Date: 20080905

Docket: T-2086-05

Citation: 2008 FC 981

Ottawa, Ontario, September 5, 2008

PRESENT: THE HONOURABLE MAX M. TEITELBAUM

BETWEEN:

THE HONOURABLE ALFONSO GAGLIANO

Applicant

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

ATTORNEY GENERAL OF CANADA

Respondent

and

THE HOUSE OF COMMONS

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application for judicial review brought by the Honourable Alfonso Gagliano (the Applicant) in respect of the report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities (the Commission), dated November 1, 2005 and entitled *Who is Responsible? – Fact Finding Report* (the Phase I Report).

[2] The Attorney General of Canada (the Attorney General) and Commissioner John H. Gomery, in his quality as former Commissioner (the Commissioner), are challenging the application.

[3] The House of Commons (the House) had intervener status in the context of the interlocutory motions.

BACKGROUND

[4] The Commission was created by Order in Council P.C. 2004-110 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.

[5] 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 identified 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.

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

[7] The second report (Phase II 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:

> 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, […].

[8] 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*).

[9] 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. François Perreault acted as the Commission's communications advisor and was responsible for media relations.

[10] 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

[11] Before turning to the issues raised in this application, it is necessary to provide some details regarding the origins of the Sponsorship Program.

[12] 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.

[13] 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 struck 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. Accordingly, he placed his Chief of Staff, Jean Pelletier, in charge of the national unity file.

[14] 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.

[15] 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. Joseph Charles Guité was Director of APORS from 1993 to 1997 and Executive Director of CCSB from 1997 until his retirement in 1999. Pierre Tremblay, then executive assistant to the Applicant, took over from Mr. Guité as CCSB Director. The Applicant was the Minister of PWGSC from 1997 to 2002.

[16] 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.

[17] In March 2002, the new Minister of PWGSC, 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.

The Report's Findings – Applicant's Responsibility

[18] In the Phase I Report section entitled "Assigning Responsibility," the Commissioner found the Applicant had personally met with and personally gave instructions to Mr. Guité, thereby excluding the Deputy Minister of PWGSC, Ronald Quail, from the supervision of Mr. Guité. The Commissioner also found that the Applicant had failed to give sufficient attention to the adoption of guidelines and criteria when it came to awarding sponsorships to advertising agencies. He also

failed to exercise oversight with respect to the activities of Mr. Guité and his successor (as of 1999) in the top position at CCSB, Mr. Tremblay. Indeed, Mr. Guité and Mr. Tremblay were systematically bypassing Deputy Minister Quail, who, under normal circumstances, would have been responsible for providing the aforementioned oversight. The Commissioner also found that the Applicant had become directly involved in decisions to provide funding to events and projects based more on partisan objectives than on considerations of national unity. Finally, the Commissioner found that the Applicant was obliged to accept responsibility for the actions and decisions of his exempt staff, such as his chiefs of staff Mr. Tremblay and, later, Jean-Marc Bard. The exempt staff refers to the political employees of the minister who report directly to him.

INTERLOCUTORY MOTIONS

[19] Five interlocutory motions were brought in these proceedings: two by the Applicant, one by the Attorney General and two by the House. I shall deal with them in the order they were filed with the Court.

[20] First, the House of Commons' motion to strike paragraph 2(*b*) from the Applicant's notice of application for judicial review dated November 22, 2005 on the basis of parliamentary immunity had been decided in favour of the House (*Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)* 2008 FC 261). I shall therefore not deal with it in these reasons. The consequence of my decision in the context of that motion was to obviate the need for the House to appear and submit arguments on the merits concerning the principle of parliamentary immunity, which it intended to invoke against the Applicant's arguments under

paragraph 2(*b*) of his notice of application for judicial review. Since I ruled in the aforementioned decision (2008 FC 261) that the principle applied in this case and that the Applicant should strike paragraph 2(*b*) from his notice of application, the House did not need to present arguments on the merits in Court.

[21] For that reason, I shall not elaborate on the House's second interlocutory motion, which sought to file additional evidence regarding the principle of parliamentary immunity pursuant to Rule 312 of the *Federal Court Rules.* That motion was allowed by consent at the hearing of February 8, 2008, but then it became moot as a result of my decision on the first motion.

1. Attorney General's motion to expurgate Me Anouk Fournier's affidavit from the record

[22] The Attorney General filed a motion to expurgate from the record the affidavit signed on May 29, 2007 by one of the Applicant's counsel, Me Anouk Fournier, on the basis of Rule 82 of the *Federal Court Rules* (SOR/98-106) (the Rules), which reads as follows:

82. Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.	**82.** Sauf avec l'autorisation de la Cour, un avocat ne peut à la fois être l'auteur d'un affidavit et présenter à la Cour des arguments fondés sur cet affidavit.

The Attorney General alleges that because Me Anouk Fournier was one of the Applicant's solicitors and did not obtain leave of the Court pursuant to Rule 82, she could not sign the affidavit filed with the Applicant's judicial review application.

[23] The Attorney General contends, in the alternative, that if I determine that the affidavit signed by Me Anouk Fournier can remain in the record, I must strike the four following categories of paragraphs and exhibits from the affidavit: the paragraphs introducing exhibits that duplicate evidence already in the record in electronic format (paragraphs 3, 9, 10 and 11), the paragraph introducing exhibits relating to the Commission's Phase II Report (paragraph 10), the paragraph introducing exhibits relating to Mr. Perreault's book entitled *Gomery – L'enquête* (hereinafter *Inside Gomery*, the title of the published English translation) (paragraph 10), and the paragraphs introducing exhibits pertaining to Mr. Chrétien's case that are unrelated to the Applicant's case (paragraphs 16 and 17).

[24] The Applicant asserts that the affidavit signed by Me Anouk Fournier satisfies the requirements of Rule 82 because she will not be presenting any arguments based on her affidavit. The Applicant's counsel in charge of pleading his case in court will be Me Pierre Fournier, her associate. That is why the Applicant is of the view that the affidavit complies with Rule 82 and should remain in the record. Alternatively, the Applicant argues that certain paragraphs and certain exhibits should not have to be expurgated from the affidavit. While he concedes that paragraphs 3, 9, 10 and 11 of the affidavit do in fact introduce exhibits which duplicate evidence already in the record, the Applicant asserts that the Commission Phase II Report, the book by Mr. Perreault and the exhibits relating to Mr. Chrétien's case are germane to his judicial review application. The Applicant further states that if Me Anouk Fournier's affidavit did in fact have to be struck from the record, Mr. Gagliano would file his own affidavit.

[25] For the reasons that follow, I deny, in part, the Attorney General's motion.

[26] Although it is not good practice for an affidavit to be signed by a lawyer from the same firm as the lawyer who will be pleading the case in court, Rule 82 provides that the prohibition applies only when the same lawyer signs the affidavit and is also presenting arguments based on that affidavit (*Agustawestland International Ltd. v. Canada (Minister of Public Works and Government Services)*, 2006 FC 1371, Kelen J., at para. 16). The affidavit of Me Anouk Fournier can therefore remain in the docket, but subject to the following modifications. I note here that the affidavit the Applicant was suggesting he could file, i.e., his own, if the one signed by Me Anouk Fournier had to be struck out, would have introduced the same categories of exhibits; for that reason, it would have been subject to the same modifications as those I am ordering for the affidavit currently in the docket. Therefore, it would be pointless to substitute affidavits.

[27] The exhibits duplicating evidence already in the record must be struck. My colleague, Mr. Justice Simon Noël issued an order on January 18, 2006 stipulating that the evidence introduced by the Attorney General was automatically included in the Applicant's docket. Moreover, the Applicant himself concedes that certain paragraphs simply duplicate evidence that is already in the electronic record. Accordingly, paragraphs 3, 9, 10 and 11 of Me Anouk Fournier's affidavit shall be struck and the exhibits introduced thereby shall be expurgated. In fact, I do not require that these modifications actually be made to the affidavit.

[28] Paragraph 10 of Me Anouk Fournier's affidavit, which seeks to introduce the Commission's Phase II Report (exhibit J), as well as newspaper articles relating to the report (exhibits E and F), must be struck, and the exhibits expurgated. I agree entirely with the Attorney General that these exhibits are not relevant to the application for judicial review. The relevance of exhibits is determined according to the test established by the Federal Court of Appeal in paragraph 10 of *Canada (Human Rights Commission) v. Pathak*, [1995] 2 F.C. 455 (C.A.) [hereinafter *Pathak*] :

> [10] 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.

