Federal Court of Appeal | Cour d'appel fédérale

Date: 20110629

Docket: A-9-08

Citation: 2011 FCA 217

CORAM: **BLAIS C.J.**
LÉTOURNEAU J.A.
MAINVILLE J.A.

BETWEEN:

THE HONOURABLE ALFONSO GAGLIANO

Appellant

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

Respondents

Heard at Montréal, Quebec, on June 16, 2011.

Judgment delivered at Ottawa, Ontario, on June 29, 2011.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: BLAIS C.J.

CONCURRING REASONS BY: MAINVILLE J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues

[1] This is an appeal of a decision by Deputy Justice Teitelbaum (judge) dated September 5, 2008 (*Gagliano v. Gomery, Attorney General of Canada and House of Commons*, 2008 FC 981).

[2] After deliberating, the judge dismissed with costs the application for judicial review filed by the appellant, the Honourable Alfonso Gagliano, and confirmed the conclusions regarding the appellant, which are set out in the Phase I Report produced by Commissioner John H. Gomery (Commissioner) as chair of the Commission of Inquiry into the Sponsorship Program and Advertising Activities of the Government of Canada (Commission).

[3] On appeal, the appellant is now representing himself. However, he is relying on the memorandum of fact and law filed in the Appeal Book by counsel representing him when the appeal proceedings began. I will therefore focus on the grounds for appeal presented in that memorandum. They read as follows:

> [TRANSLATION]
>
> A. Did the trial judge err in not applying the same legal rule to the appellant as was applied to the applicant in *Pelletier*?
>
> B. Did the trial judge err in not taking into account all of the grounds raised by the appellant for his reasonable apprehension of bias on the part of the Commissioner?
>
> C. Did the trial judge err in law in increasing the appellant's burden of proof?

D. Did the trial judge err in law in deciding that the Commissioner's inappropriate conduct did not give rise to a reasonable apprehension of bias?

E. Did the trial judge err in law in deciding that the Commissioner was correct to hold the appellant responsible under rules that did not yet exist when he was a minister?

[4] Ground E aside, all of the grounds are related to the appellant's contention that the Commissioner, by his conduct, including media interviews given during the inquiry, gave rise in the mind of the appellant and of a reasonable, well-informed person to a reasonable apprehension of bias against the appellant.

[5] The Attorney General of Canada, one of the two respondents on appeal, is joining the Commissioner in requesting that the appeal be dismissed. However, the Attorney General takes issue with the standard used by the judge to test for a reasonable apprehension of bias. Nonetheless, he submits that if the judge had applied the standard established by this Court in *Beno v. Canada*, [1997] 2 F.C. 527, at paragraph 27, he would have made the same finding because that standard, as it relates to apprehension of bias allegations, affords commissioners greater flexibility and protection in respect of their actions and statements. The Attorney General of Canada is therefore asking this Court to formulate the test applicable to the issue of a reasonable apprehension of bias.

[6] In his memorandum and at the hearing, counsel for the Commissioner analyzed the judge's decision and the appellant's grounds for appeal by referring to *Beno*, above, and the decision of this Court in *Morneault v. Canada (Attorney General)*, [2001] 1 F.C. 30.

[7] Without attacking head-on the standard used by the judge, counsel emphasized the purpose of a commission of inquiry, the role and function of a commissioner and the need, in order to check whether a reasonable apprehension of bias exists, to properly distinguish between inquisitorial and adversarial processes.

[8] Considering the importance of this issue, which is at the very heart of the dispute in this appeal, I will examine the standard that must apply to a commission of inquiry. But first, a brief summary of the facts and proceedings underlying this dispute is in order.

Facts and proceedings underlying the dispute

[9] A commission of inquiry was established in 2004 to investigate the Government of Canada's Sponsorship Program and advertising activities. Paragraphs 5 and 11 to 16 of the judge's reasons for decision suffice to describe the context in which the Commission was created to examine what would come to be known as the sponsorship scandal. I have reproduced them below.

