RICK DYKSTRA REVIEW

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PART ONE: EXECUTIVE SUMMARY

I was retained by the Conservative Party of Canada (the "Party") through its lawful agent, Conservative Fund Canada, to conduct an independent, third party review of the response of the Party's 2015 Campaign Team (the "Campaign Team") to sexual assault allegations against then incumbent Member of Parliament ("MP") and Conservative Party candidate Rick Dykstra during the period of August 1 to October 17, 2015 (the "Review"). This Review was not intended to address the merits of the allegations against Mr. Dykstra or to assign blame against any individual involved in the handling of the allegations against Mr. Dykstra. Rather, the primary purpose of the Review is to obtain information to aid the Party in appropriately responding to similar circumstances in the future.

The relevant facts are largely undisputed. Even before my retainer, Stephen Harper, then Prime Minister and Leader of the Party, publicly stated that it was his decision to continue Mr. Dykstra's candidacy. The decision was made without the benefit of a procedure or protocol for addressing these types of allegations and was made with limited information. Essentially, all that was known at the time of the decision was that there were allegations related to sexual assault or sexual misconduct (although the precise details of the allegations were unknown), a criminal investigation had been initiated and discontinued, and the Complainant wanted to maintain privacy.

Members of the Campaign Team took steps intended to obtain relevant information, including: tasking the Party's lawyer to make further inquiries (pursuant to which some information was obtained from Mr. Dykstra); attempting to ascertain whether Mr. Dykstra had failed to disclose information during the candidate selection process; and obtaining some information from Kym Purchase, the former Chief of Staff to the Government Whip. On the other hand, no effort was made to obtain information directly from the Complainant (although this is at least partly explained by her request for privacy and the absence of a formal complaint), nor were the inquiries made of Mr. Dykstra sufficient. As well, no attempt was made to obtain information directly from the police regarding the status of their investigation (while the police generally may not disclose personal information, *Maclean's* reported on January 28, 2018 that the police confirmed that their investigation was stopped at the request of the Complainant). These failures to make more extensive inquiries may be explained, in part, by the absence of any clear protocol

or procedure. Without guiding principles directing the Campaign Team's response to the situation, each member of the Campaign Team relied upon his or her own common sense approach to the situation. It is not surprising, in this context, that different conclusions were reached and all avenues of inquiry may not have been adequately explored. Whether such further inquiries would have changed the outcome is unknown.

The specific recommendations set out in this report are as follows:

Recommendation #1 – Implement a Candidate Complaint Procedure/Protocol

The Party should implement a written Candidate Complaint Procedure, which addresses how complaints or concerns about candidates may be made.

In crafting the Procedure, it is significant that political candidates are not employees of the Party and the discretion to endorse a candidate (or to revoke an endorsement) is a private matter that does not trigger a legal entitlement to due process on the part of a candidate comparable to what exists in the employment realm. This is not to say that candidates should be dropped capriciously or without thoughtful consideration. The manner in which a national political party responds to allegations of sexual assault and/or harassment against one of its candidates raises a host of competing interests and concerns, including:

(1) the alleged victim's interest in ensuring that his or her allegations are adequately and respectfully addressed;

(2) the alleged victim's potential interest in maintaining privacy;

(3) the candidate's interest in due process;

(4) the Party's interest in ensuring that its candidates are electable and of good moral character;

(5) the Party's interest in treating its candidates fairly, not frivolously;

(6) the societal interest in seeking the truth, and ensuring that political candidates and public officials are held to a high moral standard;

(7) the societal interest in empowering victims to report incidents of sexual assault and/or harassment regardless of the perpetrator's status or position;

(8) the political reality that allegations of sexual assault and/or harassment, whether or not substantiated, may, once publicized, result in irreversible damage to a candidate's political fortunes; and

(9) the practical reality that there may be inadequate time and/or resources for a political party to fairly and accurately determine whether allegations of sexual assault and/or harassment are substantiated in the midst of an election campaign. Unlike in the employment context, where an employee can be reassigned or suspended pending the outcome of criminal proceedings, an election campaign cannot be suspended. Candidates are expected to campaign and the time that would be lost waiting for the disposition of criminal charges could not be recovered. To further complicate matters, the *Canada Elections Act* establishes the "closing day for nominations" as the "21st day before polling day" (section 69). The closing day is the "drop dead" date after which the Party cannot endorse a new candidate. Accordingly, if endorsement of a candidate is withdrawn after this date, the Party will not have a candidate in that riding. The passage of this deadline is not a bar to withdrawing endorsement of a candidate; it is obviously preferable, however, for such a withdrawal to happen quickly and in advance of the closing day for nominations.

In my view, the best approach for the future is one that will be responsive to the foregoing diversity of interests and concerns, and that will afford the Party an appropriate degree of flexibility to respond on a case by case basis. While flexibility is critical, a specific Candidate Complaint Procedure would help to guide decision making.

Such a Procedure, while maintaining flexibility given the inherent exigencies of the political process, should include the following elements:

(1) The Appointment of a Coordinator – The coordinator should be responsible for receiving complaints and ensuring that all the relevant facts and information are gathered so that both recommendations and decisions are based on complete and accurate information. In my view, it is preferable, if not critical, that this responsibility be given to a single employee.

(2) A Preliminary Assessment – Upon becoming aware that a candidate is alleged to have engaged in sexual assault and/or harassment, the designated coordinator should gather and review all available relevant information to determine (to the extent possible, on an expedited basis):

(i) the number, nature and source of the allegations against the candidate;

(ii) whether there is any ongoing investigative or adjudicative process that may result in a determination regarding whether the allegations are substantiated (if no such process is ongoing, whether one has been terminated previously and, if so, on what terms); and

(iii) whether there has been any failure to disclose information (or false or misleading information provided) in the Nomination Contestant Questionnaire ("NCQ") and/or pursuant to any ongoing positive obligation to disclose issues. In some cases, a failure to disclose may rise to the level of providing false or misleading information. At such a point, the Party may consider whether it is appropriate to remove the candidate based on the seriousness of the non-disclosure, quite apart from whether the allegations or issues giving rise to the disclosure obligation are true.

With the above information, the coordinator should conduct a preliminary assessment to answer the following questions: (i) Is there sufficient information to conclude whether the allegations are substantiated without further investigation? If so, what is that conclusion? (ii) If further investigation or review is required, should the Party conduct its own investigation or retain a third party investigator to do so? (iii) Should the Party immediately disallow the candidacy in the circumstances?

Following this assessment, the coordinator should provide a recommendation to the Campaign Team and/or the Leader regarding how to proceed. Depending on the circumstances, the coordinator may recommend (i) that the candidacy be immediately disallowed; (ii) that the candidate be permitted to continue as a candidate pending the outcome of further review/investigation; or (iii) that the candidate be permitted to continue as a candidate without any further investigation or review.

(3) An Investigation, Where Appropriate – In certain circumstances, the designated coordinator may determine (or recommend) that further information is required to assess whether

or not the allegations against the candidate are substantiated and/or whether or not the candidacy should be disallowed.

The scope, comprehensiveness and urgency of that investigation may well be impacted by the timing of any upcoming election; again, there must be some flexibility in the process. If, for example, the election is imminent, the Party may well not be able to give candidates the "benefit of the doubt", absent clear factors undermining the credibility of the complainant or the veracity of the allegations. Being a candidate is a privilege, not a right. If there are factors undermining the veracity of the allegations but further investigation is required, one option would be to allow the candidacy to continue on the condition that, if the candidate is elected, the allegations against him or her will be investigated by the Party after the election. The purpose of this post-election investigation would be to determine whether the allegations against the candidate are substantiated and whether the Party can continue to support the MP as a member of the Party and caucus.

I do not recommend a specific cut-off date after which a full investigation should be considered not feasible. Such a "boiler plate" approach may fail to take into account the facts of each case. In my view, the nature and comprehensiveness of the investigation, if any, is a matter that is best left to be determined on a case by case basis considering such factors as the timing of the election, the nature of the allegations, and the number of potential witnesses to the alleged misconduct.

Where a recommendation for a full investigation is accepted, the Party may either appoint an external investigator, or conduct its own investigation by appointing an investigator internally. At the conclusion of the investigation, the investigator should prepare a written report summarizing the allegations, the steps taken during the investigation, the candidate's response to the allegations, and all relevant evidence.

Recommendation #2 – Strengthen the Existing Candidate Vetting Procedure and Ensure there is a Clear, Continuing Positive Obligation to Disclose Issues Arising After Nomination

The 2015 Nomination Rules provided that "at the time of application…the Applicant must not be party to any ongoing investigations which may lead to professional sanctions or criminal

charges" (section 3(a)(iv)). This requirement was expanded in the 2017 Nomination Rules to enshrine a continuing positive obligation of disclosure on applicants "during the nomination process". I would encourage the Party to expand this obligation even further in three respects:

(1) Most importantly, it would be advisable to expressly provide that the ongoing disclosure obligation extends to candidates in the period after nomination and does not simply apply during the nomination process. It should be clear that the positive obligation to disclose issues applies at least until the election;

(2) The scope of the obligation itself should be expanded beyond an obligation to disclose "investigations which may lead to professional sanctions or criminal charges" to include an obligation to disclose any circumstances or events which may lead to such investigations and any issues that may affect the candidate's ongoing eligibility to stand as a candidate; and

(3) It would be helpful to clearly set out the disclosure obligation in the signed attestation at the conclusion of the NCQ rather than in the introductory statements which are not specifically signed or initialed.