[29] As I stated in *Chrétien v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802, at paragraph 23 [hereinafter *Chrétien*] and *Pelletier v. Canada (Attorney General)*, 2008 FC 803, at paragraph 23 [hereinafter *Pelletier*], I do not believe that the Court of Appeal in *Pathak* intended to create a test that seriously limits the examination of the relevance of evidence to the grounds of review supporting the application for judicial review, nor one that automatically admits as relevant all evidence relating to the content of the notice of application for judicial review. The relevance of evidence must be evaluated on the basis of the grounds of review (*Pathak*, para. 10). That being said, I am satisfied that I have a discretionary role consisting in "establishing" or "determining" (those are the words used by the Court of Appeal in paragraph 10 of *Pathak*) what is relevant from what is not. It is by virtue of this discretionary power that I determine that paragraph 10, which seeks to introduce the Phase II Report and newspaper articles relating to Phase II of the Commission mandate, must be struck, and exhibits E, F, and J of

Me Anouk Fournier's affidavit expurgated. However, as stated previously, I do not require that the affidavit actually be modified at this stage. I shall simply not consider this evidence in my analysis of the case.

[30] The Attorney General also seeks removal of paragraph 10 and Mr. Perreault's book (exhibit K) on the ground that the book constitutes hearsay. The Applicant believes that Mr. Perreault's book should remain in evidence because Commissioner Gomery attested, in the foreword of the book, to the accuracy of Mr. Perreault's chronicle of the "inner workings of the Commission". The Attorney General insists that this comment by the Commissioner should not be likened to an admission that everything in the book is accurate.

[31] I agree with the Applicant that Commissioner Gomery's statement in the book's foreword to the effect that Mr. Perreault's chronicle of the inner workings of the Commission is "as fascinating as it is accurate" gives the distinct impression that he is thereby attesting to the accuracy of the entire book. I would assume that Commissioner Gomery read the whole book before agreeing to write the foreword. It follows that if any passage had struck him as inaccurate, he would have suggested to Mr. Perreault that he change it; or at the very least, he would have distanced himself from the passage by refraining from using the word "accurate" in reference to the way Mr. Perreault chronicled the inner workings of the Commission. For this reason, I am of the view that Mr. Perreault's book is admissible in evidence. The portion of paragraph 10 of Me Anouk Fournier's affidavit seeking to introduce Mr. Perreault's book as exhibit K can therefore remain in the affidavit.

[32] Finally, the Attorney General objects to exhibits L and M, which the Applicant seeks to enter in evidence at paragraphs 16 and 17 of Me Anouk Fournier's affidavit, on the ground that these documents are irrelevant to the Applicant's case. For the same reason, the Attorney General objects to the introduction of exhibits C and D in paragraph 10 of the affidavit. The Applicant maintains that these exhibits are relevant to his case because they support his contention that Commissioner Gomery is biased against politicians and members of the Liberal Party.

[33] Although it is not my role at this point to rule on the validity of that assertion for the purposes of the review application, I find nevertheless that exhibit C is relevant to the Applicant's case. This exhibit consists of a newspaper article dated January 12, 2005 which deals with comments made by the Commissioner in interviews he granted in December 2004 and how these comments raised concerns among the applicants. It is correct that Mr. Chrétien's name appears most often, but the name of the Applicant also appears; as well, his counsel is quoted in the article. Accordingly, I am satisfied that this exhibit is relevant to the Applicant's case. As to the article in exhibit D, while it deals with the same events and alludes to the same concerns raised by Commissioner Gomery's comments, my close reading of the article does not permit me to conclude that it applies directly to the Applicant's case. For that reason, I strongly doubt it is relevant, and I am satisfied that it should not form part of the Applicant's evidence. As for exhibit L, which represents nearly 2,000 pages in Mr. Chrétien's docket, the only part of it relevant to the Applicant's case is to be found on pages 33 to 44. These pages relate to newspaper articles having to do with statements the Commissioner made in interviews granted to the media in December 2004, while the

Commission was on recess for the holidays. Exhibit M introduces newspaper articles detailing the financial scandal of the Sponsorship Program, specifically, allegations to the effect that members of the Liberal Party of Canada had received “kickbacks” in the selection of advertising agencies. Although these articles deal with the sponsorship scandal, they do not relate directly to the subject of the judicial review application before me and, as such, are not relevant to the Applicant’s case.

[34] In summary, Me Anouk Fournier’s affidavit can remain in the record. However, paragraphs 3, 9, 11 and 17 of the affidavit must be struck and their corresponding exhibits expurgated. Exhibits D, E, F and J of paragraph 10 must also be expurgated. Exhibit L, introduced by paragraph 16, cannot remain in the record except for pages 33 to 44 (newspaper articles). Finally, paragraph 17 must be struck and its corresponding exhibit M expurgated.

[35] Given the divided outcome of this motion, it will be dismissed without costs.

2. Motion by the Applicant to file additional evidence (Rule 312)

[36] The Applicant filed a motion under Rule 312 of the Rules for leave to file additional evidence. Rule 312 reads as follows:

312. With leave of the Court, a party may	312. Une partie peut, avec l'autorisation de la Cour :
(a) file affidavits additional to those provided for in rules 306 and 307;	a) déposer des affidavits complémentaires en plus de ceux visés aux règles 306 et 307;

(b) conduct cross-examinations on affidavits additional to those provided for in rule 308; or	b) effectuer des contre-interrogatoires au sujet des affidavits en plus de ceux visés à la règle 308;
(c) file a supplementary record.	c) déposer un dossier complémentaire.

[37] The additional evidence the Applicant intends to file in support of his application consists of an article that appeared in the newspaper *La Presse* on November 15, 2007, entitled: [TRANSLATION] "Judge Gomery willing to share his experience with David Johnston." In the article, Commissioner Gomery indicates that he would have turned down any offer to preside over the public inquiry into the Mulroney-Schreiber affair, but that he is willing to share his experience with David Johnston, the government's advisor in the creation of that particular inquiry commission. Commissioner Gomery also states that one of the reasons why he would refuse to serve on the commission is his close association with Me Roy, a friend and confidant of Mr. Mulroney, and the fact that his daughter, Me Sally Gomery, is a lawyer in the same firm as Mr. Mulroney and Me Roy. The Applicant asserts that this article is helpful to his argument that the conduct of Commission counsel Me Roy was influenced by a bias against him.

[38] The appropriate test for determining whether additional evidence may be filed was established by the Federal Court of Appeal in *Atlantic Engraving Ltd. v. Rosenstein*, 2002 FCA 503, at paragraphs 8 and 9 [hereinafter *Atlantic Engraving*]. It is a four-part test that involves examining whether the evidence to be adduced 1) will serve the interests of justice, 2) will assist the Court, 3) will not cause substantial or serious prejudice to the other side, and 4) was not available beforehand. Although the facts in *Atlantic Engraving* involved the filing of additional affidavits (312(*a*)) and not

a supplementary record (312(*c*)), the same four-part test applies in this case. Indeed, I specified in *Pfizer Canada Inc. v. Canada (Minister of Health) et al.*, 2006 FC 984, [2007] 2 F.C.R. 371, at paragraphs 19 and 22, that the *Atlantic Engraving* test applied to all motions brought under Rule 312 :

> [19] […] Although *Atlantic Engraving* was a trade-marks case, in my view the Federal Court of Appeal's comments with respect to the rules governing the filing of additional affidavits apply to all motions brought under rule 312..

[39] On the basis of the four-part test set down in *Atlantic Engraving*, I reject the Applicant's motion. I rendered my decision at the hearing on February 8, 2008 and stated at that time that the article referred to in the motion was of no value insofar as the judicial review application was concerned and would not be useful to the Court in its analysis of the case. The Applicant therefore failed to persuade me that all parts of the *Atlantic Engraving* test had been met. More specifically, in this case, it was the second part of the test that was not met. I do not think it necessary at this point to elaborate further on the explanations provided in my decision given from the bench.

[40] This motion is denied with costs payable to the Attorney General.

3. Applicant's motion to subpoena Mr. Perreault (Rule 316)

[41] The Applicant filed a motion under Rule 316 of the Rules to require Mr. Perreault to testify in Court if his book is admitted as part of the Attorney General's motion. Rule 316 provides as follows:

316. On motion, the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised in an application.	**316.** Dans des circonstances particulières, la Cour peut, sur requête, autoriser un témoin à témoigner à l'audience quant à une question de fait soulevée dans une demande.

[42] In a letter dated December 5, 2007, the Commissioner, through his counsel, acknowledged that he had written the foreword and also attested to the accuracy of the foreword's content. The Commissioner pointed out however that this acknowledgement was limited to the foreword and did not extend to the content of Mr. Perreault's book.

[43] The Applicant explains the need for his Rule 316 motion in two stages. First, he argues that if I determine, in the context of the Attorney General's motion to quash, that Mr. Perreault's book is not relevant to the application for judicial review, the motion automatically becomes moot, as the book will not be filed in evidence and, thus, there will be no need to hear the testimony of its author. On the other hand, argues the Applicant, if I find that the book is in fact relevant, I must proceed to the second stage of the analysis and determine whether Mr. Perreault's book constitutes hearsay. If I find that it is not hearsay, I am essentially recognizing the accuracy of its content on the basis of the Commissioner's statement in the foreword and, accordingly, there will be no point in having its

author testify as to whether or not the content of his book is accurate. Conversely, the Applicant asserts that if I find that the book does in fact constitute hearsay but is still admissible in evidence on the basis of its relevance, then the motion under Rule 316 before me will enable the Applicant to question Mr. Perreault and force him to confirm or deny the accuracy of the content of his book.

