Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

REPLY OF THE MOVING PARTY, AIR PASSENGER RIGHTS

Motion pursuant to Rules 41 and 318 of the *Federal Courts Rules*

VOLUME 1 of 2

SIMON LIN
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, British Columbia, V5C 6C6
Tel: 604-620-2666

simonlin@evolinklaw.com

Counsel for the Applicant,
Air Passenger Rights

TO: **CANADIAN TRANSPORTATION AGENCY**

AND TO: **SCOTT STREINER**
15 Eddy Street
Gatineau, QC K1A 0N9
Email: *Scott.Streiner@otc-cta.gc.ca*

Table of Contents of Volume 1

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

REPLY OF THE MOVING PARTY / APPLICANT

1. The two narrow issues on this motion are whether the requested Materials are relevant and necessary for adjudicating the Reasonable Apprehension of Bias Ground [**RAB Ground**], and the procedure for obtaining the evidence to adjudicate that ground. The Agency has sidestepped these real issues by advancing technicalities that do not speak to relevance, and merits arguments that are not at issue on this procedural motion.

2. The Agency attempts to undermine Webb, J.A.'s ruling that there is a *serious issue to be tried* on the RAB Ground and is to be heard by a panel on its merits. The Agency seeks to deprive the panel from accessing the relevant evidence, except select documents that the Agency voluntarily places in the public eye.

3. The Agency filed *no evidence* on this motion. The Court should exercise special caution in considering any factual assertions within the Agency's submissions. This Court previously reminded the Agency that facts must be introduced by a witness.[1]

4. The Applicant will not reply to every technical argument advanced by the Agency, but will focus on three points: the RAB Ground cannot be fairly adjudicated based solely on the Publications; the Agency's procedural objections are meritless; and, as its alternative response, the Agency advances a contradictory proposition and misdirects the Court to issue a subpoena to an individual who has no access to the Materials.

[1] *Lukács v. CTA*, 2014 FCA 239 at para. 9 [Tab 15, p. 214].

A. Fair and Open Adjudication of the Reasonable Apprehension of Bias Ground

5. The Agency urges this Court to constrain the evidentiary record for the RAB Ground solely to the public statements that the Agency has selectively publicized, namely, the Publications. The Agency's position is unfounded both in law and in fact.

6. The Agency claims that the Publications speak for themselves because the Publications "[...] declares itself to be non-binding [...]."[2] This claim is misleading. The "non-binding" wording and other commentary purporting to backtrack from the March 25, 2020 position were added to the Publications only long *after* this judicial review was commenced.[3] The Agency's after-the-fact inclusion of self-serving accounts is akin to bootstrapping[4] and cannot retroactively cure or undo apprehensions of bias.[5] The Agency cannot retroactively "retract" the perception its earlier conduct created, regardless what the Agency says or does after the Publications were disseminated.

7. The Agency conflates actual bias with reasonable apprehension of bias.[6] The Applicant need not show that the Agency's members will *actually* be biased in future cases. Rather, the Applicant is to demonstrate to the panel that informed observers with knowledge of the Agency's appointed members' public *and* private conduct would objectively *perceive* that those members could not act fairly. The key point is perception.

8. The Publications themselves are only a small part of the evidence for the panel to consider. For the RAB Ground, the most critical evidence is the Agency's members' behind-the-scenes conduct relating to those Publications because "[p]rivate statements are often more indicative of a person's true state of mind, than public statements."[7]

---

2 Agency's Written Representations, paragraph 58.
3 Lukács Affidavit (Jan. 3, 2021), paras. 50-55 [Motion Record (**MR**), pp. 22-24].
4 *Stemijon Investments Ltd. v. Canada (A.G.)*, 2011 FCA 299 at para. 41 [Tab 19, p. 315].
5 *Gardaworld Cash Services Canada Corporation v. Smith*, 2020 FC 1108 at para. 81 [Tab 10, p. 154], citing *Newfoundland Telephone* at p. 645.
6 Agency's Written Representations, paragraphs 69-70.
7 *Canadian Arab Federation v. Canada (CIC)*, 2013 FC 1283 at paras. 78-81 [Tab 5,

9. The Agency has overlooked the longstanding principle that when an applicant demonstrates a factual basis supporting the reasonable apprehension of bias ground of judicial review, production of a broader category of documents is generally permitted.[8]

10. In this case, the RAB Ground has already withstood challenges on two separate motions.[9] On this motion, the Applicant has provided a strong factual basis to support the RAB Ground. The Agency has not put forward *any* evidence to rebut the Applicant's uncontested evidence. Therefore, there is no evidentiary basis for the Agency:

(a) to doubt the representations of a senior Transport Canada civil servant;[10]

(b) to argue that the Publications are not attributable to its appointed members;[11] or

(c) to claim that the Publications were not the product of external influences.[12]

This Court may draw an adverse inference from the Agency's failure to tender any affidavit to contest the relevance of the Materials, or to support the Agency's arguments.[13]

11. The Agency cites no authority for its claim that the behind-the-scenes discussions with airlines and Transport Canada while drafting the Publications could not give rise to a reasonable apprehension of bias. "Outside" involvement is part and parcel of the Court's assessment of whether there is a reasonable apprehension of bias.[14]

---

p. 56]; aff'd: 2015 FCA 168.

8 *Humane Society of Canada Foundation v. Canada (MNR)*, 2018 FCA 66 at para. 6 [Tab 12, p. 187]; *Kiss v. Canada (MCI)*, File No. IMM-2967-19, Order of Fothergill J. (Jan. 15, 2021) [Tab 14, p. 203]; *Right to Life Association of Toronto and Area v. Canada*, 2019 CanLII 9189 at paras. 21-22 [Tab 18, p. 286]; *Gray v. Canada (A.G.)*, 2019 FC 301 at para. 117 [Tab 11, p. 177]; *Abdi v. Canada (PSEP)*, 2018 FC 733 at paras. 35-36 [Tab 4, p. 22]; *Nguesso v. Canada (CIC)*, 2015 FC 102 at paras. 90-93 [Tab 17, p. 261]; and *Gagliano v. Canada*, 2006 FC 720 at para. 50 [Tab 9, p. 125].

9 The Misinformation Ground is not at issue on this motion. It will be for the panel, not a motions judge, to rule on its merits based on the evidence that will be filed.

10 Agency's Written Representations, paragraph 76.

11 Agency's Written Representations, paragraph 60.

12 Agency's Written Representations, paragraph 68.

13 *E.A. Manning Ltd. v. Ontario (Securities Commission)*, 1994 CarswellOnt 1015 at para. 53 [Vol. 2, Tab 7, p. 88]; aff'd: 1995 CarswellOnt 1057 [Vol. 2, Tab 8, p. 91].

14 *John Witness v. RCMP Commissioner*, [1998] 2 F.C. 252 at para. 25 [Tab 13, p. 198].

12. The Agency mischaracterizes this case as involving merely casual email exchanges between Agency staff and external parties.[15] The uncontradicted evidence is that oral discussions occurred between the Agency's Chief Strategy Officer and Air Transat. Thereafter, an email confirmed Air Transat's request for the Agency's involvement in answering passenger-refunds, in order to protect employment levels.[16] Within days, the Agency issued the Publications to protect the airlines "economic viability," adopting a position favourable to airlines, and squarely answering Air Transat's call for assistance. This series of events raises serious doubts whether the Agency's appointed members that approved, supported, or otherwise endorsed those Publications would be *perceived* as acting fairly. The Agency cannot hide behind its self-declaration of being independent. The *extent* of those "outside" influences must be assessed by the panel.[17]

13. The Agency's assertion that the *Code of Conduct* does not apply because the Publications are unattributed and non-binding is a red-herring.[18] The *Code of Conduct* prohibits members from commenting on "potential cases" in any manner.[19] The Agency failed to explain why passengers' refund complaints are not "potential cases."

14. The Agency's arguments against adjudication of the RAB Ground in advance of the Agency deciding passengers' refund complaints[20] is an attempt to relitigate the same motion to strike that was dismissed by Webb, J.A., and which was not appealed. Webb, J.A. ruled that the RAB Ground merits a hearing before a panel. It is plain and obvious that, at the minimum, the panel will need to know which appointed members approved, supported, or otherwise endorsed the Publications.[21] The Agency must not frustrate the judicial review function by withholding necessary evidence from the panel.

---

15 Agency's Written Representations, paragraph 78.
16 Lukács Affidavit, Exhibit "V" [MR, Tab 2V, p. 148].
17 *John Witness v. RCMP Commissioner*, [1998] 2 F.C. 252 at para. 25 [Tab 13, p. 198].
18 Agency's Written Representations, paragraphs 65-66.
19 *Code of Conduct*, paras. 39-40 – Lukács Affidavit, Exhibit "I" [MR, Tab 2I, p. 71].
20 Agency's Written Representations, paragraphs 62-64.
21 *Zündel v. Citron*, 2000 CanLII 17137 (FCA) at paras. 47-48. [Tab 20, p. 332].

B. The Agency's Procedural Objections are Without Merit

15. The Agency raised scattershot procedural objections against transmittal of the Materials.[22] Even if the Agency were correct that Rule 317 requires an "order" being subject to judicial review, the Agency failed to address the availability of a subpoena for the production of the same Materials under Rule 41.

16. The Agency's allegation that the Applicant's refined and narrowed-down request for Materials lacks specificity[23] is belied by the fact that the Agency's access to information personnel had no difficulty processing a similar request.[24] The Materials are specifically tied only to the Publications, and do not cross the line into seeking wholesale discovery. In a modern setting involving questions of broad scope, it is not unusual for a tribunal to be providing a voluminous record. It would be counsel's role to include only the pertinent materials in the applicant's or respondent's record.[25]

17. The Agency relied on *Patterson* and Ring P.'s recent decision in *Preventous* to argue that Rule 317 requires an "order" under review.[26] *Preventous* is *obiter* since it deals with whether Rule 317 applies to cases brought under the *Access to Information Act*, and not s. 18.1 of the *Federal Courts Act*. Ring P's decision is also *per incuriam* as it failed to cite the same Federal Court decisions that have overtaken *Patterson*.[27]

18. The Agency claims that the RAB Ground does not "affect rights, impose legal obligations, or cause prejudicial effects."[28] That cannot be correct. The right to a fair hearing before an impartial arbiter is enshrined in the *Canadian Bill of Rights*.[29]

---

[22] Agency's Written Representations, paragraphs 23, 27-30, 33, and 40-57.
[23] Agency's Written Representations, paragraphs 40-42.
[24] Lukács Affidavit, paras. 60-61, 64, and 66 [MR, Tab 2, pp. 25-26].
[25] *Deh Cho First Nations v. Canada (M.E.)*, 2005 FC 374 at paras. 16-17 [Tab 6, p. 69].
[26] Agency's Written Representations, para. 23.
[27] Moving Party's Written Representations, paras. 89-92 [MR, Tab 5, pp. 413-414].
[28] Agency's Written Representations, paragraphs 27-30.
[29] *Canadian Bill of Rights*, s. 2(e) [Tab 3, p. 14]; see also *MacBain v. Lederman*, [1985] F.C.J. No. 907, at paras. 24-29 [Tab 16, p. 232].

19. The Agency also baldly speculates, without adducing any evidence, that the Materials may be privileged, and requests a second round of objections and debates to the request for Materials.[30] The Agency should not be allowed to re-litigate the same issue multiple times, and delay the hearing of the application on its merits.

C. The Subpoena Should be Directed to the Agency's CEO

20. The Agency seeks to misdirect the Court to issue a subpoena to the Agency's Secretary, rather than the Agency's CEO.[31] That position is disingenuous in that it proposes a futile remedy that would result in a "no records found" outcome.

21. There is no evidence that the Secretary could access the Materials. On balance of probabilities, the Secretary does not have such access. The Agency's Secretary's statutory role is limited to keeping records of *formal* rulings and *binding* enactments.[32] The Agency's own admission that the Publications are not "orders" contradicts the Agency's proposition that the Secretary may have the Materials in her possession.

Postscript

22. The Agency appears to be using this motion for a collateral purpose of boot-strapping its decision currently under appeal in another case before this Court.[33] The Agency self-proclaims that its regulatory function includes "issuing exemptions [...] from the application of certain provisions of the *Canada Transportation Act*,"[34] but the cited authority contains no such language. Indeed, whether "issuing exemptions" is a regulatory or quasi-judicial function is an issue likely to be before a panel of this Court in the aforementioned appeal. It is submitted that the Court should decline to opine on this issue on the present motion, because the issue is not properly before the Court.

---

30 Agency's Written Submissions, paragraph 42.
31 Agency's Written Submissions, paragraph 82.
32 *Canada Transportation Act*, s. 21 [Tab 2, p. 12].
33 *Lukács v. Swoop*, File No. A-257-20.
34 Agency's Written Representations, paragraph 8.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 22, 2021

"Simon Lin"

SIMON LIN
Counsel for the Applicant,
Air Passenger Rights

LIST OF AUTHORITIES

Statutes and Regulations

Canada Transportation Act, S.C. 1996, c. 10,
s. 21

Canadian Bill of Rights, S.C. 1960, c. 44
s. 2(e)

Case Law

Abdi v. Canada (Public Safety and Emergency Preparedness), 2018 FC 733

Canadian Arab Federation v. Canada (Minister of Citizenship and Immigration), 2013 FC 1283

Deh Cho First Nations v. Canada (Minister of Environment), 2005 FC 374

E.A. Manning Ltd. v. Ontario (Securities Commission), 1994 CarswellOnt 1015

E.A. Manning Ltd. v. Ontario (Securities Commission), 1995 CarswellOnt 1057

Gagliano v. Gomery, 2006 FC 720

Gardaworld Cash Services Canada Corporation v. Smith, 2020 FC 1108

Gray v. Canada (Attorney General), 2019 FC 301

Humane Society of Canada Foundation v. Canada (National Revenue), 2018 FCA 66

John Witness v. Royal Canadian Mounted Police Commissioner, [1998] 2 F.C. 252

Kiss v. Canada (Minister of Citizenship and Immigration), File No. IMM-2967-19, Order of Fothergill, J. (January 15, 2021)

Lukács v. Canada Transportation Agency, 2014 FCA 239

MacBain v. Canada (Canadian Human Rights Commission), [1985] F.C.J. No. 907

Nguesso v. Canada (Minister of Citizenship and Immigration), 2015 FC 102

Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour), 2019 CanLII 9189 (FC)

Stemijon Investments Ltd. v. Canada (Attorney General), 2011 FCA 299

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

REPLY OF THE MOVING PARTY, AIR PASSENGER RIGHTS

Motion pursuant to Rules 41 and 318 of the *Federal Courts Rules*

VOLUME 2 of 2

SIMON LIN
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, British Columbia, V5C 6C6
Tel: 604-620-2666

simonlin@evolinklaw.com

Counsel for the Applicant,
Air Passenger Rights

TO: **CANADIAN TRANSPORTATION AGENCY**

AND TO: **SCOTT STREINER**
15 Eddy Street
Gatineau, QC K1A 0N9
Email: *Scott.Streiner@otc-cta.gc.ca*

Table of Contents of Volume 2

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to March 5, 2020

Last amended on July 11, 2019

À jour au 5 mars 2020

Dernière modification le 11 juillet 2019

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Head Office

Head office

18 (1) The head office of the Agency shall be in the National Capital Region described in the schedule to the *National Capital Act*.

Residence of members

(2) The members appointed under subsection 7(2) shall reside in the National Capital Region described in the schedule to the *National Capital Act* or within any distance of it that the Governor in Council determines.

1996, c. 10, s. 18; 2007, c. 19, s. 5; 2008, c. 21, s. 61.

Staff

Secretary, officers and employees

19 The Secretary of the Agency and the other officers and employees that are necessary for the proper conduct of the business of the Agency shall be appointed in accordance with the *Public Service Employment Act*.

Technical experts

20 The Agency may appoint and, subject to any applicable Treasury Board directive, fix the remuneration of experts or persons who have technical or special knowledge to assist the Agency in an advisory capacity in respect of any matter before the Agency.

Records

Duties of Secretary

21 (1) The Secretary of the Agency shall

(a) maintain a record in which shall be entered a true copy of every rule, order, decision and regulation of the Agency and any other documents that the Agency requires to be entered in it; and

(b) keep at the Agency's office a copy of all rules, orders, decisions and regulations of the Agency and the records of proceedings of the Agency.

Entries in record

(2) The entry of a document in the record referred to in paragraph (1)(a) shall constitute the original record of the document.

Copies of documents obtainable

22 On the application of any person, and on payment of a fee fixed by the Agency, the Secretary of the Agency or, in the absence of the Secretary, the person assigned by

Siège de l'Office

Siège

18 (1) Le siège de l'Office est fixé dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale*.

Lieu de résidence des membres

(2) Les membres nommés au titre du paragraphe 7(2) résident dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale* ou dans la périphérie de cette région définie par le gouverneur en conseil.

1996, ch. 10, art. 18; 2007, ch. 19, art. 5; 2008, ch. 21, art. 61.

Personnel

Secrétaire et personnel

19 Le secrétaire de l'Office et le personnel nécessaire à l'exécution des travaux de celui-ci sont nommés conformément à la *Loi sur l'emploi dans la fonction publique*.

Experts

20 L'Office peut nommer des experts ou autres spécialistes compétents pour le conseiller sur des questions dont il est saisi, et, sous réserve des instructions du Conseil du Trésor, fixer leur rémunération.

Registre

Attributions du secrétaire

21 (1) Le secrétaire est chargé :

a) de la tenue du registre du texte authentique des règles, arrêtés, règlements et décisions de l'Office et des autres documents dont celui-ci exige l'enregistrement;

b) de la conservation, dans les bureaux de l'Office, d'un exemplaire des règles, arrêtés, règlements, décisions et procès-verbaux de celui-ci.

Original

(2) Le document enregistré en application de l'alinéa (1)a) en constitue l'original.

Copies conformes

22 Le secrétaire de l'Office, ou la personne chargée par le président d'assurer son intérim, délivre sous le sceau de l'Office, sur demande et contre paiement des droits

CANADA

CONSOLIDATION

CODIFICATION

Canadian Bill of Rights

Déclaration canadienne des droits

S.C. 1960, c. 44

S.C. 1960, ch. 44

Current to January 10, 2021

À jour au 10 janvier 2021

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) freedom of religion;

(d) freedom of speech;

(e) freedom of assembly and association; and

(f) freedom of the press.

Construction of law

2 Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(a) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorize the imposition of cruel and unusual treatment or punishment;

(c) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an

a) le droit de l'individu à la vie, à la liberté, à la sécurité de la personne ainsi qu'à la jouissance de ses biens, et le droit de ne s'en voir privé que par l'application régulière de la loi;

b) le droit de l'individu à l'égalité devant la loi et à la protection de la loi;

c) la liberté de religion;

d) la liberté de parole;

e) la liberté de réunion et d'association;

f) la liberté de la presse.

Interprétation de la législation

2 Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme

a) autorisant ou prononçant la détention, l'emprisonnement ou l'exil arbitraires de qui que ce soit;

b) infligeant des peines ou traitements cruels et inusités, ou comme en autorisant l'imposition;

c) privant une personne arrêtée ou détenue

(i) du droit d'être promptement informée des motifs de son arrestation ou de sa détention,

(ii) du droit de retenir et constituer un avocat sans délai, ou

(iii) du recours par voie d'*habeas corpus* pour qu'il soit jugé de la validité de sa détention et que sa libération soit ordonnée si la détention n'est pas légale;

d) autorisant une cour, un tribunal, une commission, un office, un conseil ou une autre autorité à contraindre une personne à témoigner si on lui refuse le secours d'un avocat, la protection contre son propre témoignage ou l'exercice de toute garantie d'ordre constitutionnel;

e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations;

independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

f) privant une personne accusée d'un acte criminel du droit à la présomption d'innocence jusqu'à ce que la preuve de sa culpabilité ait été établie en conformité de la loi, après une audition impartiale et publique de sa cause par un tribunal indépendant et non préjugé, ou la privant sans juste cause du droit à un cautionnement raisonnable; ou

g) privant une personne du droit à l'assistance d'un interprète dans des procédures où elle est mise en cause ou est partie ou témoin, devant une cour, une commission, un office, un conseil ou autre tribunal, si elle ne comprend ou ne parle pas la langue dans laquelle se déroulent ces procédures.

Duties of Minister of Justice

3 (1) Subject to subsection (2), the Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

Exception

(2) A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the *Statutory Instruments Act* to ensure that it was not inconsistent with the purposes and provisions of this Part.

1960, c. 44, s. 3; 1970-71-72, c. 38, s. 29; 1985, c. 26, s. 105; 1992, c. 1, s. 144(F).

Short title

4 The provisions of this Part shall be known as the *Canadian Bill of Rights*.

Devoirs du ministre de la Justice

3 (1) Sous réserve du paragraphe (2), le ministre de la Justice doit, en conformité de règlements prescrits par le gouverneur en conseil, examiner tout règlement transmis au greffier du Conseil privé pour enregistrement, en application de la *Loi sur les textes réglementaires*, ainsi que tout projet ou proposition de loi soumis ou présentés à la Chambre des communes par un ministre fédéral en vue de rechercher si l'une quelconque de ses dispositions est incompatible avec les fins et dispositions de la présente Partie, et il doit signaler toute semblable incompatibilité à la Chambre des communes dès qu'il en a l'occasion.

Exception

(2) Il n'est pas nécessaire de procéder à l'examen prévu par le paragraphe (1) si le projet de règlement a fait l'objet de l'examen prévu à l'article 3 de la *Loi sur les textes réglementaires* et destiné à vérifier sa compatibilité avec les fins et les dispositions de la présente partie.

1960, ch. 44, art. 3; 1970-71-72, ch. 38, art. 29; 1985, ch. 26, art. 105; 1992, ch. 1, art. 144(F).

Titre abrégé

4 Les dispositions de la présente Partie doivent être connues sous la désignation : *Déclaration canadienne des droits*.

Part II

Savings

5 (1) Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

"Law of Canada" defined

(2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after

Partie II

Clause de sauvegarde

5 (1) Aucune disposition de la Partie I ne doit s'interpréter de manière à supprimer ou restreindre l'exercice d'un droit de l'homme ou d'une liberté fondamentale non énumérés dans ladite Partie et qui peuvent avoir existé au Canada lors de la mise en vigueur de la présente loi.

Définition : « loi du Canada »

(2) L'expression « loi du Canada », à la Partie I, désigne une loi du Parlement du Canada, édictée avant ou après

16

2018 FC 733, 2018 CF 733
Federal Court

Abdi v. Canada (Public Safety and Emergency Preparedness)

2018 CarswellNat 3791, 2018 CarswellNat 4125,
2018 FC 733, 2018 CF 733, 294 A.C.W.S. (3d) 818

ABDOULKADER ABDI (Applicant) and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS (Respondent) and CANADIAN CIVIL LIBERTIES ASSOCIATION (Intervener) and JUSTICE FOR CHILDREN AND YOUTH (Intervener)

Ann Marie McDonald J.

Heard: June 19, 2018
Judgment: July 13, 2018
Docket: IMM-28-18

Counsel: Benjamin Perryman, for Applicant
Melissa A. Grant, Heidi Collicutt, for Respondent
Nasha Nijhawan, Kelly E. McMillan, for Intervener, Canadian Civil Liberties Association
Jane Stewart, for Intervener, Justice, for Children and Youth

***Ann Marie McDonald J.*:**

I. Overview

1 The Applicant, Abdoulkader Abdi, was 6 years old when he arrived in Canada in 2000 as a Somalian refugee. He came to Canada with his two aunts and his sister. Shortly after arriving in Canada, Mr. Abdi was placed in the care of the Nova Scotia Department of Community Services [DCS] and spent the rest of his youth in foster care and group homes. Despite efforts by DCS officials to "regularize" his status, Mr. Abdi never obtained Canadian citizenship.

2 His lack of citizenship and trouble with the law put Mr. Abdi at risk of being removed from Canada. Mr. Abdi seeks judicial review of the decision of the Minister's Delegate [MD] of January 3, 2018. In that decision, the MD referred Mr. Abdi on to the next stage of the process which may ultimately see him removed from Canada. Mr. Abdi argues that his rights under the *Charter of Rights and Freedoms* [the *Charter*] have been infringed and he also argues that his treatment is not in keeping with Canada's international law obligations.

3 Given the *Charter* and international law issues raised by Mr. Abdi and the impact of his past experiences on his future plight, the Court granted intervener status to the Canadian Civil Liberties Association [CCLA] and the Justice for Children and Youth [JFCY] who provided submissions on the balancing of constitutional rights and the risks faced by children-in-care like Mr. Abdi.

4 The Respondent argues that the MD referral decision is a routine decision and is a direct result of Mr. Abdi's criminal conduct and the provisions of the *Immigration and Refugee Protection Act* [IRPA]. The Respondent argues that the MD has limited discretion in the circumstances and they argue that any *Charter* considerations were properly balanced.

5 For the reasons that follow, I have concluded that the MD failed to properly consider the record before her and, in particular, she failed to properly assess the *Charter* arguments raised by Mr. Abdi. Under s.3(3) of the IRPA, which incorporates general principles of constitutional law, the MD was statutorily mandated to render a decision consistent with the *Charter.* The MD failed to consider any facts which would allow this Court to determine if the MD rendered a decision in keeping with the *Charter*. Accordingly, I am allowing this judicial review as the decision of the MD does not meet the test set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.) at para 47 [*Dunsmuir*] of "justification, transparency, and intelligibility."

II. Background

6 Mr. Abdi was born on September 17, 1993 in Saudi Arabia. His father was from Saudi Arabia and his mother was from Somalia. From the information on record, it appears that Mr. Abdi's father was never a part of his life.

7 Mr. Abdi lived in Saudi Arabia for the first two years of his life then lived in a United Nations Refugee Camp in Djibouti for four years along with his mother, sister and two ants. Mr. Abdi and his family were recognized as Convention refugees by the United Nations.

8 Sadly his mother died while at this refugee camp.

9 Mr. Abdi has never lived in Somalia. He does not speak the language or know the culture or customs of either Somalia or Saudi Arabia. He has no family in either country.

10 In August 2000, Mr. Abdi arrived in Canada from Djibouti with his aunts and sister as sponsored refugees. They were originally settled in Cape Breton, Nova Scotia but were later moved to Halifax to allow them to access additional services.

11 Shortly after his arrival in Canada, in 2001, Mr. Abdi was taken into custody by the DCS. He spent the rest of his childhood in the care of the DCS. In 2003 the DCS was granted permanent care and custody of Mr. Abdi.

12 During his time in the care of DCS, Mr. Abdi was placed in 31 different foster homes. Grade 6 was the highest level of education he obtained. By 13 years of age he started getting into trouble with the law and spent time in a number of group homes in various cities. Over time, he compiled a youth criminal record.

13 In 2005 Mr. Abdi's aunt attempted to apply for citizenship for Mr. Abdi. However the DCS intervened on the basis that as a ward of the state only DCS could apply for citizenship. In 2008, Mr. Abdi's aunt unsuccessfully applied to the Nova Scotia courts for a variation of the permanent custody order. In this application she also raised the issue of Mr. Abdi's lack of citizenship.

14 In 2008, the record shows concerns within the DCS about "regularizing" Mr. Abdi's status for which DCS retained external legal counsel. In 2010 legal counsel advised DCS that Mr. Abdi's youth criminal record could prohibit him from becoming a citizen.

15 In July 2011, Mr. Abdi's social worker provided external legal counsel with the information to process his citizenship application.

16 In May 2013, external legal counsel advised Mr. Abdi, who was then 19 years of age, that he was ineligible for citizenship because of his criminal record.

17 In July 2014 Mr. Abdi entered guilty pleas to charges of aggravated assault and assaulting a police officer with a weapon for which he was sentenced to a 4.5 year custodial sentence and a one year concurrent sentence. These are the offences which gave rise to inadmissibility proceedings under the IRPA.

18 In 2016, a report was prepared pursuant to s.44(1) of the IRPA finding that there were reasonable grounds to believe that Mr. Abdi was inadmissible to Canada under s.36(1) of the IRPA. Subsequently, in 2016, a Canada Border Services Agency [CBSA] Manager and Delegate of the Minister of Public Safety and Emergency Preparedness referred Mr. Abdi to the Immigration Division [ID] pursuant to s.44(2) of the IRPA for an admissibility hearing.

19 The 2016 referral decision was overturned by this Court in *Abdi v. Canada (Public Safety and Emergency Preparedness)*, 2017 FC 950 (F.C.) [*Abdi I*] in October 2017. The Court concluded that the decision maker erred by relying on protected youth records under the *Youth Criminal Justice Act* [*YCJA*].

20 In the redetermination decision of January 3, 2018, the MD again referred Mr. Abdi to the ID for an admissibility hearing.

III. Minister's Delegate Decision Under Review

20

21 Mr. Abdi, through legal counsel, provided detailed submissions to the MD including submissions with respect to the impact of the *Charter* and international law. Mr. Abdi also argued that s.44(2) of the IRPA was unconstitutional.

22 In her decision, the MD states that she considered the following factors in making her decision: length of residence; submitted humanitarian and compassionate [H&C] grounds; severity of crimes; current behaviour; and risk of re-offence and reintegration potential.

23 The MD noted positive factors weighing in favour of Mr. Abdi, including that he has accepted responsibility for his crimes, completed recommended programs during his incarceration, was transferred from a maximum to a medium security facility, and has had no violent incidents since the transfer.

24 The MD then considered the negative factors including Mr. Abdi's convictions for serious and violent crimes. Though the MD considered a report from Correctional Services Canada [CSC] which recommended supervised programs in the community, she noted a community assessment by CSC which indicated that he had "high static and dynamic risk factors." The MD also noted that Mr. Abdi's potential for reintegration was assessed as low.

25 Finally, the MD considered inconsistencies in Mr. Abdi's application. In 2016 Mr. Abdi indicated that both of his parents were murdered. However, in a more recent affidavit, he stated that his parents divorced and his mother died in a refugee camp in Djibouti. This information was corroborated by an affidavit submitted by Mr. Abdi's aunt. The aunt, and Mr. Abdi's sister, also noted that Mr. Abdi and his sister have had no contact with their father.

26 The MD concluded that based on the negative aspects of the case, the s.44(1) report was well-founded and she recommended that the case be referred to the ID for an admissibility hearing.

IV. Issues

27 Based upon the submissions of the parties, the following issues arise:

A. Is the April 5, 2018 affidavit of Mr. Abdi admissible?

B. Are the expert affidavits admissible?

C. Did the redetermination process raise a reasonable apprehension of bias?

D. Was the redetermination process procedurally unfair?

E. Was the redetermination decision substantively reasonable?

F. Was the MD required to consider the *Charter*?

G. Is the MD decision inconsistent with international law and the *Charter*?

H. Is there a constitutional question?

I. Are there questions for certification?

V. Standard of Review

28 The standard of review for the procedural fairness allegations in this case is correctness (*Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (S.C.C.) at para 43 [*Khosa*]*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 (F.C.A.) at paras 54-56).

29 The standard of reasonableness applies to the MD's exercise of discretion on non-constitutional grounds (*Sharma v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 319 (F.C.A.) at para 15 [*Sharma*]).

30 With respect to the constitutional issues raised, in *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12 (S.C.C.) at para 7 [*Doré*], the Court held that the standard of review is reasonableness as it relates to the decision-maker's balancing of constitutional rights.

31 The constitutional challenges to the provisions of the IRPA are reviewable on a correctness standard (*Doré*, at para 43).

VI. Analysis

A. Is the April 5, 2018 affidavit of Mr. Abdi admissible?

32 Mr. Abdi's Further Affidavit, affirmed on April 5, 2018, adds to his previous Supplemental Affidavit of January 25, 2018 and his original affidavit of December 6, 2017. At paragraph 2 of his Further Affidavit, he states that the affidavit is to provide documents not included in the Certified Tribunal Record [CTR]. As well, he makes submissions regarding the continued reliance of the Respondent on protected youth records. He also seeks to replace an unsworn letter with a sworn affidavit. Finally he also seeks to introduce documents regarding access to information requests which relate to the breach of procedural fairness matters he raises.

33 The Respondent objects to this affidavit being considered by the Court because it presents new evidence not before the decision-maker. However, the Respondent submits that the affidavit should be considered to emphasize the inconsistency between Mr. Abdi's argument — that but for the acts and omissions of Nova Scotia, he would have obtained Canadian citizenship — and the evidence on the record, which shows that Nova Scotia took steps but Mr. Abdi did not cooperate with these steps.

22

34 The general principle is that the record that was before the tribunal, being the CTR, is the record that the Court considers on judicial review. This record is comprised of the information in the decision-maker's possession at the time the decision is made (*Marchand c. Canada (Commissaire à l'intégrité du secteur public)*, 2014 FCA 270 (F.C.A.) at para 4 [*Public Sector Integrity Commissioner*]).

35 An exception exists to allow a reviewing Court to consider documents outside those considered by the administrative decision-maker when an issue of procedural fairness is raised. In which case, the "relevant documents" may include documents that were not before the decision-maker if they are related to an allegation of breach of procedural fairness or bias (*Nguesso c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2015 FC 102 (F.C.) at paras 88-90).

36 However, these allegations must be supported by an adequate factual foundation (*Public Sector Integrity Commissioner*, at para 4; *Access Information Agency Inc. c. Canada (Procureur général)*, 2007 FCA 224 (F.C.A.) at paras 17-21).

37 Here, Mr. Abdi relies on the Further Affidavit in support of his submissions relating to: (1) the ongoing possession, inclusion, and redaction of youth records; (2) the refusal to replace an unsworn letter with a sworn affidavit; and, (3) the decision of CBSA to arrest him.

38 Regarding the youth records, the Court has the redacted records before it in the CTR. Mr. Abdi seeks to include correspondence which shows (i) that he requested the offending documents be removed and (ii) the Respondent's response. However these documents do not assist on the procedural fairness allegation because the existing record contains the information which form the basis of Mr. Abdi's allegations.

39 On the refusal to replace an unsworn letter with a sworn affidavit, both submissions are in the CTR and the Supplemental Affidavit. The Court can consider whether it was procedurally fair for the MD to rely on the unsworn affidavit based upon the CTR as it is. The Court need not consider the Applicant's request and the Respondent's response to replace the unsworn material with the sworn material.

40 Finally, the decision by the CBSA to arrest Mr. Abdi is a separate and reviewable administrative decision which is not relevant to the current judicial review. Any procedural impropriety in the arrest decision is therefore not at issue here.

41 It is not necessary for the Court to consider the contents of Mr. Abdi's April 5, 2018 affidavit.

B. Are the expert affidavits admissible?

42 Mr. Abdi filed two expert affidavits from social science experts. One, from Rebecca Bromwich, sworn to on April 1, 2018. Ms. Bromwich is the Director of the Graduate Diploma on

Conflict Resolution Program at Carleton University, and a Member of the Ontario Youth Justice Advisory Panel. The other affidavit is from Kiaras Gharabaghi, sworn to on April 4, 2018 who is the Director of the School of Child & Youth Care and an Associate Professor in Immigration & Settlement Studies, at Ryerson University. Both affidavits speak to the plight of youth in care and their particular vulnerability in comparison to other children. They discuss the phenomenon of children in care "crossing-over" to the criminal justice system.

43 The Respondent objects to these affidavits and argues that they do not meet the tests of reliability and necessity as outlined in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (S.C.C.).

44 The Applicant argues that these affidavits provide contextual evidence of Mr. Abdi's experience as a racialized immigrant in foster care and therefore are of assistance to the Court in the context of understanding Mr. Abdi's profile and experience.

45 I have determined that these affidavits do not meet the reliability and necessity test. I also note that these affidavits were not before the MD. Therefore in the circumstances, I decline to receive these affidavits into evidence.

C. Did the redetermination process raise a reasonable apprehension of bias?

46 Mr. Abdi argues that the communications between various CBSA officials in relation to his arrest by CBSA following the decision in *Abdi I* demonstrates a reasonable apprehension of bias. He submits that the decision-makers involved in the decision reviewed in *Abdi I* were also involved in his arrest and were involved in the redetermination decision under review. This, he argues, raises a reasonable apprehension of bias.

47 The test for bias is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude" (*Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 (S.C.C.) at 385 [*Committee for Justice and Liberty*]).

48 The threshold to establish bias is high. The party alleging bias must do more than "hint" that the outcome is tainted (*Turoczi v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1423 (F.C.) at paras 11-17 [*Turoczi*]). There must be an evidentiary foundation in support (*Zündel v. Citron*, [2000] 4 F.C. 225 (Fed. C.A.) at para 36;*Southern Chiefs Organization Inc. v. Dumas*, 2016 FC 837 (F.C.) at para 46).

49 Here, Mr. Abdi's arguments are largely speculative, pointing only to perceived associations between the MD and CBSA officials. While the MD and the CBSA officials share a common employer, there is no evidence that the MD consulted with others before rendering her decision.

24

50 As noted above, the decision by CBSA to arrest Mr. Abdi is not at issue in this judicial review. Further, the actions of CBSA in taking Mr. Abdi into custody, without more, does not provide an objective indication of bias, sufficient to meet the high threshold set out in *Committee for Justice and Liberty*.

51 I conclude that there is insufficient evidence to support a reasonable apprehension of bias finding.

D. Was the redetermination process procedurally unfair?

52 Mr. Abdi raises two issues with respect to procedural fairness: (1) the inclusion of redacted materials in the CTR is prejudicial; and, (2) the MD made negative credibility findings and should have convoked an oral hearing.

53 The duty of fairness in a redetermination consideration is "not at the high end of the spectrum in the context of decisions made pursuant to subsections 44(1) and (2)" (*Sharma*, at para 29).

(1) Redacted Material in the CTR

54 In *Abdi I*, the Court found that information protected by the provisions of the *YCJA* should not have been relied upon by the decision-maker. In this judicial review, Mr. Abdi submits that the CTR should not contain any *YCJA* material with or without redactions. Mr. Abdi argues that the presence of even redacted material is prejudicial because the decision-maker is aware of existence of the material and that alone may have had an impact on the decision. Further, he argues that he could not meaningfully respond to this material since it was redacted.

55 To succeed on a prejudice argument Mr. Abdi must demonstrate that the MD's decision was influenced by the redacted material — and he must be able to show an evidentiary basis for this assertion.

56 There is no indication that the redacted *YCJA* material influenced the MD's decision. Further, the *YCJA* material was redacted because of the Court's holding in *Abdi I*. Mr. Abdi need not be afforded the opportunity to respond to these redactions because they are not material — and in fact, are irrelevant and improper — in the MD's assessment. They did not form the "case to be met" (*Charkaoui, Re*, 2007 SCC 9 (S.C.C.) at para 57), and therefore it was not prejudicial to Mr. Abdi for the CTR to include these materials.

57 Furthermore, the issue of the purging or the destruction of *YCJA* materials is beyond the scope of this judicial review.

58 I conclude that there was no violation of Mr. Abdi's procedural fairness rights with the inclusion of redacted materials in the record.

(2) Oral Hearing

59 Mr. Abdi argues that he should have been afforded an oral hearing to address the credibility issue regarding his parents referenced by the MD in her decision. He relies upon the Supreme Court's decision in *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177 (S.C.C.) at para 59 [*Singh*], where the Court indicated that where a "serious issue" of credibility arises, it is a principle of fundamental justice that an oral hearing be convoked.

60 However the context was different in *Singh*, where the issue was not a referral, but rather a constitutional challenge to provisions of the former *Immigration Act* relating to procedures for determination of Convention refugee status.

61 In my view, the more relevant decision, in the context of a referral case, is the Federal Court of Appeal decision in *Cha v. Canada (Minister of Citizenship & Immigration)*, 2006 FCA 126 (F.C.A.) at para 52, where the Court detailed the participatory rights which apply, as follows:

- provide a copy of the immigration officer's report to the person
- inform the person of the allegation(s) made in the immigration officer's report, of the case to be met and of the nature and possible consequences of the decision to be made
- conduct an interview in the presence of the person, be it live, by videoconference or by telephone
- give the person an opportunity to present evidence relevant to the case and to express his point of view

62 Applying those considerations here, Mr. Abdi did receive disclosure, and he was interviewed by the officer who completed the s.44(1) report for the first referral decision. He was interviewed again for the second referral decision, though he notes that this interview was short. He was aware that his submissions including the unsworn letter and his affidavit were before the decision-maker, and he had the opportunity in his submissions to explain the discrepancy and to correct the record. The fact that he MD noted the inconsistency does not amount to a "serious credibility" finding against Mr. Abdi.

63 Overall I find that Mr. Abdi was afforded the necessary procedural fairness rights as prescribed by *Sharma* and *Cha*. Accordingly, and considering the relaxed procedural fairness obligations which apply in a referral case, I see no error warranting the intervention of the Court.

E. Was the redetermination decision substantively reasonable?

64 Mr. Abdi raises two main issues with the substantive reasonableness of the MD's decision. First, he argues that the MD failed to consider the totality of a CSC report. Secondly, Mr. Abdi submits that the MD failed to give proper weight to H&C factors.

65 These arguments amount to a request for this Court to reweigh the evidence, which the Court cannot do on judicial review (*Khosa*, at para 61). While there is no error in this aspect of the MD's decision, this judicial review is allowed as a result of the failure of the MD to consider the *Charter* values.

F. Was the MD required to consider the Charter?

(1) Positions of the Parties

66 Mr. Abdi argues that in making her decision, the MD was required to balance the statutory objectives of the IRPA with applicable *Charter* values.

67 The statutory objectives that Mr. Abdi argues are relevant are contained in s. 3 of IRPA and include: family reunification; integration of permanent residents; protection of public safety; and support for the social and economic well-being of refugees. He emphasizes that public safety is not the only relevant statutory objective.

68 Mr. Abdi argues that his circumstances engage sections 15(1), 12, 7, 2(d) of the *Charter*. He argues that the balancing which was required by the MD should have resulted in the issuance of a warning letter.

69 The Respondent on the other hand argues that the referral decision is a routine administrative decision with a narrow issue for consideration by the MD. The Respondent argues that there was no obligation on the MD to go outside s. 44 of IRPA and that it was reasonable for the MD to prioritize security. The Respondent disagrees that the *Charter* or international law considerations are applicable.

70 The intervenor CCLA made submissions that despite the uncertainty in the scope of the MD's discretion, she was required to consider the *Charter*. It also argues that the fact that the MD considered H&C factors is not a substitute for *Charter* considerations. In particular it emphasizes that in Mr. Abdi's case the failure of the MD to consider his status as a ward of the state and the downstream impact of the loss of his permanent resident status is enough to engage s.15 of the *Charter*.

71 In its submissions, the JFCY argues that the historical and contextual framework of Mr. Abdi's experience as a youth in care, his multiple intersecting grounds of vulnerabilities, and the fact that he has been disadvantaged by the actions of the state, needed to be considered by the MD in the *Charter* context.

(2) Statutory Discretion and Role of the MD

72 The first issue for consideration is what discretion the MD had, if any, in making her decision. Specifically, in exercising this discretion, was the MD required to consider Mr. Abdi's *Charter* submissions?

73 The law is clear that administrative decision-makers, like the MD, must act consistently with the *Charter* when exercising their statutory discretion (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.) at 1077-1078 per Lamer J; *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 (S.C.C.) at para 71*Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety & Security)*, 2010 SCC 23 (S.C.C.) at paras 62-75).

74 The *Charter* is a fundamental constraint on the action of an administrative decision-maker (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at para 55 [*Baker*]. Specifically, administrative decision-makers must "always consider fundamental values" when exercising their discretion and are "empowered, and indeed required, to consider *Charter* values within their scope of discretion" (*Doré*, at para 35). Therefore, decision-makers must render decisions in accordance with the *Charter* by considering *Charter* values themselves.

75 In addition, the IRPA, the statute under which the MD was acting, incorporates the general concept that the MD must consider and render decisions in accordance with the *Charter* where it states at s.3(3)(d) as follows:

> **3 (3)** This Act is to be construed and applied in a manner that
>
> [...]
>
> **(d)** ensures that decisions taken under this Act are consistent with the Canadian *Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;
>
> **3 (3)** L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet:
>
> [...]
>
> **d)** d'assurer que les décisions prises en vertu de la présente loi sont conformes à la *Charte canadienne des droits et libertés*, notamment en ce qui touche les principes, d'une part, d'égalité et de protection contre la discrimination et, d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada;

76 In the context of referral decisions, the Supreme Court recently accepted that the MD has *some* discretion *not* to refer a well-founded report to the ID in serious criminality cases such as

28

Mr. Abdi's (*Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 (S.C.C.) at para 6 [*Tran*]). It is the exercise of discretion that "triggers" the necessity to consider *Charter* implications (*Canada (Minister of Citizenship and Immigration) v. Singh*, 2016 FCA 96 (F.C.A.) at para 62; *Deri v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1042 (F.C.) at para 46).

77 Further the permissive language used in section 44(2) of the IRPA- the word "may" - confirms that the MD had options available to her in reaching her decision:

> **44(2)** If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.
>
> **44(2)** S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

78 In exercising discretion, the MD is the legal and factual merits-decider. The MD must address relevant issues and compile a record to allow the Court to properly conduct its judicial review function (*Martin v. Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54 (S.C.C.) at para 30 [*Martin*]. The Court cannot conduct judicial review of *Charter* issues in a factual vacuum (*MacKay v. Manitoba*, [1989] 2 S.C.R. 357 (S.C.C.) at 364 [*Mackay*]).

79 Based on the above, I am satisfied that the MD was required to consider the *Charter* implications to Mr. Abdi. The MD was also required to render a decision on these *Charter* considerations, which this Court, on judicial review, could then review.

(3) Charter Framework

80 In *Doré*, the Court outlined the framework by which judicial review courts are to determine whether the "*Charter* values" underlying a grant of discretion have been appropriately considered. In *Doré*, at paras 55-58, the Court noted that decision-makers are bound to balance *Charter* values arising before them with the statutory objectives which are at play. The main question is how the *Charter* value at issue will best be protected in view of the statutory objectives (*Doré*, at para 56). If the *Charter* value is not appropriately balanced with statutory objectives, the decision is unreasonable (*Doré*, at para 58).

81 The *Doré* framework was recently reaffirmed in *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (S.C.C.), at para 57 [*TWU*] where the Supreme Court states that "...*Charter* rights are no less robustly protected under an administrative law framework" as developed by *Doré*. The Court went on to state in paragraphs 58 and 59:

> [58] Under the precedent established by this Court in *Doré* and *Loyola*, the preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections — both rights and values (*Loyola*, at para. 39). If so, the question becomes "whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play" (*Doré*, at para. 57; *Loyola*, at para. 39). The extent of the impact on the *Charter* protection must be proportionate in light of the statutory objectives.
>
> [59] *Doré* and *Loyola* are binding precedents of this Court. Our reasons explain why and how the *Doré/Loyola* framework applies here. Since *Charter* protections are implicated, the reviewing court must be satisfied that the decision reflects a proportionate balance between the *Charter* protections at play and the relevant statutory mandate. This is the analysis we adopt.

82 This is the test which governs Mr. Abdi's circumstances and in applying this analysis to the MD's decision it is clear that there are a number of deficiencies in her decision. Most blatantly, the MD's decision discloses no indication that the MD even considered *Charter* values. This is directly contrary to framework outlined in *Doré* and *TWU*, and the provisions of IRPA, all of which requires the MD to consider *Charter* values.

83 As a result, this Court on judicial review cannot do what *Doré* and *TWU* mandate, which is to review the balancing of the statutory objectives and the *Charter* rights and values by the MD. Here the MD did not make a determination on whether the *Charter* rights and values put forward by Mr. Abdi were "engaged". In fact, the *Charter* is not mentioned anywhere in the MD's cover letter outlining the issues she considered or in the body of her decision. This is so despite Mr. Abdi's extensive submissions on the *Charter*. This Court cannot therefore properly conduct its review role to consider if the MD's balancing was proportionate since it is impossible to determine if the *Charter* issues were even weighed in the balance (*Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (S.C.C.) [*Loyola*] at para 68).

84 The Court, on judicial review, does not conduct a *de novo* review of this balancing exercise, but rather reviews on a reasonableness standard whether the balancing was reasonable (*Doré*, at paras 45, 51). However the Court cannot meaningfully do so in the absence of any evidence of consideration of the *Charter* values at play. *Charter* values cannot be considered, as noted above, in a factual vacuum (*Mackay*, at 364).

30

85 I acknowledge that it is possible for a decision maker to implicitly consider *Charter* values. In the companion case to *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 (S.C.C.) at para 29 [*TWU Ontario*], the Court concluded that despite the fact that there were no reasons offered by the decision-maker, the Court could conduct judicial review based on the reasons which "could be offered" and the record. This is consistent with the Supreme Court's previous findings in *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 (S.C.C.) at para 14 [*Newfoundland Nurses*] that courts should conduct a holistic review of administrative decisions with regard to the record.

86 That is not an option in this case because there is no evidence that the MD implicitly considered relevant *Charter* values pleaded by Mr. Abdi. There is no consideration by the MD of Mr. Abdi's facts which could engage *Charter* rights. Again, while I acknowledge that there is no obligation for a decision-maker to consider every issue, there must be some evidence that the MD considered the *Charter* issues, or facts giving rise to an engagement of *Charter* values, in light of the supremacy of the Constitution.

87 Here, Mr. Abdi provided detailed submissions on his particular and unique facts, including the fact that he was a long-term ward of the state. With respect to his lack of Canadian citizenship, he highlighted the fact that the DCS intervened to remove his name from his aunt's citizenship application. These factors may be relevant considerations with respect to a s.15 *Charter* value of non-discrimination in the MD's referral decision. But they were not considered. There is no indication in the record or in the MD's decision that she turned her mind to any of these considerations.

88 This situation is unlike *TWU Ontario*, where the Court noted that it could look to "reasons which could be offered" in absence of any explicit reasons. In that case, the Court concluded that it was clear on the evidence that the decision-makers "...were alive to the question of the balance to be struck between freedom of religion and their statutory duties" (*TWU Ontario*, at para 28). In contrast here, there is no evidence that the decision-maker was "alive" to the issues.

89 Rather, this case is more similar to *Serrano Lemus v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 114 (F.C.A.) at para 24 [*Lemus*], where the Federal Court of Appeal noted that the decision under review did not analyze relevant facts. The Court noted the following:

> While the Officer noted the existence of subsection 25(1.3), she did not look at the facts relevant to the matters raised in the application for refugee protection that might have also been relevant to whether requiring the Lemus family to return to El Salvador would cause unusual and undeserved, or disproportionate hardship.

90 In *Lemus* the Court determined that it would not be appropriate to delve into the record and reconstruct the decision. That conclusion was supported by the Supreme Court's decision in *A.T.A.*

v. Alberta (Information & Privacy Commissioner), 2011 SCC 61 (S.C.C.) [*Alberta Teachers*] where at para 55, the Court noted that:

> [i]n some cases, it may be that a reviewing court cannot adequately show deference to the administrative decision maker without first providing the decision maker the opportunity to give its own reasons for the decision. In such a case, even though there is an implied decision, the court may see fit to remit the issue to the tribunal to allow the tribunal to provide reasons.

91 In other words, despite *Newfoundland Nurses*, there is no open invitation for courts to reconstruct reasons where they are silent on important, relevant facts; or, where there are "no dots on the page" to connect: *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 (F.C.). This is the error identified in *Lemus*, and according to *Alberta Teachers*, is a basis to remit to the MD, and not a basis for this Court to reconstruct the reasons.

92 In fact, the Supreme Court most recently confirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 (S.C.C.) at para 24 that courts cannot supplant the reasons actually provided by a decision-maker. Here, the MD provided exhaustive and detailed reasons on other elements of the claim, but left out the significant issue of the *Charter*. While it may appear to be a situation where the Court could simply fill in its own *Charter* analysis, the effect of doing so would supplant the MD's reasons, which were exhaustive on every other matter but the *Charter*. If *Doré* is correct, and administrative decision-makers are able to determine *Charter* considerations, the Court should allow the MD to do so without intervention.

93 In absence of any explicit or implicit reasons, and although *Doré* counsels deference, this Court cannot defer to nothing. *Doré* and *TWU* make it clear that administrative decision-makers must conform to the *Charter* by engaging with it. It is the MD's responsibility, on first instance, to consider the *Charter* and render a decision in accordance with it. In this case, there is no engagement with the *Charter*.

94 *Dunsmuir* indicates that a reasonableness review must be concerned with the "process of articulating the reasons" (*Dunsmuir*, at para 47). Here, the reasons are silent on important *Charter* considerations, and the decision-maker has immunized her decision from review (*Vavilov v. Canada (Citizenship and Immigration)*, 2017 FCA 132 (F.C.A.) at para 39). Accordingly the decision is not justifiable, transparent, and intelligible according to *Dunsmuir*.

G. Is the MD decision inconsistent with international law and the Charter?

95 Mr. Abdi relies upon s. 3(3)(f) of the IRPA to argue that the MD had to make her decision consistent with international law norms. This provision provides:

> **3(3)** This Act is to be construed and applied in a manner that
>
> [...]

32

(f) complies with international human rights instruments to which Canada is signatory.

3(3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet:

[...]

f) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.

96 The same considerations outlined above regarding the lack of consideration by the MD to the *Charter* apply to this issue as well. The MD decision is silent on Mr. Abdi's submissions. Accordingly the referral decision does not meet the *Dunsmuir* test with respect to international law considerations.

H. Is there a constitutional question?

97 Mr. Abdi filed a Notice of Constitutional Question on May 28, 2018, challenging ss. 25, 36(1), 44(1), 44(2), 45, 46, 48, 49 and 64 of the IRPA under ss. 2(d), 7, 12, and 15(1) of the *Charter.*

98 For the reasons outlined above, this judicial review is allowed on the grounds that the MD did not consider the various *Charter* issues raised by Mr. Abdi and therefore the decision of the MD is not "justified, transparent, and intelligible" as required by *Dunsmuir*.

99 Since this is the dispositive matter on judicial review, there is no need to address the larger constitutional issues posed by Mr. Abdi.

100 Further I note that the direction of the Supreme Court that if a case can be disposed of on another ground, such as an administrative law ground, courts should not proceed to the constitutional challenge (*Tremblay c. Daigle*, [1989] 2 S.C.R. 530 (S.C.C.) at 571; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.) at 51; *R. v. Hafey*, [1985] 1 S.C.R. 106 (S.C.C.) at 121-22; *State Farm Mutual Automobile Insurance Co. v. Canada (Privacy Commissioner)*, 2010 FC 736 (F.C.) at para 119).

101 The lack of consideration of *Charter* values is, according to*Doré*, an administrative law error. In *Doré*, the Court noted that its approach to judicial review of discretionary decisions involving *Charter* issues invited a "*richer conception of administrative law*" (*Doré*, at para 35 (*emphasis added*)) and introduced a "more flexible *administrative approach* to balancing *Charter* values" (*Doré*, at para 37 (*emphasis added*)). *Doré* merges reasonableness review with review of constitutional discretion.

102 Further, this Court is not in a position to answer the constitutional questions posed which were not presented to the MD. Although Mr. Abdi did challenge s.44(2) in his submissions to the MD, this was not raised in his Notice of Application, and Mr. Abdi did not raise the other provisions

before the MD which he now challenges. This is problematic as Parliament has appointed the MD as the merits-decider and tasked it with compiling a fulsome record: *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 245 (F.C.A.) at para 46 [*Forest Ethics*]; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16 (S.C.C.) at paras 38-40 [*Okwuobi*]. *Charter* issues should not be decided in the abstract in absence of such a record (*Forest Ethics*, at para 55).

103 Despite this, Mr. Abdi argues that since he seeks a declaration on this judicial review, the Court can assume jurisdiction on these questions. Mr. Abdi relies upon the *United States v. Shulman*, 2001 SCC 21 (S.C.C.) [*Shulman*]. However *Shulman* was decided in the context of appellate review. In the context of judicial review, the Supreme Court has made it clear that the unavailability of a remedy before a decision-maker is no reason to bypass that decision-maker, and proceed straight to judicial review (*Okwuobi*, at para 44).

