true questions of jurisdiction,[34] the Court must determine whether or not the decision falls within the jurisdiction of the decision-maker. A review based on a jurisdictional error requires a standard of correctness, or an inquiry as to whether or not the decision conforms to the lawful scope of jurisdiction of the decision-maker.

i) Primary position: Error of jurisdiction

49. The Applicant argues, as its principal position, that Conflict Screens relating to Minister Leblanc are contrary to the *Conflict of Interest Act* and fall outside of the jurisdiction of the Ethics Commissioner. At its core, the question to be addressed is whether or not the Ethics Commissioner may lawfully order a Conflict Screen in view of section 29 of *the Act* in the sense of whether the Commissioner had the authority to make the relevant order that is the subject of review. The Applicant argues that the Commissioner is legally prohibited from making such an order, as it falls outside of the Commissioner's powers under *the Act*.

ii) Alternative Argument: Reasonableness with a Single Outcome

50. As an alternative argument, the Applicant submits that if the Court decides that decision at issues should be reviewed on a standard of reasonableness, the analysis in the present circumstance allows for only a single outcome and not the range of options outlined in *Dunsmuir*. While reasonableness is a single standard, it is nevertheless a "flexible deferential standard" that "varies" or "takes its colour" from the context and

[33] *Democracy Watch v. Canada (Attorney General),* [2004] 4 FC 83, 2004 FC 969 (CanLII) at para. 65. **[BOA Tab 7]**
[34] *Dunsmuir v New Brunswick*, 2008 SCC 9 ("*Dunsmuir*") at para. 59. **[BOA Tab 8]**

nature of the issue.[35] Accordingly, the question of what this standard requires in the context of a specific case has arisen on many occasions and given rise to numerous approaches since this Court's decision in *Dunsmuir*. In particular, courts have recognized that there are occasions where only one "defensible" interpretation of a statutory provision exists, rejecting as unreasonable any interpretation that may undermine the purpose of the statutory scheme at issue in the case.[36] See, for example, the reasons of Justice Moldaver, writing for the majority of the Court in *McLean*:

> It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" ([*Khosa*] at para. 4) will necessarily be limited to a single reasonable interpretation — and the administrative decision maker must adopt it.[37]

51. Depending on the statutory context and the language of the relevant provisions, the statute may constrain the possible outcomes available, thus effectively impacting upon the scrutiny entailed by the reasonableness review standard. As the Court of Appeal held in *Gitxaala Nation*:

> For example, an issue of statutory interpretation where the statutory language is precise admits of fewer acceptable or defensible solutions than one where the language is wider and more amorphous, where policy may inform the proper interpretation to a larger extent.[38]

52. In *Wilson*, Justices Moldaver, Côté and Brown went a step further, writing in dissent that the appropriate standard of review of a decision-maker's interpretation of their home statute should in fact be *correctness*. Taking into account rule of law concerns and Justice Rothstein's observation that "[d]ivergent applications of legal rules undermine the integrity of the rule of law", the dissenting judges concluded that

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[35] See *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 at paras 17-18, 23 **[BOA Tab 4]**; *Dunsmuir v New Brunswick*, 2008 SCC 9 ("*Dunsmuir*") at para. 64; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para. 59 **[BOA Tab 2]**

[36] *Wilson v Atomic Energy of Canada Ltd,* 2016 SCC 29 at paras 18-19, 35 (citing *Canada (Canadian Human Rights Commission) v Canada (Attorney General),* 2011 SCC 53 **[BOA Tab 16]**, and *Halifax (Regional Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29) **[BOA Tab 10]**. Also see: *Vavilov v Canada*, 2017 FCA 132 at para. 72 **[BOA Tab 14]**

[37] *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para. 38 **[BOA Tab 12]**

[38] *Gitxaala Nation v Canada*, [2016] 4 FCR 418, 2016 FCA 187 at para. 146 **[BOA Tab 9]**

correctness will be the appropriate standard of review where it is clear that the legislature could only have intended a statute to bear one meaning.[39]

53. In view of the foregoing, the Applicant submits that in this case, the framing of the standard of review as correctness or reasonableness will have no discernible difference. There can be only one appropriate or defensible outcome, as any other interpretation than that being advanced by the Applicant would be incompatible with the purpose of the statutory scheme.

