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OTTAWA, Ontario, June 26, 2008

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

JEAN PELLETIER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

and

THE HONOURABLE JOHN H. GOMERY, IN HIS QUALITY AS EX-COMMISSIONER OF THE COMMISSION OF INQUIRY INTO THE SPONSORSHIP PROGRAM AND ADVERTISING ACTIVITIES

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application for judicial review brought by Mr. Jean Pelletier (the "Applicant"), in respect of the Fact Finding Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities, dated November 1, 2005, entitled *Who is Responsible?*

BACKGROUND

[2] The Commission of Inquiry into the Sponsorship Program and Advertising Activities (the "Commission") was created by Order in Council P.C. 2004-0110 on February 19, 2004, pursuant to Part I of the *Inquiries Act*, R.S.C. 1985, c. I-11. The Order in Council appointed the Honourable Mr. Justice John Howard Gomery (as he then was) as Commissioner and set the Terms of Reference. The Commissioner was given a double mandate to investigate and report on the sponsorship program and advertising activities of the Government of Canada and to make recommendations based on his factual findings to prevent mismanagement of sponsorship programs or advertising activities in the future.

[3] The Commission was established as a result of questions raised in Chapters 3 and 4 of the Auditor General of Canada's November 2003 Report (the "Auditor General's Report"), which reported problems with the management of the federal government's Sponsorship Program, the selection of communications agencies for the government's advertising activities, contract management, and the measuring and reporting of value-for-money. The Auditor General's Report also noted that there was a lack of transparency in decision-making, a lack of written program guidelines, and a failure to inform Parliament of the Sponsorship Program, including its objectives, expenditures, and the results it achieved.

[4] In compliance with his mandate, the Commissioner was required to submit two reports to the Governor General. In the first report (the "Phase I Report"), the Commissioner was to provide

his factual conclusions after completing the hearings of Phase I of his mandate, which was defined as follows:

> a. to investigate and report on questions raised, directly or indirectly, by Chapters 3 and 4 of the November 2003 Report of the Auditor General of Canada to the House of Commons with regard to the sponsorship program and advertising activities of the Government of Canada, including
>
> i. the creation of the sponsorship program,
> ii. the selection of communications and advertising agencies,
> iii. the management of the sponsorship program and advertising activities by government officials at all levels,
> iv. the receipt and use of any funds or commissions disbursed in connection with the sponsorship program and advertising activities by any person or organization, and
> v. any other circumstance directly related to the sponsorship program and advertising activities that the Commissioner considers relevant to fulfilling his mandate […]

[5] The second report was to be prepared in the context of Phase II of the mandate and was aimed at presenting the Commissioner's recommendations. This second Phase was defined as follows:

[6] Although the Commissioner was given a broad mandate, the Terms of Reference made the express limitation that the Commissioner was "to perform his duties without expressing any conclusions or recommendation regarding the civil or criminal liability of any person or organization and to ensure that the conduct of the inquiry does not jeopardize any ongoing criminal investigation or criminal proceedings" (paragraph (*k*), Order in Council, *supra*).

> b. to make any recommendations that he considers advisable, based on the factual findings made under paragraph (a), to prevent mismanagement of sponsorship

> programs or advertising activities in the future, taking into account the initiatives announced by the Government of Canada on February 10, 2004, namely,
>
> i. the introduction of legislation to protect "whistleblowers", relying in part on the report of the Working Group on the Disclosure of Wrongdoing,
> ii. the introduction of changes to the governance of Crown corporations that fall under Part X of the *Financial Administration Act* to ensure that audit committees are strengthened,
> iii. an examination of
> A. the possible extension of the *Access to Information Act* to all Crown corporations,
> B. the adequacy of the current accountability framework with respect to Crown corporations, and
> C. the consistent application of the provisions of the *Financial Administration Act* to all Crown corporations,
> iv. a report on proposed changes to the *Financial Administration Act* in order to enhance compliance and enforcement, including the capacity to
> A. recover lost funds, and
> B. examine whether sanctions should apply to former public servants, Crown corporation employees and public office holders, and
> v. a report on the respective responsibilities and accountabilities of Ministers and public servants as recommended by the Auditor General of Canada, […]

[7] To assist him in completing this mandate, the Commissioner had the support of administrative staff and legal counsel. Me Bernard Roy, Q.C., was appointed as lead Commission counsel. Mr. François Perreault acted as the Commission's communications advisor and was responsible for media relations.

[8] The public hearings were held from September 7, 2004 until June 17, 2005, during which time 172 witnesses were heard. The hearings were completed in two phases. The Phase I hearings took place from September 2004 to February 2005. The Phase II hearings were held from February to May 2005. The Phase I and II Reports were submitted to the Governor General and made public on November 1, 2005 and February 1, 2006, respectively. As explained in my reasons below, the

scope of this judicial review is limited to the Phase I Report and does not include the Commission's Phase II Report.

The Sponsorship Program

[9] Before turning to the issues raised in this application, it is necessary to provide some details regarding the origins of the Sponsorship Program and advertising activities, which were the focus of the Commission's investigation and Report.

[10] In 1993, the Liberal Party of Canada, led by the Right Honourable Jean Chrétien, won a majority of seats in the House of Commons. The official Opposition party at the time was the Bloc Québécois. The following year, the Parti Québécois, led by the Honourable Jacques Parizeau, came to power in Québec and soon announced that a provincial referendum would be held in October 1995 to decide whether or not Québec should separate from Canada. The "No" side won by a very slim majority. As a result, Québec would not attempt to secede from Canada but would remain part of the Canadian federation. Mr. Parizeau resigned as Premier and was replaced by the Honourable Lucien Bouchard, who pledged to hold another referendum when "winning conditions" were present.

[11] Following the close result of the Referendum and with this pledge from Mr. Bouchard, a Cabinet committee, chaired by the Honourable Marcel Massé (Minister of Intergovernmental Affairs at the time), was appointed to make recommendations on national unity. Based on the

recommendations in the Cabinet committee's report, the Government of Canada, after holding a meeting of Cabinet on February 1 and 2, 1996, decided it would undertake special measures to counteract the sovereignty movement in Québec. These special measures became known as the "national unity strategy" or "national unity file." As stated by Mr. Chrétien in his opening statement before the Commission, national unity was his number one priority as Prime Minister. As a result, he placed his Chief of Staff, the Applicant, in charge of the national unity file in his office.

[12] The national unity strategy sought to increase federal visibility and presence throughout Canada, but particularly in Québec. This was to be accomplished in many ways, one of which was to prominently, systematically and repeatedly advertise federal programs and initiatives through a Sponsorship Program. Sponsorships were arrangements in which the Government of Canada provided organizations with financial resources to support cultural, community, and sporting events. In exchange, the organizations would provide visibility through promotional material and by displaying symbols such as the Canadian flag or the Canada wordmark. According to the Auditor General's Report, from 1997 until March 31, 2003, the Government of Canada spent approximately $250 million to sponsor 1,987 events.

[13] Responsibility for administering the Sponsorship Program was given to Advertising and Public Opinion Research Sector (APORS), a sector of the Department of Public Works and Government Services Canada (PWGSC) which later became the Communication Coordination Service Branch (CCSB) with the merger of APORS and other PWGSC sectors in October 1997.

Mr. Joseph Charles Guité was Director of APORS from 1993 to 1997 and Executive Director of CCSB from 1997 until his retirement in 1999.

[14] APORS (and later CCSB) did not have the personnel, training or expertise necessary to manage and administer the sponsorships. As a result, contracts were awarded to advertising and communication agencies to complete these tasks and, in exchange for these services, the agencies received remuneration in the form of commissions and production costs. Over $100 million of the total expenditures of the Sponsorship Program was paid to communications agencies in the form of production fees and commissions.

