Federal Court of Appeal | Cour d'appel fédérale

Date: 20181026

Dockets: A-287-16
A-424-16

Citation: 2018 FCA 194

CORAM: **RENNIE J.A.**
DE MONTIGNY J.A.
LASKIN J.A.

BETWEEN:

DEMOCRACY WATCH

Applicant

and

ATTORNEY GENERAL OF CANADA AND DOMINIC LEBLANC

Respondents

and

CONFLICT OF INTEREST AND ETHICS COMMISSIONER

Intervener

Heard at Ottawa, Ontario, on September 6, 2018.

Judgment delivered at Ottawa, Ontario, on October 26, 2018.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: RENNIE J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] At issue before this Court in this application for judicial review is the authority of the Conflict of Interest and Ethics Commissioner (Commissioner) to determine whether a conflict of interest screen is an appropriate compliance measure under section 29 of the *Conflict of Interest Act*, S.C. 2006, c. 9 (the Act). The applicant challenges two Public Declarations of Agreed Compliance Measures, which it characterizes as compliance orders issued by the Commissioner, whereby Mr. Dominic LeBlanc followed his agreement with the Commissioner and put in place conflict of interest screens to avoid any involvement in matters that could result in a conflict of interest.

[2] For the reasons that follow, I would dismiss this application. Even assuming that the Commissioner's determinations underpinning the impugned conflict of interest screens can be considered as reviewable decisions, I believe that they are a reasonable exercise of her authority pursuant to section 29 of the Act.

I. Legislative framework and factual background

[3] The prevention of conflicts of interest is central to the Act. This is made clear in section 3 of the Act, according to which its purpose notably includes to:

(b) minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise;	b) de réduire au minimum les possibilités de conflit entre les intérêts personnels des titulaires de charge publique et leurs fonctions officielles, et de prévoir les moyens de régler de tels conflits, le cas échéant, dans l'intérêt public;

(c) provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred;	c) de donner au commissaire aux conflits d'intérêts et à l'éthique le mandat de déterminer les mesures nécessaires à prendre pour éviter les conflits d'intérêts et de décider s'il y a eu contravention à la présente loi;
[Emphasis added.]	[Soulignement ajouté.]

[4] A conflict of interest is defined, at section 4 of the Act, as a situation when the public office holder "exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests". Public office holders have, according to section 5, a duty to "arrange [their] private affairs" so as to avoid finding themselves in a conflict. They are also prevented, under subsection 6(1) of the Act, from making decisions related to their official function if they know "or reasonably should know" that, in so doing, they "would be in a conflict of interest".

[5] The duty of public officials to recuse themselves in cases of conflict of interest is found at section 21 of the Act:

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.	21 Le titulaire de charge publique doit se récuser concernant une discussion, une décision, un débat ou un vote, à l'égard de toute question qui pourrait le placer en situation de conflit d'intérêts.

[6] With this duty comes the obligation to publicly declare the recusal. Pursuant to subsection 25(1) of the Act, a public office holder who has recused himself or herself shall publicly declare such recusal with "sufficient detail to identify the conflict of interest that was

avoided". These public declarations are kept in a registry maintained by the Commissioner for examination by the public (paragraph 51(1)(a) of the Act).

[7] The Commissioner advises public office holders on how to comply with the Act, and ensures compliance through a number of administrative and enforcement tools. Part 2 of the Act provides a range of compliance measures, some of which are specifically enumerated (*e.g.* at sections 21 and 27), as well as a broad power for the Commissioner, found in section 29 of the Act, to determine appropriate compliance measures:

Determination of appropriate measures	**Détermination des mesures pertinentes**
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.	29. Le commissaire détermine, avant qu'elle ne soit définitive, la mesure à appliquer pour que le titulaire de charge publique se conforme aux mesures énoncées dans la présente loi, et tente d'en arriver à un accord avec le titulaire de charge publique à ce sujet.

[8] Finally, section 30 of the Act holds that the Commissioner may, in addition to the specific compliance measures authorized by the Act, "order a public office holder, in respect of any matter, to take any compliance measure… that the Commissioner determines is necessary to comply with this Act". An example of the Commissioner's use of section 30 compliance orders is provided in the Commissioner's *2012-2013 Annual Report to Parliament*. Having learned that a minister and two parliamentary secretaries had written letters of support to the Canadian Radio-Television and Telecommunications Commission on behalf of constituents seeking broadcasting licences, the Commissioner made compliance orders to prohibit them from writing any similar

letters in the future without the Commissioner's prior approval (Application Record, Vol. 2, at pp. 303-304).

