Court File No.: A-348-17

FEDERAL COURT OF APPEAL

DEMOCRACY WATCH

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

APPLICANT'S MEMORANDUM OF FACT AND LAW

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 Decision under review in the present application is that of the Ethics Commissioner **("the Decision")** on February 2, 2016 in the form of a letter containing confidential advice that the Commissioner provided under subsection 43(b) of the *Conflict of Interest Act* (S.C. 2006, c. 9, s. 2 – the **"*COI Act*"**) to Minister of Finance William Morneau (**"Minister Morneau"**), who is a public office holder as defined in the

COI Act. The Decision allowed Minister Morneau to continue to own and control stocks in his family's company, Morneau Shepell Inc., based on the Ethics Commissioner's determination that Minister Morneau did not control the stocks.[1]

3. The Applicant takes the position that the Ethics Commissioner's Decision was a patently unreasonable refusal to exercise her jurisdiction under sections 29 and 30 of the *COI Act* to order Minister Morneau to sell the stocks he owned in Morneau Shepell Inc. or to place them in a blind trust, as required by sections 17, 20 and 27 of the *COI Act*.

4. The Ethics Commissioner's Decision to allow Minister Morneau to continue to own and control the stocks was, therefore, unlawful and a failure to exercise the Ethics Commissioner's jurisdiction properly under the *COI Act*.

5. The Federal Court of Appeal has jurisdiction under section 66 of the *COI 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 improperly exercised her jurisdiction.

Part 2: Facts

a) Public Interest Standing of Democracy Watch

6. 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

[1] Exhibit "A" to the Affidavit of Duff Conacher, affirmed December 18, 2017.

provincial laws.[2]

7. 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.[3]

8. 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;

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).[4]

[2] Conacher Affidavit, para. 14.
[3] Exhibit "F" of the Affidavit of Duff Conacher.
[4] Conacher Affidavit, para. 16.

9. 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.

10. 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.

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

b) The context and timeline of the Ethics Commissioner's Decision

12. On November 4, 2015, the day he was appointed as Minister of Finance, Minister Morneau told CBC TV: *"I suspect all my assets will go into a blind trust"* and *"I've already communicated with the Ethics Commissioner in that regard."* At the time,

his assets included 4.7 percent of the stocks of Morneau Shepell Inc., valued at more than $30 million.[5]

13. Neither Minister Morneau nor the Commissioner disclosed what exactly Minister Morneau did with the stocks he owned of Morneau Shepell Inc., and specifically neither disclosed whether the Commissioner had required him to sell the stocks or put them in a blind trust, until October 17, 2017. On that day, the Ethics Commissioner told media in general terms that she had advised Minister Morneau that he *"wasn't required"* to set up a blind trust when he was appointed as Minister of Finance.[6]

14. On October 19, 2017, Minister Morneau disclosed to the media that he owned a "million shares" in Morneau Shepell Inc. and disclosed the Commissioner's February 2, 2016 Decision letter.[7]

15. The Commissioner's Decision letter disclosed by Minister Morneau on October 19, 2017, states that he owns his shares in Morneau Shepell Inc. as follows: Minister Morneau has sole ownership of 2070689 Ontario Ltd., a holding company that holds a two-third interest of 1193536 Alberta Ltd., an investment company of which Minister Morneau holds the other one-third interest, and it is Minister Morneau's *"controlling interest in 1193536 Alberta Ltd. which holds a significant interest in Morneau Shepell Inc."* [8]

16. The Commissioner's Decision did not order Minister Morneau to divest his stocks in Morneau Shepell Inc. by selling them or placing them in a blind trust, as required by sections 17, 20 and 27 of the *COI Act*. Instead, the Commissioner's Decision ordered Minister Morneau on page 2 of the letter to establish a "conflict of

[5] Exhibit "B" of the Affidavit of Duff Conacher.
[6] Exhibit "C" of the Affidavit of Duff Conacher.
[7] Exhibit "D" of the Affidavit of Duff Conacher.
[8] Exhibit "A" of the Affidavit of Duff Conacher.

interest screen" for his stocks in Morneau Shepell Inc. There is no specific provision in the *COI Act* under which such a "screen" can be established.[9]

17. On November 16, 2017 Democracy Watch commenced the within application for judicial review of the Ethics Commissioner's Decision.[10]

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 fail to exercise her jurisdiction or make an unreasonable decision in allowing Minister Morneau to continue to own and control the stocks?