Issue 3: The Ethics Commissioner exceeded her jurisdiction or made an unreasonable decision in rendering the Conflict Screen for Minister Leblanc

54. The Applicant submits that the Ethics Commissioner's use of the Conflict Screen as a measure to replace and/or circumvent the statutory requirement of reporting each recusal that arises due to a conflict of interest constitutes a violation of *the Act*. In this sense, the measure is contrary to the statutory scheme and the order establishing it is *ultra vires* the jurisdiction of the Commissioner. The Applicant's position is supported by reference to the following: a) the statutory scheme and purpose of *the Act*; b) the Conflict Screen's reliance on the substantive definition of recusal; c) the common definition of recusal; d) the historical use of Conflict Screens under the prior statute; e) the current reporting of recusals pursuant to section 25(1) of *the Act;* and f) the statutory interpretation that precludes section 29 compliance measures from circumventing the reporting requirement under section 25(1) of *the Act*.

55. The pith of the current application relates to whether the Ethics Commissioner has the authority to create a Conflict Screen in the way that she has established her practice under section 29 of *the Act*. As a matter of statutory interpretation, either this authority exists or it does not – there can only be one of two possible outcomes of this analysis such that even under a reasonableness framework – one correct interpretation

[39] *Wilson, supra* at paras 78-89, citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para. 90

will prevail. Likewise, if this question relating to the scope of authority of the Commissioner is determined by this Court to constitute a true jurisdictional question – either the Conflict Screens are *vires* or *ultra vires* the Commissioner's authority. If the Screens are beyond the jurisdiction of the Commissioner, they must be set aside.

a) Purpose of *the Act* requires each conflict of interest to be reported

56. The Ethics Commissioner's orders of July and October 2016 violate the statutory right that the public has to be informed each time Minister LeBlanc recuses himself in relation to a conflict of interest. The Ethics Commissioner's order of the Conflict Screen does not require the Minister to issue a public declaration each time he does not take part in a discussion or decision-making process to avoid a conflict of interest. This approach is inconsistent with the purpose of *the Act* and the nature of the statutory scheme in relation to the identification and reporting of actions taken by public office holders concerning their conflicts of interest.

57. Subsection 25(1) of *the Act* states as follows:

> Public declaration — recusal
>
> 25 (1) If a reporting public office holder has recused himself or herself to avoid a conflict of interest, the reporting public office holder shall, within 60 days after the day on which the recusal took place, make a public declaration of the recusal that provides sufficient detail to identify the conflict of interest that was avoided.

Accordingly, the Ethics Commissioner's order of the screen negates, and thereby directly affects, the public's right under subsection 25(1) of *the Act* to be informed through a public declaration each time LeBlanc recuses himself.

58. The Ethics Commissioner has ordered similar screens that currently cover more than 24 public office holders, including Finance Minister Bill Morneau, Justice Minister Jody Wilson-Raybould, and many senior Cabinet minister staff persons and other senior government officials. The fact that the Ethics Commissioner's screens negate the right

of the public to be informed of the when and why details each time these public office holders recuse themselves is a significant violation of the public's right to know that Parliament clearly intended to be upheld when it included subsection 25(1) in *the Act*.

b) The Conflict Screen in substance constitutes a Recusal

59. The Decisions at issue in this case that Ethics Commissioner Dawson made for Minister LeBlanc under section 29 of the *Act* – namely establishing Conflict Screens for him in June and October 2016 – purport to be generalized declarations in relation to avoiding future conflicts of interests. The Decisions circumvent the statutory requirement in subsection 25(1) of *the Act* that the public office holder make a specific, detailed, public declaration each time the office holder does not take part in a decision-making process to avoid a conflict of interest;

60. The screens established by the Ethics Commissioner in the Decisions require the public office holder, in order to prevent a conflict of interest situation from arising to "abstain from participation in any matters or decisions" under certain conditions. The Ethics Commissioner's requirement under the screen is not only worded essentially the same as section 21 of *the Act*, it also has exactly the same legal effect as the requirement set out in section 21.

61. However, the Commissioner's Conflict Screens include the following statement: "In the event that any issue or matter that is subject to the conflict of interest screen is not caught by that screen and comes before me, I undertake to recuse myself from that issue or matter, as required by Section 21…"[40] Under this formal language, the screens established by the Ethics Commissioner in the Decisions purport to be different than a "recusal" under section 21 of *the Act* and to have a correspondingly distinct legal effect from section 21.