[15] In March 2002, the Minister of PWGSC, then the Honourable Don Boudria, asked the Office of the Auditor General to audit the government's handling of three contracts totalling $1.6 million awarded to Groupaction Marketing, a communications agency based in Montréal. Findings of shortcomings in the contract management process led to an RCMP investigation and the initiation of a government-wide audit of the Sponsorship Program and the public opinion research and advertising activities of the Government of Canada. The results of this audit were released in the Auditor General's November 2003 Report, which in turn led to the creation of the Commission and the Report at issue in this application.

INTERLOCUTORY MOTIONS

[16] The parties to this application brought two interlocutory motions relating to these proceedings. My decisions on these motions are set out below.

1. Motion by the Attorney General of Canada to quash paragraphs from the Applicant's affidavit

[17] This first motion presented by the Attorney General of Canada is to quash paragraphs and expurgate exhibits from the affidavit sworn by the Applicant on May 29, 2007 in support of his application for judicial review.

[18] At the hearing on this matter, the Attorney General submitted that he no longer objected to paragraphs 18, 19 and 23 and to corresponding exhibits 5 to 12 and 15 of the affidavit. These paragraphs and exhibits deal with interviews that Commissioner Gomery gave to the media in December 2004. Since Commissioner Gomery acknowledged to have granted these interviews and admitted to the truth of what was stated in quotation marks, the paragraphs and exhibits in question can remain in the Applicant's affidavit.

[19] However, the Attorney General seeks to have removed from the Applicant's affidavit paragraphs 11 to 14 and corresponding exhibits 2 to 4 of the affidavit, which make allegations pertaining to Me Bernard Roy as the Commission's lead counsel. These documents are included in the Applicant's affidavit in support of his allegation that Commissioner Gomery has shown a reasonable apprehension of bias towards him. Me Roy was Principal Secretary to former Prime Minister the Right Honourable Brian Mulroney from 1984 to 1988. Me Roy is now a partner in the same law firm as Me Sally Gomery (the Commissioner's daughter) and Mr. Mulroney.

[20] The Attorney General submits that these allegations, and therefore the documents that support them and that are sought to be introduced by exhibits 2 to 4, are irrelevant to the application for judicial review of Commissioner Gomery's Phase I Report. The Applicant insists that I should be extremely careful in my assessment of what is relevant or irrelevant to the present case. He submits that the relevance of evidence is determined by the grounds in support of the application for judicial review (*Canada (Human Rights Commission) v. Pathak*, [1995] 2 F.C. 455 (F.C.A.) [hereinafter *Pathak*]).

[21] I agree with the Attorney General that paragraphs 11 to 14 and corresponding exhibits 2 to 4 are irrelevant to the issue of whether Commissioner Gomery has shown a reasonable apprehension of bias towards the Applicant. The professional career and the political allegiances of Me Roy are of no use in the analysis of Commissioner Gomery's conduct. I acknowledge that pursuant to the decision in *Pathak*, above, the relevance of the evidence is a function of the grounds in support of the application for judicial review. Paragraph 10 of *Pathak* reads as follows:

> A document is relevant to an application for judicial review if it may affect the decision that the Court will make on the application. As the decision of the Court will deal only with the grounds of review invoked by the respondent, the relevance of the documents requested must necessarily be determined in relation to the grounds of review set forth in the originating notice of motion and the affidavit filed by the respondent.

[22] The Applicant submits that if I were to quash some evidence as being irrelevant at this stage, such as the documents regarding Me Roy, my decision would have the effect of striking one of the grounds in support of his application for judicial review, since the ground in question is based on the

evidence, the relevance of which I must now determine. In other words, in the Applicant's opinion, if I quash some portions of the evidence now, I deprive him at the same time of a ground of review.

[23] I am fully aware that in the course of the present interlocutory application, I must avoid deciding on the merits of the application for judicial review. However, I do not think that assessing the relevance of the evidence at this stage amounts to deciding the soundness of the grounds in support of the application. That is not the way I read and interpret the *Pathak* decision. In that case, the Court of Appeal stated "the relevance of the documents requested must necessarily be determined in relation to the grounds of review (in French: "la pertinence des documents demandés doit nécessairement être établie en fonction des motifs de contrôle") [my emphasis]. I understand from this passage that I have the discretion to "determine" or "establish" what is relevant from what is not. My task is to proceed with the assessment of the relevance of the evidence by relying on the grounds of review set forth in the notice of application. I do not think that, in *Pathak*, the Court of Appeal wanted to suggest that all the evidence relating more or less to the grounds of review must automatically be considered as relevant. My role consists precisely in filtering, "determining" or "establishing," what is relevant from what is not.

[24] For this reason and by virtue of the discretion that is conferred upon me, paragraphs 11 to 14 are quashed and corresponding exhibits 2 to 4 are expurgated from the Applicant's affidavit. However, at this point, for the sake of efficiency and practicality, I do not require that the affidavit be in fact modified. I shall simply not take into consideration this portion of the evidence in the course of my analysis of the application on the merits.

[25] The Attorney General further seeks to have removed paragraphs 40 to 42 and corresponding exhibits 36 to 43 of the affidavit, which all pertain to the media coverage surrounding the Commissioner and the publication of his Phase I Report. These documents and newspaper articles are included in the Applicant's affidavit in support of his allegation that his reputation has been damaged by the Commissioner's findings and by the statements the Commissioner made to the media. The Attorney General alleges that the newspaper articles that mention the Applicant's name in relation to the Commission constitute hearsay in that they reflect only the opinions of the journalists who wrote them. Furthermore, it is impossible to cross-examine these journalists. The Attorney General does not deny that Commissioner Gomery has made declarations to journalists; however, evidence of these declarations cannot be established by relying on the journalists' opinions.

[26] I agree with the Attorney General that the newspapers articles that allude to the Applicant in relation to the Commission constitute hearsay in that they merely represent the opinions of the journalists who wrote them. As we will see below in the course of the application presented by the Applicant based on Rule 312 of the *Federal Courts Rules*, only a limited number of newspaper articles will be admissible in evidence for the limited purpose of providing the context for some statements in quotation marks that Commissioner Gomery acknowledged as having been made by him. That is not the case of the newspaper articles we are dealing with here. For this reason, paragraphs 40 to 42 are quashed and corresponding exhibits 36 to 43 are expurgated from the Applicant's affidavit. Here again, I do not require that the affidavit be in fact modified. I shall

simply not take into consideration this portion of the evidence in the course of my analysis of the application on the merits.

[27] The Attorney General also seeks to have removed exhibits 13, 16, 17 and 22 of the affidavit, which consist of transcripts of public hearings of the Commission. The Attorney General submits that these exhibits already form part of the evidence filed in electronic form.

[28] Exhibits 13, 16, 17 and 22 do indeed already form part of the record filed electronically. Since there is an Order rendered by Mr. Justice Simon Noël that states that the evidence filed electronically by the Attorney General is automatically part of the Applicant's record, I must require that these exhibits be expurgated from the Applicant's affidavit. Here again, I do not require that the affidavit be in fact modified.

[29] The Attorney General further seeks to have removed paragraphs 32 to 39, and the corresponding exhibits 23 to 35 of the affidavit, which all relate to Phase II of the Commission's mandate, and more particularly to the Phase II Report entitled *Restoring Accountability – Recommendations*. The Attorney General asserts that everything that relates to the Commission's Phase II mandate is irrelevant to the application for judicial review of the Phase I Report.