104 I therefore decline to answer the constitutional challenge to various provisions of the IRPA because (1) the matter can be decided on administrative law grounds and (2) the constitutional questions are largely raised for the first time before this Court without the benefit of an evidentiary background.

I. Are there questions for certification?

105 Mr. Abdi proposes nine questions for certification. The Respondent objects to the certification of any of the questions.

106 The test for certification is outlined in *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 (F.C.A.) at para 46 [*Lunyamila*] as follows:

> The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance of general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21 (CanLII), 29 Imm. L.R. (4th) 211 at para. 10).

107 Additionally, a certified question will only be sufficiently general and important where the law is unsettled on the question (*Mudrak v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 178 (F.C.A.) at para 36; *Leite v. Canada (Minister of Citizenship and Immigration)*, 2016 CarswellNat 5666 (F.C.) at para 28).

108 Mr. Abdi poses the following questions:

34

1. Does the inclusion or possession of material that was not accessed in accordance with the *Youth Criminal Justice Act* render an administrative decision-maker's decision unreasonable even if those materials are redacted or not directly relied upon by the decision-maker?

2. In determining whether to refer an otherwise well-founded inadmissibility report on grounds of serious criminality to the Immigration Division for an admissibility hearing, does the Delegate's scope of discretion, in s.44(2) of the IRPA, permit or require an analysis of the full circumstances of a long-term permanent [resident] akin to the *Ribic* factors used by the Immigration Appeal Division?

3. In exercising their discretion under s.44(2) of the IRPA, is the Delegate obliged to consider whether their decision has potential to limit a *Charter* right or value in accordance with the analysis from *Doré/Loyola*? If so, in what circumstances is the obligation triggered?

4. When a party asserts that the Delegate's decision under s.44(2) has the potential to limit a *Charter* protection, must this issue be directly addressed in the reasons of the Delegate in order for the decision to be reasonable?

5. Are s.15 *Charter* protections engaged at the stage of determining whether a permanent resident is inadmissible to Canada where that person is a former Crown ward who did not become a Canadian citizen while in care?

6. Are s.7 *Charter* protections engaged at the stage of determining whether a permanent resident is inadmissible to Canada and if so, would section 7 be engaged where the deprivation of the right to liberty and security of the person of a permanent resident arises from their loss of status?

7. Has there been either a significant development in the law or circumstances/evidence that fundamentally shift the parameters of the debate such that *Chiarelli* may be reconsidered, specifically the holding that the deportation of a permanent resident who has been convicted of a serious criminal offence, despite their particular circumstances, is in accordance with the principles of fundamental justice?

8. Is an admissibility decision that causes or will likely cause the loss of permanent resident status a "treatment" that engages s.12 of the *Charter*?

9. Does s.2(d) of the *Charter* provide "*Charter* protections" that include the international human right to non-arbitrary interference with the family protected by Articles 17 and 23(1) of the International Covenant on Civil and Political Rights?

109 Question 1 involves the *YCJA* and Mr. Abdi's argument that the MD relied on redacted records. This issue is not determinative of this matter nor does it transcend the interests of the parties here.

110 Question 2 involves the scope of the MD's discretion under s.44(2). The Respondent argues that the issue on this judicial review is not the scope of any discretion, but rather if the discretion exists and if it was reasonably exercised. For the reasons outlined above and based upon *Tran* I have determined that the MD does have discretion. Therefore the response to this question would not be dispositive of the appeal, because it does not arise on the facts of the case. It should not be certified (*Varela v. Canada (Minister of Citizenship & Immigration)*, 2009 FCA 145 (F.C.A.) at para 29 [*Varela*]).

111 Although Question 3 would be dispositive of an appeal, and it transcends the interests of the parties, the law on this question is settled. *Doré*, at para 24 holds that administrative decision-makers must always act consistent with *Charter* values. Further s.3(3)(d) of the IRPA imposes an obligation on all decision-makers under the IRPA to act consistently with the *Charter*. Accordingly, there is no need to certify a question to the Federal Court of Appeal when, as a matter of constitutional law, all decision-makers must consider whether their decisions are consistent with the *Charter*.

112 Question 4 involves whether an MD is required to specifically address, in her reasons, an argument raised by a party that a particular decision has the potential to limit a *Charter* protection. Again the law on this issue is settled. A decision-maker does not need to address every argument raised by a party (*Newfoundland Nurses*, at para 16). In the context of cases engaging *Charter* values, the Supreme Court recently confirmed that there is no special obligation to provide reasons depending on the context of the decision-maker, and that courts could look to the reasons which "could be offered" in support of a decision (*TWU Ontario*, at paras 28-29).

113 Further, in this case, the question is not whether the MD was required to provide reasons. Instead, it was whether there were any facts considered which indicated the *Charter* issue were analyzed. As such, the issue of whether there was an obligation to provide reasons is not dispositive of an appeal and does not squarely arise from the issues considered in the case.

114 Accordingly, the law is settled and the question should not be certified.

115 The remainder of the questions sought to be certified by Mr. Abdi pertain to his challenge to provisions of the IRPA, including whether *stare decisis* applies to bar his constitutional claims. These challenges, as noted above, need not be decided in this case. Accordingly, there is no need to certify these questions (*Lunyamila*, at para 46).

116 In the circumstances I decline to certify any of the questions posed by the Applicant.

VII. Conclusion

36

117 In order to meet the requirements of reasonableness the MD's decision must demonstrate justification, transparency and intelligibility (*Dunsmuir*, para 47). Considering the record before the MD and the significant submissions on the Charter issues raised by Mr. Abdi, the absence of any reference to the *Charter* in either the covering letter prepared by the MD or in her reasons does not allow this Court to properly review the decision.

118 Therefore this judicial review is granted.

JUDGMENT in IMM-28-18

THIS COURT ORDERS that:

1. The application for judicial review is granted. The decision of the Minister's Delegate is set aside and the matter is remitted for redetermination by a different Delegate;

2. No question of general importance is certified; and

3. There will be no order as to costs.

Application granted.

2013 FC 1283, 2013 CF 1283
Federal Court

Canadian Arab Federation v. Canada (Minister of Citizenship and Immigration)

2013 CarswellNat 4887, 2013 CarswellNat 4888, 2013 FC 1283, 2013 CF 1283, 21 Imm. L.R. (4th) 175, 237 A.C.W.S. (3d) 4, 445 F.T.R. 93 (Eng.), 73 Admin. L.R. (5th) 179

Canadian Arab Federation (CAF), Applicant and The Minister of Citizenship and Immigration, Respondent

Russel W. Zinn J.

Heard: May 28-30, 2013
Judgment: December 23, 2013
Docket: T-447-09

Counsel: Barbara Jackman, Hadayt Nazami, for Applicant
Mary Matthews, Nur Muhammed-Ally, Eleanor Elstub, Melissa Mathieu, for Respondent

Subject: Public; Constitutional; Immigration

APPLICATION by non-governmental organization for judicial review of decision of respondent Minister for Citizenship and Immigration declining to provide applicant with funding pursuant to Language Instruction for Newcomers to Canada program.

***Russel W. Zinn J.*:**

1 This is an application for judicial review by the Canadian Arab Federation [CAF] of a decision by The Minister of Citizenship and Immigration, then Jason Kenney [the Minister], not to enter into a funding agreement under the Language Instruction for Newcomers to Canada [LINC] program for the year 2009-2010. This decision was made by the Minister despite the fact that Citizenship and Immigration Canada [CIC] had previously entered into similar funding arrangements with CAF for many years; the most recent of which expired March 30, 2009, just days after the decision under review was made.

2 The reasons for the Minister's decision are set out in a letter to CAF dated March 18, 2009, from the Associate Assistant Deputy Minister of CIC to Khaled Mouammar, President of CAF at that time:

> As you are also aware, serious concerns have arisen with respect to certain public statements that have been made by yourself or other officials of the CAF. These statements have included

> the promotion of hatred, anti-semitism [*sic*] and support for the banned terrorist organizations Hamas and Hezbollah.
>
> The objectionable nature of these public statements — in that they appear to reflect the CAF's evident support for terrorist organizations and positions on its part which are arguably anti-Semitic — raises serious questions about the integrity of your organization and has undermined the Government's confidence in the CAF as an appropriate partner for the delivery of settlement services to newcomers.

Background

Nature of CAF

3 CAF's objectives as set out in its Letters Patent, relate to advancing the interests of Arabs and Arab communities in Canada in various ways, including "[t]o promote ties and mutual understanding between Arab societies, organizations and communities in Canada and the Arab homeland... to provide assistance to new immigrants to Canada from the Arab homeland... [and] to disseminate information about and encourage support for Arab causes in Canada and the Arab homeland, particularly the cause of the suffering Palestinian people."

4 CAF's operation had two branches: Settlement Services and Immigrant Support, and Community Engagement. Settlement Services and Immigrant Support was directed towards assisting both Arab and non-Arab newcomers integrate into the community. Community Engagement was directed towards capacity building, advocacy, and community services.

5 CAF delivered two main programs under its Settlement Services branch: LINC, which provided English as a second language training to newcomers, and Job Search Workshops [JSW]. Most of the newcomers attending these programs were originally from non-Arab countries. CAF received funding for both of these programs from CIC by way of contribution agreement arrangements.

CIC Contribution Agreements

6 CIC contracted with CAF and others as private service provider organizations for the provision of settlement services to newcomers to Canada. The contracts provided for an amount of funding allocated to the service provider for reimbursable expenses. An expense unrelated to the LINC or JSW programs cannot be recovered from the funds earmarked in the contribution agreement. As was noted by the Minister in his memoranda, a party to a contribution agreement does not financially benefit from the agreement; however, there may be indirect benefits:

> None of the funds provided by Canada through the contribution agreement was [*sic*] intended to benefit the CAF. An organization may attain incidental advantages as a result of settlement funding; for example, there may be legitimacy attached to organizations who

> receive government funds and there may be an opportunity to share infrastructure costs with the settlement program. The full amount of the contribution agreement, however, is intended to directly benefit newcomers taking LINC classes.

7 It is also relevant to this application and it is the Minister's position, that the LINC program offers newcomers more than just language training. The Minister points out that it is intended that the program will also provide newcomers with an orientation to the Canadian way of life including "social, economic, cultural and political integration," and therefore the suitability of the program provider in this respect is critical. The CIC Application Package given to service providers sets out this facet of the program, as follows:

> By providing basic language instruction to adult newcomers in English or French, LINC facilitates the social, cultural[,] political and economic integration of immigrants and refugees into Canada. In addition, LINC curricula include information that helps newcomers become oriented to the Canadian way of life. This, in turn, helps them to become participating members of Canadian society as soon as possible.

8 CAF had most recently negotiated a contribution agreement and signed a contract with CIC for the period April 1, 2007 to March 31, 2009. On December 2, 2008, CIC wrote to all parties in receipt of LINC funding at that time, informing them that a new settlement program would be forthcoming but its implementation was still underway. As a consequence, "CIC has decided to extend current LINC contribution agreements to March 31, 2010." Each service provider was asked to submit a budget application and propose revised activities to CIC, which application was subject to an approval process.

9 In the information accompanying this request for applications for amendment, CIC cautioned CAF and other applicants not to assume approval for the 2009-2010 year, unless and until such approval was received in writing from CIC:

> Do not assume that your application for amendment is approved until you are notified in writing by CIC. Any expenditures incurred prior to the approved start-up date are your own responsibility and will not be reimbursed. We also ask you not to hire staff or make any commitments until you have been informed of CIC's approval. If your application is approved, it will then be used to amend your current Contribution Agreement between your organization and Citizenship and Immigration Canada.

10 CAF submitted a proposal for 2009-2010 on December 9, 2008. On February 12, 2009, a settlement officer from CIC recommended its approval. He noted in that recommendation that "[t]he Canadian Arab Federation delivers a good quality LINC program" and that despite a request for an annual increase to salaries of 2.5%, the proposal for 2009-2010 was $50,000 less than the previous year. The settlement officer emailed an unexecuted final draft of the further agreement

40 to CAF; however, given the value of the proposed contract, final approval was required by the Minister or his delegate.

11 There is nothing in the record, nor was it submitted by CAF, that CIC ever represented that final approval had been given. In fact, even though contractual negotiations had been concluded and the proposal endorsed by a settlement officer, the proposal still had to be approved and endorsed by a review officer, the local manager, and the regional director before CIC National Headquarters and the Minister's office would be notified of it. If the regional director endorsed the proposal, he had authority to approve and execute the agreement at that stage; however, CAF's proposal never made it to this stage of the process. CAF's proposal had been approved by a settlement officer on February 12, 2009 and a review officer on February 16, 2009, but before it was sent to a local manager, CIC National Headquarters intervened and raised concerns about continuing to fund CAF.

Events Prior to Minister Kenney's Appointment as Minister of CIC

12 Jason Kenney became the Minister of CIC, responsible for the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*] on October 30, 2008. He was preceded in that office by Diane Finley. On August 7, 2008, Minister Finley issued a Press Release in which she stated that "[t]o help newcomers settle in the community of Scarborough in the City of Toronto, the Government is committing more than $10 million over the next two years (through to 2010) to six agencies that provide settlement services." The Press Release went on to list the "six agencies receiving the funding in today's announcement." CAF was one of the listed agencies, and was adjacent to the figure of $2,544,815.

13 Mohamed Boudjenane, National Executive Director of CAF, attests in his affidavit that this announcement led CAF to believe that it was to be funded for 2009-2010 and the finalization of the details would be a mere formality:

> The funding was originally meant to continue for two years but in the second year, 2008, there was an announcement that it was to continue into a third year to 2010. The Minister of Citizenship and Immigration, Diane Finlay [*sic*], made a public announcement on August 7, 2008 to this effect... It was certainly the basis upon which CAF operated. Both myself and Sara Amash, the project and program manager for CAF were led to believe that the funding for 2009-2010 would continue as previously approved and that it was merely a formality to finalize the details of the contract for that year.

14 In contrast, Lee Bartlett, Director of Operations for Settlement Services for the Toronto and York offices of CIC, attests in his affidavit, sworn September 22, 2009, that the breakdown of the $2,544,815 figure in the Minister's Press Release is made up of funding to CAF under both the LINC program and under the Immigration Settlement and Adaption Program [ISAP], as follows, none of which relates to LINC funding for 2009-2010:

	FY1 07/08	FY2 08/09	FY3 09/10	TOTAL
LINC	$1,045,782	$1,037,505	N/A	$2,083,287
ISAP	$ 130,804	$ 166,581	$164,179	$ 461,564

15 The total of the funding in Mr. Bartlett's chart is $2,544,851 - $46 greater than the Minister's announced funding for CAF. Nevertheless, I find that the Press Release could not have led CAF to believe that it had secured LINC funding for 2009-2010, as is alleged by Mr. Boudjenane. The reference to funding for 2009-2010 in the Press Release referred to ISAP funding. Mr. Bartlett was cross-examined on his affidavit and his evidence was unshaken that the figure did not include 2009-2010 LINC funding because no decision had been made to extend previous LINC agreements, nor had any such announcement been made at the date of the Press Release:

> In August 2008, not even a negotiation or even a call for proposals around an extension or even decisions around how we would extend LINC for 2009/10 had been made or announced, and the LINC agreement that was in place at the time of August for CAF ran for 2007/08 and 2008/09, whereas the ISAP agreement for CAF ran 2007/08 to 2009/10, inclusive.
>
> . . .
>
> [T]he Minister would not make an announcement that agreements had been reached around funding until such an agreement had been put in place....[I]t wouldn't have been possible for the Minister to have made an announcement around LINC for 2009/10 for CAF if we hadn't even — or CIC, sorry, hadn't even at that point set out the process for entering into further agreements, and equally hadn't received any proposal from CAF at that point in relation to the amounts that it would seek for LINC in 2009/10 for further agreements.

The Minister's Position on Government Funding

16 Alykhan Velshi, the Minister's Communications Director, attests in his affidavit, that since he began working for the Minister in 2007 (the Minister at that time was the Secretary of State for Multiculturalism), the Minister has held the view that the Crown should not be funding certain organizations:

> [W]hile private citizens and organisations are free to express their opinions, no individual or organisation is entitled to a financial subsidy from taxpayers. To that end, groups that promote hatred, including anti-Semitism, or excuse terrorism and violence should not receive any official recognition or subsidy from the state.

17 Mr. Velshi points to a number of public statements by the Minister in support of this assertion. For example, on February 17, 2009, at a conference in London, England, the Minister gave a speech in which he made the following statement:

> There are organisations in Canada, as in Britain, that receive their share of media attention and public notoriety, but who, at the same time as expressing hateful sentiments, expect to be treated as respectable interlocutors in the public discourse.
>
> . . .
>
> I think as well of the leader of the Canadian Arab Federation, who notoriously circulated an e-mail when my colleague, our shadow Foreign Minister, Bob Rae, was running for the leadership of his party, calling on people to vote against Mr. Rae because of Arlene Perly Rae's involvement in Canada's Jewish Community. The same individual, the same organisation, the Canadian Arab Federation, just last week circulated — including to all parliamentarians — videos which include propaganda, including the inculcation to hatred, of children by organisations such as Hamas and Islamic Jihad.
>
> These and other organisations are free within the confines of our law and consistent with our traditions of freedom of expression, to speak their mind, but they should not expect to receive resources from the state, support from taxpayers or any other form of official respect from the government or the organs of our State.
>
> [emphasis added]

18 A week later, on February 24, 2009, during Question Period, the Minister was asked about funding for certain organizations. The Member asking the question stated that "the Canadian Arab Federation recently circulated videos from banned terrorist organizations, such as Hamas and Islamic Jihad, called Israel a 'racist state', and attacked a member of the House because of his wife's involvement in the Jewish community." He then asked: "What is the government's position on whether such groups should receive taxpayer support?" The Minister responded: "[T]he Government of Canada should take a zero tolerance approach to organizations that make excuses for terrorism, for violence, for hatred and for anti-Semitism.... From our point of view, these groups do not deserve and have no right to taxpayers' dollars to promote their kind of extremism." The Minister expressed similar sentiments during radio interviews he gave on March 2, 2009, and March 6, 2009.

19 On March 10, 2009, at the Standing Committee on Citizenship and Immigration, the Minister outlined his reason for refusing to extend funding to CAF for 2009-2010:

> The very first day I arrived at Canadian Heritage as the secretary of state responsible for the multiculturalism program, I received a briefing on grants and contributions. I indicated to the officials that I wanted to ensure that we were not providing grants and contributions to organizations that make excuses for, or apologize for, violence or terrorism, or organizations that are terrorist or that promote hatred. I mentioned, in particular, Mr. Mohamed Elmasry

> of the Canadian Islamic Congress because of his remarks that Israelis over the age of 18 are legitimate targets for elimination.
>
> I further mentioned, in particular, Mr. Khaled Mouammar, president of the Canadian Arab Federation - this was a discussion I had with my officials in January 2007 - because of his circulation, during the 2006 Liberal leadership convention, of a flyer that attacked Bob Rae, a respected member of this Parliament, because of his wife's involvement in the Jewish community. Following the circulation of that flyer, Liberal Senator Yoine Goldstein referred to this flyer as "racist filth". It was my view then, and it's remained my view since, that we ought not to finance organizations that promote extremism or hatred - in this case, hatred toward Jewish people in particular - or who publicly support a banned, illegal terrorist organization.
>
> Mr. Mouammar has a long record of public comments expressing support for Hamas and Hezbollah, which are two banned, illegal, and essentially anti-Semitic terrorist organizations. He has referred to Israel as a racist state and he has called for the end of Israel as a Jewish state. In my judgment, these and other comments of his are beyond the pale.
>
> Do I suggest that we should have a test on political opinions for the office-holders of NGOs that receive grants and contributions? No, absolutely not. People are free to say what they like within the bounds of our laws. People are free to criticize cabinet ministers or the government. But I do not believe we have any obligation to provide subsidies to individuals who use their organizations as platforms to promote extremism or hatred or to apologize for terrorism.
>
> That's the view I articulated in January 2007 at Canadian Heritage. As a result, we provided no funding to these organizations. That's also the view I articulated recently at the London conference on anti-Semitism. I have also articulated this to my officials. I have asked my department to find ways in which we can include the promotion of hatred or apologizing for terrorism as some of the criteria used in considering applicants for grants or contributions.

The Minister's View of CAF

20 The Minister was clearly aware of CAF before he became Minister of CIC; however, he only became aware that CIC was funding CAF on February 2, 2009. Upon the Minister becoming aware, he emailed his Chief of Staff expressing his position on CAF and the funding agreement, as follows:

> ... I am unclear who in our office has the lead on settlement funding.
>
> In any event, please ask the Dept to bring forward complete information on the contribution embarrassingly approved by our government for the radical and anti-semitic [*sic*] Canadian Arab Federation

44

> This is the same group whose President attacked Bob Rae because his wife is jewish [*sic*], and who now is calling me a "professional prostitute" (I guess that's better than being an amateur!)
>
> I would like to know the status of their contribution agreement with CIC to see if they are in breach in any possible respect. I want to pursue all legal means to terminate this shameful funding arrangement, and to ensure that it is not renewed.
>
> [internet references omitted]

21 The decision under review does not set out the specific conduct or events that the Minister took into consideration in reaching his decision not to fund CAF. Alykhan Velshi, the Minister's Communications Director, testified that the statements relied on to reach the conclusion that CAF's statements "have included the promotion of hatred, anti-semitism [*sic*] and support of the banned terrorist organizations Hamas and Hezbollah," included the following six matters.

1. The Bob Rae Flyer

22 In 2006, during the Liberal Party Leadership Convention, CAF's President, Khaled Mouammar, using his personal email account, forwarded a leaflet that attacked Bob Rae and his wife for involvement in the Jewish community. The flyer was originally produced and emailed by a man who was not associated with CAF. The flyer contains the following text over a picture of Bob Rae:

> Bob Rae was a keynote speaker for the [Jewish National Fund of Canada], a group shown by Israeli scholars to be complicit in war crimes and ethnic cleaning.
>
> Rae's wife is a Vice President of the [Canadian Jewish Congress], a lobby group which supports Israeli Apartheid and Israel's illegal Apartheid Wall.
>
> President Carter has condemned Israeli Apartheid.
>
> Bob Rae supports Israeli Apartheid.
>
> Don't elect a leader who supports Apartheid!

23 The distribution of the Bob Rae Flyer to delegates was reported by Canadian Press: "Bob Rae was the target of anti-Semitic attacks during the Liberal leadership contest, motivated at least in part by the fact that his wife is Jewish." When contacted by Canadian Press, CAF denied producing or distributing the flyer but later issued a press release stating: "CAF believes that Canadians have a right to know the factual information provided" in the flyer.

24 Mr. Velshi testified that the Bob Rae Flyer formed part of the basis for the Minister's decision as it attacked Mr. Rae because of his wife's involvement in the Jewish community, and specifically

the Canadian Jewish Congress. In Mr. Velshi's view, the Bob Rae Flyer was anti-Semitic and thus a form of hatred.

2. Rallies in January 2009

25 In January 2009, CAF in conjunction with other organizations, organized several rallies where some protestors (who were not related to CAF) held offensive placards and shouted repugnant slogans. Some participants were seen holding signs equating Israelis to Nazis, some were screaming vulgarities like "Jewish child, you are going to fucking die. Hamas is coming for you. Fuck off." Hezbollah flags were flying in the background, and some signs likened Zionism to Nazism and terrorism.

26 It was during one of these rallies that Mr. Mouammar described the Minister, among others, as a professional whore of war:

> We have politicians who are professional whores who support the war [i.e. the Israel-Palestine conflict] as Norman Finkelstein said at that lecture at the University of Toronto. These are, these are people like Peter Kent across the street, like Jason Kenney, like Michael Ignatieff, who only had to say while Israel was murdering women and children with phosphorous bombs burning their fleshes, the only thing these, these, professional politicians; who are whores, whores of war, the only thing they had to say was that Israel had the right to defend itself by killing women and children with phosphorous bombs.

The Minister denies that this derogatory name calling triggered or played a part in his decision. Given that he had made statements regarding government funding to CAF as early as 2007, there is no reason to question his assertion.

3. The 2007 Cairo Conference

27 Ali Mullah, Vice President of CAF at the time, attended the Cairo Conference, which described itself as an "international peace conference." It was attended by many people with different backgrounds, including some Jewish participants. The conference was also attended by delegates from Hamas, Hezbollah, Jemaah Islamiyya, and the Palestine Liberation Front - four organizations on Canada's list of terrorist organizations. Although it was reported that CAF had sent Mr. Mullah as its delegate, it was later confirmed that he attended in his personal capacity, and not as a representative of CAF.

4. Distribution of Links from Terrorist Organizations

28 On February 2, 2009, the Minister became aware that CAF, in its Daily Gaza Bulletin and its webpage, had links to web sites that featured videos with images of Hamas operatives undergoing training and which depicted flags of Hamas and Islamic Jihad. CAF asserts that it never endorsed

46 the contents of the videos in the links it posted and transmitted; rather it simply directed readers to facts so that they could form their own opinions on the issues.

5. Honouring Zafar Bangash

29 CAF, at its 40th Anniversary Gala, honoured Zafar Bangash, who is otherwise not affiliated with CAF. Mr. Bangash has referred to Canadians as "infidels or non-believers" in the past and reported on the September 11 attacks in a way that was unsympathetic to the victims.

6. Essay Contest

30 CAF sponsored an essay contest (with two other organizations) on the "ethnic cleansing" of Palestine. The timing of this contest coincided with the 60th anniversary of the establishment of Israel as a state. The Minister contends that the use of the term "ethnic cleansing" assumes that Jewish people are engaged in genocide and constitutes anti-Semitism.

31 Collectively, these six incidents formed the basis for the Minister's decision.

CAF Requests to Meet with the Minister

32 On March 2, 2009, the President of CAF wrote to the Minister requesting a meeting:

> It is important that CAF's working relationship with you and the Ministry of Immigration is based upon mutual respect and proactive outreach on both sides to the benefit of Arab Canadian communities on the whole. CAF is therefore requesting a meeting with you in the presence of other concerned Arab Canadians. This meeting will be a great opportunity to enhance and strengthen our working relationship.

The Minister did not respond.

33 The letter does not indicate why it was sent at that time; however, it is noteworthy that it was sent two weeks following the Minister's speech in London where he said, with reference to CAF and others, that while they are at liberty to engage in free speech within the law, "they should not expect to receive resources from the state, support from taxpayers or any other form of official respect from the government or the organs of our state."

34 It is against this backdrop that the following issues arise.

Issues

35 The six issues raised by CAF in its written memorandum can be collapsed and addressed within a discussion of the following four questions:

a. Did the Minister owe CAF a duty of procedural fairness, and if so, was it breached?

b. Is the Minister's decision not to enter into a funding agreement with CAF under the LINC program tainted by a reasonable apprehension of bias?

c. Was CAF's section 2(b) *Charter* right to freedom of expression engaged, and if so, was that right infringed, and, was the infringement justified?

d. Was the Minister's decision reasonable?

1. Did the Minister owe CAF a duty of procedural fairness?

36 CAF submits that the Minister owed it a duty of fairness because:

1. A duty of fairness is imposed on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual: *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.), at 653 [*Cardinal*];

2. CAF had received funding for the LINC program without any issues for twelve consecutive years;

3. CAF had a legitimate expectation that funding would be renewed because of its history with CIC and because the contract for 2009-2010 had been negotiated and was awaiting final approval; and

4. Final approval had historically been a formality after the contract's terms had been negotiated and the Minister rarely intervened at any stage.

37 The Minister submits that no duty of fairness was owed to CAF because:

1. The relationship between CAF and CIC was purely contractual in nature and no duty of fairness is owed by the government when it is exercising its contractual rights in the same manner as an ordinary citizen: *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 (S.C.C.) at paras 103-104, [2008] 1 S.C.R. 190 (S.C.C.) [*Dunsmuir*];

2. The funding period under the last executed agreement between CIC and CAF for the provision of LINC services expired on March 31, 2009, no new agreement had been executed, and CAF was specifically advised that approval could not be taken for granted; and

3. There is no obligation on CIC to enter into a new agreement with any party, or to renew an existing agreement that is set to expire, merely because it is a government institution.

38 The following provides the reasons for my conclusion that the Minister did not owe a duty of procedural fairness to CAF. In summary, it is because the nature of the relationship was

48

strictly commercial. There is no statutory provision that imposes procedural fairness obligations in relation to contribution agreements, nor is there any contractual provision set out in the call for proposals or the contribution agreements themselves that stipulates that service provider organizations will be treated in a procedurally fair manner. Finally, according procedural rights in what is essentially a strictly commercial context would unduly burden the Minister, particularly where the window for making a decision is short and there are greater public policy considerations which the Minister must weigh. In such a context, the parties' rights are best protected by a reviewing court's assessment of the reasonableness of the decision, not by extending procedural rights where none would otherwise exist.

39 When determining whether a duty of procedural fairness applies to the decision under review, one must first determine the nature of the relationship between the affected person and the public authority.

40 In *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.), at 669, the Supreme Court, relying upon the decision of Justice LeDain in *Cardinal* at 653, stated that whether the duty of fairness exists will be dependant upon "the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights."

41 In *Dunsmuir* at para 114, the Supreme Court noted an exception to this broad statement of principle [the *Dunsmuir* exception]. *Dunsmuir* involved the dismissal of an employee from his employment with the province:

> The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law.
>
> [emphasis added]

42 CAF submits that the *Dunsmuir* exception does not apply to the relationship between CAF and CIC. CAF relies on the Supreme Court of Canada's decision in *Mavi v. Canada (Attorney General)*, 2011 SCC 30, [2011] 2 S.C.R. 504 (S.C.C.) [*Mavi*] for the proposition that the *Dunsmuir* exception to the duty of fairness was intended to be narrow and specific to the employment context and therefore does not apply to this case. In particular, the Supreme Court in *Mavi* held, at para 51, that:

> The situation here does not come close to the rather narrow *Dunsmuir* employment contract exception from the obligation of procedural fairness. As the *Dunsmuir* majority itself emphasized:
>
> > This conclusion does not detract from the general duty of fairness owed by administrative decision makers. Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law.
> >
> > [Emphasis added; para. 82.]
>
> *Dunsmuir* was not intended to and did not otherwise diminish the requirements of procedural fairness in the exercise of administrative authority.
>
> [emphasis in original]

43 In my view, the *Dunsmuir* exception is not as narrow as CAF submits. I find support for this view in the decision of the Federal Court of Appeal in *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488 (F.C.A.) [*Irving Shipbuilding*], wherein Justice Evans for the Court and with reference to *Dunsmuir*, stated at para 60 that the *broader point* made in that case "is that when the Crown enters into a contract, its rights and duties, and the available remedies, are generally to be determined by the law of contract." I also agree with Justice Evans' statement at para 45 that "[t]he common law duty of fairness is not free-standing but is imposed in connection with the particular scheme in which the impugned administrative decision has been taken."

44 In *Mavi*, unlike in *Irving Shipbuilding*, while the parties' relationship was governed by a contract, it was also inextricably rooted in statute, as was noted by the Court at para 2:

> The present proceedings were initiated by eight sponsors who denied liability under their undertakings. As will be explained, the undertakings are valid contracts but they are also structured, controlled and supplemented by federal legislation. The debts created thereby are not only contractual but statutory, and as such their enforcement is not exclusively governed by the private law of contract. The issue raised by this appeal is the extent to which, if at all, the government is constrained by considerations of procedural fairness in making enforcement decisions in relation to these statutory debts.
>
> [emphasis added]

In my view, the fact that the contracts were grounded and rooted in statute distinguishes *Mavi* from *Irving Shipbuilding* and from this case. The undertakings in *Mavi* were not of a strictly contractual nature. In fact, the Supreme Court in *Mavi* distinguished *Dunsmuir* on this basis, stating at para 47:

50

> The Attorneys General resist the application of a duty of procedural fairness in part on a theory that the claims against the sponsors are essentially contractual in nature. *Dunsmuir*, they say, stands for the proposition that procedural fairness does not apply to situations governed by contract. However, in this case, unlike *Dunsmuir*, the governments' cause of action is essentially statutory.
>
> [emphasis added]

45 Unlike in *Mavi*, one cannot say that the relationship of the parties in this case is "structured, controlled and supplemented by federal legislation," or that the cause of action is essentially statutory. The Settlement Manual — a guidebook given to settlement officers for evaluating applications for funding — states that "[w]ith the establishment of the Department of Citizenship and Immigration in 1950, the federal government made provisions in its Annual Estimates for payments to not-for-profit organizations in order to provide settlement services to immigrants in Canada." These settlement programs fall within the *Act's* objectives in section 3, most particularly the objective "to promote the successful integration of permanent residents into Canada." The parties have not pointed to any other statutory provision relevant to LINC funding. Accordingly, there is no statutory provision governing procedural fairness in relation to the possible extension of the term of an existing contribution agreement.

46 In this case, the parties were in a purely contractual relationship at the time the Minister made his decision. CAF was a party to a LINC funding contract with CIC, ending March 31, 2009. There was no provision in that contract for the automatic renewal or extension of that term. However, as a consequence of that contractual relationship, CAF was invited to submit a proposal for an amendment to the contract to extend its term for one year. CAF was informed that its contract with CIC would be extended to March 31, 2010, subject to an application being submitted and "approved." Despite the negotiations for 2009-2010 having been completed, the fact remains that no contract for funding for 2009-2010 had been approved or executed, and it had been made clear to CAF in both the *Guidelines for Amendments: Language Instruction for Newcomers to Canada (LINC) 2009-2010*, and subsections 4.6 and 12.5 of the 2007-2009 contribution agreement, that it should not expect any additional funding beyond March 31, 2009, until it was notified in writing that the application for an amendment to extend the term of the existing contract had been approved.

47 There was nothing in the documents sent to CAF that committed CIC to amend the existing contract. The letter from CIC indicating that the contract term of CAF's existing contribution agreement could be extended is akin to a request for the submission of a proposal and, as was held in *Irving Shipbuilding*, arguably creates a contract when the recipient responds. In this case, that contract contains no express promise that parties responding will be treated in a procedurally fair manner.

48 CAF points out that there was nothing in the document package to indicate that organizations that were considered by the Minister to be anti-Semitic or supporters of terrorism would not be granted a contract extension. Equally there was nothing in the package that indicated that approval by the Minister would be automatic even if his officials were otherwise satisfied with the proposal.

49 Accordingly, to the extent that the parties' relationship was a commercial and contractual relationship, there is nothing in the record that suggests that there was any obligation on the Minister to engage with CAF about his concerns prior to making his decision not to extend the existing contract's term. There is neither a statutory or contractual basis on which this Court can impose on a duty of procedural fairness on the Minister.

Implied Duty of Fairness

50 The question remains whether there is any implied duty of procedural fairness. I find that there is no implied duty in this case for many of the reasons the Court found that there was no implied duty of fairness in *Irving Shipbuilding*.

51 First, this is essentially a commercial relationship, notwithstanding the fact that the service provider makes no profit from the agreement. As Justice Evans stated at para 46 of *Irving Shipbuilding*: "It will normally be inappropriate to import into a predominantly commercial relationship, governed by contract, a public law duty developed in the context of the performance of governmental functions pursuant to powers derived solely from statute."

52 Second, if CAF is awarded procedural rights in this context, it would open the door to every failed applicant for a contribution agreement being entitled to at least notification that their proposal was not going to be accepted and an opportunity to address the reasons why. Such an obligation on the Minister would unduly delay his decisions in a process when, as in this case, the time for a decision is short. Further, it opens the door to what Justice Evans called a "cascading array of potential procedural rights-holders." Where there are more persons seeking funding than funds available, any change in decision by the Minister leads automatically to a subsequent failed applicant. If procedural fairness is extended to the initial failed applicant, the same safeguards must be extended to the subsequent failed applicants.

53 Third, as was submitted by the Minister, a decision on funding settlement programs for newcomers to Canada involves broader public policy considerations; there is more at stake than just the relationship between the service provider and CIC. Those who enrol in the LINC program are to be orientated to the Canadian way of life and therefore the suitability of the program provider is critical. The question of whether a particular organization is best suited to act as a beacon of Canadian values in the provision of settlement services (even when its second-language training program is otherwise fully acceptable), is not something subject to judicial review on procedural grounds. The Applicant's interests - to the extent that they have interests at all - are protected

52 from capricious decision-making under the reasonableness standard, not by affording it procedural fairness.

54 Even if the nature of the relationship between CIC and CAF was other than that of a commercial contract, and even if the *Dunsmuir* exception was read to apply as narrowly as CAF submits, I nevertheless would have found that CAF does not have a right, privilege, or interest that is affected by the decision sufficient to impose a duty of fairness on the Minister.

55 The Supreme Court held in *Cardinal* that a duty of fairness is imposed on every public authority making an administrative decision which is not of a legislative nature and which affects the *rights, privileges or interests* of an individual. This language was tracked in the Supreme Court's decision in *Knight*, when it stated that the effect of the decision on the individual's rights is a factor to be considered when determining whether a duty of fairness applies. In *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (S.C.C.) [*Wells*], the Supreme Court again reaffirmed the concept that a right, interest, or privilege must be engaged before a duty of fairness will be imposed, when at 224, it said that "[t]here is no vested interest at stake causing a duty of fairness to arise (*Knight*, *supra*). The respondent did not show any basis on which he could have formed a reasonable expectation to be consulted in the process."

56 Although the Court's comments in *Wells* were directed towards the issue of procedural fairness in the context of reappointment of a public official following lawful termination, the message is still instructive — there must be some valid interest that stands to be affected by the decision for there to be a duty of fairness owed. Here, CAF (or any other service provider organization for that matter) does not have a right to LINC funding. While the Minister conceded that there may be indirect benefits to CAF as a result of the contribution agreements such as increased legitimacy of the organization as a result of its contractual relationship with the government, or the sharing of infrastructure costs with CAF's other operations, I find that these are not sufficient privileges or interests so as to engage an obligation of fairness.

57 If the added legitimacy resulting from the very act of contracting with the government is a sufficient interest to impose procedural fairness obligations, virtually every party that contracts with the government in any fashion will suddenly acquire procedural rights. Furthermore, part of the reason that the Minister decided not to continue to fund CAF was because he did not think it was appropriate for the government to appear to support, endorse, or legitimize an organization that might be viewed as anti-Semitic or that might support terrorism.

58 The sharing of infrastructure costs is similarly not a sufficient interest to impose an overarching duty of fairness on the Minister. In this case, the actual financial benefit to CAF cannot be significant — it was already renting a separate building for its other operations and the majority of the LINC staff played no additional role in CAF's other operations. Furthermore, funding for the LINC program was provided on a cost-recovery basis for recoverable expenses related to the

LINC program only. This effectively limited the extent to which costs unrelated to the program could be reimbursed. On the other hand, as I have already indicated, imposing a duty of fairness on the Minister would significantly constrain his ability to expeditiously make broad, policy-based decisions. Any incidental interest CAF may have had was heavily outweighed by the public's interest in a Minister with the discretion to make decisions swiftly, instead of one who is paralyzed by procedure.

59 For these reasons, I find that CAF was not entitled to procedural fairness in the Minister's decision not to accept their proposal and extend the term of its contribution agreement with CIC under the LINC Program.

Content of the Duty of Fairness

60 Had I found that it was entitled to procedural fairness, I would have found that this case attracts no more than minimal procedural protections and that those requirements were met. The five factors set out in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), which the Court is to consider when determining what procedural rights the duty of fairness requires in a particular context, all point to such a conclusion.

61 The decision not to approve an extension of CAF's LINC funding is not close to judicial decision-making. It is discretionary and purely administrative. Although there is no appeal from such a decision, there is no impediment to CAF applying in the future for funding and this, in my view, points to a lower duty of fairness.

62 Despite the fact that LINC funding comprised roughly 74 percent of CAF's annual budget, the LINC funding was not critical to CAF's operations as the provision of LINC training was not within its main mandate nor did the contribution agreements generate income for CAF's activities as funding was provided on a cost recovery flow-through basis. CAF had no legitimate expectation that the contract extension would be provided. In fact, it was aware from the Minister's statements that funding was in jeopardy. Further, CAF had no legitimate expectations in the process - on the contrary, CAF was explicitly told not to expect approval until it was notified in writing and similarly, not to incur any expenses or hire any staff until final approval was received. Despite approval appearing to be a formality in years past, it does not change the fact that the Minister always had ultimate discretion.

63 Lastly, the choice of procedure used by CIC and the requirement of the Minister's approval given the value of the contract, are left to the Minister. All of these factors indicate that minimal procedural protections would have been appropriate in this case.

64 Had it been entitled to fairness, in my view, the following are the procedural rights CAF would have been entitled to receive: (1) to know the reasons why the Minister did not approve its proposal, (2) to know the Minister's concerns regarding it and the fact that those concerns could

54

lead to it not being approved for future funding, and (3) to be given an opportunity to respond to those concerns.

65 Here, a letter was provided to CAF outlining the Minister's reasons for his decision. The Minister submits that the other two elements are also satisfied. He says that CAF was aware of his concerns and it had the opportunity to respond to them. The notification and response, he says, were the numerous public statements he and CAF officials made.

66 The Minister made many public statements detailing the specific statements and activities of CAF that he says he considered when making the decision. He also made it clear that CAF's LINC funding was in jeopardy as a result of those statements and activities. Further, CAF was aware of the Minister's specific concerns, it addressed them, and offered its response in various statements and press releases. In a radio interview on February 17, 2009, nearly a month before the decision, the interviewer put directly to Mr. Mouammar that the Minister was "poised to slash federal funding to Canada's largest Arabic group" because "groups whose leaders say intolerant or hateful things should not get taxpayers' funding." Mr. Mouammar responded:

> It does not belong to Jason Kenny [*sic*], and it's up to Canadian taxpayers to decide who gets this money to provide such settlement services, not Jason Kenny [*sic*]. His approach is really a fascist approach. He is threatening people that you cannot criticize government policies, and if you do, you are therefore banned from receiving funding from settlement services, which are not under his jurisdiction, because as I said, this is taxpayers' money.

67 No authority was provided for the proposition that public statements provide notice of the sort required to satisfy the duty of procedural fairness. However, I can see no principled basis to reject the adequacy of notice through public statements provided they are sufficiently detailed, the receiving party is made aware of them, and the receiving party provides a response. In this case, I find all of the requirements were satisfied and the notice was adequate.

68 I cannot see how the fairness of the decision-making process would have been enhanced had the Minister sent a formal notice to CAF detailing the very statements and concerns he had publicly expressed, and given it an opportunity to respond. The function of notice had clearly been served as evidenced by Mr. Mouammar's response during the February 17, 2009 interview. Further, it is not suggested by CAF that it could have or would have offered a response that differed from the public response it had given.

69 In my view, CAF was aware of the Minister's concerns and the possible result. CAF responded publicly to those concerns. The Minister had CAF's public responses before him when he made his decision. The three elements required by the duty of fairness were therefore satisfied in these unique circumstances. Had I found otherwise, on these facts, I would have found the breach to have been a technical, inconsequential breach, and the result unlikely to have been different in

light of the parties' public discourse. For those reasons, I would not have exercised my discretion to award CAF a remedy.

2. Was the Minister's Decision Tainted by a Reasonable Apprehension of Bias?

70 Regardless of whatever else the duty of fairness may require in terms of procedural protections, where fairness applies, the decision maker must in all cases be impartial and free from a reasonable apprehension of bias. Because I have found that no duty of fairness applied here, I need not explore whether the decision was tainted by a reasonable apprehension of bias. However, should a reviewing court determine that fairness did apply, I shall provide my assessment of CAF's allegations of bias.

71 The test to be applied in determining whether an administrative decision-maker is biased will vary depending on the nature of the decision-making body: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.), at 637-640 [*Newfoundland Telephone*].

72 The Ontario Court of Appeal in *Davis v. Guelph (City)*, 2011 ONCA 761 (Ont. C.A.) at para 71, (2011), 345 D.L.R. (4th) 1 (Ont. C.A.), summarized how to determine the appropriate test for bias:

> At the adjudicative end of the spectrum, the traditional "reasonable apprehension of bias" test will apply in full force. At the other end of the spectrum, however - where the nature of the decision is more of an administrative, policy or legislative nature - the courts have held that a more lenient test, known as the "closed mind" test is applicable. [references omitted]

73 Additionally, the Supreme Court of Canada stated in *Cie pétrolière Impériale c. Québec (Tribunal administratif)*, [2003] 2 S.C.R. 624 (S.C.C.), at 646-647 that:

> The appellant's reasoning thus treats the Minister, for all intents and purposes, like a member of the judiciary, whose personal interest in a case would make him apparently biased in the eyes of an objective and properly informed third party. This line of argument overlooks the contextual nature of the content of the duty of impartiality which, like that of all of the rules of procedural fairness, may vary in order to reflect the context of a decision-maker's activities and the nature of its functions.
>
> [emphasis added]

74 CAF submits, without analysis, that the appropriate standard is a reasonable apprehension of bias and not the closed mind test. The Minister says that this was a policy driven decision - he exercised a broad discretion, weighed competing interests, and made a decision respecting a commercial relationship - and therefore the higher standard of a closed mind is appropriate.

56

75 I agree with the Minister that the closed mind test is the appropriate standard by which to judge his decision because the Minister is a democratically elected official and this particular decision comes in the context of the administration of the *Act*. The question to be asked is whether the Minister had prejudged the matter "to the extent that any representations at variance with the view, which has been adopted, would be futile:" *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 (S.C.C.), at 1197. For the following reasons, I find that the Minister's mind was closed.

76 The Minister says that he did not make up his mind until March 18, 2010, and he was impartial when he rendered his decision. The Court was pointed to comments he made in numerous radio interviews leading up to the decision, including the following:

> a. In an interview on March 2, 2009 the Minister made clear to the host that he had not yet made a decision; and
>
> b. The Minister stated in an interview on March 14, 2009 that if the character of CAF were to change and there was to be new leadership that was more in keeping with Canadian values, he would be"...entirely comfortable with [CAF] being a service delivery partner."

77 The Minister submits that while he expressed strong opinions prior to the decision, these statements did not indicate that his position could not be dislodged. He reminds the Court that in *Newfoundland Telephone*, the Supreme Court of Canada stated at 639 that "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."

78 However, the Minister's public statements are only part of the evidence that must be examined to determine whether he had a closed mind regarding CAF. Private statements are often more indicative of a person's true state of mind, than public statements. This may be especially true of political figures.

79 I agree with CAF that particularly telling is the Minister's February 2, 2009 email in which he requests "information on the contribution agreement *embarrassingly* approved by our government for *the radical and anti-semitic [*sic*] Canadian Arab Federation.*" He goes on to say that he wants "*to pursue all legal means to terminate this shameful funding arrangement, and to ensure that it is not renewed."* [emphasis added]

80 Any reasonable person reading this would conclude that the Minister had made up his mind about the issue of future funding for CAF; his only interest was in pursuing the means to reach his end goal of terminating the relationship CIC had with CAF.

81 I conclude, despite the Minister's public statements and assertions to the contrary, that his private actions revealed that he would not truly consider CAF's submissions - that any efforts by CAF short of changing its leadership were futile. His mind was closed.

3. Was CAF's Freedom of Expression Infringed?

82 There is no doubt, and it was undisputed by the Minister, that CAF's advocacy activities are protected expression. Additionally, the expression surrounding the LINC program is also protected. Nevertheless, I find that CAF's freedom of expression was not infringed.

83 The Supreme Court of Canada in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673 (S.C.C.) [*Baier*], set out how one determines whether a right claimed is a positive entitlement to a particular platform or benefit, or a negative right to be free from government restraint. The claim is a positive entitlement claim if the government has to legislate or otherwise act to support or enable an expressive activity; the claim is a negative rights claim if what is being sought is freedom from government restriction on activity that people would otherwise be free to engage without any need for government support or enablement.

84 CAF contends that by cancelling its LINC funding, the Minister restricted its expression surrounding the Israel-Palestine conflict and therefore, that this is a standard negative rights freedom of expression claim. CAF is asking that the Minister be restrained from restricting expression in which it would otherwise be free to engage. The Minister contends that this is a positive rights claim because CAF is seeking positive entitlement to funds for its LINC program and by extension, its expression.

85 I agree with the Minister that this is a positive rights claim for three reasons.

86 First, only the expression through the LINC program is engaged by the decision to cut funding. There is no link between the discontinuation of funding for LINC training and CAF continuing its advocacy surrounding the Israel-Palestine conflict. The funding provided by the contribution agreement was intended only for expenses related to the LINC program, and for no other purpose. CAF was reimbursed only for eligible costs actually incurred in carrying out the services during the term of the contract - the funds were not provided to be used at CAF's discretion. It is notable that CAF's LINC contract was not terminated as a consequence of its speech, it was merely not extended. Further, CAF's other contribution agreement for ISAP continued. In addition, the LINC program was run by CAF's Settlement Services branch which is entirely separate from its advocacy branch. The two were essentially wholly independent, even operating out of entirely separate geographic locations. These factors demonstrate the separation between CAF's LINC operation and its advocacy operation.

87 Second, the LINC program is a platform that the government created. Since access to the LINC program requires enablement by the government, this points to a positive rights claim.

88 Third, *Baier* makes clear that a claim does not become a negative rights claim simply because the applicant historically had access to the platform of expression prior to the legislation or decision to disentitle the applicant. In this case, CAF's access to the LINC program for 12 years prior to the Minister's decision does not automatically convert the claim into a negative one. The Court in *Baier* said that "to hold otherwise would mean that once a government had created a statutory platform, it could never change or repeal it without infringing s. 2(b) and justifying such changes under s. 1."

89 *Baier* held that an applicant must establish the following factors to successfully claim a positive entitlement under s. 2(b) of the *Charter*:

> 1. The claim is grounded in a fundamental freedom of expression rather than in access to a particular statutory regime;
>
> 2. The claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with s. 2(b) freedom of expression, or has the purpose of infringing freedom of expression under s. 2(b); and
>
> 3. The government is responsible for the inability to exercise the fundamental freedom.

90 In *Baier*, legislation was passed that disqualified school employees from running for positions as school trustees of any school board unless they went on a leave of absence and resigned from their positions as teachers if elected. The Alberta Teachers Association alleged that this was an infringement of the employees' freedom of expression. It argued that the role of a school trustee was a unique platform for advocacy surrounding educational issues and therefore constituted a fundamental freedom.

91 The Court rejected this characterization saying that "claiming a unique role is not the same as claiming a fundamental freedom. The appellants' claim, as they have articulated it, is grounded in access to the particular statutory regime of school trusteeship" (at para 44). Similarly, CAF's access to LINC funding is a particular platform created by the government, not a fundamental freedom.

92 The Court in *Baier* also stated that even if eligibility for trusteeship was a fundamental freedom, removing eligibility was not a substantial interference with freedom of expression because even without the position, teachers could still engage in advocacy surrounding educational issues. This is analogous to CAF's situation: even without access to the LINC program, CAF can still engage in, and has still engaged in, its advocacy surrounding the Israel-Palestine conflict. Discontinuing LINC funding has not created an "inability" to engage in expression or substantially interfered with CAF's expression.

93 In summary, there is no positive entitlement to funding because the right to administer the LINC program is not grounded in a fundamental freedom. There is also no substantial interference with CAF's advocacy efforts because CAF has continued to express its ideas surrounding the Israel-Palestine conflict despite not receiving funding for LINC training.

94 Having found that there is no breach of s. 2(b) of the *Charter*, it is unnecessary for me to conduct a section 1 analysis.

4. Was the Minister's Decision Reasonable?

95 There is no jurisprudence on the applicable standard for reviewing a decision (Ministerial or not) to reject a funding request under the LINC program. After undertaking the analysis set out in *Dunsmuir*, I determine the applicable standard of review to be reasonableness. The factors to be considered are: (i) the existence of a privative clause, (ii) any special expertise of the decision-maker, and (iii) the nature of the question being decided.

96 First, there is no privative clause at play and thus there is no reason to extend to the Minister any added deference.

97 Second, one could argue that the Minister has no particular expertise that is relevant to the determination of whether or not funding should be granted to CAF for administering the LINC program, and therefore little deference is required. However, the Minister is an elected official making a decision in the administration of the *Act* that involves broader policy considerations and therefore he should be granted deference by virtue of his position. This factor points to a reasonableness standard of review.

98 Third, the nature of the question being decided also points to reasonableness. In this case, this is a policy-driven commercial decision made with the intent of giving effect to the broad purposes of the *Act*. There is no question of law central to the importance of the legal system. Therefore, much deference is owed.

99 Accordingly, the applicable standard in this case is the reasonableness standard. The fact that this is a broad policy-based decision by an elected official warrants a high degree of deference for his decision.

100 The reasonableness standard of review requires only that the Minister's decision fall within a range of reasonable outcomes to avoid being overturned.

101 In assessing whether the decision falls within that range, one must first correctly determine what is being assessed. The parties differ in their characterization of the Minister's decision. CAF submits that the Minister's decision is that CAF is anti-Semitic and supports terrorist organizations and it is that decision which is unreasonable. The Minister submits that he decided not to distribute

60

finite resources to fund CAF because it is not an appropriate service provider organization as it *appears* to be engaged in extremism contrary to Canadian values, and that decision was reasonable.

102 In the March 18, 2009 letter, it is stated that the Minister decided not to renew CAF's funding, because:

> Serious concerns have arisen with respect to certain public statements that have been made by yourself or other officials of the CAF. These statements have included the promotion of hatred, anti-semitism [*sic*] and support for the banned terrorist organizations Hamas and Hezbollah.
>
> The objectionable nature of these public statements — in that they appear to reflect the CAF's evident support for terrorist organizations and positions on its part which are arguably anti-Semitic — raises serious questions about the integrity of your organization and has undermined the Government's confidence in the CAF as an appropriate partner for the delivery of settlement services to newcomers.
>
> [emphasis added]

103 Based on the express wording of the decision letter, I agree with the Minister's characterization of the decision. The question that must be addressed is whether or not it was reasonable to not continue funding CAF's LINC program because it is an organization that *appears to* be anti-Semitic and support terrorist organizations. I find that the Minister's decision in this case falls within the range of reasonable outcomes.

104 CAF filed many affidavits from academic scholars, legal professors, Jewish advocacy groups, and people who have worked closely with CAF, stating that they have never witnessed anti-Semitism, promotion of hatred, or support for terrorism from CAF. While this evidence is compelling, it must be considered in light of the conflicting opinion and evidence in the record on the question of what constitutes anti-Semitism and evidence of how other Canadians have perceived CAF's actions. The only thing that is clear from the record is that there is no consensus.

105 The Court is not required to resolve the question of what constitutes anti-Semitism because the Minister did not say that CAF is anti-Semitic, rather he said that public statements made "*appear to reflect* the CAF's evident support for terrorist organizations and positions on its part which are *arguably* anti-Semitic." The Minister does not have to prove that CAF is anti-Semitic, only that they could appear to be anti-Semitic. There is an abundance of evidence in the record to show that, although many do not consider CAF's actions to be anti-Semitic, including people of Jewish ethnicity, there are many others that hold the opposite view, including a former CAF president. In this context, it is especially important to be deferential to the Minister's decision.

106 With respect to the six specific matters relied on by the Minister, it is submitted by CAF that it did not authorize them, the persons involved were not officially representing CAF at the time, or the actions and content were not endorsed or approved of by CAF. In many cases, this defense ignores the maxim that "one is known by the company one keeps." Quite simply, CAF cannot completely disassociate itself from the content of web links it includes in its materials, or from comments, distribution of materials, or attendances at meetings and conferences by its executive.

107 All of the statements and actions raised by the Minister can, in my view, reasonably lead one to the view that CAF *appears* to support organizations that Canada has declared to be terrorist organizations and which are *arguably* anti-Semitic. Aside from the Minister himself reaching this view, the record is replete with news articles and statements of others to the same effect, all of which support that it was not unreasonable for the Minister to reach that conclusion.

108 The decision, for these reasons, falls within the scope of reasonableness, as described in *Dunsmuir* at para 47.

Costs

109 The Minister is entitled to his costs. If the parties cannot reach an agreement on quantum, they are to advise the Court within 30 days of this decision. The Minister shall provide his written submissions on costs, not exceeding ten (10) pages, within ten (10) days thereafter, and CAF shall have twenty (20) days from receipt of the Minister's submissions to provide its written response.