62. By purporting not to be the same and not to have the same legal effect as a recusal under section 21 of *the Act*, the screens established by the Ethics

[40] See: Exhibits A and B to the Conacher Affidavit, **AR, Vol. 1, Tabs 3A and 3B, pages 29 and 32.**

Commissioner's Decisions allow Minister LeBlanc as a public office holder to violate the requirement set out in subsection 25(1) of *the Act* that an office holder issue a public declaration each time the office holder does not take part in a discussion, decision, debate or vote on any matter in order "to avoid a conflict of interest…"

63. The plain meaning, and clear intent, of section 21 and subsection 25(1) of *the Act* are to require public disclosure of the details of every specific situation in which an office holder does not take part in any discussion, decision, debate or vote on any matter in order to avoid a conflict of interest. The Ethics Commissioner's screens deny the public's right to know, which is clearly set out under subsection 25(1), the details of each situation.

64. By allowing public office holders not to issue the required public declaration detailing each situation, the screens also hide whether the public office holder is actually recusing him/herself from specific discussions and decision-making processes in which they have a conflict of interest. The formal language of the Conflict Screen does not change the substance of the Screen itself, which calls for recusal as outlined under section 21 of *the Act*.

c) Definition of Recusal not limited to "last minute" withdrawal

65. The Commissioner claims that when a public office holder removes himself or herself from a discussion, decision, debate or vote through a screen, it is not a recusal as defined by section 21 of *the Act*. In her testimony on October 26, 2010 before the House of Commons Standing Committee on Access to Information, Privacy and Ethics, the Commissioner claimed that "Recusals take place in relation to specific conflict situations that usually come up at relatively short notice." **[8th para. after line mark 1535]**. Later in her testimony, the Commissioner claimed that the legal definition of "recusal" is something "you do at the last minute" **[3rd para. after line mark 1645]** and later that "Recusal is a last-minute absenting yourself from the room." **[immediately before line mark 1700]**.[41]

[41] Exhibit "P" of the Affidavit of Jennae O'Connor, **AR, Vol. 2, Tab 5P, page 449, 452**, **454.**

66. In her testimony on October 27, 2016 before the House of Commons Standing Committee on Access to Information, Privacy and Ethics (the “Ethics Committee”), the Commissioner, when speaking about the difference between a screen compared to a recusal removing someone from a decision-making process, claimed that: "Sometimes it may be a surprise that something comes up. You wouldn't have foreseen it, and then you'd have a recusal."[42]

67. In other words, the Commissioner essentially defines recusal as "a last-minute removal of yourself from a decision-making process when you are surprised that a topic has arisen in which you have a conflict of interest."

68. However, the commonly accepted definition of “recusal” is not limited to a last-minute decision to withdraw, but includes a circumstance when one removes oneself from a decision-making process because of a conflict of interest at any time. For example, it is a “recusal” when a judge decides in advance of a legal proceeding not to take part in adjudicating a case because of bias, conflict of interest and/or relation to a party, lawyer or witness.[43] In that situation, the judge applies a screen to himself or herself and determines that the conflict of interest means they should “recuse” themselves and not take part in the case which is to occur in the future.

69. The Commissioner effectively acknowledged this broad definition of recusal in her January 2013 report on the five-year review of *the Act* submitted to the Ethics Committee. In this report, the Commissioner states that “….a ‘recusal’ occurs when a public office holder removes himself or herself from involvement in a specific matter that is before, or is about to come before, the public office holder.” There is no mention in this statement by the Commissioner of the public office holder being “surprised” by some “last-minute” issue that they didn’t foresee. Accordingly, even according to the Ethics Commissioner’s own definition, there is no temporal condition that qualifies what

[42] Exhibit “R” of the Affidavit of Jennae O’Connor, [at 5th para. before line mark 1250], **AR, Vol. 2, Tab 5R, page 471**.
[43] *Wewaykum Indian Band v. Canada*, 2 S.C.R. 259, 2003 SCC 45 **[BOA Tab 15]**

constitutes a "recusal."[44] Accordingly, the common definition of recusal constituting both prospective and sudden unanticipated withdrawals suggests that the measure outlined by the Ethics Commissioner constitutes a recusal and must accordingly trigger corresponding reporting requirements pursuant to section 25(1) of *the Act*.

d) Historical Use of Conflict Screens

70. The first federal Ethics Commissioner, Bernard Shapiro, who as an Officer of Parliament from May 2004 to April 2007 enforced the predecessor to the *Act* which was entitled the *Conflict of Interest and Post-Employment Code for Public Office Holders* (the "*Code*"), also used conflict of interest screens but only because the Recusals section in the Schedule of the *Code* did not require detailed public declarations of each recusal by an office holder. In fact, the *Code* required the Ethics Commissioner to maintain a "confidential record of recusals".[45]

71. In the "Recusals" section of his annual report for fiscal year 2004-2005, Ethics Commissioner Shapiro recommended requiring public disclosure of the details of **each recusal**, stating:

> I intend to recommend that in the future, recusals by the Prime Minister from Cabinet or Cabinet committee meetings be recorded and, subsequently, a report of these instances of recusal be provided to the Office by the Clerk of the Privy Council for inclusion in a registry to be made available for public inspection.[46]

72. At subsection C (iv) of the "Recusal" section and in Recommendation 2 of his *Issues and Challenges 2005* special report, Ethics Commissioner Shapiro repeated this recommendation requiring the public disclosure of the details of each recusal, stating that:

> …Recent experience in Canada and similar countries points to the need for greater transparency as the cornerstone of any recusal process for public office holders…

[44] Exhibit "B" of the Affidavit of Jennae O'Connor, at page 35 of the report, **AR Vol. 2, Tab 5B, page 251**.
[45] Exhibit "C" of the Affidavit of Duff Conacher at pp. 28-29 of the Code, **AR Vol. 1, Tab 3C, pages 63-64**.
[46] Exhibit "D" of the Affidavit of Duff Conacher at p. 12 of the Annual Report, **AR Vol. 1,Tab 3D, page 299**.

> The Commissioner also recommended that all instances of ministerial recusal from Cabinet or Cabinet Committee meetings, including details of the reasons for each recusal, be recorded in a public registry as soon as possible…
>
> Full disclosure of the details of instances of recusal involving all public office holders would further enhance the public's confidence in this regard. For such a recusal disclosure process to be effective, these details would have to be made public at the earliest opportunity, recognizing the constraints of the requirement to respect Cabinet confidence…
>
> RECOMMENDATION 2
> It is recommended to the Prime Minister that all instances of ministerial recusal from Cabinet or Cabinet Committee meetings be recorded in a public registry as soon as possible, including details of the reasons for each recusal. The same disclosure requirement would also apply to other public office holders on any instance of recusal.[47]

73. In addition, in the "Recusals" section of his annual reports for the 2004-2005 and 2005-2006 fiscal years, Ethics Commissioner Shapiro (following his recommendation for greater transparency to the extent he could given that the *Code* at the time required him to maintain a confidential registry of the details of recusals) disclosed general information about the specific situations which then-Prime Minister Martin, and some other public office holders, had been required to recuse themselves.[48]

74. Ethics Commissioner Shapiro's annual report for the 2005-2006 fiscal year also mentions under the "Challenges Ahead" part, under section "A. Impact of Bill C-2" that one of the challenges if Bill C-2 was enacted would be that the bill included, among other changes to federal laws and regulations, the new *Conflict of Interest Act* which incorporated, in subsection 25(1) of *the Act*, Ethics Commissioner Shapiro's recommendation that details be disclosed concerning every recusal by any public office holder. Therefore, Ethics Commissioner Shapiro concluded that the Ethics Commissioner's office would have to maintain "an expanded public registry to include

[47] Exhibit "E" of the Affidavit of Duff Conacher at pp.10-11 of the special report, **AR, Vol.1, Tab 3E, pages 121-122**.
[48] Exhibit "D" of the Affidavit of Duff Conacher at pp. 11-12 of the Annual Report - **AR, Vol. 1, Tab 3D, pages 82-83**; Exhibit "F" of the Affidavit of Duff Conacher at pp. 9-11 of the Annual Report – **AR, Vol. 1, Tab 3F, pages 149-150**.

recusal information that would not otherwise breach Cabinet confidences or harm national security."[49]

e) Reporting Recusals under new *Conflict of Interest Act*

75. The requirement in subsection 25(1) of the new *Conflict of Interest Act* contained in Bill C-2, which was introduced in April 2006, clearly implemented the recommendations of Ethics Commissioner Shapiro in the reports he issued in 2004-2005 with the intent to require that the details of all recusals by all public office holders be disclosed to the public. The wording of subsection 25(1), which is situated in the "Public Declaration" section of *the Act*, mirrors Ethics Commissioner Shapiro's recommendations:

> Public declaration — recusal
>
> 25 (1) If a reporting public office holder has recused himself or herself to avoid a conflict of interest, the reporting public office holder shall, within 60 days after the day on which the recusal took place, make a public declaration of the recusal that provides sufficient detail to identify the conflict of interest that was avoided.

76. Subsection 25(1) relates directly to section 21 of *the Act* which states as follows:

> **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.