> [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.

. . .

[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.

[10] The Commission's work yielded a report assigning responsibility for the program's mismanagement to a certain number of persons, including the Right Honourable Jean Chrétien; his Chief of Staff, the late Jean Pelletier; and the appellant, who was then the Minister of Public Works and Government Services Canada.

[11] While the Commissioner's inquiry was underway, Mr. Chrétien and Mr. Pelletier claimed to have an apprehension of bias on the part of the Commissioner after he made some surprising statements to the media. Proceedings were instituted in the Federal Court but, as agreed with the Attorney General of Canada, stayed to allow the Commission to continue its work. Once the

Commission released its report, these stayed proceedings were abandoned. However, Mr. Chrétien and Mr. Pelletier instituted new proceedings to challenge the conclusions in the report. The appellant did the same.

[12] In both decisions dated June 26, 2008 (*Chrétien v. Gomery and Attorney General of Canada*, 2008 FC 802; *Pelletier v. Attorney General of Canada and Gomery*, 2008 FC 803), the judge set aside the conclusions in the Commission's report, but, in the decision dated September 5, 2008, which is the subject of this appeal, upheld those regarding the appellant (2008 FC 981).

[13] The Attorney General of Canada appealed the decisions in *Chrétien* and *Pelletier*. This Court dismissed the appeal concerning Mr. Chrétien (*Attorney General of Canada v. Right Honourable Jean Chrétien*, 2010 FCA 283). The appeal proceedings concerning Mr. Pelletier were not concluded, owing to his death.

[14] Regarding the appellant, a first hearing of his appeal took place, but a new hearing had to be held as a result of an unfortunate confluence of events beyond his control. These reasons are based on that second hearing.

Conclusions in the report regarding the applicant's responsibility

[15] It is necessary to summarize the conclusions in the Commissioner's report to show how they are related to the grounds for appeal. First, the Commissioner concluded that the appellant had circumvented the chain of authority and ministerial responsibility by going around the Deputy Minister of his department to deal directly with a public servant under the Deputy Minister's authority.

[16] Second, also according to the Commission, the appellant gave no consideration to the need to adopt guidelines when it came to awarding sponsorships. He let the public servant and his successor operate without oversight by systematically bypassing the Deputy Minister, who should have been in charge of implementing the Sponsorship Program.

[17] Third, the Commissioner stated that in his opinion, the appellant had became directly involved in decisions to provide funding for events and projects that were directed more towards partisan purposes rather than considerations of national unity in keeping with the program's supposed purpose.

[18] Last, the Commissioner held the appellant responsible for the actions and decisions of his political staff members who succeeded one another as Chief of Staff.

[19] The way is now paved to analyze the judge's decision and the parties' submissions. I will begin by examining the standard applicable to a reasonable apprehension of bias on the part of the Commissioner.

Analysis of the judge's decision and the parties' submissions

(a) Standard applicable to a reasonable apprehension of bias on the part of the Commissioner

[20] There is a world of difference in terms of significant impacts between a commission of inquiry and an adjudicative tribunal. A public inquiry is neither a civil trial nor a criminal trial. This Court stated the following in *Beno v. Canada*, above, at paragraphs 23 and 24 of that decision:

> [23] It is clear from his reasons for judgment that the Judge of first instance assimilated commissioners to judges. Both, in his view, exercise "trial like functions." That is clearly wrong. A public inquiry is not equivalent to a civil or criminal trial (see *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 2 F.C. 36 (C.A.), at paragraphs 36, 73 [hereinafter *Krever*]; *Greyeyes v. British Columbia* (1993), 78 B.C.L.R. (2d) 80 (S.C.), at page 88; *Di Iorio et al. v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152, at page 201; *Bortolotti v. Ontario (Ministry of Housing)* (1977), 15 O.R. (2d) 617 (C.A.), at pages 623-624; *Shulman, Re*, [1967] 2 O.R. 375 (C.A.), at page 378)). In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate (*Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, at page 138). The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only "inquire" and "report" (see *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, at page 231; *Greyeyes*, *supra*, at page 88). Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding

> by the Somalia Inquiry is that reputations could be tarnished (see *Westray*, *supra*, at page 163, *per* Cory J.; *Krever*, *supra* at paragraph 29; *Greyeyes*, *supra*, at page 87).
>
> [24] It does not follow, however, that the impartiality of commissioners should always be judged by applying the "closed mind" test rather than the "apprehension of bias" test. Rather, whatever the applicable test, in assessing the behaviour of commissioners, the special nature of their functions should be taken into account: *Newfoundland Telephone*, *supra*, at pages 636, 638; *Irvine*, *supra*, at pages 230-231; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, at page 327.
>
> [Emphasis added]

These words received Justice Cory's approval in *Canada (P.G.) v. Canada (Krever Comm.)*, [1997] 3 S.C.R. 440, at paragraph 34.

[21] By definition, commissions of inquiry investigate rather than adjudicate. It must not be forgotten that the commissioners chairing such commissions do not have evidence establishing the facts, causes and circumstances of the events being investigated. It is the very role of commissioners to seek out that evidence and then analyze it.

[22] Good investigators, just like fine bloodhounds, are driven by suspicions which they seek to confirm so that the file can be closed, or to dispel so that the search can pursue other tracks. In so doing, investigators can and often will create an appearance of bias. Commissioners, therefore, through their questions and interventions and those of their counsel who closely examine witnesses, may one day give the impression of being prejudiced against a person who or group that is receiving particular attention from the commission at that time. However, the next

day, when the commission has focused its attention on someone else, it is that person who will then be inclined to believe that the commissioner is prejudiced against him or her. Nevertheless, that is the nature of investigations.

[23] Suspicions, information, speculations, beliefs, doubts, reasonable grounds to believe, extrapolations and confirmations, to name but a few of the stages investigators go through, are part of their everyday experience. That is why the nature and complexity of inquiries and the properties of their attendant powers mean that a Commissioner's inquisitorial process cannot be held to the same standard of bias as is applied to the adversarial process in which, contrary to commissioners whose primary and essential function is to seek out, find and gather evidence, courts only weigh the evidence the parties already have in hand and have submitted to the court to be assessed.

[24] Basically, as this Court stated in *Beno,* at paragraph 27, after having concluded that the Commission of Inquiry on Somalia under review had to be situated between the legislative and adjudicative extremes of the *Newfoundland Telephone* spectrum,

> [27] . . . [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. . . .
>
> [Emphasis added]

[25] In my view, this approach is particularly appropriate when the dispute concerns, as in this case, the conclusions of the commissioner's report, which sets out the evidence gathered and the assessment of that evidence. We cannot and may not disregard the evidence obtained to return to the period before the report came out, while the inquiry was underway, to look for signs of a reasonable apprehension of bias, because the test for a reasonable apprehension of bias at this stage is to check whether the basis for the challenged conclusions is other than evidentiary. In other words, the question is whether they are predicated on the evidence or a prejudice. Going back to the period before the report, while the inquiry was being conducted, to look for signs of an apprehension of bias is, to my mind, a futile exercise if the conclusions in the report "are supported by some evidence in the record of the inquiry": see *Morneault v. Canada*, [2001] 1 F.C. 30, at paragraph 46 (FCA).

[26] The case in *Morneault* is similar to the one before us. Lieutenant-Colonel Morneault was challenging the conclusions of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, which found him responsible for the shortcomings noted in the organization, direction and supervision of troop training in preparation for their deployment to Somalia.