Judgment

THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed; and

2. Costs are awarded to The Minister of Citizenship and Immigration.

Application dismissed.

2005 FC 374, 2005 CF 374
Federal Court

Deh Cho First Nations v. Canada (Minister of Environment)

2005 CarswellNat 1868, 2005 CarswellNat 736, 2005 FC 374, 2005 CF 374, [2005] F.C.J. No. 474, 138 A.C.W.S. (3d) 33, 13 C.E.L.R. (3d) 27

Grand Chief Herb Norwegian, the Deh Cho First Nations, Lliidli Koe First Nation, Fort Simpson Metis Nation Local 59, Pehdzeh Ki First Nation, T'Thek'Ehdeli Ki First Nation, Ka'A'Gee Tu First Nation and Sambe K'E Dene Band (Applicants) and Her Majesty The Queen In Right of Canada as represented by the Minister of Environment, the Attorney General of Canada, Imperial Oil Resources Ventures Limited, The Inuvialuit Regional Council, The Inuvialuit Game Council, The Sahtu Secretariat Incorporated and Gwich'In Tribal Council (Respondents)

Hargrave Prothonotary

Heard: March 11, 2005
Judgment: March 15, 2005
Docket: T-1686-04

Counsel: Mr. Gregory J. McDade, Q.C., Ms Michelle Ellison for Applicants
Mr. Kirk N. Lambrecht, Q.C. for Respondent, Her Majesty the Queen, Attorney General of Canada
Mrs. Mary Comeau for Respondent, Imperial Oil Resources Venture Ltd.
Mr. Brian Crane for Respondent, The Sahtu Secretariat Incorporated and Gwich'In Tribal Council
Mr. Darin Hannaford for Respondent, Inuvialuit Regional Council and Inuvialuit Game Council

***Hargrave Prothonotary*:**

1 These reasons arise out of a motion for a broad range of documents from a tribunal, pursuant to Federal Court Rule 317, the tribunal making the decision at issue being the Minister of the Environment. The documents sought bear on a decision to establish a Joint Review Panel to undertake an environmental impact assessment in connection with a proposed MacKenzie Valley gas pipeline (the "pipeline"). Some 40% of the proposed pipeline would run through the traditional territory of the Applicants, who make up the Deh Cho First Nations.

2 The motion is of interest for while the decision under review was made 3 August 2004, the decision has roots in events going perhaps back to about 2000, involving various drafts of agreements, agreements, frameworks by which to proceed and a cooperation plan, culminating in the decision under review. The basic reason for this judicial review proceeding is the view of the Deh Cho First Nations that not only were they not properly consulted, but also they were discriminated against, but that is for another day. I will now turn to some less contentious relevant background.

Some Relevant Background

3 The MacKenzie Gas Pipeline Project involves, among other things, a natural gas field in the MacKenzie Delta region. This proceeding involves a decision as to the assessment of the environmental impact of the pipeline, running from the MacKenzie Delta, along the MacKenzie River, to the Alberta border, where it will connect with an existing south bound natural gas pipeline system, overall a very substantial project.

4 Given the number of environmental assessment regimes applicable in the Northwest Territories the various regulatory agencies and assessment authorities have worked, since about 2000, to harmonize the multiple assessments required into one overall assessment. This harmonization process resulted in a June 2002 *Cooperation Plan for the Environmental Impact Assessment and Regulatory Review of the Northern Gas Pipeline Project Through the Northwest Territories* (the "Cooperation Plan"). The Cooperation Plan was not in itself a decision, but an outline of how the parties, some 15 entities, would coordinate their response to any future proposal to build a MacKenzie Valley pipeline. There followed a Regulators' Agreement, for coordination of the regulatory review of the MacKenzie Gas Project of 22 April 2004, a Joint Review Panel Agreement of 3 August 2004, and Joint Review Panel Terms of Reference of August 2004. Interspersed among these various documents were drafts of an Agreement for an Environmental Impact Review of the MacKenzie Gas Project, draft number 1 in September 2002, number 2 in December 2003, number 3 in July 2004 and a final version 18 August 2004, accompanied by the final terms of reference for the environmental impact statement for the MacKenzie Gas Project.

5 As I have already indicated the Minister of the Environment established the Joint Review Panel, by a decision of 3 August 2004. However the Applicants say they were excluded from the formal part of all of this, although there was a good deal of correspondence between the Grand Chief, from time to time, of the Deh Cho First Nations, on the one hand and the Minister of the Environment and his officials, on the other hand, with the Deh Cho First Nations only becoming aware that the agreement, the subject of this review, on 18 August 2004, when it was released to the public.

6 The Deh Cho First Nations, who historically are said to have occupied a territory in the southwestern part of the Northwest Territories, comprising some 210,000 square kilometres of

land and water, take exception to the Minister's decision, pursuant to section 40(2) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, to establish the Joint Review Panel to assess the impact of the MacKenzie Gas Project from an environmental point of view. They seek, in addition to injunctive relief, to have the decision to appoint the Joint Review Panel set aside; declaratory relief dealing with alleged failure to meet fiduciary and constitutional duties on the part of the Minister; equal treatment under the law as a jurisdiction pursuant to section 40 of the *Canadian Environmental Assessment Act*; consideration of and a declaration bearing on the exclusion of the Deh Cho First Nations from the Joint Review Panel; and a declaration as to whether a Joint Review Panel agreement violates their rights under section 15 of the *Charter* and section 35 of the Constitution.

7 The Respondents have produced a number of documents surrounding the 3 August 2004 decision, including a memorandum to the Minister of 28 July 2004 and various so-called talking points and speaking points used by Ministers involved. However none of this material is in the form of a summary, or report, or recommendations to the Minister on which the Minister might base the 3 August 2004 decision to establish the Joint Review Panel.

8 While the Applicants do have a substantial assortment of documents they seek the paperwork leading up to and behind the 3 August 2004 decision on the basis that what occurred was an ongoing process in which both the Minister and those representing the Minister took part, giving rise to issues and evidence which must have been in the Minister's mind when he made the decision: this is in contrast to the more usual situation in which there is either a set of well defined investigation material, or summarized material before the Minister, for the Minister to consider in making a decision. In the present situation the Applicants say that the ongoing material generated by the Minister and those who assist him should be produced, as material on which the Minister made his decision. Here I would note that the Applicants do not seek all of the material which was generated over the past five years, but only such drafts, minutes, notes of meetings, briefing notes, drafts of agreements, drafts of correspondence and documents in the possession of the Minister, including the Minister's copies of correspondence received and draft and final news releases: the Applicants do not seek to have the Minister approach others for documents, nor would the Minister, either at law or under what is proposed by the Applicants, need to prepare any new material.

9 The Respondents say that what is requested goes beyond what is usually thought of as a tribunal record and amounts not only to a fishing expedition, but also to full discovery of documents. I do not take seriously the suggestion that the Applicants should have commenced an action, rather than a judicial review proceeding, or could convert the present judicial review proceeding to an action and then pursue full discovery of documents, for that is not what anyone wants or needs: what is required is a summary proceeding leading to an expeditious outcome, not protracted litigation which might take years to resolve. However I also take notice of the position of the Applicants, which is quite proper, that modern judicial review may be very complex, dealing with significant questions with broad scope, but that even in such circumstances, including as in the

66 present instance where there has been a prolonged process leading to a decision, the judicial review process is still more expeditious than proceeding by way of an action.

Consideration

10 In a judicial review proceeding Federal Court Rule 317(1) provides and limits the production of documents from a tribunal to "... material relevant to an application that is in the possession of the tribunal whose order is a subject of the application ...", such material not being in the possession of the party making the request. For the most part the case law which has developed, bearing on the production of documents by a tribunal, limits production to documents which were before the tribunal when it made the decision in question. This is the general overall rule, but is subject to some limited exceptions, to which I will refer in due course.

11 In the present instance there were submissions to the effect that the test, on the plain reading of Rule 317, is merely whether documents are relevant. However, as I pointed out in *Pauktuutit, Inuit Women's Assn. v. R.* (2003), 229 F.T.R. 25 (Fed. T.D.), at 27, what is relevant, in the context of Rule 317, must be viewed in the light of the purpose of judicial review, which is not an appeal process:

> In essence, judicial review is just that, a review of a tribunal's decision which is based on the evidence which the tribunal had before it: to allow in additional material would not only be irrelevant, but also would transform a judicial review process into an appeal process. (*Toft v. Canada (Attorney General)*, an unreported 18 July 2001 decision in file T-264-01, 2001 FCT 808 (Fed. T.D.))
>
> This passage has its roots in a brief unreported 18 May 1994 decision of Mr. Justice Nadon, as he then was, in *Asafov v. Canada (Minister of Employment & Immigration)*, [1994] F.C.J. No. 713 (Fed. T.D.), IMM-7425-93. Mr. Justice Nadon made essentially the same point, after reviewing most of the relevant cases, in *1185740 Ontario Ltd. v. Minister of National Revenue* (1998), 150 F.T.R. 60 (Fed. T.D.) at 66, in the result requiring production of only those documents that were before the Minister of National Revenue when he made the decision at issue. This was upheld by the Federal Court of Appeal (1999), 247 N.R. 287 (Fed. C.A.), at 289:
>
> In *Pathak v. Canada (Human Rights Commission)*, [1995] 2 F.C. 455, 180 N.R. 152 (Fed. C.A.), this court held that only documents which were actually before the Human Rights Commission in making its decision had to be produced. Other documents relied upon by the investigator did not have to be produced inthe absence of evidence that the investigator had inaccurately summarized them. To much the same effect is the decision of this court in *Quebec Ports Terminals Inc. v. Canada (Labour Relations Board)* (1993), 164 N.R. 60, 17 Admin. L.R. (2d) 16 (Fed. C.A.). I accept and follow these decisions.

> This general rule, in effect, precludes full and complete discovery of all documents that may in the Minister's possession. However in the same paragraph Mr. Justice of Appeal Sexton points out one of the several exceptions to the rule, an instance in which there has been an inaccurate summation of underlying material by an investigator issuing a report relied upon by the tribunal. In *Canadian Broadcasting Corp. v. Paul* (2001), 274 N.R. 47 (Fed. C.A.) Mr. Justice of Appeal Strayer, while emphasizing that a tribunal is entitled to rely upon summaries from investigators and indeed the judge involved in judicial review is obliged to have only the record that was before the tribunal, observed that there may be special allegations extending the production of relevant documents, for example allegations bearing on procedure or jurisdiction (see page 66). Similarly in *Assn. of Architects (Ontario) v. Assn. of Architectural Technologists (Ontario)* (2002), 291 N.R. 61 (Fed. C.A.) Justice of Appeal Evans observed, at page 69, that while judicial review was "... normally conducted on the basis of the material before the administrative decision-maker.", "... affidavit evidence is admitted on issues of procedural fairness and jurisdiction.". These references to procedure and procedural fairness as a means of extending the production of documents could be relevant in the present instance, and logically lead to the *Friends of the West Country* case, to which I will shortly return.

12 Mr. Justice von Finckenstein took a slightly different approach to an extended view of what must be produced on judicial review in *Khadr (Next Friend of) v. Canada (Minister of Foreign Affairs)*, an unreported 28 January 2005 decision, 2005 FC 135 (F.C.). There the applicants, who wished to have consular and diplomatic services extended to Mr. Khadr, a teenager who had then been detained some three years at Guantanamo Bay, sought production of all communications and representations made with regard to a number of specific areas. At issue thus became whether, in the case of an ongoing proceeding, the applicants were entitled to all documents that had been before the Minister up to the day of the hearing. Mr. Justice von Finckenstein began with a reference to the Court of Appeal decision in *Pathak v. Canada (Human Rights Commission)*, [1995] 2 F.C. 455 (Fed. C.A.), at 460:

> 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.
>
> Mr. Justice von Finckenstein then observed that the record indicated that there had been discussions as to consular visits, conditions of detention, requirements of due legal process and legal detentions. These were issues that the Minister considered when he wrote various letters and therefore material bearing on those issues was relevant, as being part of the record which was before the Minister and thus produceable under Rule 318.

68

13 All of the exceptions to the general rule, that it is the material which was before the tribunal that is produceable, while fairly narrow, are recognized as existing exceptions, including procedural matters. This leads to *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)* (1997), 130 F.T.R. 206 (Fed. T.D.). In that decision, which has been distinguished in many instances, by limiting it to specific facts, but never over-ruled, Mr. Justice Muldoon relied upon the fact that the Minister had a supervisory function with respect to the assessment at issue, there being no distinct investigation stage, on the one hand and separate decision making stage, on the other hand. Thus, without the distinct two-stage process, Mr. Justice Muldoon permitted a departure from the general law limiting production to what was specifically before the Minister at the time the decision was made. Certainly *Friends of the West Country Assn.* involved legislation which provided no distinct investigation and decision making stages, with the Minister, or other responsible authorities, taking a supervisory role over the whole of the investigation and not exercising the role of a mere passive recipient of a report or recommendations: see *Friends of the West Country Assn.* at page 215. While the present situation does not include a statutory requirement that the Minister take a direct supervisory role in the investigation, on the affidavit evidence before me that appears to have been in fact what occurred, with the present Minister and his predecessor, together with their assistants, taking a direct supervisory role, culminating in the 13 August 2004 decision made by the Minister. In the present situation it is proper that the Applicants have additional material, that is all produceable relevant material produced by or which may have been before the Minister up to the day that the decision was in fact made. This may go back four or five years in order to include material leading to the June 2002 Cooperation Plan. However this should not be looked upon as an impossibly onerous task. Having established that material leading up to the 3 August 2004 decision must be produced, that production is circumscribed by the fact that the Applicants have acknowledged and listed, in a 13 October 2004 affidavit of Grand Chief Herb Norwegian, a large number of documents which they presently have in their possession. This leaves the question of relevance.

14 In *Pathak v. Canada (Human Rights Commission)* (supra) at 460 Justice of Appeal Pratt defined a relevant document as one which may affect the decision and therefore relevance must be tested in relation to the grounds of review in the originating document and supporting affidavit, the passage being set out earlier in these reasons. Mr. Justice Hugessen took a similar approach in *Merck Frosst Canada Inc. v. Canada (Minister of Health)* (1997), 80 C.P.R. (3d) 550 (Fed. T.D.), at 555, noting that a document may be formally relevant, in the case of an action, on the basis of issues defined in the pleadings, "... but in an application for judicial review, where there are no pleadings (a notice of motion itself being required to set out only the legal as opposed to the factual grounds for seeking review), the issues are defined by the affidavits which are filed by the parties." (p. 555). He went on to couple formal relevance with legal relevance, an issue on cross-examination. In *Merck Frosst* Mr. Justice Hugessen would test formal relevance on the basis of affidavits filed "by the parties": in the present instance we have only affidavit material filed by

the Applicants. Mr. Justice Hugessen was upheld by the Court of Appeal (2000), 3 C.P.R. (4th) 286 (Fed. C.A.).

15 I am satisfied that the material requested by the Applicants falls within the ambit of and is relevant in the light of the 13 October 2004 affidavit of Grand Chief Herb Norwegian.

16 The descriptions of the documents which the Applicants seek come close to an overly general request, but do not cross the line by seeking wholesale production. Rather, the documents are requested in relation to various specific steps or phases in the process leading to the 3 August 2004 decision to establish the Joint Review Panel. The descriptions have the certainty necessary so that the Respondents are not left guessing as to what is desired.

17 Counsel for the Respondents looks upon the task of assembling all of the documents requested by the Applicants as daunting. However, in *Quebec Ports Terminals Inc. v. Canada (Labour Relations Board)* (1993), 17 Admin. L.R. (2d) 16 (Fed. C.A.) the Court of Appeal points out at page 21 that such a request is limited both to material in the possession of the tribunal, and to material which already exists when the request is made: the tribunal is not obliged to prepare anything which it does not already have. In *Quebec Ports* Mr. Justice Décary went on to note, at page 22, that the tribunal need not produce anything which the party requesting the material ought to have in its own material. As a further limitation the Court of Appeal, in *Trans Quebec & Maritimes Pipeline Inc. v. Canada (National Energy Board)*, [1984] 2 F.C. 432 (Fed. C.A.), at 442 makes it clear that production of documents by a tribunal is not an opportunity for a fishing expedition and thus production under the rules governing judicial review stops short of the full discovery which would enable the other side to make demand for the whole of the tribunal's file so that it might be searched for grounds for an application. For this reason production is limited, as pointed out in *Pathak*, to what is relevant under the originating notice of motion and the affidavit in support, or taking the view of Mr. Justice Hugessen, *Merck Frosst Canada Inc.* (supra), to the issues defined by the affidavits filed by the parties. By this measure there may be a considerable number of documents, but that is a necessary result of a situation in which there is not an investigative phase, followed by a decision making phase, but rather where the Minister and the Minister's assistants supervise the procedure leading to the decision. Here I accept the view of counsel for the Applicants that judicial review, in a modern setting, may involve significant questions of broad scope and that being the case there is no limit on the size of the record, which is governed by the affidavit material. Nor is the production requested too broad. The production requested, set out in the notice of application, is fairly specific. The Applicants request documents in existence at each step taken by the Minister and his representatives leading to the final step, the decision in August of 2004, being only those relevant documents which the Applicants have not declared in their extensive affidavit material.

18 To require the Minister or his representatives to approach other entities involved, thus producing documents not already in the files of the Minister and his representatives, goes beyond

70 the scope of Rule 317. Rule 317 requires production of material in the possession of the tribunal, in this instance the Minister and those who represent him. Documents in the possession of others need either be sought nor produced.

19 The schedule for the production of the Minister's documents is to be dealt with as a case management matter. Costs of the motion to the Applicants which, if not agreed, to be dealt with in writing. I thank counsel for their on point and manageable submissions in the face of a large amount of material.

Order accordingly.

1994 CarswellOnt 1015
Ontario Court of Justice (General Division) [Divisional Court]

E.A. Manning Ltd. v. Ontario (Securities Commission)

1994 CarswellOnt 1015, [1994] O.J. No. 1026, 17 O.S.C.B. 2339, 18 O.R. (3d) 97, 24 Admin. L.R. (2d) 283, 3 C.C.L.S. 221, 47 A.C.W.S. (3d) 896, 72 O.A.C. 34

E.A. MANNING LIMITED, JUDITH MARCELLA MANNING, TIMOTHY EDWARD MANNING and WILLIAM DOUGLAS ELIK v. ONTARIO SECURITIES COMMISSION; APPLICATION UNDER THE JUDICIAL REVIEW PROCEDURE ACT, R.S.O. 1990, c. J.1

Montgomery, Dunnet and Howden JJ.

Heard: April 19 and 20, 1994
Judgment: May 13, 1994
Docket: Doc. 72/94

Counsel: *Bryan Finlay, Q.C.*, and *J. Gregory Richards*, for applicants.
Dennis R. O'Connor, Q.C., *James D.G. Douglas* and *Benjamin T. Glustein*, for respondent.

Subject: Securities; Public; Corporate and Commercial

Application for order prohibiting Ontario Securities Commission from proceeding with hearings.

The judgment of the court was delivered by *Montgomery J.*:

1 The applicants seeks prohibition to stop the Ontario Securities Commission ("OSC") from proceeding with two hearings that relate to allegedly improper sales practices by the applicants. Relief is sought on the ground of bias and in particular on the basis that the OSC has allegedly prejudged the case against the applicants.

The Issues

2 (1) Actual bias;

3 (2) Reasonable apprehension of bias;

4 (3) The doctrine of necessity.

5 These issues are to be decided under a legislative scheme which gives the OSC the following roles: investigator, prosecutor, policy maker and adjudicator.

6 The OSC is defined by s. 2 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "Act") as consisting of a Chair and between 8 and 10 members, referred to as Commissioners, appointed by the Lieutenant Governor in Council. A quorum is two members. By subs. 3(3), where a Commissioner has, as part of his or her duties in the investigative and enforcement roles of the Commission, ordered proceedings to be instituted, that Commissioner may not participate in the resulting hearing. This is an important and apparently the only express statutory guide as to how the OSC is to keep its adjudicative role separate from its other duties. The issues in this case deal with the standard and application of the common law duty of a tribunal, with several conflicting functions assigned to its members and its staff, to act fairly, without bias or conduct indicating bias, when it comes to its adjudicative role.

The Facts

7 On December 15, 1993, the OSC issued a notice of hearing (the "first notice of hearing"), pursuant to the Act, to consider:

> (a) whether under s. 27 of the Act, it is in the public interest that the registrations of the applicants E.A. Manning Limited ("Manning Limited"), Judith Marcella Manning ("Judith Manning"), Timothy Edward Manning ("Ted Manning") and William Douglas Elik ("Elik") and certain other employees or officers of Manning Limited be suspended, cancelled, restricted or made subject to conditions;
>
> (b) whether under s. 128 of the Act, it is in the public interest to order that any or all of the exemptions contained in ss. 35, 72, 73 and 93 of the Act no longer apply to the said applicants and others.

First Notice of Hearing

8 With respect to the applicants named in the first notice of hearing, the staff of the OSC allege that they engaged in conduct involving trading in the securities of BelTeco Holdings Inc. ("BelTeco") and Torvalon Corporation ("Torvalon") which was abusive of the capital markets and contrary to the public interest.

9 In particular, the staff of the OSC allege that the applicants named in the first notice of hearing conducted trades in the securities of BelTeco and Torvalon contrary to the public interest by:

> (a) failing to adequately advise purchasers of the securities of BelTeco and Torvalon that Manning Limited was selling the securities as principal, not agent, and failing to disclose

to purchasers of the securities that mark-ups were included in the purchase price of those securities;

(b) permitting, encouraging or requiring salespersons of Manning Limited to approach customers with no bona fide independent verification of the nature of the businesses and the financial condition of BelTeco or Torvalon;

(c) failing to disclose to purchasers of the securities of BelTeco and Torvalon, inter alia, the limited marketability of the securities, and the nature of the businesses and the financial condition of BelTeco and Torvalon;

(d) using high pressure sales tactics to induce persons to purchase the securities of BelTeco and Torvalon;

(e) failing to comply with their suitability and "know your client" obligations, contrary to s. 114 of Regulation 1015, R.R.O. 1990;

(f) failing to make any bona fide independent effort to verify the nature of the businesses and the financial condition of BelTeco and Torvalon;

(g) giving undertakings to clients concerning the future value of the securities of BelTeco and Torvalon with the intention of effecting a trade in such securities;

(h) executing orders on behalf of clients in the securities of BelTeco and Torvalon without prior authorization;

(i) failing to execute, or refusing to accept, sell orders by clients in respect of the securities of BelTeco and Torvalon;

(j) failing to advise potential purchasers of the securities of BelTeco and Torvalon that investment in those securities was highly speculative and involved a significant risk;

(k) failing to advise clients of the commissions received by the salesperson in respect of the securities of BelTeco and Torvalon; and

(l) failing to deal fairly, honestly and in good faith with their clients in respect of the securities of BelTeco and Torvalon.

10 In addition, the staff of the OSC allege in the first notice of hearing that Judith Manning and Manning Limited failed to properly supervise the activities of Ted Manning and Elik, and the trading of Manning Limited in the securities of BelTeco and Torvalon.

11 The proceeding arising from the first notice of hearing is scheduled to commence on Monday, September 19, 1994.

Second Notice of Hearing

12 On February 1, 1994, the staff of the OSC informed Manning Limited that the staff would be attending before the OSC on February 2, 1994 at 2:00 p.m. to seek an order under s. 27(2) of the Act, for an interim suspension of the registration of Manning Limited.

13 On February 2, 1994, a panel of two Commissioners, Vice-chair Smart and Commissioner Blain, dismissed the s. 27(2) application and held that the allegations grounding the application should be considered at a full hearing under s. 27(1) of the Act.

14 Consequently, on February 4, 1994, the OSC issued a notice of hearing (the "second notice of hearing") to consider:

> (a) whether under s. 27(1) of the Act, it is in the public interest that the registrations of all of the applicants be suspended, cancelled, restricted or made subject to conditions; and
>
> (b) whether under s. 37(1) of the Act, it is in the public interest to suspend, cancel, restrict or impose terms and conditions upon the right of the applicants to call at or telephone to any residence in Ontario for the purpose of trading in any security or in any class of securities.

15 The staff of the OSC allege that from January 4, 1994, all of the present applicants, and from September 1992, the applicant Elik, have failed and continue to fail to deal fairly with and act in the best interests of clients during telephone calls made to induce individuals to purchase securities from Manning Limited, and in particular that the applicants:

> (a) failed to adequately disclose that Manning Limited was selling securities to its clients at markups and that Manning Limited's salespersons were receiving commissions at 17-1/2% on each client's purchase;
>
> (b) failed to disclose that Manning Limited salespersons would lose their entitlement to commissions if clients sold securities within a certain period of time;
>
> (c) used high pressure sales tactics;
>
> (d) resisted or refused to sell securities when so instructed by their clients;
>
> (e) failed to adequately advise about the risks associated with purchases and in particular that the purchases were highly speculative in nature and could result in significant loss of invested capital;
>
> (f) failed to comply with their "know your client" obligations;
>
> (g) misrepresented the commissions received by salespersons;

(h) gave oral undertakings relating to the future value or price of the securities sold or attempted to be sold and/or made unjustifiable statements with respect to the anticipated price of the securities sold or attempted to be sold;

(i) made unjustifiable, misleading and/or false statements with respect to companies whose securities were being sold or attempted to be sold;

(j) made representations based upon purported knowledge of inside information;

(k) misrepresented the results of previous securities recommendations; and/or

(l) instructed Manning Limited's salespersons to use the sale practices set out above.

16 The staff also allege that Manning Limited, Judith Manning and Mary Martha Fritz failed to adequately supervise salespersons of Manning Limited.

17 The proceeding arising from the second notice of hearing is scheduled to commence on Monday, June 13, 1994.

Background to Application

18 Policy 1.10 was adopted by the OSC on March 25, 1993. Its purpose was to address unfair or abusive sales practices that the OSC believed some securities dealers employed from time to time in connection with the marketing and sale of low cost, highly speculative securities ("penny stocks"). Policy 1.10 outlined certain business practices which the OSC regarded appropriate for securities dealers to adopt in connection with the marketing and sale of penny stocks. These practices were considered to be consistent with the duty to deal fairly, honestly, and in good faith with the securities dealers' customers.

19 Policy 1.10 purports to provide against any prejudgment of whether conduct by a particular securities dealer would constitute a breach of s. 27(1) of the Act. Page 2 of Policy 1.10 provided that:

> Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case.

20 The purpose of Policy 1.10 was to serve as a guide to assist securities dealers and their employees in satisfying their obligations under the Act in connection with the marketing and sale of penny stocks.

Investigation

21 I accept the fact that the Commissioners did not participate in the investigation of the alleged misconduct of the applicants. Investigations are conducted by OSC staff who make up the Enforcement Branch of the OSC. If an investigation discloses an apparent breach of the Act or conduct of a market participant contrary to the public interest, the Director of Enforcement, in consultation with the Executive Director of the OSC, considers whether it is appropriate to call a hearing before the Commissioners.

22 The investigation involving the shares of BelTeco and Torvalon arose out of two separate reports from the Toronto Stock Exchange. Neither of these reports was forwarded to nor reviewed by the Commissioners.

The Impugned Conduct

23 The applicants contend that the OSC has already made up its mind on the issues raised for hearings. Further, they say the Commissioners prejudged them before issuing Policy 1.10 and this is evidenced by the fact that the policy, as noted by the OSC in their factum of the *Ainsley*, infra, case, was issued in response "to the abusive and unfair sales practices that it had found to exist".

24 In *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1993), 106 D.L.R. (4th) 507 [1 C.C.L.S. 1] (Ont. Gen. Div. [Commercial List]), Blair J. declared Policy 1.10 to be invalid as the Policy exceeded the OSC's statutory jurisdiction. At p. 509, the Court said:

> O.S.C. Policy Statement 1.10, with which the commission expects securities dealers to comply, contains very detailed and embracive measures regarding the trading of speculative penny stocks. Trading in such stocks comprises the predominant portion of the plaintiffs' business. They say that Policy 1.10 will drive them out of business and is designed to do just that.

And at pp. 511 to 513, Blair J. described in some detail its purpose and its very specific requirements:

> **Policy 1.10**
>
> Policy Statement 1.10, entitled "Marketing and Sale of Penny Stocks", was issued in its final form on March 25, 1993, to come into effect on June 1, 1993. The commission has agreed to hold the policy in abeyance pending the release of this decision.

Purpose of the policy

Policy 1.10 was developed by the commission as result of a growing concern over the employment of high pressure and unfair sales practices by securities dealers on a widespread basis in connection with the marketing and trading of low cost, highly speculative penny stocks in the over-the-counter market. The policy is designed to redress the abuses perceived by the commission in this respect.

The purpose of the policy is stated at some length in the body of the text. I set out that statement of purpose in full, because it is of some importance. The policy asserts:

> **Purpose of this Policy**
>
> The Act and the regulations under the Act (the 'Regulations' require, among other things, that registrants 'know their clients' and deal 'fairly, honestly and in good faith' with their customers and clients. The Commission is concerned that securities dealers engaged in unfair sales practices like those mentioned above are not complying with these obligations and are recommending investments in penny stocks that are highly speculative and often are not appropriate for an investor given his/her personal circumstances, investment experience, investment objectives and financial means. The Commission is also concerned that, as a result of the sales practices employed, investors often purchase penny stocks unaware of the risks involved and without adequate consideration being given to the suitability of the purchase. Losses of a significant portion of an investment in penny stocks are common. The Commission has concluded that these sales practices have a significant adverse impact on the fairness and integrity of the capital markets in Ontario.
>
> The Commission is issuing this Policy as a guide to identify what the Commission believes are appropriate business practices to assist securities dealers and their employees in satisfying their obligations under the Act in connection with the marketing and sale of penny stocks. This Policy is intended to inform interested parties that the Commission will be guided by this Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario.
>
> This Commission believes that the business practices set out in this Policy should be adopted by securities dealers when selling penny stocks. The Commission believes that such practices are in the public interest to promote and maintain fair, equitable and efficient capital markets in Ontario and to protect investors from high pressure and other unfair sales practices employed in the marketing and sale of penny stocks and that these business practices are consistent with the duty of securities dealers and their officers,

> partners, salespersons and directors to deal fairly, honestly and in good faith with their customers and clients. Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case.
>
> This policy is not intended to restrict unduly legitimate investment opportunities in the penny stock market or capital formation for small businesses but merely to regulate the high pressure and other unfair sales practices often employed in the marketing and sale of penny stocks. The Commission believes that this Policy will carry out its purposes without unduly inhibiting legitimate investment opportunities in the penny stock market or capital formation for small businesses.

In a section entitled "Appropriate Business Practices", the policy states:

> The Commission has concluded that it is in the public interest that the business practices identified in this Policy be adopted by securities dealers in connection with the marketing and sale of penny stocks.

The operative portions of Policy 1.10 call for the following, in furtherance of this conclusion and the objectives of the policy:

> (1) *the furnishing of a risk disclosure statement* to the client — in Form 1, attached to the Policy — together with a sufficient explanation of its contents to the client that the client understands he or she is purchasing a penny stock and is aware of and willing to assume the risks associated with such an investment; and before any order to purchase a penny stock can be accepted,
>
> (2) *the provision of a suitability statement in Form 2* (also attached to the policy) to the client, completed and signed by the salesperson, together with an explanation of its contents; and
>
> (3) *the return of the suitability statement, signed by the client*, to the securities dealer; and thereafter
>
> (4) *an agreement between the client and the securities dealer* with respect to the price of the penny stock to be purchased.

In addition, Policy 1.10 provides:

(5) that the securities dealer is to disclose to the client in advance of the trade that it is acting as principal or as agent for another securities dealer acting as principal on the transaction where that is so; *and*

(6) that the securities dealer is to disclose "the nature and amount of all compensation payable to the securities dealer, its salespersons, employees, agents and associates or any other person", including mark-ups, bonuses and commissions.

25 The OSC issued the Proposed Policy in draft form on August 11, 1992. In the "Introduction", the following appears:

1. *General*: The Ontario Securities Commission (the "Commission") is concerned about *the widespread use of high pressure and other unfair sales practices being employed* in connection with the marketing and sale of low cost, highly speculative securities commonly referred to as "penny stocks". These sales practices include:

(a) repeated unsolicited phone calls to potential customers at their homes and/or places of business and other high pressure tactics designed to encourage purchases of penny stocks;

(b) promises of great returns, including promises that the value or price of a penny stock will increase;

(c) representations that the dealer is in possession of favourable inside information;

(d) failing to advise customers that the dealer is selling the penny stocks as principal and is receiving a significant mark-up;

(e) failing to make necessary inquiries of customers to determine their personal circumstances, including their investment objectives, investment experience and financial resources, to enable the dealer to determine whether or not penny stocks are a suitable investment;

(f) failing to adequately advise investors of the risks associated with investing in penny stocks; and

(g) failing to advise customers of the compensation/commissions being paid to the salesperson.

These sales practices *are being engaged in by many securities dealers* and their salesperson engaged in the business of selling penny stocks and *who are not members of the Toronto Stock Exchange (the "TSE") or the Investment Dealers Association (the "IDA")*. The penny stocks involved do not generally trade on a stock exchange, but rather trade in the over-the-counter market in Ontario. The issuers of these securities often do not have significant tangible assets.

[Emphasis added.]

26 It is not disputed that there were, at the time the Policy was formulated, only some ten securities dealers trading primarily in highly speculative penny stocks. The applicant Manning was one of these dealers. Reliance is placed upon the underlined words to demonstrate that the OSC *had concluded* the ten or so were engaging in improper activity and, therefore, these comments are indicative of a closed mind.

27 On March 25, 1993, the *OSC* issued its Final Policy Statement 1.10. This document had been considered at many meetings of the Commissioners and was approved by them. The changes from the Proposed Policy are largely cosmetic.

28 As was the case in the Proposed Policy, the Final Policy reflected the OSC's *conclusion* that securities dealers like Manning Limited had engaged and continued to engage in the improper activity described in the Final Policy.

29 The *OSC* said in the "Background" portion of the Final Policy:

> The Ontario Securities Commission (the "Commission") is concerned about *high pressure and other unfair sales practices that are being employed on a widespread basis* in connection with the marketing and sale of low cost, highly speculative securities commonly known as "penny stocks". These sales practices include:
>
> • repeated, unsolicited phone calls to potential clients at their homes and/or places of business and other high pressure tactics designed to encourage purchases of penny stocks;
>
> • assurances of great returns, including assurances that the value or price of a penny stock will increase;
>
> • failing to advise investors adequately of the risks associated with investing in penny stocks;
>
> • failing to explain to clients adequately when the dealer is selling the penny stocks as principal and is receiving a significant mark-up;
>
> • failing to advise clients of the compensation/commission being paid to the salesperson; and
>
> failing to make necessary inquiries of clients to determine their personal circumstances, including their investment objectives, investment experience and financial resources, to enable the dealer to determine whether or not penny stocks are a suitable investment;

> *These sales practices often are conducted as part of a pattern of activity by securities dealers that* are engaged primarily in the business of selling penny stocks. While these Securities Dealers are registrants under the *Securities Act* (Ontario) (the "Act"), they *are not members of The Toronto Stock Exchange (the "TSE) or the Investment Dealers Association (the "IDA")* or any similar recognized self-regulatory organization and, accordingly, are not subject to the compliance, investigation, disciplinary or other rules, regulations, policies and by-laws of such self-regulatory organizations.

[Emphasis added.]

30 Under the heading "Purpose of this Policy", the *OSC* stated:

> The Act and the regulations under the Act (the "Regulations") require, among other things, that registrants "know their clients" and deal "fairly, honestly and in good faith" with their customers and clients. The Commission is concerned that *securities dealers* engaged in unfair sales practices like those mentioned above *are not complying with these obligations* and are recommending investments in penny stocks that are highly speculative and often are not appropriate for an investor given his/her personal circumstances, investment experience, investment objectives and financial means. The Commission is also concerned that, as a result of the sale practices employed, investors often purchase penny stocks unaware of the risks involved and without adequate consideration being given to the suitability of the purchase. Losses of a significant portion of an investment in penny stocks are common. The Commission *has concluded* that these sales practices have a significant adverse impact on the fairness and integrity of the capital markets in Ontario.

[Emphasis added.]

31 On August 18, 1993 the *OSC* issued a News Release in response to the *Ainsley* decision. The News Release stated in part:

> August 18, 1993 (Toronto) — The Ontario Securities Commission announced today that it is consulting with representatives of the Government of Ontario and other Canadian securities regulators, among others, with respect to the recent decision of the Ontario Court of Justice (General Division) in the action commenced by several securities dealers. In its decision, the Court concluded that the Commission does not have the jurisdiction to issue proposed Policy 1.10. *That policy was intended to address the abuses that the Commission believes to exist in the marketing and sale of penny stocks by certain securities dealers*. Among the issues under consideration is the desirability of an appeal of the court decision.
>
> . . . . .

> *The Commission has instructed its staff to continue to monitor penny stock abuses and to initiate any proceedings under the Act that may be available to protect investors from those abuses*.

[Emphasis added.]

32 As a further result of *Ainsley*, on October 7, 1993 the Ontario Minister of Finance announced the formation of a joint Ministry of Finance and OSC Task Force on securities regulation. The mandate of the Task Force was to review and to make recommendations in respect of the legislative framework for the development of securities policy in the Province of Ontario with particular attention to the policy-making role of the OSC.

33 The OSC staff, including the Chair and the other two full-time Commissioners, made a written submission to the Task Force. The submission was conveyed to the Task Force under cover of a December 17, 1993 transmittal letter from the OSC's Chair, Edward J. Waitzer.

34 I see nothing indicative of bias or reasonable apprehension of bias in the 13-page submission. It dealt exclusively with the reasons why the Task Force should recommend that the Legislature confer rule-making powers to the OSC.

35 The seven part-time Commissioners made a separate written submission to the Task Force. Their eleven-page submission is to the same effect as the prior submission and similarly contains no bias or views which would prompt any reasonable apprehension of bias.

36 The conclusions stated by the OSC in Policy 1.10 reflected the findings made in a Staff Report of July 8, 1992 which the Commissioners had before them and relied upon in formulating and approving Policy 1.10. The Staff Report sets out in detail the same allegations of ongoing improper conduct which are now the subject matter of the second notice of hearing. The sort of conclusions made in the Staff Report, which was in turn adopted by the OSC, can be observed in the following passage:

> Based upon our examination of the penny stock industry, we believe that as a result of the unfair sales practices engaged in by broker/dealers in the marketing of penny stocks:
>
> (a) Investors purchase penny stocks unaware of risks that:
>
> (i) there may be no market to sell their penny stocks after the broker/dealer has sold its inventory position; and
>
> (ii) they are likely to lose a significant portion of their investment.
>
> (b) Investors are unaware of the commission and/or mark-up charged by salespersons and broker-dealers;

(c) Investors are pressured into purchasing penny stocks over the phone; and

(d) Broker/dealers do not comply with their know-your-client obligations.

37 As can be seen, the unfair conduct alleged in the second notice of hearing has already been found to exist by the Commissioners. The *conclusions* stated in Policy 1.10 and the *conclusions* stated in the Staff Report, which the OSC expressly adopted in approving Policy 1.10, demonstrate that the subject matter of the hearing has already been decided by the Commissioners.

38 The affidavit of Mr. Gordon, a staff lawyer for the OSC, sufficiently creates the link between the unfair conduct alleged and the applicants. Mr. Gordon's affidavit was just part of the evidence relied upon by the OSC in the *Ainsley* case to support Policy 1.10. The conduct of Manning Limited which Mr. Gordon calls "unfair sales practices" is the same conduct alleged in the second notice of hearing.

39 Having considered all of the evidence filed by the OSC in the *Ainsley* case, the Honourable Mr. Justice R.A. Blair made a finding that the OSC had *concluded* that the plaintiff securities dealers (including Manning Limited) were guilty of various abuses. He said at p. 515:

> With the completion of this review, the commission was satisfied that it had found cogent evidence of abusive and unfair sales practices in the marketing of penny stocks, and in addition, I think it is fair to say, *had concluded that these abuses were centred in the practices of the plaintiff securities dealers*. It set out to remedy the situation for the reasons and in the manner outlined above. [i.e. by implementing Policy 1.10.]

[Emphasis added.]

40 On the material filed before me, it appears that the OSC has already decided that Manning Limited and related parties are guilty of these unfair practices.

41 The first notice of hearing merely goes through substantially the same allegations of improper conduct repeated in the second notice but relates them to the securities of two named companies, BelTeco and Torvalon, after certain dates in 1992 and 1994. These allegations are based on complaints of particular conduct about Manning Limited and other securities dealers which were before the Commissioners when they concluded such conduct was in fact occurring widely and approved Policy 1.10. In addition, on December 22, 1992, copies of the pleadings against the OSC in the *Ainsley* action were distributed to the Commissioners "to assist them in their review of the Draft Policy". In that action, substantial material was filed by the OSC specifically pertaining to complaints and practices now alleged against Manning Limited, its officers and employees and to be dealt with at the upcoming hearings.

42 Even if OSC staff tried to separate their investigative role from the Commissioners' role as adjudicators, the creation and adoption of Policy 1.10 and the additional evidence, including the mass of complaints specifically regarding Manning Limited and others in the staff report and the material led by the OSC in *Ainsley*, lead me to the irresistible conclusion that the roles have become so interwoven that there is a reasonable apprehension of bias against all Commissioners who took office prior to November 1993.

43 In a press interview, the Chair of the OSC, Mr. Waitzer, stated that dealing with penny stock dealers is a "perennial priority". "There will always be marginal players in the securities industry. Our task is to get these players into the self-regulatory system or get them out of the jurisdiction."

44 I conclude that Mr. Waitzer cannot sit on either hearing because of a reasonable apprehension of bias.

The Functions of the OSC

45 As previously noted, the OSC is investigator, prosecutor, policy maker and adjudicator. The 1993 annual report of the OSC to the Minister of Finance states in part:

> **The Mandate of the OSC**
>
> The OSC has administrative responsibility for the *Securities Act*, the *Commodity Futures Act* and the *Deposits Regulation Act*, as well as certain provisions of the *Ontario Business Corporations Act*. Most of the OSC's day-to-day operations relate to the administration and enforcement of the *Securities Act* and the *Commodity Futures Act*.
>
> **The Structure of the OSC**
>
> The OSC is a Schedule I regulatory agency of the Government of Ontario. The Minister of Finance answers for the OSC in the Legislature and presents OSC financial estimates as part of the Ministry of Finance's estimates.
>
> **The Commission**
>
> The OSC has two distinct parts. One part is an autonomous statutory tribunal — the Commission — the eleven members of which are appointed by Order-in-Council. At present, there is a full-time Chairman, one full-time Vice-Chair, and nine part-time Commissioners.
>
> . . . . .
>
> The OSC is empowered to grant official recognition to Self-Regulatory Organizations, and has recognized The Toronto Stock Exchange and The Toronto Futures Exchange. SROs, such as the TSE, the TFE and the IDA, impose financial and trading rules on their membres that are enforced through independent audit and compliance checks. The OSC reviews those rules and hears appeals from decisions of the SROs.

. . . . .

The Chairman is by statute the Commission's Chief Executive Officer. The Commission assists in the formulation of policy, sits as an administrative tribunal in hearings, acts as an appeal body from decisions made by the Executive Director and staff, hears appeals from decisions of the TSE and the TFE, and makes recommendations to the government for changes in legislation. Two members constitute a quorum. The Commission holds regular policy meetings, and also convenes in panels for administrative hearings.

The *Office of the Secretary* provides support to the Commission meetings and hearings, receives and co-ordinates the processing of applications to the OSC, publishes the weekly *OSC Bulletin*, coordinates corporate communications, provides library services and coordinates meetings of the CSA. (The CSA is an association of securities administrators from each of the provinces and territories in Canada. It seeks to achieve uniformity in legislation and policies.)

The Staff of the Commission

The other major part of the Commission is an administrative agency composed of more than 230 lawyers, accountants, investigators, managers and support staff. The *Executive Director* is the OSC's Chief Operating and Administrative Officer and is responsible for the day-to-day activities of the seven operating departments of the OSC — the Offices of the Chief Accountant, the General Counsel and the Chief of Compliance, and the Corporate Finance, Capital Markets/International Markets, Enforcement, and Administrative and Systems Services branches. The Executive Director also participates actively in policy development.

The Law

46 In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, Cory J., speaking for the Court, said at pp. 636 to 637:

The Duty of Boards

All administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine. This was recognized in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. Chief Justice Laskin at p. 325 held:

> ... the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.

86

Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. See *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

In *Szilard v. Szasz*, [1955] S.C.R. 3, Rand J. found a commercial arbitration was invalid because of bias. He held that the arbitrator did not possess "judicial impartiality" because he had a business relationship with one of the parties to the arbitration. This raised an apprehension of bias that was sufficient to invalidate the proceedings. At p. 7 he wrote:

> Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.

And at pp. 638 to 639:

> 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 prejudgment 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.

And further at p. 642:

> During the investigative stage, a wide licence must be given to board members to make public comment. As long as those statements do not indicate a mind so closed that any submissions would be futile, they should not be subject to attack on the basis of bias.

47 Two other important cases must be addressed. *W.D. Latimer Co. v. Bray* [sub nom. *W.D. Latimer Co. v. Ontario (Attorney General)*] (1974), 6 O.R. (2d) 129 (C.A.) established the principle

that evidence of prejudgment, even in the context of the unique statutory scheme established by the *Securities Act*, is a ground for disqualification. However, it recognized that mere knowledge by Commissioners of market conditions or even of grounds for a complaint to be heard by them do not produce any apprehension of bias in the particular circumstances of this tribunal. Dubin J.A. (as he then was) delivered the judgment of the Court. He stated at pp. 140 to 141:

> Where by statute the tribunal is authorized to perform tripartite functions, disqualification must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task. Evidence of prejudgment, however, is a ground for disqualification, unless the statute specifically permits the tribunal to have arrived at a preliminary judgment before conducting an inquiry.
>
> . . . . .
>
> I do not read s. 8 [now s. 27] of the *Securities Act* as permitting a prejudgment of the issues prior to the conduct of the inquiry.

48 The Court concluded on the facts there was no reasonable apprehension of bias.

49 In *Barry v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301, the Chairman of the Alberta Securities Commission was a member of a panel at a hearing under Alberta's securities legislation. At issue was whether or not there was a reasonable apprehension of bias because the Chair had received a report from the Deputy Director of Enforcement prior to the hearing.

50 In finding that there was no reasonable apprehension of bias on these facts, L'Heureux-Dubé J., delivering the judgment of the Court, relied heavily on the Court of Appeal's decision in *Latimer*. She said at p. 315:

> Dubin J.A. found that the structure of the Act whereby commissioners could be involved in both the investigatory and adjudicatory functions did not, by itself, give rise to a reasonable apprehension of bias.
>
> I am in agreement with this proposition. So long as the Chairman did not act outside of his statutory authority, and so long as there is no evidence to show involvement above and beyond the mere fact of the Chairman's fulfilling his statutory duties, a "reasonable apprehension of bias" affecting the Commission as a whole cannot be said to exist.

51 In the case at hand, the *OSC* did act outside its statutory authority in adopting Policy 1.10. The Commissioners, in effect, sought to legislate. This, as found by *Ainsley*, was ultra vires. In the process of formulating and deciding to issue the mandatory regulation presented by Policy 1.10, the Commissioners in March 1993 closed their minds to the issue of whether securities dealers, including Manning Limited, are guilty of unfair sales practices. This constitutes prejudgment.

52 In the context of the litigation brought by the securities dealers, including the motion for judgment in the *Ainsley* case and the pending appeal, the *OSC* went beyond merely defending itself and its jurisdiction and adopted the role of advocate against them and strenuously sought to demonstrate that Manning Limited and others are guilty of the very conduct which is now the subject of the current notices of hearing.

53 The affidavits filed on behalf of the *OSC* speak loudly in what they fail to address. The affidavit of Mr. Gordon does not say that there was no discussion between the staff and Commissioners about Manning Limited when Policy 1.10 was being prepared. There is no affidavit evidence to say the Commissioners have been canvassed and individually could make an unbiased decision. Further, there is no evidence to show that the 55 complaints about Manning, which were made to OSC staff and made know to the Commissioners in the 1992 report accepted by them, have not tainted them. It is reasonable to assume that the complaints played a part in the desire to establish Policy 1.10. Given these gaps in the respondent's material, it seems to me that "the informed bystander", to use the words of Cory J. in *Newfoundland Telephone*, "could reasonably perceive bias on the part of an adjudicator".

54 The OSC (both staff and Commissioners) were acting within the ambit of their statutory duties in assembling and considering information in respect of a certain segment of the securities market. But in using that information to conclude that the securities dealers (including Manning Limited) were in fact engaging in the practices alleged in Policy 1.10, and now in the notices of hearing, the Commissioners prejudged the case. They pursued a course in excess of their policy and regulatory functions due to a too-narrow focus on a small number of parties and very particular allegations of practices and that, in turn, has produced an overly specific regulation beyond the OSC's jurisdiction. It has also produced an obvious apprehension of bias, quite distinct from the situation in *Latimer*.

55 The OSC has repeatedly recorded its conclusion that the targeted dealers engaged in unfair sales practices. The OSC issued Policy 1.10 in an effort to protect the public from unfair sales practices it "had found to exist". In my view, this prejudgment coupled with the continued effort of the OSC to vindicate its position through the ongoing litigation with the security dealers, including the appeal in *Ainsley*, created a reasonable apprehension of bias that precludes all members of the OSC who were Commissioners prior to the fall of 1993 from sitting at the hearings involving the applicants. In addition, the new Chair, Mr. Waitzer, is precluded from sitting for reasons stated earlier.

Remaining Members of the OSC

56 By Order-in-Council dated November 3, 1993, John Arthur Geller was appointed a member and Vice-chair of the OSC for a period of three years. By Order-in-Council dated April 6, 1994,

Helen M. Meyer was appointed a member of the OSC for a period of six months. There still remains one vacancy on the OSC.

57 It is argued by the applicant that there is a corporate taint affecting all those Commissioners subsequently appointed to the OSC. There is no judicial authority for this proposition. Bias is a lack of neutrality.

58 Blake in *Administrative Law in Canada* (Toronto: Butterworths, 1992) states at p. 92:

> Many tribunals are part of a larger administrative body. The fact that one branch of that administrative body is biased does not mean that another branch that has carriage of the matter is biased. Bias on the part of an employee of the tribunal or a member who is not on the panel hearing the matter usually does not give rise to a reasonable apprehension of bias on the part of the tribunal. Even bias on the part of the Minister in charge of the department does not necessarily make the adjudicator employed by the Ministry biased.

59 There is no evidence that the views of the Chair are shared by the new Commissioners. Further, there is no evidence before the Court to indicate any underlying agenda of Mr. Geller or Ms. Meyer. As well, the minutes of the Commissioners indicate that they were not party to any of the decisions respecting Policy 1.10 or the OSC's position in *Ainsley*.

60 There must be a presumption in the absence of contrary evidence that a Commissioner will act fairly and impartially in discharging his/her adjudicative responsibility. As noted in *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171 at 181 (C.A.); leave to appeal to the S.C.C. dismissed (27 August 1992), [1992] 6 W.W.R. lvii (note):

> Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear. No individual is identified here. Rather, the effect of the submissions is that all of the members of the commission appointed pursuant to s. 4 of the *Securities Act*, regardless of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where an entire tribunal of unidentified members had been disqualified from carrying out statutory responsibilities by reason of real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration.

61 I therefore conclude that Mr. Geller and Ms. Meyer are not biased, nor is there any evidence of conduct by them raising any apprehension of bias. The vacant position may or may not be filled. The presumption remains that whomever is appointed to that vacancy is unbiased.

62 If it is felt elsewhere that there is some corporate taint, I would allow the above 2 or 3 persons, as the case may be, to sit on the basis of the doctrine of necessity. Natural justice must

give way to necessity. The doctrine of necessity was enunciated by Jackett C.J. in *Caccamo v. Canada (Minister of Manpower & Immigration)* (1977), 75 D.L.R. (3d) 720 (Fed. C.A.) at p. 726:

> As I understand the law concerning judicial bias, however, even where actual bias in the sense of a monetary interest in the subject of the litigation is involved, if all eligible adjudicating officers are subject to the same potential disqualification, the law must be carried out notwithstanding that potential disqualification. ... If this is the rule to be applied where actual bias is involved, as it seems to me, it must also be the rule where there is no actual case of bias but only a "probability" or reasonable suspicion arising from the impact of unfortunate statements on the public mind.

63 This case does not require the doctrine of necessity to be applied to the extent of the example referred to in *Caccamo v. Canada (Minister of Manpower & Immigration)*. The doctrine of necessity is properly used to prevent a failure of justice and not as an affront to justice: De Smith's *Judicial Review of Administrative Action*, 4th ed. (1980), at pp. 276-7. Neither new member has acted in any way or even participated in any process which could give rise to a reasonable apprehension of bias on their part. Therefore the doctrine of necessity is rightly applied in these facts to allow a panel to be constituted, in case any general corporate disqualification beyond those members' control were found. (R.R.S. Tracey, *Disqualified Adjudicators: The Doctrine of Necessity in Public Law*, [1982] Public Law 628, at p. 632.)

Conclusion

64 Mr. Geller and Ms. Meyer are capable of forming a quorum to conduct the s. 27 hearings. If the vacancy is filled, the person appointed could also sit, or any two of the three, as designated by the Chair of the OSC. The application is dismissed. The hearings may proceed only before a panel constituted as directed by this Court.

65 The matter of costs may be addressed by fax.

Application dismissed.

1995 CarswellOnt 1057
Ontario Court of Appeal

E.A. Manning Ltd. v. Ontario (Securities Commission)

1995 CarswellOnt 1057, [1995] O.J. No. 1305, 125 D.L.R. (4th) 305, 18 O.S.C.B. 2419, 23 O.R. (3d) 257, 32 Admin. L.R. (2d) 1, 55 A.C.W.S. (3d) 3, 7 C.C.L.S. 125, 80 O.A.C. 321

E.A. MANNING LIMITED, JUDITH MARCELLA MANNING, TIMOTHY EDWARD MANNING, WILLIAM DOUGLAS ELIK, MARY MARTHA FRITZ, MARC HAROLD SCHWALB and PETER JOHN FINANCE v. ONTARIO SECURITIES COMMISSION

Dubin C.J.O., Labrosse and Doherty JJ.A.

Heard: November 30 and December 2, 1994
Judgment: May 9, 1995 *
Docket: Doc. CA C18902

Counsel: *Bryan Finlay, Q.C.*, *Philip Anisman* and *J. Gregory Richards*, for appellants.
Dennis R. O'Connor, Q.C. and *Benjamin T. Glustein*, for respondent.

Subject: Securities; Corporate and Commercial; Public

Annotation

Introduction

On August 17, 1995 the Supreme Court of Canada refused leave to appeal the decision of the Ontario Court of Appeal in this case. [1] This brought to a close the efforts of Toronto-based broker dealer E.A. Manning Ltd. to prevent the Ontario Securities Commission from conducting a hearing into its fitness to stay in business.

The Issue

The central issue in this case was the allegation of a reasonable apprehension of bias. Bias cases tend to be quite rare. Cases in which tribunals are disqualified from proceeding, or have their decision quashed are rarer still. [2] There are several reasons why bias cases raise difficult issues.

Tribunals and Courts

A judge, in a court of law, will normally disqualify himself or herself before becoming involved in the proceedings if there is even the slightest question of bias. For example, a judge married to a lawyer in a particular firm will refuse to look at any files in which one of the counsel is from that firm. In other cases, a judge will ask counsel whether they would wish the judge to step down. [3]

Since judges are so cautious, if not hyper-sensitive, bias cases involving judges are exceedingly rare. The situation of administrative tribunals, however, is somewhat different, and not because of any lack of sensitivity on the part of tribunal members.