[30] I agree with the Attorney General that any allusion or reference to the Phase II mandate of the Commission is irrelevant to the present application for judicial review. I apply the same reasoning as that used above as to what constitutes relevance (see *Pathak*, above). For this reason,

paragraphs 32 to 39 are quashed and the corresponding exhibits 23 to 35 are expurgated from the Applicant's affidavit. Here again, I do not require that the affidavit be in fact modified. I shall simply not take into consideration this portion of the evidence in the course of my analysis of the application on the merits.

[31] Next, the Attorney General seeks to have removed paragraphs 43 to 46 and corresponding exhibits 44 and 45 of the affidavit, which deal with Mr. François Perreault's book entitled *Inside Gomery*. These documents are included in the Applicant's affidavit in support of his allegation that Commissioner Gomery has shown a reasonable apprehension of bias towards him. The Applicant believes that Mr. Perreault's book should be admitted into evidence because in the foreword written by him, Commissioner Gomery recognizes the accuracy of Mr. Perreault's "chronicle of the inner workings of the commission." On the other hand, the Attorney General insists that this statement by Commissioner Gomery should not be perceived as an admission that the entirety of the book is accurate. In the Attorney General's opinion, Mr. Perreault's book constitutes hearsay.

[32] I agree with the Applicant that Commissioner Gomery's statement in his foreword to the effect that the inner workings of the Commission, as chronicled by Mr. Perreault, are accurate, strongly suggests that he in fact attests to the accuracy of the entire book. I assume Commissioner Gomery read Mr. Perreault's book before agreeing to author its foreword, and that if there was a passage of the book that struck him as inaccurate, he would have suggested to Mr. Perreault to modify the passage, or at the very least, that he would have distanced himself from the book by not using the term "accurate" in reference to the manner Mr. Perreault chronicled the inner workings of

the Commission. For this reason, Mr. Perreault's book is admissible, and paragraphs 43 to 46 and corresponding exhibits 44 and 45 can remain in the Applicant's affidavit.

2. Motion by the Applicant pursuant to Rule 312 of the *Federal Courts Rules*

[33] The Applicant filed a motion for leave to file the supplemental affidavit of Ms. Patricia Prud'homme, sworn on November 9, 2007, pursuant to Rule 312. This affidavit introduces additional evidence that consists of newspaper articles and transcripts of interviews granted by Commissioner Gomery when he retired from the Superior Court of Québec in August 2007. In the course of these interviews, Commissioner Gomery made some comments that the Applicant considers relevant to his application for judicial review.

[34] However, relevance of the documents sought to be adduced is not the only condition that has to be met in order to file a supplemental affidavit. Other conditions are: 1) the evidence must serve the interests of justice; 2) it must assist the Court; 3) it must not cause substantial or serious prejudice to the other side; and 4) the evidence must not have been available prior to the cross-examination of the opponent's affidavits (*Atlantic Engraving Ltd v. Rosenstein*, 2002 FCA 503 at paras. 8-9).

[35] I agree with the Applicant that all these conditions have been satisfied in the present case. The motion for leave to file Ms. Prud'homme's supplemental affidavit pursuant to Rule 312 is therefore granted. The evidence introduced by that affidavit is henceforth part of the record.

ISSUES ON JUDICIAL REVIEW APPLICATION

[36] Taking into account the submissions of the parties, the issues in this application may be framed as follows:

1. What content of procedural fairness was owed to persons appearing before the Commission?

2. What are the applicable standards of review?

3. Did the Commissioner breach the duty of procedural fairness?
    a. Was there a reasonable apprehension of bias on the part of the Commissioner toward the Applicant?
    b. Was the Applicant given adequate notice pursuant to section 13 of the *Inquiries Act*?
    c. Did the Commissioner err by making findings not supported by some evidence on the record?
    d. Was the Commissioner's act of allowing Commission counsel to provide him with summaries of the evidence a breach of the duty of fairness?

ANALYSIS

Issue 1: The Content of Procedural Fairness owed to persons appearing before the Commission

[37] Procedural fairness is a basic tenant of our legal system. It requires that public decision-makers act fairly in coming to decisions that affect the rights, privileges or interests of an individual. There is no exception of the application of this principle for commissions of inquiry. As stated by Justice Cory in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System),* [1997] 3 S.C.R. 440, at paras. 30-31 [hereinafter *Krever*]:

> Undoubtedly, the ability of an inquiry to investigate, educate and inform Canadians benefits our society. A public inquiry before an impartial and independent commissioner which investigates the cause of tragedy and makes recommendations for change can help to prevent a recurrence of such tragedies in the future, and to restore public confidence in the industry or process being reviewed.

> The inquiry's roles of investigation and education of the public are of great importance. Yet those roles should not be fulfilled at the expense of the denial of the rights of those being investigated. The need for the careful balancing was recognized by Décary J.A. [in the Court of Appeal's decision in the same case] when he stated at para. 32 "[t]he search for truth does not excuse the violation of the rights of the individuals being investigated". This means that no matter how important the work of an inquiry may be, it cannot be achieved at the expense of the fundamental right of each citizen to be treated fairly.

[38] The content of the duty of fairness is variable and flexible. The requirements of procedural fairness will depend on the nature and function of the administrative board (see generally *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 [hereinafter *Knight*]; *Baker v. Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817 [hereinafter *Baker*]; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 74-75; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 79 [hereinafter *Dunsmuir*]).

[39] In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 [hereinafter *Westray*], Justice Cory noted the following about the function of public inquiries in Canada:

> Commissions of inquiry have a long history in Canada. This Court has already noted (*Starr v. Houlden*, *supra*, at pp. 1410-11) the significant role that they have played in our country, and the diverse functions which they serve. As ad hoc bodies, commissions of inquiry are free of many of the institutional impediments which at times constrain the operation of the various branches of government. They are created as needed, although it is an unfortunate reality that their establishment is often prompted by tragedies such as industrial disasters, plane crashes, unexplained infant deaths, allegations of widespread child sexual abuse, or grave miscarriages of justice.
>
> […]

> One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public: *Westray*, *supra*, at paras. 60, 62.

[40] With respect to the nature of public inquiries, Justice Cory set out the following basic principles in *Krever*, *supra*, at paragraph 57:

> (a) (i) a commission of inquiry is not a court or tribunal, and has no authority to determine legal liability;
>
> (ii) a commission of inquiry does not necessarily follow the same laws of evidence or procedure that a court or tribunal would observe.
>
> (iii) It follows from (i) and (ii) above that a commissioner should endeavour to avoid setting out conclusions that are couched in the specific language of criminal culpability or civil liability. Otherwise the public perception may be that specific findings of criminal or civil liability have been made.
>
> (b) a commissioner has the power to make all relevant findings of fact necessary to explain or support the recommendations, even if these findings reflect adversely upon individuals;

> (c) a commissioner may make findings of misconduct based on the factual findings, provided that they are necessary to fulfill the purpose of the inquiry as it is described in the terms of reference;
>
> (d) a commissioner may make a finding that there has been a failure to comply with a certain standard of conduct, so long as it is clear that the standard is not a legally binding one such that the finding amounts to a conclusion of law pertaining to criminal or civil liability;
>
> (e) a commissioner must ensure that there is procedural fairness in the conduct of the inquiry.

[41] In *Baker*, the Supreme Court of Canada identified five non-exhaustive factors that are to be considered when determining the content of the duty of fairness. They are: (i) the nature of the decision and the decision-making process; (ii) the statutory scheme; (iii) the importance of the decision to the individuals affected; (iv) the legitimate expectations of the parties; and (v) the choices of procedure made by the decision-making body. Justice L'Heureux-Dubé in *Baker* stressed that:

> […] underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker: *Baker*, supra, at para. 22.