[9] The relevant facts in the case at bar can be summarized as follows. On November 4, 2015, Mr. LeBlanc was appointed Leader of the Government in the House of Commons. It appears that as part of their preliminary consultations, the Commissioner determined and Mr. LeBlanc agreed that a voluntary screen was an appropriate measure under section 29 by which he could comply with the Act by preventing conflicts of interest. I use the phrase "it appears that" because the record before us is limited, and does not include documentation of any communications between the Commissioner and Mr. LeBlanc leading up to Mr. LeBlanc's agreement. On January 27, 2016, a public declaration was posted on the Commissioner's electronic public registry, announcing that a conflict of interest screen had been established by Mr. LeBlanc, in accordance with the Commissioner's determination, to help him comply with his obligation not to participate in any matters or decisions relating to his friend, James D. Irving, or any company he may have owned. The screen was administered by Mr. LeBlanc's chief of staff (Public Declaration of Agreed Compliance Measures, January 27, 2016, Application Record, Vol. 2, at pp. 315-316).

[10] On May 31, 2016, Mr. LeBlanc assumed, in addition to his prior responsibilities as House Leader, the role of Minister of Fisheries, Oceans and the Canadian Coast Guard (Minister of Fisheries). On July 12, 2016, Mr. LeBlanc signed an updated public declaration relating to his screen, which update was also posted on the Commissioner's public registry. The update reflected the addition of his new ministerial title, as well as the fact that his two chiefs of staff (as

House Leader and Minister of Fisheries) would, from that point forward, administer the screen (Public Declaration of Agreed Compliance Measures, July 12, 2016, Application Record, Vol. 2, at pp. 319-320).

[11] In July 2016, the applicant served on the Commissioner a Notice of Application for Judicial Review seeking an order to quash the Commissioner's "compliance order" of July 12, 2016.

[12] On October 7, 2016, Mr. LeBlanc signed an updated public declaration relating to his screen. This update reflected another change to his ministerial title, having stepped down from his House Leader role but remaining as Minister of Fisheries. It replaced the declaration of July 12 (Public Declaration of Agreed Compliance Measures, October 7, 2016, Application Record, Vol. 2, at pp. 317-318).

[13] On November 7, 2016, a second application for judicial review was filed, this time in respect of the October 7 "compliance order". This application raised the same issues and was based on the same grounds as the first application. As a result, the two files were consolidated by Order of Chief Justice Noël, and continued under A-287-16 as the lead file (the other file being A-424-16). By the same Order, the Commissioner was also granted intervener status, and was replaced, as respondent, by the Attorney General of Canada and Mr. LeBlanc (Application Record, Vol. 1, at p. 18).

II. Issues

[14] The only substantive issue to be decided in this case is whether the Commissioner failed to exercise her jurisdiction or made an unreasonable decision in determining that screens were an appropriate compliance measure to prevent conflicts of interest. Before turning to that issue, however, I must deal with two preliminary matters raised by counsel for the respondents, namely whether the applicant has standing to raise the substantive issue and whether this Court is seized with a reviewable matter. These preliminary issues were also raised in a companion case in which judgment is also being delivered today (*Democracy Watch v. Canada (Attorney General)*, 2018 FCA 195). The applications in the two cases were heard one after the other by the same panel of the Court.

III. Analysis

A. *Preliminary matters*

(1) Standing

[15] It is beyond dispute that the applicant is not directly affected by the issues raised in its application. The question for the Court, therefore, is whether it should exercise its judicial discretion to grant public interest standing to the applicant. The interrelated factors to be considered in answering that question are well-known, and have been summarized by the Supreme Court in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524 at para. 37 (*Downtown Eastside Sex Workers*):

> 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. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred. [References omitted.]

[16] A justiciable issue for this purpose is an issue of a kind that is appropriate for judicial determination (*Downtown Eastside Sex Workers* at para. 30).