As the Court of Appeal in *Manning* quite appropriately observed, people are often appointed to tribunals for their expertise. For this reason, they are expected to have specialized knowledge of the matters within their jurisdiction. How are they to maintain this knowledge after they have been appointed, if not by reading about, and maintaining close contact with the regulated industry? Of equal importance, typically, a judge will encounter a particular set of parties only once in a judicial career (with the exception of special parties such as the Attorney General, who is really only notionally a party, but, in practice, the Government's lawyer). Many tribunals encounter the same few parties repeatedly.

A member of a regulatory tribunal such as the Ontario Securities Commission [4] will undoubtedly, over time, form opinions of the parties who appear before the Commission. Does this really mean that a party in a regulatory process must have a lower expectation of the degree of neutrality of the decision-maker than would a litigant in a court of law? The answer depends upon how one defines neutrality or, to put the issue the other way, how one defines bias.

The Open Mind

The public expectation is usually that the decision-maker will have an open mind. Rendering that expectation unrealistic is the obvious fact that there is no such thing as a totally open mind (except for a totally empty mind). The mature human mind can never be tabula rasa. There must be a continuum between a mind that is totally open to any point of view and one that is closed to at least one of the parties. At what point do the values and inclinations acquired during the lifetime of a decision-maker, or the views and inclinations of the matter at hand, as influenced by the firmly held opinions of a lifetime, give rise to a disqualifying bias? If one could measure degrees of open-mindedness as one does temperature, with a device analogous to a thermometer, one could easily set a standard. But there is no such scale. And even if there was, there would be no way to insert it into the mind of the decision-maker in order to obtain a reading. As we can never know what is in a decision-maker's mind we can never be certain whether it is or is not open or unbiased.

Every experienced counsel will have encountered decision-makers who appear to have it in for his or her client, judging by the decision-maker's demeanour and questions during the course of the

hearing, only to receive a favourable decision at the end of the case; or, conversely, to have the decision-maker smile approvingly and be friendly throughout, only to receive a decision which disagrees with the client's position on every important issue. Appearances can be, and frequently are, misleading. The more common situation, however, is that a negative or hostile reaction will precede loss of the case. But, even then, negative initial reactions of decision-makers can often be turned around through good advocacy. When they are not, it should still not be assumed that the negative initial reaction was due to bias against the individual applicant, rather than an honest expression of scepticism or disagreement with the individual applicant's arguments. In short, bias, like beauty, is very often in the eye of the beholder. The law, therefore, needs an objective test, and one that is not too quick to disqualify the relatively few members appointed to any tribunal from deciding cases.

The Presumption of Impartiality

Everyone is entitled to adjudication before an impartial decision-maker. But what does this mean in practice? Since, as we have said, there is no objective way to measure bias, and, as we do not give our decision-makers sodium pentathol, or some other "truth serum" before permitting them to make a decision, none of us can know what is in the mind of an individual decision-maker. The logical rule, therefore, as the Court of Appeal noted, is that the decision-maker is presumed not to be biased, absent proof to the contrary.

What form can this proof take? First, if the decision-maker writes an article or makes a speech which clearly indicates a pre-disposition in one direction, that may be a bias for suspecting that when a particular case appears before that decision-maker, the pre-disposition will determine the particular case. Canadian law, however, appears to require stronger proof than that before the decision-maker will be disqualified from participation in the decision, or the decision quashed. [5] There must be evidence that, for some further reason, the decision-maker cannot be trusted to bring objectivity to bear on the *particular* decision in issue. In other words, the presumption of impartiality in Canadian law is rather strong, and requires clear and direct evidence to overcome it. A mere apprehension of bias is not enough; a real likelihood of bias is required. [6]

The main occasions on which a disqualifying bias tends to arise, in practice, is where a decision-maker is alleged to have a proprietary or pecuniary interest in the outcome of a decision [7] or where there is some personal connection such as the decision-maker being a relative of one of the parties by birth or by marriage. Those cases are easy. They almost never result in litigation. The more difficult cases arise when a decision-maker has expressed a point of view on a subject, which is alleged to give rise to a real likelihood of bias. Judges can relatively easily avoid this problem by limiting their speeches to non-controversial subjects, or, at least, to subjects which are not likely to arise before them in a particular case. And, where a judge does make a speech on a subject, or writes an article, and the particular case does come up, there is usually a large enough pool of other judges available that there is no problem in finding an alternate judge. However, the problem is

greater for tribunals. Tribunal members are often required to make speeches, or to issue guidelines, as part of their regulatory duties, to provide guidance to the industry being regulated. The courts have held that it is better to do this openly and publicly than behind closed doors. [8] In some cases it will be necessary for a member of the tribunal, perhaps even one sitting on a case in which the issue is raised, to make a speech indicating a general policy or an inclination in a particular direction. The Court of Appeal left open the possibility that even that might not create a disqualifying bias, although the comment must be regarded as obiter, since it did not arise in the particular case. On the other hand, there are rare, extreme cases in which a member of a tribunal makes a speech which gives the impression that regardless of the evidence, he is very strongly inclined to a particular point of view, giving rise to a *real* likelihood of bias. [9]

Is There a Doctrine of "Corporate Taint"?

As if all of this was not complicated enough, the situation is further complicated when the decision-maker against whom bias is alleged may be only one member of a panel hearing the matter, or only one member of a tribunal, but not sitting on the panel hearing the matter. Is there some sort of doctrine of "corporate taint" in bias cases and, if so, when and how does it apply?

There does not appear to be any doctrine of "corporate taint" in Canadian law. The actions of one member of a tribunal do not, in ordinary circumstances, create a real likelihood of bias with respect to others. There are some circumstances, though, where the bias of one member will be imputed to others. If a tribunal makes a decision in a case, and then it is learned that one of the members of the panel which decided the case has a bias, a court will not speculate that the decision might have been the same had the member with the bias not participated. In those circumstances, the bias of one member will be seen as having tainted the entire panel. [10] On the other hand, as the Court of Appeal in *Manning* found, even if a member of a tribunal had a bias, if that member does not participate in making the decision, the decision is not tainted by that bias. [11] The reason for the difference in the two situations is that once a member with a bias participates on a panel, it becomes impossible afterwards to unravel what would have happened had that member not participated. Where, however, the decision-making panel has not yet been assembled, the presumption will be that the member with the bias will not participate and, therefore, taint the others. That presumption can be rebutted if there is evidence to the contrary.

The applicant in the *Manning* case had three grounds for its argument that the new Commissioners should be disqualified: first, the notion of "corporate taint"; second, by virtue of the comments of the Chair of the Commission; and third, because the Commission defended an action brought against it by some of the same parties, in the *Ainsley* case (annonated below). We have already discussed the scope and limits of the doctrine of corporate taint. The comments of the Chair were held, on the facts, not to give rise to a legal disqualification. Finally, the Court accepted the common

sense proposition that one cannot commence litigation against a tribunal, as in Ainsley, and then argue, when it defends itself, that that defence constitutes a bias.

Conclusion

There is nothing wrong with a member of a tribunal having a disqualifying bias. The problems arise when the member participates, or attempts to participate in making a decision in relation to which he or she should be disqualified. Fact situations in which the decision-maker is tainted by a proprietary or pecuniary interest, or a family connection, are fairly simple and straight-forward, although there may be difficulty in borderline cases. However, speeches and policy pronouncements, which chairs and members of tribunals, and sometimes even staff members, are often called upon to make, may make tribunal decisions targets for accusations of bias. Had the Court in the *Manning* case imposed a judicial standard of conduct on the Chair, despite his different institutional duties, and, had the Court expanded the notion from that of the bias of one member tainting a panel to that of the bias of one member tainting an entire tribunal, the decision in the *Manning* case could have gone the other way. Fortunately, the Court did not lose sight of the difference between tribunals and courts, and unequivocally rejected the new "corporate taint" doctrine advocated by the appellant.

Andrew J. Roman [12]

Appeal from judgment reported at (1994), 3 C.C.L.S. 221, 17 O.S.C.B. 2339, 18 O.R. (3d) 97, 72 O.A.C. 34, 24 Admin. L.R. (2d) 283 (Div. Ct.), dismissing application for order prohibiting Ontario Securities Commission from proceeding with hearings.

The judgment of the court was delivered by *Dubin C.J.O.*:

1 The appellants, by leave, appeal from the judgment of the Divisional Court, now reported at (1994), 18 O.R. (3d) 97 [3 C.C.L.S. 221], dismissing their application for an order in the nature of prohibition to prevent the Ontario Securities Commission (the "Commission") from proceeding with two hearings relating to allegedly improper sales practices by the appellants. The appellants alleged actual bias, and a reasonable apprehension of bias, principally arising out of a Policy Statement issued by the Commission relating to the sales practices of securities dealers recommending investment in penny stocks.

2 The Divisional Court held that the Commissioners who participated in the formulation and adoption of the Policy Statement and the Chair of the Commission appointed after the formulation and adoption of that Statement were precluded from participating in the two hearings then pending. The Divisional Court held, however, that the Commissioners who had been appointed to the Commission after the adoption of the Policy Statement were not disqualified and could preside over the hearings, and that the two hearings could proceed if presided over by the new Commissioners. The application for prohibition was therefore dismissed.

Facts

3 The appellant, E.A. Manning Limited ("Manning"), is registered as a securities dealer under s. 98(9) of the Regulation (R.R.O. 1990, Reg. 1015, as amended) enacted pursuant to the Ontario *Securities Act*, R.S.O. 1990, c. S.5. The other appellants at the material times were directors, officers or salespersons of Manning. The respondent Commission has a two-tiered structure, consisting of an appointed statutory tribunal (the Commission proper, or "Commissioners") and the Commission staff. The Commission is defined by s. 2(2) of the *Securities Act* as comprising a Chair, and not more than ten or less than eight other members. Section 2(4) of the *Securities Act* provides that two Commissioners constitute a quorum for any hearing held pursuant to the provisions of the *Securities Act*.

4 The Policy Statement sets forth the Commission's conclusion that abusive and unfair sales practices existed among securities dealers involved in the trading of the low-cost shares known as penny stocks. The Policy Statement sought to remedy these abuses by requiring securities dealers to provide potential purchasers with a risk disclosure statement and to complete a suitability statement in respect of each purchase. Brokers and investment dealers were excluded from the Policy Statement's consideration, the Commission having satisfied it self that traders registered under those classifications were adequately policed by the Toronto Stock Exchange and the Investment Dealers Association, the self-governing bodies to which they were respectively required to belong pursuant to the Regulation passed under the *Securities Act*.

5 The purpose of the Policy Statement was set forth in the statement as follows:

> **Purpose Of This Policy**
>
> The Act and the regulations under the Act (the "Regulations") require, among other things, that registrants "know their clients" and deal "fairly, honestly and in good faith" with their customers and clients. *The Commission is concerned that securities dealers engaged in unfair sales practices like those mentioned above are not complying with these obligations and are recommending investments in penny stocks that are highly speculative and often are not appropriate for an investor given his/her personal circumstances, investment experience, investment objectives and financial means. The Commission is also concerned that as a result of the sales practices employed, investors often purchase penny stocks unaware of the risks involved and without adequate consideration being given to the suitability of the purchase. Losses of a significant portion of an investment in penny stocks are common. The Commission has concluded that these sales practices have a significant adverse impact on the fairness and integrity of the capital markets in Ontario*.
>
> The Commission is issuing this Policy as a guide to identify what the Commission believes are appropriate business practices to assist securities dealers and their employees in satisfying

> their obligations under the Act in connection with the marketing and sale of penny stocks. This Policy is intended to inform interested parties that the Commission will be guided by this Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario.
>
> The Commission believes that the business practices set out in this Policy should be adopted by securities dealers when selling penny stocks. The Commission believes that such practices are in the public interest to promote and maintain fair, equitable and efficient capital markets in Ontario and to protect investors from high pressure and other unfair sales practices employed in the marketing and sale of penny stocks and that these business practices are consistent with the duty of securities dealers and their officers, partners, salespersons and directors to deal fairly, honestly and in good faith with their customers and clients. Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. *In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case*.

[Emphasis added.]

6 On September 15, 1992, about one month after the issuance of the Policy Statement in its draft form, Manning and other securities dealers commenced an action (the *Ainsley* action) against the Commission alleging that the Policy Statement was ultra vires the Commission, that the Commission had no basis upon which to formulate the policy, and that they were being harassed and discriminated against by the Commission. In May 1993, the plaintiffs in that case brought a motion for summary judgment on the issue whether Policy Statement 1.10 was ultra vires the Commission. On August 13, 1993, Blair J. held that the Policy Statement, including the requirements with respect to the future business conduct of the securities dealers, was beyond the jurisdiction of the Commission ([*Ainsley Financial Corp. v. Ontario (Securities Commission)*] (1993), 14 O.R. (3d) 280). The decision of Blair J. was appealed to this court by the Commission, and the appeal was dismissed, the reasons for judgment being delivered by Doherty J.A. ((1994), 21 O.R. (3d) 104). The other allegations in the *Ainsley* action have not as yet been resolved, and they are still outstanding.

7 On December 15, 1993, the Commission issued a notice of hearing (the "first notice of hearing") to determine whether under s. 27 of the *Securities Act*, it was in the public interest to suspend, restrict, or cancel the registrations of Manning and three of the other appellants and to determine whether certain exemptions should no longer apply to the appellants. The notice alleged that the appellants traded in securities of BelTeco Holdings Inc. and Torvalon Corporation, contrary

to the public interest by, inter alia, using high-pressure sales tactics, failing to disclose that they were selling securities as principal and not as agents, and failing to disclose that mark-ups were included in the purchase price and that shares were of limited marketability. The hearing was scheduled to commence on September 19, 1994. On February 4, 1994, the Commission issued a second notice of hearing against Manning and five of the other appellants, the primary purpose of which was to seek an order prohibiting the named parties from calling on residences to sell securities (the Commission staff having failed in its attempt two days earlier to obtain an ex parte order under s. 27(2) of the *Securities Act* for an interim suspension of the registration of Manning). Essentially, the allegations in the second notice echoed the allegations in the first notice, but did not relate to the trading in the shares of specific corporations.

8 Following the release of the Policy Statement, Mr. Edward Waitzer was appointed the new Chair of the Commission; Mr. John Arthur Geller, the Vice-Chair of the Commission; and Helen M. Meyer, a member. A second new Commissioner has now also been appointed.

9 On December 7, 1993, one week prior to the issuance of the first notice of hearing, an interview with Edward Waitzer was published in the *Dow Jones News*. Mr. Waitzer was quoted as saying that dealing with penny stock dealers was a "perennial priority" of the Commission. He added, "[t]here will always be marginal players in the securities industry .... Our task is to get these players into the self-regulatory system or get them out of the jurisdiction."

10 Montgomery J., writing for the Divisional Court, made the following findings:

> i) There was a reasonable apprehension of bias on the part of the Commissioners who were involved in the adoption of the Policy Statement, as in the process of formulating it they had closed their minds to the issue whether securities dealers, including Manning Ltd., were guilty of unfair sales practices. Moreover, the defence of the *Ainsley* case was also evidence of prejudgment in that the Commission went beyond merely defending its jurisdiction and strenuously sought to show that Manning Ltd. (among others) was guilty of the very offences which were the subject of the hearings;
>
> ii) There was a reasonable apprehension of bias on the part of the new Chair, Waitzer, because of his public comments;
>
> iii) There was no evidence or reasonable apprehension of bias on the part of the two other Commissioners appointed after the adoption of the Policy Statement;
>
> iv) New Commissioners would not be affected by "corporate taint", and indeed, there is no judicial authority for such a concept;
>
> v) Even if the legal concept of "corporate taint" existed, the doctrine of necessity would apply to allow those Commissioners against whom no specific reasonable apprehension of bias was found to form a quorum for the hearings;

vi) That the hearings of the Commission could proceed only before a panel of Commissioners consisting of any two or more of Vice-Chair Geller and Commissioner Helen Meyer, or any Commissioner appointed after November 1, 1993. [A new Commissioner was appointed after the order of the Divisional Court.]

11 The appellants now appeal from the order of Montgomery J. dismissing their application for prohibition and submit that the Divisional Court erred in permitting the two hearings to proceed before the new Commissioners.

Issues

12 The appellants submitted that the Divisional Court erred in failing to give effect to their submissions that the conduct of the Commission in its formulation and adoption of the Policy Statement, its defence to the *Ainsley* action, and the comments of its Chair, Mr. Waitzer, had so tainted the entire Commission that even newly-appointed Commissioners should be excluded from sitting on the hearings to consider the allegations in the first and second notices of hearing. They also submitted that the Divisional Court erred in holding that even if the concept of corporate taint could be invoked to otherwise disqualify the new Commissioners, the doctrine of necessity would apply.

13 The respondent, although not conceding before the Divisional court that there was any basis for disqualification of any member of the Commission, did not seek to have any of the Commissioners who had participated in the formulation of the Policy Statement conduct the hearings. The respondent was content before the Divisional Court to have the hearings conducted by the new Commissioners. The respondent did not cross-appeal from the order of the Divisional Court.

14 On the appeal, the respondent submitted that the Divisional Court erred in holding that those Commissioners who participated in the formulation and adoption of the Policy Statement were disqualified to sit on the pending hearings, and that no case of bias had been made out against them. The respondent further submitted that the Divisional Court erred in holding that Mr. Waitzer, the Chair, was disqualified. It would follow that, under such circumstances, there would be no basis for questioning the qualification of the new Commissioners.

15 However, as has been noted, the respondent did not cross-appeal from the order of the Divisional Court and did not seek here, or in the Divisional Court, to have anyone other than the new Commissioners preside over the pending hearings. If the judgment under appeal permitting the new Commissioners to sit was dependent on the proposition that none of the Commissioners, nor the Chair, were disqualified, I would have to consider whether the Divisional Court was corrected in so holding. However, in my view, the status of the new Commissioners to conduct the hearings is not dependent upon the status of the others to do so. Assuming that the Divisional Court was

100 correct in disqualifying the Commissioners who had participated in and formulated the Policy Statement, it is only necessary to consider whether the new Commissioners are disqualified (1) on the doctrine of corporate taint, or (2) by reason of the comments of the Chair, or (3) by reason of the Commission's defence to the *Ainsley* action.

Overview

16 By statute, the Commission is given many independent responsibilities and duties, and, in considering issues of bias and reasonable apprehension of bias, regard must be had to the statutory framework within which the Commission functions.

17 Within that statutory framework, the Commission is, in disciplinary matters, the investigator, the prosecutor, and the judge. As a general principle, in the absence of statutory authority, this overlap would be held to be contrary to the principles of fairness. However, where such functions are authorized by statute, the overlapping of these functions, in itself, does not give rise to a reasonable apprehension of bias.

18 In this respect, Madam Justice L'Heureux-Dubé in *Barry v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301 [hereinafter referred to as *Brosseau v. Alberta (Securities Commision)*], observed as follows at pp. 313-314:

> Securities commissions, by their nature, undertake several different functions. They are involved in overseeing the filing of prospectuses, regulating the trade in securities, registering persons and companies who trade in securities, carrying out investigations and enforcing the provisions of the Act. By their nature, they will have repeated dealings with the same parties. The dealings could be in an administrative or adjudicative capacity. When a party is subjected to the enforcement proceedings contemplated by ss. 165 or 166 of the Act, that party is given an opportunity to present its case in a hearing before the Commission, as was done in this case. The Commission both orders the hearing and decides the matter. Given the circumstances, it is not enough for the appellant to merely claim bias because the Commission, in undertaking this preliminary internal review, did not act like a court. It is clear from its empowering legislation that, in such circumstances, the Commission is not meant to act like a court, and that certain activities which might otherwise be considered "biased" form an integral part of its operations.

19 In dealing with the issue of a reasonable apprehension of bias, Madam Justice L'Heureux-Dubé added at pp. 314-315:

> The particular structure and responsibilities of the Commission must be considered in assessing allegations of bias. Upon the appeal of *Latimer* to the Ontario Court of Appeal, Dubin J.A., for a unanimous Court, dismissed the complaint of bias. He acknowledged that

the Commission had a responsibility both to the public and to its registrants. He wrote at p. 135:

> ... I view the obligation of the Commission towards its registrants as analogous to a professional body dealing in disciplinary matters with its members. The duty imposed upon the Commission of protecting members of the public from the misconduct of its registrants is, of course, a principal object of the statute, but the obligation of the Commission to deal fairly with those whose livelihood is in its hands is also by statute clearly placed upon it, and nothing is to be gained, in my opinion, by placing a priority upon one of its functions over the other.

Dubin J.A. found that the structure of the Act whereby commissioners could be involved in both the investigatory and adjudicatory functions did not, by itself, give rise to a reasonable apprehension of bias.

I am in agreement with this proposition. So long as the Chairman did not act outside of his statutory authority, and so long as there is no evidence to show involvement above and beyond the mere fact of the Chairman's fulfilling his statutory duties, a "reasonable apprehension of bias" affecting the Commission as a whole cannot be said to exist.

20 In delivering the judgment of the Divisional Court, Montgomery J. stated as follows at p. 113:

> ... *W.D. Latimer Co. v. Bray* (1974), 6 O.R. (2d) 129 ... (C.A.), established the principle that evidence of prejudgment, even in the context of the unique statutory scheme established by the *Securities Act*, is a ground for disqualification. However, it recognized that mere knowledge by Commissioners of market conditions or even of grounds for a complaint to be heard by them do not produce any apprehension of bias in the particular circumstances of this tribunal. Dubin J.A. (as he then was) delivered the judgment of the court. He stated at pp. 140-141:
>
> > Where by statute the tribunal is authorized to perform tripartite functions, disqualification must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task. *Evidence of prejudgment, however, is a ground for disqualification unless the statute specifically permits the tribunal to have arrived at a preliminary judgment before conducting an inquiry*.

[Emphasis added.]

Disqualification by Reason of Corporate Taint

21 As noted earlier, the appellants submitted that the Divisional Court erred in failing to prohibit the Commission from conducting the hearings pursuant to the two notices previously referred to. They submitted that the Divisional Court, having found that those Commissioners who had participated in the formulation and adoption of the Policy Statement had prejudged the matters to be considered, erred in failing to hold that this prejudgment tainted the entire Commission, including those members who were appointed after the formulation and adoption of the Policy Statement.

22 It should be noted that the Policy Statement was held to be beyond the jurisdiction of the Commission because it had crossed the line between a non-mandatory guideline, and a mandatory pronouncement having the same effect as a statutory instrument, without the appropriate statutory authority (Doherty J.A. in *Ainsley*, supra). However, there is no suggestion of bad faith.

23 For the reasons noted earlier, it is unnecessary to determine whether the Divisional Court was correct in finding that those Commissioners who had participated in the formulation and adoption of the Policy Statement were disqualified.

24 Assuming that the Divisional Court was correct in so finding, I agree with its conclusion that such a finding did not disqualify the new Commissioners. Montgomery J., at p. 116, stated, in part, as follows:

> It is argued by the applicant that there is a corporate taint affecting all those Commissioners subsequently appointed to the OSC. There is no judicial authority for this proposition. Bias is a lack of neutrality.
>
> Blake in *Administrative Law in Canada* (Toronto: Butterworths, 1992), states at p. 92:
>
> > Many tribunals are part of a larger administrative body. The fact that one branch of that administrative body is biased does not mean that another branch that has carriage of the matter is biased. Bias on the part of an employee of the tribunal or a member who is not on the panel hearing the matter usually does not give rise to a reasonable apprehension of bias on the part of the tribunal. Even bias on the part of the Minister in charge of the department does not necessarily make the adjudicator employed by the Ministry biased.

25 There was no evidence of prejudgment on the part of the new Commissioners. They were not involved in the consideration and adoption of the Policy Statement. Furthermore, none of the evidence which the staff of the Enforcement Branch proposed to adduce at the hearings was provided to them.

26 It should also be noted that the evidence to be adduced in connection with the second notice of hearing only came to the attention of Commission staff after final approval of the Policy Statement by the Commissioners. Furthermore, none of the details of the evidence proposed to be presented

to the Commissioners in connection with the first notice of hearing formed part of the staff report presented to those Commissioners who were present when the Policy Statement was adopted.

27 It is assumed, of course, that the new Commissioners would be familiar with the Policy Statement and the concerns of the Commission with respect to the trading in penny stocks.

28 Securities Commissions, by their very nature, are expert tribunals, the members of which are expected to have special knowledge of matters within their jurisdiction. They may have repeated dealings with the same parties in carrying out their statutory duties and obligations. It must be presumed, in the absence of any evidence to the contrary, that the Commissioners will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case.

29 As noted earlier, even advance information as to the nature of a complaint and the grounds for it, which are not present here, are not a basis for disqualification.

30 In *Brosseau*, supra, the fact that the Chairman of the Commission had received the investigative report and sat on the panel hearing the matter did not give rise to a finding of a reasonable apprehension of bias.

31 In *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171 (C.A.), an allegation of bias against the Commission was made because the staff of the Commission had cooperated with Crown counsel in quasi-criminal proceedings against those who were subsequently to appear before the British Columbia Securities Commission.

32 In rejecting a motion to stay the proceedings before the Commission by reason of the participation of the staff in the quasi-criminal proceedings, the British Columbia Court of Appeal first referred to the following portion of the judgment at first instance, at p. 180:

> I have also indicated earlier in these reasons, as well, that the fact that employees of the commission swore the information used by the Crown to prosecute the Bennetts and Doman in the *quasi*-criminal trial and used their investigative capacity to provide the evidence, does not lead automatically to an inference of bias on the part of the commission, because of the very nature of the commission under the Securities Act. Indeed, I do not take an inference of bias from their having done so. Nor is there any other demonstrated evidence of bias in this case.

33 The British Columbia Court of Appeal went on as follows at pp. 180-181:

> We are fully in accord with these findings. In the absence of any evidence of bias we are unable to understand how it could be inferred that staff activities of the sort which occurred

104

> here could lead a reasonably informed person to apprehend that presently unknown hearing officers would not be able to act in an entirely impartial manner if the hearing proceeds...
>
> We wish to add one further observation and that is as to the target of a bias allegation. Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear. No individual is identified here. Rather, the effect of the submissions is that all of the members of the commission appointed pursuant to s. 4 of the *Securities Act*, regardless of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where an entire tribunal of unidentified members had been disqualified from carrying out statutory responsibilities by reason of real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration.

34 A case very much in point is *Laws v. Australian Broadcasting Tribunal* (1990), 93 A.L.R. 435 (H.C.). In that case, three members of the Australian Broadcasting Tribunal, during the course of what was intended to be a preliminary investigation, concluded that the appellant (Laws) had breached broadcasting standards. Subsequently, the tribunal, as a whole, decided to hold a formal inquiry to consider whether it should exercise any of its regulatory powers against the appellant including the withdrawal of its licence. The appellant sought an order prohibiting the broadcasting tribunal from conducting such a hearing on the ground that the entire tribunal was tainted by reason of the prejudgment of three of its members. An employee of the tribunal, Ms. Paramore, the Director of its Programs Division, later gave an interview on behalf of the tribunal in which she repeated the conclusions made earlier by the three tribunal members. Mr. Laws submitted that this was a further ground for disqualification.

35 An action for defamation was commenced by Mr. Laws against the tribunal and Ms. Paramore arising from the radio interview. In defence, the tribunal pleaded justification. That also formed the basis of the appellant's application to prohibit the tribunal from proceeding with its formal inquiry. I find it convenient to deal with the impact of the lawsuit later.

36 At first instance, Morling J. concluded that the three members of the tribunal who had undertaken the preliminary investigation had gone much further and had made a positive finding that the appellant had violated broadcasting standards. He held that they were precluded from participating in the formal inquiry, but the appellant was not entitled to an order prohibiting the formal inquiry from continuing so long as it was conducted by other members of the tribunal who had not participated in the preliminary investigation. That conclusion was upheld by the full court and by the High Court of Australia.

37 With respect to the statements made by Ms. Paramore, the appellant contended that those statements reflected the corporate view of the members of the tribunal and thus formed the basis for an order of prohibition against the tribunal itself.

38 Morling J. held that there was no justification for attributing Ms. Paramore's views to the members of the tribunal who were to conduct a formal inquiry. That conclusion was upheld in the High Court of Australia. On that issue, Mason C.J. and Brennan J. stated at pp. 444-445:

> In order to examine this submission it is necessary to consider the interview given by Ms. Paramore. Although the Act did not authorise the publication of the findings of non-compliance by the appellant with RPS 3 [broadcasting standards], it was not disputed that Ms Paramore spoke for the tribunal when she gave an account of the vitiated decision of 24 November. The tribunal is constituted by the Act as a body corporate (s 7(1), (2)(a)) and it consists of a chairman, a vice-chairman and at least one other member but not more than six other members; s 8(1). There is nothing to identify the source of Ms. Paramore's authority to make the statements which she made in the interview on behalf of the tribunal. It is very likely that her authority arose from her responsibility as Director of the Programs Division; in other words, it was part of her general responsibility to publish and explain, by way of broadcast, interview and otherwise, decisions made by the tribunal. The fact that the decision which she sought to report and explain was vitiated, at least so far as it related to the appellant, did not deny to the interview the character of a corporate act performed in purported pursuance of s 17(1). *However, though it might be correct to regard the interview as a corporate act, it was not necessarily an act done on behalf of each of the individual members of the corporation. The circumstances are not such as to justify the drawing of an inference that each of the individual members of the tribunal authorised the interview or approved of its content. At best from the appellant's viewpoint, it might be inferred that the three members of the tribunal who made the decision of 24 November so authorised or approved the interview. Accordingly, the interview does not entitle the appellant to wider relief than that granted at first instance by Morling J.*

[Emphasis added.]

39 Although there may be circumstances where the conduct of a tribunal, or its members, could constitute institutional bias and preclude a tribunal from proceeding further, this is not such a case. This is not a case where the Commission has already passed judgment upon the very matters which are to be considered in the pending hearings by the new Commissioners and, in this respect, is distinguishable from the case of *Association des officiers de direction du service de police de Québec (ville) c. Québec (Commission de police)* (1994), 119 D.L.R. (4th) 484 (Que. C.A.), where that was the nature of the concern of the majority of the members of the court. In any event, and with respect, I prefer the dissenting reasons for judgment of Fish J.A.

Disqualification by Reason of the Comments of the Chair, Mr. Waitzer

40 In the reasons of the Divisional Court, Montgomery J. stated at p. 111 as follows:

> In a press interview, the Chair of the OSC, Mr. Waitzer, stated that dealing with penny stock dealers is a "perennial priority". "There will always be marginal players in the securities industry. Our task is to get these players into the self-regulatory system or get them out of the jurisdiction".
>
> I conclude that Mr. Waitzer cannot sit on either hearing because of a reasonable apprehension of bias.

Montgomery J. did not expand upon his reasons for arriving at that conclusion.

41 The appellants submitted that the statements of the Chair exhibited a bias against them which was reflective of the Commission as a whole, and, therefore, they could not get a fair hearing from any members of the Commission. They submitted that, having found Mr. Waitzer was disqualified by reason of a reasonable apprehension of bias, the Divisional Court erred in not prohibiting the hearings from proceeding.

42 Mr. Waitzer's comments were delivered in the context of a series of four articles published in the same issue of the *Dow Jones News*. They appeared under the titles: "OSC Chairman Sees Mandate To Improve Market Efficiency," "Growing Power of Institutions"; "Jurisdiction Debate Red Herring"; and "Market Transparency a Priority". In those articles, Mr. Waitzer discusses trends in the securities industry, and potential regulatory responses to them. He is quoted as saying that he sees as part of his job the removal of un necessary regulatory burdens from participants in Ontario capital markets, rather than the mere imposition of new measures. He also states that the Toronto Stock Exchange may well have to adapt to admit members who do not trade on the exchange. One of the articles notes his concern that the self-regulating agencies adapt to accommodate the trend to various proprietary trading systems:

> While Waitzer says he sees no immediate threat to the TSE, he says his concern is that the situation will evolve into one where "all of a sudden we have 20 trading systems and no self-regulatory system; we've got a real problem and it all lands in the Commission's lap."

In this context, Mr. Waitzer's comment about getting the penny stock dealers into the self-regulating system is clearly a reflection of what he sees as the ideal regulatory solution to the industry's problems. It is a solution he advocates for all players in the market, not just for the class of traders to which the appellants belong.

43 With respect, I fail to see how what was said by Mr. Waitzer could form any basis for concluding that there was a reasonable apprehension of bias if he were to sit on either of the pending hearings, let alone disqualify the other Commissioners from conducting the hearings. In making the comments complained of here, Mr. Waitzer was fulfilling his mandate as Chair of the Commission.

44 In this respect, what was stated by Doherty J.A. in *Ainsley Financial Corp. v. Ontario (Securities Commission)*, supra, at pp. 108-109, is apt:

> The authority of a regulator, like the Commission, to issue non-binding statements or guidelines intended to inform and guide those subject to regulation is well established in Canada. The *jurisprudence* clearly recognizes that regulators may, as a matter of sound administrative practice, and without any specific statutory authority for doing so, issue guidelines and other non-binding instruments: *Hopedale Developments Ltd. v. Oakville (Town)*, [1965] 1 O.R. 259 at p. 263, 47 D.L.R. (2d) 482 (C.A.); *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at pp. 6-7; 137 D.L.R. (3d) 558; *Capital Cities Communications Inc. v. Canadian Radio-Television & Telecommunications Commission*, [1978] 2 S.C.R. 141 at p. 170, 81 D.L.R. (3d) 609 at p. 629; *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at p. 35; 88 D.L.R. (4th) 1; *Pezim*, *supra*, at p. 596; Law Reform Commission of Canada, Report 26, *Report on Independent Administrative Agencies: Framework for Decision Making* (1985), at pp. 29-31.
>
> Non-statutory instruments, like guidelines, are not necessarily issued pursuant to any statutory grant of the power to issue such instruments. Rather, they are an administrative tool available to the regulator so that it can exercise its statutory authority and fulfil its regulatory mandate in a fairer, more open and more efficient manner. While there may be considerable merit in providing for resort to non-statutory instruments in the regulator's enabling statute, such a provision is not a prerequisite for the use of those instruments by the regulator. The case law provides ample support for the opinion expressed by the Ontario Task Force on Securities Regulation, *Responsibility and Responsiveness* (June 1994) at pp. 11-12:
>
> > A sound system of securities regulation is more than legislation and regulations. Policy statements, rulings, speeches, communiqués, and Staff notes are all valuable parts of a mature and sophisticated regulatory system. ...

45 Mr. Waitzer's comments did not in any way relate to the subject matter of the complaints made against the appellants in the pending proceedings, nor should they be viewed as a veiled threat against the appellants, as was contended.

46 However, even if statements by a regulator relate to the very matters which he or she is considering, that, in itself, is not a basis for concluding that the regulator has prejudged the matter.

47 In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, Cory J. stated at p. 639:

> 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

108

> 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.

48 Even if it could be said that the statements of the Chair exhibited bias against the appellants that, in itself, would not disqualify the other Commissioners from conducting the headings.

49 In *Van Rassel v. Royal Canadian Mounted Police*, (sub nom. *Van Rassel v. Canada (Commissioner of R.C.M.P.))* [1987] 1 F.C. 473 (T.D.), it was alleged that the Commissioner of the R.C.M.P. made a public comment strongly critical of the R.C.M.P. officer who faced a trial before the R.C.M.P. service tribunal. Joyal J. held that even if such a statement were made, it could not lead to a reasonable apprehension of bias against the whole tribunal, at p. 487:

> Assuming for the moment that the document is authentic and that the words were directed to the applicant, it would not on that basis constitute the kind of ground to justify my intervention at this time. The Commissioner of the RCM Police is not the tribunal. It is true that he has appointed the tribunal but once appointed, the tribunal is as independent and as seemingly impartial as any tribunal dealing with a service-related offence. One cannot reasonably conclude that the bias of the Commissioner, if bias there is, is the bias of the tribunal and that as a result the applicant would not get a fair trial.

50 As I indicated earlier, in my opinion, there was no merit in the contention that the new Commissioners were disqualified by reason of the comments made by the Chair.

Bias Resulting from Commission's Defence in the Ainsley Action

51 As noted earlier, the *Ainsley* action was an action commenced by several investment dealers, including the appellants, against the Commission.

52 In the judgment of the Divisional Court, Montgomery J. found that the Commission's defence of the *Ainsley* action offered further evidence of its prejudgment of the matters contained in the first and second notices of hearing. In part, he stated as follows at pp. 114-115:

> In the context of the litigation brought by the securities dealers, including the motion for judgment in the *Ainsley* case and the pending appeal, the OSC went beyond merely defending itself and its jurisdiction and adopted the role of advocate against them and strenuously sought to demonstrate that Manning Limited and others are guilty of the very conduct which is now the subject of the current notices of hearing.

53 Counsel for the appellants submitted that the Divisional Court, having come to that conclusion, erred in not holding that the Commission should be prohibited from proceeding with the two hearings even if such hearings were presided over by the new Commissioners.

54 In the action, the plaintiffs claimed, in part, that the Commission staff could neither establish the public interest basis for the Policy Statement, nor the truth of the conclusion reached in the staff report upon which it was based. The plaintiff's also alleged bad faith, harassment, intimidation, and intentional interference with their business interests and claimed damages in the amount of $1 million.

55 These were very serious allegations and certainly called for a vigorous defence. The Divisional Court did not detail the manner in which they felt that the Commission in its defence to the *Ainsley* action went beyond defending itself and its jurisdiction. It would be a strange result if a securities dealer, whose conduct is under investigation, could, by the institution of an action calling for a defence, prevent the Commission from taking proceedings against it.

56 However, it is unnecessary to determine whether the Divisional Court was correct in holding that the defence of the *Ainsley* action was a basis for disqualification of certain of the Commissioners.

57 It was the Commission staff, along with counsel, who were responsible for assembling the materials that formed the basis of the Commission's response to the plaintiffs' allegations in the *Ainsley* action. None of the Commissioners, with the exception of the former Chair, Robert Wright, participated in any way in assembling those materials, or preparing the Commission's response to the action.

58 In my opinion, it cannot be said tht the defence of the action was a basis to conclude that the new Commissioners had prejudged the complaints which were the subject matter of the notices of hearing, and, in this respect, I agree with the Divisional Court.

59 I agree with the way that this issue was dealt with in *Laws v. Australian Broadcasting Tribunal*, supra.

60 As noted above, in that case, an action for defamation had been commenced against the tribunal and one of its employees. The tribunal, in its defence, relied upon justification which, in effect, alleged that what the employee of the tribunal had stated was true, i.e., the Laws had violated the broadcasting standards. The High Court of Australia did not accede to the submission of the appellant in that case that the defence in the civil action demonstrated bias, or a reasonable apprehension of bias, on the part of all the members of the Commission, including those who had not participated in the preliminary investigation.

61 The court concluded that the defence in the defamation action did not preclude members of the tribunal who had not participated in the preliminary investigation from conducting the pending inquiry.

62 Mason C.J. and Brennan J., with respect to this matter, concluded as follows at pp. 447-448:

> We are left then with the suggestion that in the circumstances there is a reasonable apprehension of bias because the defences to the action for defamation give rise to a suspicion of prejudgment or because the members of the tribunal have a conflicting interest in defeating that action. *Granted that the existence of apprehended bias is a question of fact we are not persuaded that the appellant succeeds in making out such a case against members of the tribunal other than the chairman, vice-chairman and Ms Bailey, who participated in the decision of 24 November and may be taken to have approved the giving of the interview by Ms Paramore*.
>
> . . . . .
>
> *However, we do not consider that the inference drawn in the preceding paragraph, taken in conjunction with the other circumstances which we have described, would lead a fair-minded ob server to conclude that the members of the tribunal, apart from those who participated in the decision of 24 November, would bring other than an unprejudiced and impartial mind to the resolution of the issues which would properly arise in an inquiry to be held under s 17c; see Livesey v New South Wales Bar Association (CLR at 293-4)*.

[Emphasis added.]

63 Gaudron and McHugh JJ., concurring, added the following at pp. 457-458:

> In the present case, the most that can be said against those members of the tribunal who were parties to the filing of the defamation defences is that they believed that, upon the evidence then known to them, the assertions in the defences were true and that on that evidence they would probably have decided the s 17c issues adversely to the appellant. But to attribute that belief and that decision to them does not give rise to a reasonable fear that they would not fairly consider any evidence or arguments presented by the appellant at the s 17c inquiry or that they would not be prepared to change their views about the issues. When the defamation proceedings against the tribunal were commenced, the members of the tribunal were required to file the tribunal's defence on the evidence that they then had in their possession and without the benefit of evidence or argument from the appellant. When all the evidence is heard and the case argued, it may become apparent to them that the defences which the tribunal filed cannot succeed. However, there is no suggestion that the filing of the defences was itself an abuse of process or the product of prejudice. *To the contrary, the hypothesis is that the members of the tribunal believed that the assertions in the defences were true. But neither logic nor the evidence makes it reasonable to fear that because of that belief, the members of*

the tribunal will not decide the case impartially when they hear the evidence and arguments for the appellant at the s 17c inquiry.

[Emphasis added.]

64 As indicated earlier, I would reject the submission that the defence in the *Ainsley* action precluded the new Commissioners from presiding over the pending hearings.

Doctrine of Necessity

65 As noted earlier, the Divisional Court held that even if this were a case of "corporate taint," the doctrine of necessity could be invoked which would allow those Commissioners against whom no specific reasonable apprehension of bias was found to form a quorum for the hearings.

66 In the view that I take of the matter, it is not necessary to consider the doctrine of necessity.

Conclusion

67 I am indebted to counsel for their very thorough and able submissions.

68 In the result, I would dismiss the appeal with costs.

Appeal dismissed.

Footnotes

* Leave to appeal to the Supreme Court of Canada was denied (August 17, 1995), Doc. 24773, Lamer C.J.C., La Forest, and Major JJ. (S.C.C.).

1 *The Globe & Mail*, August 18, 1995, p. B.3.

2 The leading case in the area, which was not even referred to in the reasons of the Ontario Court of Appeal, is *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, 9 N.R. 115, 68 D.L.R. (3d) 716. The decision of the NEB in that case was overturned. However, the usual natural justice/fairness cases involve, primarily, allegations that for some reason the hearing itself was unfair.

3 For example, the writer was once asked by a judge as to whether he should disqualify himself on the ground that when he was an articling student (apparently at least 30 years earlier) he had worked on a file involving the parent company of the other party in the case.

4 Other examples might include professional disciplinary bodies, tribunals regulating prices of services, such as the CRTC for telephone rates, or issuing permits, such as the National Energy Board and numerous licensing bodies.

5 See the *R. v. Pickersgill*; *Ex parte Smith* (1970), 14 D.L.R. (3d) 717 (Man. Q.B.).

6 This was the central rule to emerge from the *Committee for Justice & Liberty* case, supra, at note 2, relying on the *PPG* case, ante, note 7.

7 See *Re Canada (Anti-dumping Tribunal)* (sub nom. *PPG Industries Canada Ltd. v. Canada (Attorney General)*), [1976] 2 S.C.R. 739, 7 N.R. 209, 65 D.L.R. (3d) 354, for a detailed discussion of this type of bias.

8 *Capital Cities Communications Inc. v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1978] 2 S.C.R. 141, 36 C.P.R. (2d) 1, 81 D.L.R. (3d) 609, 18 N.R. 181, at p. 629 (D.L.R.).

9 A rare, but clear example of this is found in the case of the consumer advocate who became a member of the tribunal in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissions of Public Utilities)*, [1992] 1 S.C.R. 623, 4 Admin. L.R. (2d) 121, 134 N.R. 241, 89 D.L.R. (4th) 289, 95 Nfld. & P.E.I.R. 271, 301 A.P.R. 271.

10 This was the situation in the *Committee for Justice & Liberty* case, supra, note 2, where only one member of the panel was found to have had a bias but the decision of the entire panel had been quashed by the Federal Court of Appeal.

11 The decision of the Supreme Court of Canada in *PPG*, supra, note 7, reversed the Federal Court of Appeal on a similar ground: although the Chair of the tribunal had a bias, he did not participate in making the decision.

12 Partner, Miller Thomson

2006 FC 720, 2006 CF 720
Federal Court

Gagliano v. Gomery

2006 CarswellNat 1606, 2006 CarswellNat 1682, 2006 FC 720, 2006 CF 720, [2006] F.C.J. No. 917, 293 F.T.R. 108 (Eng.), 49 Admin. L.R. (4th) 261

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 The Attorney General of Canada, (Respondents)

The Right Honourable Jean Chrétien, (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 The Attorney General of Canada, (Respondents)

Mr Jean Pelletier, (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 The Attorney General of Canada, (Respondents)

M.M. Teitelbaum J.

Heard: May 5, 12, 2006
Judgment: June 9, 2006
Docket: T-2086-05, T-2118-05, T-2121-05

Counsel: P.A. Fournier for Alfonso Gagliano
P. Doody for Jean Chrétien
G. Pratte for Jean Pelletier
R. Langlois, Marie-Geneviève Masson for John H. Gomery
B. Saunders, A. Lespérance, P. Guay for Attorney General of Canada

***M.M. Teitelbaum J.*:**

I. Background

1 The applicants, the Right Honourable Jean Chrétien (Chrétien), the Honourable Alfonso Gagliano (Gagliano), and Mr. Jean Pelletier (Pelletier) separately applied for judicial review

114

to quash the Phase I Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities (the Commission). Each applicant has requested various materials from the Commission under Rule 317 of the *Federal Courts Rules*. The Commission transmitted copies of certain materials that were in its possession and to which it did not object to providing to the parties. However, the Commission objected to the production of certain other materials requested by each applicant. In its view these other requested materials were not relevant, and it informed the parties in writing of the reasons for its objection as required under Rule 318(2). Chrétien, Gagliano and Pelletier presently bring separate motions under Rule 318 of the *Federal Courts Rules* for Orders that the Commission provide certified copies of the material they requested that the Commission has not transmitted to them and that the Commission has in its possession.

2 The applicants filed their motions separately, but on the parties' request, the Court heard their motions together. As the applicants' motions raise substantially similar issues, the Court presently provides one set of reasons that apply equally to all three motions.

II. The Legislative Framework

3 The applicable Rules related to materials in the possession of a tribunal read as follows:

317.(1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.	317.(1) Une partie peut demander que des documents ou éléments matériels pertinents à la demande qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande lui soient transmis en signifiant à l'office fédéral et en déposant une demande de transmission de documents qui indique de façon précise les documents ou éléments matériels demandés.
(2) An applicant may include a request under subsection (1) in its notice of application.	(2) Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.
(3) If an applicant does not include a request under subsection (1) in its notice of application, the applicant shall serve the request on the other parties.	(3) Si le demandeur n'inclut pas sa demande de transmission de documents dans son avis de demande, il est tenu de signifier cette demande aux autres parties.
318 (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit	318 (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :
(*a*) a certified copy of the requested material to the Registry and to the party making the request; or	*a*) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;
(*b*) where the material cannot be reproduced, the original material to the Registry.	*b*) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.
(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.	(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).	(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.
(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.	(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

III. Jean Chrétien's Submissions

4 Jean Chrétien seeks an Order that the Commission provide a certified copy of the following materials:

> a. All documents presented to the Commission at the Roundtables in Moncton, Québec, Toronto, Edmonton, and Vancouver;
>
> b. A summary of the discussions held during the Commission's Roundtables in Moncton, Québec, Toronto, Edmonton, and Vancouver;
>
> c. A copy of the emails to the Commissioner from the public that referred to Mr. Chrétien, Mr. Jean Pelletier or to the Prime Minister's Office, received between September 7, 2004 and October 31, 2005;
>
> d. A copy of the emails in response to the Commissioner's request to Canadians on August 25, 2005; and
>
> e. A copy of the submissions received from the public that referred to the role of Mr. Chrétien, Mr. Jean Pelletier or the Prime Minister's Office in the Sponsorship Program.
>
> Jean Chrétien's Written Representations at para. 2.
>
> Chrétien submits that the documents requested pursuant to Rule 317 are relevant, and should therefore be provided.

5 The Commission's tasks were divided into two separate but related Phases, and the applicant is only challenging the first, fact-finding Phase. However, he has requested materials from both Phase I and Phase II of the Commission's mandate, the latter Phase being the recommendations stage of the Commission. The e-mails received between September 7, 2004 and October 31, 2005 are materials that would have been received during Phase I. However, the materials related to the public's later e-mails and submissions, as well as all materials regarding the Commission's roundtable consultations are all materials from Phase II.

116

6 Chrétien submits that if a document may affect the decision that the Court will make on an application, then it is relevant to the application for judicial review, and must be produced by the Commission. It is argued that the leading case of *Pathak v. Canada (Human Rights Commission)*, [1995] 2 F.C. 455 (Fed. C.A.) ["*Pathak*"] establishes that the relevance of documents requested must be determined in relation to the grounds of review provided in the originating notice of motion and the supporting affidavit.

7 The applicant recognizes that there is a general rule that only material which was before a tribunal is producible. As I note below, the respondents claim that the applicant is not entitled to several requested materials on the basis that the materials were not before the Commissioner when he wrote his Phase I Report. However, the applicant claims that there are several exceptions to the general rule. He contends that where a judicial review alleges lack of procedural fairness and the consideration of irrelevant matters, or the failure to consider relevant matters, an applicant is entitled to material that may have affected the decision of the administrative decision-maker: *Deh Cho First Nations v. Canada (Minister of Environment)*, [2005] F.C.J. No. 474 (F.C.) [*Deh Cho First Nations*]; *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)*, [1997] F.C.J. No. 557 (Fed. T.D.) [*Friends of the West*]; *Telus Communications Inc. v. Canada (Attorney General)*, [2004] F.C.J. No. 1587 (F.C.A.) [*Telus*]. Chrétien claims that he is entitled to the requested material because his application for judicial review is based in part on an argument that the Commission breached procedural fairness, and that the requested materials are relevant to this claim.

8 The applicant maintains that the materials from Phase II are relevant since there is evidence to support the claim that the Commissioner received submissions related to the Phase I fact-finding mandate during Phase II. He notes that there is an overlap in the timing of Phase I and Phase II, and that materials received during Phase II would have been before the Commissioner as he wrote the Phase I Report.

9 Chrétien submits that the Commissioner may have been influenced by the materials received for Phase II in writing Phase I. He argues that he should have been provided with an opportunity to respond to the materials received by the Commission for Phase II that may have been before him during Phase I. He highlights that he was not a party to the private roundtable consultations held by the Commissioner, and that e-mails received by the Commissioner in response to the Commission's call for public input were not disclosed to him.

10 The applicant also claims that parts of the Phase II materials made their way into the Phase I Report.

11 Chrétien presents evidence in support of his claim that the requested Phase II materials are relevant to the judicial review of the Commission's Phase I Report. He claims that the Commission received secret advice from Professor Donald Savoie, who was named special advisor to the

Commissioner for the recommendations phase, (Phase II,) of the Commission's mandate. It is argued that the Commission may have received additional advice from other academics, and policy analysts during the private roundtable sessions. Chrétien complains that he was not provided with an opportunity to respond to any allegations by Professor Savoie or by participants in the roundtables. He also claims that Savoie's view that power had become concentrated in the Prime Minister's Office was reflected in the Phase I Report, and since there was no evidence supporting such a finding during the Phase I hearings, the submissions made in Phase II must have made their way back into Phase I.

12 The applicant similarly argues that he was not provided with a reasonable opportunity to respond to comments made by the public in response to the Commissioner's request on August 25, 2005 for public input, and that the public's views made their way back into Phase I. He claims that the Commissioner sought public input relating to his mandate, which the applicant claims was described by the Commission as addressing issues including:

> The extent to which we can still identify individuals, whether at the political and administrative levels, who are responsible, answerable and accountable for the development and management of sponsorship initiatives or advertising activities or, more generally, of government programs.
>
> "Invitation to Canadians - Consultation Paper Input" ["Invitation to Canadians"]
>
> Chrétien submits that the above request amounted to an improper continuation of the Commission's fact-finding mandate during Phase II, and that the responses from the public must have influenced the Commissioner, since several factual findings made in Phase I cannot be supported on the basis of the Phase I public record.

13 Chrétien also claims that e-mails received by the Commission during Phase I are relevant. It is argued that the Commissioner received e-mails from the public that expressed their support for the Commissioner. These e-mails were allegedly referred to by the Commission's Press Secretary, François Perreault. The applicant claims that these e-mails were received during Phase I, were before the decision-maker when he wrote Phase I, and support the applicant's claim that the Commissioner became preoccupied with media coverage, and that for all of these reasons they are relevant and should be transmitted to the parties.

IV. Alfonso Gagliano's Submissions

14 Alfonso Gagliano seeks an Order that the Commission provide the following materials:

> a. Une copie de tout document afférant au mandat de M. François Perreault; à toute instruction qu'il aurait reçue relativement aux activités et audiences de la *Commission*

118

> *d'enquête sur le programme de commandites et les activités publicitaires* (Commission); aux entrevues accordées aux médias par le Commissaire les 16 et 17 décembre 2004;
>
> b. Tous les documents remis à la Commission aux tables rondes de la Commission à Moncton, Québec, Toronto, Edmonton et Vancouver;
>
> c. Une copie des courriels du public adressés à la Commission qui faisaient référence à l'honorable Alfonso Gagliano, reçus entre le 7 septembre 2004 et le 21 octobre 2005 inclusivement;
>
> d. Une copie des soummissions [*sic*] du public en référence au rôle de l'honorable Alfonso Gagliano ou d'autres ministres dans les activités de commandites;
>
> e. La liste des sujets qui devaient être traités lors des consultations publiques qui a été retirée du site internet de la Commission

Alfonso Gagliano's Motion Record at 31 [emphasis removed].

15 Gagliano adopts Chrétien's submissions and the submissions of Jean Pelletier. He also maintains that the materials from Phase II and the requested e-mails are relevant as they will assist him in determining whether the Commission's counsel, who are allegedly the alter-ego of the Commissioner, received materials regarding the applicant that were not offered into evidence. The applicant also claims that the public consultations had the result of continuing to hold him to public opprobrium. He claims that they created a more visible opportunity at which it could be said that he was responsible for the situation.

16 It is Gagliano's submission that the materials related to the Commissioner's interviews to the media are relevant since the Commissioner made statements that lead to a reasonable apprehension that the Commissioner had reached his conclusions before all of the evidence had been adduced.

17 The materials related to François Perreault are said to be relevant because Perreault wrote a book entitled *Inside Gomery*, and the preface to the book was written by Gomery. The book claims to reveal the inside workings of the Commission. The materials are also said to be relevant because Perreault allegedly told the press that Canadians are supporting Gomery. Gagliano claims that it is important to learn about the exact mandate that was conferred on the Commission's Press Secretary, that the materials support the applicant's claims that the Commissioner's conduct raises a reasonable apprehension of bias, and that the Commission breached his procedural rights.

V. Jean Pelletier's Submissions

18 Jean Pelletier presently seeks an Order that the Commission provide the following materials:

> a) Une copie de tout courriel ou autre correspondance reçu et/ou sollicité par la Commission relative ou rôle du cabinet du Premier ministre et de son Chef de cabinet;

> b) Une copie de tout document afférent au rapport ou tout commentaire que monsieur François Perreault, porte-parole de la Commission, fit au commissaire relativement au rôle du cabinet du Premier ministre ou de son Chef de cabinet; au mandat de monsieur Perreault; à toute instruction qu'il aurait reçue relativement aux activités et audiences de la Commission; aux entrevues accordées aux médias par le Commissaire les 16 et 17 décembre 2004; les transcriptions et preuves documentaires afférentes à la présente demande;
>
> Jean Pelletier's Written Representations, at para. 19.

19 Pelletier adopts the submissions of the other applicants. He accepts that *Pathak*, above, establishes when documents are considered relevant for the purposes of Rule 317. He also provides jurisprudence demonstrating that requested documents may be relevant, even if they were not necessarily before the Commission or considered by the Commissioner, when it is alleged that a Commission's report was biased and incomplete: *Canadian Broadcasting Corp. v. Paul*, 2001 FCA 93 (Fed. C.A.) at para. 65 [*Paul*]; *Friends of the West*, above; *Lindo v. Royal Bank*, 162 F.T.R. 142, [1999] F.C.J. No. 85 (Fed. T.D.), at para. 14 [*Lindo*].