[44] The Attorney General maintains that the Applicant's motion should fail for two reasons. First, he asserts that it is not necessary to hear the testimony of Mr. Perreault, for even if I find that the book is relevant at this early stage in the proceedings, it will still be his prerogative to dispute the relevance of the book on the merits of the case. Second, the Attorney General argues that the Applicant has failed to disclose any "special circumstances" that would authorize Mr. Perreault's testimony, as required by Rule 316.

[45] I ruled at the hearing of February 8, 2008 that I would grant the Applicant's motion if it became necessary. In light of my decision on the Attorney General's motion with respect to the admissibility of Mr. Perreault's book, I now wish to clarify that ruling. In that I have found that Mr. Perreault's book is relevant to the judicial review application and does not constitute hearsay, the Commissioner having attested to its accuracy in the foreword, the present motion under Rule 316 becomes moot. Accordingly, I dismiss the motion, but without costs.

SUBMISSIONS OF THE PARTIES

[46] The Applicant raises two main arguments in support of his judicial review application. First, he alleges that the Commissioner violated procedural fairness by limiting his right to cross-examine Mr. Guité, a portion of whose testimony was used against the Applicant; by exceeding the mandate of his inquiry, by imposing rules upon the Applicant that did not exist when he was a minister; and by raising a reasonable apprehension of bias, mainly through his conduct during the Commission hearings. Second, the Applicant alleges that the Commissioner erred in his appraisal of the evidence by, among other things, making findings unsupported by the evidence and by failing to take into account evidence that was favourable to the Applicant.

[47] The Attorney General is the respondent who must answer the allegations regarding the violations of procedural fairness.

[48] The Commissioner is also represented in this application, not personally as John H. Gomery, but rather, *qua* ex-Commissioner of the Commission. It is in this sense that I shall use, in the following analysis, the term “Commissioner” when I refer to the “arguments of the Commissioner” or to “allegations or assertions of the Commissioner.” The Commissioner’s position is limited to the argument that the findings of the Phase I Report are based on the evidence.

ISSUES

[49] With regard to the submissions of the parties, the issues raised by the present review application are as follows:

1. What are the appropriate standards of review?

2. To what degree of procedural fairness were persons who appeared before the Commission entitled?

3. Did the Commissioner violate procedural fairness with respect to the Applicant?

4. Did the Commissioner err by making findings unsupported by the evidence or by failing to consider the evidence in the record?

ANALYSIS

1. The standards of review applicable in this judicial review application.

[50] Essentially, the Applicant is asking this Court to intervene on two principal grounds: first, on the ground that procedural fairness was violated, and second, on the ground that there was no evidence to support the Commissioner's findings.

[51] It is settled law that the standard-of-review analysis is not applied to questions of procedural fairness (*C.U.P.E. v. Ontario (Minister of Labour)*, 2003 CSC 29, [2003] 1 S.C.R. 539). Such questions are always reviewed as questions of law and are therefore reviewable on the standard of correctness (*Sketchley v. Canada (Attorney General)*, 2005 CAF 404, [2005] 3 F.C.R. 392 (F.C.A.), at para. 46; *Dunsmuir v. New Brunswick*, 2008 CSC 9). If I find there was a breach of procedural fairness on any of the grounds raised by the Applicant, then the findings of the Phase I Report

concerning the Applicant will have to be set aside and there will be no need to pursue the analysis of the other grounds (*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at 645 [hereinafter *Newfoundland Telephone*]).

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

> 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.
>
> > 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 <u>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</u>.
> >
> > [my emphasis]

[53] Thus, the standard of review applicable to an inquiry commission's findings consists of three cumulative elements: 1) the finding must be based to a certain extent on evidence, 2) this evidence must tend logically to show the existence of facts consistent with the finding, and 3) the reasoning supportive of the finding must not be significantly self-contradictory.

[54] That standard was subsequently re-applied by this Court in *Beno v. Canada (Attorney General)*, 2002 FCTD 142, [2002] 3 F.C. 499 (T.D.), Heneghan J., at paragraphs 110 to 115 [hereinafter *Beno (2002)*].

2. Degree of procedural fairness to which persons who appeared before the Commission were entitled.

[55] The degree of procedural fairness to which parties appearing before administrative or judicial decision-makers are entitled varies depending on the context (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 837). That is why it is important to determine the degree of procedural fairness that parties who appear before the Commission have a right to expect before we examine whether this right was violated in the specific case of the Applicant. However, as I have already established, the degree of procedural fairness in *Chrétien*, *supra* (at paragraphs 39 to 61), and *Pelletier*, *supra* (at paragraphs 37 to 59), I do not believe it is necessary for me to engage in the same detailed analysis to determine the requisite degree of procedural fairness in this case. Indeed, since we are dealing with the same commission of inquiry, what I decided regarding Commissioner Gomery's procedural fairness obligation in the cases of Mr. Chrétien and Mr. Pelletier applies in the same way here. The fact that Mr. Gagliano's allegations regarding the merits of his review application may be different or differently structured from those of Mr. Chrétien and Mr. Pelletier has no bearing on the degree of procedural fairness he is entitled to expect from Commissioner Gomery.

[56] In an effort to be concise, I shall simply repeat that, under the five criteria set out in *Baker*, *supra*, to wit (i) the nature of the decision being made and process followed in making it, (ii) the nature of 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 agency, the Applicant was entitled to a high degree of procedural fairness before the Commission.

3. Did Commissioner Gomery violate procedural fairness with respect to the Applicant?

[57] The Applicant alleges that the Commissioner violated procedural fairness in four ways: 1) by raising a reasonable apprehension of bias, 2) by exceeding the mandate of his inquiry, 3) by imposing rules on the Applicant that did not exist when he was a minister, and 4) by limiting his right to cross-examination.

[58] According to the Applicant, elements 2), 3) and 4) not only constitute grounds for judicial review on their own, they also serve as illustrations of the Commissioner's bias. The Applicant suggests that I should take all elements of evidence into account when I am determining whether a reasonable apprehension of bias exists.

1) Allegation of reasonable apprehension of bias

Reasonable apprehension of bias test

[59] Procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker (*Baker*, *supra*, 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*, *supra*). In *Newfoundland Telephone*, the Supreme Court, in reasons written by Cory J., 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.*, pp. 638-639)

[60] Applying this flexible approach, Cory J. 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.

[61] 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 (F.C.A.)*], the Federal Court of Appeal took into consideration the nature, mandate and function of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia and ruled that the Commission was situated somewhere between the legislative and adjudicative extremes of the scale, stating as follows at paragraphs 26 and 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.

[62] The Attorney General argues that the nature of the Gomery Commission is similar to that addressed by the Court of Appeal in *Beno (F.C.A.)* and that, unlike the situation in *Newfoundland Telephone*, *supra*, the Gomery Commission never went past the investigative stage. Accordingly, the Attorney General alleges that the applicable standard is that of the "closed mind". This consists in establishing whether there is a reasonable apprehension that the commissioner would reach a conclusion on a basis other than the evidence. The Attorney General acknowledges that the reasonable apprehension of bias test based on the reasonable person standard exists, but he did not avail himself of this argument in the alternative.

[63] The Applicant asserts that the applicable test is the reasonable apprehension of bias test, as set out in dissent by Grandpré J. of the Supreme Court in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 [hereinafter *Committee for Justice and Liberty*] (test later endorsed by the Supreme Court in, *inter alia*, *R. v. S.(R.D.),* [1997] 3 S.C.R. 484 [hereinafter *R.D.S.*]).

[64] 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. Accordingly, using a flexible application of the reasonable apprehension of bias test, I find that the applicable test is the one 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*, p. 394)

[65] As Cory J. stated in *R.D.S., supra,* 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.*, 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.*, paras 112-113).

[66] 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 (F.C.A.), supra,* para. 29, quoting *Committee for Justice and Liberty*, *supra*, p. 395). 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.

Application of the reasonable apprehension of bias test in this case

[67] I emphasize from the outset that the arguments raised by the Applicant on the issue of the reasonable apprehension of bias are different from those raised by Messrs Chrétien and Pelletier in the decisions I rendered previously (*Chrétien*, *supra*, and *Pelletier*, *supra*). Indeed, counsel for the Applicant in the instant case affirmed that Commissioner Gomery's public statements at the heart of the *Chrétien* and *Pelletier* cases did not apply to his client.