[42] The Applicant argues that these factors indicate that a high duty of procedural fairness was owed to parties appearing before the Commission. The Attorney General submits that the duty of procedural fairness imposed on commissions of inquiry is more limited than that put forward by the

Applicant. The Attorney General does not dispute that the content of the duty of fairness is variable, but suggests that the content of the duty of fairness is to be decided using the following three factors established in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 and applied in *Knight*, *supra*: (i) the nature of the decision to be made by the administrative body in question; (ii) the relationship between that body and the individual, and; (iii) the effect of that decision on the individual's rights. However, in my reading of *Knight*, these factors do not apply when determining the content of the duty of fairness; instead, their proper application is in the context of determining whether or not a general duty to act fairly exists at all. Whether a duty to act fairly exists is not at issue here and the jurisprudence is clear that procedural fairness is essential in commissions of inquiry (see *Krever*, *supra*, at para. 55). Thus, the content of fairness in the present case shall be determined using the five non-exhaustive factors set out in *Baker*.

(i) <u>The nature of the decision and the decision-making process</u>

[43] In *Knight*, the Supreme Court held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making" (*Knight*, *supra*, at p. 683). In *Baker*, the Supreme Court added "[t]he more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness" (*Baker*, *supra*, at p. 838).

[44] Some of the rules and procedures adopted by the Commission are similar to the procedures found in the judicial process. For example, there existed the right to discovery of relevant documents, witnesses gave their evidence under oath or affirmation, proceedings could be held *in camera* at the discretion of the Commission (despite this being a public inquiry), parties had the right to be represented by counsel, the right to give evidence and to call and question witnesses, and the opportunity to cross-examine witnesses. Parties were also entitled to bring procedural motions, to have those motions argued and decided upon by the Commissioner, and to make final submissions, both written and oral. Further, pursuant to the *Inquiries Act*, the Commissioner had the power to summons witnesses and to compel witnesses to give evidence and produce documents.

[45] Despite these similarities, however, commissions of inquiry are not synonymous to trials. In *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527 (F.C.A.) [hereinafter *Beno (FCA)*], the Federal Court of Appeal held that Mr. Justice Campbell had erred in his decision at the trial level when he characterized the Commission as "trial-like" (see *Brigadier-General Ernest B. Beno v. The Honourable Gilles Létourneau*, [1997] 1 F.C. 911 at para. 74 (F.C.T.D.) *per* Campbell J. [hereinafter *Beno (TD)*]). The Federal Court of Appeal stated at paragraph 23:

> It is clear from his reasons for judgment that the Judge of first instance assimilated commissioners to judges. Both, in his view, exercise "trial like functions." That is clearly wrong. A public inquiry is not equivalent to a civil or criminal trial (see *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 2 F.C. 36 (C.A.), at paragraphs 36, 73 [hereinafter *Krever*]; *Greyeyes v. British Columbia* (1993), 78 B.C.L.R. (2d) 80 (S.C.), at page 88; *Di Iorio et al. v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152, at page 201; *Bortolotti v. Ontario (Ministry of Housing)* (1977), 15 O.R. (2d) 617 (C.A.), at pages 623-624;

> *Shulman, Re*, [1967] 2 O.R. 375 (C.A.), at page 378)). In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate (*Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, at page 138). The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only "inquire" and "report" (see *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, at page 231; *Greyeyes*, *supra*, at page 88). Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding by the Somalia Inquiry is that reputations could be tarnished (see *Westray*, *supra*, at page 163, *per* Cory J.; *Krever*, *supra* at paragraph 29; *Greyeyes*, *supra*, at page 87).

Thus, unlike trials, commissions of inquiry are inquisitorial in nature rather than adversarial.

[46] There are also significant differences in the nature of the decisions. As held in *Krever*, the findings of a Commissioner "are simply findings of fact and statements of opinion" that carry "no legal consequences…They are not enforceable and do not bind courts considering the same subject matter" (*Krever*, *supra*, at para. 34). Further, as noted above, section (*k*) of the Order in Council provided that the Commissioner was to perform his duties "without expressing any conclusion or recommendation regarding the civil or criminal liability of any person or organization." Thus, the nature of the Commission's report and recommendations are vastly different than judicial decisions.

[47] Although there are similarities in procedure, the role played by Commissioners is distinct from the role of a judge presiding over a trial. The nature of a Commission's report and recommendations are also vastly different than judicial decisions. This suggests that a lower content of procedural fairness is required.

(ii) The nature of the statutory scheme and the precise statutory provisions

[48] The Commission was created by an Order in Council pursuant to section 2 of the *Inquiries Act*, which provides that the Governor in Council may "cause inquiry into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof."

[49] The *Inquiries Act* also contains fairness guarantees in sections 12 and 13. Section 12 provides that persons whose conduct is under investigation may be represented by counsel. Section 13 provides that notice must be given to persons against who there are allegations of misconduct.

[50] The finality of the decision also affects the content of procedural fairness. In *Baker*, the Court held that greater procedural protections will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted (*Baker*, *supra,* at p. 838). The Order in Council and the *Inquiries Act* are silent on the availability of an appeal. This suggests that, with the exception of challenging findings on judicial review, the Commission's findings are final. Further, the objective of such a commission of inquiry is to produce a fact-finding report that sheds light on the matter or conduct it was created to investigate. After conducting the inquiry, the commission is expected to produce a report and recommendations based on its factual findings. Thus, the report is determinative of the issue insofar as it relates to the public inquiry, recognizing of course that the report is not determinative of any other proceedings and hearings. On the other hand, the Inquiry also seems preliminary in nature in

that no rights or interests are determined and the result of the Inquiry is simply findings of fact and recommendations. However, since the report is determinative of the Inquiry, I am satisfied that the second factor in this analysis also suggests that a high degree of fairness is owed.

(iii) The importance of the decision to the individuals affected

[51] The more important the decision is to the lives of those affected and the greater its impact, the greater the procedural protections to be provided (*Baker*, *supra*, at pp. 838-839). In *Krever*, the Supreme Court recognized that findings of commissions of inquiry may damage the reputation of witnesses and that, "[f]or most, a good reputation is their most highly prized attribute" (*Krever*, *supra*, at para. 55). "It is therefore essential," stated the Court in *Krever*, "that procedural fairness be demonstrated in the hearings of a commission" (*ibid.*). In the present case, the Commissioner, himself, recognized the potential for evidence emerging throughout the inquiry that "might be perceived as adverse or unfavourable to persons' reputations" and stated that it was "of paramount importance that the Inquiry's process be scrupulously fair" (Phase I Report, Appendix C: Opening Statement at p. 524-525).

[52] This is not to say, however, that the content of fairness is necessarily more stringent where there is a risk that one's reputation may be negatively affected. As I stated in *Addy v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia – Létourneau Commission)*, [1997] 3 F.C. 784, [1997] F.C.J. No. 796 (QL), "the possible and purported damage to the Applicants' reputations must not trump all other factors and interests" (*Addy*, at para. 59). In determining the standard of fairness, it is necessary to "balance the risks to an individual's

reputation and the social interests in publication of a report" (*Addy*, at para. 61). Likewise, the risks to an individual's reputation must be balanced with the social interest in permitting the Commission to conduct its inquiry and to inform and educate the public about the matter or conduct under review.

[53] Although a Commission does not have the power to affect any individual rights in that it cannot make any conclusions or recommendations regarding civil or criminal culpability, this does not mean that the findings of a commission of inquiry are any less important to the persons affected. As noted in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 at p. 667 (Q.B.) and cited by the Supreme Court in *Baker* at paragraph 25:

> In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

[54] Recognizing the importance of one's reputation and the potential damage that may be caused to one's reputation as a result of the Commission's findings, it follows that this factor suggests that a high content of procedural fairness is required.