20 Pelletier also submits that the Federal Court has recently affirmed in *Cooke v. Canada (Correctional Services)*, [2005] F.C.J. No. 886, 2005 FC 712 (F.C.) at para. 23, the principle found in *Pathak*, above, that relevant material includes materials which may affect the decision that the Court may make.

21 Pelletier submits that the Commissioner's mandate did not permit him to engage in public consultations except during Phase II of his report. He follows both Chrétien and Gagliano by referring to the comments allegedly made by François Perreault indicating that the Commissioner had received e-mails from the public before the Commissioner officially solicited e-mails from the public as part of his Phase II mandate. Pelletier argues that the comments by Perreault suggest that the Commissioner solicited and received communications regarding the role of the Prime Minister's Office before he completed Phase I of his Report. He then relies on extracts from *Inside Gomery* to support his belief that the Commissioner had considered the e-mails that he received.

22 Pelletier alleges that these communications support his argument that the Commissioner's decision is tainted by a reasonable apprehension of bias. He claims that the requested materials are relevant, and that since he carefully tailored his request for the materials, he cannot be accused of being engaged in an improper fishing expedition.

23 Turning to the materials related to François Perreault, Pelletier is of the view that they are relevant since it is important to the applicant to learn of the instructions received by Mr. Perreault, and to understand his role as Commission spokesperson. He asserts that *Inside Gomery* reveals that the Commissioner and Perreault worked together to heighten the visibility of the Commission.

120 Pelletier's argument is that the Commission had a duty to act fairly and to avoid encouraging any publicity that would harm his reputation. The Commissioner and Press Secretary's active efforts to increase media coverage of the Commission allegedly raise issues of natural justice. Pelletier also claims that Mr. Perreault's responsibilities included managing the evidence, which raises issues of procedural fairness.

24 Pelletier stresses that the heightened media profile of the Commission and the treatment of the evidence are both important issues, since they raise issues of natural justice and procedural fairness. He asserts that natural justice and procedural fairness are essential during Commissions to protect individuals whose reputations may be needlessly damaged when they testify before Commission: *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 (S.C.C.); *Morneault v. Canada (Attorney General)* (2000), [2001] 1 F.C. 30 (Fed. C.A.). It is therefore submitted that the materials related to Mr. Perreault's work for the Commission are relevant.

VI. The Attorney General of Canada's Submissions

25 The Attorney General of Canada (AGC) argues that the applicants are engaging in improper fishing expeditions under Rule 317. He explains that a request made under Rule 317 is different from discovery of documents in an action. A Rule 317 request must be focused, and the AGC notes that the Court has rejected overly broad requests which amount to attempts to effect discovery: *Bradley-Sharpe v. Canada (Human Rights Commission)*, 2001 FCT 1130 (Fed. T.D.), at paras. 23-25; *Atlantic Prudence Fund Corp. v. Canada (Minister of Citizenship & Immigration)*, [2000] F.C.J. No. 1156 (Fed. T.D.), at para. 11; *Pauktuutit, Inuit Women's Assn. v. R.*, 2003 FCT 165 (Fed. T.D.) (Proth.) at para. 15.

26 The AGC agrees that *Pathak*, above, makes it clear that relevance for the purpose of Rule 317 is determined by having regard to the notice of application, the grounds of review invoked by the applicant, and the nature of judicial review. He also maintains that normally an application for judicial review is conducted on the basis of material that was before the decision-maker at the time the decision was made, and that the Court therefore generally only orders the transmission of documents under Rule 317 that were before the decision maker at the time the decision was made: *Pathak*, above, at para. 23; *H. (K.A.) v. Canada (Acting/Assistant Commissioner, Correctional Service)*, [1999] F.C.J. No. 1957 (Fed. T.D.), affirmed by the Federal Court of Appeal: [2001] F.C.J. No. 297 (Fed. C.A.), application for leave to appeal to the Supreme Court of Canada Dismissed: [2001] S.C.C.A. No. 227 (S.C.C.).

27 The Attorney General of Canada submits that the Commission's responses to the applicants' Rule 317 requests were appropriate for three reasons. First, each request is allegedly overly broad and amounts to a fishing expedition undertaken in an effort to find material to build the applicant's case. Second, the Commission's responses to the Rule 317 requests were allegedly appropriate

since the material sought was not part of the evidence filed in the public record, and therefore was not considered by the Commission. Third, the AGC argues that the material requested by each applicant is not relevant to the grounds of the judicial review.

A. The requests were drafted in overly broad terms

28 The AGC notes that Chrétien's request for "all documents" presented to the Commission at the roundtable appears inconsistent with the requirement that Chrétien had to make a focused request for materials.

29 The AGC similarly claims that Gagliano's request for "all" documents related to certain themes is simply too broad a request. As noted above, Gagliano requests:

> Une copie de tout document afférant au mandat de M. François Perreault; à toute instruction qu'il aurait reçue relativement aux activités...; Tous les documents remis à la Commission aux tables rondes de la Commission » [emphasis added].
>
> The AGC maintains that Gagliano's request for all e-mails referring to him and for copies of submissions made with respect to him and to other ministers with respect to sponsorship activities are also too broad.

30 The AGC makes similar arguments with respect to Pelletier's request for "all" e-mails, and "all" documents. As noted above, Pelletier requests:

> Une copie de tout courriel ou autre correspondance reçu et/ou sollicité par la Commission relative ou rôle du cabinet du Premier ministre et de son Chef de cabinet; Une copie de tout document afférent au rapport ou tout commentaire que monsieur François Perreault, porte-parole de la Commission, ... à toute instruction qu'il aurait reçue relativement aux activités et audiences de la Commission [emphasis added].

31 The AGC claims that the applicants' broad requests are impermissible as they fail to precisely identify the material being sought, and amount to impermissible "attempts to scour for any information within the file or files of the Commission because she is dissatisfied or displeased with the decision of the Commission": *Beno v. Canada (Somalia Inquiry Commission)* (1997), 130 F.T.R. 183 (Fed. T.D.), at para. 8; *Bradley-Sharpe v. Canada (Human Rights Commission)*, [2001] F.C.J. No. 1561, 2001 FCT 1130 (Fed. T.D.), at para. 24.

B. The material is irrelevant since it was not in the public record and not considered by the Commissioner

32 The AGC highlights that the Commissioner stated that he only considered evidence in the public record in writing his Phase I Report:

122

> A vast quantity of documentary evidence was put into evidence and forms part of the record of the Commission. A list of the exhibits, many of which are books of documents, is attached as Appendix F. As Commissioner, I have systematically avoided taking cognizance of any document or evidence which has not been produced into the record at the public hearings, although I am conscious that Commission counsel have had access to many documents that I have not seen and have had meetings and discussions with witnesses and other persons on matters that are not part of the evidence that I have heard. Commission counsel have respected my expressed wishes that any information acquired in this fashion would not be communicated to me. This Report has been written solely on the basis of the evidence in the public record.

Chapter I: Introduction, Phase I Report, at 5.

33 The AGC maintains that there is no evidence that casts doubt on the above statement. It is therefore submitted that the Commission correctly rejected the requests from the parties for materials that were not on the public record on the basis that the Commissioner did not take the requested material into account. The AGC claims that the Commissioner's declaration that he did not consider evidence not contained in the public record enjoys a strong presumption of truth: *Stevens v. Conservative Party of Canada*, [2004] F.C.J. No. 451, 2004 FC 396 (F.C.), at paras. 15-22.

C. The material is not relevant to the grounds of the judicial review

34 The AGC also claims that the relevancy of the requested materials must be considered against the grounds of review alleged by the applicants, and that such an analysis reveals that the requested materials are not relevant in any of the applications.

35 The AGC claims that the material requested by the applicants is not relevant to any of the three main grounds of review alleged by each party. The applicants each allege that the Commission erred in findings of fact. The AGC submits that this argument must be based on the evidence on record, and that the requested material is irrelevant on this point. Each applicant alleges that his right to procedural fairness was breached during Phase I of the Commission. The AGC argues that the requested materials will not assist the applicantsin making this argument, and that it can be made by referring exclusively to materials available from the public record. Finally, the applicants each raise the argument that a reasonable apprehension of bias existed on the part of the Commissioner. While the applicants may wish to examine the requested materials in order to then argue that they influenced the Commissioner's fact finding report, the AGC maintains his earlier argument that there is no reason to doubt the Commissioner's statement that he only relied on materials found in the public record to reach his decision.

VII. The Commission's Submissions

36 The Commission maintains that it was justified to object to the applicants' request for materials. The Commission categorizes the purpose of Rule 317 as preventing the parties from engaging in a fishing expedition for information. It asserts in the same manner as the AGC had, that the production of documents in a judicial review application is more restricted than in the context of an action, and claims that it is not under a duty to prepare new documents: *Quebec Ports Terminals Inc. v. Canada (Labour Relations Board)*, 1993 CarswellNat 815 (Fed. C.A.), at paras. 8-10.

37 The Commission submits that, in general, the only documents available to the applicants are those which were available to the decision-maker at the time of rendering his decision. The Commission relies on several cases in support of this proposition: *S.C.F.P., Local 301 c. Québec (Conseil des services essentiels)*, 1997 CarswellQue 82 (S.C.C.) paragr. 75; *Farhadi v. Canada (Minister of Citizenship & Immigration)*, [1998] 3 F.C. 315, [1998] F.C.J. No. 381 (Fed. T.D.), (conclusion not raised on appeal at [2000] F.C.J. No. 646 (Fed. C.A.); *Ominayak v. Lubicon Lake Indian Nation Election (Returning Officer)*, [2000] F.C.J. No. 2056 (Fed. C.A.); *Nametco Holdings Ltd. v. Minister of National Revenue*, [2002] F.C.J. No. 592, 2002 FCA 149 (Fed. C.A.); *Hoechst Marion Roussel Canada v. Canada (Attorney General)*, [2004] F.C.J. No. 633, 2004 FC 489 (F.C.).

38 The Commission's counsel argues that the Commissioner clearly indicated that he only relied on the evidence in the public record in writing the Phase I Report, and that the Commissioner made it clear that at all times he considered the two phases of his mandate to be distinct. The Commissioner referred to the two Phases in his Opening Statement of the Phase I Report as being "two separate, but related, functions": Appendix C: Opening Statement, Phase I Report, at 531.

39 The Commission cites *Pathak*, above, and *Stevens*, above, in support of its reiteration of the argument presented by the AGC that the statement by the Commissioner claiming that he only considered materials on the public record benefits from a strong presumption of truth. The argument is further developed when the Commission claims that although Commissioner Gomery was not acting as a court judge during the Commission, he had the intellectual ability and training of a judge and was therefore able to determine relevancy of evidence and not take discarded elements into account. The Commission relies on the Supreme Court's decision of *Société d'énergie Foster Wheeler ltée c. Société intermunicipale de gestion & d'élimination des déchets inc.*, [2004] 1 S.C.R. 456, [2004] S.C.J. No. 18, 2004 SCC 18 (S.C.C.), at paras. 46 at 47:

> 46. The City was unhappy with this part of the Court of Appeal's decision, as the City still wished to prohibit the production of documents it claimed to be covered by professional secrecy. The City opposed even allowing the trial court to examine these documents.
>
> 47. The City's attitude is without doubt motivated by a cautious strategy which seeks to avoid allowing the trial judge to be influenced by the content of documents the City alleges are inadmissible. These concerns, while common, are unjustified. We must

> remember that every day judges must rule on the admissibility of evidence that they must inspect or hear before excluding, and that this duty is an indispensable part of their role in the conduct of civil or criminal trials. Judges understand that they must disregard any evidence that they deem inadmissible and base their judgments solely on the evidence entered into the court record.

40 Applying the above principles to the present requests for materials, the Commission submits that the documents requested by the applicants are not part of the public record, were not considered by the Commissioner, and therefore are not relevant.

A. E-mails Received During Phase I

41 The Commission submits that there is nothing in the applicants' allegations supporting their claims that the Commission "solicited" e-mails other than in the context of Phase II of the inquiry. It also argues that even if it did receive e-mails from the public during Phase I, they were not considered by the Commissioner, and their existence does not in itself create bias. It is maintained that the applicants' requests for these e-mails were properly refused since these documents had no effect on the evidence filed, and they relate to matters that took place outside the scope of the Commission.

B. Information Related to François Perreault

42 The Commission argues that the documents related to Perreault and his book *Inside Gomery* had no effect on the evidence filed, and relate to matters that took place outside the scope of the Commission. The Commission submits that the materials requested relating to Perreault have nothing to do with the preparation of the Phase I Report. It claims that the media coverage of the Commission, the role played by Perreault, and the instructions that he may have received from the Commissioner did not deprive the applicants' of their ability to dispute certain evidence before the Commission or to make submissions as to their relevancy.

43 The Commission claims that the applicants cannot invoke procedural fairness solely as a means of attempting to have access to documents that otherwise would not be made available to them.

C. Phase II Materials

44 The e-mails and submissions received in response to the Commissioner's roundtable sessions were part of Phase II of the Commission's mandate, and it is alleged that they were not connected to Phase I. It is submitted that these materials were not considered by the Commissioner in writing his Phase I Report, and copies of these materials were therefore properly denied to the applicants.

45 The Commission claims that the Phase II consultations were part of a separate process that was designed to assess whether the system in place "allows for the determination of who is answerable for a given action or decision".

Commission's Memorandum of Fact and Law (Chrétien, T-2118-05) at para. 44.

46 The Commission maintains that the applicant will either succeed or fail in demonstrating that the Commissioner could not have made his comment related to the concentration of power in the Prime Minister's Office ("PMO") based on the evidence submitted during Phase I of the Commission's mandate. It claims that the analysis does not need to consider materials from the Phase II roundtables or the previous writings of Professor Savoie. The Commission argues that since the Commissioner's reference to power in the PMO was the only grounds upon which Chrétien justified his request to have access to materials relating to the roundtables and the public submissions, he has failed to demonstrate that the Court should depart from the general rule that only documents that were before the Commissioner when he wrote his report must be produced.

47 The Commission claims that the applicants' allegations that the Commissioner made erroneous findings of fact, and that their procedural rights were breached can be determined by reference solely to evidence in the pubic file. It is also argued that although the applicants allege bias on the part of the Commission, they fail to demonstrate a real and identifiable bias.

VIII. Analysis

48 The starting point in determining whether copies of the requested materials should be provided is *Pathak*, above. It has been described as a "leading case in the interpretation of Rule 317": *Ecology Action Centre Society v. Canada (Attorney General)*, [2001] F.C.J. No. 1588, 2001 FCT 1164 (Fed. T.D.), at para. 6; See *Canadian Arctic Resources Committee Inc. v. Diavik Diamond Mines Inc.*, 35 C.E.L.R. (N.S.) 1, 183 F.T.R. 267, [2000] F.C.J. No. 910 (Fed. T.D.), at para. 30.

49 According to *Pathak*, above, and subsequent jurisprudence, documents are relevant for the purposes of Rule 317 if they may affect the decision that the reviewing court will make. The relevance of requested materials is determined by having regard to the notice of application, the grounds of review invoked by the applicant, and the nature of judicial review.

50 It is trite law that in general only materials that were available to the decision-maker at the time of rendering a decision are considered relevant for the purposes of Rule 317. However, the jurisprudence also carves out exceptions to this rule. The Commission's own written representations indicate that, "An exception exists where it is alleged that the federal board breached procedural fairness or committed jurisdictional error": David Sgayias et al., *Federal Practice*, (Toronto: Thomson, 2005) at 695, reproduced in the Commission's Memorandum of

126

Fact and Law (Chrétien, T-2118-05) at para. 24. The above comment is clearly supported by jurisprudence which indicates that materials beyond those before the decision-maker may be considered relevant where it is alleged that the decision-maker breached procedural fairness, or where there is an allegation of a reasonable apprehension of bias on the part of the decision-maker: *Deh Cho First Nations*, above; *Friends of the West*, above; *Telus*, above; *Lindo*, above.

51 The applicants raise grounds of review that fall within the exceptions that permit the transmission of materials beyond those that were before the decision-maker. However, the Court is not required to provide the applicants with the requested materials merely because they raise issues of procedural fairness. Rule 318(3) states that a Court "*may*" order that "all *or part* of the material requested be forwarded to the Registry" [emphasis added]. The wording is permissive, but leaves the Court with full discretion over whether or not to order the transmission of requested materials.

52 It is the Court's view that when a party alleges a breach of procedural fairness, the Court still determines relevancy of the requested materials by reference to the applicant's notice of application, the grounds of review invoked by the applicant, and the nature of judicial review as directed by *Pathak*, above.

A. List of subjects posted on the Internet

53 Gagliano seeks transmission of a copy of a list of subjects that were to be examined by the Commission during its consultations. The requested list was allegedly posted on the Commission's website but was later removed from the site. The Court has not received an adequate explanation as to how this material could be relevant. Gagliano wishes to view the materials that were formerly posted online to determine whether they provide further grounds for his allegations of reasonable apprehension of bias on the part of the Commissioner and breaches of procedural fairness. However, under Rule 317 of the *Federal Courts Rules*, relevancy must be established by the applicant to demonstrate that he is entitled to them. Documents requested under Rule 317 are not transmitted first so that a party may then determine whether they are relevant. The Rule has been crafted in this fashion to avoid rewarding applicants for engaging in improper fishing expeditions.

54 The applicant has requested these particular materials without providing any evidence whatsoever as to their relevancy. The assertion that the web materials *may be* relevant is pure speculation. Since the Court has not received an adequate explanation as to the relevancy of materials that were posted and later removed from the Commission's website, the Court is not prepared to order that the Commission transmit them to Gagliano.

B. Materials from Phase II

55 The applicants seek a variety of materials from Phase II of the Commission, including documents presented at the Commission's roundtables, a summary of discussions held during the

roundtables, and copies of e-mails in response to the Commissioner's Invitation to Canadians. The applicants note that the Phase II consultations began before the Commissioner had completed Phase I of his report. The complaint is that the Commissioner may have heard matters in private hearings in Phase II that addressed issues that were within the sole purview of Phase I of the Commission. They are concerned that elements from the Phase II consultations may have influenced the Commissioner and may have made their way back into the Phase I decision. The applicants argue that materials found in Phase II are relevant since they will support the claim that Phase I findings were made without regard to the evidence. It is also argued that the Commissioner sought information during Phase II that fell entirely within the realm of Phase I, and that it was unfair for the Commissioner to have heard these arguments during Phase II without providing the applicants an opportunity to respond.

56 The applicants principally relied on two arguments to show how Phase II materials are relevant to the judicial review of Phase I. The first argument, which was presented by Chrétien, is that that during the Phase II consultations, the general public was invited to comment on matters which, in Chrétien's view, fell strictly within the boundaries of Phase I. The second claim is that the Phase I Report contains findings and statements which allegedly demonstrates that the views of Professor Savoie, other participants in the Phase II roundtables, and the general public made their way into the Phase I Report.

57 Chrétien claims that the public was invited to provide additional materials during Phase II that went to the Commission's fact-finding role which should have fallen exclusively within Phase I of the Commission. He bases this claim on a passage from the Commissioner's Invitation to Canadians:

> [T]he extent to which we can still identify individuals, whether at the political and administrative levels, who are responsible, answerable and accountable for the development and management of the sponsorship initiatives or advertising activities, or, more generally, of government programs.
>
> The applicant argued that this passage reveals that the Commissioner was still engaged in fact-finding exercises during Phase II.

58 When the above passage is considered in its full context, it becomes clear that it was not an invitation to the public to assist the Commissioner in his fact-finding role, which the parties agree should have fallen exclusively within Phase I. The Invitation to Canadians clearly sets out that the Commissioner is seeking public input to assist him in answering the question, "What should be done *to improve accountability* in the government of Canada?" [emphasis added]. The general request does not ask the public what happened or what should have been done; it asks the public to provide input for what can be done in the future.

59 When the excerpt relied upon by Chrétien is read within the context of the above introductory remarks, it becomes clear that the request was not designed to seek information to single out individuals, or to continue the fact-finding efforts of Phase I. Moreover, the passage as a whole reads:

> In addition, evidence at the public hearings raised *a number of issues related to ministerial accountability*, including:
>
> • The extent to which we can still identify individuals, whether at the political and administrative levels, who are responsible, answerable and accountable for the development and management of the sponsorship initiatives or advertising activities, or, more generally, of government programs.
>
> • The extent to which Parliament was or should have been informed as the sponsorship/ advertising initiatives took shape.
>
> • The role Parliament played or should have played in the sponsorship/advertising initiatives.
>
> • The role that career officials played or should have played in the sponsorship/ advertising initiatives.
>
> • The degree to which administrative and financial responsibility for delivering government initiatives should fall on career officials.
>
> • Whether internal audit reports should be made public as they are prepared.
>
> [emphasis added]

I agree with the Commission's counsel on their point that the excerpt was intended to assess whether governance structures allow for the determination of who is answerable for decisions.

60 Finally, immediately before the website's online questionnaire that forms part of the Invitation to Canadians document, the Commission provided a paragraph including the following instruction:

> We ask Canadians *to look to the future*, to accountability mechanisms that *they would like to see introduced or strengthened* and to the role of ministers, their members of Parliament and career officials in the management of government programs. [...] The responses received will be valuable input to Justice Gomery in formulating his final recommendations.

This instruction is followed by a list of questions which ask what "should" happen in the future. The only exception is the open-ended question, "Is there anything else you would suggest to Justice Gomery in pursuing his mandate?" This question, read by itself or in the context of the other questions, simply cannot be interpreted as inviting the general public

> to make comments relating to the Commission's fact-finding activities. It is clear that the "mandate" referred to in this question is the Commission's obligation to develop policy recommendations.

61 In short, the reference relied upon by Chrétien, when considered by itself, as well as more properly within the context of the Commission's Invitation to Canadians clearly asked the public to provide input that could be used by the Commissioner to develop policy recommendations. The Commissioner did not offer the public with an opportunity to provide input that could have been used to assist him with the Phase I fact-finding portion of the Commission's inquiry.

62 The applicants argue that not only was there no evidence on the record of Phase I to support several key factual findings made by the Commission, but that the evidence suggests that the Commissioner may have relied on materials that were before him as part of Phase II in order to make findings for Phase I. By way of example, Gagliano submits that while all of the witnesses in Phase I stated that the term "program" has a particular meaning within government, the Commissioner's determination as to the meaning of the word "program" was likely influenced by public comments received during Phase II.

63 Chrétien also claims that the Commissioner's statement related to the concentration of power in the Prime Minister's Office ("PMO") provides evidence that materials found in Phase II made their way back into Phase I. The sentence at issue can be found at page 434 of the Phase I Report:

> The concentration of power in the Office of the Prime Minister is a phenomenon of modern Canadian government which has been noted with concern by academics and commentators.

64 Chrétien's counsel argues that while there was no evidence on the public record to support any of the claims found in the above sentence, Professor Savoie has made similar comments in his publications, and comments to the same effect can be found in the Phase II Report.

65 The problem with these arguments is that they are entirely speculative in nature. Gagliano's claim that the Phase II materials contributed to the Commissioner's finding regarding the meaning of the word "program" is not supported by any evidence. In the Court's view, the allegations arising from the Commissioner's comments regarding the concentration of power in the PMO are similarly too speculative. The Commissioner's comment does not explicitly claim to be based on any materials based on Phase II. The Commissioner's reference to "academics and commentators" is broadly worded; it does not attribute the views that are mentioned in the sentence to Professor Savoie, or to any other specific academic who may have participated in the Phase II roundtables.

66 The applicants are asking the Court to make an inference as to the source of this comment which is only one of several possible inferences that could be made. While the applicants claim that this comment is unsupported by anything in the public record during Phase I, this is an issue that may be argued before the Applications Judge.

130

67 The single sentence regarding the concentration of power in the PMO does not reveal in a convincing manner that the Commissioner may have heard arguments that would have influenced his fact-finding Phase, or that he considered materials from Phase II when writing Phase I. The Court has not heard any arguments beyond mere speculation to suggest that the Commissioner considered materials received during Phase II to make findings within Phase I, or that he requested input during Phase II that were Phase I issues.

68 The only clear statement that the Court has received as to the interplay between materials received during Phase II and the Commission's work in Phase I was provided by the Commissioner himself. The Commissioner stated that the Phase I Report was written solely on the basis of evidence in the public record. For the sake of clarity, I once more reproduce the Commissioner's introductory comments for the Phase I Report:

> As Commissioner, I have systematically avoided taking cognizance of any document or evidence which has not been produced into the record at the public hearings, although I am conscious that Commission counsel have had access to many documents that I have not seen and have had meetings and discussions with witnesses and other persons on matters that are not part of the evidence that I have heard. Commission counsel have respected my expressed wishes that any information acquired in this fashion would not be communicated to me. This Report has been written solely on the basis of the evidence in the public record.

69 It is the view of the Court that this clear statement by the Commissioner creates a strong presumption that he only considered material which can be found in the public record. Unless there is clear and convincing evidence to the contrary, when a Commissioner states that he did not use certain material, then that presumption must hold.

70 Counsel for the applicants claimed that the Court should order the transmission of documents received as part of Phase II to the parties, and that the weight to be accorded to these materials can be determined at a later date. The problem with this argument with respect to the Phase II materials is that the applicants have not provided any clear and convincing evidence to support their claims that Phase I issues formed part of the Commission's Phase II.

71 As noted above, Phase II was intended to be a separate, albeit related exercise to Phase I. In *Pathak*, above, the Federal Court of Appeal wrote at paragraph 21 that it did not wish to create, "a limitless legal fiction merging the mostly separate identities of the investigator and the Commission." While the present situation is somewhat distinguishable, as it could be argued that the Commissioner is both investigator and decision-maker, the Court is still concerned that it has been asked by the applicants to create a legal fiction by merging Phase I and Phase II of the Commission. The Court has been asked by the applicants to allow in documents from Phase II. This argument essentially asks the Court to merge the mostly separate mandates of Phase I and Phase II of the Commission. But the Commissioner wrote that he treated the two phases as separate,

and absent clear and convincing evidence that the two Phases were merged by the Commission itself, the Court sees no reason to merge them. At this time, the Court sees no reason to merge the largely separate phases of the Commission's mandate for the purpose of finding Phase II materials relevant for a judicial review of the Commission's Phase I Report.

72 In sum, the applicants have failed to provide clear and convincing evidence to rebut the presumption that the Commissioner did not consider Phase II materials in writing his Phase I Report. The requested materials from Phase II were not part of the public record, and it is not disputed that the Phase II materials should not have been considered by the Commissioner while writing Phase I. The Commissioner's statement clearly indicates that he did not consider Phase II materials in Phase I, and the Court has no reason to doubt the veracity of the Commissioner's statement as it relates to the use of Phase II materials. The applicants also claimed that they should receive copies of Phase II materials since they may have included materials that went to Phase I. The argument is that the applicants should have been provided an opportunity to respond to these submissions. But the Court has found above that the applicants have failed to provide anything beyond mere speculation to support the claim that Phase II materials may have included information pertaining to, or used for Phase I. It follows that the Phase II materials are not relevant and were properly excluded. Thesedocuments are not relevant for the purposes of Rule 317 since if they were admitted, they would not affect the decision that the reviewing court might make.

C. E-mails Received From September 2004 Through October 2005

73 The applicants argue that the e-mails received by the Commission during Phase I are relevant and that copies of these materials should therefore be transmitted to them. They rely on comments made by François Perreault that confirm that the Commission received e-mails during Phase I. They claim that the respondents have not clearly denied that the Commissioner may have seen the e-mails received by the Commission during Phase I, and since it can be inferred that they were before him they must be treated as relevant. It is alleged that the e-mails support their allegations of a reasonable apprehension of bias on the part of the Commissioner and of breaches of procedural fairness.

74 As a preliminary matter, I find that there is nothing before the Court to support any allegation that the Commission solicited the e-mails it received during Phase I prior to the Commissioner's Invitation to Canadians. Had the Commission solicited these e-mails from the public and not provided the applicants with an opportunity to respond to them, then issues of procedural fairness would clearly be raised. However, absent evidence pointing to a request for comments from the public, the Court assumes for the purpose of this motion that these e-mails were received without having first been requested.

75 These unsolicited e-mails are still relevant for the purposes of Rule 317 and must be transmitted to the parties. These e-mails were received during Phase I and presumably regard the

132 Commission's Phase I mandate. While the Commissioner claimed that he did not take "cognizance" of these e-mails in writing the Phase I Report since they were not part of the public record, his statement does not clearly state that the e-mails were never before him. The Commissioner wrote that Commission counsel had access to documents that he has not seen, yet the introductory statement does not clearly state that the Commissioner did not see the e-mails received in Phase I. The Commissioner has not provided any clear evidence, either through his statement in his Phase I Report or by affidavit to state that he was unaware or did not see these e-mails.

76 In fact, the evidence before the Court suggests that the Commissioner *was aware of the e-mails*. François Perreault wrote the following in *Inside Gomery* at page 111 (page 156 of *Gomery l'enquête*):

> Later, after the commission had received a blizzard of e-mails during the recusal crisis, John Gomery wisecracked [...]
>
> [emphasis added].

> Plus tard, devant le nombre de courriels reçus pendant la crise sur la récusation, John Gomery me lancera avec humour pour détendre l'atmosphère [...]
> [c'est moi qui souligne].

As I find below, while the weight to be accorded this and other comments in *Inside Gomery* can be argued before the Applications Judge, the above passage appears to provide evidence that the Commissioner was aware of the e-mails.

77 The Commission argues that the Commissioner's statement that effectively states that he did not consider the e-mails when writing his Phase I Report should be given deference. The Court agrees that the claim that the Commissioner did not consider the e-mails is a statement that deserves a strong presumption of veracity. However, whether this presumption can be refuted is a matter best left for the Applications Judge. It is not so strong a presumption as to deny the Applicants their right to materials that were before the decision-maker during Phase I which were received with respect to the Phase I mandate of the Commission.

78 The issue when considering relevance under Rule 317 is not whether the materials were given any weight or considered by the Commissioner, but rather whether they were before him. In this regard, this case differs from *Pathak*, above, where the investigator and the decision-maker were two different individuals, and where there was nothing on the record to suggest that materials before the investigator were also before the decision-maker. In the present situation, the Commissioner is both investigator and decision-maker. While he may have decided to exclude certain materials when writing the Phase I Report, if the materials were before him, and was not received as part of Phase II, then the applicants are entitled to them.

79 The treatment of the e-mails by the Commission may also be relevant to the applicant's allegations of breaches of procedural fairness. The applicants refer to comments attributed to François Perreault regarding the e-mails received by the Commission during Phase I. In an article

dated January 13, 2005, the Toronto Star reported that François Perreault confirmed that the Commission had received approximately two dozen e-mails from the public. Mr. Perreault is said to have stated that, "People are saying in the e-mails, 'What's Chrétien got to hide?'". Jean Pelletier's written materials included similar reports from La Presse dated January 19, 2005.

80 Chrétien alleges in his Notice of Application for Judicial Review that the Commissioner became preoccupied with media coverage (Chrétien's Amended Notice of Application, at 23). This allegation may involve arguments regarding whether the Commission breached Chrétien's right to procedural fairness and whether there were grounds to find a reasonable apprehension of bias on the part of the Commissioner.

81 The Court makes no finding at this time with respect to any of the applicant's allegations. These will be assessed by the Applications Judge after hearing full argument from the parties. The Court is presently only concerned with whether the e-mails are relevant for the purposes of Rules 317 and 318 of the *Federal Court Rules*. The use of the e-mails by the Commission may still raise issues of procedural fairness and reasonable apprehension of bias, and they therefore may be considered relevant.

82 The Court notes, however, that not all of the requested e-mails are relevant at this stage. Gagliano and Chrétien requested e-mails received between September 2004 and October 2005, and Pelletier did not specifically indicate which dates were relevant. The difficulty with these dates is that on August 25, 2005 the Commission issued its Invitation to Canadians to assist him with his Phase II mandate. Any e-mails received after August 25, 2005 were likely received in response to the Commissioner's call for public input with regards to Phase II. The Court has noted above that Phase II materials are not relevant to the present applications for judicial review. It follows that only the requested Phase I e-mails received by the Commission between September 7, 2004 and August 25, 2005 are relevant for the purposes of Rule 317. Copies of the e-mails should be transmitted to the parties, and the weight of the content of these e-mails can be determined by the Applications Judge.

83 To summarize, unless there is clear and convincing evidence to the contrary, when a Commissioner states that he did not use certain material, then this statement must be presumed to be true. This is a view that is supported by recent Supreme Court jurisprudence: *Société d'énergie Foster Wheeler ltée c. Société intermunicipale de gestion & d'élimination des déchets inc.*, above. However, in determining the relevance of a document under Rule 317, the issue is not whether the decision-maker did not consider certain evidence, but rather whether the evidence was or should have been before the decision-maker. At this stage of the proceedings, the applicants have shown that the requested Phase I e-mails received between September 7, 2004 and August 25, 2005 are relevant to their grounds for judicial review. The Court makes no comment as to whether or not these claims will succeed. That is a task for the Applications Judge to determine.

134

D. Inside Gomery and Materials related to François Perreault

84 The Court is satisfied that the requests by Gagliano and Pelletier to obtain copies of materials related to the mandate of the Commission's Press Secretary, François Perreault, should be allowed. The Court finds that these requests fall within exceptions to the general rule that only materials before the decision-maker must be transmitted to the applicants.

85 None of the parties take the position that *Inside Gomery*, the book published by the Commission's Press Secretary François Perreault, should not be admissible on judicial review. The Court is of the view that *since the book's preface was written by the Commissioner*, it is admissible. The Commissioner wrote in the preface to *Inside Gomery* at page 3 (page 13 of *Gomery l'enquête*) that:

> When he told me of his intention to write a book about his experiences in connection with the commission, I encouraged him to go ahead with the project, because I was sure that he would give an honest account of his observations and experiences from the perspective of an insider.
>
> Lorsqu'il m'a parlé de son projet d'écrire un livre sur les expériences qu'il a vécues au cours des travaux de la Commission, je l'ai encouragé à le réaliser, parce que j'étais convaincu qu'il relaterait de manière honnête ses observations et expériences, dans la perspective de quelqu'un qui connaît les choses de l'intérieur.

And further on the same page, the Commissioner wrote:

> In his book François has produced a chronicle of the inner workings of the commission that is as fascinating as it is accurate.
>
> Dans son livre, François relate de manière captivante et exacte le fonctionnement interne de la Commission.

The weight to be accorded to *Inside Gomery* will be determined on judicial review after the parties are able to present full argument.

86 The materials related to François Perreault may be relevant to both the applicants' allegations of a reasonable apprehension of bias and to the argument that the applicants' rights to procedural fairness were breached. Among the grounds for judicial review relied upon by the parties are arguments that the Commission breached its duty of procedural fairness and breached principles of natural justice in the way it interacted with the media. The applicants also argue that the Commissioner himself became too concerned with the media's interests in the Commission's work. A further ground raised is that the Press Secretary became too involved in the work of Commission counsel. Once again, the Court is not making any finding as to the applicant's grounds for judicial review. However, the Court finds that the documents related to the mandate given to

the Commission's Press Secretary, documents related to instructions that he may have received by the Commissioner or Commission staff, and materials related to interviews accorded by the Press Secretary or by the Commissioner himself to the media or to any other persons are relevant for the purpose of Rule 317. These materials relate to the applicants' grounds for judicial review, and may assist the Court in coming to a reasonable conclusion regarding the allegations of a reasonable apprehension of bias and breaches of procedural fairness.

87 At this time, the Court is simply deciding that these materials should be transmitted to all of the parties. The parties will have the opportunity at a later date to debate the weight to be accorded to these materials and the Court will hear full submissions related to both the claims of a reasonable apprehension of bias and breaches of procedural fairness.

IX. Conclusion

88 The applicants' requests for materials from Phase II of the Commission were properly opposed by the Commission. The supposed relevancy of these materials is too speculative, and the applicants have engaged in an improper fishing expedition with regards to these requested materials in an attempt to build their case.

89 The applicants were not merely fishing when they requested e-mails received by the Commission during Phase I. The requests were carefully tailored. The Court finds that most of these materials are relevant for the purposes of Rule 317. The applicants are entitled to the requested e-mails received by the Commission from September 7, 2004 to August 25, 2005. Those e-mails received after August 25, 2005 were most likely sent to the Commission in response to his Invitation to Canadians to assist him with Phase II of the Commission. E-mails received after August 25, 2005 are therefore not relevant to Phase I of the Commission's mandate.

90 The book *Inside Gomery* is admissible, and various materials related to the mandate of the Commission's Press Secretary, François Perreault, are also to be transmitted to the parties. These materials fall within an exception to the rule that only materials before the Commissioner in making his decision are relevant. At this stage these materials appear to be relevant to the applicants' claims of a reasonable apprehension of bias and breaches of procedural fairness. Whether or not these claims succeed will be a matter to be determined by the Applications Judge.

Order

THIS COURT ORDERS that:

> 1. Copies of e-mails received by the Commission from September 7, 2004 to August 25, 2005 inclusive referring to Mr. Chrétien, Mr. Pelletier, Mr. Gagliano, or the Prime Minister's Office, if still possessed by the Commission, are to be transmitted to the parties within thirty (30) days of the issuance of these Reasons.

136

2. Copies of all materials related to Mr. François Perreault's mandate at the Commission, related to any and all instructions he received regarding the activities and audiences of the Commission from the Commissioner or Commission staff, and materials related to interviews accorded to the media by the Commissioner on December 16 and 17, 2004, are to be transmitted to the parties within thirty (30) days of the issuance of these Reasons.

3. Costs are in the cause.

Motion granted in part.

2020 FC 1108
Federal Court

Gardaworld Cash Services Canada Corporation v. Smith

2020 CarswellNat 5193, 2020 FC 1108

GARDAWORLD CASH SERVICES CANADA CORPORATION (Applicant) and DEAN A. SMITH (Respondent)

Sébastien Grammond J.

Heard: October 26, 2020
Judgment: December 2, 2020
Docket: T-162-20

Counsel: J. Raymond Chartier, Samantha Jenkins, Jennifer McBean, for Applicant
Glenn Solomon, Q.C., Kajal Ervin, Ryan Phillips, for Respondent

***Sébastien Grammond J.*:**

1 GardaWorld Cash Services Canada Corporation [Garda] terminated Mr. Smith, one of its employees who headed its branch in Red Deer, Alberta. Mr. Smith initiated a complaint for unjust dismissal under the *Canada Labour Code*, RSC 1985, c L-2 [the Code]. After protracted proceedings, which included the issuance and retraction of a first decision, the adjudicator found that Mr. Smith's dismissal was unjust, ordered Garda to pay approximately $60,000 in damages, as well as $500,000 in punitive damages.

2 Garda now applies for judicial review of the adjudicator's decision. It argues that the decision is unreasonable on the merits and that the adjudicator breached procedural fairness and showed a reasonable apprehension of bias. I agree that the adjudicator's private communications with Mr. Smith, conduct towards Garda's counsel and comments about witnesses give rise to a reasonable apprehension of bias. Thus, the adjudicator's decision must be quashed. However, I decline Garda's invitation to rule on the merits of the complaint myself. The matter must be sent back to a different adjudicator for redetermination.

3 Although the parties filed a considerable volume of evidence and made wide-ranging submissions, I will confine myself to the issue of bias, which is sufficient to dispose of the case, and I will say as little as possible about the merits. These reasons are organized as follows. I first give an account of the incident that led to Mr. Smith's termination. I describe the main steps of the

proceedings before the adjudicator. I then show why several aspects of the adjudicator's conduct gave rise to a reasonable apprehension of bias.

I. Factual Background

4 On July 10, 2017, Mr. Smith attended the Sobeys liquor store in Sylvan Lake. He wore his uniform and was ostensibly on duty. He explained to the store's manager that he thought he had lost a piece of identification while shopping at the store a few days earlier and asked for an opportunity to look at the recordings of the store's CCTV camera system. Even though the manager had not found any lost ID, she agreed to Mr. Smith's request.

5 Mr. Smith found images of himself waiting in line to pay at the cash. He asked for permission to take pictures of these images on his smartphone, to be able to enlarge them later. He is not alone on the pictures he took. Another woman appears in front of him at the cash. This woman is a social worker with the Alberta Ministry of Children's Services. One of the cases assigned to her relates to the son of Ms. Opal Roszell, who is Mr. Smith's tenant and, according to Garda, his girlfriend. Mr. Smith admits that he knows who the social worker is and that he recognized her on that occasion.

6 On July 14, 2017, Ms. Roszell transmitted a complaint to Alberta's Children's Services Minister, alleging that the social worker had an alcohol consumption problem. The complaint contained information about the social worker apparently retrieved from the Internet, including personal information and various pictures appearing on social media showing the social worker partying with friends. It also included two pictures taken by Mr. Smith from the Sobeys CCTV footage, showing the social worker buying alcohol. Mr. Smith himself can be seen on one of the pictures.

7 The social worker called the RCMP, as she was concerned for her own safety. She identified the man standing besides her on one of the pictures as Ms. Rozsell's boyfriend. After speaking with Sobeys's store manager, the RCMP officer who investigated the matter concluded that no criminal offence was committed, but found it appropriate to disclose the situation to Garda and Sobeys. On July 20, 2017, Sobeys wrote to Garda to complain about the incident and to request that Mr. Smith not be dispatched to Sobeys stores.

8 On July 21, 2017, Garda executives interviewed Mr. Smith regarding the Sobeys incident. Their notes show that Mr. Smith explained that he was simply seeking to find his lost piece of identification and that he sent the pictures to his girlfriend, who had a phone with a wider screen, to be able to enlarge the pictures. Mr. Smith was immediately suspended from road duties. Mr. Smith was interviewed again by Garda's corporate security investigator on July 25. He was terminated on August 14.

9 Some aspects of these events are in dispute or have been the subject of contradictory evidence before the adjudicator. Mr. Smith now asserts that a number of statements attributed to him in

Garda's notes of the interviews are false. Notably, he denies sending the pictures to Ms. Roszell, who testified that she may have had access to them because her tablet was synchronized with Mr. Smith's smartphone. Ms. Roszell initially denied sending the complaint to the Ministry of Children's Services, but later recanted her testimony and admitted doing so. Mr. Smith and Ms. Roszell deny that they are in a romantic relationship; rather, Ms. Roszell would simply be renting a room in Mr. Smith's house.

II. Proceedings Before the Adjudicator

10 Mr. Smith made a complaint for unjust dismissal and requested the appointment of an adjudicator pursuant to the Code. After significant delays, a hearing took place on April 3 and 4, 2019. At that hearing, Garda called as witnesses its two executives who interviewed Mr. Smith before his termination. Mr. Smith, who was not represented by a lawyer, called three current or former Garda employees and testified himself. Garda argued that Mr. Smith was a "manager" who cannot bring a complaint for unjust dismissal, given subsection 167(3) of the Code, and that, in any event, his termination was justified, mainly because of the Sobeys incident and his refusal to be forthcoming about what really took place.

11 At the close of the April hearing, the adjudicator left open the possibility of reconvening a further hearing. After the hearing, both parties communicated by email with the adjudicator, without immediately copying each other. For example, Mr. Smith sent written submissions on April 20, and Garda on June 3. In both cases, the adjudicator forwarded the email to the other party.

12 From June 21 to July 16, however, the adjudicator engaged in a series of email exchanges with Mr. Smith, unbeknownst to Garda. In these exchanges, the adjudicator solicited information from Mr. Smith regarding two main subjects: his status as a manager and his claim for damages. Mr. Smith took the opportunity of these exchanges to reiterate allegations of bad faith against Garda and to inform the adjudicator that a number of Garda employees, including one who testified at the hearing, had been terminated. These exchanges are analyzed in more detail below.

13 Moreover, on June 26, after reaching the conclusion that Mr. Smith had been unjustly dismissed, the adjudicator sought the help of the firm Economica Ltd. to calculate damages. He mentioned this to Mr. Smith, but not to Garda.

14 On July 18, 2019, the adjudicator issued a 45-page decision that fully sided with Mr. Smith. The adjudicator's reasons are poorly structured and difficult to follow. He reached the conclusion that Mr. Smith was not a manager and was terminated without cause. He found that Garda acted in "bad faith" and treated Mr. Smith in a "premeditated, careless and callous manner." While this conclusion is not explicitly justified, the recurring theme throughout the decision is that Garda invented crucial aspects of the Sobeys incident to be able to terminate Mr. Smith without providing notice, as part of a campaign to reduce Garda's operating costs. Thus, the adjudicator suggests, at several places in his reasons, that Garda's witnesses were not credible and that "an inference

140

may be drawn that Garda was looking for additional reasons for dismissal" (p 27; see also pp 8, 11). He went as far as suggesting that the RCMP officer acted improperly at the behest of Garda's management (p 27) and doubting that Ms. Roszell ever sent a complaint about the social to the Ministry of Children's Services (p 9).

15 As Economica Ltd. had not yet provided its calculation of the damages, the adjudicator retained jurisdiction. Nevertheless, he ordered the immediate payment of a sum of $13,779, to compensate Mr. Smith for various expenses incurred after his termination, as well as a sum of $2,000 intended to pay for the publication of a notice of the award.

16 On July 31, 2019, Garda wrote to the adjudicator to express its concerns with the July 18 decision. It asserted that the decision was based on a number of erroneous findings of fact. It appended a "can say" statement from the RCMP officer who investigated the Sobeys incident, as well as pictures taken from the Internet that could suggest that Mr. Smith and Ms. Roszell were involved in a romantic relationship. Moreover, Garda noted that several findings were based on emails from Mr. Smith that were never provided to Garda. It also argued that the award of costs was unsupportable at law. For all these reasons, Garda asked the adjudicator to retract his July 18 decision.

17 On August 1, the adjudicator agreed to retract his decision, forward a copy of his email exchanges with Mr. Smith to Garda's counsel and reconvene a hearing. Over the following days, he forwarded most, but not all, communications he had with Mr. Smith in June and July.

18 On August 16, the adjudicator sent three long emails to Garda's counsel, disputing most of the claims made in the July 31 letter. Lengthy exchanges followed, mainly between the adjudicator and Garda's counsel, as to the scheduling of this new hearing. Garda initially sought to have 20 witnesses testify at that new hearing. The adjudicator strongly reacted to what he considered an abusive stance. This led to heated exchanges that are further analyzed below.

19 The second hearing took place on November 7. Mr. Smith testified and was cross-examined, but left immediately afterwards given his work schedule. Garda called four witnesses: two of its executives, the RCMP officer and a representative from the Ministry of Children's Services. The adjudicator also received sworn statements from Mr. Smith and Ms. Roszell.

20 The adjudicator, the parties and Ms. Roszell kept communicating with each other by email over the following weeks. Garda's counsel objected to the fact that these emails constituted unsworn evidence. As a result, the adjudicator asked Mr. Smith, Ms. Roszell and another witness to provide further sworn statements.

21 The adjudicator issued his decision on January 29, 2020. The decision is 61 pages long and once again, it is poorly organized and difficult to follow. Although the adjudicator mentions the evidence given at the second hearing, his main findings are substantially the same as in his first

decision. In reviewing the evidence, the adjudicator criticizes everything that does not conform to Mr. Smith's version of events. While he acknowledges that Ms. Roszell admitted sending the complaint to the Ministry of Children's Services after denying doing so, he apparently believes her explanation that she gained access to the pictures taken by Mr. Smith at Sobeys through a common iCloud account. The following two paragraphs (at p 39) appear to summarize his views:

> Reflecting on the evidence and various testimonies, the Adjudicator is of the opinion that, on a balance of probabilities, the examination of the Sobeys CCTV by the Complainant was not an unauthorized extraordinary event (that occurred on this single instance) warranting termination of his employment for cause. Such examination was probably only regarded as serious because Sobeys expressed concern. It is hard to understand how the rather incomplete can say information provided by the RCMP officer happened to coincide with [Garda's general manager's] misleading and distorted interpretation of the circumstances. While difficult to understand, the Adjudicator feels the officer's uninvestigated can say suggestion of July 19, 2019 as quoted before: "I concluded that the most probable version of events is that Dean Smith fabricated that he wanted pictures of his lost ID in order to obtain pictures of [the social worker] purchasing liquor..." must have contributed to or fitted in with the misleading circumstances portrayed by Garda.
>
> Consequently, the Adjudicator is of the view, on a balance of probabilities, based on the evidence and in the context of a campaign to reduce head count, it was expedient for Garda to terminate the employment of the Complainant, Smith, even for cause.

22 The adjudicator condemned Garda to pay Mr. Smith damages in the amount calculated by Economica Ltd, that is, $62,278. In addition, he condemned Garda to pay $500,000 in punitive damages.

23 Garda is now seeking judicial review of this decision.

III. Analysis

24 Garda challenges the adjudicator's second decision on three main grounds: it is unreasonable on the merits, the adjudicator breached procedural fairness and his conduct raises a reasonable apprehension of bias. These grounds are intertwined to a certain extent, as Garda's allegations regarding apprehension of bias rely on its criticism of the decision and on events that would also be procedurally unfair.

25 I conclude that the adjudicator's conduct raises a reasonable apprehension of bias. I reach this conclusion without reviewing the substance of the adjudicator's decision. Likewise, I do not need to review allegations of procedural unfairness beyond those related to bias. The matter will be remitted to a different adjudicator for a new decision. As I do not pronounce on the substance

142 of the dispute, the new adjudicator will be free to take a fresh look at the matter, unconstrained by previous pronouncements.

A. Reasonable Apprehension of Bias

26 Disagreement among members of our society is inevitable. Yet, to achieve social peace and a sense of justice, we must at least be able to agree on a process to settle legal disputes. This is the role of courts and administrative decision-makers. But for people to agree to submit their disputes to the courts and respect their decisions, they must consider that courts are impartial, not biased. No one would have confidence in the administration of justice if judges were biased.

27 Thus, impartiality inheres in the adjudicative role. As the symbol of a blindfolded woman holding the scales of justice suggests, judges and other decision-makers must not favour one party at the expense of the other. They must approach cases with an open mind and be ready to be convinced by each party's evidence and arguments. They must not have an interest in the case or prejudice towards one party. Indeed, the public "expects judges to undertake an open-minded, carefully considered, and dispassionately deliberate investigation of the complicated reality of each case before them:" *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at paragraph 40.

28 The adjudicator in this case did not meet this standard. Several aspects of his conduct give rise to a reasonable apprehension of bias. The *ex parte* communications show that he took up the role of an advocate for Mr. Smith. He showed antipathy towards Garda's counsel. He made remarks that were systematically favourable to Mr. Smith's witnesses and unfavourable to Garda's. The sequence of events leading to the award of punitive damages leads a reasonable observer to conclude that this award was made in retaliation for Garda's challenge to his first decision.

29 To explain why I reach these conclusions, I first lay out the general principles guiding the analysis of allegations of reasonable apprehension of bias. I then examine each aspect of the adjudicator's conduct that contributes to creating such an apprehension.

(1) Legal Principles

30 The impartiality of judges and administrative decision-makers is guaranteed by several constitutional and statutory sources, as well as the common law. I need not examine the written sources here, as this case may be settled by the rules of the common law. Case law has established general principles to ascertain whether a judge is impartial. After setting out these principles, I address how their application must take into account two specific aspects of this case, namely, that the adjudicator is not a judge but an administrative decision-maker and that Mr. Smith is self-represented.

31 As mentioned above, impartiality is pivotal to ensure that parties accept the judicial process and its outcome. To achieve this, however, the process must not only be fair but also perceived to

be fair, if not by the parties themselves, at least by reasonable observers who take a close look at the situation. Thus, we approach allegations of bias not by inquiring into the judge's actual state of mind, but by asking whether the circumstances give rise to a reasonable apprehension of bias. According to a long line of cases, allegations of bias must be assessed from the perspective of a reasonable observer who takes all the facts into careful consideration: *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.) at 394.

32 There is a high threshold for proving a reasonable apprehension of bias, as judges are presumed to be impartial: *Cojocaru (Guardian ad litem of) v. British Columbia Women's Hospital & Health Center*, 2013 SCC 30 (S.C.C.) at paragraphs 14-22, [2013] 2 S.C.R. 357 (S.C.C.); *Yukon Francophone School Board*, at paragraph 25; *Oleynik v. Canada (Attorney General)*, 2020 FCA 5 (F.C.A.) at paragraph 57 [*Oleynik*]. Indeed, respect for the administration of justice would be undermined if litigants made allegations of bias in a careless fashion or if judges were disqualified without solid grounds.

33 Like judges, administrative decision-makers must be impartial. Administrative decision-makers, however, exercise a broad range of functions, ranging from adjudication of disputes to broad policy-making decisions. Thus, the requirement of impartiality must be calibrated by reviewing the nature and characteristics of the decision-maker, as well as the relevant statutory regime: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at paragraph 47 [*Baker*]. The Supreme Court of Canada provided the following explanation in *Bell Canada v. C.T.E.A.*, 2003 SCC 36 (S.C.C.) at paragraph 21, [2003] 1 S.C.R. 884 (S.C.C.):

> ... administrative tribunals perform a variety of functions, and "may be seen as spanning the constitutional divide between the executive and judicial branches of government" [...]. Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the spectrum: their primary purpose is to adjudicate disputes through some form of hearing. Tribunals at this end of the spectrum may possess court-like powers and procedures. These powers may bring with them stringent requirements of procedural fairness, including a higher requirement of independence.

34 Adjudicators under the Code are close to the judicial end of this spectrum. Our Court requires them to be impartial and relies on the principles regarding the impartiality of judges to assess whether there is a reasonable apprehension of bias: *Bank of Montreal v. Brown*, 2006 FC 503 (F.C.); *Bank of Montreal v. Payne*, 2012 FC 431 (F.C.) at paragraphs 51-52, reversed on other grounds, 2013 FCA 33 (F.C.A.); *Toronto-Dominion Bank and Rafizadeh, Re*, 2013 FC 781 (F.C.), at paragraphs 15 and 16.

144

35 Nevertheless, procedure before administrative decision-makers is flexible and is not required to mirror the judicial process. One of the reasons for entrusting large areas of the law to administrative decision-makers is to allow for a process that is simpler, more flexible and more accessible than that of the courts. Thus, a reviewing court should not find bias simply because a decision-maker adopts a process that differs, in some respects, from that followed by courts. In particular, adjudicators under the Code do not show bias simply by acting differently than courts in some respects, for example by engaging in mediation: *Skinner and FedEx Ground Package Systems Ltd., Re*, 2014 FC 426 (F.C.).

36 The fact that Mr. Smith is self-represented is also relevant to the bias issue. Self-represented litigants face significant disadvantages when they bring their cases to court. They are often unfamiliar with the judicial process and the substantive law. Judges and administrative decision-makers increasingly recognize that they should provide information and assistance to self-represented litigants, to help them understand the process. There is also a growing acceptance of the need to transform the judicial or administrative process to make it more accessible for self-represented litigants, for example through what is known as "active adjudication." These practices do not give rise, in and of themselves, to a reasonable apprehension of bias: Canadian Judicial Council, *Statement of Principles on Self-represented Litigants and Accused Persons*, September 2006, endorsed by the Supreme Court of Canada in *Pintea v. Johns*, 2017 SCC 23 (S.C.C.), at paragraph 4, [2017] 1 S.C.R. 470 (S.C.C.); see also Michelle Flaherty, "Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law" (2015) 38 Dalhousie LJ 119; Jula Hughes and Philip Bryden, "Implications of Case Management and Active Adjudication for Judicial Disqualification" (2017) 54 Alberta L Rev 849. Yet, the requirement of impartiality remains and the judge or decision-maker "must carefully walk the line between being of assistance to [self-represented] litigants and becoming their advocate:" *Malton v. Attia*, 2016 ABCA 130 (Alta. C.A.), at paragraph 3. A detailed review of the facts of this case shows that the adjudicator crossed that line.