[68] At the hearing, when I saw that counsel for the Applicant had come to the end of his submissions with no comment as to the effect of Commissioner Gomery's public statements on the existence of a reasonable apprehension of bias toward his client, I asked him if he wanted to address that issue. He replied that because the Commissioner's remarks were not directed at his client, no

prejudice was suffered on his part. In the interests of clarity, I reproduce below the relevant passage from the hearing transcript:

> [TRANSLATION]
>
> JUDGE :
> So that's your evidence, you have nothing else to tell me?
>
> Me PIERRE FOURNIER :
> No, My Lord, unless you have questions to ask me, which I will be pleased to answer.
>
> JUDGE:
> No, it's not up to me to tell you how to lead your evidence, but I am a little surprised that you've said nothing about the issues of prejudice with respect to the comments Mr. Gomery made in the press in December 2004.
>
> Me PIERRE FOURNIER :
> I understand.
>
> JUDGE:
> You're not obligated to talk about all that if you're satisfied that it doesn't prove anything, but that's why I'm asking you. Did you forget it or…
>
> Me PIERRE FOURNIER :
> No.
>
> JUDGE:
> ... are you prepared to leave it?
>
> Me PIERRE FOURNIER :
> No, neither one, My Lord. Because the thing is, we have to agree on what we mean by "prejudice." The comments made by Commissioner Gomery, I talked about this, as far as I am concerned, they prove his bias, period.
>
> You'll recall that these comments at the time were not directed at my client; there was no prejudice caused to my client by those comments. They were comments directed principally at Mr. Chrétien.

> Mr. Chrétien may perhaps say, the Commissioner went beyond his jurisdiction and [“] what he said was prejudicial to me [”]. For my part, all I can say about those comments, in fact, I think all I can say about those comments is that they indicate, they demonstrate the Commissioner’s bias against politicians, his desire to find a scapegoat. But I can’t go any farther than what I’ve said about that already.
>
> JUDGE:
> Thank you, thank you very much. […]

[69] Because of this admission on the part of counsel for the Applicant, I cannot take some of Commissioner Gomery’s public statements into consideration in my analysis of the apprehension-of-bias ground raised by the Applicant. The Applicant was clearly a politician during the period covered by the Commissioner’s investigation, but the test for a reasonable apprehension of bias is a personalized one: it must be assessed on the basis of the individual alleging that he or she is a “victim” of the existence of a reasonable apprehension of bias. And that is why, if I were to determine that there was a reasonable apprehension of bias on the part of the Commissioner against the Applicant, only the findings in the Phase I Report concerning the Applicant would have to be set aside. Thus, in order for the Commissioner’s statements (those challenged by Mr. Chrétien and Mr. Pelletier in their respective cases) to qualify as evidence of the reasonable apprehension of bias against the Applicant, he would have to link them to his case and assert that they were actually prejudicial to him. In the absence of any such assertion, I must omit that aspect from my analysis.

[70] The Applicant bases his allegation of a reasonable apprehension of bias on the following evidence: i) Commissioner Gomery’s conduct during the Commission hearings, specifically his numerous interventions and interruptions, as well as the tone of his interventions, during the

testimony of the Applicant and that of other witnesses on the subject of the Applicant's involvement in the Sponsorship Program; ii) the book written by Commission spokesperson Mr. Perreault and the role he played, both of which reflect the importance the Commissioner attached to the media and public opinion; iii) the newspaper articles; and iv) the role of Me Roy. I have already ruled in the interlocutory motions that the ground of review based on Me Roy's role was unfounded, so I will not address it in my analysis on the merits.

[71] As I stated above, the Applicant contends that, in addition to this specific evidence, a reasonable apprehension of bias is also supported by the other grounds for review referring to violations of procedural fairness. The Applicant therefore enjoins me to maintain a comprehensive view in my analysis and to consider these grounds as a whole demonstrating a reasonable apprehension of bias against him on the Commissioner's part. For clarity's sake, though, I shall address these issues separately. I am going to begin by examining the more specific elements of the reasonable apprehension of bias, and then I will deal with the procedural fairness allegations one by one, ever mindful of the fact that the Applicant considers them to be additional pieces of evidence pointing to the reasonable apprehension of bias.

i) The Commissioner's interventions

[72] The Applicant alleges that the Commissioner's interventions during his testimony and that of other witnesses regarding the degree of his involvement in the Sponsorship Program, in addition to the frequency and tone of those interventions, indicate that the Commissioner harboured a preconceived idea of the Applicant's role in the program and was attempting to minimize any and

all evidence favourable to the Applicant that would have run counter to that preconception. According to the Applicant, the Commissioner looked upon him as an adversary rather than as a witness helping him in his inquiry mandate. The Applicant also asserts that the Commissioner showed impatience with him in several instances, adopted an accusatory tone, made aggressive and insulting remarks, interrupted him and, generally speaking, showed a lack of respect towards him.

[73] In response, the Commissioner explains that an inquiry commission possesses an inquisitorial function granting him license to intervene and even put questions to witnesses himself in order to clarify evidence and uncover facts. In that sense, the Commissioner emphasizes, the Commission he was directing was quite different from a civil or criminal court.

[74] In *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada)*, [1997] 3 S.C.R. 440, at paragraph 34 [hereinafter *Krever*], the Supreme Court clearly distinguished a commission of inquiry from a civil or criminal trial:

> A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter. The nature of an inquiry and its limited consequences were correctly set out in *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527, at para. 23:

> A public inquiry is not equivalent to a civil or criminal trial [...] 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 [...] 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" [...]may impose monetary or penal sanctions; the only potential consequence of an adverse finding [...]is that reputations could be tarnished.
>
> Thus, although the findings of a commissioner may affect public opinion, they cannot have either penal or civil consequences. To put it another way, even if a commissioner's findings could possibly be seen as determinations of responsibility by members of the public, they are not and cannot be findings of civil or criminal responsibility.

[75] I believe that the inquisitorial nature of an inquiry commission explains the role that Commissioner Gomery was required to play as part of his fact-finding mandate. In my opinion, his interventions and interruptions were necessary in order to distinguish the relevant evidence from the irrelevant evidence and to maintain order throughout the hearings. It is even established that a commissioner may be required to intervene to clarify inconsistencies detected in the evidence (*Beno (FC.A.)*, *supra*, para. 30). In my opinion, the Commissioner's interventions do not establish a reasonable apprehension of bias within the meaning of the test set out in *Committee for Justice and Liberty* and *R.D.S.*, *supra*. On the contrary, a reasonable and informed person viewing the matter realistically and practically, and having thought the matter through, would conclude that Commissioner Gomery, by virtue of the terms of his mandate and, more generally, his role as a

commissioner, was in control of his proceedings and sometimes had to intervene in order to ensure that the Commission hearings ran properly.

[76] Interventions and the frequency thereof may be appropriate, but the tone with which they are made may not. On several occasions, the Applicant indicated to me that the Commissioner, by the accusatory and disrespectful tone with which he questioned him, had conducted an adversarial rather than a simply inquisitive inquiry. I very closely examined the contentious passages identified by the Applicant, and I was unable to come to the conclusion that they were sufficient, whether taken in isolation or as a whole, to establish a reasonable apprehension of bias. I do see that on certain occasions the Commissioner became impatient with the Applicant, but as the Supreme Court noted in *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, [hereinafter *Miglin (S.C.C.)*], the reasonable person test established in *Committee for Justice and Liberty* and *R.D.S.*, *supra*, requires more than that to establish a reasonable apprehension of bias:

> Mr. Miglin urged this Court to order a new trial on the basis that the interventions by the trial judge throughout the proceedings, by reason of their frequency, timing, content and tone, gave the trial an unmistakable appearance of unfairness.
>
> The appropriate test for reasonable apprehension of bias is well established. The test, as cited by Abella J.A., is whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 111, *per* Cory J.; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at pp. 394-95, *per* de Grandpré J. A finding of real or perceived bias requires more than the allegation. The onus rests with the person who is alleging its existence (*S. (R.D.)*, at para. 114). As stated by Abella J.A., the assessment is difficult and requires a careful and thorough examination of the proceeding. The record must be considered in its

> entirety to determine the cumulative effect of any transgressions or improprieties. We see no reason to interfere with the Court of Appeal's assessment of the record, nor with its conclusion that although the trial judge's comments were intemperate and his interventions at times impatient, they do not rise to the level necessary to establish a reasonable apprehension of bias.
>
> (*Miglin (S.C.C.)*, paras 25-26)

[77] I am of the opinion that this reasoning applies to the case before me. To quote Madam Justice Abella (then of the Ontario Court of Appeal) in the judgment on appeal to the Supreme Court (*Miglin v. Miglin* (2001), 53 O.R. (3d) 641 (O.C.A.), at para. 31 [hereinafter *Miglin (O.C.A.)*]; decision reversed on appeal before the Supreme Court of Canada, but not on the issue of reasonable apprehension of bias), I am of the view that, by his interventions and manifestations of impatience, Commissioner Gomery "risked triggering the perception that he was prejudging [the] credibility" of the Applicant (*Miglin (O.C.A..)*, para. 31). However, like Abella J.A., I find that, in the end, that conduct did not give rise to a reasonable apprehension of bias within the meaning of the test established by *Committee for Justice and Liberty* and *R.D.S.*, *supra.*

ii) Mr. Perreault's book and role

[78] I determined in the interlocutory motions that when the Commissioner wrote, in his foreword to *Inside Gomery*, that Mr. Perreault had "produced a chronicle of the inner workings of the Commission that is as fascinating as it is accurate," he was actually attesting to the accuracy of the entire book.