[17] Counsel for the respondents submits that the applicant fails on the first and third branches of the public interest standing test. The application allegedly does not raise a justiciable issue, insofar as it concerns Parliament's own means of holding the government to account. Relying on *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49 and *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, the respondents argue that the Court should not overstep the bounds of its constitutional role when deciding whether to grant public interest standing. Moreover, the respondents claim that the present application is not a reasonable and effective way to raise the issue, as it relates to a non-adversarial process between the Commissioner and public office holders to reach agreement on compliance measures, thereby not resulting in a "decision" or "order". Equally relevant is the fact that section 44 of the Act provides another review mechanism, allowing parliamentarians who have reasonable grounds to believe a public office holder has contravened the Act to request that the Commissioner examine the matter.

[18] There is no doubt in my mind that the issues raised by the applicant are serious. Specifically, the question raised in regard to the reasonableness of the Commissioner's interpretation of section 29 of the Act constitutes an important question that is far from frivolous. The same is true of the question of whether or not the establishment of a conflict screen circumvents the requirement, pursuant to section 25, to report each recusal arising due to a conflict of interest. These issues are also clearly justiciable, for the purpose of assessing public interest standing, as they concern the correct interpretation to be given to provisions of the Act. The Court is not called upon to play the role of an arbiter between various branches of government, but to ensure that a parliamentary servant does not stray beyond its proper legislative mandate. This is clearly and eminently a judicial function.

[19] The respondents do not contest, and rightly so, the genuine interest of the applicant in the matter. Indeed, I am satisfied by the evidence on file that the applicant has demonstrated a real and continuing engagement with the issues it seeks to raise, and more generally with questions of democratic reform and ethical behaviour in government (see Affidavit of Duff Conacher, Application Record, Vol. 1, at pp. 25-26; Democracy Watch's "20 Steps" Mandate, Application Record, Vol. 1, at p. 211). Accordingly, I am of the view that this second factor favours granting public interest standing.

[20] As for the third factor of the public interest standing analysis, the Supreme Court has cautioned against a rigid approach in *Downtown Eastside Sex Workers,* and relaxed the previous requirement that there be "no other reasonable and effective manner" (emphasis in original) by which the issue may be brought before the Court. Instead, the Court referred to the third factor as

requiring consideration of whether the proposed suit is "a reasonable and effective means to bring the challenge to court" (at para. 44). Among the considerations that can be taken into account, the Court proposed the following:

> …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…
>
> (*Downtown Eastside Sex Workers* at para. 50.)

[21] In this case, it is clear that the applicant has the resources and expertise to bring the issue forward and that, subject to the issue of reviewability discussed below, the issue has been presented in a context sufficient to allow for judicial determination. It is also clear that, even if it is the public office holders who are directly affected by the conflict of interest screens, it is unlikely that they will challenge them in court; in any event, it can also be said that the applicant brings a useful and distinctive perspective to the resolution of the issue before us.

[22] Finally, I am not convinced by the respondents' claim that the review mechanisms provided for by sections 44 and 45 of the Act constitute a more effective means by which the issues at hand could be raised. Admittedly, information from the public "may" be considered, under subsection 44(4) of the Act, by the Commissioner conducting an examination. But, as the text of the provision makes clear, this information from the public has to be brought to the attention of the Commissioner by a Member of Parliament. Moreover, for a compliance examination pursuant to these provisions to be commenced in the first place, it is necessary for a parliamentarian to make a request to that effect (subsection 44(1) of the Act), or for the Commissioner to do it on his or her own initiative (subsection 45(1) of the Act). No direct

mechanism exists for a member of the public to request an investigation into such issues, as this Court made explicitly clear in *Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15 at para. 11, leave to appeal to SCC denied, 33086 (June 11, 2009) (*Democracy Watch, 2009*).

[23] For all of the above reasons, I am of the view that the three factors that have to be weighed in exercising the discretion whether to grant public interest standing favour the applicant.

(2) Reviewable matter

[24] Paragraph 28(1)(b.1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7, recognizes the jurisdiction of this Court to hear applications for judicial review made in respect of the Commissioner. The privative clause of section 66 of the Act serves as an indication that deference is due to the Commissioner's determinations, in holding that a decision or order from her is reviewable only if the Commissioner (i) acted without jurisdiction, acted beyond his or her jurisdiction or refused to exercise his or her jurisdiction; (ii) failed to observe a principle of natural justice or procedural fairness; or (iii) acted or failed to act by reason of fraud (*Federal Courts Act*, paragraphs 18.1(4)(a), (b) and (e)).