77. The new *Conflict of Interest Act* came into effect on January 1, 2007. In the "Recusals" section of Ethics Commissioner Shapiro's Annual Report for the 2006-2007 fiscal year, he makes it clear that in every case in which public office holders recuse themselves from a decision-making process as required under section 21 of the *Act*, they must "sign a *Public Declaration of Recusal*" as required by subsection 25(1) the *Act*.[50]

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[49] Exhibit "F" of the Affidavit of Duff Conacher at p. 16 of the Annual Report – **AR, Vol. 1, Tab 3F, page 156**.

[50] Exhibit "G" of the Affidavit of Duff Conacher at p.4 of the Annual Report, **AR, Vol. 1, Tab 3G, page 180**.

78. Ethics Commissioner Shapiro resigned from the position on March 31, 2007, and Mary Dawson's first term as Ethics Commissioner began in July 2007. Other than in a few instances, Ethics Commissioner Dawson has not required a public declaration of recusals as required by sections 21 and subsection 25(1) of the *Act* since she was appointed, and has instead used Conflict Screens.

f) Section 29 of *the Act* does not permit the use of Conflict Screens to override section 25(1) Reporting Requirement

79. The Commissioner has under section 29 of *the Act* the power to "…determine the appropriate measures by which a public office holder shall comply with this *Act*" and under section 30 "…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*." There is no provision in the *Act* that expressly mentions or permits the use of Conflict Screens.

80. The central problem with the Commissioner's Decisions at issue in this case, made under section 29 of *the Act*, is that they ordered Minister LeBlanc to use a compliance measure - the Conflict Screen - that exempts him from *the Act*'s subsection 25(1) requirement that public office holders issue a public declaration every time they do not take part in a discussion, decision, debate or vote due to a conflict of interest.

81. In other words, the problem is not the Ethics Commissioner's use of Conflict Screens, it is the use of screens that claim to replace and override the duty to recuse under section 21 and the duty to issue a public declaration under subsection 25(1) that sets out details of each recusal. The Commissioner's Conflict Screens clearly exceed her jurisdiction under section 29 because they allow public office holders to violate subsection 25(1) of *the Act*.

82. The Commissioner has effectively acknowledged that her screens are beyond the jurisdiction of *the Act* as they do not comply with the recusal requirement in section

21 of *the Act*. In her January 2013 report on the five-year review of the *Act* submitted to the Ethics Committee, the Commissioner stated:

> I recommend that section 21 be amended to add a subsection that would reflect the practice of establishing conflict of interest screens where a public office holder foresees that future recusals may likely be necessary in order to avoid a conflict of interest.

At page 37 of the Report, the recommendation states:

> RECOMMENDATION 4-5
>
> That section 21 be amended to provide expressly for the establishment of conflict of interest screens by public office holders in consultation with the Commissioner where a conflict of interest could very likely arise.[51]

83. If section 21 of *the Act* must be amended to provide for Conflict Screens, then clearly the Ethics Commissioner's screens are beyond the jurisdiction of *the Act*.

84. The Commissioner has also elsewhere effectively acknowledged that her Conflict Screens are outside the jurisdiction of *the Act* as they allow public office holders to violate the subsection 25(1) requirement to issue a public declaration that sets out the details of each recusal. In her January 2013 report to the Ethics Committee, the Commissioner stated:

> If Recommendation 4-5 is accepted, an amendment should also be made to subsection 25(1), which currently only includes recusals, to include conflict of interest screens established pursuant to section 21.

And recommendation 4-11 of the Ethics Commissioner Report states as follows:

> RECOMMENDATION 4-11
>
> That, if Recommendation 4-5 is accepted, subsection 25(1), relating to

[51] Exhibit "B" of the Affidavit of Jennae O'Connor, at page 36 of the report, **AR, Vol. 2, Tab 5B, page 252**.

disclosures of recusals, be amended to include conflict of interest screens.[52]

85. Given the above, the Ethics Commissioner, in making her Decisions of July 12, 2016 and October 7, 2016 which allow Minister LeBlanc to violate subsection 25(1) of *the Act*, therefore, rendered a decision contrary to the *Conflict of Interest Act*, which was also beyond her jurisdiction established by the provisions of *the Act*.

[52] Exhibit "B" of the Affidavit of Jennae O'Connor, at page 40 of the report, **AR, Vol. 2, Tab 5B, page 256**.

Part 5: Order Sought

86. Based on the foregoing, the Applicant seeks the following relief:

a) That the Conflict Screen decisions relating to Dominic Leblanc be set aside in accordance with the *Conflict of Interest Act* and the reasons of this Honourable Court;
b) Costs of this Application;
c) Such further and other relief as counsel may recommend and this Honourable Court may order.

ALL OF WHICH IS SUBMITTED THIS 15th day of January 2018

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