[27] The Federal Court had ruled in Lieutenant-Colonel Morneault's favour, and the Attorney General of Canada filed an appeal of that decision, in which this Court had to rule on the level of evidence necessary for the conclusions of a commission of inquiry to be valid. At paragraph 46, Justice Stone, for a unanimous court, wrote the following:

The Inquiry's evidentiary record

[46] I turn then to the appellant's argument that the findings in issue are supported by the record. The Motions Judge examined the findings on a standard of patent unreasonableness, although they are findings of a commission of inquiry. Where that standard applies, the Supreme Court has held that "if there is any evidence capable of supporting the decision even though the reviewing court may not have reached the same decision" the decision is not patently unreasonable: *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at pages 340-341. 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*, *supra*, at page 814, Lord Diplock remarked on differences between an investigative inquiry and ordinary civil litigation and went on, at page 820, to lay down the two rules of natural justice in the passage quoted above. He then added, at page 821:

> The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based on some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.

[Emphasis added]

[28] In my opinion, the following conclusions may be drawn from the case law of this Court. When, in the course of an inquiry, an allegation of bias is made against a commissioner, the commissioner must not be disqualified for bias unless there is a reasonable apprehension that the commissioner's decisions are made on a basis other than the evidence. This test must be applied flexibly. Although the commissioner's recusal is not impossible to obtain at that stage, it is difficult, given the nature of the commissioner's function and necessarily inquisitorial role.

[29] When the conclusions of a commission of inquiry's report are in dispute, and a reasonable apprehension of bias on the part of the Commissioner is alleged, the evidence supporting the report's conclusions cannot be ignored. And, for the conclusions to be upheld, it suffices for them to be supported by some evidence in the record of the inquiry. Those are the principles that I intend to follow in examining the appellant's grounds for appeal.

[30] I should note that in *Chrétien*, above, the Attorney General of Canada agreed with the argument that the judge had used the correct test to assess the reasonable apprehension of bias on the part of the Commissioner. However, the Attorney General submitted that the judge had improperly applied it to the facts of the case. The test used in *Chrétien* is the same test the judge applied in this case.

[31] Although the judge referred to this Court's decision in *Beno*, above, he instead used the test set out by Justice de Grandpré in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. At page 394, Justice de Granpré formulated the applicable test as follows:

> [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. In the words of the Court of Appeal, that 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, whether consciously or unconsciously, would not decide fairly."

[32] Mr. Crowe was the chairman of the Board, which had a quasi-judicial function. In that case, the Board had to decide between competing applications for certificates of public convenience and necessity in connection with a project to install a natural gas pipeline. It is very clear that the Board did not have an inquisitorial role. I agree with the Attorney General of Canada that the judge misdirected himself in applying this test to the Commissioner. He neglected to take into account the inquisitorial function served by the Commission as required in accordance with the decisions of this Court in *Beno* and *Morneault*.

[33] The admission by the Attorney General of Canada in *Chrétien* was of no significance. The panel hearing the appeal accepted it and simply considered the application of the test used by the judge, as the Attorney General of Canada asked it to do.

[34] The admission concerned a question of law, and is not binding on this Court. That is why we have agreed to reconsider the issue in order, as the Attorney General of Canada has requested, to provide clarification and guidance to future commissions of inquiry.

(b) Did the judge err in not applying the same legal rule to the appellant as was applied to the applicant in *Pelletier*?

[35] It is clear from reading paragraphs 65 to 74 of the judge's decision in *Pelletier*, above, that, as previously mentioned, the judge applied the same analysis test for an apprehension of bias as was applied to the appellant. I understand what the appellant means, which is that the judge should have made the same finding in his regard as was made regarding Mr. Pelletier.

[36] As a general rule, identical situations call for identical conclusions. However, the situations must indeed be identical. In this case, the problem is twofold.

[37] First, while it is true that the judge ruled in Mr. Pelletier's favour, the Attorney General of Canada appealed the decision. Mr. Pelletier's death put an end to proceedings, and it would be fundamentally unfair, both to Mr. Pelletier and to the appellant, to speculate as to what the decision of this Court could have been if the correct test for an apprehension of bias had been used.