(iv) The legitimate expectations of the parties

[55] As stated in *Baker*, the legitimate expectations of the person challenging the decision may determine the procedures required by the duty of fairness. The content of the duty of fairness will be affected where a legitimate expectation is found to exist, and the duty of fairness will require that the procedure expected is followed (*Baker*, *supra*, at para. 26). However, the doctrine of legitimate expectations does not create substantive rights (*Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170). But, where decision-makers act in contravention of representations as to procedure, or backtrack on substantive promises without according significant procedural rights, the decision-maker will generally be seen to have acted unfairly (*Baker*, *supra*, at para. 26).

[56] The Applicant notes that the Commissioner, in his opening statement, recognized that "it [was] of paramount importance that the Inquiry's process be scrupulously fair" because of the potential that reputations could be harmed as a result of factual findings made by the Commission. He argues that he had a legitimate expectation that the proceedings would be conducted in such a manner.

[57] In my view, there was a legitimate expectation on behalf of the Applicant that the Commission would comply with all procedures listed in its *Rules of Procedure and Practice*. However, the extent of the Applicant's legitimate expectations is limited by the nature of the process, since a commission of inquiry cannot afford as many safeguards as proceedings before a normal court of justice. As the Supreme Court noted in *Krever*, *supra*, at paragraph 53: "No matter how carefully the inquiry hearings are conducted they cannot provide the evidentiary or procedural

safeguards which prevail at a trial." Despite this, the Applicant certainly had a legitimate expectation that the process would be fair and would be conducted in accordance with the Commission's *Rules of Procedure and Practice*.

(v) The choices of procedure made by the decision-making body

[58] A lower content of procedural fairness will be called for where a statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has expertise in determining what procedures are appropriate in the circumstances. Here, section (*e*) of the Terms of Reference contained in the Order in Council provides:

> [T]he Commissioner be authorized to adopt any procedures and methods that he may consider expedient for the proper conduct of the inquiry, and to sit at any times and in any places in Canada that he may decide.

This conferral of power upon the Commissioner suggests that a lower content of procedural fairness is required.

[59] Taking into consideration the factors enunciated in *Baker*, I find that the Applicant was entitled to a high level of procedural fairness before the Commission. Although the nature of the proceedings do not provide for the same level of procedural fairness required in a trial, the potential damage that the findings of the Commission could have on the reputations of the parties involved in the investigation was of such serious consequence that a high degree of fairness was required.

Issue 2: Applicable Standards of Review

[60] With respect to the Commission's findings, the applicable standard of review is that enunciated by the Federal Court of Appeal in *Morneault v. Canada (Attorney General)*, [2001] 1 F.C. 30 (F.C.A.) [hereinafter *Morneault*], at paragraph 46:

> Given that the findings are those of a commission of inquiry, I prefer to review them on a standard of whether they are supported by some evidence in the record of the inquiry. In [*Mahon v. Air New Zealand Ltd.*, [1984] 1 A.C. 808 (P.C.)] at page 814, Lord Diplock remarked on differences between an investigative inquiry and ordinary civil litigation and went on, at page 820, to lay down the two rules of natural justice in the passage quoted above. He then added, at page 821:
>
> > The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based on some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.

[61] The Federal Court (Trial Division) has also adopted this standard when reviewing the findings of commissions of inquiry (see *Beno v. Canada (Attorney General)* (F.C.T.D.), [2002] 3 F.C. 499, *per* Heneghan J. [hereinafter *Beno II*]).

[62] Following the Federal Court of Appeal in *Morneault*, the standard applicable to the Commission's findings in the present application is whether the findings are "based on some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory."

[63] With respect to the other issues raised in this application, the Applicant submits that the standard of review analysis has no application. The Respondents did not make submissions with respect to the standard applicable to the issues of procedural fairness and natural justice save for their submissions regarding the standard of review applicable to the Commission's findings.

[64] I accept the Applicant's submissions in this regard. It is well-established that the standard of review analysis does not apply to issues of procedural fairness (*Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29). They are always reviewed as questions of law and, as such, the applicable standard of review is correctness (*Dunsmuir*, *supra*). No deference is owed when determining the fairness of the decision-maker's process. If the duty of fairness is breached, the decision in question must be set aside (*Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392, 2005 FCA 404; *Ha v. Canada*, [2004] 3 F.C.R. 195, 2004 FCA 49).

Issue 3: Did the Commissioner breach the duty of procedural fairness?

A. Was there a reasonable apprehension of bias on the Commissioner's part toward the Applicant?

[65] Procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker (*Baker*, *supra*, at para. 45). The standard of impartiality expected of a decision-maker is variable depending on the role and function of the decision-maker involved (*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, *per* Cory J. [hereinafter *Newfoundland Telephone*]. In

Newfoundland Telephone, the Supreme Court established a spectrum for assessing allegations of bias against members of commissions or administrative boards:

> It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.
>
> […]
>
> Further, a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. This does not of course mean that there are no limits to the conduct of board members. It is simply a confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the Board which is being considered. In the end, however, commissioners must base their decision on the evidence which is before them. Although they may draw upon their relevant expertise and their background of knowledge and understanding, this must be applied to the evidence which has been adduced before the board: *Newfoundland Telephone Co.*, *supra*, at pp. 638-639.

[66] Justice Cory stressed in that case "that the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the Board which is being considered" (*Newfoundland Telephone*, *supra*, at p. 639). Applying this flexible approach, he

then concluded that the applicable standard for assessing the Board's impartiality during the investigative stage was the closed-mind standard. He also found that when the matter reached the hearing stage, the Board's role had changed and, as a result, the standard used to assess the Board's conduct at that stage was the reasonable apprehension of bias standard.

[67] In *Beno (FCA)*, *supra*, the Federal Court of Appeal considered the nature, mandate and function of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia and determined that the Commission was situated somewhere between the legislative and adjudicative extremes on the spectrum, stating the following at paragraphs 26-27:

> It is not necessary, for the purposes of this appeal, to determine with precision the test of impartiality that is applicable to members of commissions of inquiry. Depending on its nature, mandate and function, the Somalia Inquiry must be situated along the Newfoundland Telephone spectrum somewhere between its legislative and adjudicative extremes. Because of the significant differences between this Inquiry and a civil or criminal proceeding, the adjudicative extreme would be inappropriate in this case. On the other hand, in view of the serious consequences that the report of a commission may have for those who have been served with a section 13 notice, the permissive "closed mind" standard at the legislative extreme would also be inappropriate. We are of the opinion that the Commissioners of the Somalia Inquiry must perform their duties in a way which, having regard to the special nature of their functions, does not give rise to a reasonable apprehension of bias. As in Newfoundland Telephone, the reasonable apprehension of bias standard must be applied flexibly. Cory J. held (supra, at pages 644-645):
>
> > Once matters proceeded to a hearing, a higher standard had to be applied. Procedural fairness then required the board members to conduct themselves so that there could be no reasonable apprehension of bias. The application of that test must be flexible. It need not be as strict for this Board dealing with policy matters as it would be for a board acting solely in an adjudicative capacity. This standard of

> conduct will not of course inhibit the most vigorous questioning of witnesses and counsel by board members.
>
> Applying that test, we cannot but disagree with the findings of the Judge of first instance. A commissioner should be disqualified for bias only if the challenger establishes a reasonable apprehension that the commissioner would reach a conclusion on a basis other than the evidence. In this case, a flexible application of the reasonable apprehension of bias test requires that the reviewing court take into consideration the fact that the commissioners were acting as investigators in the context of a long, arduous and complex inquiry. The Judge failed to appreciate this context in applying the test.