Recommendation #3 – Require Candidates to Provide More Comprehensive Police Checks

The 2015 Nomination Rules required Nomination Contestant Applicants to submit an original copy of a current Certificate of Conduct (obtained through the RCMP or local police detachment). Rather than a basic police record check, it is possible to request a broader criminal record and judicial matters check, which includes such additional information as records of absolute and conditional discharges (within certain time limits), and outstanding charges. This broader criminal record check may help the Party to identify relevant concerns in respect of both applicants and candidates before the concerns intensify in the midst of an election campaign.

Recommendation #4 – Implement a Code of Conduct and Harassment Policy for Candidates

The Party has a Code of Conduct and a Whistleblower Policy for employees, as well as a Code of Conduct for the Party's National Council. While these may assist in the monitoring of candidates, I recommend that a separate policy/procedure be implemented specifically to govern the conduct of candidates. This separate policy/procedure ought to include procedures for the

receipt, investigation, and resolution of any complaints against candidates. A Candidate Code of Conduct could parallel the Code of Conduct governing the Party's National Council but should also be expanded to expressly require candidates to acknowledge an obligation that they must be of good character, respect the dignity of all individuals, respect the principles of equality and inclusion and adhere to the highest ethical standards.

In conjunction with establishing a Candidate Code of Conduct, I recommend the promulgation of a specific policy prohibiting discrimination and harassment by candidates. I also recommend that the Party require candidates to implement a parallel discrimination and harassment policy in respect of each candidate's employees and campaign staff. The Party can either prepare a template policy for its candidates or it can set out the essential elements which must be included in a policy prepared by each candidate.

Recommendation #5 – Training for Candidates

To have a positive impact, the Code of Conduct, Harassment Policies and Candidate Complaint Procedure must be properly implemented. This means that their existence and content must be clearly and effectively communicated to all relevant stakeholders. Candidates should be provided with training in respect of basic human rights (including harassment and equality principles), the Code of Conduct that is implemented for candidates, and the Harassment Policies and Candidate Complaint Procedure. This training, which should be made mandatory for all candidates, could be implemented during the nomination process or after the nomination stage as a condition of Party endorsement.

Recommendation #6 – Ensure Robust Reporting Policies, Training and Investigation Procedures are in Place Outside of the Campaign

While the focus of this Review has been on the Campaign's response to the allegations regarding Mr. Dykstra, it must be noted that, had the allegations against Mr. Dykstra been promptly reported and thoroughly investigated in 2014, the issue may well have been addressed and resolved before the election. The Dykstra incident underscores the need for a robust sexual assault and/or harassment reporting and investigation regime that applies to parliamentary staff. Admittedly, this is a matter outside the scope of my mandate. Nonetheless, I invite the Party to consider this Recommendation, especially given the pending legislative amendments flowing

from Bill C-65. This Bill, which received Royal Assent on October 25, 2018, will amend the *Canada Labour Code*, RSC 1985, c L-2 and the *Parliamentary Employment and Staff Relations Act*, RSC 1985, c 33 (2nd Supp). Part 2 of Bill C-65 will require members of the House of Commons, in their capacity as employers, to: (i) investigate, record and report incidents of harassment (including sexual harassment); (ii) take measures to prevent and protect against harassment; and (iii) respond to incidents of harassment and offer support to employees affected by harassment in the workplace.

PART TWO: PROCESS

A. Introduction

As set out above, I was retained by the Party, through its lawful agent, Conservative Fund Canada, to conduct an independent, third party review of the response of the 2015 Campaign Team to sexual assault allegations against then incumbent MP and Party candidate Rick Dykstra during the period of August 1 to October 17, 2015 (the "Review").

The Review was conducted independently and the findings and recommendations set out in this Report were reached without interference from the Party or its agent.

The Review was commissioned after the media reported in January 2018 that sexual assault allegations against Mr. Dykstra had been raised by a Conservative Party parliamentary staffer in 2014, approximately one year before Mr. Dykstra ran for office during the 2015 federal election. In particular, *Maclean's* published two articles: *Ontario PC Party president Rick Dykstra resigns after sexual assault accusation* dated January 28, 2018 and *Inside the explosive Conservative Party fight over Rick Dykstra* dated February 2, 2018.

B. The Scope and Function of the Review

The scope of the Review and the terms of my engagement were confirmed in a letter dated March 10, 2018. This letter provides that "the primary purpose of the Review is to obtain information that will aid the Conservative Party's 2019 National Campaign Team to formulate procedures or protocols that can be in place for the forthcoming federal election to address and appropriately respond to circumstances such as those that are the subject of the Review". To meet that objective of providing practical recommendations for addressing similar

circumstances, the Review would consider "the response of the Conservative Party of Canada's Campaign Team to sexual assault allegations against incumbent MP and Conservative Party candidate Rick Dykstra". More specifically, the Review would consider:

(1) the events giving rise to the information about the allegations against Rick Dykstra being brought to the attention of the Party's Campaign Team within the time period of August 1 to October 17, 2015 (the "Review Period");

(2) any external demands (such as requests or requirements from counsel for the complainant) that were present and/or known by the Campaign Team during the Review Period;

(3) any decision(s) made by the Campaign Team during the Review Period in respect of Rick Dykstra; and

(4) the content of any investigation or inquiry undertaken by the Campaign Team regarding Rick Dykstra during the Review Period.

Even before my retainer, Stephen Harper, the Leader of the Party at all material times, publicly acknowledged that it was his decision to not remove Mr. Dykstra as a candidate. In a Twitter statement of February 2, 2018, Mr. Harper wrote, in part:

> When allegations were brought to my attention during [the] 2015 election campaign, I understood that the matter had been investigated by the police and closed a year prior. Given this understanding of the situation, I did not believe that I could justify removing him as a candidate.
>
> Recently, much more information has come to light, including information to the effect that the original investigation may not have been complete. In my view, it is essential that criminal allegations, including this one, be fully investigated and prosecuted if warranted.
>
> I have never hesitated to remove candidates or caucus members. My standard has been that either there are facts that justify such removal or allegations that trigger investigation. Sexual assault is a heinous crime and intolerable in any environment. Any allegation of this nature must be taken seriously, forwarded to the police, investigated and prosecuted.

> There are at present discussions in organizations all over the world about how to protect sexual assault victims and encourage them to come forward. At the same time, we must have some basic standards of process to try to ensure fairness for all involved. This is a healthy conversation and I hope that it brings about positive change for everyone.

My mandate is not to second-guess or evaluate the propriety of the decision made by the Party and/or the Leader to not discontinue Mr. Dykstra's candidacy. Rather, the purpose of this Review is to identify potential means for improving processes and procedures to ensure that the Party has the tools to address similar situations in the future.

C. What Was Outside the Scope of the Review

The Review was not intended to provide, and this Report does not contain, legal conclusions or a legal opinion, although the recommendations set out herein are intended to reflect (and may provide) relevant legal information.

The purpose of the Review was not to determine whether the sexual assault allegations against Mr. Dykstra are or were substantiated. It was not my mandate to investigate or make factual findings as to whether Mr. Dykstra engaged in unlawful or inappropriate conduct of any kind. Rather, the scope of the Review was limited to determining what the Campaign Team knew about the sexual assault allegations against Mr. Dykstra and how it responded to those allegations during the Campaign so as to provide relevant recommendations to the Party.

During the course of the Review, I received unsolicited correspondence from counsel for the victim of the alleged assault by Mr. Dykstra requesting that the report not include any information which could serve to identify her. I have attempted to respect this request for privacy. For ease of reference and to maintain this anonymity, the alleged victim is referred to herein as the "Complainant".

The mandate and Review are restricted to the sexual assault allegations. This Report does not extend to the issue regarding Mr. Dykstra allegedly buying drinks for underage girls in St. Catharines in September 2015 (the "Mansion House Allegations"). Mr. Dykstra reportedly denied knowingly buying alcohol for underage girls.

D. Methodology

During the course of the Review, I interviewed seven people:

(1) Ray Novak

(2) Jenni Byrne

(3) Arthur Hamilton

(4) Hamish Marshall

(5) Stephen Harper

(6) Guy Giorno

(7) Nick Koolsbergen

All of these interviews were conducted in person, with the exception of the interviews with Hamish Marshall and Nick Koolsbergen, which were conducted over the phone.

Each interviewee was provided with a letter explaining the scope, purpose and methodology of the Review. Each interviewee was informed that, at the conclusion of the Review, a Report would be provided to the Party and that the Party intended to make the Report public. Nevertheless, to preserve the confidentiality and integrity of the Review, each interviewee was asked to keep the content of the interview confidential.

Each interview was attended by me, an associate lawyer from my office, the interviewee, and, in some cases, personal counsel for the interviewee. Notes of each interview were taken by the associate lawyer to create a record of statements made during the interview. After the interview, each interviewee was provided an opportunity to review the notes for accuracy, and to make any desired changes to the notes. These notes were made for my use only, and have not been disclosed to the Party.

I was not restricted by the Party in respect of who I could invite for an interview. Interviewees were selected based on relevant publicly available information regarding the Campaign Team's

response to the allegations against Mr. Dykstra, as well as information provided by the interviewees themselves.