[79] Based on certain passages of Mr. Perreault's book, the Applicant contends that the Commissioner was more concerned about capturing public attention and holding on to it than he was about conducting his fact-finding mission, and that he was seeking a kind of public endorsement completely unrelated to his inquiry mandate. The Applicant indicated to me a number of times that this was inappropriate and gave rise to a reasonable apprehension of bias.

[80] While I agree that it was perhaps inappropriate for the Commission lawyers to disclose to Mr. Perreault their questioning strategy and the admissions they hoped to elicit from the witnesses; for Mr. Perreault then to present the day's highlights to the media on the basis of those confidences; and for the Commissioner to believe he needed to sustain the nation-wide interest in the Commission (*Inside Gomery*, p. 149), I am not persuaded that this evidence, or any of the other elements raised by the Applicant, would, in the mind of a reasonable and informed person, having thought the matter through and viewing it realistically and practically, give rise to a reasonable apprehension of bias. Let us recall that the applicable test of the reasonable and informed person is not that of the "very sensitive or scrupulous conscience" (*Committee for Justice and Liberty*, *supra*, p. 396). One must ensure that it is the reasonable person test that is being applied and that the question being asked is whether this person would come to the conclusion that the Commissioner, because of his concern for public opinion, would in all likelihood, consciously or unconsciously, fail to render a fair decision.

[81] I think there is a margin between being concerned about public opinion and failing to render a fair decision. A reasonable and informed person should not be willing to cross that margin on the basis of mere suspicions (*R.D.S.*, *supra*, para. 112).

[82] I emphasize here that the Applicant's allegations regarding the Commissioner's preoccupation with the media and public opinion are different from those advanced in *Chrétien* and *Pelletier*, *supra*. In my rulings in those two cases, I determined that the examples raised by the applicants regarding the Commissioner's preoccupation with the media and public opinion had a prejudicial impact on the fairness of the proceedings in relation to the applicants. At the time, I was principally referring to the public statements made by the Commissioner in interviews granted to the media in December 2004, while the Commission was on a holiday recess, before all the evidence had been heard. However, as I stated above, counsel for the Applicant in the case at bar has affirmed that his client suffered no prejudice as a result of those comments. He cannot now persuade me that my finding on that point in *Chrétien* and *Pelletier* should also apply to his client.

[83] Coming back to the term "inappropriate" used repeatedly by the Applicant, I note that something can be inappropriate without necessarily creating a reasonable apprehension of bias: the two concepts are based on different criteria. Determining what is appropriate depends on a multiplicity of highly subjective variables. Moreover, it is not a legal test. Determining whether there is a reasonable apprehension of bias depends on an objective legal test (*R.D.S.*, *supra*, para. 111) based on specific criteria. My role is not to pronounce on whether the facts Mr. Perreault reports in his book are appropriate or not. My role is to determine whether a reasonable and

informed person, having thought the matter through and viewing it realistically and practically, would conclude on the basis of those facts that the Commissioner would not render a fair decision. I determine that such a person would not come to such a conclusion. The evidence relating to Mr. Perreault's book and role does not create a reasonable apprehension of bias.

iii) Newspaper articles

[84] I would point out, once again, that the newspaper articles referred to by the Applicant are not the same as those on which Messrs Chrétien and Pelletier relied to allege a reasonable apprehension of bias against them on the part of the Commissioner. I agreed in the context of the Attorney General's motion to strike that those newspaper articles should be admitted in evidence (partial production of Exhibit L). However, in addition to making the admission I discussed above about the Commissioner's contentious statements not applying to his client, counsel for the Applicant relied only on the two following articles.

[85] The first article, entitled [TRANSLATION] "Sponsorship Scandal – Canadians support Justice Gomery," discusses the number of e-mails received by the Commission in one day, as well as the statement made by Mr. Perreault to the effect that people are supporting the Commissioner and wondering what Mr. Chrétien has to hide by attempting to discredit the Commissioner.

[86] In *Chrétien, supra*, I dealt with the question of the e-mails received by the Commission and Mr. Perreault's comment about the supposed message contained in those e-mails concerning what it was that Mr. Chrétien might have to hide from the Commissioner. I made two findings in that case.

First, it was immaterial that Commissioner Gomery himself did not make that statement about Mr. Chrétien. Indeed, as spokesperson for the Commission, Mr. Perreault was, in the words of the Commissioner himself, "the only person who will speak on behalf of the Commission" (Phase I Report, p. 522, "Opening Statement"). Accordingly, his words could to a great extent be attributed to the Commissioner, this even despite the Commissioner later asserting that Mr. Perreault's comment about the e-mails had been made without his knowledge. Second, I found that this comment had tarnished Mr. Chrétien's reputation and had, with respect to him personally, a prejudicial impact on the fairness of the proceedings.

[87] However, in the case at bar, this second finding in no way applies to the Applicant. I am persuaded that a reasonable and informed person, having thought the matter through and viewing it realistically and practically, would not think that the Commissioner, because of Mr. Perreault's comment about the content of the e-mails in respect of Mr. Chrétien, would fail to render a fair decision in respect of the Applicant. Accordingly, I find that no reasonable apprehension of bias against the Applicant results from this first article.

[88] The second article, entitled [TRANSLATION] "Report on the Gomery Commission– Leaks said to be false", deals with the alleged leak in the *Toronto Star* newspaper about the conclusion of the Phase I Report which reportedly blamed Mr. Chrétien "and his entourage" and, in other places, "the Chrétien government" for the sponsorship scandal. The article also talks about Mr. Perreault's comment to the effect that the leaks were false and that [TRANSLATION] "any Canadian who has

been following the Commission on television could have pretended to be Justice Gomery and written what the *Star* wrote".

[89] While I admit that this second article concerns the Applicant—albeit indirectly—more than the first article, I am not in the least certain that it raises a reasonable apprehension of bias. I agree that an informed person would know that the Applicant was a member of the "Chrétien government" at the time of the sponsorship scandal. However, Mr. Perreault's reaction, as reported in the article, consists precisely in denying the allegations of a leak and in trivializing the rumour about the alleged conclusions of the Phase I Report. I do not construe his comment as confirming that the guilt of Mr. Chrétien or "his entourage" or the "Chrétien government" is obvious. Nor do I see it as providing an indication of the Commissioner's conclusion to come. Rather, I interpret it as meaning that any person having watched the Commission hearings on television could have come to a conclusion similar to the one falsely reported by the *Toronto Star*. Mr. Perreault did not say it was the only possible conclusion that a person who had watched the hearing could have made. He simply said, in an effort to minimize the rumour, that any person could have pretended to be the Commissioner and come to his or her own conclusion.

[90] I am persuaded that a reasonable and informed person—not one with a very sensitive or scrupulous conscience—having thought the matter through and viewing it realistically and practically, would not think that the Commissioner, because of Mr. Perreault's comment, would fail to render a fair decision in respect of the Applicant. Accordingly, I find that no reasonable

apprehension of bias on the part of the Commissioner against the Applicant results from this second article.

[91] I shall now determine whether the Commissioner violated procedural fairness on the basis of the other grounds raised by the Applicant. At the same time, I shall consider whether these grounds also create a reasonable apprehension of bias.

2) Allegation regarding the limits of the mandate and the scope of the word "program"

[92] The Applicant faults the Commissioner for exceeding his jurisdiction by [TRANSLATION] "setting the temporal parameters of his inquiry arbitrarily" and by choosing to inquire into the period supposedly preceding the actual creation of the Sponsorship Program in September 2001. The Applicant alleges that the Commissioner exceeded the terms of his mandate and demonstrated his bias against him. According to the Applicant, the Commissioner also failed to take notice of a piece of evidence favourable to him, namely, the fact that under his reign as minister there was a reduction in the production costs (commissions) for which the advertising agencies were billing the government, and thus, an improvement in the management of the Program. Furthermore, the Applicant contends that if the Commissioner had limited his inquiry to the actual Sponsorship Program *per se,* i.e., from the period after September 2001, he would not have found any major problem in the management of the Program because guidelines were put in place along with the creation of Communication Canada in September 2001 (through the amalgamation of CCSB and the Canada Information Office).