[68] Relying on the Federal Court of Appeal's decision in *Beno*, the Attorney General submits that the Commission falls between the middle and the closed-mind end of the *Newfoundland Telephone* spectrum and argues that the applicable test is whether there is a reasonable apprehension that the Commissioner would reach a conclusion on a basis other than the evidence. In the alternative, the Attorney General submits that the applicable test is the reasonable apprehension of bias test as enunciated in the dissenting judgment of Justice de Grandpré in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 [hereinafter *Committee for Justice and Liberty*] and adopted subsequently by the Supreme Court of Canada.

[69] The Applicant submits that the test for assessing Commissioner Gomery's impartiality is the reasonable apprehension of bias test or reasonable person test established in *Committee for Justice and Liberty*. The Applicant argues that since the Commissioner is a judge and was appointed as Commissioner because of his judicial skills, the applicable test for determining whether or not there is a reasonable apprehension of bias on the part of the Commissioner is the same as that which is

applied when assessing the impartiality of a judge presiding over a trial. Put simply, the Applicant argues that because the Commissioner in this case was selected because of his skills as a judge, although he was sitting as a Commissioner in the hearings, he should be held to the same standard of judicial neutrality expected of a judge presiding over a trial.

[70] Although the Commissioner's experience as a judge may have assisted him in his role as Commissioner, he was not sitting as a judge while performing his duties as a Commissioner. Thus, it does not necessarily follow that his impartiality is to be assessed using a strict application of the reasonable apprehension of bias test.

[71] After considering the jurisprudence cited by the parties, I conclude that the Commission falls somewhere between the middle and high end of the *Newfoundland Telephone* spectrum. Thus, using a flexible application of the reasonable apprehension of bias test, I adopt the test enunciated by Justice de Grandpré in *Committee for Justice and Liberty*:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. […] [T]hat test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe [the Chairman of the Board], whether consciously or unconsciously, would not decide fairly": *Committee for Justice and Liberty*, *supra*, at page 394.

[72] As Justice Cory stated in *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 [hereinafter *R.D.S.*], the test for a reasonable apprehension of bias "contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in

the circumstances of the case" (*R.D.S.* at para. 111). He further noted that "the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including 'the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold'" (*ibid.*) [emphasis in original]. He added "the threshold for a finding of real or perceived bias is high" and "a real likelihood or probability of bias must be demonstrated…a mere suspicion is not enough" (*R.D.S.* at paras. 112-113).

[73] I harken back to the words of Lord Denning in *Metropolitan Properties Co. (F.G.C.), Ltd. v. Lannon*, [1968] 3 All E.R. 304 (C.A.) at p. 310, 1 Q.B. 577 (C.A.) at p. 599, wherein he stated:

> [I]n considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand [cited cases omitted]. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough [cited cases omitted]. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

[74] There exists a presumption that a decision-maker will act impartially, and "[m]ore than a mere suspicion, or the reservations of a 'very sensitive or scrupulous conscience,' is required to

displace that presumption" (*Beno (FCA), supra*, at para. 29). The onus of demonstrating bias lies with the person who is alleging its existence and the threshold for finding a reasonable apprehension of bias is high. But, where a reasonable apprehension of bias is found, the hearing and any decision resulting from it will be void, since the damage created by such an apprehension of bias cannot be remedied. This is consistent with Justice Le Dain's decision, speaking for the Court in *Cardinal v. Director of Kent Institution*, *supra*, at p. 661, wherein he stated:

> [...] I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

Application of reasonable apprehension of bias test in the present case

[75] The Applicant alleges that the following indicate a reasonable apprehension of bias: (1) the public statements made in the course of the interviews granted by Commissioner Gomery in December 2004, before all the evidence had been submitted and all the witnesses had testified; (2) the August 2007 interview in which the Commissioner confirmed that some of the December 2004 comments were a mistake; (3) the August 2007 newspaper articles in which the Commissioner was quoted as stating that the Commission was "an amazing spectacle" and that he "had the best seat in the house for the best show in town"; (4) the public statements made by Mr. François Perreault, the Commission's spokesperson, and more generally, the role played by Mr. Perreault in

ensuring media attention on the Commission; (5) Commissioner Gomery's declaration to Mr. Alex Himelfarb, then Clerk of the Privy Council, revealing his preoccupation with media coverage; and (6) that the Commission's lead counsel, Me Roy, was the Secretary to the Prime Minister of Canada, the Right Honourable Brian Mulroney, from 1984 to 1988 and is now a partner of Mr. Mulroney and Me Sally Gomery, the Commissioner's daughter, at the law firm of Ogilvy Renault LLP. I have already determined that the documents evidencing the relationship between the Commissioner's lead counsel and Mr. Mulroney and Me Gomery are not relevant. Thus, I need not consider this ground in my analysis on this part.

[76] The Applicant submits that the Commissioner's comments, on the record, to the media, and after the Inquiry had concluded establish a reasonable apprehension of bias. He further argues that Commissioner Gomery was seduced by the media and the limelight to such an extent that the judicial instinct for fairness, objectivity and restraint which the Applicant was entitled to expect of him gave way to a preoccupation on his part with focussing media (and public) attention upon himself, a course of conduct which preordained unfavourable findings about the Applicant in the Report.

[77] The Attorney General argues that the Court, in assessing the allegations of a reasonable apprehension of bias, must be cautious not to confound the Commissioner's personality with his state of mind. He suggests that the Commissioner was outspoken and transparent, and even though the Commissioner himself acknowledged that some of his comments were a mistake, the Attorney General maintains that these comments do not establish that the Commissioner would decide on

something other than the evidence or, in the alternative, that there is a reasonable apprehension of bias toward the Applicant.

[78] I also add that counsel for the Attorney General admitted that some of the Commissioner's remarks to the journalists were inappropriate.

[79] After reviewing the evidence placed before me on this issue, I am convinced that there is more than sufficient evidence to find that an informed person, viewing the matter realistically and practically and having thought the matter through would find a reasonable apprehension of bias on the part of the Commissioner. The comments made by the Commissioner, viewed cumulatively, not only indicate that he prejudged issues but also that he was not impartial toward the Applicant.

[80] Statements made by the Commissioner indicate that while conducting the hearings, the Commissioner formed conclusions about issues he was to investigate and report before having heard all the evidence. In December 2004, when the Commission's Phase I hearings had recessed for the holidays, the Commissioner granted interviews to journalists, which resulted in the publication of a number of newspaper articles. As noted above, the Commissioner does not contest the accuracy of the statements in quotations in the articles.

[81] In an article in the *Ottawa Citizen*, dated December 16, 2004, the Commissioner is quoted as having stated: "I'm coming to the same conclusion as (Auditor General) Sheila Fraser that this was a government program which was run in a catastrophically bad way. I haven't been astonished with

what I'm hearing, but it's dismaying." In an article published the following day in the *National Post*, Commissioner Gomery, speaking of his previous comment that the Sponsorship Program "was run in a catastrophically bad way," stated: "Does anyone have a different opinion on that subject?" "I simply confirmed the findings that Sheila Fraser had made, which I think I am in a position to do after three months of hearings" [my emphasis].

[82] The Attorney General submits that the Commissioner was indeed in a position to determine at the time he made these statements that the Sponsorship Program was "run in a catastrophically bad way," since this was, in essence, one of the conclusions of the Auditor General's Report on which the Commissioner's mandate was based. In other words, the Commissioner's mandate had the premise that there had been very bad mismanagement of the Program. Further, the Attorney General states that none of the Auditor General's conclusions were ever challenged by the parties, despite Commissioner Gomery's invitation to do so. The Attorney General submits that in fact, "everybody admitted" the problems noted in the Auditor General's Report.