Each interviewee participated in the Review process voluntarily. I did not have the authority to issue summonses to prospective interviewees or to compel anyone to answer questions under oath.

Not everyone accepted the invitation to be interviewed. In particular, Lynette Corbett and Emrys Graefe did not respond to my invitations.

Some of these interviewees expressed varying degrees of reluctance to participate in the Review. One interviewee repeatedly failed to attend scheduled meetings without advance notice; another was intensely critical of me, the process, and even the scope of my mandate. Ultimately, however, all the participants were cooperative and helpful and I thank them for their contributions.

Additional potential interviewees were identified, including Fred DeLorey, Matt Wolf, and Stephen Lecce. These individuals, however, were identified as having information primarily relating to the candidate vetting process and/or the Mansion House Allegations and/or the general management of candidate issues. These matters were outside of the scope of this Review. As such, I did not invite them for interviews.

PART THREE: THE PROCESS FOR NOMINATING AND DISALLOWING CANDIDATES

Before considering the lessons from the handling of the Dykstra allegations, it is useful to review the process for nominating a candidate and the process for disallowing a candidacy.

A. Nomination and Candidate Vetting

The Candidate Nomination Rules and Procedures as revised in November 2013 were in effect in 2015 (“the “2015 Nomination Rules”) and set out a rigorous process for vetting nominee candidates.

The 2015 Nomination Rules confirmed that the National Candidate Selection Committee (“NCSC”) provided “general supervision over the nomination process” (section 1(b)) and

described the application process. Specifically, a person made an application as described in section 3(b) to be a "nomination contestant". Section 3(a)(iv) provided that "at the time of application" to be a nomination contestant, the applicant must have met various eligibility criteria, including a requirement that he or she "must not be party to any ongoing investigations which may lead to professional sanctions or criminal charges". Section 3 also set out the requirement for the applicant to complete and submit a Nomination Contestant Questionnaire ("NCQ").

The 2015 NCQ included extensive disclosure obligations, including the following questions relevant to the instant inquiry:

- Have you been accused of, or been engaged in, activities that promote discrimination or hatred against people on the basis of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, or disability?

- Have you faced, or are you currently facing, any lawsuits relating to your personal or business life?

- In your personal or business experience, have you ever been sued for, or are there any circumstances which may result in you being sued for… violation of human rights?

- Have you ever been disciplined or cautioned by a professional organization or tribunal?

- Are you currently, or have you ever been, under investigation by a professional organization or tribunal for alleged misconduct (even if you were subsequently cleared of any wronging)?

- Are you currently, or have you ever been, under investigation by any law enforcement agencies (even if no charges were brought against you)?

- Have you ever been, or are there any circumstances that may cause you to be charged with a criminal offence? Charged with a statutory, regulatory or by-law offence (other than traffic offences)? Fined (other than traffic fines)? Placed on probation? Imprisoned?

- Have you been the subject of any legal proceedings, inquiry or investigation instituted or undertaken by an agency of government or a regulatory body in Canada or elsewhere?

- Is there anything in your personal, professional or business background that could cause embarrassment for the Party, hinder your ability to perform, adversely affect your candidacy or the Party, or demonstrate a lack of integrity, if it became public knowledge during the campaign or if you should become a Member of Parliament?

The NCQ concluded with a requirement that the applicant "attest and agree that I have truthfully completed this NCQ and have not omitted any information that may be relevant". The application form also provided the following introductory statements, which imposed a positive obligation on candidates to disclose any relevant developments after their nomination:

> Applicants are required to inform the CNC [Candidate Nomination Committee] of any new facts or circumstances related to the questions in this document. If an applicant fails to do so, s/he may be requested to withdraw as a nominee or a nominated candidate.
>
> Any applicant that provides false information with the intent to mislead the NCSC, CNC, members of the party or the general public will be disqualified.

In addition to the NCQ, section 3 of the 2015 Nomination Rules required applicants to provide various additional documents including "a current Certificate of Conduct obtained through the RCMP or local police detachment", an authorization for the Party to conduct a criminal record check, a signed agreement to advance the policies, principles, goals and objectives of the Party and to participate in training conducted by the Party on how to run an effective campaign.

Section 4 of the 2015 Nomination Rules set out the "Application Process" which included an interview by the Candidate Nomination Committee ("CNC"). A CNC is appointed by the Electoral District Association ("EDA") to administer the candidate nomination and selection process. The CNC may not disallow the candidacy but must inform the NCSC if "a majority of the CNC believes that there may be cause to reject an Applicant" (section 4(c)). The "NCSC may disallow a candidacy on such grounds as it sees fit …whether or not the CNC has expressed a belief that there may be cause to do so" (section 4(e)).

If, following the close of nominations, there is only one nomination contestant, the CNC shall acclaim that person the Party Candidate (section 7(b)). If there is more than one nomination contestant, the candidate is selected through a vote of party members at a nomination meeting.

B. Process for Disallowing a Candidacy

Once a candidate is selected, authority for disallowing the candidacy rests with the NCSC pursuant to the Party's Constitution as amended on November 2, 2013 (which is the version effective at all material times and is referred to herein as the "2015 Constitution"). Specifically, the 2015 Constitution provided:

> 14.1 National Council shall create rules and procedures for the selection of candidates… **National Council shall establish the National Candidate Selection Committee that shall have the right to disallow the candidacy of any person before or after nomination by the electoral district association**, subject to the appeal of such a decision to National Council whose decision shall be final and binding or who may refer the matter to the Arbitration Committee for decision by a panel.
>
> [Emphasis added]

Based on this provision, section 4(e) of the 2015 Nomination Rules confirmed that the NCSC has the authority to "disallow a candidacy on such grounds as it sees fit":

> Pursuant to Article 14.1 of the Constitution of the Party, the NCSC may disallow the candidacy of any person before or after nomination by the EDA. The CNC may not disallow a candidacy. **NCSC may disallow a candidacy on such grounds as it sees fit**. NCSC may disallow a candidacy whether or not the CNC has expressed a belief that there may be cause to do so.
>
> [Emphasis added]

Notwithstanding the foregoing process, most interviewees indicated that authority to disallow a candidacy rests with the Leader of the Party. This apparent discrepancy is explained in two ways. First, it appears that in some, if not most, cases, a candidate is not disallowed through the formal procedures of the NCSC. Rather, he or she is confronted with the issue/allegation/concern and asked by the Leader (or on his or her behalf) to voluntarily step down. Second, even if the procedures of the NCSC are employed as a result of a refusal to voluntarily step down, the Leader's views are no doubt significantly persuasive in the application of the formal NCSC procedures.

The weight given to a party leader's views in assessing candidates has been recognized in the literature. For example, Professor Royce Koop described the nomination review process and the power of party leaders as follows in "Who Selects Candidates? Candidate Nomination in Canadian Parties", (2014) 2015: J Parliamentary & Pol L 145:

> All parties have national bodies with the explicit power to certify individuals as fit to run for local nominations—or the right to be "green lighted," to use the terminology of the Liberal Party. **These bodies employ a range of criteria to determine if candidates are eligible, and turn to voluminous questionnaires that probe many aspects of candidates' personal lives and which they must fill out in order to qualify. These questionnaires and subsequent red-lighting are justified by the party as a means to weed out potential candidates who will cause problems for the party during election campaigns. Often, these organizations do not even provide justifications for halting the nominations of particular candidates**. **And, crucially, in most cases these intra-party committees are either strongly influenced or outright controlled by the party leader**.
>
> [Emphasis added]

PART FOUR: LESSONS LEARNED FROM THE PARTY'S HANDLING OF THE DYKSTRA ALLEGATIONS

The following conclusions regarding the Party's handling of the allegations against Mr. Dykstra flow from a careful consideration of all information received in the course of this Review.

The primary persons involved in responding to the sexual assault allegations against Mr. Dykstra were Stephen Harper (then Prime Minister and Leader of the Party), Jenni Byrne (National Campaign Manager), Guy Giorno (National Campaign Chair), Ray Novak (Chief of Staff), Lynette Corbett (who was identified as leading the "issues management team"), and Arthur Hamilton (external counsel to the Party).

The Campaign Team's response to the allegations against Mr. Dykstra illuminates the following concerns that are relevant to determining how similar incidents ought to be addressed in the future:

(1) The Campaign Team was not guided in its response by a defined policy or protocol. Accordingly, each member of the Campaign acted in accordance with his or her own

common sense interpretation of how the situation should be addressed, and what decisions should be made in respect of Mr. Dykstra's candidacy in the face of the available information.

(2) The Campaign Team did not immediately ascertain (to the best of its ability) the date of the alleged incident and did not immediately determine whether Mr. Dykstra had failed to disclose relevant information on his NCQ or whether he had provided false or misleading information. Although Mr. Giorno did make relevant inquiries, these were made on his own initiative and not guided by a written protocol or procedure. Indeed, during the course of the relevant Review Period, no single person appears to have been tasked with reviewing Mr. Dykstra's NCQ for such a disclosure.