[25] Counsel for the respondents, supported by the intervener, submits that there is no legally binding decision or order to be reviewed within the meaning of section 66 of the Act and subsection 18.1(3) of the *Federal Courts Act*. More specifically, argue the respondents, the Commissioner's determination under section 29 of the Act that certain compliance measures are

appropriate does not constitute an order with binding legal consequences, as would a compliance order made under section 30 of the Act.

[26] The text of section 29 and its statutory context certainly provide some support for this submission. In section 29, Parliament has not used the verb "[to] order" as in section 30 of the Act, or even the verb "[to] decide", but has instead used the verb "[to] determine". Parliament has also referred, in section 29 *in fine*, to the duty of the Commissioner to "try to achieve an agreement with the public office holder", language that seems to indicate the preventive and voluntary nature of section 29 measures. As suggested by the respondents, the text of section 29 "allows for the process of attempting to achieve an agreement with a public office holder on measures they will voluntarily implement to ensure compliance" (Respondents' Memorandum, p. 15, at para. 42). Indeed, the Commissioner refers to conflict of interest screens as "arrangements" in her *2013-2014 Annual Report*, an excerpt of which is reproduced in the two impugned Public Declarations of Agreed Compliance Measures.

[27] The Commissioner's power to make compliance orders under section 30 of the Act was not engaged, insofar as an agreement was reached with Mr. LeBlanc pursuant to section 29. As the Commissioner herself made clear in her Submission to the Standing Committee on Access to Information, Privacy and Ethics dated January 30, 2013, compliance orders under section 30 of the Act are used "in circumstances in which it is not possible to reach an agreement with a public office holder on a compliance measure, where I have reason to believe that a public office holder is not adhering to the terms of a compliance measure that has been put in place, or more generally, when a public office holder is uncooperative in establishing an appropriate compliance

measure" (The *Conflict of Interest Act*: Five-Year Review, Application Record, Vol. 2, at p. 261).

[28] In *Democracy Watch, 2009*, this Court considered an application for judicial review brought by the same applicant, against a letter of the Commissioner explaining that she did not have sufficient grounds to begin an examination pursuant to subsection 45(1) of the Act. The Court found, on a preliminary basis, that the letter in question was "not judicially reviewable" because no order or decision had been rendered (*Democracy Watch, 2009* at para. 9). The Court also held that the applicant had "no statutory right to have its complaint investigated by the Commissioner", nor did the Commissioner have a statutory duty to act on it (*Democracy Watch, 2009* at para. 11). Furthermore, the Court was of the view that the Commissioner had not made any statements in her letter which could have binding legal effects (*Democracy Watch, 2009* at para. 12). The Supreme Court dismissed the application for leave to appeal from this judgment.

[29] From that point forward, the ruling of this Court in *Democracy Watch, 2009* has been used in support of the idea that "an application for judicial review cannot be brought where the conduct attacked in the application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects" (*Sganos v. Canada (Attorney General)*, 2018 FCA 84 at para. 6; See also *Air Canada v. Toronto Port Authority et al.*, 2011 FCA 347, [2013] 3 F.C.R. 605 at para. 29). The applicant tries to distinguish the case at bar from *Democracy Watch, 2009* on the basis that the Commissioner is required to make a decision under section 29 of the Act, whereas the Commissioner has no obligation to commence an investigation upon a request from the public. But the fact that a determination has to be made does not necessarily translate into a

reviewable order or decision, or give the Commissioner's determination under section 29 that certain compliance measures are appropriate binding legal consequences. It is hard, in light of the record, to see what prejudicial effect, if any, the Commissioner's determination would have on the public office holder. It is unclear, for example, whether the decision of the public office holder not to follow this determination would necessarily lead the Commissioner to make an order under section 30 of the Act. There is therefore some merit to the position that, at best, the Commissioner's advice can be characterized as a non-binding opinion, or a suggested course of action.

[30] In support of its argument that there is a reviewable matter here, counsel for the applicant also submits that the conflict of interest screens result in a violation of the Act by circumventing the public office holder's duty to report, pursuant to subsection 25(1) of the Act. That argument is premised on the notion that conflict of interest screens and recusals are for all intents and purposes the same process, as the words of the screen statement regarding when and why Mr. 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 are essentially the same. Therefore, it is argued, the screen directly interferes with the statutory requirement to make a public declaration of the recusal with sufficient detail to identify the conflict that was avoided.