Part 4: Law and Argument

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

18. 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

[9] Exhibit "A" of the Affidavit of Duff Conacher.
[10] Notice of Application, dated November 16, 2017.

resource considerations.[11]

19. 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[.][12]

20. 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.

a) A serious justiciable issue has been raised

21. 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 the effective prevention of conflicts of interest from arising in full compliance with the requirements of the law. The Applicant submits that the *COI Act* clearly requires public office holders to divest controlled assets such as stocks and that allowing Minister Morneau to continue to own and control stocks is contrary to the *COI 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.

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

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

b) Democracy Watch has a genuine interest in the matter

22. The second branch of the test for public interest standing is to determine whether 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.[13]

23. 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."

24. 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.[14] 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.

25. Democracy Watch maintains a strong "track record" and "degree of involvement" with the subject matter of the application.[15] 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*.[16] 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

[13] *Downtown Eastside, supra* at para. 43.
[14] Conacher Affidavit, para. 15, and Exhibit F: "20 Steps toward a Modern, Working Democracy" from the website of Democracy Watch, accessed July 19, 2017.
[15] *Sierra Club, supra* at paras 54-553.
[16] Conacher Affidavit, para. 14.

advancement of accountability in democratic governance before the courts.[17]

26. 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.[18]

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

27. 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."[19] 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.[20] 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.[21]

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

[17] Conacher Affidavit, paras. 16, 18-19.
[18] *Sierra Club, supra* at paras 66-68.
[19] *Downtown Eastside, supra* at para 52.
[20] *Downtown Eastside, supra* at para. 49.
[21] *Downtown Eastside, supra* at para. 50.

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.[22]

29. 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

30. 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.[23]

31. The Applicant submits that this Honourable Court has jurisdiction to adjudicate the present application for three main reasons: a) the Ethics Commissioner's Decision to allow Minister Morneau to continue to own and control his Morneau Shepell Inc. stocks was an improper refusal to exercise her jurisdiction; b) the failure of the Ethics Commissioner to exercise her jurisdiction to order Minister Morneau to divest the stocks results in a violation of the *COI Act* by circumventing the public officer holder's duty to divest; and c) any other arrangement to avoid taking part in decisions when in a conflict of interest that is made by Minister Morneau as a public office holder does not alter the underlying unlawfulness of the Ethics Commissioner's Decision itself, which effectively failed to require Minister Morneau to comply with the legal obligation of divesting the stocks.

[22] *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**.**
[23] See for example: *Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15 (CanLII).

a) The Decision was an Improper Exercise of Jurisdiction

32. Section 29 of the *COI Act* is entitled "Compliance Measures" and the marginal note 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…"

33. The letter sent to Minister Morneau by the Ethics Commissioner's office on February 2, 2016 states on page 2 under the heading "Conflict of Interest situation and Agreed compliance measure (section 4, 7, 21, 29) the following: "Considering that you do not hold controlled assets as contemplated under section 17 of the Act a blind trust agreement is therefore not required under section 27 of the Act…" and that "…you have controlling interests in 2070689 Ontario limited which has a controlling interest in 1193536 Alberta Ltd. which holds a significant interest in Morneau Shepell Inc…."[24]

34. 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*, not to exercise her jurisdiction to order Minister Morneau to establish a blind trust or otherwise divest the significant interest he held in Morneau Shepell Inc.

Issue 3: What is the appropriate standard of review?

35. 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.[25]

36. For true questions of jurisdiction,[26] 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

[24] Exhibit "A" of the Affidavit of Duff Conacher.
[25] *Democracy Watch v. Canada (Attorney General),* [2004] 4 FC 83, 2004 FC 969 (CanLII) at para. 65.
[26] *Dunsmuir v New Brunswick*, 2008 SCC 9 ("*Dunsmuir*") at para. 59.

the decision conforms to the lawful scope of jurisdiction of the decision-maker.

a) Primary position: Error of jurisdiction

37. The Applicant argues, as its principal position, that the failure of the Ethics Commissioner to require Minister Morneau to divest the stocks was an improper failure to exercise of jurisdiction. At its core, the question to be addressed is whether or not the Ethics Commissioner may lawfully fail to order divestment under sections 17, 20, 27 and 29 of the *COI Act*. The Applicant argues that the Commissioner improperly refused to exercise her jurisdiction to order Minister Morneau to divest the stocks.

b) Alternative Argument: Reasonableness with a Single Outcome

38. In the alternative, the Applicant submits that if the Court decides that decision at issue 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 nature of the issue.[27] 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.[28] 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

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

[28] *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; and *Halifax (Regional Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29)**.** Also see: *Vavilov v Canada*, 2017 FCA 132 at para. 72.