(3) The Campaign Team did not initiate or conduct its own investigation, as far as it could, to determine whether the allegations against Mr. Dykstra were substantiated. The Campaign Team's response to the allegations, and the Leader's decision to permit Mr. Dykstra to continue to run as a candidate, were clearly driven by (i) the fact that there was no live controversy, legal proceeding or investigation in respect of the allegations, as the corresponding police investigation had been "closed"; and (ii) to some degree, the Complainant's stated desire for privacy. It appears that few, if any, meaningful inquiries were made regarding the nature of the police investigation, or the reasons for or significance of its closure. While *Maclean's* reportedly obtained information from the police that the investigation was stopped at the request of the Complainant, no similar inquiries to the police were made by (or at the direction of) the Campaign Team. Similarly, no effort was made to obtain information directly from the Complainant. Correspondence from counsel for the Complainant was focussed on document preservation, did not include details of the allegations and included a specific request to protect the Complainant's privacy. Notwithstanding her request for privacy, the Complainant, in my view, should have at least been extended an opportunity to provide more detailed information before a decision regarding Mr. Dykstra's candidacy was made. While Mr. Hamilton spoke with Mr. Dykstra at the direction of the Campaign Team, the information obtained from Mr. Dykstra was similarly inadequate. Mr. Dykstra denied the allegations. He further advised that he was interviewed by the police and the matter was closed and the records sealed. There is no evidence that Mr. Dykstra was

ever required to respond to the merits of the allegations against him in any detail. Indeed, Mr. Hamilton specifically stated that his inquiry was to determine the status of the issue rather than to fully investigate the allegations.

(4) Although the Leader was ultimately responsible for making the decision about Mr. Dykstra's candidacy, the Campaign Team was not governed by a documented structure regarding roles and responsibilities. While each interviewee seemed to have a reasonably clear sense of his or her own responsibilities, even job titles did not seem to be clear in every case. Although there was at least a draft organizational chart for the 2011 campaign, I was not provided with a similar document for 2015. This approach may have allowed for flexibility and there is nothing wrong with having a process whereby multiple individuals provide input into decision making. Indeed, the deliberation and input from multiple people may lead to better decisions than those that are made without the benefit of various viewpoints and opinions. Mr. Novak characterized the discussions regarding the allegations against Mr. Dykstra as "healthy debate". However, in this case, the absence of formal documented responsibilities appears to have been complicated by, if not compromised by, the tensions between senior members of the team. These tensions were variously characterized as "divisions", "dysfunction", and "fighting". One telling email that was not directly related to the issues addressed herein instructed various senior members of the Campaign team to "get along". Admittedly, some of the apparent tensions may have been caused by the personalities at play, as opposed to the lack of documented structure. Even if the structure had been more clearly documented, one interviewee described some level of tension as being natural in a campaign considering, for example, that the Chief of Staff is "in charge" outside of the campaign, but that the Campaign Manager takes control during the campaign. While these and other tensions may be "natural", they are not ideal, particularly when exacerbated by the personalities at play. More clearly documented responsibilities are unlikely to have been sufficient to offset these issues in the 2015 Campaign but they may have served to reduce the issues to some degree.

(5) Most discussions took place verbally. Verbal conversations may serve to minimize the risk of information being leaked or privacy being compromised. However, written

documents often clarify thinking and reveal gaps in information. Presumably the reason these discussions took place verbally was due to sensitivity concerns.

PART FIVE: RECOMMENDATIONS

A. Introduction and General Observations

The #MeToo movement has been characterized as a sexual revolution. Not only has it helped to shine a light on persistent abuses to which a blind eye has often been turned in some industries, but it has helped to empower victims to bring complaints forward. In response to the movement, some organizations are now responding to allegations of sexual impropriety more quickly and decisively than ever before. While these responses may be well intentioned, it must be remembered that a mere allegation can irreparably tarnish a reputation. As a result, those accused of wrongdoing are entitled to an appropriate level of due process and should be given a meaningful opportunity to respond to allegations to the extent possible.

In the employment context, an employer owes *all* of its employees procedural fairness in investigating allegations.

Generally, employers should only take disciplinary or other action against employees for off-duty conduct if there is a sufficient connection or nexus between the off-duty conduct and the employment. Employers are generally not charged with policing the character of their employees. Accordingly, without a nexus to the employment relationship, the fact that an act is criminal is not sufficient to establish just cause for discipline or discharge.

When, however, a sufficient connection is established, an employer may properly suspend an employee who has been charged with or is being investigated for a criminal offence pending disposition of the criminal proceedings. Whether a suspension is reasonable is assessed by balancing an employee's interest in maintaining his or her livelihood against the employer's interest in maintaining its reputation, productivity and morale.

Arbitrators often apply the following principles, which were first recognized in *Ontario Jockey Club* (1977), 17 L.A.C. (2d) 176, in assessing the employer's response to off-duty conduct:

1. The off-duty conduct must present a reasonably serious and immediate risk to the employer's legitimate interests.

2. The onus is on the employer to prove the risk to its interests. The employer must establish that the nature of the charge is potentially harmful to the employer's reputation, that it will render the employee unable to perform his or her duties, or that there is a risk to other employees or customers.

3. The employer must investigate the criminal charge to the best of its abilities before deciding on its response.

4. The employer must take reasonable steps to ascertain whether the risk of continued employment could be mitigated through closer supervision or a transfer to another position.

5. During a suspension, there is a continuing obligation on the employer to evaluate new information and consider reinstating the suspended employee to his or her position.

These factors have similarly been applied in the non-union context (e.g. *Reininger v. Unique Personnel Canada Inc*., [2002] O.J. No. 2826 (S.C.J.)).

Typically, an employee is suspended pending the outcome of the criminal proceedings. Once the criminal proceedings are concluded, the employer determines its final response. Notably, while a conviction is treated as conclusive evidence of guilt, an acquittal (or a withdrawal of charges) is not determinative of the issue in civil proceedings. To be convicted criminally, the Crown must prove guilt beyond a reasonable doubt. Civilly, the standard of proof is on the balance of probabilities. Accordingly, facts which may not be sufficient to establish guilt beyond a reasonable doubt required for a criminal conviction may nonetheless be sufficient to establish guilt on a balance of probabilities in a civil proceeding (e.g. a discharge case). Following the disposition of criminal charges, it is often incumbent on the employer to assess the appropriate disciplinary response. In doing so, the employer should consider the outcome of the criminal charges, whether the misconduct is established on a balance of probabilities even if there was no criminal conviction, and the nexus of the conduct to the workplace.

Political candidates, however, are not employees of the Party and, needless to say, unique considerations come into play in the political arena. First, there is no right to run for election on behalf of a political party; it is a privilege granted at the discretion of the party. A party's endorsement of a candidate can be revoked at any time. Second, endorsement of a candidate signals the party's support for and approval of a candidate conveying that he or she shares common values and objectives with the party. In this regard, endorsement of a candidate is very different from the employment context where, in most cases, an employer is not the custodian of an employee's character. As the assessment of a candidate's suitability necessarily involves subjective assessments, it seems wholly reasonable for a party to exercise discretion in both conferring or revoking endorsement of a candidate. Finally, there is no free-standing legal entitlement of candidates to receive due process in the Party's determination of the appropriate response to allegations of misconduct.

Section 67 of the *Canada Elections Act*, S.C. 2000, c. 9, governs the process for a witness to file the nomination papers for a prospective candidate in a federal election:

> 67 (4) The witness shall file with the returning officer, together with the nomination paper,
>
> […]
>
> (c) **if applicable, an instrument in writing, signed by the person or persons authorized by the political party to endorse prospective candidates that states that the prospective candidate is endorsed by the party**.
>
> [Emphasis added]

Section 67(4)(c) of the *Canada Elections Act* reserves discretion for the political party to endorse a prospective candidate to run for office by not providing any restrictions on the process of signing a person's nomination paper.

To a large degree, the Courts have recognized and approved the Party's discretion to both endorse a candidate and to disallow a candidacy. In *Grewal v. Conservative Party of Canada*, [2004] O.J. No. 2299, Mr. Justice Fragomeni the Ontario Superior Court of Justice stated:

> **26…[T]he leader of a political party has the statutory authority pursuant to the Canada Elections Act, S.C. 2000 c. 9**

s. 67(4) to refuse to endorse a candidate. Section 67(4)(c) reads as follows:

67(4) The witness shall file with the returning officer, together with the nomination paper,

(c) if applicable, an instrument in writing, signed by the leader of the political party or by a person referred to in subsection 383(2), that states that the prospective candidate is endorsed by the party in accordance with section 68.

27 The plaintiff argues that pursuant to s. 67(4)(c) the leader cannot reject candidates arbitrarily. The plaintiff submits that the leader must give reasons for rejection of a candidate and that the Act does not give the leader an absolute right to act arbitrarily.

28 The plaintiff submits that the purpose of s. 67(4)(c) is to convey to the Elections Commission that that candidate represents a particular party.

29 I cannot accept the plaintiff's position on the meaning of s. 67(4)(c) and the restrictive application of that section.

30 Firstly, there is nothing in that section that stipulates that a leader must give reasons for not endorsing a candidate. In any event, in this case reasons were articulated and the plaintiff was advised of the reasons by the Interim Council.

31 Secondly, **the Party, [*sic*] determines the candidates it wishes to have representing the Party. It is not for the Court to make those determinations. The Court should not interfere with a process that has been established by a Party or a process that has been established pursuant to a statute**.

…

34 I agree with the defendant that a process whereby the Party, [*sic*] retains the ability to ensure that candidates put forward warrant the endorsement of the leader, is reasonable and necessary.

…

37 The Court cannot stand in the shoes of the leader of the Party and endorse the plaintiff as a candidate by granting the relief requested in his motion.