[31] In my view, this argument is mistaken. First of all, I fail to see how this reasoning, even if true, would make the matter reviewable; it goes to the substantive merit of the application, not to the preliminary objection that the Commissioner's determination is not properly before this Court. More importantly, it completely misses the purpose of conflict of interest screens.

Compliance measures such as conflict of interest screens are proactive in nature, designed to prevent conflicts of interest before they occur, allowing the public office holder not to be placed in a situation where he/she may have to recuse himself/herself. They are not meant to avoid the reporting obligation set out in section 25 of the Act, but to ensure that the public office holder will not have to recuse himself or herself from a discussion, decision, debate or vote at the last minute. As the Commissioner stated in a Backgrounder:

> Despite the Act's requirement that recusals by reporting public office holders be made public, it has been noted that the public registry contains few recusal notices. This is because in most cases the establishment of conflict of interest screens eliminates the likelihood of a situation arising that would require recusal.
>
> *Conflict of Interest Screens*. The Office helps public office holders make formal arrangements in advance in order to avoid dealing with files that pose a real or potential conflict of interest. If a conflict of interest screen is in place, files that pose a potential conflict of interest are not brought to the public office holder's attention and therefore no recusal is required.
>
> (*Conflict of Interest Screens and other Compliance Measures*, Application Record, Vol. 2, at p. 242.)

[32] Public declarations of agreed compliance measures are signed by the public office holders themselves. On the contrary, a compliance order under section 30 of the Act is issued by the Commissioner. Conflict of interest screens are not meant to replace the obligation on public office holders to recuse themselves in any situation where it might become necessary pursuant to section 21 of the Act, nor do they interfere with the Commissioner's power to order a compliance measure under section 30 of the Act and to probe the conduct of public office holders should they contravene their obligations under the Act.

[33] Despite the apparent strength of the argument that a "determination" under section 29 does not constitute an "order or decision" subject to judicial review, there are also textual and

contextual arguments that support the position that a determination under section 29 is a "decision", if not an "order". One of the ordinary meanings of "[to] determine" is "[to] decide". Section 29 uses mandatory language in providing that the Commissioner "shall determine the appropriate measures by which a public office holder shall comply" (emphasis added). This is consistent with the mandate given the Commissioner by paragraph 3(c) of the Act "to determine the measures necessary to avoid conflicts of interest".

[34] There is also an argument to be made that section 29 should not be read in isolation and disconnected from section 30. One could argue that these two sections should be interpreted as a continuum, the Commissioner's determination of the appropriate measures operating, so to speak, as the "carrot" inducing the office holder's agreement, and the compliance orders, if there is no agreement, as the "stick". Viewed in that light, the measures determined by the Commissioner such as public interest screens could well be viewed as having indirect consequences and prejudicial effects on a public office holder were he or she not to follow up with these measures.

[35] The applicant submitted that this case can be distinguished from *Democracy Watch, 2009*, to the extent that in the case at bar, the Commissioner made a determination instead of merely declining to act. In that previous case, the Commissioner's refusal to conduct an investigation was based on her determination, pursuant to subsection 45(1) of the Act, that she did not have sufficient "reason[s] to believe that a public office holder or former public office holder has contravened this Act…". This is why this Court wrote, at paragraph [2] of that decision, that "the Commissioner found that she did not have sufficient grounds to begin an

examination" (emphasis added). In this respect, it can be argued that in *Democracy Watch, 2009*, the Commissioner made as much of a determination as she does here.

[36] The arguments in favour of reviewability would be more compelling if there was anything in the record that would give them an air of reality. However, there is no evidence in the record specifying the determination made by the Commissioner, and there is certainly nothing in writing from the Commissioner suggesting that her determination will be followed by an order if she cannot come to an agreement with the public office holder. Indeed, there is no record of the Commissioner's determination, and it appears that the discussion between the Commissioner and Mr. LeBlanc were confidential. Accordingly, I remain hard-pressed to find any reviewable decision or order that could be the subject of judicial review.

[37] However, I do not believe it necessary to finally decide this issue. In part because there have now been a number of conflict of interest screens put in place, I believe it appropriate to proceed to consider the substantive issue. Even if the Commissioner could be said to have made a reviewable decision, I believe the Commissioner's interpretation and application of the Act, on the basis of which the screens have been set up, are reasonable. I would therefore dismiss the application regardless of my conclusion on reviewability.