> necessarily be limited to a single reasonable interpretation — and the administrative decision maker must adopt it.[29]

39. 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.[30]

40. 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 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.[31]

41. 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 4: The Ethics Commissioner failed to exercise her jurisdiction or made an unreasonable decision in allowing Minister Morneau to continue to own and control the stocks

[29] *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para. 38.
[30] *Gitxaala Nation v Canada*, [2016] 4 FCR 418, 2016 FCA 187 at para. 146.
[31] *Wilson, supra* at paras 78-89, citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para. 90.

42. The Applicant submits that the Ethics Commissioner's Decision to allow Minister Morneau to continue to own and control the stocks in Morneau Shepell Inc. constitutes an unreasonable decision and a failure to exercise her jurisdiction under the *COI Act*. The Applicant's position is supported by reference to the following: a) the statutory scheme and purpose of the *COI Act*; and b) the statutory interpretation that precludes section 29 compliance measures from circumventing the requirements of sections 17, 20 and 27 in the *Act*.

43. The pith of the current application relates to whether the Ethics Commissioner has the authority to fail to exercise her jurisdiction to order divestment as required under the *COI 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 will prevail. If the Ethics Commissioner does not have the authority and failed to exercise her jurisdiction to order Minister Morneau to divest the Morneau Shepell Inc. stocks, then her Decision must be set aside.

44. It is trite law that statutory provisions are to be interpreted in accordance with their text, context, and purpose. As recently noted by the Federal Court of Appeal in *Vavilov*, the need to take into account the purpose of statutory provisions is made especially important by section 12 of the *Interpretation Act*, which provides that "a statutory provision shall be given such fair, large, and liberal construction and interpretation as best ensures the attainment of its objects."[32]

[32] *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at paras 41-42.

a) The *Act* clearly requires divestment of all controlled assets, including Minister Morneau's controlled assets

45. Section 17 of the *COI Act* prohibits public office holders such as Minister Morneau from holding controlled assets except as provided in Part 2 of the *COI Act*. Part 2 includes section 20 which defines "controlled assets" as "including, but not limited to" things like "publicly traded securities of corporations…such as, but not limited to, stocks…" Part 2 also includes subsection 27(1) which requires a reporting public office holder (such as Minister Morneau) to, within 120 days of their appointment, to divest each of their controlled assets by either "(a) selling it in an arm's-length transaction" or "(b) placing it in a blind trust…"

46. The plain meaning, and clear purpose and intent, of sections 17 and 20, and subsection 27(1) of the *COI Act* are that public office holders are required to divest controlled assets.

47. In March 2011, the Ethics Commissioner posted a "Guideline" entitled "Controlled Assets" on the Commissioner's website, and the Guideline states on the last page that it was "modified" on April 7, 2015 (although it does not clarify how it was modified).[33]

48. The first page of the Ethics Commissioner's Guideline summarizes section 17 of the *COI Act* (which states that reporting public office holders such as Minister Morneau are not allowed to "hold controlled assets"). Under the heading **"**What do I do if I have controlled assets?" on the third page of the Guideline it also summarizes the requirements in subsection 27 of the *COI Act* for divesting controlled assets by selling them or placing them in a blind trust.[34]

49. Under the heading "What assets are controlled assets?" on the first page of the Guideline it quotes and summarizes section 20 of the *COI Act* which defines the term

[33] Exhibit "E" of the Affidavit of Duff Conacher.
[34] *Ibid.*

“controlled assets” as a list of assets “whose value could be directly or indirectly affected by government decisions or policy including, but not limited to, the following:…” and what follows is a list that includes publicly traded securities and stocks such as Minister Morneau owned in Morneau Shepell Inc. when he was appointed as Minister of Finance.[35]

50. At the end of that section, the Ethics Commissioner’s Guideline states: “This list is not exhaustive—controlled assets also include other similar investment products. Briefly, any financial instrument that is traded on any stock exchange or over the counter is considered a controlled asset.”[36]

51. Subsection 1(3) of Ontario’s *Securities Act* (R.S.O. 1990, c. S-5) defines "controlled companies" as follows:

> “1(3) A company shall be deemed to be controlled by another person or company or by two or more companies if,
>
> (a) voting securities of the first-mentioned company carrying more than 50 per cent of the votes for the election of directors are held, otherwise than by way of security only, by or for the benefit of the other person or company or by or for the benefit of the other companies; and
>
> (b) the votes carried by such securities are entitled, if exercised, to elect a majority of the board of directors of the first-mentioned company.”