[83] I cannot agree with the Attorney General that the Commissioner, after conducting only three of nine months of hearings, was in a position to confirm the findings of the Auditor General or to conclude that the Sponsorship Program was "run in a catastrophically bad way." First, unlike the Auditor General's investigation, the Commissioner's mandate, as set out in the Terms of Reference, was not limited to investigating and reporting only the way in which the Program was managed by public servants. I stress that section (iii) of Part I of the Commissioner's mandate provided that the Commissioner was to investigate and report on "the management of the sponsorship program and

advertising activities by government officials at all levels" [my emphasis]. Thus, the Commissioner was not in a position to conclude that the program was mismanaged before having heard from government officials of all levels who were set to testify. This is especially so given that the Commissioner ultimately concluded that the Sponsorship Program was run out of the Prime Minister's Office under the direct supervision of the Applicant (who had yet to testify), who "for all practical purposes, assumed the role, the functions and the responsibilities of a Minister of a department charged with the implementation of a program." Without having heard the testimony of all witnesses who were to appear before the Commission, especially those whom he found to be in charge of the program, the Commissioner was not and could not be in a position to conclude that the Program was "run in a catastrophically bad way."

[84] Second, to conclude that the mismanagement was "catastrophic" before hearing all the evidence undermined the very purpose of the commission of inquiry, creating a sense that the proceedings were perfunctory in nature. The Commissioner's remarks indicate that he had reached conclusions or drawn inferences of fact before the evidence was complete and submissions had been received from all participants. The Commissioner had a duty not to reach conclusions about the management of the sponsorship program until having heard all the evidence, and he was not in a position to do so until then. The objective of the Inquiry was to get to the truth of the matters that were the subject of chapters 3 and 4 of the Auditor General's Report. By stating that he "was coming to the same conclusion" and that he "simply confirmed the findings that Sheila Fraser had made" after only three months of hearings would, in my view, leave the reasonable person with the

view that the Commissioner had prejudged some of the very matters he was tasked to investigate before hearing all the evidence.

[85] There is other evidence to lead a reasonable observer to conclude that the Commissioner prejudged the outcome of the investigation. In Mr. Perreault's book entitled *Inside Gomery* (which the Commissioner in the foreword to the book described as "accurate" ["exacte" in the original, French version]) and in an article in the *Toronto Star*, dated March 1, 2006, Commissioner Gomery is cited as having stated the following with respect to the answer given by Mr. Chrétien when asked who was responsible for managing the Sponsorship Program: "And the very answer he gave me was the only answer that counted as far as I was concerned." "So, with this answer, I had everything that I needed." Mr. Chrétien's answer referred to by Commissioner Gomery was given in the course of the following exchange between Me Roy, Commissioner Gomery, and Mr. Chrétien at the February 8, 2005 hearing of the Commission:

> Mr. Roy: And you, did you have in your office, the PMO, had you directed certain people to get involved in the post-referendum strategy file?
>
> Mr. Chrétien: Mr. Pelletier, who had been mayor of Quebec City, he knew Quebec well and he was my chief of staff and he had the same commitment as I did to ensure that Quebec was going to stay in confederation, took up those responsibilities afterwards.
>
> Mr. Roy: So, my question, more precisely, is as follows: who, inside the PMO, from your cabinet, had the responsibility for ensuring that the game plan would be followed and that the government would be ready to face a future referendum campaign?
>
> […]

> The Commissioner: But Mr. Chrétien, I would really like to have an answer to this question. Did you designate someone to take charge --
> -
>
> Mr. Chrétien: I already said that Mr. Pelletier was responsible for the unity file in my office.
>
> The Commissioner: Thank you.

Commissioner Gomery's intervention at the hearing, combined with his subsequent comment that Mr. Chrétien's answer "was the only answer that counted" and that it gave him "everything that [he] needed," raises doubt as to whether Commissioner Gomery was indeed impartial in his fact-finding mission, or if he was in search of specific answers that supported pre-determined conclusions.

[86] Again, this comment was made before all the evidence had been heard from the witnesses who were called to testify or were to be called to testify. A reasonable, well-informed person, viewing this statement, would conclude that, instead of sitting as a dispassionate decision-maker presiding over the hearings with no pre-established ideas regarding the conclusions he would eventually reach after hearing all the evidence, the Commissioner had a plan or checklist of the evidence that was expected and which was required in order to support pre-determined conclusions.

[87] Also, in an article in the *Ottawa Citizen*, dated December 16, 2004, the Commissioner is quoted as having stated, in reference to upcoming evidence that was to be heard by the Commission, that the "juicy stuff" was yet to come. The term "juicy" is defined by the Canadian Oxford Dictionary as meaning "racy or scandalous."

[88] This comment trivialized the proceedings, which had enormous stakes for the witnesses involved in the proceedings, especially those who had yet to testify. It telegraphed to the public a prediction that evidence of wrongdoing was forthcoming, and, because in terms of public interest the most important witnesses were yet to come (including the Applicant, other senior officials, the Prime Minister and cabinet ministers), the comment was clearly directed at what might be expected from or about them. Whatever interpretation is given to this comment, the comment bears a pejorative connotation to which no witness ought to have been subjected.

[89] I note that on a number of occasions, the Commissioner gave assurances that he had not prejudged any issues and that his impartiality remained intact. First, in an article in the *National Post* on December 17, 2004, the Commissioner was quoted as stating: “I don’t think I am in danger of having prejudged an issue that I shouldn’t have prejudged,” and “I haven’t made any judgments or prejudged any issue. I just made a comment on the personality of one of the witnesses.” This second statement was made with respect to a comment the Commissioner had made in an interview the previous day about Mr. Guité: “It’s impossible not to like Chuck Guité.” “Let’s face it, he’s a charming scamp and he had his department mesmerized. He got himself promoted just before his retirement and thereby built up his pension. I’m going to hear more about Mr. Guité. He will probably have to testify again.”

[90] When the hearings resumed in January 2005, counsel for the Applicant expressed concern about the statements the Commissioner had made to the media. The Commissioner expressed regret

if his comments had caused anxiety or concern and reassured the parties that he had not reached any conclusions and would not do so until having heard all the evidence. However, the Commissioner went on to justify his conduct by stating that there had been a change in what was considered proper judicial conduct and stated:

> We have also seen over the last decades an increasing pressure for judges to come out of their ivory towers to establish some sort of a relationship with the media and to permit the media to have a better understanding of what it is that is taking place in the courtrooms or before commissions of inquiry of this kind.
>
> It was on the understanding of this evolution that led me to make -- to grant certain interviews at the end of the year. I was told by representatives of the media that there was a desire to know a little bit better what was going on and what could be expected. It was in that context that these press interviews were granted.

In the Commissioner's dismissal of the Motion for Recusal brought against him by Mr. Chrétien, the Commissioner provided further reassurances that he had not prejudged any issues and that he remained impartial, stating:

> In the representations made before me on January 11th, Mr. Scott declared and I quote: "You have closed your mind". That statement was factually incorrect. I am the only person in the world who could know if I had closed my mind, and I said then, to reassure Mr. Scott and others, that my mind remained open. It is still open today and I repeat that I have not yet reached any final conclusion on any of the questions which the Inquiry calls upon me to decide.
>
> […]
>
> When I referred to the report of the Auditor General, I am quoted as saying that I "was coming" to the same conclusions as she did, not that I had so concluded. In other words, I indicated that my mental processes were ongoing; I have not closed my mind to contrary evidence, should such evidence be adduced.
>
> When I made reference to autographed golf balls, I said that it was disappointing to have heard evidence that a Prime Minister *would*

> allow (note the use of the conditional tense) his name to be used in this way. My mind remains open to any reasonable explanation, and it is a small point in any event. I am looking forward to hearing Mr. Chrétien's testimony.
>
> I have heard contradictory evidence, from various witnesses. I must conclude that some witnesses have not been truthful, but I did not say which witness or witnesses I was talking about, or indicate which of the conflicting versions I may be inclined to prefer. As to the relative truthfulness of various witnesses, these are conclusions I will draw only in light of all the evidence thus far and yet to come.
>
> Finally, my description of Mr. Guité and the characterization of him as a "charming scamp", which is admittedly the kind of colourful language that judges should avoid using, does not in any way betray how I feel about his credibility. Sometimes charming people are credible and sometimes not. It is too soon to decide what weight I will give to Mr. Guité's testimony. That remains to be decided when the hearings are completed […].