B. *Did the Commissioner fail to exercise her jurisdiction or make an unreasonable decision?*

[38] Contrary to the applicant's submission, this application does not raise any true question of jurisdiction that would attract correctness review. Questions of jurisdiction, to borrow from

the language of the Supreme Court, "are narrow and will be exceptional" (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 39 (*Alberta Teachers' Association*)). I agree with my colleague Justice Stratas that questions of legislative interpretation of an administrative decision-maker's home statute, which call for reasonableness review, are often incorrectly labelled by the parties as "jurisdictional". As he stated:

> … the issue whether an administrative tribunal is inside or outside the "jurisdictional" fences set up by Parliament is really an issue of where those fences are – in other words, an interpretation of what the legislation says about what the administrative decision-maker can or cannot do.
>
> (*Canadian Copyright Licensing Agency v. Canada*, 2018 FCA 58 at para. 58 (Justice Stratas, concurring reasons); See also, more generally on jurisdictional questions, *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174 at paras. 38-68 (Justice Rennie, dissenting on another issue); *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at paras. 31-38; *West Fraser Mills Ltd. v. British Columbia Compensation Appeal Tribunal*, 2018 SCC 22 at paras. 9-12.)

[39] Where an administrative body is interpreting its home statute or statutes closely connected to its function, the reasonableness standard of review presumptively applies (*Alberta Teachers' Association* at para. 30). I see no reason to detract from this jurisprudence, especially in light of the strong privative clause at section 66 of the Act. Pursuant to that clause, questions of law, of mixed fact and law, and of fact are not reviewable. That kind of language has been interpreted as a strong indicator that deference is in order and that the standard of reasonableness should apply. As the Supreme Court stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 52:

> The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference

> by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction. [Emphasis added.]
>
> See also: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 at para. 104; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 42; Donald J.M. Brown and John M. Evans, *Judicial review of administrative action in Canada*, 2nd ed. (Toronto: Cavasback, 2018), at 13:5280; Sara Blake, *Administrative law in Canada*, (Markham, Ont.: LexisNexis Canada, 2011), 5th ed., at 8.13.

[40] I also note that a number of recent decisions from this Court have implicitly followed a similar reasoning with respect to subsection 31(4) of the *Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365, which enacts a privative clause similarly worded to section 66 of the Act (see *Bahniuk v. Canada (Attorney General)*, 2016 FCA 127 at para. 14; *Canada c. Féthière*, 2017 CAF 66 at para. 15; *MacFarlane v. Day & Ross Inc.*, 2014 FCA 199 at para. 3). I shall therefore examine the Commissioner's interpretation and application of her home statute with respect to the use of conflict of interest screens under the reasonableness standard.

[41] Counsel for the applicant submits that 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. By allowing public office holders not to issue the required public declaration detailing each of those situations, the applicant argues, the

screens deny the public's right to know the details of each situation where Mr. LeBlanc has actually recused himself.

[42] In my view, this argument is untenable. It mischaracterizes conflict of interest screens and mistakenly assimilates them to recusals, it ignores the intent and spirit of the Act as well as the broad language of section 29, and it leads to potentially insurmountable challenges of implementation.

[43] Screens are meant to prevent conflicts of interest from actually arising, by identifying in advance the potential for conflict and establishing means to avoid it. In other words, the purpose of the screens is to divert away the potential conflicts before they are brought to the public office holder's attention. As a result, the public office holder is never even aware of the matter. In that respect, it is helpful to quote the Commissioner herself in order to grasp her own understanding of that mechanism:

> Ms. Mary Dawson: …Basically, the screens are put in place so that information doesn't get to the person who has the screen. In other words, a decision-making situation doesn't penetrate the screen. Someone is designated to enforce the screen. There is no recusal involved because no information has gone through. If something penetrates the screen by accident, then they would have to recuse.
>
> …[T]he whole purpose of those screens is to prevent a conflict of interest [from] happening. It doesn't negate the recusal system at all, if necessary. Sometimes it may be a surprise that something comes up. You wouldn't have foreseen it, and then you'd have a recusal.
>
> (Standing Committee on Access to Information Privacy and Ethics, October 27, 2016, Application Record, Vol. 2, at p. 471.)