37 Various kinds of situations may give rise to a reasonable apprehension of bias: for a survey, see Philip Bryden, "Legal Principles Governing the Disqualification of Judges" (2003) 82 Can Bar Rev 555. In this case, the allegations of bias are based on the adjudicator's statements or conduct during the course of the proceedings. The case law provides examples of conduct that gives rise to a reasonable apprehension of bias, including the decision-maker's public statements regarding the outcome of the case (*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.) [*Newfoundland Telephone*]), private communications with one party or its counsel (*Hunt v. The Owners, Strata Plan LMS 2556*, 2018 BCCA 159 (B.C. C.A.) [*Hunt*]; *Setlur v. Canada (Attorney General)* [2000 CarswellNat 6336 (Fed. C.A.)], 2000 CanLII 16580 [*Setlur*]) and persistent hostility towards counsel (*Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*, 2015 SCC 25 (S.C.C.) at paragraph 25, [2015] 2 S.C.R. 282 (S.C.C.) [*Yukon Francophone School*

Board]) or a witness (*R. v. Brouillard*, [1985] 1 S.C.R. 39 (S.C.C.)). In certain circumstances, a reasonable apprehension of bias may result from comments made in the reasons for decision: *Baker*, at paragraph 48; *Sawridge Band v. R.*, [1997] 3 F.C. 580 (Fed. C.A.) [*Sawridge Band*].

38 In particular, a judge should not communicate with one party about the case in the absence of the other party or, at the very least, without giving notice to the other party as soon as feasible: *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (S.C.C.) at paragraphs 74-75 [*Tobiass*]. This situation, known as an "*ex parte* communication," may give rise to procedural unfairness, as the other party is deprived of the opportunity to respond: *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.) at 1114-1115; *Banque Nationale du Canada c. Lajoie*, 2007 FC 1130 (F.C.) at paragraphs 16-20. Quite understandably, the party excluded from the conversation may also have serious concerns about the judge's impartiality, thus giving rise to a reasonable apprehension of bias: see, for example, *Tobiass*; *Setlur*; *Ciebien v. Canada (Attorney General)*, 2005 FC 167 (F.C.) at paragraphs 59-61.

39 The rationale for this prohibition also applies to administrative decision-makers. Nevertheless, some flexibility is in order, especially where the decision-maker is not assisted by a registry through which communication with the parties may be channelled. In these circumstances, communications pertaining to purely administrative or scheduling matters do not give rise to procedural unfairness or an apprehension of bias: *Grey v. Whitefish Lake First Nation #459*, 2020 FC 949 (F.C.) at paragraphs 44-51. Likewise, where a party, especially a self-represented one, sends information to the decision-maker without providing a copy to the other party, no harm is done if the decision-maker immediately forwards the communication to the other party: *Fasteners from China & Chinese Taipei, Re*, 2006 FCA 118 (F.C.A.) at paragraph 17; see also *Opaskwayak Cree Nation v. Booth*, 2009 FC 225 (F.C.) at paragraphs 55-59, aff'd 2010 FCA 299 (F.C.A.).

(2) Ex parte communications with Mr. Smith

40 The first problematic aspect of the adjudicator's conduct is his *ex parte* communications with Mr. Smith. These communications did not pertain to purely administrative matters and did not simply deprive Garda of the opportunity to respond. Rather, they show that the adjudicator had made up his mind on several crucial issues without the necessary evidence and was seeking additional facts from Mr. Smith to buttress his conclusions. They also show, more generally, that the adjudicator was prepared to give advice to Mr. Smith (and to his witness Ms. Roszell) to help him present his case. He also shared his preliminary findings with Mr. Smith, but not with Garda's counsel. Thus, one could reasonably conclude that the adjudicator viewed his role as that of an advocate for Mr. Smith rather than a neutral decision-maker. As a result, the adjudicator's conduct gives rise to a reasonable apprehension of bias.

41 A first *ex parte* communication took place on June 7, 2019. On that date, Mr. Smith sent an email to the adjudicator about the termination of certain Garda employees. The adjudicator

146 forwarded the email to Garda's counsel. This, however, was not the end of the conversation. The next day, Mr. Smith emailed again (Applicant's Record [AR] at 550), making the point that the termination of one of these employees (Mr. Dan Smith, not to be confused with the respondent Mr. Smith), who had testified for Garda at the hearing, tended to show that the Sobeys incident was merely a pretense for terminating his own employment for cost reduction purposes. He wrote:

> And the termination of Dan Micheal Smith is suspicious to say the least. [...] Dan was cost cutting and lied! [...] He lied, in attempt to come up with a reason not to pay me severance to cut cost. Rumor has it they are letting go of all senior staff for overhead reasons for the purpose of sale.

42 The adjudicator's initial reaction to this email, conveyed the same day, was to tell Mr. Smith to "focus on your own complaint only and not pursue the firings mentioned by you" (AR at 553). Nevertheless, the adjudicator became increasingly interested in the idea that the true motive for Mr. Smith's termination was the reduction of Garda's operating costs.

43 The most important series of *ex parte* communications begins on June 20, 2019. On that date, without giving notice to Garda's counsel, the adjudicator sent Mr. Smith a long list of questions pertaining to the "manager issue," to the use of Garda vehicles and fuel cards and to the damages Mr. Smith was seeking. Mr. Smith responded the next day (AR at 557-563). The adjudicator replied the same day with further questions on the same subjects as well as the Sobeys incident. On June 24, the adjudicator asked another round of questions and suggested to Mr. Smith that he claim his expenses associated with the hearing. The adjudicator noted:

> I can see that my queries are somewhat endless and are going around in circles. I am trying to understand the extent of control Garda Calgary may have had over your working day. (AR at 573)

44 On June 25, the adjudicator emailed Mr. Smith, telling him that he had reached the conclusion that Garda had no just cause for his termination and that the remaining issue was what reasonable notice had to be paid. He asked him to prepare calculations based on 3, 6 and 12 months of notice (AR at 579-580). Mr. Smith responded later the same day with a schedule of various heads of damages totalling a little more than $1 million (AR at 585-588). On June 26, the adjudicator responded with some comments and mentioned that he intended to hire an accountant (AR at 594). Mr. Smith and the adjudicator exchanged several emails on that day.

45 On July 4, the adjudicator wrote again to Mr. Smith to ask another series of questions about the Sobeys incident and his termination, as well as the "manager issue" (AR at 622-627). Mr. Smith answered the same day, and provided additional answers and a statement of expenses the next day and the day after (AR at 628-637). On July 5, the adjudicator also asked additional questions about the "manager issue," the Sobeys incident and his termination. The adjudicator wrote again to Mr.

Smith on July 11 and 12, asking questions pertaining mostly to his termination, Garda's motives and damages (AR at 645-649).

46 On July 16, two days before issuing his first decision, the adjudicator sent a long list of questions to Mr. Smith, essentially asking him to confirm a number of findings of fact he intended to make regarding the Sobeys incident and his termination (AR 653-662).

47 Thus, one can appreciate that during the first half of the month of July, the adjudicator kept looking for additional evidence and clarification on the "manager issue" and Mr. Smith's termination, even though he had already told him on June 25 that he had concluded that he had been dismissed without cause. Yet, the adjudicator could only reach this conclusion after finding that Mr. Smith was not a manager and after considering all the evidence regarding his termination.

48 To give rise to a reasonable apprehension of bias, it is not necessary to show the impact of the evidence conveyed through the *ex parte* communications. In any event, the first decision's poor structure makes it difficult to follow the adjudicator's reasoning and to isolate the impact of specific pieces of evidence. Nevertheless, the reasons for decision refer extensively to information provided by Mr. Smith. For example, at pages 5 and 6 of the first decision, the adjudicator quotes verbatim an answer provided by Mr. Smith on July 4 and gives a detailed summary of the July 16 email; at pages 18-24, he summarizes other answers given by Mr. Smith in late June and early July; at pages 39-41, he quotes verbatim Mr. Smith's July 12 email regarding his financial circumstances and attempts to find new employment.

49 Most importantly, the adjudicator did not seek Garda's comments on the evidence he obtained from Mr. Smith. To a reasonable observer, this can only mean that the adjudicator had made up his mind in favour of Mr. Smith, sought additional evidence buttressing his conclusion and was uninterested in hearing anything that would contradict it. In other words, the adjudicator ceased acting in an impartial manner and instead became an advocate for Mr. Smith. These communications are sufficient to create a reasonable apprehension of bias. By their duration and scope, they far exceed those that led to the disqualification of the decision-maker in cases such as *Setlur* or *Hunt*. No reasonable observer would accept to submit their disputes to such a process. I would simply add that the flexibility of administrative proceedings and the willingness to help self-represented litigants do not excuse the adjudicator's conduct. Even in an adapted form, justice must still be done in public and with both parties present.

50 Nevertheless, Mr. Smith argues that the adjudicator also engaged in *ex parte* communications with Garda's counsel, thus showing that he was not biased. To be sure, such communications took place on a few occasions. In particular, on June 7, the arbitrator asked a number of factual questions to Garda's counsel. On July 5, she provided a response to the adjudicator alone (AR at 483), who never forwarded it to Mr. Smith. However, a review of these communications shows that the adjudicator did not embark on a systematic search for evidence favourable to Garda or

148 anything that might evince bias against Mr. Smith. As in *Setlur*, the fact that the decision-maker initiated separate conversations with each party does not negate the apprehension of bias resulting from the comments made to one party during one of these conversations. Later in these reasons, I will address Mr. Smith's argument that by writing to the adjudicator alone, Garda acquiesced to whatever communications the adjudicator had with Mr. Smith.

51 Mr. Smith also suggests that the adjudicator acted in good faith. He knew that it was preferable not to have *ex parte* communications, as he initially urged Mr. Smith to copy Garda's counsel on any correspondence sent to him (AR at 553). Forgetting to abide by this rule himself would be nothing more than an honest mistake. His mention of Mr. Smith's emails in his first decision would show that he thought he was not doing anything wrong. However, a reasonable apprehension of bias does not depend on proof of the decision-maker's actual state of mind. The assessment is objective. Any reasonable observer would conclude that the adjudicator seriously misunderstood his role. Moreover, the remarks he made in his second decision, which are quoted below, belie any suggestion that the adjudicator acted by mistake in engaging in *ex parte* communications with Mr. Smith.

(3) Hostility Towards Garda's Counsel

52 The adjudicator's hostility towards Garda's counsel also contributes to create a reasonable apprehension of bias. This hostility manifested itself mainly in the course of email exchanges taking place in August and early September 2019, after Garda's counsel wrote a long letter criticizing the adjudicator's first decision and the process that led to it. In these communications, the adjudicator and Garda's counsel explored various manners of convening a second hearing or gathering new evidence. For our purposes, what matters is not the procedural decisions the adjudicator made, but the adversarial tone he adopted towards Garda's counsel.

53 On August 16, the adjudicator sent three long email to Garda's counsel, essentially refuting point by point the arguments made in Garda's July 31 letter. These emails set the general tone of the following exchanges. The adjudicator blamed Garda and its counsel for not providing the information obtained from Mr. Smith in the *ex parte* communications and went as far as saying that this was "dishonest" (AR at 821). He also asked Garda to provide evidence on certain matters by way of affidavits and announced his intention to hold a new hearing where several witnesses would be heard, including the RCMP officer, the social worker, Ms. Rozsell, the Sobeys employee and a representative from the Ministry of Children's Services.

54 On August 23, Garda's counsel responded and added more names to the list of witnesses suggested by the adjudicator. She announced her intention to call 20 witnesses, noting that some of these were necessary to respond to allegations of fraud or bad faith. The adjudicator responded the same day, saying that five days of hearings would be needed to accommodate so many witnesses.

55 On August 27, however, the adjudicator wrote a formal letter to Garda's counsel, suggesting that it might not be necessary to convene a hearing in person. Rather, he asked counsel for Garda to provide affidavits from all proposed witnesses no later than September 3, that is, within seven days, including the Labour Day weekend. He also wrote that witnesses who were heard in April, or who "could or should have been called" on that occasion would not be able to testify at the new hearing. Remarkably, this applied to some of the witnesses he had himself suggested to call in his August 16 email. On August 30, Garda's counsel replied that it would not be possible to provide the requested affidavits before September 3, that this requirement was a breach of procedural fairness and that Garda would apply for judicial review if the requirement were enforced.

56 On September 4, the adjudicator sent an email to Garda's counsel, containing the following statement:

> Affidavits and information on various matters have previously been requested from Garda. It would seem legal counsel may have elected to ignore such requests. In the event these are not provided by 1:00 p.m. on Thursday, September 12, 2019 the Adjudicator will either deem you and your client to be in contempt of this Tribunal or seek the order of a Superior Court to issue an order holding your client, Garda, and\or legal counsel for Garda to be in contempt of this Tribunal. (AR at 850)

57 Garda provided some of the information on September 12. The adjudicator did not take any steps to hold Garda or its counsel in contempt.

58 In fact, blaming Garda's counsel appears to be the adjudicator's way of absolving himself of his procedural missteps, in particular his *ex parte* communications with Mr. Smith. Although this theme is frequently repeated in communications with Garda's counsel, for example in an email sent on December 24 (AR at 1570-1572), the adjudicator's position is clearly stated at page 12 of the second decision:

> While some of this information was to a limited extent contained in the evidence previously provided, the area remained vague. As a result, without including legal counsel in his queries, the Adjudicator asked the Complainant directly for such clarification and accepted the information provided by the Complainant's various emailed responses. These responses were not communicated to legal counsel for Garda until later.
>
> [...]
>
> The Adjudicator was of the strong view it was delinquent of the employer, Garda, not to volunteer in the first instance the full significance of the daily activities of the Complainant in the course of carrying out his duties and responsibilities. The non-existence of any helpful explanation of the realities of the employee's day-to-day job seemed to leave a vacuum full of

150

job titles. The absence of a full explanation required the Adjudicator to look into the matter further.

59 This constant hostility towards Garda's lawyers, in particular the threat to hold them in contempt, is similar to, if not more serious than, the conduct of the judge that gave rise to a reasonable apprehension of bias in *Yukon Francophone School Board*.

60 In reaching this conclusion, I am mindful that adjudicators must be able to manage actively the proceedings before them to achieve the Code's aim of a quick resolution of unjust dismissal complaints. In so doing, adjudicators may have to rein in lawyers who seek to lengthen proceedings for purely tactical purposes. Here, it is obvious that the adjudicator viewed Garda's request to call 20 witnesses as excessive — he wrote that this would be tantamount to "allow[ing] a circus" (AR at 1011). He was certainly entitled to refuse to hear some of them. Nevertheless, his hostility to Garda's counsel predated Garda's attempt to have 20 witnesses testify and manifested itself with respect to issues other than the number of proposed witnesses.

(4) Comments About Witnesses

61 The adjudicator's comments regarding certain key witnesses also contribute to raising a reasonable apprehension of bias. These comments are found in the second decision, in emails sent to Mr. Smith and Garda's counsel and, surprisingly, in an email from the adjudicator to the Ministry of Children's Services. They suggest that the adjudicator firmly believed that Garda had invented the story that Ms. Roszell made a complaint to the Ministry of Children's Services about the social worker and systematically expressed doubts when confronted with evidence that it actually happened.

62 This evidence first came in the form of the "can say" statements of the RCMP officer who investigated the social worker's complaint. These statements confirmed that Ms. Roszell sent a complaint to the Ministry of Children's Services. They also express the officer's view that the pictures found in Ms. Roszell's complaint were obtained by Mr. Smith from Sobeys surveillance video. They mention the fact that the social worker recognized Mr. Smith and identified him as Ms. Roszell's boyfriend.

63 After receiving the first "can say" statement, the adjudicator wrote to Garda's counsel, on August 16, and made negative comments about the statement (AR at 813). He suggested that it was improper for the officer to have reached any conclusion about the Sobeys incident without interviewing Mr. Smith and went as far as suggesting that the officer's supervisor should review his conduct. Yet, the officer states that he concluded that no criminal offence was committed. The adjudicator failed to appreciate that this might very well explain that the officer decided to apprise Mr. Smith's employer of the situation instead of interviewing him.

64 In his second decision, he again disparaged the work of the RCMP officer in these terms (at p. 17):

> [The adjudicator] finds it somewhat bizarre that an RCMP officer would, in the normal course of his work, generously issue a statement, that included his assumptions and opinion on matters not directly investigated. [...] Is it possible someone else told him certain things that were not actually under investigation?

65 The same attitude is apparent with respect to the existence of Ms. Rozsell's complaint itself. At the April hearing, Ms. Roszell provided an affidavit denying ever sending a complaint to the Ministry of Children's Services. In his first decision, the adjudicator apparently gave credence to this version of events, when he wrote that "it is impossible to conclude whether any photographs taken of Sobeys CCTV screen ever made their way to the court of Family Child Services [*sic*]" (p 9). After this decision was retracted, Garda sought evidence of the complaint from the Ministry of Children's Services and asked the adjudicator to send a notice to appear to a representative of the Ministry. Despite his initial reluctance, the adjudicator eventually agreed. On November 1, the Ministry of Children's Services, through its lawyers, sent the adjudicator a copy of Ms. Roszell's complaint. The adjudicator's initial reaction was to allege that the copy he received was impossible to read. On November 3, he replied to the Ministry to request a clearer copy of the documents. He volunteered the following opinion (AR at 1074):

> It is my understanding that Opal Roszell complained to CFS about the Social Worker because of her online postings which gave all the world to see her face and physical address (and friends). If this was all then Ms. Roszell may have done a good service for your worker, and her future personal security.

66 It appears that the adjudicator believed until very late in the process that Ms. Roszell never made any complaint to the Ministry of Children's Services. On November 6, that is, the day before the second hearing, the adjudicator wrote to Garda's junior counsel about scheduling issues, and mentioned that the representative from the Ministry would likely testify to the effect that Ms. Roszell never complained about the social worker (AR at 1334). How the adjudicator could write this while having Ms. Roszell's complaint before him is puzzling, to say the least, and it appears to contradict his email of November 3, reproduced above.

67 Moreover, after the second hearing, Ms. Roszell provided a sworn statement in which she admitted sending the complaint to the Ministry and explained that she gained access to the pictures of the social worker by accident, without Mr. Smith's knowledge. The adjudicator described his reaction in an email to Garda's counsel dated December 24:

152

> As you are probably aware, the Adjudicator was very surprised with Ms. Roszell's admission that she acquired the two supposed [photos of the social worker] from [Mr. Smith's] computer or camera system. (AR at 1571)

68 He then proceeded to blame Garda's counsel for not obtaining this evidence earlier. In the second decision, he chose to believe Ms. Roszell's explanation that she obtained the pictures because her tablet was synchronized with Mr. Smith's smart phone.

69 The common theme of these comments is that the adjudicator was unwilling to listen to evidence favourable to Garda, but was prepared to resort to every stretch of the imagination to construct a narrative favourable to Mr. Smith. A reasonable observer would conclude that the adjudicator did not have an open mind.

(5) Punitive Damages Award

70 The substance of a decision may, in appropriate circumstances, raise a reasonable apprehension of bias: *Baker*; *Sawridge Band*. Care must be taken, however, as a decision-maker must inevitably choose between the competing arguments of the parties. Deciding in favour of one of them is not tantamount to showing bias. Even a finding that a decision is unreasonable does not entail that the decision-maker was biased.

71 Nonetheless, one aspect of the decision would lead a reasonable observer to apprehend bias: the punitive damages award. I come to this conclusion mainly because of the sequence of events leading to this award rather than its merits, although I note that the amount of $500,000 is far removed from the usual range of punitive damages awarded in employment law cases, which rarely, if ever, exceed $100,000. See, for example, *Joseph v. Tl'azt'en First Nation*, 2013 FC 767 (F.C.), at paragraphs 48-56; *Spruce Hollow Heavy Haul Ltd. v. Madill*, 2015 FC 1182 (F.C.), at paragraphs 114-128; *Elgert v. Home Hardware Stores Ltd.*, 2011 ABCA 112 (Alta. C.A.), at paragraph 102.

72 The adjudicator did not mention punitive damages in his communications with the parties prior to his first decision. In particular, his *ex parte* communications with Mr. Smith do not touch upon the issue, even though he disclosed many other aspects of what would become the first decision. The only mention of punitive damages is found in an email to Economica Ltd., on June 28, in which he says (AR at 676):

> Because of the manner of the employee's dismissal (bad faith, gross misrepresentation of facts, lack of credibility of the Garda witnesses and emotional stress placed on the employee - all as further compounded by the termination of Garda Alberta management shortly after the Labour Code hearing I am considering awarding general exemplary damages in the range of $100,000.00. I assume that such damages are non taxable?

73 Yet, the first decision does not mention punitive damages, even though it contains findings of bad faith against Garda. While the adjudicator retained jurisdiction, this was mainly motivated by the fact that Economica Ltd. had not yet forwarded its assessment of damages. Economica Ltd. was never asked to assess the amount of punitive damages; it was only asked, as we saw above, whether they would be taxable. Thus, a reasonable observer would conclude that the adjudicator considered awarding punitive damages in the amount of $100,000, but finally decided that such damages were not warranted.

74 Mentions of punitive damages begin to appear in the communications with the parties only after Garda asked the adjudicator to retract the first decision. In its July 31 letter, Garda objected to the award of a sum of $13,779 to compensate Mr. Smith for various expenses. In an email sent to Garda's counsel on August 16, the adjudicator stated that "If such costs are not supportable in law, the Adjudicator will consider the matter of punitive damages."

75 Moreover, the evidence adduced after the adjudicator retracted the first decision did not provide any additional support for a punitive damages award. If anything, this evidence confirmed that the facts on which Garda based Mr. Smith's termination were true. It appears that the "independent actionable wrong" (*Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.)) that the adjudicator identified as the basis for the punitive damages award is Garda's bad faith termination of Mr. Smith, a finding the adjudicator had already made in his first decision.

76 Lastly, there is no logical explanation for the sudden jump from $100,000 to $500,000 in the amount awarded. Neither does the amount of $500,000 bear any relationship to the amount of $13,779 in costs, which, according to the adjudicator's August 16 email, was the reason why he considered awarding punitive damages.

77 After a careful review of this sequence of events, and irrespective of the adjudicator's actual state of mind, a reasonable observer would be seriously concerned that the adjudicator made an extraordinary award of punitive damages in retaliation for Garda's request to retract the first decision.

78 To reach this conclusion, I need not rely on the adjudicator's correspondence with a freelance legal researcher, in which he asked about the validity of his $13,779 award for Mr. Smith's expenses. Asking for clarification on a legal issue does not, in and of itself, indicate that the adjudicator had made up his mind on the issue.

(6) Timely Complaint, Waiver, Prejudice and Curing

79 Mr. Smith argues that even if I were to find the adjudicator's conduct objectionable, Garda acquiesced in it, waived the right to complain or failed to complain in a timely manner. He also

154

argues that the second hearing cured the flaws of the process leading to the first decision and that Garda failed to show any prejudice. I am unable to agree with these submissions.

80 In analyzing these submissions, two legal principles are particularly relevant. First, a party who wishes to allege bias must do so on the first reasonable occasion: *Hennessey v. R.*, 2016 FCA 180 (F.C.A.) at paragraphs 20-21; *Eckervogt v. British Columbia (Minister of Employment & Investment)*, 2004 BCCA 398 (B.C. C.A.) at paragraphs 47-48. One cannot wait for the outcome and allege bias if the decision is unfavourable. An early objection also gives the decision-maker the opportunity to put his or her view of the matter on the record. In that sense, failure to object may amount to a form of "waiver."

81 Second, proof of actual prejudice is not necessary to reach a finding of reasonable apprehension of bias. This is because we recognize that it is impossible to inquire into the decision-maker's actual state of mind: *Hunt*, at paragraph 124; *Stuart Budd & Sons Ltd. v. IFS Vehicle Distributors ULC*, 2016 ONCA 60 (Ont. C.A.) at paragraph 50. For the same reasons, subsequent events in the proceedings cannot "cure" partiality. To quote from the Supreme Court of Canada in *Newfoundland Telephone*, at 645: "The damage created by apprehension of bias cannot be remedied." See also *Oleynik*, at paragraph 51.

82 Contrary to Mr. Smith's submissions, Garda complained of bias as soon as it discovered the *ex parte* communications. The July 31, 2019 letter to the adjudicator objected to these communications and asked the adjudicator to provide copies of them. While Garda framed the matter mainly as a procedural fairness issue, it also stated that "the Draft Preliminary Decision reaches a patently unreasonable conclusion and appears to be biased in favour of the Complainant." In my view, Garda complained at the earliest opportunity. That Garda did not seek the adjudicator's immediate recusal, or that it did not carry its threat to bring an application for judicial review, does not amount to waiver. In principle, the proceedings before the adjudicator must have reached their conclusion before a party applies for judicial review: *Sioux Valley Dakota Nation v. Tacan*, 2020 FC 874 (F.C.). With the benefit of hindsight, it is easy to criticize Garda's reaction to the adjudicator's conduct for being not sufficiently decisive. In my view, one must be sensitive to the context in which Garda found itself, which provided no obvious and immediate solution.

83 Moreover, one must not lose sight that the facts giving rise to a reasonable apprehension of bias kept accumulating over a prolonged period. Some of the communications between the adjudicator and Mr. Smith were revealed to Garda only after the application for judicial review was begun. Garda complained on several occasions of various instances of procedural unfairness, for example on August 30 (AR at 845). It also asked the Minister of Employment and Social Development to revoke the appointment of the adjudicator, to no avail (AR at 1155). Given the unusual circumstances, Garda could not have been expected to do more than what it did.

84 Neither did Garda acquiesce in the adjudicator's *ex parte* communications with Mr. Smith by itself engaging in similar communications. While it is true that Garda's counsel sent emails to the adjudicator without copying Mr. Smith, she could legitimately expect that the adjudicator would forward these emails to Mr. Smith and that the reverse would occur. For example, when Mr. Smith wrote on June 7 to inform the adjudicator of the recent firing of certain Garda employees, the adjudicator forwarded the email to Garda's counsel the next day. Moreover, on June 21, the adjudicator forwarded copies of correspondence with Mr. Smith to Garda's counsel. The adjudicator did not forward any subsequent communications with Mr. Smith to Garda's counsel until after he rendered his first decision. There was nothing to alert Garda to the existence of these further communications between the adjudicator and Mr. Smith. One cannot acquiesce in what one does not know.

85 Even assuming, contrary to established jurisprudence, that a procedural impropriety giving rise to a reasonable apprehension of bias can be cured, the second hearing did not cure the shortcomings of the process that led to the first decision. As I mentioned above, once he retracted his first decision, the adjudicator began to show hostility towards Garda's lawyers. On August 16, in three long emails sent to Garda's counsel, he defended most of the findings he made in the first decision. This, together with his later comments about witnesses, would give any reasonable observer an apprehension that his mind was closed. A second hearing marred by such problems cannot be a cure for anything. In fact, a reasonable observer would apprehend that, despite having retracted his first decision, the adjudicator decided to maintain the substance of it in spite of whatever new evidence would be adduced and to punish Garda for seeking that retraction.

B. Substantive Unreasonableness

86 Garda is also asking me to pronounce on the merits of the case, not only to hold that the adjudicator's decision is substantively unreasonable, but also to dismiss the complaint myself. It argues that Mr. Smith's account of the Sobeys incident is implausible and that his position in this regard evolved over time. It also says that Ms. Roszell is not a credible witness, as she first denied making a complaint to the Ministry of Children's Services, only to recant her testimony when evidence of the actual complaint surfaced. Moreover, Garda argues that the evidence shows that Mr. Smith was a manager who is not entitled to make a complaint for unjust dismissal under the Code. Lastly, the amount of punitive damages would be unreasonable. On all these issues, there would be, according to Garda, only one reasonable outcome.

87 I decline to rule on the merits of the case. Like most applicants for judicial review, Garda is understandably eager to see this matter come to an end. Nevertheless, the general rule is that the matter must be returned to the decision-maker designated by Parliament: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (S.C.C.) at paragraphs 139-142. Reviewing courts should not substitute themselves for the initial decision-maker.

88 Sending the matter back is unavoidable in cases of reasonable apprehension of bias. The reviewing court cannot rely on findings made by a potentially biased decision-maker. Moreover, the oral evidence was not recorded and there is no reliable transcript of the hearings. It would be a hazardous task to attempt to reach a decision on the merits in such conditions.

IV. Disposition and Costs

89 For the foregoing reasons, Garda's application for judicial review will be allowed and the matter will be sent back for a new hearing before a different adjudicator.

90 I note that the Code was recently amended to give jurisdiction to the Canadian Industrial Relations Board over unjust dismissal complaints. According to section 383 of the *Budget Implementation Act, 2017, No. 1*, SC 2017, c 20, subsection 240(1) of the Code continues to apply in its previous form to any complaint made before the day on which the section came into force. Section 383 came into force on July 29, 2019, as set by the *Order Fixing July 29, 2019 as the Day on which Certain Provisions of that Act Come into Force*, SI-2019-76, (2019) Can Gaz II, 153. As Mr. Smith made his complaint before that date, the matter must be sent back to an adjudicator and not to the Canadian Industrial Relations Board.

91 Costs usually follow the event. In this case, however, each party should bear its own costs, as the outcome is mainly the result of the adjudicator's serious misunderstanding of his role. Mr. Smith, who was not represented before the adjudicator, cannot be blamed for this and be made responsible for Garda's costs.

JUDGMENT in file T-162-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision rendered by the adjudicator on January 29, 2020 is quashed.

3. The matter is sent back to another adjudicator appointed under the Canada Labour Code for redetermination.

4. No order is made as to costs.

Application granted.

2019 FC 301, 2019 CF 301
Federal Court

Gray v. Canada (Attorney General)

2019 CarswellNat 2484, 2019 CarswellNat 2485, 2019 FC 301,
2019 CF 301, 306 A.C.W.S. (3d) 310, 71 Admin. L.R. (6th) 187

TIM GRAY AND MUHANNAD MALAS (Applicants) and ATTORNEY GENERAL OF CANADA (Respondent)

Catherine M. Kane J.

Heard: February 4, 2019
Judgment: March 12, 2019
Docket: T-1252-17

Counsel: Amir Attaran, Randy Christensen, for Applicants
Michael Roach, Taylor Andreas, for Respondent

***Catherine M. Kane J.*:**

1 The Applicants, Tim Gray and Muhannad Malas, appeal the Order of Prothonotary Mandy Aylen, dated September 10, 2018, [the Order] pursuant to Rule 51(1) of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*]. Prothonotary Aylen is the Case Management Judge [CMJ] for the underlying Application for Judicial Review. The CMJ's Order dismissed the Applicants' Rule 318 motion for production of additional documents, which were not included in the Certified Tribunal Record [CTR] produced in accordance with Rule 317 of the *Federal Courts Rules*.

2 The issue on this Appeal is whether the CMJ erred in her primary finding that the material requested by the Applicants for production pursuant to Rule 317 was not relevant to the grounds alleged in the Notice of Application or in her alternative finding that the material requested was not otherwise producible because the material was not in the possession of the decision-maker and was not part of the record before the decision-maker.

3 For the Reasons that follow, I find that the CMJ did not err in her primary or her alternative finding.

4 The Applicant, Kim Perrotta, has discontinued her application and as a result, the style of cause is amended to remove her name.

158

I. Background

5 In 2015, the United States Environmental Protection Agency issued a Notice of Violation against Volkswagen AG, alleging that some models of Volkswagen, Audi and Porsche diesel cars included a "defeat device" allowing the cars to circumvent emissions standards. Shortly after, Environment and Climate Change Canada [ECCC] announced an investigation into the matter in Canada. The ECCC Press Release dated September 22, 2015 announcing the investigation stated that Canadian legislation prohibits vehicle manufacturers from equipping vehicles with such "defeat devices" and that if sufficient evidence of violation is uncovered, enforcement action will be taken in accordance with the *Canadian Environmental Protection Act*, 1999, SC 1999, c 33 [*CEPA*].

6 The Applicants note that Volkswagen's conduct in developing the "defeat device" caused serious damage to the environment and, more importantly, to the health of individuals. The Applicants also note that decisive action was taken in Germany and in the US. The convictions in the US resulted in enormous financial and other penalties.

7 In 2017, Mr. Gray and Mr. Malas separately requested that ECCC open investigations into the alleged violations by Volkswagen and related entities [Volkswagen], pursuant to section 17 of *CEPA*. The requests alleged that Volkswagen:

1. Unlawfully imported non-compliant diesel cars;

2. Unlawfully applied the National Emissions Mark to non-compliant diesel cars and sold those cars;

3. Knowingly provided false and misleading information; and

4. Unlawfully resumed sales of 2015 model cars after only completing a "half-fix".

8 The Director General of the ECCC Environmental Enforcement Directorate, Heather McCready, responded to each request as the Minister's Delegate. Ms. McCready declined to open an investigation into allegations 1 to 3 and agreed to investigate allegation 4 and report the investigation's progress to the Applicants every 90 days, as required under section 19 of *CEPA*.

9 The decision letter from Ms. McCready states:

> *With respect to allegations 1-3, an investigation has already been opened by Environment and Climate Change Canada (ECCC) Enforcement Branch and continues to be conducted into potential violations resulting from the importation into Canada of vehicles equipped with a defeat device. The offences alleged in your application are covered by the current*

> *investigation. In light of this, a Ministerial investigation will not be opened for these allegations*.
>
> *With respect to allegation 4, ECCC will investigate all matters considered necessary to determine the facts relating to the alleged offence. As required under CEPA, I will keep you informed of the progress of this investigation every 90 days*.

10 In August 2017, the Applicants served and filed Notices of Application for Judicial Review, which were later consolidated. The Notice of Application describes Mr. Malas and Mr. Gray as representatives of environmental or public health organizations concerned about the conduct of Volkswagen, notes that the Applicants invoked their rights pursuant to *CEPA* to request the Minister to investigate, asserts that the decision of the Minister set out in the letter is "boilerplate", and notes that ECCC staff clarified that the Minister would not provide progress reports to the Applicants with respect to the three allegations for which investigations were not opened.

11 The Applicants seek an order to set aside the decision, to direct the Minister to open investigations into allegations 1 to 3 in accordance with section 17 of *CEPA*, and to provide progress reports, among other relief.

12 The Applicants allege that the refusal to open investigations is *ultra vires* the *CEPA*. Paragraph 11 of the Notice of Application states:

> 11. The Minister's decision to acknowledge Mr. Malas's allegations and request for investigations, but to refuse to open investigations for three of the allegations, is *ultra vires*. Under *CEPA* ss.17-21, Mr. Malas has the right to request Ministerial investigations, and once the Minister acknowledged his requests, the Minister must provide him regular progress reports and/or reasons to refuse *ab initio* to open the investigations that he requested, whether or not ECCC has an allegedly similar investigation currently underway.

13 At paragraph 12, the Applicants allege that the Minister's decision is highly prejudicial to their other *CEPA* rights, stating that by refusing to open an investigation and provide progress reports, the Minister "sets those public participation rights at naught which is inconsistent with a purposive reading of CEPA, unaccountable to Canadians, and illegal."

14 The Notice also includes a request for production of material pursuant to Rule 317 as follows:

> 22. Having regard to the ratio on R317 in *Cooke v. Canada*, 2005 FC 712, all material possessed by the Respondent respecting ECCC's "current investigation" referred to in the impugned decision; and
>
> 23. Any other records possessed by the Respondent respecting [the Applicants'] s.17 requests and the Minister's decisions to open or not to open Ministerial investigations.

160

15 On October 5, 2017, the Respondent produced a certificate listing 20 documents. These documents constitute the CTR. Items 1 to 15 were appended. Items 16 to 20 of the CTR were withheld on the basis of solicitor-client privilege and also on the basis of investigative privilege, in relation to item 20. The Applicants note that only one page of the documents produced was new; all others were already in the Applicants' possession.

16 The Respondent objected to producing further material on the basis that:

(i) the request is in the nature of discovery and improper under Rule 317;

(ii) additional materials are irrelevant to the applications;

(iii) additional materials were not used by the decision-maker in her deliberations nor do they form part of the record in relation to the decisions;

(iv) the request is too broad, vague or general to permit a focused search for records potentially relevant to the decisions subject to the applications;

(v) the requested documents are subject to investigative privilege as they form part of an on-going investigation; and

(vi) certain documents are subject to solicitor-client privilege.

17 The Applicants then filed a motion for production of materials pursuant to Rule 318. They sought material related to the existing investigation not included in the CTR, as well as items 16 to 20.

18 The Respondent's responding motion record included an affidavit from Mr. Michael Enns, the Executive Director of Environmental Enforcement at ECCC. Mr. Enns was extensively cross-examined by the Applicants.

19 The CMJ directed that the Applicants' Rule 318 motion be bifurcated. The first phase of the motion would address whether the Court should order that a certified copy of all or part of the requested material be forwarded to the Registry. The second phase of the motion would proceed only in the event that material was ordered to be forwarded to the Registry and would determine whether that material contains Volkswagen Group Canada Inc.'s confidential information warranting the Court's protection or any other limitation.

20 One business day before the hearing of phase one of the Rule 318 motion, the Respondent provided the Applicants with a partially redacted copy of item 20, a memorandum that appears to have been prepared for Ms. McCready, which provided background, summarized the Applicants' section 17 *CEPA* request and the ECCC's obligations, and set out three options to respond to the request.

II. The Case Management Judge's Decision Under Review

21 The CMJ denied the Applicants' motion. A summary of her decision at para 5 of her Order states:

> For the reasons that follow, I find that the additional material requested by the Applicants beyond the material included in the Certified Tribunal Record is not relevant to the application as pleaded and need not be produced. Even if I am wrong in that regard, I am not satisfied that the additional material would otherwise be producible under Rule 317. Further, I find that the claims of solicitor-client privilege were properly asserted by the Respondent in relation to items 16 through 20 of the Certified Tribunal Record. Phase two of the Rule 318 motion shall therefore only proceed in relation to the remaining redactions to item 20 of the Certified Tribunal Record.

22 With respect to the production of additional documents, the CMJ relied on *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128, [2017] F.C.J. No. 601 (F.C.A.) (QL) [*Tsleil-Waututh*]. The CMJ noted that the only material accessible under Rule 317 is material which is relevant to the Application, is actually in the possession of the administrative decision-maker and was before the decision-maker when making the decision. The CMJ also noted that relevance is determined with regard to the grounds of review alleged in the Notice of Application, read holistically. The CMJ emphasized that not everything which is admissible can be obtained under Rule 317, as these are separate concepts, citing *Tsleil-Waututh* at para 117.

23 The CMJ concluded that the material requested by the Applicants is not relevant to the grounds of review set out in the Notice of Application. The CMJ noted that the Applicants argued that they need the additional material to test the decision-maker's claim that the existing investigation covers their allegations. However, the Notices of Application allege that the refusal to open investigations is *ultra vires* "whether or not ECCC has an allegedly similar investigation currently underway". The CMJ added that the Applicants' assertion that the scope and status of the investigation is at issue "is entirely contradicted by the Applicants' own pleading".

24 The CMJ also rejected the Applicants' assertion that they had challenged the currency and coverage of the investigation by stating in their pleadings, "the Minister refused to open investigations for three of the four applications, because *ostensibly* these were 'covered by [ECCC's] current investigation'". The CMJ found that this was a factual allegation.

25 The CMJ also considered, in the event that she was wrong in finding that the material requested is not relevant to the grounds alleged in the Notice of Application, whether there was other material in the possession of the decision-maker, Ms. McCready, which was before her when the decision was made. The CMJ concluded that there was no such material.

26 The CMJ found that the evidence was clear that Ms. McCready relied on the documents included in the CTR, oral advice that she had received from Mr. Enns and from the regional director of the Ontario region, and on her own personal knowledge of the existing investigation. The CMJ accepted that Ms. McCready had sufficient existing knowledge, based on her position and her involvement in the investigations.

27 The CMJ rejected the Applicants' submission that the investigation file was technically before the Minister (characterized by the Applicants as the administrative decision-maker as a whole) and should be imputed to be before Ms. McCready.

28 With respect to the Applicants' arguments related to Mr. Enns' credibility and Ms. McCready's failure to file an affidavit, the CMJ was satisfied that Mr. Enns' credibility was not impugned and that an adverse inference due to the lack of any direct evidence from Ms. McCready was not warranted.

29 The CMJ concluded that the material requested was not before Ms. McCready when she rendered her decision and is not *prima facie* producible under Rule 317.

30 The CMJ then considered whether the requested material should be produced on the basis that it meets an exception to the general rule that only documents that were before the decision-maker should be produced. She concluded that this was not the case, noting that the Notices of Application do not raise allegations falling within any exception.

31 The CMJ also noted concerns about the breadth of the Applicants' request and the lack of precision.

32 With respect to the production of items 16 to 20, the CMJ reviewed unredacted copies that were provided by the Respondent to her under seal and agreed that the claims of solicitor-client privilege asserted by the Respondent in relation to each document were properly made.

33 The CMJ awarded the Respondent $1500 in costs on the motion. The CMJ rejected the Applicants' assertions that they were partially successful to the extent that the Court directed the Respondent to produce items 16 to 20 to the Court under seal and because the Respondent disclosed a partially unredacted version of item 20 to the Applicants. The CMJ noted that this was a common practice where claims of solicitor-client privilege were asserted.

III. The Applicants' Overall Position

34 The Applicants allege that the CMJ made both errors of law and palpable and overriding errors of mixed law and fact and that no deference is owed. The Applicants made detailed arguments on all the issues that were addressed by the CMJ.

35 The Applicants note that the Minister's decision provided only one reason for refusing to launch an investigation: "[T]he offences alleged in your application are covered by the current investigation. In light of this, a Ministerial investigation will not be opened for these allegations." The Applicants submit that the decision letter raises the issue of the currency and coverage of ECCC's investigation. They submit that they require the documents to test the reason given, otherwise the decision will be immunized from judicial review. The Applicants argue that the CMJ lost sight of the fact that the judicial review would be determined on the standard of reasonableness.

36 The Applicants argue that the documents requested are relevant within the meaning of Rule 317. The Applicants submit that the CMJ erred in determining what was relevant to the judicial review by misinterpreting the jurisprudence and by reading the Notice of Application technically and formalistically, rather than in a holistic and practical manner.

37 The Applicants further submit that Rule 317 does not restrict production to documents that were possessed and considered by Ms. McCready. Rather, it extends to documents that should have been before her, particularly given that she was at the top of the "chain of command" of the Volkswagen investigation.

38 The Applicants also argue that the CMJ erred in her assessment of the evidence regarding what was actually in the possession of Ms. McCready when she rendered her decision and that the evidence does not support the CMJ's finding.

IV. The Respondent's Overall Position

39 The Respondent submits that the CMJ did not err in her understanding of the law with respect to Rule 317 or in finding that the documents requested were not relevant to the grounds pleaded in the Notice of Application and, alternatively, were not otherwise producible because the documents requested were not before the decision-maker, Ms. McCready. Nor did the CMJ err in finding that the request was overbroad.

40 The Respondent notes that the production of documents for judicial review differs from the broader discovery in the context of an action. The Respondent disputes the Applicants' submission that they need a broader record to test their suspicion that the ECCC investigation is not current and does not cover their allegations. The Applicants' submission that their case will be stronger with a bigger record is not the test under Rule 317.

41 The Respondent notes that the Notice of Application alleged only that the decision to refuse to open an investigation was *ultra vires*, not that the existing investigation was not duplicative of the allegations.

42 The Respondent disputes that documents must be produced regardless of whether they were considered by the decision-maker. The Respondent argues that the CMJ did not err in relying on the affidavit evidence, which established what was and what was not considered by Ms. McCready.

43 The Respondent adds that the CMJ did not err in declining to draw an adverse inference from the use of affidavit evidence on information and belief, noting that this is specifically permitted on such motions and that it is entirely within the CMJ's discretion whether to draw any inferences.

V. The Issues

44 The Applicants raised several arguments on this appeal which I have restated to align with the CMJ's findings.

45 With respect to the CMJ's key finding that the documents requested are not relevant given the grounds alleged in the Notice of Application, the Applicants argue that:

- The CMJ erred in law in her interpretation of the governing jurisprudence with respect to relevance — in particular, by relying on the summary set out in *Tsleil-Waututh*, rather than on primary jurisprudence, including that which establishes that a broad interpretation should be given to "relevance" within the meaning of Rule 317;

- The CMJ erred in law by reading the Notice of Application in a formalistic manner and not considering the overall allegations, which resulted in the CMJ's incorrect finding that the documents were not relevant; and

- The CMJ erred by failing to appreciate that the Application for Judicial Review would be conducted on the reasonableness standard, which also resulted in the CMJ's error in determining whether the documents requested were relevant.

46 With respect to the CMJ's alternative or additional finding that the documents are not otherwise producible because the documents were not in the possession of the decision-maker and not considered by the decision-maker, the Applicants argue that:

- The CMJ erred in law in her interpretation of the governing jurisprudence regarding possession — again by relying on general principles summarized in *Tsleil-Waututh* rather than primary jurisprudence; and

- The CMJ erred in law and made a palpable and overriding error of mixed law and fact in her assessment of the evidence regarding what was in the possession of the decision-maker — in particular, by accepting inadmissible hearsay in the affidavit of Mr. Enns, which was not demonstrated to be necessary or reliable, and by failing to draw an adverse inference from

> the failure of the Respondent to provide an affidavit from Ms. McCready, who was otherwise available and had first-hand knowledge.

47 The Applicants clarified that they are not pursuing their appeal of the costs awarded by the CMJ. However, the Applicants emphasize that awarding costs against them is not in the interests of justice given that they are acting in the public interest.

VI. The Standard of Review

48 The parties agree that the applicable test for reviewing discretionary orders of motions judges, including case management judges, is set out in *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215 (F.C.A.) at para 66, [2017] 1 F.C.R. 331 (F.C.A.) [*Hospira*]. Such orders are to be reviewed on the ordinary civil appellate standard established in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) at paras 19-37 [*Housen*]. Questions of law are to be reviewed on a correctness standard, and questions of fact are owed deference unless there is a palpable and overriding error. Questions of mixed fact and law are also owed deference absent palpable and overriding error, unless the analysis contains an extricable error of law or legal principle. If so, no deference is owed (*Hospira* at para 66).

49 The Parties disagree on whether certain issues are questions of law, fact or mixed fact and law or whether there is an extricable question of law in some issues of mixed fact and law. They also disagree on the meaning of "palpable and overriding error".

50 The distinction between the three types of questions was explained in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688 (S.C.C.) at para 43 [*Teal Cedar*]:

> In particular, it is not disputed that legal questions are questions "about what the correct legal test is" (*Sattva*, at para. 49, quoting *Southam*, at para. 35); factual questions are questions "about what actually took place between the parties" (*Southam*, at para. 35; *Sattva*, at para. 58); and mixed questions are questions about "whether the facts satisfy the legal tests" or, in other words, they involve "applying a legal standard to a set of facts" (*Southam*, at para. 35; *Sattva*, at para. 49, quoting *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

51 With respect to the meaning of palpable and overriding error, the Applicants submit that the description in *Hospira* governs, since *Hospira* was a decision of a five member panel of the Federal Court of Appeal. The Applicants submit that *Hospira*, at para 68, equates palpable and overriding error to situations where a motions judge has misapprehended the facts or failed to give weight to relevant circumstances.

52 I do not view the Court of Appeal's statements in *Hospira* as defining what a palpable and overriding error is. The passage relied on by the Applicants at para 68 is in the context of the Court's finding that the standard of review for a discretionary decision of a prothonotary and that

166 of a motions judge amounts to the same thing. The Court noted that the jurisprudence had used different language in setting out the standards and that simplicity and clarity should prevail and, therefore, that only the *Housen* standard should apply to discretionary decisions of both judges and prothonotaries.

53 Palpable and overriding error is a higher standard than a misapprehension of the facts or a failure to properly weigh relevant circumstances. The Court of Appeal has provided a consistent definition of palpable and overriding error in its jurisprudence both before and after *Hospira*. For example, in *South Yukon Forest Corp. v. R.*, 2012 FCA 165 (F.C.A.) at para 46, [2012] F.C.J. No. 669 (F.C.A.) (QL), Justice Stratas stated:

> [46] Palpable and overriding error is a highly deferential standard of review: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services* (2006) 217 O.A.C. 269 (C.A.) at paragraphs 158-59; *Waxman*, *supra*. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

54 More recently in *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2017] F.C.J. No. 726 (F.C.A.) (QL), Justice Stratas provided the same definition of palpable and overriding error (at paras 61-64). Justice Stratas provided examples of a palpable error at para 62:

> Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.

55 Justice Stratas further explained at para 64 that an overriding error is "an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding." The judgment of the first-instance court remains in place."

56 In *Housen*, the Supreme Court of Canada provided examples of an extricable question of law or legal principle at para 36, noting that this would include the "application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle". In *Teal Cedar*, the Supreme Court of Canada cautioned lower courts against finding extricable errors of law too readily, noting at para 45 that "mixed questions, by definition, involve aspects of law", adding the caution that counsel are motivated to "strategically frame a mixed question as a legal question".

57 One final principle applies in the present circumstances. A Case Management Judge is familiar with the circumstances and issues in a particular case and is owed deference, absent a reviewable error (*Hospira* at para 103).

VII. Did the Case Management Judge err in determining that the material requested was not relevant?

A. The Applicants' Submissions

58 The Applicants submit that the CMJ erred by: misreading the jurisprudence and ignoring other jurisprudence which calls for a liberal interpretation of relevance pursuant to Rule 317; reading the Notice of Application in a formalistic, rather than holistic, manner; and failing to understand that reasonableness governs the judicial review.

59 First, the Applicants submit that the CMJ erred in law by interpreting relevance too narrowly. They argue that a decision-maker is obliged to produce relevant documents and that the jurisprudence has established that "relevant" should be interpreted liberally. The Applicants submit that relevant documents are those which *may* affect the Court's decision on the application. The Applicants submit that documents related to the investigation's currency and coverage are relevant and necessary to the Court's determination of their Application for Judicial Review.

60 The Applicants argue that the CMJ erred in relying on the summary of principles stated in *Tsleil-Waututh* rather than assessing the original jurisprudence and other jurisprudence, which has not been overruled, including *Canada (Procureur général) c. Telbani*, 2014 FC 1050, 251 A.C.W.S. (3d) 457 (F.C.) [*Telbani*]; *Deh Cho First Nations v. Canada (Minister of Environment)*, 2005 FC 374, [2005] F.C.J. No. 474 (F.C.) (QL) [*Norwegian*]; *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)* (1997), 130 F.T.R. 206, [1997] F.C.J. No. 557 (Fed. T.D.) (QL) [*Friends of the West*]; and *Pathak v. Canada (Human Rights Commission)*, [1995] 2 F.C. 455, [1995] F.C.J. No. 555 (Fed. C.A.) (QL) [*Pathak*]. The Applicants submit that these cases support a more expansive view of what is relevant and should be provided in the record of the decision-maker. The Applicants also argue that the main issue in *Tsleil-Waututh* was whether exceptional evidence — i.e. evidence beyond what was before the decision-maker — could be produced and that the comments of Justice Stratas regarding Rule 317 more generally are *obiter*.

61 Second, the Applicants submit that the CMJ erred by reading the Notice of Application in a narrow and formalistic, rather than holistic, manner which led her to conclude that the currency and coverage of the existing investigation do not relate to the grounds of review. Although the CMJ noted the guiding principle from *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250, [2013] F.C.J. No. 1155 (F.C.A.) (QL) [*JP Morgan*], she failed to apply it.

168

62 The Applicants argue that the CMJ's failure to read the pleading holistically is an error of law or alternatively an error of mixed fact and law with an extricable legal principle and no deference is owed to the CMJ's reading of the Notice.

63 The Applicants point to para 9 of their Notice of Application, which states, "Again the Minister refused to open investigations for three of the four allegations because ostensibly these were "covered by [ECCC's] current investigation"". The Applicants argue that the use of the word "ostensibly" signalled that they challenged the currency and coverage of the ECCC investigation — in other words, the reasonableness of the decision.

64 Third, the Applicants submit that the CMJ failed to understand that their Application for Judicial Review will be reviewed on the reasonableness standard as articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.).

65 The Applicants submit that although they assert in the Notice of Application that the Minister's decision to refuse to open an investigation for three allegations is *ultra vires*, this does not invite only a correctness review on the jurisdictional issue. They submit that it is clear that they are challenging the reasonableness of the decision which stated that the ECCC's existing investigation "covered" the Applicants' request. They submit that the CMJ focused on their allegation of *ultra vires* and failed to appreciate that the judicial review would proceed on the standard of reasonableness, which should have informed her determination of relevance for the purpose of production under Rule 317.

66 The Applicants acknowledge the CMJ's comment that the sufficiency of the record is an issue for judicial review. However, they argue that their case would be stronger if they had the relevant documents produced to inform whether the decision is reasonable.

B. The Respondent's Submissions

67 The Respondent notes that document production is more limited on a judicial review than in an action. Material must be actually relevant to fall within Rule 317 and material which *could* be relevant is not covered by this rule. Relevance is defined by the grounds of review in the Notice of Application, which must be read holistically.

68 The Respondent notes that the Notice of Application alleges only that the Minister's decision to refuse to open investigations into the Applicants' allegations was *ultra vires* and submits that the CMJ did not err.

C. Rules 317 - 318

69 The Rules applied by the CMJ regarding production of documents are set out below:

317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

. . .

318 (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

(a) a certified copy of the requested material to the Registry and to the party making the request; or

(b) where the material cannot be reproduced, the original material to the Registry.

(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

317 (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

318 (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet:

a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.

170

> **(4)** La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

D. The CMJ did not err in finding that the documents were not relevant within the meaning of Rule 317

(1) The CMJ did not err in law in her interpretation of Rule 317

70 The CMJ did not err in her reliance on or understanding of the law that governs the determination of relevance pursuant to Rule 317.

71 I disagree with the Applicants' submission that the CMJ erred in relying on the principles summarized in *Tsleil-Waututh* to the exclusion of other original jurisprudence. I also disagree with the Applicants that *Tsleil-Waututh* is about exceptional evidence and that Justice Stratas' summary of the law regarding Rule 317 more generally is *obiter*. Contrary to the Applicants' view, in *Tsleil-Waututh* the Court of Appeal responded to the applicants' motion for further disclosure pursuant to Rule 317. Several issues were identified, beginning with the importance of the record on judicial review, the function of and limits on Rule 317 and the admissibility of evidence other than that which was before the decision-maker (i.e. the exceptions to the general rule of admissibility). Justice Stratas noted, at paras 64-66, the need to see the forest from the trees in matters where procedural rules were relied on and to consider the basis for the rules and the general principles. He noted that this approach was necessary to place Rule 317 in context. Justice Stratas explained the importance of the record of the decision-maker to the Court on judicial review. He then set out the principles governing Rule 317 at paras 88-93 and 106-119, and addressed the exceptions to the Rule. These principles were derived from Court of Appeal jurisprudence and were elaborated upon.

72 The principles set out in the *Tsleil-Waututh* decision are not, as the Applicants suggest, *obiter*. The principles reflect the law that is binding on this Court and was binding on and applied by the CMJ.

73 The jurisprudence preferred by the Applicants is, with the exception of *Pathak*, not appellate jurisprudence. In addition, it must be considered in its proper context. Focusing on isolated passages or without referring to the cases cited therein may lead to extrapolation and misinterpretation. On the whole, the jurisprudence relied on by the Applicants, while suggesting a broad or liberal interpretation of relevance within Rule 317, does not contradict the principle that relevance is determined with regard to the grounds pleaded. It is also notable that the jurisprudence relied on by the Applicants cites the same passage of *Pathak* as does *Tsleil-Waututh*.

74 With respect to the Applicants' reliance on *Telbani* at para 40 to support their argument that relevance is a broad concept and that the record extends to documents that should have been before the decision-maker, the context in *Telbani* should be noted. In *Telbani*, the Attorney General had withheld documents from the tribunal record relying on section 38.01 of the *Canada Evidence Act* (claiming that the information was potentially injurious to national security). In determining whether the documents should be excluded from disclosure or redacted, the Court noted that the first step is to determine whether the information sought to be excluded is relevant. Of note, the Respondent conceded that most documents withheld were relevant.

75 In *Telbani*, the Court cited one line in *Pathak*, that relevance means any document that "may affect the decision that the Court will make on the application", rather than the whole passage.

76 In *Pathak*, the Federal Court of Appeal considered the predecessor to Rule 317. The motions judge had found that all documents relied on by the investigator in preparing a report for the Canadian Human Rights Commission should be produced to the applicant because the investigator conducted the investigation as an extension of the Commission. The Court of Appeal disagreed.