[Emphasis added]

Similarly, in *Pick et al v. Conservative Party of Canada*, unreported February 27, 2004 (Sask. Q.B.) at pages 4 and 5, the Court stated:

> The right of a registered political party to endorse a prospective candidate is found in the Act itself.
>
> The plaintiffs err in believing that they have the right to compel Mr. Devine's name appear upon the ballot. The power of the defendant party to accept or reject an applicant who desires to be a nomination contestant rests with the defendant party. The Candidate Nomination Rules and Procedures, particularly Article 3, and specifically section K of Article 3 read compatibly with section 67(4)(c) of the Act, as I have previously stated.

In *Guergis v. Novak*, 2013 ONCA 449, the Ontario Court of Appeal considered the scope of authority to refuse to endorse a candidate as follows:

> [90] **Even if the allegation regarding the Prime Minister's involvement is read as proven, s. 67(4)(c) of the *Canada Elections Act*, S.C. 2000 c.9, gives the leader of a political party the authority to refuse to endorse a candidate. As it is statutorily allowed, it therefore cannot be an unlawful act**.
>
> …
>
> [96] Furthermore, the tort claims arise from the appellant's removal from Cabinet and from caucus. They are an attempt to get around the non-justiciability of the Prime Minister's exercise of prerogative power and Parliamentary privilege. **The torts based on the denial of the appellant's candidacy for election are also certain to fail on the basis that the leader of a political party has the statutory authority to refuse to endorse a candidate and the CPC, as an unincorporated body, cannot be sued**.
>
> [Emphasis added]

More recently, in *Trost v. Conservative Party of Canada*, [2018] O.J. No. 2409, the Ontario Divisional Court considered the jurisdiction of the Court to review a disciplinary decision of the Party. In that case, the Leadership Election Organizing Committee found that a candidate for the leadership of the Party had violated the rules governing the leadership contest because his campaign was responsible for the leak of confidential information. As a result, he was fined. The applicant argued, among other things, that he had been denied procedural fairness and sought judicial review in Court. The Court found that it did not have jurisdiction to hear the

application. Considering all the circumstances, the Court concluded that the decision was not a public decision and stated at paragraph 35:

> The CPC is a voluntary association. While it plays a very important role in the Canadian political system, it is nevertheless a private actor, and its decisions are not subject to judicial review by way of certiorari.

While the circumstances of this case were different from a case considering whether endorsement of a candidate should be revoked, the recognition that the Party is a private organization that does not exercise public responsibilities is significant. Indeed, the Court cited with approval the decision of the Alberta Court of Appeal in *Knox v. Conservative Party of Canada*, 2007 ABCA 295. In *Knox*, two individuals were nominated for an electoral district, one of whom was subsequently disqualified by the NCSC, with the result that the second nominee was acclaimed. The disqualified nominee appealed to the National Council, which rejected the appeal. The matter was ultimately considered by the Alberta Court of Appeal. The Alberta Court of Appeal described the nature of political parties at paragraphs 26 and 27, making two important observations: political parties are private organizations, and the public importance of the parties' activities does not bring them within the public law realm. The Court stated:

> [26] Neither constituency associations nor political parties are given any public powers under the *Canada Elections Act*, S.C. 2000, c. 9. They are essentially private organizations. It is true that their financial affairs are regulated: they may only give tax receipts in certain circumstances, and they may only spend the money they raise in certain ways. However, merely because an organization is subject to public regulation does not make it a public body subject to judicial review. The fact that the organization may require or may hold a licence or permit of some kind is also not sufficient, nor is the fact that the organization may receive public money. Many organizations are subject to public regulation. For example, all charities must be registered in order to issue charitable receipts, but that does not mean that they are exercising public functions and therefore are subject to judicial review.
>
> [27] It is argued that the democratic process, elections, and the activities of political parties are of great public importance. That is undoubtedly true, but public importance is not the test for whether a tribunal is subject to judicial review. When arranging for the nomination of their candidate in Calgary West, the Party and the Association were essentially engaged in private activities, and their actions, in this case, are not subject to judicial review. They are,

> however, subject to private law remedies that may be engaged. Like many private organizations, the Appellants in this case have constitutions, bylaws and rules. Members are entitled to have those documents enforced in accordance with their terms and the proper interpretation of those terms. The remedies available are, however, private law remedies.

The Court concluded that judicial review (a public law remedy) was not available in the circumstances.

This approach in *Knox v. Conservative Party of Canada* was implicitly accepted by the Supreme Court of Canada in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26. The Supreme Court rejected the premise that "where a decision has a broad public impact, the decision is of a sufficient public character and is therefore reviewable" and noted:

> [20] […] [A] decision will be considered to be public where it involves questions about the rule of law and the limits of an administrative decision maker's exercise of power. Simply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term. Again, judicial review is about the legality of state decision making.
>
> …
>
> [24] Even if Mr. Wall had filed a standard action by way of statement of claim, his mere membership in a religious organization - where no civil or property right is granted by virtue of such membership - should remain free from court intervention. Indeed, there is no free-standing right to procedural fairness with respect to decisions taken by voluntary associations. Jurisdiction cannot be established on the sole basis that there is an alleged breach of natural justice or that the complainant has exhausted the organization's internal processes. Jurisdiction depends on the presence of a legal right which a party seeks to have vindicated. Only where this is so can the courts consider an association's adherence to its own procedures and (in certain circumstances) the fairness of those procedures.

The foregoing jurisprudential review is not intended to reach any legal conclusion regarding the scope of the Court's jurisdiction to review Party decisions respecting candidates. Rather, the intention is to highlight that the discretion to endorse a candidate (or to revoke an endorsement) has been found in at least some cases to be a private matter that does not trigger a legal

entitlement to due process on the part of a candidate comparable to what exists in the employment realm.

This is not to say that candidates should be dropped capriciously or without thoughtful consideration. When allegations of sexual assault and/or harassment are made against a candidate, the Party has an obvious interest in determining whether or not the allegations are substantiated. This determination may ultimately be the outcome of a criminal proceeding (pursuant to which the Crown is required to establish the guilt of the accused "beyond a reasonable doubt") or a non-criminal proceeding (such as a civil suit or internal investigation in which culpability is assessed against the lesser standard of a "balance of probabilities"). Where an independent investigation into allegations of sexual assault and/or harassment against a candidate is ongoing, the Party could defer to that process for a determination regarding the candidate's culpability because the Party may lack the time, resources or expertise to conduct or commission an investigation of comparable quality and rigour. The avoidance of contrary findings of fact may also be sought.

Where no independent investigation into the allegations is ongoing or where the Party cannot afford to wait for the outcome of such proceedings, the Party has the option of conducting or commissioning its own investigation. Potential downsides to this option include:

(1) It may be perceived as being beyond the purview or expertise of the Party;

(2) It requires a potentially substantial investment of time and resources;

(3) Should an investigation conducted or commissioned by the Party become publicized, whether deliberately or inadvertently, the mere fact of the investigation may damage the candidate's political prospects; and

(4) To the extent that the absence of an independent investigation is a product of the alleged victim's decision not to pursue the matter by pressing criminal charges or launching a formal complaint, an investigation initiated by the Party without the consent or participation of the alleged victim is less likely to be fruitful, and may in fact be contrary to the alleged victim's personal preferences or interests.

On the other hand, a political party that declines to investigate allegations of sexual misconduct or assault against a candidate exposes itself to the following risks:

(1) The mere fact that there is no ongoing independent investigation, even as a result of the alleged victim's decision not to pursue a formal resolution, does not mean that there is no truth to the allegations. A victim of sexual assault and/or harassment could have numerous reasons for not pursuing the matter that are unrelated to the merit of the allegations (e.g., lack of knowledge of his or her rights or options, fear of reprisal, aversion to public disclosure of personal matters, etc.). If the allegations are true, the Party will unknowingly be supporting a candidate who has engaged in serious misconduct.

(2) The Party may be perceived as complicit in the candidate's alleged impropriety if it comes to light that the Party was aware of the allegations at an earlier date, but did nothing. Although the allegations may not be publicly known or the subject of an independent investigation at the time that they come to the Party's attention, the Party cannot be certain that this will continue to be the case indefinitely (as the circumstances surrounding the Dykstra incident clearly demonstrate). Indeed, decision making should be premised on the assumption that all decisions may be subject to public scrutiny at some point or another.

While there are clear benefits to some degree of investigation and due diligence, in some cases, the alleged misconduct at issue may be so morally repugnant that the mere spectre of wrongdoing may be intolerable for the Party. After all, the ultimate objective of the Party is not just to endorse candidates who have common values and objectives but also candidates who are electable.

In the political arena, the possibility of false allegations or ones made in bad faith, whether for political gain or otherwise, must also be kept in mind. A declared intention to act on bald allegations would no doubt increase the scope of opportunity for false allegations to be used as political weapons.