[93] The Commissioner contends that the Applicant's argument based on the meaning of the word "program," and more specifically on the question of whether a "program" actually existed prior to the creation of Communication Canada in September 2001, is without merit. According to him, his mandate gave him jurisdiction to inquire into the pre-2001 period. As well, the Commissioner made two qualifications to the Applicant's argument that an inquiry limited to the post-2001 period would have shown an improvement in the operation of the Sponsorship Program: first of all, loss of control over the Program was not solely attributable to the sums of money received by the advertising agencies, and second, the improvement alleged by the Applicant is altogether relative, as the Program guidelines were not put in place until the very end of his term as minister.

[94] I reject the Applicant's argument that the Commissioner overstepped his mandate by inquiring into the pre-2001 period. In my opinion, this argument is essentially about the terminological definition of the word "program."

[95] Commissioner Gomery's mandate was based on the findings of the Auditor General in her report, which covered the period from November 1997 (creation of the CCSB) to March 31, 2003 (a new accountability and management scheme for the Sponsorship Program came into effect on April 1, 2003). Let us recall that the Commissioner's mandate for the investigative phase of the Commission inquiry (Phase I) was to "a) investigate and report on questions raised, directly or indirectly, by Chapters 3 and 4 of the […] Report of the Auditor General of Canada…" (Phase I Report, p. 453). At paragraphs 3 and 4 of her Report, the Auditor General refers specifically to the

period from 1997 to 2003 (Phase I Report, p. 465, para. 3.7 and para. 3.11). In proceeding with the inquiry, Commissioner Gomery observed that the problems noted by the Auditor General originated in events dating back to the aftermath of the October 1995 referendum. That is why he decided to extend the period targeted by his inquiry to 1996. In my view, it was his prerogative to do so because of his terms of reference, which refer to "questions raised, directly or indirectly, by Chapters 3 and 4 of the […] Report of the Auditor General" [my emphasis]. The fact that the Commissioner noted that certain issues raised by the Auditor General pre-dated the period of his inquiry goes to to his assessment of the evidence, regarding which I must show considerable deference.

[96] In closing on this point, I would note that the Applicant did not object during the hearings to the fact that the Commission was inquiring into the pre-2001 period.

[97] Since the Commissioner did not exceed his mandate by inquiring into the pre-2001 period, I find that he also did not, in so inquiring, raise a reasonable apprehension of bias in the mind of a reasonable and informed person.

3) The allegation regarding rules that did not exist when the Applicant was minister

[98] The Applicant alleges that the Commissioner violated procedural fairness by redefining the concept of "ministerial responsibility", by imposing a responsibility upon him that he did not have and by blaming him on the basis of rules that were not in force when he was minister.

[99] The question of the Applicant's accountability for the actions of his exempt staff and public servants is important because the Applicant submits that there is no evidence of him personally meeting with Mr. Guité and that he cannot be held accountable if members of his staff met with him. I will address the two aspects of that assertion by the Applicant in the section on the sufficiency of the evidence, below, under the headings of the frequency and irregularity of the meetings. I am satisfied that, if I find there was some evidence supporting the Commissioner's findings regarding the Applicant's responsibility, it will automatically lead to the conclusion that the Commissioner did not violate procedural fairness by making such findings.

4) The allegation regarding the right to cross-examination

[100] The Applicant alleges that the Commissioner violated procedural fairness by limiting his right cross-examine Mr. Guité. This allegation is made on the basis of paragraph k of the Commissioner's terms of reference, which reads as follows:

> k. the Commissioner be directed to perform his duties without expressing any conclusion 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;
>
> (Phase I Report, p. 456)

[101] As a reminder of the context of the above, when counsel for the Applicant tried to cross-examine Mr. Guité about three controversial contracts, counsel for Mr. Guité objected on the basis that his client was facing parallel criminal charges in connection with, among other things, those same three contracts. Commissioner Gomery sustained the objection of counsel for Mr. Guité on the basis of paragraph k) of his terms of reference. In the end, the Commissioner relied in part on the

testimony of Mr. Guité to determine that the Applicant was responsible. On the whole, the Commissioner found that Mr. Guité was not credible; nevertheless, he accepted a portion of his testimony attesting to the hands-on approach of the Applicant in the Sponsorship Program.

[102] The Applicant sees in the Commissioner's decision to sustain the objection of counsel for Mr. Guité an undue limitation on his right to cross-examine, with negative consequences for him. The Applicant alleges therefore that he did not have the opportunity to truly demonstrate Mr. Guité's lack of credibility through cross-examination.

[103] I repeat that the Commissioner found Mr. Guité, on the whole, not to be credible, which clearly illustrates that he had sufficient evidence to assess the credibility of Mr. Guité. As I mention below, the Commissioner's decision to accept a very small portion of Mr. Guité's testimony to support, along with other evidence, his finding of blame with respect to the Applicant is attributable to his appraisal of the evidence, regarding which I must show considerable deference.

[104] Paragraph k) is clear. In my opinion, the Commissioner would have risked compromising the parallel criminal proceedings if he had allowed the Applicant to cross-examine Mr. Guité about the three controversial contracts. The Commissioner's decision to sustain the objection of counsel for Mr. Guité on the basis of the restrictions of paragraph k) of his terms of reference was therefore well founded. I note that the Applicant did not contest the Commissioner's terms of reference through any other appropriate channels.

[105] The Applicant also contends that his right to cross-examine certain witnesses was infringed by the Commissioner's interventions. In support of that assertion, the Applicant cites *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193 [hereinafter *Lyttle*], wherein the Supreme Court ruled that the right to cross-examine, in a criminal trial context, was an essential component of an accused's right to a full answer and defence and that disrupting the rhythm of a cross-examination was unwarranted (*Lyttle*, at paras 1, 2 and 7). The Applicant maintains that the Supreme Court's instruction in *Lyttle* applies equally to the context of the Commission.

[106] I disagree. I do not believe that what the Supreme Court stated in *Lyttle* applies completely and automatically to the context of the Gomery Commission or to inquiry commissions in general. We saw in paragraph 34 of *Krever*, *supra*, that inquiry commissions are not the same as civil or criminal trials. In that excerpt, the Supreme Court quotes with approval the Federal Court of Appeal in *Beno (F.C.A.)*, which corrected what our Court had said in *Brigadier General Ernest B. Beno v. The Honourable Gilles Létourneau*, [1997] 1 F.C. 911 (F.C.T.D.), at paragraph 74, Campbell J. [hereinafter *Beno (1997)*], to the effect that an inquiry commission had a "trial-like function." The Federal Court of Appeal pointed out that, on the contrary, an inquiry commission was to be distinguished from a civil or criminal trial for a variety of reasons, including more flexible rules of procedure (*Beno (F.C.A.)*, at para. 23), and the Supreme Court affirmed that principle in *Krever*. Commissions of inquiry are inquisitorial in nature, and the commissioners who conduct them are in control of their procedure (*Beno (2002)*, *supra*, at paras 113-114). Moreover, the right to cross-examination is not absolute. That principle was reiterated by this Court in several instances in the context of an inquiry commission, including *Boyle v. Canada (Commission of Inquiry into the*

Deployment of Canadian Forces in Somalia – Létourneau Commission), [1997] A.C.F. no. 942, Dubé J., at paragraph 37, and in *Beno (2002)*, *supra*, where my colleague Heneghan J. stated as follows:

> [113] It is undisputed that Lieutenant-General Reay was not cross-examined by the applicant. The lack of an opportunity to cross-examine this witness and others was a matter falling within the procedure established by the Commission. The fact that some of the evidence was not tested by cross-examination goes to its probative value and that is a matter clearly falling within the jurisdiction of the Commissioners. The choice of procedure is beyond review by the Court, as long as the applicant was accorded procedural fairness.

[107] More specifically, Commissioner Gomery in this case had the power to establish his own procedure under paragraph e) of his terms of reference, which reads as follows:

> e. the 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;

[108] For these reasons, I find that the Commissioner did not violate procedural fairness by limiting, allegedly, the Applicant's right to cross-examination.

4. Did the Commissioner err by making findings unsupported by the evidence or by failing to consider the evidence in the record?

[109] In accordance with the standard of review established by the Federal Court of Appeal in *Morneault*, *supra*, I must determine in my analysis in this section, whether the Commissioner's findings of fact with respect to the Applicant's responsibility are supported by some evidence in the record. This is a standard of review calling for a high level of judicial deference.