52. Subsection 1(5) of Ontario’s *Business Corporations Act* (R.S.O. 1990, c. B-16) defines “control” in almost exactly the same words as the above subsection 1(3) of Ontario’s *Securities Act*.

53. Subsection 2(3) of the *Canada Business Corporations Act* (R.S.C., 1985, c. C-44) defines “control” in almost exactly the same words as the above subsection 1(3) of Ontario’s *Securities Act*.

54. Subsection 2(2) of Alberta’s *Business Corporations Act* (R.S.C., 1985, c. C-44) defines a body corporate as being controlled by a person in almost exactly the same

[35] *Ibid*.
[36] *Ibid*.

words as the above subsection 1(3) of Ontario's *Securities Act*.

55. The case law clearly upholds these clear rules in the above statutes – a person controls a corporation, and securities held by the corporation, when the person holds more than 50 percent of the securities and votes for the board of directors of the corporation, as Minister Morneau did in the situation addressed in the Ethics Commissioner's Decision.[37]

b) The Ethics Commissioner's Decision improperly and unreasonably failed to exercise her jurisdiction to require divestment of Minister Morneau's controlled assets

56. As summarized in section (a) above, the definition of "controlled asset" set out in the *COI Act*, and every relevant statute, in all case law, and even in the Ethics Commissioner's own March 2011 Guideline, clearly and directly covers the type of asset Minister Morneau owned and controlled – namely his stocks in Morneau Shepell Inc.

57. Even the letter sent by the Ethics Commissioner's office to Minister Morneau on February 2, 2016 states on page 2 that "…you have controlling interests in 2070689 Ontario limited which has a controlling interest in 1193536 Alberta Ltd. which holds a significant interest in Morneau Shepell Inc…."[38]

58. As summarized above in section (a), sections 17, 20, and subsection 27(1), of the *COI Act*, and the Ethics Commissioner's own Guideline, clearly require divestment of controlled assets.

59. Section 29 of the *COI Act* states that the Ethics Commissioner "shall determine the appropriate measures by which a public office holder shall comply with this Act." Section 30 of the *COI Act* states that:

[37] *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 SCR 795, 1998 CanLII 827 (SCC); *Lyrtech RD Inc. v. Canada*, 2014 FCA 267 (CanLII), and; *McGillivray Restaurant Ltd. v. Canada*, [2017] 1 FCR 209, 2016 FCA 99 (CanLII).
[38] Exhibit "A" of the Affidavit of Duff Conacher.

> "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."

60. The Ethics Commissioner's Decision, exercised under her section 29 and 30 of the *COI Act*, did not require Minister Morneau to comply with the specific compliance measures set out in sections 17 and 20, and subsection 27(1). Specifically, the Decision did not require Minister Morneau to sell his stocks in Morneau Shepell Inc. or to place them in a blind trust, as required by section 20 and subsection 27(1). The letter sent to Minister Morneau by the Ethics Commissioner's office on February 2, 2016 states on page 2 under the heading "Conflict of Interest situation and Agreed compliance measure (section 4, 7, 21, 29)" the following:

> "Considering that you do not hold controlled assets as contemplated under section 17 of the Act a blind trust agreement is therefore not required under section 27 of the Act…"[39]

61. Instead, the Ethics Commissioner's Decision ordered Minister Morneau to establish a "conflict of interest screen" for his stocks in Morneau Shepell Inc. There is no specific provision in the *COI Act* under which such a "screen" can be established.

62. Therefore, the Ethics Commissioner's Decision to allow Minister Morneau to continue to own and control his stocks in Morneau Shepell violates the statutory requirement in the *COI Act* that all controlled assets, including stocks, be divested.

63. Therefore, Ethics Commissioner's Decision improperly and unreasonably failed to exercise her jurisdiction to require divestment of Minister Morneau's controlled assets.

[39] *Ibid*.

Part 5: Order Sought

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

a) An order quashing the Decision, in accordance with the Directions of this 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 RESPECTFULLY SUBMITTED

DATED AT OTTAWA THIS 29th day of March, 2018

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