In short, all of these types of issues and considerations must be balanced in the decision making process. The manner in which a national political party responds to allegations of sexual assault

and/or harassment against one of its candidates raises a host of competing interests and concerns, including:

(1) the alleged victim's interest in ensuring that his or her allegations are adequately and respectfully addressed;

(2) the alleged victim's potential interest in maintaining privacy;

(3) the candidate's interest in due process;

(4) the Party's interest in ensuring that its candidates are electable and of good moral character;

(5) the Party's interest in treating its candidates fairly, not frivolously;

(6) the societal interest in seeking the truth, and ensuring that political candidates and public officials are held to a high moral standard;

(7) the societal interest in empowering victims to report incidents of sexual assault and/or harassment regardless of the perpetrator's status or position;

(8) the political reality that allegations of sexual assault and/or harassment, whether or not substantiated, may, once publicized, result in irreversible damage to a candidate's political fortunes; and

(9) the practical reality that there may be inadequate time and/or resources for a political party to fairly and accurately determine whether allegations of sexual assault and/or harassment are substantiated in the midst of an election campaign. Unlike in the employment context, where an employee can be reassigned or suspended pending the outcome of criminal proceedings, an election campaign cannot be suspended. Candidates are expected to be campaigning and the time that would be lost waiting for the disposition of criminal charges could not be recovered. To further complicate matters, the *Canada Elections Act* establishes the "closing day for nominations" as the "21st day before polling day" (section 69). The closing day is the "drop dead" date after which the Party cannot endorse a new candidate. Accordingly, if endorsement of a candidate is withdrawn after this date, the Party will not have a candidate in that riding. The passage

of this deadline is not a bar to withdrawing endorsement of a candidate. However, it is obviously preferable for such a withdrawal to happen quickly and in advance of the closing day for nominations.

Given the number and nature of these competing interests and concerns, it is unlikely that any single specific approach will be a complete answer to the issues raised by the discovery of sexual assault and/or harassment allegations against a candidate. The best approach is one that will be responsive to the diversity of interests and concerns, and that will afford the Party an appropriate degree of flexibility to respond on a case by case basis.

B. Toward an Election Campaign Protocol

The Dykstra case illustrates the need for a specific protocol for dealing with allegations of sexual assault and/or harassment brought against a candidate during an election campaign. My recommendations respecting such a protocol are as follows.

Recommendation #1 – Implement a Candidate Complaint Procedure/Protocol

The Party should implement a written Candidate Complaint Procedure regarding how complaints or concerns about candidates may be made. Such a Procedure, while maintaining flexibility given the inherent exigencies of the political process, should include the following elements:

1. the appointment of a coordinator;
2. a preliminary assessment;
3. preparation of a preliminary written report on which a preliminary decision can be made; and
4. a full investigation, where appropriate.

(1) Appoint a Coordinator

The designation of a senior member of the campaign team to be responsible for coordinating the campaign's response to allegations of sexual assault and/or harassment against a candidate is a crucial component of an effective Candidate Complaint Procedure. The ideal coordinator will possess: (i) excellent organizational and communication skills; (ii) sufficient authority to delegate tasks where appropriate; and (iii) sufficient time to respond to relevant incidents as they arise.

The key is that there be a single person who is specifically charged with receiving complaints, allegations or information about potential wrongdoing and who is specifically responsible for ensuring that all the relevant facts and information are gathered so that both recommendations and decisions are based on complete and accurate information. In my view, it is preferable, if not critical, that this responsibility be given to a single person. If one person is not specifically accountable, the possibility of important tasks being ignored or overlooked is greatly increased. Even if the Party chooses to employ informal organizational structures generally, in the context of candidate complaints, some formality regarding accountability and responsibility is necessary.

(2) Conduct a Preliminary Assessment

Upon becoming aware that a candidate is alleged to have engaged in sexual assault and/or harassment, the designated coordinator should gather and review all available relevant information, including, without limitation, e-mails, correspondence and media reports, and should consider contacting or directing others to contact (on a confidential basis) the alleged victim, the candidate, and the person or organization responsible for investigating the allegations, if any. In the Dykstra case, for example, rather than simply relying on the Complainant's request for privacy, the Complainant could have been contacted, through counsel or otherwise, and requested to provide a statement. She may well have declined, in which case the decision making may have been unaltered. However, this is an unknown and this avenue ought to have been explored. Similarly, Mr. Dykstra should have been asked to respond to the merits of the allegations to the extent that they could be ascertained. Further, an attempt should have been made to obtain information directly from the police regarding the status of their investigation (while the police generally may not disclose personal information, *Maclean's* reported on January 28, 2018 that the investigating officer confirmed that the investigation was stopped at the request of the Complainant). Again, it is unknown to what extent, if any, these additional inquiries would have revealed further relevant information in the Dykstra case.

Upon obtaining the above information, the coordinator should conduct a preliminary assessment to answer the following questions:

(1) Is there sufficient information to draw a conclusion regarding whether the allegations are substantiated without further investigation? If so, what is that conclusion?

(2) If further investigation or review is required, should the Party conduct its own investigation or retain a third party investigator to do so?

(3) Should the Party immediately disallow the candidacy in the circumstances?

In answering the above questions, the coordinator should consider the following factors:

(1) Merits of the Allegations

a. The nature and seriousness of the allegations is a relevant factor. Sexual assault allegations are always extremely serious. Other allegations may be assessed on the following criteria:

i. The degree to which the allegations may detrimentally affect the Party's reputation;

ii. The degree to which the allegations may impact the candidate's reputation;

iii. Whether the allegations would render the candidate unable to discharge his or her responsibilities either as a candidate or an MP if elected;

iv. Whether the alleged misconduct is compatible with the Party's Constitution commitment to have representatives "who at all times conduct themselves in an ethical manner and display integrity, honesty and concern for the best interests of all";

b. The candidate's response and explanation, if any;

c. Whether the allegations are corroborated or contradicted by independent evidence characterized by a high degree of authenticity (e.g. photographic or video evidence, multiple disinterested eyewitnesses, etc.); and

d. Whether there are any other circumstances or factors that tend to enhance or undermine the credibility of the person making the allegations and/or the candidate. Some preliminary assessment of credibility can be made considering such factors as:

i. Is the story internally consistent?

ii. Is the story consistent with information given by other witnesses?

iii. Has the story changed over time?

iv. Does the person's memory appear to be selective such that he or she is able to remember some incidents with perfect clarity but other equally significant occurrences cannot be recalled?

v. Do the demeanour, words, and actions of both parties seem inappropriate to the seriousness of the allegation?

vi. Did the complaint immediately follow the alleged incident or was there an unexplained and unreasonable delay in reporting the offence?

vii. While this factor must be considered cautiously, has the complainant made previous accusations of harassment? What were the circumstances and outcomes in the other situations? Does the complainant have anything to gain by making the allegations?

viii. Have previous complaints involving the candidate been brought forward in the past?

ix. Is there any evidence of bad faith or reason to doubt the legitimacy of the complainant's motives?

(2) Disclosure Obligations

a. Did the candidate fail to disclose information or provide misleading information in the NCQ?

b. Did the candidate fail to disclose information pursuant to an ongoing obligation to disclose potential issues (assuming such an obligation is clearly adopted as recommended below)?

In some cases, a failure to disclose may rise to the level of providing false or misleading information. At such a point, the Party may consider whether it is appropriate to remove the candidate based on the seriousness of the non-disclosure, quite apart from whether the allegations or issues giving rise to the disclosure obligation are true. This is one of the

reasons why it is imperative that the disclosure obligations be as clear and extensive as possible.

(3) The Status of any Investigation and Opportunity for Further Investigation:

a. Have the allegations been publicized and, if not, what is the likelihood that they will be publicized? Imminent publication of allegations may well necessitate an immediate response from the Party. In some cases, interim measures could be implemented pending a more thorough investigation.

b. Has there been any investigative or adjudicative process regarding the allegations? If no such process is ongoing, was one terminated previously (and, if so, on what terms)?

c. Is there an ongoing investigative or adjudicative process in respect of the allegations? What stage has that process reached? When is that process likely to produce a determination regarding the candidate's culpability?

d. How long would it likely take the Party to investigate the allegations?

e. Is the alleged victim seeking a formal resolution or investigation, and what is the likelihood that he or she would be willing to participate in an investigation conducted or commissioned by the Party?

f. At what stage is the election campaign (i.e. whether a writ of election has been issued, and if so, how many days are left in the election period, and whether the closing day for nominations has passed)?

Following this assessment, the coordinator should provide a recommendation to the Campaign and/or the Leader regarding how to proceed. The reasons for the recommendation being made, even if very concise or 'bottom line' should be outlined. Depending on the circumstances, the coordinator may recommend:

(1) that the candidacy be immediately disallowed;

(2) that the candidate be permitted to continue as a candidate pending the outcome of a further review/investigation; or

(3) that the candidate be permitted to continue as a candidate without any further investigation or review.

The nature of the coordinator's recommendation will depend on the specific facts encountered at the relevant time.

Generally, and to the extent possible, I recommend that the results of the preliminary assessment and the preliminary recommendation be set out in writing. The coordinator can prepare a simple form setting out the following:

(1) name of the complainant;

(2) the date of the complaint;

(3) date of alleged incident;

(4) summary of events based on the complainant's account;

(5) summary of events based on the respondent's account;

(6) witnesses identified, if any;

(7) relevant documents or other corroborating evidence, if any;

(8) circumstances / factors relevant to credibility;

(9) relevant disclosures or failures to disclose in the NCQ or thereafter; and

(10) recommendations / conclusions.