[110] On several occasions during the hearing of this application, the Commissioner reminded me of the similarities between the case before me and the Supreme Court of Canada's decision in *Krever*, *supra*. He raised this similarity notably in the context of the standard applicable to findings of fact in order to enjoin me to show deference in respect of those findings. Paragraph 40 of *Krever* is particularly relevant:

> The appellants do not appear to challenge the power of a commissioner to make findings of fact; their objection is to the commissioner's assessment of those facts. However, in my view, the power of commissioners to make findings of misconduct must encompass not only finding the facts, but also evaluating and interpreting them. This means that commissioners must be able to weigh the testimony of witnesses appearing before them and to make findings of credibility. This authority flows from the wording of s. 13 of the Act, which refers to a commissioner's jurisdiction to make findings of "misconduct". According to the Concise Oxford Dictionary (8th ed. 1990), misconduct is "improper or unprofessional behaviour" or "bad management". Without the power to evaluate and weigh testimony, it would be impossible for a commissioner to determine whether behaviour was "improper" as opposed to "proper", or what constituted "bad management" as opposed to "good management". The authority to make these evaluations of the facts established during an inquiry must, by necessary implication, be included in the authorization to make findings of misconduct contained in s. 13. Further, it simply would not make sense for the government to appoint a commissioner who necessarily becomes very knowledgeable about all aspects of the events under investigation, and then prevent the commissioner from relying upon this knowledge to make informed evaluations of the evidence presented.
>
> [my emphasis]

[111] According to the Commissioner, in deference to this in-depth knowledge of the facts that he acquired in the course of his investigation, I must show restraint in respect of his findings of fact.

[112] The Applicant faults the Commissioner for coming to conclusions about his involvement in the Sponsorship Program that are not supported by the evidence in the record. The Applicant criticizes the Commissioner for, among other things, accepting Mr. Guité's testimony at the expense of his own testimony regarding the extent of his involvement in the program. He deplores the fact that the Commissioner found Mr. Guité not credible in general, yet believed him over his own version.

[113] On this point, the main passages of the report under contention are the following:

> In spite of his protestations to the contrary, the evidence is overwhelming that Mr. Gagliano was a hands-on manager who took a great interest in the Sponsorship Program and an active part in its direction.
>
> […]
>
> Mr. Gagliano was not a good or persuasive witness. He was at times evasive and argumentative, and he did not give the impression that he was as interested in increasing the Commission's understanding of the operation of the Sponsorship Program as he was in seeking his own vindication. In this respect, he compares unfavourably with Mr. Guité. When the latter says that Mr. Gagliano gave him advice, suggestions and instructions concerning the choice of agencies to handle sponsorship contracts, I am inclined to believe him in spite of Mr. Gagliano's denials.
>
> (Phase I Report, pp. 154-155)
>
> […]
>
> Throughout this Report I have had to assess the credibility of Mr. Guité's testimony on a number of subjects. In general, I have come to the conclusion that he is not always a reliable witness, and that any affirmations made by him should be accepted with caution. This being said, some of the statements of even the most unreliable witness may prove to be true. For example, if a statement is corroborated by the evidence of other witnesses or by

> documentation, or if it is made against the interests of the witness, or if it corresponds to a logical or plausible explanation of the surrounding circumstances, it may be accepted, even if the statement has been made by an otherwise untruthful person.
>
> […]
>
> As I indicated earlier in this Report when analyzing that evidence, considering the evidence as a whole, taking into account simple logic, plausibility, and elements of corroboration by independent witnesses such as Isabelle Roy and Joanne Bouvier, it is improbable that the question of the selection of agencies was never discussed during those meetings. Accordingly, in spite of the many instances where Mr. Guité contradicted himself and was not truthful on other subjects, his testimony with respect to the subjects discussed at his meetings with [Mr.] Gagliano was accepted, notwithstanding the denials of [Mr. Gagliano] who, in general, [was] more credible.
>
> (Phase I Report, pp. 401-402)

[114] The Applicant challenges the fact that the Commissioner chose the logic and testimony of a generally non-credible witness to support his findings of blame in preference to other evidence in the record which, in the Applicant's opinion, worked in his favour.

[115] In response, the Commissioner pointed out that he did not rely solely on the logic and testimony of Mr. Guité, but on a good deal of other evidence that corroborated Mr. Guité's version, hence the logic of that version. The Commissioner insisted that my role was not to substitute my opinion for his with respect to weighing the evidence; rather, it was only to determine whether, in accordance with the test in *Morneault*, *supra*, his findings were supported to some extent by evidence in the record.

[116] For the reasons that follow, I am persuaded that the *Morneault* test has been met and that the Commissioner's findings are supported to some extent by the evidence.

1) Frequency and nature of meetings with Mr. Guité

[117] The Commissioner established first of all that there was evidence confirming the existence of meetings, and the frequency and nature of those meetings, between Mr. Guité and the Applicant or members of his staff. To that end, he began by referring me to the evidence he expressly cited in the Phase I Report. That evidence includes the testimony of Huguette Tremblay, M. Guité's assistant from 1987 to 1991, office manager from 1991 to 1997, and person in charge of advertising agency selection procedure at PWGSC from 1997 to 1999; Isabelle Roy, special assistant in the Applicant's office when he was Minister of Labour in 1996 and 1997, then at PWGSC from 1997 to 1999, and assistant at CCSB from 1999 to 2004; and Joanne Bouvier, Ms. Roy's successor in the Applicant's office and assistant to Jean-Marc Bard, the Applicant's executive assistant.; excerpts from the MP Log, an electronic file in which the Applicant's assistants kept a written record of the decisions made with respect to sponsorship matters; "Exhibit 201," presented to the Commissioner during the hearings, being a collection of over 240 pages of evidence with respect to the direct interventions by the Applicant or members of his staff; and an exchange between a representative of the RCMP and Mr. Guité.

[118] The Applicant contends that the people who testified about the frequency of the meetings between the Applicant and Mr. Guité never in fact attended those meetings or saw the Applicant meet with Mr. Guité. According to the Applicant, all their testimony reveals is that Mr. Guité told

them he was going to the minister's office or to see the minister, or that he was returning from seeing the minister. And considering Mr. Guité's lack of credibility, the Applicant asserts, the Commissioner should not have taken testimony based on Mr. Guité's statements into account.

[119] In response, the Commissioner points out that when Mr. Guité would say he was meeting with the Applicant or going to his office, he had no reason to lie. The Sponsorship Program was in full swing and nothing indicated it was ever going to be the subject of a public inquiry. Therefore, according to the Commissioner, when Mr. Guité told his assistants he was going to meet the Applicant, those meetings did in fact take place. Furthermore, the Commissioner emphasizes that Ms. Roy and Ms. Bouvier had discussions with the Applicant, to which Mr. Guité was not party, in the course of which decisions were made by the Applicant regarding the selection of events to sponsor.

[120] In any case, there is still the MP Log, which clearly records the Applicant's interventions in the Sponsorship Program. Notations in the MP Log such as [TRANSLATION] "Minister [the Applicant] decided we are giving $5,000," [TRANSLATION] "IR [for Isabelle Roy] spoke to Minister and the answer is no," [TRANSLATION] "IR talked it over with the Minister. 31-1-99 Minister talked to Chuck [Mr. Guité]. Minister confirmed to me that we're giving the requested amount ([$]10,000)," [TRANSLATION] "IR checked with the Minister and Chuck and the answer is no," [TRANSLATION] "The letter [signed by the Applicant] confirms the amount of $300,000 for Soirées 1999," all constitute clear evidence that the Applicant and members of his staff, for whom he was responsible, intervened actively in the management of the Sponsorship Program and

that, generally speaking, the Applicant ensured that he was kept apprised of which events were receiving sponsorship money, in what amount, and with the assistance of which advertising agency.

[121] In addition to the evidence expressly cited in the report, there is other uncited evidence that was presented to the Commission on which the Commissioner relied to support his findings with respect to the question of the meetings. This evidence includes the testimony of Mr. Quail and Ghislaine Ippersiel, assistant to Mr. Bard (Applicant's executive assistant) from 1997 to 2001.

2) Irregularity of the meetings

[122] Second, the Commissioner listed the evidence supporting his finding that these meetings between Mr. Guité and the Applicant or members of his staff were irregular.The Commissioner asserts that the meetings were irregular in that they constituted political interference on the part of the Applicant: his interventions were more than mere suggestions and were sometimes designed to achieve partisan ends. Beyond that, they disrupted the normal chain of communication and accountability between departmental officers, assistant deputy ministers or deputy ministers and the minister. In support of his assertion that he had sufficient evidence on which to base his findings regarding the irregularity of the meetings, the Commissioner produced the testimony of Mr. Quail; of Jim Stobbe, Assistant Deputy Minister at PWGSC from 1990 to 2000 (to whom Mr. Guité reported); of Ronald Bilodeau, Deputy Minister and Associate Secretary of the Cabinet (Intergovernmental Relations) Privy Council Office from 1994 to 1996, and Associate Secretary and Deputy Clerk of the PCO from 1996 to 2003; of the Honourable Marcel Massé, Minister of Intergovernmental Affairs from 1993 to 1996 and President of the Treasury Board and Minister

responsible for the Infrastructure Program from 1996 to 1999; of Jocelyne Bourgon, Clerk of the Privy Council from 1994 to 1999; of the Honourable Diane Marleau, Minister of PWGSC from January 1996 to June 1997; and, although the Commissioner did not cite him explicitly in his Report, of Alex Himelfarb, Clerk of the Privy Council from 2002 to 2006.