[38] Second, I am not satisfied that both situations are identical. Mr. Pelletier and the appellant held different positions and had different roles. The appellant was involved to a greater extent in directly implementing the Sponsorship Program. In fact, he was the Minister in charge of that implementation. In my opinion, the finding in one case cannot be transposed into another. It must be determined whether, in the appellant's case, the conclusions reached in his respect result from the evidence in the record of the inquiry or from a prejudice the Commissioner had against him.

(c) Are the Commissioner's conclusions supported by the evidence in the record of the inquiry or do they result from a prejudice against the appellant?

[39] If, in the media attention given to his role and person, the Commissioner overstepped the bounds of propriety, this does not mean that his report is without merit or that his conclusions are

based on a prejudice against the appellant. There is not necessarily a relationship of cause and effect.

[40] The appellant is criticizing the Commissioner for having believed certain aspects of Mr. Guité's testimony despite having been of the opinion that Mr. Guité was not a credible witness. There is no discordance in that. A witness may be generally not credible in a substantial portion of his or her testimony, but still be credible in certain elements of it.

[41] It was up to the Commissioner to decide on the witnesses' credibility and assess the probative value of their testimonies. The judge could not substitute his assessment of the evidence for the Commissioner's. Aware that he did not have that power, the judge reviewed, and rightly so, the Commissioner's findings of fact in relation to the supporting evidence on which he relied. The details of the judge's analysis are set out at paragraphs 109 to 137 of the reasons for his decision.

[42] In analyzing the Commissioner's findings of fact, the judge applied the test set out in *Morneault*. At the end of this analysis, he stated being satisfied that the Commissioner's conclusions were supported by some evidence. Neither in his analysis nor in the analysis results do I see an error warranting this Court's intervention.

(d) Did the judge err in not taking into account all of the grounds raised by the appellant for his reasonable apprehension of bias on the part of the Commissioner?

and

(e) Did the judge err in law in deciding that the Commissioner's inappropriate conduct did not give rise to a reasonable apprehension of bias?

[43] Considering my conclusion in section (c), above, and the standard for a reasonable apprehension of bias by a commissioner applicable to the findings of fact in the commissioner's report, this Court would be wrong and unjustified to intervene on the basis of these two grounds for appeal.

(f) Did the judge err in law in increasing the appellant's burden of proof?

[44] Here I reproduce paragraph 66 of the judge's reasons for his decision:

> [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.
>
> [Emphasis added]

[45] The appellant takes issue with the judge's statement that "threshold for finding a reasonable apprehension of bias is high". The appellant interprets that statement as increasing the burden of proof he acknowledges rests upon him.

[46] For the reasons I set out earlier to do with the function's inquisitorial nature and the tests in *Beno* and *Morneault*, the judge was correct to state that the threshold is high, both at the stage of the ongoing inquiry and at the stage of analyzing the findings of fact in the report.

(g) Did the judge err in law in deciding that the Commissioner was correct to hold the appellant responsible under rules that did not yet exist when he was a minister?

[47] The judge gave two reasons for dismissing the appellant's contention that his responsibility for the sponsorship program's management had been assessed on the basis of publications that had not come out until 2003, that is, after the end of his time as Minister.

[48] I agree with the Commissioner and the judge that the principles of ministerial responsibility and accountability within the government apparatus did not come into existence in 2003 along with the publications describing them. They existed long before the appellant entered Cabinet and did not cease to exist when he left it.

[49] Moreover, the judge referred to the testimonies the Commissioner received from senior public servants, which reported that, within each department, there is a chain of communication between the Minister and the public servants of that department: see paragraphs 122 to 126 of the reasons for his decision. This chain of communication within a structured hierarchy like the government heralds, underpins and reinforces ministerial responsibility and accountability. I cannot find that there is any merit to this ground for appeal.

Conclusion

[50] For these reasons, I would dismiss the appeal with costs, but I would limit the hearing costs to one set.

"Gilles Létourneau"
J.A.