Because some time may be required to prepare a written report, thereby causing delay in key decision making, there may be some hesitation in the creation of a written record. On balance, however, the benefits of written communication are likely to outweigh the costs and risks. First, written communications are generally clearer than verbal communications. Taking the time to commit thoughts to writing almost invariably ensures greater attention to detail, which may serve

to highlight gaps in information. The process of recording information in writing will help to ensure that recommendations are thoughtful and not simply based on quick emotional responses. With a written recommendation, there may also be more clear separation between the facts and the conclusions / recommendations based on those facts.

Again, flexibility in the procedure is important. For example, on the eve of the close of nominations or where a media request for comment is pending, it may not be possible to prepare a full written preliminary assessment in advance of a required decision. In such cases, I would still encourage putting as much as possible in writing; at a minimum, the preliminary assessment should be documented as quickly as possible, even if it is only done after the decision is made.

Section 91 of the *Canada Elections Act* provides that "no person shall, with the intention of affecting the results of an election knowingly make or publish any false statement of fact in relation to the personal character or conduct of a candidate or prospective candidate". For this section to be violated, the Court has held that the Crown must establish that the statements were false; the defendant knew the statements were false; and the statements were made for the purpose of affecting the general election (*R v. Clarke*, 2008 ONCJ 230). Any statements made in the preliminary assessment are being made for the purpose of assessing the suitability of a candidate and <u>not</u> for the purpose of affecting the election. That said, out of an abundance of caution, I would recommend that care be taken in setting out conclusions and recommendations to ensure that they do not overstate the evidence and reflect fair comments and conclusions that can be reasonably made based on the available evidence.

(3) Conduct or Commission an Investigation, Where Appropriate

In certain circumstances, the designated coordinator may determine (or recommend) that further information is required to assess whether the allegations against the candidate are substantiated and/or whether the candidacy should be disallowed. Accordingly, the coordinator may recommend that the Party conduct or commission an investigation into the allegations.

The scope, comprehensiveness and urgency of that investigation may well be impacted by the timing of any upcoming election; there must be some flexibility in the process. For example, where time permits, the purpose of the investigation may be to determine whether the candidacy should be disallowed with a view to substituting another candidate prior to the end of the election

period; such an investigation may consider both whether the allegations against the candidate are substantiated, and the degree to which the allegations will impact the candidate's electability, whether or not substantiated. If, however, the election is imminent, there may not be adequate time for more than a preliminary assessment and the Party may not be able to give candidates the "benefit of the doubt", absent clear factors undermining the credibility of the complainant or the veracity of the allegations. Being a candidate is a privilege, not a right. If there are factors undermining the veracity of the allegations but further investigation is required, one option would be to allow the candidacy to continue on the condition that, if the candidate is elected, the allegations against him or her will be investigated by the Party after the election. The purpose of this post-election investigation would be to determine whether the allegations against the candidate are substantiated and whether the Party can continue to support the MP as a member of the Party and caucus.

I do not recommend a specific cut-off date after which a full investigation may not be considered feasible. Such a "boiler plate" approach may fail to take into account the facts of each case. In my view, the nature and comprehensiveness of the investigation, if any, is a matter that is best left to be determined on a case by case basis considering such factors as the timing of the election, the nature of the allegations, and the number of potential witnesses to the alleged misconduct.

Where a recommendation for a full investigation is accepted, the Party may either appoint an external investigator, or conduct its own investigation by appointing an investigator internally. An external investigator may be more appropriate where the Party lacks the time or resources to conduct its own investigation or where the allegations against the candidate are numerous or otherwise require unique expertise to properly investigate. An external investigator may also be preferred to ensure the appearance of neutrality if allegations relate to a very senior person in the Party. Whether the investigation is conducted by an internal or external appointee, the Party must appoint an investigator who is, and is seen to be, objective. The Party must take appropriate steps to ensure that the person who is appointed is not someone who is under the direct control of the candidate, or who may have a personal interest in the outcome of the investigation.

It may be appropriate, and possible, to complete an investigation even where an independent criminal investigation into the merits of the allegations is ongoing. In criminal law, an individual

must be proven guilty “beyond a reasonable doubt”. In civil proceedings, the lower standard of proof “on a balance of probabilities” is applicable. Accordingly, while deferral of a decision pending criminal proceedings is an option and a criminal conviction will nearly always be treated as conclusive evidence that the crime was committed, the withdrawal of charges or even an acquittal should not be treated as determinative. Indeed, in some circumstances, it may well be more likely than not that the person committed the offence, despite the absence of proof beyond a reasonable doubt. To determine whether a candidacy should be continued, the relevant standard of proof will typically be whether the allegations have been established on the balance of probabilities. Indeed, even proof on a balance of probabilities is not required for the Party to determine that the candidacy should disallowed.

In each case, the investigator should:

(1) Endeavour to preserve the confidentiality of the investigation, and abstain from disclosing identifying information unless necessary to conduct the investigation or as required by law.

(2) Collect and review any relevant documents.

(3) Make reasonable efforts to thoroughly interview the alleged victim, the candidate, and any relevant witnesses.

(4) Provide the candidate with an opportunity to respond to the specific allegations against him or her, and provide the alleged victim with an opportunity to reply where appropriate.

(5) Take detailed notes or statements during all interviews.

At the conclusion of the investigation, the investigator should prepare a written report summarizing the allegations, the steps taken during the investigation, the candidate’s response to the allegations, all relevant evidence, the investigator’s findings of fact and any relevant recommendations.

Recommendation #2 – Strengthen the Existing Candidate Vetting Procedure and Ensure there is a Clear, Continuing Positive Obligation to Disclose Issues Arising After Nomination

Prior to the 2015 election, all candidates, including previously elected MPs, were required to submit a NCQ and a certificate of conduct obtained through the RCMP or local police detachment. The candidate vetting process is thorough and designed to ensure that candidates are worthy of the Party's endorsement.

The 2015 Nomination Rules provided that "**at the time of application**…the Applicant must not be party to any ongoing investigations which may lead to professional sanctions or criminal charges" (section 3(a)(iv) emphasis added). The 2015 application form expanded this obligation as it provided the following introductory statements, which imposed a positive obligation on candidates to disclose any relevant developments after their nomination:

> Applicants are required to inform the CNC of any new facts or circumstances related to the questions in this document. If an applicant fails to do so, s/he may be requested to withdraw as a nominee or a nominated candidate.
>
> Any applicant that provides false information with the intent to mislead the NCSC, CNC, members of the party or the general public will be disqualified.

Since 2015, the Party has amended its 2017 Nomination Rules to enshrine a **continuing** positive obligation of disclosure on applicants during the nomination process. Section 6 of the NCQ now provides:

> b) If any of the following eligibility requirements are not met by an Applicant **at all times during the nomination process**, the Applicant will not be allowed to become a Nomination Contestant or their status as a Nomination Contestant will be disallowed:
>
> v. **the Applicant is not subject to any investigations which may lead to professional sanctions or criminal charges, knowledge of which must be disclosed to the CNC and NCSC, and the Applicant has not obtained an approval to contest the nomination by NCSC.**
>
> If requirements are not met, the Applicant will not be allowed to become a Nomination Contestant.

[Emphasis added]

This expanded provision in the 2017 Rules clearly imposes a positive disclosure obligation on the applicant throughout the nomination process. This is a commendable step by the Party as it enshrines the positive obligation to disclose any investigations that may lead to professional sanctions or criminal charges.

I would, however, encourage the Party to expand this obligation even further in three respects. Most importantly, it would be advisable to expressly provide that the ongoing disclosure obligation extends to candidates in the period after nomination and does not simply apply during the nomination process. Any issues that arise after nomination but prior to the election should be captured by the positive disclosure obligation. Any candidate is likely already expected to disclose such issues but the obligation should be express and in writing. Second, the scope of the obligation itself should be expanded beyond an obligation to disclose investigations to include an obligation to disclose any circumstances or events which may lead to such investigations and any issues that may affect their ongoing eligibility to stand as candidates. Finally, if the obligation is included in the application material as in 2015, it would be helpful to include it in the signed attestation at the conclusion of the NCQ rather than in the introductory statements which are not specifically signed or initialed.

Recommendation #3 – Require Candidates to Provide More Comprehensive Police Checks

The 2015 Nomination Rules required Nomination Contestant Applicants to submit an original copy of a current Certificate of Conduct obtained through the RCMP or local police detachment (section 3(b)(iv)). This requirement was reinforced in Part III of the Application for Nomination Contestants Package as follows:

> PART III - CRIMINAL RECORD REPORT
>
> All potential candidates are required to provide the constituency nomination committee with a Criminal Record Report or a current Certificate of Conduct (obtained through the RCMP or local police detachment) whether offences have or have not been committed.
>
> **If you have no criminal convictions:**
>
> Go to a RCMP or local police station with your photo ID and a written request for their written confirmation that you do not have

> a criminal record. This is called a "Certificate of Conduct". Normally this can be done while you wait. A cash fee is likely to be required.
>
> **If you have had a criminal conviction:**
>
> Go to a RCMP or local police station with your photo ID and a written request for a copy of your criminal record. It will be necessary for the RCMP to obtain fingerprints. The process normally takes about a month and there is a cost for the search.
>
> A Criminal Record Report or Certificate of Conduct is required of all potential candidates, and must be submitted to the Candidate Nomination Committee.