[123] Mr. Quail's and Mr. Stobbe's testimony are the same: they were not aware of all the meetings that were taking place between the Applicant or his staff and Mr. Guité, nor of the content of those meetings, and they could not therefore control the work that Mr. Guité was doing. The testimony of Mr. Bilodeau, Mr. Massé, Ms. Bourgon, Ms. Marleau and Mr. Himelfarb are also consistent: there is a chain of communication among the employees of a department and the minister, that chain of communication must include the assistant deputy minister and the deputy minister, and ultimately, the minister is accountable for the actions of his exempt staff and the public servants in his department.

[124] The Commissioner also produced two documents from the PCO on which he relied in the Phase I Report, the first entitled *Guidance for Deputy Ministers*, and the second entitled *Governing Responsibly: A Guide for Ministers and Ministers of State*. The first document refers to the normal chain of communication in the administration of a department:

> The Deputy Minister needs to be attentive to maintaining good working relations with the Minister's office in providing complementary support to the Minister. It is important to remember, however, that exempt staff of a Minister do not have the authority to give direction to public servants. When they ask for information or convey a Minister's instructions, it is normally done through the Deputy Minister.

> (*Guidance for Deputy Ministers*, section 3: Accountability to the Minister; Phase I Report, p. 41)

The Commissioner found that this chain of communication was disrupted by the direct meetings between Mr. Guité and the Applicant or members of his staff, beyond the reach and control of the Deputy Minister, Mr. Quail or the Assistant Deputy Minister, Mr. Stobbe.

[125] This document also confirms the minister's responsibility for the public servants in his department (ministerial responsibility):

> Ministers are individually responsible for their personal acts, the general conduct of their department, acts done (or left undone) in their name by their departmental officials whether or not the Minister had prior knowledge of any activity, and for departmental financial and administrative practices.
>
> (*Guidance for Deputy Ministers*, section 1: Responsibility)

[126] As for the second document, it confirms the responsibility of the minister for his exempt staff:

> Ministers are personally responsible for the conduct and operation of their office. They hire their own office staff, who are known as "political" or "exempt" staff.
>
> (*Governing Responsibly: A Guide for Ministers and Ministers of State*, section VI.1: Ministers' Offices and Exempt Staff; document cited at p. 39 of the Phase I Report)

[127] Certain clarifications should be made in respect of these two documents. The second document, the one addressed to ministers, has been replaced by more recent versions. In addition, both the first document addressed to deputy ministers and the second addressed to ministers were

published in 2003. The Applicant argues that he should not be held to principles and standards that came into force after his term as minister and that Commissioner Gomery therefore violated procedural fairness by holding him to those principles and standards.

[128] I reject that argument for two reasons. First of all, these documents are only two pieces of evidence among others that confirm the Applicant's responsibility for his department and his exempt staff. It is important to keep in mind that the *Morneault, supra,* standard of review requires only that there be some evidence in the record to support the Commissioner's findings. In light of the abundant testimony referred to above confirming the existence of a normal departmental chain of communication and the fact that the Applicant disrupted it by meeting directly (either personally or through his exempt staff, including his executive assistant) with Mr. Guité, I find that the Commissioner had sufficient evidence to allow him to conclude as he did. Thus, even accepting the argument that these two documents should not have been considered because they were published subsequent to the Applicant's term as minister, I am still of the opinion that the Commissioner had before him sufficient evidence, without those documents and solely on the basis of the testimony that was heard, to find that the Applicant was responsible and that his interventions in the Sponsorship Program were irregular.

[129] My second reason for rejecting the Applicant's argument based on the publication date of the documents is that the Commissioner states in an endnote on page 57 of his report that the principles contained in the document "apply to any era." I agree completely. In other words, these principles of ministerial management do not change, they are timeless, and they existed and applied

beyond the period during which the Applicant was minister. That the documents setting out the principles of ministerial and cabinet responsibility were not published until after his term as minister is no shield to the Applicant: these principles are at the core of our system of government—responsible government—which is based on the responsibility and accountability of ministers. That these principles were the subject of publications in 2003 does not diminish in any way the duty incumbent on the Applicant to comply with them, for they existed even during his reign as minister a few years earlier. Referring back to the heading above, therefore, the Commissioner did not violate procedural fairness by holding the Applicant responsible on the basis of government documents published in 2003.

[130] All of the evidence above proves the involvement of the Applicant and his staff, for whom he was responsible, in the Sponsorship Program. By "involvement in the Sponsorship Program," I mean selection of advertising agencies, selection of events to sponsor and monetary amounts to allocate to those events. In my opinion, Commissioner Gomery had before him sufficient evidence to support his findings. In light of the standard of review established by the Court of Appeal in *Morneault*, *supra,* I determine that no intervention on my part is warranted in the case at bar.

3) Commissioner's alleged failure to provide reasons for his findings

[131] The final heading under the sufficiency of evidence section is the Applicant's allegation to the effect that the Commissioner failed to explain why he was disregarding certain pieces of evidence in favour of others. The Applicant raises this argument both as an example of the

insufficiency of evidence in support of the Commissioner's findings and as a demonstration of the Commissioner's bias against him.

[132] The Commissioner argues that, on the contrary, the findings in his report are strongly supported by the evidence, that the decision to favour one piece of evidence over another simply goes to his weighing of the evidence, in respect of which I must show considerable deference, and that, in any case, a decision-maker's obligation to provide reasons for his conclusions can vary depending on the circumstances.

[133] In *Baker, supra,* the Supreme Court ruled that the duty of a decision-maker to provide reasons for its decision was subject to various factors; it is not absolute, in other words. L'Heureux-Dubé J., wrote as follows:

> In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected, as with those at issue in Orlowski, Cunningham, and Doody, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.
>
> In my view, however, the reasons requirement was fulfilled in this case since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of

> the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, supra, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways." I conclude that the notes of Officer Lorenz satisfy the requirement for reasons under the duty of procedural fairness in this case, and they will be taken to be the reasons for decision
>
> (*Baker*, at paras 43-44)

[134] As stated by the Supreme Court, the duty to provide written reasons for a decision to meet the ends of procedural fairness varies according to the circumstances. However, I did state above that, in my view, the Applicant was entitled to a high degree of procedural fairness before the Commission. Considering the hundreds of references contained in the Phase I Report, I am satisfied that the Commissioner's findings are sufficiently explained by written reasons. I am quite aware that the number of references is not in itself an irrefutable indication of the sufficiency of reasons for decision: one section of a decision may be abundantly supported by references, while another that is perhaps more critical for one of the parties may be less so. Be that as it may, in the case at bar, it must be observed that the number of references does in fact serve as a solid indication that Commissioner Gomery's report was based on meticulous attention to the evidence. Moreover, a close reading of the Phase I Report allows me to observe that the Commissioner explains his reasons for preferring certain pieces of evidence over others. Finally, those choices fall under the

Commissioner's discretion to weigh evidence, to which, again by virtue of the limitations imposed upon me by the standard established in *Morneault*, *supra*, I must show considerable deference.

[135] In closing, I would emphasize that my role in this application for judicial review was not to re-examine the evidence or substitute my conclusions for the Commissioner's:

> I am satisfied from my own examination of the Inquiry's record that it contains some evidence to support each of the findings which the Motions Judge found to be unsupported. I say this even if the evidence may not appear to be wholly consistent for, in the final analysis, it was for the Commission to weigh and assess the evidence of the various witnesses in coming to its findings of fact. It scarcely requires mention that such is not an easy task in the best of circumstances, and certainly not here where the sense of frustration with some of the testimony is made readily apparent in the Report. In my view, therefore, it is surely not the proper function of a reviewing Court to assume the role of the Commissioners by reweighing and reassessing the evidence that is here in dispute.
>
> (*Morneault*, *supra*, para. 47)

[136] While my role was not to reweigh the evidence, I did nevertheless have to review the evidence that was presented to the Commissioner in order to determine, still on the basis of the applicable standard, whether there was some evidence in the record to support the Commissioner's findings. In the light of that review, I am persuaded that the standard was met and that my intervention is not warranted in this case. The evidence supporting the findings made with respect to the Applicant is abundant, and I am of the opinion that the Commissioner did not commit any error in assigning responsibility to the Applicant in connection with the Sponsorship Program.

[137] Since procedural fairness was not violated, and since there is sufficient evidence in the record to support the Commissioner's findings, I dismiss the application for judicial review.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

(a) the application for judicial review be dismissed;

(b) the findings appearing in the Phase I Report which relate to the Applicant be upheld;

(c) the costs relating to this application and to the interlocutory motion filed by the Applicant pursuant to Rule 312, be awarded to the Attorney General.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2086-05
STYLE OF CAUSE:	The Honourable Alfonso Gagliano 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 and the House of Commons
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING :	May 8 and 9, 2008, May 26, 27 and 28, 2008, and June 19 and 20, 2008
REASONS FOR JUDGMENT BY:	The Honourable Max M. Teitelbaum
DATED:	September 5, 2008

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SOLICITORS OF RECORD

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