77 Justice Pratte, with Justice Décary concurring, held that the Rule provides that the material to be produced must be relevant to the application for judicial review. Relevance is determined in relation to the grounds of review set out in the Notice of Motion. If the material is not relevant, it need not be produced. Justice Pratte found that there was nothing in the notice of motion to cast doubt on the investigator's report and that the report must be taken as complete summary of the evidence before him. As a result, the documents requested would not be useful. The line that was cited in *Telbani* is part of the following paragraph of *Pathak* at page 460:

> 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.

78 Justice MacGuigan agreed with Justice Pratte on this key finding, and made additional comments. Justice MacGuigan found at pages 463-464 that although the documents relied on by the investigator were in the Commission's custody, they were not all actually before the Commission when it made its decision and were, therefore, not producible.

79 In *Friends of the West*, the Court noted that possession and relevance to the grounds for judicial review are the tests for the predecessor to Rule 317. The Applicants appear to rely on para 21 where the Court stated:

> If part of its case is that the scope was too restricted, the applicant must have all of the relevant documents which may tend to prove this in order to make out its argument, if it can. To hold otherwise would prejudice the applicant.

80 In *Friends of the West*, the Court went on to review each request and objection, noting (at paras 31-33) that relevance must be determined with respect to the grounds set out in the originating notice of motion. The Court allowed some further production and refused other requests.

81 In the present case, despite the Applicants' submission that the issue is the coverage of the investigation, the CMJ found that this was not pleaded as a ground of judicial review. The principle remains that relevance is determined in relation to the grounds pleaded. *Friends of the West* has also been characterized in subsequent jurisprudence as relying on an exception to the general rule, because procedural issues were raised.

82 In *Norwegian*, also relied on by the Applicants, Prothonotary Hargrave noted that Rule 317 limits the production of documents to material relevant to an application that is in the possession of the decision-maker. He also cited *Pathak* and other cases that have emphasized that relevance must be determined in relation to the grounds of review. Prothonotary Hargrave also noted, at para 11, that the general rule which limits production to material before the decision-maker when the decision was made "precludes full and complete discovery of all documents that may [be] in the Minister's possession."

83 Prothonotary Hargrave considered *Friends of the West*, noting that it was a departure from this general rule. He added that the decision had been distinguished in subsequent cases by limiting it to its specific facts.

84 Prothonotary Hargrave found that material that may have been before the Minister when the decision was made should be produced, but he based this finding on the fact that the Minister had directly supervised the decision-making process and that procedural issues had been raised. In other words, an exception to the general rule applied. Contrary to the Applicants' submission, I do not find that *Norwegian* suggests any broader interpretation of relevance or possession than *Pathak*.

85 The Applicants argue that the jurisprudence they rely on has not been overruled. They argue that this jurisprudence supports the proposition that what is relevant and what is "before" the decision-maker should be interpreted broadly and that documents that should have been before the decision-maker should also be produced. However, this proposition is not supported by the cases relied on by the Applicants, with the exception of comments in *Friends of the West* and *Telbani*, which as noted above, arose in a distinct context and are not appellate jurisprudence. Moreover, the jurisprudence relied on by the Applicants all refers to *Pathak*, which establishes that what is relevant will be determined in relation to the grounds of review set out in the Notice of Application.

86 The principles relied on by the CMJ as set out by Justice Stratas in *Tsleil-Waututh* reflect the established appellate jurisprudence.

87 For example, in *Access Information Agency Inc. c. Canada (Procureur général)*, 2007 FCA 224 (F.C.A.) at para 20, [2007] F.C.J. No. 814 (F.C.A.) [*Access Information Agency*], the Court of Appeal noted the distinction between the discovery of evidence in an action and the production of documents for judicial review. The Court explained the purpose of Rule 317, at para 21, as being to limit discovery to the documents that were in the hands of the decision-maker when the decision was made and requiring that the requested documents be precisely described. The Court of Appeal added:

> When dealing with a judicial review, it is not a matter of requesting the disclosure of any document which could be relevant in the hopes of later establishing relevance. Such a procedure is entirely inconsistent with the summary nature of judicial review.

88 In *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, [2012] F.C.J. No. 93 (F.C.A.), the Court of Appeal again confirmed, at para 19, the general rule that the evidentiary record before the court on judicial review is restricted to the evidentiary record that was before the decision-maker.

89 In *Marchand c. Canada (Commissaire à l'intégrité du secteur public)*, 2014 FCA 270 (F.C.A.) at para 4, [2014] F.C.J. No. 1167 (F.C.A.), the Court of Appeal noted a judicial review must be decided "on the basis of the information in the decision-maker's possession at the time the decision is made". The Court noted that to gain other information, the applicant must raise a ground for review that falls within an exception — for example a breach of procedural fairness or bias.

90 In *Canadian Copyright Licensing Agency v. Alberta*, 2015 FCA 268, [2015] F.C.J. No. 1397 (F.C.A.) at paras 13 and 14 [*Access Copyright 2015*], the Court recognized the need for the reviewing Court to have a sufficient record in order to detect a reviewable error, but also noted that Rule 317 entitles requesting parties to "everything that was before the decision-maker at the time it made its decision". The Court of Appeal did not, in my view, suggest a departure from the general rule of relevance and possession.

91 In setting out a summary regarding the interpretation of Rule 317, which the Applicants mischaracterize as *obiter*, Justice Stratas cited the original or primary appellate jurisprudence that has established the governing principles.

92 Justice Stratas elaborated at paras 107-108:

> [107] Rule 317 means what it says. The only material accessible under Rule 317 is that which is "relevant to an application" and is "in the possession" of the administrative decision-

174

maker, not others. Rule 318(1) shows us that the material under Rule 317 must come from the administrative decision-maker, not others.

[108] The material must be actually relevant. Material that "could be relevant in the hopes of later establishing relevance" does not fall within Rule 317: *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, 66 Admin L.R. (4th) 83 at para. 21. The principles canvassed above — particularly those in section 18.4(1) of the *Federal Courts Act* and Rule 3 of the *Federal Courts Rules* relating to promptness and the orderly progression of judicial reviews — discourage fishing expeditions.

93 Justice Stratas reiterated, at para 109, that relevance is defined by the grounds of review in the notice of application, citing *Pathak* at page 460, which is the same passage relied on in the jurisprudence preferred by the Applicants.

94 Without meaning to belabor this point, the current and binding appellate jurisprudence in *Tsleil-Waututh* confirms the general rule that Rule 317 provides for production of relevant material, determined with reference to the grounds stated in the Notice of Application, that is in the possession of the decision-maker when making the decision "and nothing more" (at para 112). The CMJ did not err in law in her reliance on this jurisprudence.

(2) The CMJ did not err by reading the Notice of Application too narrowly

95 Contrary to the Applicants' submission that the requirement to read the pleadings holistically includes an extricable principle of law, the jurisprudence has established that characterization of pleadings, which includes a notice of application, is an issue of mixed fact and law (*Apotex Inc. v. Canada (Minister of Health)*, 2012 FCA 322 (F.C.A.) at para 9, [2012] F.C.J. No. 1659 (F.C.A.) (QL)). The CMJ's assessment of the grounds asserted for judicial review is owed deference unless there is a palpable and overriding error. No such error has been demonstrated.

96 The CMJ correctly noted and applied the principle that the Court must gain a realistic interpretation of an application for judicial review's essential character by reading it holistically and practically, without fastening onto matters of form (*Tsleil-Waututh* at para 110; *JP Morgan* at para 50).

97 As noted by the CMJ, the Notice of Application alleges that the refusal to open investigations is *ultra vires*. The Notice of Application states that individuals have the right to request Ministerial investigations and that "*CEPA* does not give the Minister statutory discretion to refuse *ab initio* to open the investigations that he requested "whether or not ECCC has an allegedly similar investigation currently underway"".

98 Although the Applicants argue that it is apparent that they question the coverage and currency of the investigation and the reason for refusing to open the investigation and that they seek

documents to determine the reasonableness of the decision, the Notice of Application does not say this. As the CMJ found, this assertion is "entirely contradicted by the Applicants' own pleading".

99 The Applicants' use of the word "ostensibly" in the Notice of Application does not signal that the Applicants challenge the coverage or currency of the investigation or that the reason cited in the decision is not justified (i.e., not reasonable). "Ostensibly" means apparently or purportedly, not unreasonably, as the Applicants now submit. As the CMJ found, the allegation that the investigation ostensibly (or apparently) covers allegations 1 to 3 is a factual allegation. This is not set out as a ground for review.

100 There is no palpable and overriding error in the CMJ's finding at para 21 that the Notice of Application does not include an assertion that the existing investigation is not duplicative of the requested investigation requests or that the ECCC investigation is not ongoing. In other words, it does not assert that the ECCC's investigation is not current or that it does not cover the Applicants' allegations 1-3.

101 The CMJ understood that on judicial review, the standard of review could be reasonableness. There is no support for the Applicants' submission that the CMJ overlooked that on judicial review, the standard of review could be reasonableness, and that this led her to err in determining what was relevant and should be produced.

102 The CMJ's determination that the Notice of Application alleged that the refusal to open the investigations was *ultra vires* did not lead the CMJ to make any conclusions on the ultimate standard of review, nor did it limit her consideration of the relevance of the documents requested. In addressing this same argument that the decisions cannot be *justified* based on the CTR because there is no evidence of the currency and coverage of the ECCC investigations, the CMJ specifically noted at para 30 of her decision, "Whether or not the Certified Tribunal Record provides sufficient evidence to demonstrate the *reasonableness* of the decisions at issue is not the applicable test on this motion. In any event, decisions-makers whose decisions cannot be fairly evaluated on judicial review due to a lack of evidence in the Certified Tribunal Record on an essential element may find their decisions quashed" [emphasis added]. The CMJ clearly contemplated that on judicial review, the reasonableness of the decision could be raised. Moreover, even where issues of *vires* are raised, the standard of review is generally reasonableness unless there is a true question of *vires* (*Canada (Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] S.C.J. No. 31 (S.C.C.) (QL) at para 31).

103 The Applicants' argument that the reasonableness standard for judicial review expands production and entitles them to any documents relating to the decision's justification is not supported by the jurisprudence (*Access Information Agency* at para 21).

104 In addition, Rule 301(e) of the *Federal Courts Rules* requires that an application for judicial review set out a complete and concise statement of the grounds intended to be argued. This means

176

all the legal bases and material facts that will support the application (*JP Morgan* at para 39). In order to challenge a decision, the material facts and legal bases must be set out, which in turn will determine the relevance of documents sought for production.

105 With respect to the Applicants' submission that the CMJ is out of touch with how pleadings are drafted and that it is unnecessary to specifically plead each issue, I do not agree that there is a new way to draft pleadings. A CMJ is not required to go beyond a holistic reading and read-in words that are not in the pleadings, but that in hind sight, an applicant argues were intended.

106 In conclusion, the CMJ did not err in her primary finding that the requested material is not relevant to the grounds of review pleaded.

VIII. Did the CMJ err in finding that the material requested was not in the possession of and considered by the decision-maker?

A. The Applicants' Submissions

107 The Applicants submit that the CMJ erred in law by interpreting Rule 317 as limited to what is physically in the decision-maker's possession. The Applicants argue that this narrow interpretation would immunize decisions from judicial review and would fail to reflect how complex decisions are made in government.

108 The Applicants argue that relevant documents include those that should have been before the decision-maker and are required to be produced, noting that there is no limit on the size of the record. The Applicants reiterate that they are entitled to the documents in the control of the administrative decision-maker — not simply those in her physical possession. They submit that Ms. McCready made the decision as the head of the chain of command regarding the existing Volkswagen investigation and had access to the investigative file, which is relevant to the issues on judicial review and should, therefore, be produced.

B. The Respondent's Submissions

109 The Respondent submits that the CMJ did not err in finding that Rule 317 is generally restricted to the actual material that an administrative decision-maker had before it when making the decision. The CMJ then considered if any exceptions applied — for example where documents relating to allegations of procedural fairness or bias may be relevant — and found that there were not.

C. The CMJ did not err in finding that the material requested was not in the possession of and considered by the decision-maker

110 Whether documents requested pursuant to Rule 317 are in the possession of a decision-maker is a question of mixed law and fact. The CMJ did not err in law by relying on binding

jurisprudence that has interpreted Rule 317. Nor did the CMJ make a palpable and overriding error in applying the law to the facts and concluding that the documents sought were not producible.

111 As noted in *Tsleil-Waututh*, the authoritative law relied on by the CMJ, Rule 317 allows applicants to obtain the record before a decision-maker (at paras 89, 91). The purpose is to allow parties to pursue their rights to challenge administrative decisions and to allow reviewing courts to consider the evidence that was presented to the decision-maker (*Access Copyright 2015* at paras 13-14).

112 The weight of the jurisprudence supports a limited interpretation of what is meant by material "before" the actual decision-maker. The jurisprudence cannot be stretched to support the Applicants' argument that documents accessible through the "chain of command" of the ECCC's investigation into Volkswagen must be produced. Although there may be no limit to the size of the record, production is still limited to documents that are relevant and were in the possession of and considered by the decision-maker — unless an exception applies.

113 In *Pathak*, Justice MacGuigan, in his concurring reasons, clarified that only the documents that were actually before the decision-maker had to be produced. Justice MacGuigan concluded that even though documents consulted by the investigator were in the Commission's custody and accessible, they were not actually before the Commission when it made its decision (at pages 463-464).

114 The general rule in *Pathak* was reiterated in *Tsleil-Waututh* at paras 111-114: Rule 317 cannot be used to obtain documents in the possession of others, only those documents that the administrative decision-maker had before it when making the decision, and "nothing more".

115 The Applicants continue to rely on *Friends of the West*, which has been noted in subsequent cases to depart from the general rule of actual possession. It has also been distinguished on its facts in subsequent cases, including characterizing it as falling in an exception to the general rule. Otherwise, it is not consistent with the appellate jurisprudence, which is binding.

116 The Applicants also point to *Norwegian* to support their view that "possession" throughout a chain of command should be captured by Rule 317. In that case, Prothonotary Hargrave found that the Minister and the Minister's assistants directly supervised the decision-making process, and concluded that documents leading to the final step were producible (at para 17). However, Prothonotary Hargrave reiterated the general principle regarding Rule 317 of relevance and possession, then found that an exception to the general rule in *Pathak* applied because procedural fairness was challenged (at paras 11, 13).

117 The exceptions to the general rule were recently considered in *Humane Society of Canada Foundation v. Canada (National Revenue)*, 2018 FCA 66 (F.C.A.) at paras 5-6, (2018), 289 A.C.W.S. (3d) 875 (F.C.A.). The Federal Court of Appeal confirmed that documents beyond those

178 that were before the decision-maker may be subject to disclosure where there is an allegation of a breach of procedural fairness or of a reasonable apprehension of bias.

118 Since the Notices of Application in this case do not raise procedural fairness or bias as an issue, an exception to the general rule does not apply, as noted by the CMJ.

119 The Applicants' view that the whole institution or government department should be regarded as the administrative decision-maker is not supported by the jurisprudence (*Ecology Action Centre Society v. Canada (Attorney General)*, 2001 FCT 1164 (Fed. T.D.) at para 6, [2001] F.C.J. No. 1588 (Fed. T.D.) (QL)). The Applicants' reliance on *Cooke v. Canada (Correctional Service)*, 2005 FC 712 (F.C.) at para 20, (2005), 274 F.T.R. 44 (Eng.) (F.C.) [*Cooke*], where the Court stated that the decision-maker for the purpose of Rule 317 "is not the specific individual who decided the case but the tribunal itself", is misplaced. In that case, the Court was addressing the issue of an investigator's report and recommendation which was adopted by the Canadian Human Rights Commission and as such, the record before the investigator was part of the record of the decision-maker. I am not aware of any jurisprudence where *Cooke* has been relied on to support the view that the documents held by the whole institution are "before" the decision-maker.

120 In the present case, Ms. McCready actually made the decision. While she could have accessed documents in ECCC's custody, the evidence accepted by the CMJ is that the voluminous investigative file was not before her when she made the decision.

IX. Did the CMJ err in her assessment of the evidence?

A. The Applicants' Submissions

121 The Applicants submit that the CMJ erred by admitting and relying on the affidavit and evidence of Mr. Enns, which included significant amounts of hearsay. The Applicants argue that Mr. Enns' affidavit cannot support the finding that Ms. McCready made the decision based on the CTR, oral advice received from Mr. Enns and the Ontario Regional Director, and her knowledge of the investigation — i.e. made without the investigation file. The Applicants submit that Mr. Enns could not know what was in Ms. McCready's head at the time.

122 The Applicants submit that the CMJ made an error of law by admitting hearsay evidence without an analysis of necessity or reliability and made a palpable and overriding error of fact based on this unreliable evidence. The Applicants argue that the CMJ further erred by not drawing an adverse inference from the hearsay evidence tendered pursuant to Rule 81(2) of the *Federal Courts Rules*. The Applicants submit that this error of mixed law and fact includes an extricable legal principle, and as a result, that no deference is owed.

123 The Applicants submit that the CMJ's finding that there was no basis to impugn Mr. Enns' credibility cannot be supported. The Applicants contend that Mr. Enns is not a reliable witness.

124 The Applicants note that on cross-examination, Mr. Enns repeatedly either could not recall or was evasive in answering whether he had contact with Ms. McCready in a three-week period leading up to the preparation of his affidavit, then did a "flip-flop" and stated that they had met to discuss the preparation of the affidavit.

125 The Applicants also argue that Mr. Enns' evidence was not necessary because better evidence could have been provided first hand by Ms. McCready.

126 The Applicants add that Mr. Enns was not part of the "chain of command" in the Volkswagen investigation and suggest that he was put forward as the affiant to insulate others in the chain of command, including Ms. McCready, from cross-examination.

B. The Respondent's Submissions

127 The Respondent notes that Rule 81(1) of the *Federal Courts Rules* provides that affidavits on belief are admissible on motions (other than motions for summary judgment or summary trial). Mr. Enns provided extensive evidence in his affidavit describing both his personal knowledge of the matter and information based on belief, for which he set out the grounds for the belief.

128 The Respondent submits that Mr. Enns' evidence demonstrated his extensive knowledge about the Volkswagen investigation and the structure of ECCC. The fact that Mr. Enns is not formally part of the Volkswagen investigation's chain of command does not impact his knowledge of the investigation or relegate his evidence to hearsay. The Respondent submits that there is no issue with Mr. Enns having spoken to Ms. McCready while preparing the affidavit, as he identified when she was the source of his information and that she did not direct him on what to include.

129 The Respondent adds that whether an adverse inference is warranted is highly discretionary and that there was no palpable and overriding error in the CMJ's finding that no adverse inference was warranted. Mr. Enns has detailed knowledge of the investigation and the documents and process leading to the decision, making direct evidence from Ms. McCready unnecessary.

C. The CMJ did not err in admitting and relying on the affidavit of Mr. Enns to determine what was in the possession of the decision-maker

130 The CMJ did not err in law by admitting the affidavit which included hearsay evidence without an analysis of necessity or reliability and did not make a palpable and overriding error of fact based on the evidence.

131 Mr. Enns' affidavit is admissible pursuant to Rule 81(1) of the *Federal Courts Rules* which states:

180

> **81 (1)** Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.
>
> **81 (1)** Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête — autre qu'une requête en jugement sommaire ou en procès sommaire — auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

132 Rule 81(1) reflects the rule against hearsay by generally requiring affidavits to be based on personal knowledge. The reference to statements on "belief" in Rule 81(1) has been recognized as being synonymous with hearsay (*Cabral v. Canada (Citizenship and Immigration)*, 2018 FCA 4 (F.C.A.) at para 32, [2018] F.C.J. No. 21 (F.C.A.) (QL)).

133 The prohibition of hearsay does not apply on "motions, other than motions for summary judgment or summary trial". Therefore, under Rule 81(1), affidavits with hearsay are presumptively admissible on interlocutory motions (*John Doe v. R.*, 2015 FC 236 (F.C.) at paras 21-22, (2015), 256 A.C.W.S. (3d) 782 (F.C.)), which would include motions for production of documents. This evidence does not need to meet the necessity and reliability requirements in order to be admissible. Applying such requirements to hearsay in affidavits on motions would fail to give effect to the words of Rule 81(1). However, Rule 81(1) provides as a condition that the affiant state the grounds for their belief. Rule 81(2) also permits an adverse inference to be drawn where a party fails to provide evidence of persons having personal knowledge of material facts.

134 Mr. Enns' affidavit does include statements based on his belief, i.e. hearsay. This includes his description of Ms. McCready's personal knowledge and of the documents before her when she made her decision. However, Mr. Enns identified the grounds for this belief at paragraph 35 of his affidavit. He noted that, given his role in the Applicants' section 17 requests, which he described in detail in the earlier parts of his affidavit, that he had personal knowledge of the material relied on by Ms. McCready in making the decision at issue. He then noted that he had "been informed by Ms. McCready and verily believe" that she relied on the CTR, verbal advice from Mr. Enns and the Regional Director, legal advice and her own personal knowledge. He went on to again describe the categories of documents in the investigation file noting that they were not part of the record before Ms. McCready. He added, based on his direct knowledge, that neither he nor Ms. McCready has access to the investigation file documents, noting that these are located in the Burlington Office. In addition, he stated on cross-examination that Ms. McCready never accessed the investigation file. As a result, Mr. Enns' affidavit fulfills the requirements of Rule 81(1), which governs admissibility. The CMJ did not err in admitting it.

135 Moreover, Mr. Enns' affidavit also included information based on his personal knowledge due to his role as Executive Director about the structure of the ECCC Enforcement Branch, the

section 17 requests, how such requests are generally handled, the background of the Volkswagen investigation, his work related to the Volkswagen investigations, and his participation in briefings with Ms. McCready on the Volkswagen investigation. The Applicants' characterization of Mr. Enns as an unhelpful affiant is not justified.

136 The CMJ did not make a palpable and overriding error in finding that the evidence she accepted established that the documents requested were not before or considered by Ms. McCready when she made her decision. Mr. Enns' evidence — on his information and belief — explained what Ms. McCready had before her. In addition, based on his personal and direct knowledge, he explained that the investigation file was located in Burlington. On cross-examination, he reiterated that it was never accessed.

137 The CMJ's finding that Ms. McCready could have accessed documentation, but that the "evidence is clear that she did not and I find that there is no basis to doubt the reliability of that evidence", is owed deference.

D. The CMJ did not err in declining to draw an adverse inference from the Respondent's failure to provide an affidavit based on personal knowledge

138 The CMJ did not err in declining to draw an adverse inference from the Respondent's failure to provide an affidavit based only on personal knowledge. I disagree with the Applicants' contention that the CMJ's determination that no adverse inference was warranted raises a question of mixed fact and law with an extricable legal principle. As noted above, an extricable legal principle includes the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle.

139 The drawing of an adverse inference is within the CMJ's discretion based on her consideration of the circumstances. The standard of review remains palpable and overriding error — which has not been demonstrated.

140 Where hearsay evidence is admissible, an adverse inference under Rule 81(2) may be drawn and may affect the weight given to such evidence (*Ottawa Athletic Club Inc. v. Athletic Club Group Inc.*, 2014 FC 672 (F.C.) at para 119, [2014] F.C.J. No. 743 (F.C.) (QL) [*Ottawa Athletic Club*]). As noted by the Applicants, this Court has found that "an adverse inference can be drawn where hearsay evidence is introduced instead of first-hand evidence and no adequate explanation is provided for why the best evidence is not available" (*Ottawa Athletic Club* at para 117). However, the permissive language of Rule 81(2) does not suggest that drawing an adverse inference is mandatory in such cases.

141 In *Apotex Inc. v. Canada (Health)*, 2018 FCA 147, [2018] F.C.J. No. 820 (F.C.A.) at para 67 [*Apotex*], the Federal Court of Appeal noted that the law with respect to the drawing of adverse inferences has evolved. Previously, it was accepted that adverse inferences had to be drawn

182

where a party failed to call material evidence that was available to it. The inference was that the evidence would have been unhelpful to the party. However, more recent cases have treated adverse inferences as a matter of discretion, partly because the matter is bound up inextricably with the adjudication of the facts (*Apotex* at para 68; *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, 2001 SCC 4, [2001] 1 S.C.R. 221 (S.C.C.) at para 73).

142 In: *O'Grady v. Canada (Attorney General)*, 2016 FCA 221, 270 A.C.W.S. (3d) 648 (F.C.A.), the Court of Appeal explained that the applications judge may consider what inferences should be drawn from the affidavit evidence, noting at para 11,

> Whether or not evidence is within an affiant's personal knowledge under Rule 81(1) bears on the admissibility of the affidavit. However, whether an adverse inference should be drawn from otherwise admissible evidence is a matter better left for the application judge, who has the benefit of the complete record and the arguments of counsel. To this extent, we would clarify the reasons given by the Judge. The question of what inference, adverse or otherwise, is to be drawn remains open to the application judge hearing this matter on the merits.

143 The CMJ found that "the circumstances of this case do not warrant any adverse inference", noting also that there was "no basis to impugn Mr. Enns' credibility". I acknowledge the Applicants' concerns that Mr. Enns was evasive on cross-examination regarding his regular contact with Ms. McCready in the weeks before the affidavit was filed. However, as noted above, Mr. Enns' evidence addressed much more than this issue. The information that he provided — including his direct knowledge and that provided on information and belief, for which he set out his grounds, and his evidence on the cross-examination — was sufficient to support the CMJ's finding. The CMJ may have overstated that there was "*no* basis" to impugn his credibility and could have restricted this comment to his credibility on specific aspects. However, there is no palpable and overriding error in the CMJ's finding that there was no basis to impugn his credibility. The CMJ could have declined to draw an adverse inference even if she had found some credibility concerns on specific parts of the affidavit.

144 Moreover, the CMJ's key and determinative finding is that the documents requested were not relevant to the grounds as pleaded, which turned on her interpretation of the Applicants' Notices of Application, and which Mr. Enns' affidavit has no impact on. Hence, the failure to draw an adverse inference would not be overriding. The tree remains standing.

X. The CMJ did not err in awarding the Costs of the Rule 318 motion to the Respondent

145 In written submissions, the Applicants acknowledge that the award of costs is discretionary but submit that it was not in the interests of justice. They note that the Respondent gave them additional disclosure on the eve of the hearing of their motion, after resisting for months. The Applicants assert that the Respondent ignored their request for particulars of the documents in ECCC's investigation file, which prevented them from narrowing their request.

146 At the hearing of this appeal, the Applicants clarified that they are not pursuing their appeal of the cost order. The Applicants emphasize that the Volkswagen investigation is of great public importance and that they have tried to use *CEPA*'s Public Participation process to defend the environment and health of all Canadians. In their view, no cost award is appropriate.

147 The Respondent notes the general rule that costs follow the event and should be awarded to the successful litigant. Cost awards are discretionary and can only be set aside if the court has made an error in principle or the award is plainly wrong. The Respondent submits that it was entirely successful on the motion. The disclosure of one partially redacted document is insignificant and does not mean that the Applicants were partially successful. The Respondent also disputes the Applicants' claim that they tried to narrow the scope of their motion.

XI. The Alternative Remedies Cannot be granted

148 In the alternative to an order directing the Respondent to produce the requested documents, the Applicants seek an order admitting documents, which they obtained under the *Access to Information Act*, RSC 1985, c A-1 [*ATIP*], into evidence as part of the CTR.

149 The Applicants also seek an order granting leave to compel the attendance of Ms. McCready (the decision-maker) at the hearing of the Application or at another time to be questioned regarding the decision and the currency and coverage of ECCC's investigation.

150 The Respondent submits that the alternative relief sought by the Applicants is improper noting that these are not related to the decision under appeal and raise new issues which were not raised before the CMJ.

151 The Respondent submits that the *ATIP* documents are not part of the CTR because there is no evidence they were before Ms. McCready.

152 First, there is no need to consider alternative remedies because no remedy is required. Having found that the CMJ did not err, the Order stands and the Applicants are not entitled to further production as requested.

153 Second, contrary to the Applicants' characterization of the issues, they are indeed new and cannot be raised in the context of an appeal of the CMJ's decision. The CMJ is tasked with managing this litigation and to raise alternative remedies at this appeal suggests an "end run" around the case management role and the decision under appeal. Moreover, the alternative relief appears to be another attempt to gain a more expansive record for the judicial review despite that the record should be restricted to the documents in the possession of and considered by Ms. McCready at the time she made the decision.

184

154 Third, the remedies requested — even if the appeal were allowed — would not remedy the lack of production of the documents requested pursuant to Rule 317. In particular, the issue of admissibility of evidence is distinct from the requirements of Rule 317 (*Tsleil-Waututh* at para 119). There is no evidence that the *ATIP* documents were part of the record before Ms. McCready when the decision was made. Whether the *ATIP* documents are admissible on the judicial review is a question that should be addressed by the Application Judge.

XII. Costs on this motion

155 Costs generally follow the event and could again be ordered against the Applicants. The Respondent and Applicants agree that if costs are awarded, the costs should be set at $1000, not payable forthwith.

156 In the present circumstances, and acknowledging the Applicants' submission that they are acting in the public interest and have nothing personally to gain, I decline to order Costs.

ORDER IN T-1252-17

THIS COURT ORDERS that

1. The style of cause is amended to remove Kim Perrotta as an Applicant.
2. The Appeal of the Order of Prothonotary Aylen dated September 10, 2018 is dismissed.
3. No Costs are ordered with respect to this Appeal.

Appeal dismissed.

2018 CAF 66, 2018 FCA 66
Federal Court of Appeal

Humane Society of Canada Foundation v. Canada (National Revenue)

2018 CarswellNat 11946, 2018 CarswellNat 1253, 2018 CAF 66, 2018 FCA 66, 2018 D.T.C. 5043, 289 A.C.W.S. (3d) 875

HUMANE SOCIETY OF CANADA FOUNDATION (Appellant) and MINISTER OF NATIONAL REVENUE (Respondent)

Wyman W. Webb J.A.

Heard: March 15, 2018
Judgment: March 28, 2018
Docket: A-176-17

Counsel: Adam Aptowitzer, Josh Vander Vies, for Appellant
Lynn M. Burch, Selena Sit, for Respondent

***Wyman W. Webb J.A.*:**

1 The appellant brought a motion that was heard in Vancouver on March 15, 2018. In its notice of motion the appellant stated that:

> THE MOTION IS FOR the following orders:
>
> (1) The appellant requests that the court order under Rule 318(4) the respondent to provide a certified copy of all documents in its possession requested by the appellant under Rule 317 of the *Federal Courts Rules*. Specifically, after having now examined the record for the first time, the appellant respectfully requests the following:
>
> > a. All documents and records of all meetings and conversations related to issuing the notice of intention to revoke the registration of the appellant as a charity under s. 168(1) of the Act date stamped 22 April 2015, including clear identification as to which documents were not considered by Charities Directorate in issuing the said notice of intention to revoke;
> >
> > 2. all documents and records of all meetings and conversations related to the notice of objection dated July 20, 2015 filed by the appellant pursuant to s. 168(4) of the Act with clear identification as to which documents were considered by Tax and Charities

Appeal Directorate in abandoning the proposal to suspend and instead issuing the notice of intention to revoke date stamped 22 April 2015;

3. all documents and records of all meetings and conversations related to the issuance of the confirmation of the notice of intention to revoke date stamped May 2, 2017;

4. all Canada Revenue Agency policies and procedures used to ensure independence between Audit Division, Charities Directorate and Charities Redress Section;

5. all Canada Revenue Agency policies and procedures used to ensure independence between the above CRA divisions and the Tax and Charities Appeals Directorate and Appeals Branch;

6. the legal interpretations applied by the auditor, appeals officer and Minister to the Organization. These legal interpretations may be contained in Audit Guidelines, Audit Considerations, or some other type of document unknown to the appellant;

7. Any other material prepared or considered by the Minister or others at the Canada Revenue Agency in the course of the decision to audit and revoke the registration of the appellant as a charitable foundation, including:

a. all of the documents involving Humane Society of Canada for the Protection of Animals and the Environment ("HSCPAE"), Ark Angel Foundation and Ark Angel Fund reviewed by the Minister in coming to the determination to issue the Notice of Intention to Revoke;

b. a list of all individuals at the Charities Directorate and Tax and Charities Appeals Directorate who worked on the Appellant's file and the related files of HSCPAE, Ark Angel Foundation and Ark Angel Fund;

c. a list of those individuals with delegated authority to decide, on behalf of the Minister, to issue a Notice of Intent to Revoke; and

d. the entire record of the court file of *Humane Society of Canada for the Protection of Animals and the Environment v. Minister of National Revenue*, 2015 FCA 178 (F.C.A.) be included in the appeal book.

2 At the commencement of the hearing of this motion counsel for the appellant stated that the motion for disclosure has been reduced to the following:

1. all documents and records of all meetings and conversations related to issuing the notice of intention to revoke the registration of the appellant as a charity under s. 168(1) of the Act date stamped 22 April 2015;

> 2. all documents and records of all meetings and conversations related to the notice of objection dated July 20, 2015 filed by the appellant pursuant to s. 168(4) of the Act;
>
> 3. all documents and records of all meetings and conversations related to the issuance of the confirmation of the notice of intention to revoke date stamped May 2, 2017.

3 In this case the Minister of National Revenue (Minister) produced a tribunal record of more than 1500 pages. In addition the appellant filed a request for the disclosure of documents under the *Access to Information Act*, R.S.C., 1985, c. A-1 (the ATIP Request). The appellant received 1907 pages of documents as a result of the ATIP Request. There is significant overlap between the documents that were disclosed to the appellant as part of the tribunal record and as a result of the ATIP Request. The disclosure sought in this motion is for documents that are in addition to these documents.

4 The appellant submitted that it is entitled to additional disclosure in this case because it alleged, in its notice of appeal, that the Minister was biased and that there was a breach of procedural fairness.

5 In *Gagliano v. Gomery*, 2006 FC 720, 293 F.T.R. 108 (Eng.) (F.C.) (appeal dismissed by the FCA — 2007 FCA 131 (F.C.A.)), Teitelbaum J. discussed the entitlement to additional disclosure:

> **50** It is trite law that in general only materials that were available to the decision-maker at the time of rendering a decision are considered relevant for the purposes of Rule 317. However, the jurisprudence also carves out exceptions to this rule. The Commission's own written representations indicate that, "An exception exists where it is alleged that the federal board breached procedural fairness or committed jurisdictional error": David Sgayias et al., *Federal Practice*, (Toronto: Thomson, 2005) at 695, reproduced in the Commission's Memorandum of Fact and Law (Chrétien, T-2118-05) at para. 24. The above comment is clearly supported by jurisprudence which indicates that materials beyond those before the decision-maker may be considered relevant where it is alleged that the decision-maker breached procedural fairness, or where there is an allegation of a reasonable apprehension of bias on the part of the decision-maker: Deh Cho First Nations, above; Friends of the West, above; Telus, above; Lindo, above.
>
> (emphasis was added by Teitelbaum J.)

6 Therefore, documents in addition to those that were before the decision-maker may be considered relevant and subject to disclosure where there is an allegation of a breach of procedural fairness or an allegation of a reasonable apprehension of bias. However, as noted in *Access Information Agency Inc. c. Canada (Procureur général)*, 2007 FCA 224 (F.C.A.) :

> **20** In closing, the Court would like to express its disapproval for document disclosure requests drafted in terms as vague as the one at issue. Judicial review does not proceed on the same

188

basis as an action; it is a procedure that is meant to be summary. There is therefore a series of limits on the parties as a result of this distinction. Evidence is brought by affidavit and not by oral testimony. There is less leeway for preliminary procedures such as discovery of evidence in the hands of the parties and examination on discovery. If such proceedings do prove to be necessary, the Rules provide that a judicial review may be transformed into an action.

21 It is in this context that we find section 317 of the Rules dealing with the request for disclosure of material. The purpose of the rule is to limit discovery to documents which were in the hands of the decision-maker when the decision was made and which were not in the possession of the person making the request and to require that the requested documents be described in a precise manner. When dealing with a judicial review, it is not a matter of requesting the disclosure of any document which could be relevant in the hopes of later establishing relevance. Such a procedure is entirely inconsistent with the summary nature of judicial review. If the circumstances are such that it is necessary to broaden the scope of discovery, the party demanding more complete disclosure has the burden of advancing the evidence justifying the request. It is this final element that is completely lacking in this case.

(emphasis added)

7 In *Maax Bath Inc. v. Almag Aluminum Inc.*, 2009 FCA 204 (F.C.A.) , it was noted that:

15 In the words of this Court, the applicant's request "betrays a misunderstanding of the purpose of section 317 ... [S]ection 317 does not serve the same purpose as documentary discovery in an action" (*Access to Information Agency Inc. v. Canada* (*Attorney General*), 2007 FCA 224 at paragraph 17; *Atlantic Prudence Fund Corp.*, *supra* at paragraph 11). It should not be open to the applicant to engage in a fishing expedition.

(emphasis added)

8 Therefore, while additional disclosure is warranted when there are allegations of a reasonable apprehension of bias or a breach of procedural fairness, this does not allow a person to engage in a fishing expedition in the hopes of discovering some documents to establish the claim.

9 The allegation of bias in this case is only contained in paragraph 5 of the Notice of Appeal:

5. The notice of intention to revoke and its confirmation violate the principles of procedural fairness and natural justice and should be quashed or vacated on the basis that they suffer from personal and institutional bias, well beyond a mere apprehension of bias.

10 This is simply a bald assertion of bias. In *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250, 450 N.R. 91 (F.C.A.) , Justice Stratas, writing on behalf of this Court, stated that:

> **42** While the grounds in a notice of application for judicial review are supposed to be "concise," they should not be bald. Applicants who have some evidence to support a ground can state the ground with some particularity. Applicants without any evidence, who are just fishing for something, cannot.
>
> **43** Thus, for example, it is not enough to say that an administrative decision-maker "abused her discretion." The applicant must go further and say what the discretion was and how it was abused. For example, the applicant should plead that "the decision-maker fettered her discretion by blindly following the administrative policy on reconsiderations rather than considering all the circumstances, as section Y of statute X requires her to do."
>
> **44** The statement of grounds in a notice of application for judicial review is not a list of categories of evidence the applicant hopes to find during the evidentiary stages of the application. Before a party can state a ground, the party must have some evidence to support it.
>
> **45** It is an abuse of process to start proceedings and make entirely unsupported allegations in the hope that something will later turn up. See generally *Merchant Law Group v. Canada (Revenue Agency)*, 2010 FCA 184 at paragraph 34; *AstraZeneca Canada Inc. v. Novopharm Ltd.*, 2010 FCA 112at paragraph 5. Abuses of process can be redressed in many ways, such as adverse cost awards against parties, their counsel or both: Rules 401 and 404.

11 Rule 337 of the *Federal Courts Rules*, SOR/98-106, also provides that in a notice of appeal the appellant is to set out "a complete and concise statement of the grounds intended to be argued".

12 Therefore, a bald assertion of bias is not sufficient and cannot support an order for production of documents to allow the appellant to go on a fishing expedition to see if something can be found to support the allegation of bias.

13 During the hearing of this motion, counsel for the appellant was asked whether there was any document, in the more than 2,000 pages of documents that were submitted as part of this motion record, that would support the allegation of bias. Counsel for the appellant was unable to identify any document in the voluminous motion record that could support the allegation of bias. It, therefore, seems clear that the appellant was on a fishing expedition.

14 Counsel for the appellant submitted during the hearing that the breach of procedural fairness argument was based on a lack of evidence. If the Minister has any document to counter the breach of procedural fairness argument, then the Minister has an interest in disclosing it.

15 As a result of discussions and concessions made during the hearing of the motion, the issue was reduced to the question of whether certain documents that were submitted by the Minister to the Court in a sealed envelope should be disclosed to the appellant. Documents comprising a total of 281 pages were included in this sealed envelope. Most of these pages were part of the documents

190

that had been disclosed as a result of the ATIP Request, although parts had been redacted. During the hearing, counsel for the Minister, without admitting the relevancy of any of the documents and to simply move the matter along, agreed to provide the appellant with unredacted copies of these documents.

16 As a result only a few documents in the sealed envelope (comprising approximately 60 pages) remained for consideration. These consisted of copies of e-mails and copies of draft letters. Having reviewed these documents, in my view, none of these documents is relevant and, therefore, there is no basis to order disclosure of these remaining documents.

17 As a result the appellant's motion is dismissed, with costs payable in any event of the cause.

Application dismissed.

1997 CarswellNat 2175
Federal Court of Canada — Trial Division

John Witness v. Royal Canadian Mounted Police Commissioner

1997 CarswellNat 2175, 1997 CarswellNat 2757,
[1998] 2 F.C. 252, 138 F.T.R. 176, 76 A.C.W.S. (3d) 3

In The Matter of the Witness Protection Program Act, S.C. 1996, c.13

Persons Seeking to Use the Pseudonyms of John Witness and Jane Dependant, Applicants and The Commissioner of the Royal Canadian Mounted Police, Respondent

Reed J.

Heard: September 29, 1997
Judgment: November 4, 1997
Docket: T-697-97

Counsel: *Mr. M.A. Swadron* and *Ms. S. Flam*, for the Applicants.
Mr. J.W. Leising and *Mr. Jordon Solway*, for the Respondent.

***Reed J.*:**

1 Counsel for the applicants brings a motion pursuant to *Federal Court Rules* 1612 and 1614 seeking an Order to compel "the respondent to produce any legal opinion or correspondence provided to the Commissioner" that was "considered in the reaching of the decision to be reviewed". The decision to be reviewed is one dated May 23, 1997, in which the Commissioner of the Royal Canadian Mounted Police ("R.C.M.P."), through his delegate Assistant Commissioner Ryan, refused to admit the applicants to the R.C.M.P. Witness Protection Program.[1] For the purposes of these reasons, I will refer to the Commissioner, although it was Assistant Commissioner Ryan who was involved.

2 The factual background to this application, as I understand it, follows. In March of 1996 the applicants, pursuant to agreements reached with the Waterloo Regional Police and perhaps also the Ontario Provincial Police, provided information that led to a seizure of cocaine, which was hidden in mops located in a Cambridge, Ontario, business premise. The Waterloo Regional Police subsequently wrote to the R.C.M.P. asking that the applicants be protected under the R.C.M.P. Witness Protection Program. The initial response from the R.C.M.P. was that the request deserved consideration. The R.C.M.P. wrote offering to assist the Waterloo Regional Police on a

cost recovery basis. The Waterloo Regional Police did not pursue this offer but proposed other arrangements to the applicants, which were not acceptable to them. The Waterloo Regional Police rejected the proposition that the costs associated with the use of the Witness Protection Program should be borne by the Waterloo Regional Police. The R.C.M.P. rejected the claim that it had any responsibility for the protection of the applicants since it had not played a role in the investigation that led to the applicants disclosing the information in question, nor had it made any commitment to the applicants concerning protection. The R.C.M.P. subsequently suggested a cost sharing agreement; this the Waterloo Regional Police also rejected.

3 On February 10, 1997, the applicants commenced an action in the Ontario Court of Justice (General Division) against the Waterloo Regional Police Board, the Attorney General of Canada and two individuals, one of whom is a member of the O.P.P., the other a member of the Waterloo Regional Police Board. The Attorney General of Canada's participation is, of course, in relation to the actions of the R.C.M.P. and for ease of reference that organization will hereafter be referred to as the defendant. The action claims damages in the amount of $4,500,000.00. It seeks an injunction to ensure that the plaintiffs are provided with protection, pursuant to assurances that had been given to them. The injunctive remedy in so far as it was sought against the R.C.M.P. was dismissed by the Ontario Court (General division) on July 31, 1997. The damage claims against the R.C.M.P. were stayed, on the same date, pending disposition by the Federal Court of the application that by then had been filed in this court by the applicants, to set aside the decision of the Commissioner refusing to admit them to the Program.

4 I turn then to the proceeding in the Federal Court. Counsel for the applicants became aware, by no later than March 24, 1997, that the R.C.M.P. was taking the position that the Ontario Court (General Division) did not have jurisdiction to review decisions made by the Commissioner of the R.C.M.P. pursuant to the *Witness Protection Program Act*. Counsel for the applicants then moved to commence an action in this Court. On April 21, 1997, Mr. Justice McKeown granted the applicants' motion that they be allowed to commence an application for judicial review under the pseudonyms set out in the style of cause. An order requiring the respondent to produce the record of the decision for which judicial review was being sought was refused, because as of that date there had been no decision by the Commissioner. Not only had there been no decision, there had been no request by the applicants to the Commissioner that they be given protection under the Witness Protection Program.

5 A request for admission to the Program was made on May 1, 1997. A response was given, as noted above, on May 23, 1997. It is that decision that is now under review; and it is with respect to that decision that the production of "any legal opinion or correspondence provided to the Commissioner" is sought. The Commissioner asserts that all documentation that was before him has been produced except legal opinions prepared by counsel that would be covered by solicitor-client. I was not asked by counsel for the applicants to review the documents, for which privilege is claimed, to see if they fall within the category claimed.

6 Counsel for the applicants seeks disclosure of the documents because he thinks they will assist his challenge to the May 23, 1997 decision. He thinks they will strengthen his claim that the Commissioner was biased when he made his decision, biased because the counsel who advised him, Mr. Leising, was also defending the R.C.M.P. in the Ontario Court (General Division) action. He thinks that disclosure of the documents will show that Mr. Leising wrote much of the Commissioner's May 23, 1997 decision, that the Commissioner relied very heavily on counsel's advice in reaching that decision. He thinks the documents will disclose that the Commissioner focussed on the impact that a decision favourable to his clients would have on the action pending in the Ontario Court (General Division) rather than on the merits of the applicants' situation.

7 As noted, the assertion that the Commissioner's decision was biased or tainted, is based on the fact that Mr. Leising was counsel defending the R.C.M.P. in the Ontario Court (General Division) action while, at the same time, he was acting as counsel for the Commissioner when he was making his decision pursuant to section 5 of the *Witness Protection Program Act*. It is argued that acting in the two roles taints the section 5 decision, but without the production of the documents sought, the applicants are unable to ascertain the scope of Mr. Leising's involvement in the section 5 decision-making process.

8 Counsel for the applicants alleges that not only did Mr. Leising act as legal advisor to the Commissioner when the section 5 decision was being made but he wrote the Commissioner's decision or significant parts of it. Counsel for the applicants argues that Mr. Leising wrote the reasons for decision because (1) Mr. Leising told counsel for the applicants that the Commissioner had requested a legal opinion, which Mr. Leising was preparing; (2) the reasons speak in the first person when counsel for the applicant has had no contact with the Commissioner but only with Mr. Leising; (3) there is a statement in the reasons that:

> the applicants have chosen to engage in a public relations campaign exaggerating their situation and if anything, aggravating the potential for risk by publicly proclaiming themselves to be informants. All of this suggests an agenda quite independent of obtaining reasonable and appropriate protective services. This conduct suggests to me an immaturity and complete lack of judgment that leads me to conclude that [there] is no reasonable program of protective services that they would be able to adjust to.

9 The record contains copies of two articles from Macleans Magazine, alleging that the R.C.M.P. was not protecting its informants adequately. One of the articles was based on an interview, by a reporter, of the male applicant using his pseudonym. It carries a very large picture of counsel for the applicants over the caption "Toronto Lawyer Swadron: Police Forces 'Squabbling Over Who Should Pay the Bill'". After this article appeared Mr. Leising wrote to Mr. Swadron, in a letter dated April 29, 1997:

> I can't help but think that your efforts to date represent the worst possible way to go about obtaining protective services for your clients. Presuming that there is a legitimate need for some level of protective services, and assuming that your efforts really are about obtaining such services and not optimising your personal media exposure, may I respectfully suggest that you try another tact. I suggest specifically that you expend your efforts and the public's funds on negotiating a resolution to the dispute with the assistance of a professional mediator. My clients are prepared to engage in some form of alternate dispute resolution if you and the other parties are.

10 Counsel argues that because the Commissioner's reasons refer to a public relations campaign, and this reflects the sentiments expressed by Mr. Leising in his letter of April 29, 1997, Mr. Leising wrote the Commissioner's reasons or influenced him to characterize what had occurred as he did, and take that characterization into account in rendering his decision. The reference by the Commissioner to the publicity, which had been encouraged by the male applicant and by counsel, is not enough to lead to a conclusion that Mr. Leising played the role counsel suggests. The magazine articles were part of the record. The Commissioner had been encouraged by counsel for the applicants to take the media reports into account. Also, it defies common sense to think that the Commissioner would have no knowledge of these reports unless Mr. Leising had brought them to his attention, or that without Mr. Leising's encouragement he would not have drawn a conclusion that there was an immaturity and lack of judgment involved in persons who are seeking witness protection allowing themselves to be interviewed by the media.

11 With respect to reliance on the fact that Mr. Leising told counsel for the applicants that he had been asked for and was preparing a legal opinion, this does not demonstrate that Mr. Leising was the drafter of all of the Commissioner's reasons. Those reasons are divided into two different sections. The first states that the Commissioner is without jurisdiction to admit the applicants to the Program because they were not part of an R.C.M.P. investigation and there is no agreement in place covering them. The second is an assessment of their claim on the merits, which is stated to be given in case the Commissioner's legal position with respect to lack of jurisdiction is wrong. The Commissioner's decision on the merits contains considerable comment on the applicants' unsuitability for the program because of their lack of judgment and other personal characteristics.

12 The legal position that the Commissioner has taken, presumably on the advice of Mr. Leising, will be assessed by the Court when this application is heard on the merits. Whether Mr. Leising provided that advice or whether it was provided by someone else is irrelevant. It will be the Court that will eventually assess its correctness.

13 I accept the argument that legal opinions provided to an adjudicative tribunal may not in all instances be privileged. [2] But I am, not persuaded that legal opinions provided to the Commissioner with respect to the scope of his jurisdiction when deciding whether to admit persons to the witness

protection program fall into that category. The Commissioner (as client) is surely entitled to seek legal advice on such a matter and to have the advice so given protected by solicitor-client privilege. Also, as noted above, the content of such an opinion is irrelevant since the Court will in any event decide that legal issue.

14 I turn, then, to counsel for the applicants' argument that his clients are being prevented by the use of the solicitor-client privilege rule from ascertaining the scope of the role that Mr. Leising played in the section 5 decision. Counsel asserts that Mr. Leising not only gave the Commissioner legal advice but also either wrote or played a crucial role in advising the Commissioner with respect to the decision on the merits of the applicants' request. As I understand the respondent's response, it is that whatever the scope of that role it is irrelevant.

15 At one time it was thought that at the judicial level, at least, reasons for decision that were written by anyone other than the decision-maker ran the risk of being treated as evidence that a delegation of decision-making authority had occurred. It is my perception that this is no longer necessarily taken to be the case. There is greater acceptance now of reasons being written by someone other that the decision-maker. If this is acceptable at the judicial level, it is even more likely to be acceptable with a quasi-judicial or administrative decision-maker.

16 In *Khan v. College of Physicians & Surgeons (Ontario)* (1992), 57 O.A.C. 115 (Ont. C.A.), at 141 - 142, it was held that a decision-making body composed of several members, i.e., a committee, was entitled to avail itself of counsel's assistance during the drafting process. I will set out below excerpts from the decision that are particularly pertinent. The part of the decision, as a whole, from which they are taken, is added as an appendix to these reasons. The particularly pertinent passages are:

> **[126]** The Committee's ultimate responsibility for the authorship of the reasons is not inconsistent with the Committee availing itself of counsel's assistance during the drafting process....
>
> . . . . .
>
> ...The debate must fix, not on the Committee's entitlement to assistance in the drafting of reasons, but on the acceptable limits of that assistance.
>
> **[128]** The line between permissible assistance and that which is forbidden must be drawn by regard to the effect of counsel's involvement in the drafting process, on the fairness of the proceedings and the integrity of the overall ... process....

17 The analysis set out in the *Kahn* decision was adopted in *Armstrong v. Royal Canadian Mounted Police Commissioner* (1994), 73 F.T.R. 81 (Fed. T.D.), at 98 ff. The analysis was applied to a decision by one person, the Commissioner of the R.C.M.P. The use of others to draft his reasons was justified on the ground that: the Commissioner, as a decision-maker, did not have to hear witnesses or decide questions of credibility after an in person hearing; the Commissioner

was acting as an appeal court; the Commissioner had many functions to perform, only one of which was the decision-making function in question; the individual who wrote the Commissioner's reasons was not involved in the proceedings that were before the Commissioner; the workload of the Commissioner is such that, as a matter of necessity, he required assistance in writing the reasons.

18 The jurisprudence is clear, then, that a decision-maker in the position of the Commissioner may use someone else to write reasons for his decision providing he retains control of the decision-making process and providing that such decision written by another "not ... create an appearance of bias or lack of independence". [3]

19 Part of counsel for the respondent's argument that the documents being sought by the applicants are not producible is based on the jurisprudence that has held that working papers and staff opinions are not relevant to an impugned decision. In *Trans Quebec & Maritimes Pipeline Inc. v. Canada (National Energy Board)*, [1984] 2 F.C. 432 (Fed. C.A.) it was held that staff papers prepared for consideration by the National Energy Board, in rendering a decision, did not form part of the record of the decision under review. It was held that such documents were irrelevant and need not be produced under the then Federal Court Rule 1402(3). The headnote reads in part:

> However, where the decision of a tribunal can be shown to have been based on staff reports it may well be possible to make out a case for requiring their inclusion ... there is nothing in the material before the Court showing that the papers sought to be produced relate to any of the applicant's proposed grounds of appeal

The text of the decision reads, in part:

> ...I do not think the order so made should be regarded as authority for a general proposition that staff reports prepared for the assistance of members of a tribunal either in the course of a proceeding or in the judgment-making process are papers that must be included in the material on which the tribunal's decision is to be reviewed. As it appears to me, where the decision of a tribunal can be shown to have been based on staff reports to which the parties have not had access containing evidentiary material to which the parties have not had an opportunity to respond, it may well be possible to make out a case for requiring that they be included in the case for review. Further, in such a situation the fact that the reports were prepared and submitted on a confidential basis, in my view, would not afford them protection. But no such case has been made out here.
>
> The applicant's memorandum indicates that the principal reason for seeking the inclusion of staff memoranda in the case is to attempt to establish the Board's reasons for decision. The analysis and opinion in staff memoranda are irrelevant to the ascertainment of the Board's reasons for decision because they cannot be assumed to have been adopted by it as its reasons.

> The Board's reasons for decision are those which it chooses to express or which can otherwise be clearly shown from its own words or actions to have been its reasons.

20 In *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)* (1996), 37 Admin. L.R. (2d) 241 (Fed. T.D.) an order to produce documents was refused. It was held that the analysis and opinions set out in staff memoranda were irrelevant to the tribunal's reasons for decision since it could not be assumed that they had been adopted. In order for these to be relevant, the Court held it would have to be shown that they amounted to additional evidence. Counsel for the respondent also notes that administrative tribunals can rely on deliberative secrecy; see *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952 (S.C.C.) at 965.

21 At the same time, documents relevant to the grounds of review asserted by an applicant (in this case reasonable apprehension of bias) should be produced under Rule 1612:

> 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. [4]

22 The extent of Mr. Leising's involvement in the writing of reasons on the merits, and the making of recommendations thereon, are relevant to counsel for the applicants' allegation of a reasonable apprehension of bias. Mr. Leising was involved from the beginning in defending the applicants' action in the Ontario Court. He is reported as having told counsel for the applicants, on March 1997, that he would not recommend acceptance of the applicants into the Program unless they dropped their Court action. The jurisprudence cited above indicates that the writing of a decision-maker's reasons for decision by another is limited by the requirement that it not affect the fairness of the proceedings. The jurisprudence also indicates that staff papers are producible if they relate to a ground of the applicants' claim. The applicants are entitled to know the extent of Mr. Leising's involvement in the formation and writing of the decision on the merits. If he was acting in two capacities, that is, as both legal advisor and delegated decision writer with respect to the merits, the applicants are entitled to know. Not everything a lawyer writes is protected merely because he is a lawyer.