A basic police record check discloses: (i) criminal convictions from Canadian Police Information Centre ("CPIC") and/or local police databases for which an individual has been convicted and no pardon has been granted; (ii) summary convictions for within five years of the criminal record check; and (iii) findings of guilt under the *Youth Criminal Justice Act* within the applicable disclosure period. However, it is possible to request a broader criminal record and judicial matters check, which includes both the items listed in the basic police record check and:

(1) records of absolute discharge if the request is made within one year of discharge;

(2) records of conditional discharge if the request is made within three years of discharge;

(3) outstanding criminal charges and warrants to arrest; and

(4) court orders against an individual, excluding orders under the *Mental Health Act*, restraining orders under the *Family Law Act*, and orders in relation to charges that were withdrawn or dismissed.

This broader criminal record check may help the Party to identify relevant concerns in respect of both applicants and candidates before the concerns intensify in the midst of an election campaign.

It would also be advisable to define the meaning of a "current" Certificate of Conduct. However, it appears that the Party has already taken this step as the 2017 Nomination Rules provide for the criminal record check to be no more than six months old.

Recommendation #4 – Implement a Code of Conduct and Harassment Policy for Candidates

Apart from the candidate vetting process and the obligation set out in the application package to "inform the CNC of any new facts or circumstances related to the questions in this document [the NCQ]", I was provided with no policies or codes governing the conduct of candidates.

The Party did, however, have some laudable policies for employees, including a Code of Conduct and a Whistleblower Policy, as well as a Code of Conduct for the Party's National Council.

The Code of Conduct for employees provides that employment with the Conservative Fund Canada or the Party is conditional upon compliance with applicable laws and requires employees to report unlawful or unethical conduct by a candidate of the Party to specified individuals, such as the National Campaign Manager and the Ethics Officer (who is defined in the Code as the National Campaign Chair or his designate). Note that the Code of Conduct addressees various other matters not relevant to the present inquiry (e.g., financial controls, conflicts of interest, etc.). The Code of Conduct is an important element in the process of monitoring candidates and it should be strictly enforced.

A separate Code of Conduct governs the Party's National Council. The National Council Code of Conduct sets out the following principles for members for the National Council:

(1) Respect the rule of law;

(2) Serve and be seen to serve the Party and its members in a conscientious and diligent manner;

(3) Be committed to perform functions with integrity and to avoid the improper use of the influence of their office, and conflicts of interest, both apparent and real;

(4) Perform duties in office and arrange their private affairs in a manner that promotes Members' confidence and will bear close Member scrutiny; and

(5) Seek to serve the Party's and the Members' interests by upholding the letter and the spirit of applicable Party Constitutions, Bylaws, rules and procedures.

The National Council Code of Conduct sets out standards of conduct, as follows:

> It is the duty of every councillor to:
>
> > 1. act honestly and in good faith with a view to the best interests of the Party; and
> >
> > 2. exercise the care, skill, and diligence that a reasonably prudent person would exercise in comparable circumstances.

The Whistleblower Policy (the "Policy") sets out the Party's commitment to integrity and ethical behaviour in the workplace with the intention of fostering and maintaining an environment where personnel can report concerns, and have those concerns investigated without fear of retaliation. The Policy allows for any personnel to submit a good faith report of actual or reasonably suspected wrongdoing, which report will be investigated and may result in disciplinary action. "Wrongdoing" is broadly defined to include:

> [A]ny illegal action in connection with the Conservative Party or any violation of the Conservative Party policy including any action or inaction that may adversely impact the Conservative Party, its members, employees, donors, Caucus members, candidates, associations, affiliated organizations, or the public at large, and any Reprisal.

While the definition of "wrongdoing" is theoretically broad enough to include wrongdoing by a candidate, the person responsible for receiving and investigating a complaint is the "Appropriate Authority" which is determined based on the "seniority of the respondent". There is no "Appropriate Authority" identified for receipt and investigation of a complaint against a candidate.

Practically speaking, it may also be difficult for the investigation procedures outlined in the Policy to be applied to allegations regarding a candidate raised in the context of an election campaign, given the 14 day investigation process. This may be too long a period in the midst of a campaign.

Despite the obvious value and need for the existing Codes of Conduct and Whistleblower Policy, I recommend that a separate Code of Conduct be implemented specifically to govern the conduct of candidates. A Candidate Code of Conduct could parallel the existing Codes of Conduct to some degree but should also be expanded to expressly require candidates to acknowledge an

obligation that they must be of good character, respect the dignity of all individuals, respect the principles of equality and inclusion and adhere to the highest ethical standards.

In conjunction with establishing a Candidate Code of Conduct, I recommend the promulgation of a specific policy prohibiting discrimination and harassment by candidates. A clear policy is one of the most effective ways that an entity can deter discriminatory behaviour, harassment, and/or sexual misconduct and, ensure that all incidents are dealt with in a timely and procedurally fair manner. Other benefits of such a policy include:

- The Party will demonstrate its commitment to the highest ethical standards. This may increase willingness to bring forward complaints.
- Through clear definitions of harassment and other prohibited behavior, candidates will be made aware of what constitutes harassing behaviour and the scope of conduct that is inappropriate. While there is no question that assault is unacceptable, guidance regarding what is permissible may help to prevent more subtle forms of discrimination and harassment.
- The Party will be able to communicate its commitment to respect confidentiality to the greatest extent possible, and reassure potential complainants who fear further victimization for having filed a complaint.

In addition to an anti-discrimination and harassment policy for candidates, the Party should require candidates to implement a parallel discrimination and harassment policy in respect of each candidate's employees and campaign staff. The Party can either prepare a template policy for its candidates or it can set out the essential elements which must be included in a policy prepared by each candidate. The discrimination and harassment policy should be clear and comprehensive. It is important that the policy be concise and be written in simple language. A complicated document that is difficult to understand will deter alleged victims of harassment from coming forward with their complaints. The parallel policy should contain the following elements:

(1) clear and detailed definitions of discrimination and harassment and examples of unacceptable conduct;

(2) a complaint procedure, including information concerning how to make a complaint and to whom a complaint should be made;

(3) a statement that no reprisals or threats of reprisals will be made or taken against anyone who files a complaint in good faith; and

(4) a flexible investigation procedure, including a commitment to resolving complaints as expeditiously as possible and a commitment to maintaining confidentiality to the extent possible.

Recommendation #5 – Training for Candidates

Article 2 of the 2015 Constitution enshrines the fundamental belief that good and responsible government has representatives who at all times conduct themselves in an ethical manner and display integrity, honesty and concern for the best interest of all, as follows:

> 2.1 The Conservative Party of Canada is founded on and will be guided in its policy formation by the following principles:
>
> …
>
> 2.1.19. A belief that good and responsible government is attentive to the people it represents and has representatives who at all times conduct themselves in an ethical manner and display integrity, honesty and concern for the best interest of all.

Consistent with this commitment, the Party has provided employees and candidates with training regarding political and campaign ethics and legal compliance. In my view, the scope of this training should be expanded to address basic human rights (including harassment and equality principles), the Code of Conduct that is implemented for candidates, the Harassment Policies and the Candidate Complaint Procedure. This training, which should be made mandatory for all candidates, could be implemented during the nomination process or after the nomination stage as a condition of party endorsement.

Notably, training is contemplated by Nomination Rules. The 2015 Nomination Rules, for example, provided at section 3(b)(viii)(5) that the Applicant was required to sign a declaration stating that "if they are successful in winning the nomination, they will participate in training session(s) conducted by the Party on how to run an effective federal election campaign". This acknowledgement should, ideally, be expanded to recognize that training will address more than winning and will include training regarding the above-noted matters as well as any other training deemed to be necessary by the Party.

To have a positive impact, the Code of Conduct, Harassment Policies and Candidate Complaint Procedure must be properly implemented. This means that their existence and content must be clearly and effectively communicated to all relevant stakeholders. The Party's commitment to the enforcement of these policies and procedures must also be clearly understood. In the words set out in the Party's own training material, "[i]t is not enough to hand people the rules. We need to educate them – help them understand what they mean. We need to include the rules in training".

Recommendation #6 – Ensure Robust Reporting Policies, Training and Investigation Procedures are in Place Outside of the Campaign

While the focus of this Review has been on the Campaign's response to the allegations regarding Mr. Dykstra, it must be noted that, had the allegations against Mr. Dykstra been promptly reported and thoroughly investigated in 2014, the issue may well have been addressed and resolved before the election.

The Dykstra incident underscores the need for a robust sexual assault and/or harassment reporting and investigation regime that applies to parliamentary staff. Admittedly, this is a matter outside the scope of my mandate. Nonetheless, I invite the Party to give further consideration and discussion to this Recommendation, especially given the pending legislative amendments flowing from Bill C-65. This Bill, which received Royal Assent on October 25, 2018, will amend the *Canada Labour Code*, RSC 1985, c L-2 and the *Parliamentary Employment and Staff Relations Act*, RSC 1985, c 33 (2nd Supp). The amendments to the *Canada Labour Code*, which are set out in Part 1 of Bill C-65, are intended to strengthen the framework for the prevention of harassment of violence in the workplace. These provisions will come into force on a day to be fixed by order of the Governor in Council. Part 2 of Bill C-65 will extend certain provisions of the *Canada Labour Code*, including the amendments regarding harassment and violence, to parliamentary employees and employers. As such, members of the House of Commons, in their capacity as employers, will be required to: (i) investigate, record and report incidents of harassment (including sexual harassment); (ii) take measures to prevent and protect against harassment; and (iii) respond to incidents of harassment and offer support to employees affected by harassment in the workplace.