[44] Accordingly, conflict of interest screens and recusals serve two very different yet complementary purposes: one is to prevent a situation of conflict of interest from arising in the

first place, the other is to ensure that if and when a conflict of interest does materialize, the public office holder does not take part in the decision-making process or discussion. Indeed, conflict of interest screens do not dispense with recusals altogether. There may well be situations where the screen fails to catch a potential conflict of interest, or where the matter is not subject to a screen. In such a case, a public office holder's section 21 obligation to recuse would be engaged and he or she would be required to report the recusal under section 25, as occurred with Mr. LeBlanc in one instance (see Public Declaration of Recusal, July 11, 2016, Application Record, Vol. 2, at p. 321).

[45] It seems to me that such a measure is entirely compatible with the intent and spirit of the Act. After all, the central purpose of the Act is to "minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise" (paragraph 3(b) of the Act; emphasis added), and to "provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred…" (paragraph 3(c) of the Act; emphasis added). Moreover, section 5 of the Act provides that public office holders are to "arrange [their] private affairs in a manner that will prevent" conflicts of interest.

[46] Conflict of interest screens also clearly fall within the ambit of the broad language found in section 29 of the Act. That provision empowers the Commissioner to "determine the appropriate measures" by which a public office holder is to comply with the Act. That language signals a large discretion vested with the Commissioner when fashioning the tools best suited to

ensure compliance with the Act. Courts must be weary to sterilize the powers conferred by the legislature upon administrative decision-makers "through overly technical interpretations of enabling statutes" (*Bell Canada v. Canada*, [1989] 1 S.C.R. 1722 at p. 1756). While the Act does not expressly grant to the Commissioner the power to create conflict of interest screens as appropriate compliance measures under section 29, they must be deduced from the wording of the Act by necessary implication (see *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at paras. 35-38; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 at paras. 60 and 68; *R v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 at paras. 81-82). This is in keeping with subsection 31(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which holds that:

31(2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.	31(2) Le pouvoir donné à quiconque, notamment à un agent ou fonctionnaire, de prendre des mesures ou de les faire exécuter comporte les pouvoirs nécessaires à l'exercice de celui-ci.

[47] Counsel for the applicant also contended that if the Commissioner already possessed that power, there would have been no need for her to recommend, before the Standing Committee of Access to Information, Privacy and Ethics, that her authority to establish screens be made explicit in the Act. Advocating for more clarity is no proof that the power is not already granted under section 29.

[48] Likewise, it seems reasonable to say that the transparency and public accountability purposes of subsection 25(1) of the Act are also furthered by the Commissioner's practice of

finding that the establishment of public conflict screens is an appropriate compliance measure. Relying on paragraph 51(1)(e) of the Act, which authorizes the Commissioner to include in the public registry any documents that he or she considers appropriate, it appears that every conflict of interest screen currently in place have been publicized in this way. This practice of publicly identifying the potential conflicts of interest of each public office holder before any problematic situation has occurred strikes me as an eminently reasonable way to ensure the furtherance of the Act's purpose, which is to be preferred to the overly technical interpretation proposed by the applicant. As pointed out by the respondents, the publication of conflict of interest screens may well end up providing more information to the public than the publication of recusals. Pursuant to paragraph 51(2)(a) of the Act, no publication of the declaration of a recusal can be made if the very fact of the recusal could reveal directly or indirectly a cabinet confidence. Similarly, paragraph 51(2)(b) of the Act is to the effect that no publication of recusal could contain any detail that could directly or indirectly reveal a cabinet confidence or other privileges, or that could injure privacy or commercial interests.

[49] Finally, I also agree with the respondents that public office holders would be put in the impossible position of having to report in sufficient detail on matters and meetings they do not even know about if, as the applicant contends, sections 21 and 25 of the Act were engaged even for matters screened out by a conflict of interest screen. In the alternative, the public office holder would need to be made aware, with sufficient detail, of all matters diverted to another decision-maker by the screen and of all meetings where he or she is not scheduled to attend, in order to address the requirements of section 25. Such a course of action would negate the

benefits of the screens, which once again are put in place to prevent situations of conflict of interest.

IV. Conclusion

[50] For all the above reasons, I am therefore of the view that this application for judicial review should be dismissed. No costs are warranted in the special circumstances of this case.

"Yves de Montigny"
J.A.

"I agree
Donald J. Rennie J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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