"I agree.
Pierre Blais C.J."

Certified true translation
Sarah Burns

MAINVILLE J.A. (Concurring)

[51] In his reasons, Justice Létourneau sets out clearly the issues raised by the appellant and the facts underlying this appeal, and I agree with his conclusions. However, I do not think it necessary, in this appeal, to rule on the standard applicable to a reasonable apprehension of bias, since by applying either the standard established in *Beno v. Canada*, [1997] 2 F.C. 527 and *Morneault v. Canada (Attorney General)*, [2001] 1 F.C. 30, as did Justice Létourneau, or the standard established in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 (*Committee for Justice*) and *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (*Newfoundland Telephone*), as did the trial judge, the conclusions of this appeal would be the same.

[52] Therefore, by applying to this appeal the principles established in *Committee for Justice* and in *Newfoundland Telephone*, and taking into account the factual background of the case recited at length by the trial judge in his reasons, it is not possible that a well-informed person considering the issue in a thorough, realistic and practical manner would believe, in all likelihood, that the Commission showed bias against the appellant.

[53] I further note that the Attorney General of Canada conceded in the appeal concerning Mr. Chrétien that the trial judge had correctly defined the applicable standard, and that this Court

agreed with that conceded point in *Canada (Attorney General) v. Chrétien*, 2010 FCA 283 (*Chrétien*). That standard is the same as the trial judge identified in this case.

[54] What distinguishes this case from *Chrétien* is that considerable evidence supported the trial judge's findings of a reasonable apprehension of bias on the part of the Commissioner against Mr. Chrétien, including disparaging public statements by the Commissioner and his spokesperson which were aimed directly at Mr. Chrétien.

[55] In this appeal, however, it is common ground that none of the public statements by the Commissioner or his spokesperson were aimed directly at Mr. Gagliano. As the trial judge noted, this is an important and determinative distinction that mitigates the reasonable apprehension of bias on the part of the Commissioner against Mr. Gagliano.

[56] As for the numerous surprising public statements made by the Commissioner and his spokesperson, which resulted in attracting media attention to his role and person, it should be recalled, as this Court did at paragraph 11 of its decision in *Chrétien*, that the media are not a forum for commissions of inquiry to comment on testimonies. A commission of inquiry must at all times act with dignity, be impartial and independent and demonstrate vigilance to avoid violating the rights of the individuals being investigated: *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System*), [1997] 3 S.C.R. 440, at paragraphs 31 and 55.

[57] Mr. Gagliano submits that the many public statements by the Commissioner and his spokesperson cast doubt on the impartiality of the process and leave the Commissioner's conclusions about him open to challenge. Like Justice Létourneau, I agree that although the Commissioner may have overstepped the bounds of propriety in drawing media attention to his role and person, this does not necessarily mean that he showed bias against Mr. Gagliano. As I stated above, unlike in Mr. Chrétien's case, it is common ground that none of the public statements for which the Commissioner and his spokesperson are criticized were aimed directly at Mr. Gagliano.

[58] Mr. Gagliano's other grounds for appeal are analyzed at paragraphs 35 to 42 and 44 to 49 of Justice Létourneau's reasons, and I concur with Justice Létourneau's conclusions regarding those other grounds.

[59] For these reasons, I would dispose of the appeal as Justice Létourneau proposes.

"Robert M. Mainville"

J.A.

Certified true translation
Sarah Burns

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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REASONS DATED:	June 29, 2011

APPEARANCES:

Alfonso Gagliano	SELF-REPRESENTED
Raynold Langlois, Q.C., CIRC Marie-Geneviève Masson	FOR THE RESPONDENT HON. JOHN H. GOMERY
Jacques Savary	FOR THE RESPONDENT A.G. OF CANADA

SOLICITORS OF RECORD:

Langlois Kronström Desjardins, L.L.P. Montréal, Quebec	FOR THE RESPONDENT HON. JOHN H. GOMERY
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT A.G. OF CANADA