[91] The Attorney General relies heavily on these assurances by the Commissioner in support of the argument that the Commissioner had not formed premature conclusions. That the Commissioner made assurances that he had not prejudged any issue is irrelevant, as one may be unaware of their own biases. In *R v. Gough*, [1993] A.C. 646 (H.L.) at p. 655 (quoted by the Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259), Lord Goff, quoting Devlin L.J. in *The Queen v. Barnsley Licensing Justices*, [1960] 2 Q.B. 167 (C.A.), stated:

> Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit.

[92] The determinative test, as stated above, is whether a reasonably well-informed person, viewing the matter realistically and practically, would conclude that there is a reasonable apprehension of bias. As I have already stated, I am satisfied that the test for a reasonable apprehension of bias has been met in this case.

[93] Lastly, I note that the Commissioner made other inappropriate comments that seemingly tainted the purpose and focus of the Inquiry. On a number of occasions, the Commissioner referred to the proceedings as a "show" or "spectacle" and even declared: "I have the best seat in the house for the best show in town." Upon his retirement, the Commissioner further commented: "I was criticized for saying it but I stand by what I said – I had the best seat in the house for the best show in town." "It was an amazing spectacle. It was a drama with surprise discoveries almost every day, with eminently competent lawyers. It was an ideal situation for the person running the show." "It wasn't a rehearsed spectacle, but to see witnesses, one after the other, making startling revelations after being confronted with documents they couldn't explain was exciting and engrossing." Although these statements do not indicate a reasonable apprehension of bias toward the Applicant *per se*, they had the effect of transforming the nature of the inquiry from one that was a fact-finding mission with the hallmarks of fairness into an "exhibition" of misconduct on the part of senior government officials.

[94] The Applicant has also raised concerns about the Commissioner's preoccupation with the media. He argues that Commissioner Gomery was seduced by the media and the limelight to such an extent that the judicial instinct for fairness, objectivity and restraint which the Applicant was

entitled to expect of him gave way to a preoccupation on his part with focussing media (and public) attention upon himself, a course of conduct which preordained unfavourable findings about the Applicant in the Report.

[95] I agree with the Applicant that the Commissioner became preoccupied with ensuring that the spotlight of the media remained on the Commission's inquiry, and he went to great lengths to ensure that the public's interest in the Commission did not wane. An example of the Commissioner's obvious preoccupation with the media is the following statement he made during Mr. Himelfarb's testimony:

> "You know that both the opposition parties and the public would not be satisfied by saying 'Well, we know that there was money lost but we have corrected that for the future.' That is not going to satisfy the public, I don't think. Certainly it isn't going to satisfy the media, which represents the public to some degree." [my emphasis]

This preoccupation with the media outside the hearing room had a detrimental impact on the fairness of the proceedings as it applies to the Applicant and, as I have said in my decision, as it applies to Mr. Chrétien.

[96] I note that although the Commissioner, in his ruling on the Motion for Recusal brought against him by Mr. Chrétien, acknowledged that some of the statements he had made during the interviews were, in his words, "ill-advised" and "inappropriate." He further acknowledged that his statements detracted attention from "the real objective of the Inquiry, which [was] to get at the truth of the matters which were subject of Chapters 3 and 4 of the Report of the Auditor General" and expressed his regret for this distraction. However, this acknowledgement and expression of regret,

in my view, were incapable of repairing the harm that the Commissioner caused to the Applicant's reputation and the irreparable harm caused to the fairness or apparent fairness of the proceedings.

[97] Considering again the basic principles applicable to commissions of inquiries so succinctly set down by Justice Cory in *Krever*, above, I do not read that it is a function of a Commissioner to grant press interviews nor to express, during such an interview or interviews, an opinion as to what the evidence showed, and more particularly, to express that opinion before all of the evidence had been heard from the witnesses who were called to testify or were to be called to testify. I find that the Commissioner's conduct outside the hearing room had a detrimental effect on the fairness of the proceedings in that the Applicant was put in a position in which he was caused to appear before a Commission that had publicly questioned the conduct and integrity of witnesses, including Mr. Chrétien, to which the Applicant was, in many respects, the *alter ego*, before they had even appeared before the Commission. This is sufficient to instill doubt in the mind of the reasonable person as to the fairness of the inquiry process.

[98] The media is not an appropriate forum in which a decision-maker is to become engaged while presiding over a commission of inquiry, a trial, or any other type of hearing or proceeding. Indeed, the only appropriate forum in which a decision-maker is to become engaged is within the hearing room of the very proceeding over which he or she is presiding. Comments revealing impressions and conclusions related to the proceedings should not be made extraneous to the proceedings either prior, concurrently or even after the proceedings have concluded.

[99] I stress that even in public inquiries where the purpose of the proceedings is to educate and inform the public, it is not the role of decision-makers to become active participants in the media. First and foremost, a decision-maker's primary duty is to remain impartial, with an open mind that is amenable to persuasion. It is only when all the evidence is heard and after deliberating on that evidence that a decision-maker is to form conclusions and, finally, to issue a judgment or report on the basis of these conclusions. It follows that a decision-maker speaks by way of his or her decision. This is the only appropriate forum in which a decision-maker should state his or her conclusions. As my colleague, mentor and friend, the late Justice Frank Collier once said to me when I was first appointed as a judge, "Let the decision speak for itself."

[100] I am convinced that an informed person, viewing the matter realistically and practically and having thought the matter through would find that the Commissioner's statements to the media during the Phase I hearings, after the release of the Report and upon his retirement, viewed cumulatively, indicate that the Commissioner prejudged issues under investigation and that he was not impartial toward the Applicant. The nature of the comments made to the media are such that no reasonable person, looking realistically and practically at the issue, and thinking the matter through, could possibly conclude that the Commissioner would decide the issues fairly.

[101] Given that I have already found a reasonable apprehension of bias on the part of the Commissioner toward the Applicant, I need not address the remaining issues in this application. At the hearing, the parties made submissions regarding the effect of a finding of a reasonable apprehension of bias on the Commissioner's Report if one were to be found. I conclude that, as a

result of my finding that there existed a reasonable apprehension of bias on the part of the Commissioner toward the Applicant, the findings in the Report, as they relate to the Applicant, must be set aside. This is consistent with the decision of the Supreme Court of Canada in *Newfoundland Telephone*, *supra*, wherein Justice Cory, writing for the Court, held that where a reasonable apprehension of bias is found to exist on the part of a tribunal, its decision must be treated as void.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

(a) the findings contained in the Phase I Report of the Commissioner, dated November 1, 2005, and relating to the Applicant are set aside;

(b) costs for this application, as for the Rule 312 interlocutory motion, are awarded to the Applicant;

(c) costs on the Attorney General's motion to quash paragraphs in the affidavit of the Applicant are awarded to the Attorney General.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-2121-05
STYLE OF CAUSE:	Mr. Jean Pelletier and the Honourable John H. Gomery, in his quality as Ex-Commissioner of the Commission of Inquiry into the Sponsorship Program and Advertising Activities and The Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 11, 12, 13, 14, 18 and 19, 2008
REASONS FOR JUDGMENT:	TEITELBAUM D.J.
DATED:	June 26, 2008

APPEARANCES:

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Justice Canada	For the Attorney General of Canada