23 Rules 1612 and 1613 do not set out any procedure for dealing with applications for the production of documents within the possession of a tribunal which that tribunal declines to produce. Rule 1612 specifies that the request be a "written request" and Rule 1613(2) states that an objection should be made "in writing". Rule 1613(3) states that a judge may give directions with respect to the procedure for making submissions with respect to the objection. As noted earlier, the applicants did not seek any directions pursuant to this subsection. The respondent was not asked to file the documents in Court, on a "for the Court's eyes only" basis, as might have been done.

198

When a claim for solicitor-client privilege is asserted in the context of an action and it is objected to by the opposing party, it is normal for the Court to review the documents to assess the claim.

24 The Commissioner has asserted that the documents that have not been produced are all covered by solicitor-client privilege. The applicants' motion, as presented to the Court, seems to accept that characterization but asserts that the documents, nevertheless, should be produced. Yet counsel's arguments on the hearing of the motion raised the question of whether all the documents were in fact covered by solicitor-client privilege. It is this discrepancy between the text of the motion and the content of the arguments that has created difficulty in not rendering a decision more speedily. In any event, the motion does request "such ... other relief" as the "Court deems just". I have decided that in the circumstances, an order should go requiring the Commissioner to review the documents for which privilege has been claimed, again, with the assistance of counsel, to ensure that they all fall within the claimed category. Any document *or part thereof* that deals with the merits of the decision, and not with a legal opinion, and that is relevant to Mr. Leising's involvement in the decision-making process must be produced. If counsel was acting in two capacities, that is, as both legal adviser and drafter or primary recommender of the decision on the merits, the applicants are entitled to know.

25 I emphasize that these reasons do not constitute a finding that Mr. Leising's involvement, if any, in the merits of the decision necessarily results in a tainted decision (a reasonable apprehension of bias). This is an assessment that can only be made once the extent of that involvement is known. The present decision only requires the production of documents to enable an open and fair consideration of the position that counsel for the applicants is attempting to put before the Court.

Order accordingly.

APPENDIX

[126] The Committee's ultimate responsibility for the authorship of the reasons is not inconsistent with the Committee availing itself of counsels's assistance during the drafting process. It is well-established that a tribunal such as the Committee may look to outside sources for assistance in the preparation of its reasons: ***Spring v. Law Society of Upper Canada*** (1988), 28 O.A.C. 375, 64 O.R. (2d) 719, 50 D.L.R. (4th) 523 (Div. Ct.); Macaulay, **Practice and Procedure Before Administrative Tribunals** (1988), at pp. 22-10 to 22-10.21. That assistance should be discouraged or deprecated. In ***I.W.A. v. consolidated-Bathurst Packaging Ltd.***, [1990] 1 S.C.R. 282, at p. 327; 105 N.R. 161, 38 O.A.C. 321, at p. 347; 68 D.L.R. (4th) 524, 90 C.L.L.C. 14,007, 42 Admin. L.R. 1, Gonthier, J., for the majority, observed that tribunals must marry their use of "outside" assistance with procedural fairness.

> The rules of natural justice should not discourage administrative bodies from taking advantage of the accumulated experience of its members. On the contrary, the rules of natural justice should in their application reconcile the characteristics and exigencies of decision making by specialized tribunals with the procedural rights of the parties.

[127] That same reconciliation must be achieved during the drafting of reasons. The ultimate aim of the drafting process is a set of reasons which accurately and fully reflects the thought processes of the Committee. To the extent that consultation with counsel promotes that aim, it is to ben encouraged. The debate must fix, not on the Committee's entitlement to assistance in the drafting of reasons, but on the acceptable limits of that assistance.

[128] The line between permissible assistance and that which is forbidden must be drawn by regard to the effect of counsel's involvement in the drafting process, on the fairness of the proceedings and the integrity of the overall discipline process. Without attempting an exhaustive description of these concepts, fairness includes considerations of bias, real or apprehended, independence, and each party's right to know the case made against them and to present their own case. Integrity concerns encompass those fairness concerns but include the broader need to ensure that the body charged with the responsibility of making the particular decision in fact makes that decision after a proper consideration of the merits. If the reasons presented for the decision are not those of the decision maker, or do not appear to be so, it raises real concerns about the validity of the decision and the genuineness of the entire inquiry.

[129] There is no single formula or procedure referrable to the drafting process that can be uniformly applied across the very board spectrum of decision making, when determining whether the involvement of the non-decision maker in the drafting process comprises the fairness of the proceedings of the integrity of the process. The nature of the proceedings, the issues raised in those proceedings, the composition of the tribunal, the terms of the enabling legislation, the support structure available to the tribunal, the tribunal's workload, and other factors will impact on the assessment of the property of procedures used in the preparation of reasons. Certainly, the judicial paradigm of reason writing cannot be imposed on all boards and tribunals: ***I.W.A. v. Consolidated-Bathurst packaging Ltd.***, supra, at pp. 323-324 S.C.R., pp. 342-343 O.A.C.

[130] It must also be recognized that the volume and complexity of modern decision making all but necessitates resort to "outside" sources during the drafting process. Contemporary reason writing is very much a consultive process during which the writer of the reasons resorts to many sources, including persons not charged with the responsibility of deciding the matter, in formulating his or her reasons, it is inevitable that the author of the reasons will be influenced by some of these sources. To hold that any "outside" influence vitiates the validity of the proceedings or the decision reached is to insist on a degree of isolation which is not only totally unrealistic but also destructive of effective reasons writing.

[131] In deciding whether the involvement of counsel in the drafting of the reasons operated unfairly against Dr. Khan or appeared to do so, I take the words of Gonthier, J., in **Commission des affaires sociales v. Temblay**, a decision of the Supreme Court of Canada

200

released April 16, 1992, at pp. 18-19, [136 N.R. 5, 47 Q.A.C. 169], as an appropriate starting place:

> ...A consultation process by plenary meeting designed to promote adjudicative coherence may thus prove acceptable and even desirable for a body like the Commission, provided this process does not involve an interference with the freedom of the decision makers to decide according to their consciences and opinions. The process must also, even if it does not interfere with the actual freedom of the decision makers, not be designed so as to create an appearance of bias or lack of independence. (emphasis added.)

Footnotes

1 *Witness Protection Program Act*, S.C. 1996, c. 15.

2 *Melanson v. New Brunswick (Workers' Compensation Board)* (1994), 25 Admin. L.R. (2d) 219 (N.B. C.A.).

3 *Kahn*, parag. 131.

4 *Pathak v. Canada (Human Rights Commission)*, [1995] 2 F.C. 455 (Fed. C.A.).

Federal Court Cour fédérale

Date: 2020115

Docket: IMM-2967-19

Ottawa, Ontario, January 15, 2021

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ATTILA KISS and ANDREA KISS

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER

UPON the motion of the Applicants for a further and better certified tribunal record [CTR] pursuant to Rule 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, and to amend the deadlines and hearing date set out in the Order of this Court dated November 10, 2020;

AND UPON hearing counsel for the Applicants and for the Respondent on January 8, 2021;

AND UPON reading the materials filed;

AND CONSIDERING the following:

The Applicants are citizens of Hungary. They seek judicial review of a decision made on April 2, 2019 by an officer [Officer] with Immigration, Refugees and Citizenship Canada. The Officer cancelled the Kisses' Electronic Travel Authorizations [eTAs], preventing them from boarding a flight from Budapest to Toronto.

The Respondent concedes that the application should be allowed on the grounds of procedural fairness. However, the Applicants assert that the Officer's decision was discriminatory. They seek a declaration to this effect.

The Applicants have brought a motion for a further and better CTR. Most, but not all, of the additional documentation they request relates to the allegation that the Officer's decision was made in accordance with discriminatory policies and practices approved by the Respondent.

The Respondent takes the position that much of the additional documentation sought by the Applicants does not exist or does not properly fall within the scope of the CTR. The Respondent maintains that the requested documentation amounts to an impermissible fishing expedition in the nature of examination for discovery, which is not permitted in applications for judicial review.

Documents in addition to those that were before the decision-maker may be considered relevant and subject to disclosure where there is an allegation of a breach of procedural fairness or an allegation of a reasonable apprehension of bias (*Humane Society of Canada Foundation v Canada (National Revenue)*, 2018 FCA 66 at para 6). A document is properly included in the CTR if it is likely to influence the manner in which the Court determines the application for judicial review (*Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 102 at para 90).

The Applicants allege that the policies and practices applied by the Respondent to screen documents of Hungarian travellers, particularly those of Roma ethnicity, are discriminatory. In order to assess this allegation, it is necessary for the Court to understand what those policies and practices are. The Applicants' request for additional documentation, with minor adjustments explained during the hearing, is reasonable, and the motion for a further and better CTR is therefore granted.

THIS COURT ORDERS that:

1. The Respondent shall prepare and submit an amended CTR pursuant to Rule 17 that includes the following additional documents, provided that they exist and have not previously been included in the CTR:

    (a) the Applicants' applications for ETAs;

    (b) the BudSec security agent's transmissions to the Officer concerning the Applicants on April 2, 2019, and any date thereafter;

(c) records contained in the Global Case Management System [GCMS] that were reviewed by the Officer that pertain to the Applicants and their "hosts" in Canada, including records that pertain to Andrea Kiss' visit to Canada in 2017; if the Respondent is unable to identify the precise records reviewed by the Officer, the Respondent may produce the records as they currently appear in the GCMS with any necessary caveats;

(d) CBSA Operational Bulletin 2015-05, as referred to in the Officer's reasons;

(e) Air Canada Rouge's "Interception Report" concerning the Applicants, as sent to the CBSA;

(f) the Applicants' requests for reconsideration and any documents pertaining to the treatment of those requests;

(g) materials used by the Respondent to train Government of Canada officials, airline personnel and/or private security personnel in Hungary on document screening at or near the relevant time; and

(h) any list of suspicious "Indicators" referred to by the Officer in rendering the decision under review.

2. The Respondent may redact information that he considers to be personal or sensitive, and that is not relevant to the application for judicial review, without

prejudice to the Applicants' right to request that the Court review any information that is withheld.

3. The Respondent may redact information that he considers to be subject to solicitor-client privilege, without prejudice to the Applicants' right to demand that any such claim be formally determined by the Court.

4. The application for judicial review shall be heard by this Court, together with IMM-5570-19 (LÁSZLÓ SZÉP-SZÖGI and JUDIT SZÉP-SZÖGI and LAURA SZÉP-SZÖGI and LÉNA SZÉP-SZÖGI v MINISTER OF CITIZENSHIP AND IMMIGRATION), by videoconference using the Zoom platform on Thursday, April 15, 2021, commencing at 10:30 a.m. (AST), for a duration not exceeding three (3) hours.

5. The previously scheduled hearing date of February 2, 2021 is vacated.

6. The amended CTR shall be sent to the parties and to the Registry of the Court on or before February 5, 2021.

7. Further affidavits, if any, shall be served and filed by the Applicants on or before February 15, 2021.

8. Further affidavits, if any, shall be served and filed by the Respondent on or before February 25, 2021.

9. Cross-examinations on affidavits, if any, shall be completed on or before March 8, 2021.

10. The Applicants' further memorandum of argument, if any, shall replace the Applicants' memorandum of argument filed pursuant to Rule 10 and reply memorandum (if any) filed pursuant to Rule 13, and shall be served and filed on or before March 19, 2021.

11. The Respondent's further memorandum of argument, if any, shall replace the Respondent's memorandum (if any) filed pursuant to Rule 11, and shall be served and filed on or before March 30, 2021.

12. The transcript of cross-examinations on affidavits, if any, shall be filed on or before March 30, 2021.

13. Notwithstanding the above, the parties may consent to an alternate time-line for completing the steps in paragraphs 7 and 8 (further affidavits), 9 (cross-examinations), 10 and 11 (further memoranda for applicants and respondent), and 12 (transcript of cross-examinations on affidavits), in which case a joint amended schedule shall be filed with the Registry. All steps shall be completed no later than the date set under paragraph 12 for submission of the transcript of cross-examinations, if any.

14. No costs are awarded to any party.

"Simon Fothergill"
Judge

Federal Court of Appeal | Cour d'appel fédérale

Date: 20141023

Docket: A-357-14

Citation: 2014 FCA 239

Present: **WEBB J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

And

CANADA TRANSPORTATION AGENCY

Respondent

REASONS FOR ORDER

WEBB J.A.

[1] The respondent has brought a motion to determine the content of the appeal book in this matter because the respondent wants to include a document and the appellant objects to the inclusion of this document. The document in question is the "Annotated Dispute Adjudication Rules" (Annotation) and the version that the respondent is seeking to include in the appeal book, based on the submissions of counsel for the respondent, is the version that was amended and

published on the respondent's website on or around August 22, 2014 (paragraph 17 of the respondent's written representations).

[2] The appellant has, with leave, appealed to this Court from the *Canadian Transportation Dispute Adjudication Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)* (Dispute Adjudication Rules) made by the respondent. In particular, the appellant is asking that paragraphs 41(2)(b), 41(2)(c), and 41(2)(d) of these Dispute Adjudication Rules be quashed as being *ultra vires* the powers of the respondent or "invalid because they are unreasonable and establish inherently unfair procedures that are inconsistent with the intent of Parliament in establishing the Agency" (appellant's notice of appeal, paragraphs (i) and (ii)). Although couched in different terms, it appears that essentially the appellant is questioning the authority of the respondent to make the Dispute Adjudication Rules in question.

[3] The right of appeal to this Court is granted by section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10:

> 41. (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.
>
> 41. (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

[4] Therefore, appeals only lie on questions of law or jurisdiction. In this case the legal issue is essentially related to the authority of the respondent to make the Dispute Adjudication Rules in question. As a preliminary matter, it is difficult to discern how a document (the Annotation):

(a) purportedly created by the respondent to explain or clarify the Dispute Adjudication Rules;

(b) amended and published on its website over two months after the Dispute Adjudication Rules were adopted; and

(c) which, as part of the disclaimer at the beginning thereof, includes the statement that:

"This document is a reference tool only. It is not a substitute for legal advice and ***has no official sanction***" (emphasis added)

would assist in determining whether as a matter of law the respondent had the authority to adopt the Dispute Adjudication Rules in question.

[5] As noted by the respondent there was no prior hearing in this matter and therefore there were no documents that had been previously introduced before a tribunal or a court. The respondent is requesting that either this Court determine under Rule 343 of the *Federal Courts Rules* that the Annotation should be included as part of the appeal book, or that this Court grant leave under Rule 351 of the *Federal Courts Rules* to include the Annotation as new evidence.

[6] Since there was no prior hearing, the only facts submitted to any tribunal or court related to the Annotation will be those as submitted as part of this motion. In its motion record the respondent submitted an affidavit of Alexei Baturin. However, there is no mention of the Annotation in this affidavit.

[7] The written submissions of counsel for the respondent include the following:

> 12. The Dispute Adjudication Rules that are the subject of this appeal came into force on June 4, 2014. On that date, the Agency published the Annotation on its website.
>
> 13. The Annotation was designed, as its introduction states, as a companion document to the Dispute Adjudication Rules, with the intention of providing explanations and clarifications of the Rules for those unfamiliar with the Agency and its processes.
>
> 14. The Annotation was prepared by Agency staff and was approved for publication by the Agency's Chair and Chief Executive Officer. The document is intended as a soft law instrument to provide guidance on the Agency's procedures but is not intended to fetter the Agency's discretion in the adjudicative decision-making process.
>
> 15. The Annotation is also intended to be an evergreen document, to be updated as needed.
>
> 16. Having received comments from the appellant respecting concerns about the Agency's procedures under the new Dispute Adjudication Rules, the Agency amended its Annotation on or around August 22, 2014, to address the following issues:
>
> a. The Agency's continued commitment to providing reasons for its decisions;

b. The possibility of requesting an opportunity to respond to a request to intervene in dispute proceedings before the Agency;

c. The possibility of requesting an opportunity to conduct a cross-examination on affidavit; and

d. The possibility of proceeding by way of oral hearing.

[8] There are a number of facts related to the creation and amendment of the Annotation in these written submissions. In dissenting reasons in *R. v. Schwartz,* [1988] 2 S.C.R. 443, Dickson C.J. (as he then was) stated certain general principles. There is no indication that the majority of the Justices of the Supreme Court of Canada disagreed with the general principles as expressed by Dickson C.J. In his reasons, Dickson C.J. stated that:

> 59 One of the hallmarks of the common law of evidence is that it relies on witnesses as the means by which evidence is produced in court. As a general rule, nothing can be admitted as evidence before the court unless it is vouched for viva voce by a witness. Even real evidence, which exists independently of any statement by any witness, cannot be considered by the court unless a witness identifies it and establishes its connection to the events under consideration. Unlike other legal systems, the common law does not usually provide for self-authenticating documentary evidence.
>
> 60 Parliament has provided several statutory exceptions to the hearsay rule for documents, but it less frequently makes exception to the requirement that a witness vouch for a document. For example, the *Canada Evidence Act* provides for the admission of financial and business records as evidence of the statements they contain, but it is still necessary for a witness to explain to the court how the records were made before the court can conclude that the documents can be admitted under the statutory provisions (see ss. 29(2) and 30(6)). Those explanations can be made by the witness by affidavit, but it is still necessary to have a witness....

[9] Facts are to be introduced by a witness, not as part of the written representations of counsel. Once introduced, counsel can refer to the facts. However, it does not seem to me that it is appropriate for counsel to refer to facts that have not been introduced by any witness, unless a Judge could take judicial notice of such facts. There was no suggestion by counsel in the written submissions submitted as part of the respondent's motion record that a Judge could (or should) take judicial notice of the alleged facts as set out in the paragraphs referred to above.

[10] In response to the written submission of the appellant, the respondent submitted a reply and included an affidavit of Mary Catharine Murphy. Rule 369(3) of the *Federal Courts Rules* provides that:

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).	(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

[11] The reply is to contain written representations only – not another affidavit. The appropriate manner in which the facts should have been introduced by the respondent was in the affidavit that was submitted as part of the respondent's record – not in the written submissions of counsel for the respondent or in an affidavit included with the reply.

[12] In the reply submissions, counsel for the respondent indicated that "since the Annotation is an Agency document that is prominently displayed on the home page of its Government website and is available to any member of the public, evidence of its existence by way of

affidavit is unnecessary". No authority for this proposition was provided. The reference to the document being available to any member of the public could suggest that perhaps the respondent is arguing that a Judge could take judicial notice of the existence of the Annotation. However, since this argument was not raised by counsel, I will not address it. In any event, it appears that the respondent is attempting to introduce the Annotation for what it says about the Rules in question, not simply to show that it exists.

[13] Therefore, none of the facts that the respondent has attempted to introduce in the written representations of counsel or in the affidavit included in the reply will be considered in this motion.

[14] As a result, the only facts submitted by the respondent that are properly part of this motion are the facts as set out in the affidavit of Alexei Baturin. Since there is no reference to the Annotation in this affidavit, there is no witness to introduce this document and the result is that the respondent is attempting to include in the appeal book a document without any facts related to the document.

[15] As a result the Annotation is not to be included in the appeal book, whether it is considered as existing evidence or new evidence under Rule 351 of the *Federal Courts Rules*.

[16] The respondent's motion to include the Annotation in the appeal book is dismissed. Since the appellant did not ask for costs, no costs are awarded.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-357-14
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. CANADA TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	WEBB J.A.
DATED:	OCTOBER 23, 2014

WRITTEN REPRESENTATIONS BY:

Self-represented	FOR THE APPELLANT
Barbara Cuber	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Legal Services Branch Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT

1985 CarswellNat 161
Federal Court of Canada — Appeal Division

MacBain v. Canada (Canadian Human Rights Commission)

1985 CarswellNat 161, 1985 CarswellNat 628, [1985] 1 F.C. 856, [1985] F.C.J. No. 907, 16 Admin. L.R. 109, 18 C.R.R. 165, 22 D.L.R. (4th) 119, 33 A.C.W.S. (2d) 481, 62 N.R. 117, 6 C.H.R.R. D/3064, 85 C.L.L.C. 17,023

MacBAIN v. CANADIAN HUMAN RIGHTS COMMISSION; MacBAIN v. LEDERMAN et al.

Heald, Mahoney and Stone JJ.

Heard: September 12 and 13, 1985
Judgment: October 7, 1985
Docket: Nos. A-703-84; A-704-84; A-996-84

Counsel: *P. Genest, Q.C.*, and *J. Page*, for Alistair MacBain.
R. Rueter, for Sydney N. Lederman, Wendy Robson, Peter Cumming. R. Jurianz, and J. Hendry, for Canadian Human Rights Commission.
Mary Cornish, for Kristina Potapczyk.
J.J. Carthy, Q.C., and *R.E. Hawkins*, for Attorney General of Canada.

The judgment of the Court was delivered by *Heald J.*:

1 These reasons apply to three different proceedings in this Court which, by order of the court, and on the consent of all parties, were argued together.

2 The proceeding in File No. A-703-84 is an appeal from a judgment of the Trial Division which dismissed, without costs, the appellant's application for a writ of prohibition. The proceeding in File No. A-704-84 is an appeal from a judgment of the Trial Division which dismissed, with costs, the appellant's claim for declaratory relief as specified in the appellant's amended statement of claim filed in that action. The proceeding in File No. A-996-84 is a s. 28 application which attacks a decision made by the respondents Lederman, Robson and Cumming, acting as a Human Rights Tribunal (the Tribunal) appointed under s. 39 of the Canadian Human Rights Act, S.C. 1976-77, c. 33 (the Act).

3 All three proceedings arise from a complaint filed with the Canadian Human Rights Commission (the Commission) by the respondent Potapczyk. That complaint alleged that the appellant/applicant Alistair MacBain (MacBain) engaged in a discriminatory practice against her

on the basis of her sex during the course of her employment with him in contravention of ss. 7(a), 7(b) and 10(a) of the Act. After the filing of the complaint, the Commission appointed an investigator pursuant to s. 35 of the Act who completed an investigation into that complaint, thereafter reporting her findings to the Commission pursuant to s. 36 of the Act. The relevant portions of ss. 35 and 36 read as follows:

> **Investigation**
>
> 35.(1) The Commission may designate a person (hereinafter referred to as an "investigator") to investigate a complaint.
>
> 36.(1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.
>
> (2) If, on receipt of a report mentioned in subsection (1), the Commission is satisfied
>
> (a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or
>
> (b) that the complaint could more appropriately be dealt with, initially or completely, by a procedure provided for under an Act of Parliament other than this Act,
>
> it shall refer the complainant to the appropriate authority.
>
> (3) On receipt of a report mentioned in subsection (1), the Commission
>
> (a) may adopt the report if it is satisfied that the complaint to which the report relates has been substantiated and should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in subparagraphs 33(b)(ii) to (iv); or
>
> (b) shall dismiss the complaint to which the report relates if it is satisfied that the complaint has not been substantiated or should be dismissed on any ground mentioned in subparagraphs 33(b)(ii) to (iv).
>
> (4) After receipt of a report mentioned in subsection (1), the Commission
>
> (a) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and
>
> (b) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3).

4 On November 22, 1983, the Commission passed a resolution in which it found that Potapczyk's complaint against MacBain was substantiated pursuant to the authority conferred upon it pursuant to subs. 36(3) of the Act.1 This decision has not been questioned in any of the proceedings presently before the Court. Accordingly, it remains as a finding against MacBain respecting his

conduct towards Potapczyk. The Commission further resolved to appoint a Tribunal to inquire into the complaint and authorized the Chief Commissioner to do so. The authority to appoint such a Tribunal is contained in subs. 39(1) of the Act.

5 Sections 39, 40 and 41 read:

Human Rights Tribunal

39.(1) The Commission may, at any stage after the filing of a complaint, appoint a Human Rights Tribunal (hereinafter in this Part referred to as 'Tribunal') to inquire into the complaint.

(2) A Tribunal may not consist of more than three members.

(3) No member, officer or employee of the Commission, and no individual who has acted as investigator or conciliator in respect of the complaint in relation to which a Tribunal is appointed, is eligible to be appointed to the Tribunal.

(4) A member of a Tribunal is entitled to be paid such remuneration and expenses for the performance of duties as a member of the Tribunal as may be prescribed by by-law of the Commission.

(5) In selecting any individual or individuals to be appointed as a Tribunal, the Commission shall make its selection from a panel of prospective members, which shall be established and maintained by the Governor in Council.

40.(1) A Tribunal shall, after due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the Tribunal, any other interested party, inquire into the complaint in respect of which it was appointed and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, of appearing before the Tribunal, presenting evidence and making representations to it.

(2) The Commission, in appearing before a Tribunal, presenting evidence and making representations to it, shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint being inquired into.

(3) In relation to a hearing under this Part, a Tribunal may

(a) in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the Tribunal deems requisite to the full hearing and consideration of the complaint;

(b) administer oaths; and

(c) receive and accept such evidence and other information, whether an oath or by affidavit or otherwise, as the Tribunal sees fit, whether or not such evidence or information is or would be admissible in a court of law.

(4) Notwithstanding paragraph (3)(c), a Tribunal may not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

(5) Notwithstanding subsection (2), a conciliator appointed to settle a complaint is not a competent or compellable witness at a hearing of a Tribunal appointed to inquire into the complaint.

(6) A hearing of a Tribunal shall be public, but a Tribunal may exclude members of the public during the whole or any of a hearing if it considers such exclusion to be in the public interest.

(7) Any person summoned to attend a hearing pursuant to this section is entitled in the discretion of the Tribunal to receive the like fees and allowances for so doing as if summoned to attend before the Federal Court of Canada.

41.(1) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is not substantiated, it shall dismiss the complaint.

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:

(a) that such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future;

(b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice; and

(d) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the victim as a result of the discriminatory practice.

(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

(4) If, at the conclusion of its inquiry into a complaint regarding discrimination in employment that is based on a physical handicap of the victim, the Tribunal finds that the complaint is substantiated but that the premises or facilities of the person found to be engaging or to have engaged in the discriminatory practice impede physical access thereto by, or lack proper amenities for, persons suffering from the physical handicap of the victim, the Tribunal shall, by order, so indicate and shall include in such order any recommendations that it considers appropriate but the Tribunal may not make an order under subsection (2) or (3).

6 After the Commission decided to substantiate the complaint and to appoint a Tribunal, a short list of potential members was prepared for the Chief Commissioner of the Commission. The Chief Commissioner proceeded to personally select the respondents Lederman, Robson and Cumming to constitute the Tribunal to inquire into the complaint against MacBain. As of December 1983, approximately one hundred persons had been appointed by the Governor in Council as prospective members of Tribunals to be selected under subs. 39(5) of the Act. The Chief Commissioner, in testimony before the House of Commons Standing Committee on Justice and Legal Affairs, on December 13, 1983, stated that only 26 of these prospective members had been selected during 1982 to sit as Tribunals.

7 The Tribunal commenced its hearing into the complaint against MacBain on April 9, 1984, with the Commission appearing as prosecutor. Meanwhile, on March 30, 1984, MacBain had commenced an action in the Trial Division of this Court for a declaration, inter alia, that Pt. III of the Act (which includes s. 39) was inconsistent with subs. 11(d) of the Canadian Charter of Rights and Freedoms (the Charter). On June 21, 1984, MacBain filed an amended statement of claim wherein the declaration asked for in respect of Pt. III and s. 39 was broadened to allege inconsistency with s. 7 of the Charter as well. The amended statement of claim also asked for a declaration that Pt. III and portions of s. 39 of the Act were inoperative as abrogating, abridging and infringing MacBain's right to a fair hearing under subs. 2(e) of the Bill of Rights, R.S.C. 1970, App. III (the Bill).

8 As noted supra, MacBain also sought a writ of prohibition to prohibit the Tribunal from proceeding to hear the complaint against him citing in support of that application, the same grounds on which the declaratory relief was sought. On March 29, 1984, MacBain had requested in writing that the hearing scheduled to commence on April 9, 1984, be adjourned pending resolution of the applicant's proceedings in the Trial Division. The adjournment request was declined by the Tribunal at the opening of the hearing on April 9th. It also declined to stay its proceedings pending the application for prohibition. The Tribunal went on to hear the complaint in the absence of MacBain and his counsel who withdrew from the hearing. At the hearings before the Tribunal, the Commission, pursuant to s. 40, prosecuted the complaint against MacBain.

9 The applications for prohibition and for judgment in the action were heard together by Collier J. on May 7 and 8, 1984, and he delivered oral reasons for judgment on May 9, 1984. When the motions before Collier J. were heard, the Tribunal had heard only part of the evidence and had adjourned its hearings to a date to be fixed. The Tribunal proceeded with its hearings on May 17 and 18, 1984. When the hearings resumed, MacBain's counsel asked for an adjournment pending an appeal from the judgment of Collier J. That motion was refused and the Tribunal went on to hear the remainder of the evidence in the absence of MacBain and his counsel who withdrew from that hearing also. Like the Commission, the Tribunal found that Potapczyk's complaint against MacBain had been substantiated and made the following order dated July 23, 1984:

> (a) That the Respondent, Alistair MacBain, cease any further contravention of Section 7(b) of the Canadian Human Rights Act in the manner set out in the aforesaid Reasons and that he refrain henceforth from committing the same or similar contraventions against his employees;
>
> (b) That the Respondent, Alistair MacBain, pay to the Complainant, Kristina Potapczyk, compensation in the amount of $1,500.00 under section 41(3) of the Canadian Human Rights Act.
>
> Decision of Tribunal, Case, Vol. I, pp. 64-65

Reasonable Apprehension of Bias

10 The central issue in all three proceedings presently before the Court is an allegation that MacBain had a reasonable apprehension of bias arising out of the method of prosecuting and deciding the complaint. It is common ground that in the circumstances of this case, there was no evidence of actual bias. The matters, both in the Trial Division and in this Court were argued on the basis of reasonable apprehension of bias. Collier J. held that, on all the facts in the two proceedings before him, there was a well-founded reasonable apprehension of bias. In this Court, counsel for the appellant/applicant supported that finding. In essence his submission was to the following effect: in the instant case, and pursuant to the scheme envisaged in the Act, the Commission investigated, made findings of substantiation and then prosecuted this complaint; the very same Commission

also appointed the Tribunal members who heard and decided the case adversely to the appellant/applicant. Such a scheme violates the principle that no one will judge his own cause since it cannot be said that there is any meaningful distinction between being your own judge and selecting the judges in your own cause. Accordingly, the scheme is inherently offensive and gives rise to a reasonable apprehension of bias thereby violating the principles of natural justice.

11 Counsel all agreed that the proper test to be applied when considering the issue of reasonable apprehension of bias was that set out by Mr. Justice de Grandpré in the Crowe [1] case. The relevant portion of his reasons read as follows:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the 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.
>
> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias' 'reasonable suspicion of bias' or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience'.
>
> This is the proper approach which, of course, must be adjusted to the facts of the case. The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted by statute with an administrative discretion exercised in the light of its experience and of that of its technical advisers.

Collier J. after reviewing the facts, the scheme of the Act and the test set out in the Crowe case supra, concluded that (A.B. pp. 28-29):

> ... the reaction of a reasonable and right-minded person, viewing the whole procedure as set out in the statute and as adopted in respect of this particular complaint, would be to say: there is something wrong here; the complaint against me has been ruled proved; now that complaint is going to be heard by a tribunal appointed by the body who said the complaint has been proved; that same body is going to appear against me in that hearing and urge the complaint to be found to be proved.

12 It is clear from a perusal of the reasons of the learned trial Judge in their entirety that, in his view, the most serious problem with the scheme of the Act is the requirement initially for the Commission to determine whether the complaint has been "substantiated" (subs.

36(3)) whereas the Tribunal is obligated in its deliberations to make the same determination — namely substantiation of the complaint (subss. 41(1) and (2)). He observed that the same word "substantiate" was used in both subsections and it was his opinion that the same meaning should be ascribed to that word in both subsections. He defined "substantiate" to mean "prove" and applied that definition to both subsections. In his view, it was the fact that the Commission had already found that the case against MacBain had been "proved" prior to the appointment of the Tribunal that gave rise to a reasonable apprehension of bias. The trial Judge made it clear that his finding of apprehension of bias rested on the provisions requiring substantiation and that if the statute had simply required the Commission to be satisfied that there was enough evidence to warrant a hearing, no apprehension of bias would exist. I say this because of that portion of his reasons which reads (A.B. p. 29):

> No feeling of disquietude could arise, nor indeed any complaint be made, if the provisions regarding substantiation of the complaint by the Commission were absent. Or, if the procedural provision there, merely required the Commission to be satisfied there was enough material or evidence warranting a hearing and decision by a tribunal.

13 With respect, I differ from the view of the learned trial Judge that the issue of substantiation is the only factor when considering apprehension of bias. In my view, the apprehension of bias also exists in this case because there is a direct connection between the prosecutor of the complaint (the Commission) and the decision-maker (the Tribunal). That connection easily gives rise, in my view, to a suspicion of influence or dependency. After considering a case and deciding that the complaint has been substantiated, the "prosecutor" picks the Tribunal which will hear the case. It is my opinion that even if the statute only required the Commission to decide whether there was sufficient evidence to warrant the appointment of a Tribunal, reasonable apprehension of bias would still exist.

14 The situation in the case at Bar is quite different, in my view, from the issue decided by the Ontario Court of Appeal in the case of R. v. Valente (No. 2) (1983), 41 O.R. (2d) 187, 20 M.V.R. 168 (sub nom. R. v. Valente), 2 C.C.C. (3d) 417, 14 C.R.R. 137, 145 D.L.R. (3d) 452 [affirmed S.C.C., No. 17583, Dickson C.J.C., Beetz, Estey, McIntyre, Chouinard, Lamer and Le Dain JJ., December 19, 1985]. The issue there was the independence of provincially appointed Judges in the Province of Ontario. It is beyond argument that the principle of judicial independence is essential to the administration of justice in our system. This principle is supported by the tradition of a division of powers. However, as a practical matter, absolute independence is not possible at present. This is so because the Government of Canada as well as the Government of the Province exercise considerable, albeit varying degrees of administrative oversight over the judiciary. I refer to the financial and administrative control over Judges which presently resides in the Executive Branch of the Federal and most Provincial Governments. It is to this nebulous area where the division of powers is not absolute that the Ontario Court of Appeal addressed itself in Valente (No. 2), supra and concluded that the principle of independence had been maintained.

15 I see at least two very important differences between the system of appointment of Provincial Judges in Ontario which was reviewed in Valente (No. 2), and the system employed by the Commission under this Act. Firstly, in most jurisdictions in this country, the appointment of Judges is permanent [2] whereas the scheme of this Act contemplates the appointment of temporary "Judges" on a case by case basis.

16 At p. 105 of his study, Chief Justice Deschênes said:

> An appointment during pleasure or for a probationary period is inconsistent with the independence necessary to the judicial function.
>
> In this way, the executive hangs a sword of Damocles over the head of a new judge. A judge who accepts a one-year appointment is, in all likelihood, interested in carving out a career in the judiciary but this career will hinge on the goodwill of the Prince. Clearly, a judge on probation is not independent and there is a risk that his decisions may be coloured by his plans for the future. Could he rule against a government from whose 'pleasure' his appointment derives? And in private litigation, could he take the position that the law and his conscience dictate but that might displease the government of the day? Then too, what criteria will the government apply in deciding after one year of probation whether a judge merits a permanent appointment?

His firm recommendation was, accordingly, that the system of appointing Judges during pleasure or for a probationary period should be abolished. That criticism of the system of probationary and "at pleasure" appointments applies even more forcibly to the system of case-by-case assignments employed under this Act. At the very least, the prosecutor should not be able to choose his "Judge" from a list of temporary "Judges". That, however, is precisely what happens when the Commission chooses the Tribunal members who will hear a particular case.

17 The second important distinction between the Valente facts and the facts in the case at Bar relates to the distinction which has to be made between independent *administration* (which, as we have seen does not totally exist at the present time) and independent *adjudication* which, in my view, is a necessary and vital component of judicial independence and the proper administration of justice. Independent adjudication must necessarily include such matters as the preparation of trial lists, decisions on the order in which cases are to be tried, the assignment of Judges to the cases and the allocation of court rooms. Chief Justice Deschênes characterizes these items as being "caseflow management". His comments read as follows (see Deschênes, supra, p. 124):

> These are all factors on which the integrity of the judicial process itself depends. Leave its control to outsiders, civil servants or others, and soon one will see a particular judge being assigned to a particular case for reasons irrelevant to the proper administration of justice. The independence of the judiciary requires absolutely that the judiciary and it alone manage and

> control the movement of cases on the trial lists and the assigning of the judges who will hear these cases.

In my view, those comments have particular pertinence to the appointment of a Tribunal under this Act. Given a scheme in which both of the objectionable features discussed by Chief Justice Deschênes, are present, I have no hesitation in concluding that an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that a reasonable apprehension of bias exists under this scheme and in this case.

18 In attempting to impeach the findings of the learned trial Judge on reasonable apprehension of bias, counsel for the Commission submitted that Collier J. did not properly apply the test from the Crowe case. More particularly, it was his submission that the trial Judge omitted from the Crowe test the issue as to whether a reasonable and right-minded person was properly informed. I do not agree with this submission. A reading of the reasons of Collier J. persuades me that he did in fact apply the Crowe test. At p. 28 of the Appeal Book, Mr. Justice Collier clearly prefaces his conclusion with the following: "Keeping in mind the test propounded in the Marshall Crowe case ..." It is correct to observe that later on at pp. 28 and 29 of the Appeal Book, he does not include in his reference to "a reasonable and right-minded person" the further qualification that such a person must also be "properly informed". However, in my view, in applying the Crowe test, he did not lose sight of this additional requirement since he applies the test of a reasonable and right-minded person "... viewing the whole procedure as set out in the statute and as adopted in respect of this particular complaint ..." I think it clear from this passage that in view of Collier J. a "properly informed person" was one who was knowledgeable about the scheme of the statute and was also knowledgeable as to the way in which that scheme was applied in the processing of the complaint at Bar. Accordingly, I do not think he failed to properly apply the Crowe test. Counsel for the Commission then went on to analyze the cases which had been heard by Tribunals under this Act. The analysis indicates that during the years 1979 to 1984, approximately one-half of the Tribunals appointed did not substantiate the complaints before them. With respect, I fail to appreciate the relevance of such statistics. They would only be relevant, in my view, if the issue being discussed was *actual* bias rather than *apprehension* of bias.

19 Counsel also submitted that Mr. Justice Collier erred in finding that "substantiate" as used both in subss. 36(3) and 41(1) meant "proved" in both subsections.

20 As stated earlier herein, I do not consider the issue of substantiation to be the only factor when considering apprehension of bias. Having said that, let me hasten to add that, in my view, Mr. Justice Collier was correct in concluding that "substantiate" has the same meaning in subs. 36(3) as it does in subs. 41(1). I so conclude because, in my view, since the word is used in two sections of the Act, both of which form part of the same procedure for the disposition of complaints, it should be presumed initially that the same word should have the same meaning. Dr. Driedger, in the Construction of Statutes (2nd ed., 1983), says at p. 93:

> There is another draftsman's guide to good drafting and hence also a reader's guide, namely, the same words should have the same meaning, and, conversely, different words should have different meanings. (Called the 'presumption against a change of terminological usage' by Lord Simon in Black-Clawson International Ltd. v. Papierwerke Wadlhof-Aschaffenburg A.G. [1975] 1 All E.R. 810 at p. 847).

Likewise, in the case of Giffels & Vallett of Can. Ltd. v. R., [1951] O.R. 652, [1952] 1 D.L.R. 620 at 630 (Ont. C.A.), Gale J. said:

> Whilie it is quite true that a word may have different meanings in the same statute or even in the same section, it is not to be forgotten that the first inference is that a word carries the same connotation in all places where it is found in a statute.

In order to give effect to this submission, it would be necessary to read subs. 36(3)(a) of the Act as though the word "substantiated" was deleted and the following word or words of like import were substituted therefor: "that an inquiry into the complaint is warranted." The Courts have resisted this practice of adding or deleting words in a statute. The rationale for this resistance was well stated by Lord Brougham in Crawford v. Spooner (1846), 6 Moo. P.C.C. 1, 13 E.R. 582 (P.C.C.), where he said:

> The construction of the Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the Legislature; we cannot aid the Legislature's defective phrasing of the Act; we cannot add, and mend, and, by construction make up deficiencies ...

For these reasons, I find no basis for this submission by counsel for the Commission.

21 I turn now to the submissions made by counsel for the members of the Tribunal. Counsel relied on the decision of this Court in Caccamo v. Min. of Manpower & Immigration, [1978] 1 F.C. 368, 75 D.L.R. (3d) 720 (sub nom. Re Caccamo and Minister of Manpower & Immigration), 16 N.R. 405, to answer the submissions of MacBain's counsel that the scheme of the Act as applied to this case gave rise to a reasonable apprehension of bias. In that case, it was submitted that a reasonable apprehension of bias existed in respect of a Special Inquiry Officer designated to hold an inquiry under the Immigration Act, S.C. 1976-77, c. 52, to determine whether the appellant Caccamo should be deported. The alleged basis for deportation was that the appellant had been adjudged by the Ontario Courts and the Supreme Court of Canada to be a member of the Mafia and was, therefore, a member of an inadmissible class, namely, a member of a group which engages in or advocates subversion of democratic government, institutions or processes as they are understood in Canada and that prior to the inquiry, a newspaper report quoted the Director of Information of the Department of Manpower and Immigration as saying that the Department must take the position that the Mafia is a subversive organization. The Court decided that the Special Inquiry

230

Officer would not be disqualified in such a situation merely because he, along with every other officer of the Department of Manpower and Immigration was an officer subject to the direction and control of the Deputy Minister of Manpower and Immigration as was the Information Director who made the press statements complained of. The Court expressed the view that since the newspaper report indicated no more than that the Department had instituted deportation proceedings against the appellant because of its views with respect to the appellant's activities, there was no suggestion that the Department was imposing its views on the Special Inquiry Officer. The Special Inquiry Officer was still under a duty to determine, on the evidence, whether the appellant was subject to deportation. In my opinion, the Caccamo case, supra, is easily distinguishable on its facts from the case at Bar. In Caccamo there was no suggestion that the Department had taken the firm position in advance of the inquiry that the allegations against the appellant had been substantiated. The press release simply stated the position that the Department was going to take at the Special Inquiry. That is quite a different situation from the one at Bar where the Commission, *after* deciding that the complaint has been substantiated, chooses the part-time Judges who will hear the complaint, and at that hearing takes the position that its earlier decision was correct. Such a scheme represents after-the-fact justification for a decision already made by it and before Judges of its own choosing.

22 Counsel for the Attorney General opened his oral submissions with a frank concession that "What we have here is an appearance of unfairness" which "may deserve relief." He then went on to urge that any relief granted should not "demolish the statute". He proceeded to emphasize that in this case we are dealing with an administrative tribunal and not a Court in the traditional sense. He submitted that, in these circumstances, the procedure set out in the Act should be seen "... through the eyes of an informed person examining this tribunal and its functions realistically and practically." He then proceeded to detail numerous features of the scheme of the Act. With respect, it seems to me that this analysis begs the question because it fails to consider whether the respondent was afforded fundamental justice under that scheme. Some of the features mentioned by counsel relate to "utilitarian considerations" such as volume, expense, efficiency and expediency. In this connection, I think the observations made by Madame Justice Wilson in Singh v. Min. of Employment & Immigration, [1985] 1 S.C.R. 177, 12 Admin. L.R. 137, 14 C.R.R. 13, 17 D.L.R. (4th) 422, 58 N.R. 1, are relevant. The learned Justice was discussing the s. 1 limits on s. 7 of the Charter. At pp. 218 and 219 [S.C.R.], she expressed doubt that "utilitarian considerations" can constitute a limitation on the rights set out in the Charter. She went on to state:

> Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles.

Since the constitutional or quasi-constitutional rights under the Charter and Bill are central to this case, I consider these statements of the law to be germane to the issue being discussed.

23 For all of the above reasons, I have concluded that Mr. Justice Collier did not err in finding a reasonable apprehension of bias in this case.

The Application of the Bill of Rights

24 The relevant sections of the Bill of Rights for the purpose of considering the issues in these proceedings are subss. 2(e) and 5(2). Those provisions read as follows:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> . . . . .
>
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.
>
> 5. ...
>
> (2) The expression 'law of Canada' in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

At the hearing before Mr. Justice Collier, counsel for MacBain urged the application of subs. 2(e) of the Bill to this case. This argument was rejected. His reasons for refusing to apply the Bill are found in the Appeal Book at pp. 30 to 33 inclusive. I quote herewith the pertinent portions of those reasons:

> The Bill of Rights is not part of Canada's Constitution. It has had an unhappy, ineffective judicial history. ...
>
> For MacBain, it was said it can be brought into play here: The Commission has, in this instance, so applied the Canadian Human Rights Act to create a reasonable apprehension of bias; a fair hearing cannot be had; if the Commission intends to appoint a tribunal, it must first not substantiate the complaint. Mr. Genest did not submit that I should hold the relevant provisions of the legislation to be inoperative. He argued I should merely hold the application of the statute by the Commission, in this case, to be contrary to the strictures found in paragraph 2(e) of the Bill of Rights.

> I have concluded, with regret, misgiving, and doubt, I cannot utilize the Bill of Rights in that manner. Nor can I, in the facts and circumstances here, hold the relevant provisions of the Canadian Human Rights Act to be inoperative.
>
> . . . . .
>
> In partial self defense I suggest the Bill of Rights is an awkward statute. That is all it is: a statute. It has no real fangs. It is, as phrased, to my mind, a tool for construction of legislation, not for destruction of impingements on rights.

25 With deference I agree with Mr. Justice Collier's appreciation of the state of the law pertaining to the Bill as of the date his reasons for judgment were given in this case. However, since that time the decision of the Supreme Court of Canada in the Singh case, supra, has been delivered. I think it accurate to observe that most certainly one of the consequences of that landmark decision has been to reinvigorate the Canadian Bill of Rights. Accordingly, I think it necessary to consider that decision in some depth. Madame Justice Wilson speaking for herself, the Chief Justice and Lamer J. at p. 185 of her reasons made the following comments concerning the Bill in general:

> There can be no doubt that this statute continues in full force and effect and that the rights conferred in it are expressly preserved by s. 26 of the Charter. However, since I believe that the present situation falls within the constitutional protection afforded by the Canadian Charter of Rights and Freedoms, I prefer to base my decision upon the Charter.

26 On the other hand, Mr. Justice Beetz, speaking for himself and Estey and McIntyre JJ. found that the procedures followed for determining Convention refugee status as set out in the Immigration Act, 1976 were in conflict with subs. 2(e) of the Canadian Bill of Rights. At p. 224 of his reasons, Mr. Justice Beetz stated:

> Thus, the Canadian Bill of Rights retains all its force and effect, together with the various provincial charters of rights. Because these constitutional or quasi-constitutional instruments are drafted differently, they are susceptible of producing cumulative effects for the better protection of rights and freedoms. But this beneficial result will be lost if these instruments fall into neglect. It is particularly so where they contain provisions not to be found in the Canadian Charter of Rights and Freedoms and almost tailor-made for certain factual situations such as those in the cases at bar.

In my view, this statement puts to rest the concept stated by Collier J. (as established in the pre-Singh jurisprudence) that the Bill is merely an instrument of construction or interpretation. At p. 226 of his reasons, Beetz J. appears to have adopted the submission of the appellant's counsel that two points must be established in order to find a breach of subs. 2(e): *Firstly*, it must be shown that a party's "rights and obligations" fall to be determined by a Federal Tribunal; and, *secondly*, it must be established that the party concerned was not afforded a "fair hearing in accordance with the principles of fundamental justice". On the first branch of the test, Beetz J. stated at p. 228:

> Be that as it may, it seems clear to me that the ambit of s. 2(e) is broader than the list of rights enumerated in s. 1 which are designated as 'human rights and fundamental freedoms' whereas in s. 2(e), what is protected by the right to a fair hearing is the determination of one's 'rights and obligations', whatever they are and whenever the determination process is one which comes under the legislative authority of the Parliament of Canada. It is true that the first part of s. 2 refers to 'the rights or freedoms herein recognized and declared', but s. 2(e) does protect a right which is fundamental, namely 'the right to a fair hearing in accordance with the principles of fundamental justice' for the determination of one's rights and obligations, fundamental or not. It is my view that, as was submitted by Mr. Coveney, it is possible to apply s. 2(e) without making reference to s. 1 and that the right guaranteed by s. 2(e) is in no way qualified by the 'due process' concept mentioned in s. 1(a).

27 Applying that view of the matter to the instant case, I think that this Act imposes upon MacBain the obligation not to treat his employees in a discriminatory way. MacBain's position is that he has fulfilled that condition. The position of the Commission and the complainant Potapczyk is that he has not. Accordingly, it seems clear that the Tribunal appointed in this case was charged with determining MacBain's obligations under the Act. Therefore the first branch of the test as above stated has been met, in my view.

28 Insofar as the second branch of the test is concerned, if my conclusions on reasonable apprehension of bias supra, are correct, it necessarily follows that MacBain was not afforded a fair hearing in accordance with the principles of fundamental justice. While actual bias was neither alleged or established in this case, the appearance of injustice also constitutes bias in law.[3] The case at Bar has some similarities to the case of Re McGavin Toasmaster Ltd. and Powlowski (1973), 37 D.L.R. (3d) 100, decided by the Manitoba Court of Appeal. Although the scheme of the Manitoba Human Rights Act, S.M. 1974, c. 65 (also C.C.S.M., c. H175), therein being considered is somewhat different, I find relevant a statement made by Hall J.A. for the majority at p. 119 where he said:

> The Commission and the statute under which it functions are concerned with human rights of both the complainant and the person complained against, and for that reason alone justice demanded consummate care on their part in the procudures to be followed in disposing of the complaints.

As in the McGavin case supra, we are also concerned here with human rights legislation which by its very nature demands "consummate care" in respect of the procedures to be followed. In this case, the scheme of the statute and the procedure prescribed therein for the appointment of Tribunals offends fundamental justice since the "consummate care" referred to by Hall J.A. which is reasonably to be expected when dealing with the human rights of individuals, cannot be taken under this procedure.

29 Before leaving the Singh case, I should observe that, in applying the Bill to an Act which post-dated the enactment of the Bill, Mr. Justice Beetz expressly rejected any suggestion that the Bill only applied to Acts which pre-dated it. At p. 239 of the reasons he said:

> I do not see any reason not to apply the principle in the Drybones case to a provision enacted after the Canadian Bill of Rights. Section 5(2) provides:
>
> (2) The expression 'law of Canada' in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

The Canadian Charter of Rights and Freedoms

30 On the hearing of the appeal, the principal thrust of the argument by counsel for MacBain pertained to subs. 2(e) of the Bill of Rights. It was his position that if the Court agreed with his submissions on subs. 2(e), there would be no need to consider whether s. 7 or subs. 11(d) of the Charter have any application to this case. Nevertheless, in his submissions in chief and in his memorandum of fact and law he did make submissions with respect to s. 7 and subs. 11(d) of the Charter. However, during the course of the submissions being made to us by counsel for the Attorney General of Canada, counsel for MacBain advised us that he was not asking the Court to make a finding on the applicability of any section of the Charter. On this basis, the Court did not hear further argument from counsel for the respondents on this issue. Accordingly, I do not propose to deal with the applicability of the Charter in this case.

Remedies

31 Since I have concluded that the adjudicative structure of the Canadian Human Rights Act contains an inherent bias, thereby offending subs. 2(e) of the Bill, it becomes necessary to consider the appropriate form of remedy in all the circumstances of these proceedings. Like its American counterpart, the Canadian Bill of Rights does not expressly address the issue of the consequences of failure to comply with its provisions. This circumstance is in marked contrast to the Charter which deals with this matter with clarity and unprecedented scope. I refer to subs. 52(1) of the Charter which provides that any law inconsistent with the provisions of the Charter "... is, to the extent of the inconsistency, of no force and effect". Likewise, reference should be made to subs. 24(1) of the Charter which empowers "a court of competent jurisdiction" to grant such remedy as it considers "appropriate and just in the circumstances". However, the Bill's silence in this regard does not, in my view, imply unenforceability for it is trite law that there can be no right without a remedy. Furthermore, the relevant jurisprudence supports that view of the matter. In R. v. Drybones, [1970] S.C.R. 282 at 294, 71 W.W.R. 161, 10 C.R.N.S. 334, [1970] 3 C.C.C. 355, 9 D.L.R. (3d) 473,

Ritchie J. writing for the majority of the Supreme Court of Canada quoted the opening words of s. 2 of the Bill which read:

> Every law of Canada shall, *unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights*, be so construed and applied as not to abrogate ...

[The emphasis is that of Ritchie J.] Thereafter, Mr. Justice Ritchie went on to state:

> It seems to me that a more realistic meaning must be given to the words in question and they afford, in my view, the clearest indication that s. 2 is intended to mean and does mean that if a law of Canada cannot be 'sensibly construed and applied' so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized and declared by the Bill, then such law is inoperative 'unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights.'
>
> I think a declaration by the courts that a section or portion of a section of a statute is inoperative is to be distinguished from the repeal of such a section and is to be confined to the particular circumstances of the case in which the declaration is made. The situation appears to me to be somewhat analogous to a case where valid provincial legislation in an otherwise unoccupied field ceases to be operative by reason of conflicting federal legislation.

32 While the Supreme Court of Canada did not, to my knowledge, after Drybones supra, declare any other laws inoperative pursuant to the Bill until the Singh case, the Court nevertheless consistently affirmed the principle of Drybones insofar as the remedy for failure to comply with the provisions of the Bill is concerned.[4] The following quotation from the decision of Laskin J. in Curr v. R., [1972] S.C.R. 889 at 899, 18 C.R.N.S. 281, 7 C.C.C. (2d) 181, 26 D.L.R. (3d) 603, is yet another example of the perspective of the Supreme Court of Canada on the effect of non-compliance with the Bill:

> Compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny *operative* effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so ...

(Emphasis added) In addition to the Singh case, there is at least one other recent decision in Canadian Courts rendering inoperative federal legislation which abrogated rights protected by the Bill. I refer to the Manitoba Court of Appeal decision in R. v. Hayden, [1983] 6 W.W.R. 655, 23 Man. R. (2d) 315, 36 C.R. (3d) 187, 8 C.C.C. (3d) 33, 7 C.R.R. 325, [1984] 1 C.N.L.R. 148, 5 C.H.R.R. D/2121, 3 D.L.R. (4th) 361, where Hall J.A. speaking for the Court, found a section of the Indian Act, R.S.C. 1970, c. I-6, concerning intoxication on a reserve to be inoperative because it offended subs. 1(b) of the Bill. In the Singh case the relief proposed by Beetz J. was stated at pp. 239 to 240 as follows:

> For the purposes of these seven cases, I would declare *inoperative* all of the words of s. 71(1) of the Immigration Act, 1976, following the word: 'Where ...'

(Emphasis added) It is to be noted that notwithstanding the above statement by Mr. Justice Beetz, the word "inoperative" did not appear in the judgment as distinct from the reasons for judgment pronounced by the Supreme Court of Canada. This matter will be discussed later herein.

33 As stated by Ritchie J. in Drybones supra, another characteristic of the relief to be granted under the Bill is that there must be a degree of particularity introduced into a finding that statutory provisions are inoperative. In the second revised edition of Tarnopolsky's The Canadian Bill of Rights (1975), s. 2 and the Drybones case are referred to as follows (pp. 140 and 141):

> It would seem then, that by the opening paragraph of s. 2 Parliament intended what the majority of the Supreme Court said it intended, and that is that courts are to declare 'inoperative' any laws which contravene the Canadian Bill of Rights.
>
> The specific choice of the term 'inoperative' as an alternative, to 'void' or 'Invalid' must have been intended to restrict the effect of these decisions to the particular fact circumstances.

This view of the matter was adhered to by Mr. Justice Beetz in Singh, because his declaration was specifically restricted to the "... seven cases at Bar where Convention refugee claims have been adjudicated upon the merits without the holding of an oral hearing at any stage." (Reasons of Beetz J. at p. 237.)

34 The strictures of the remedies for violations of the Bill as outlined supra, require comparison with the emerging trends respecting remedies under the Charter. In Hunter, Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc., [1984] 2 S.C.R. 145 at 710, [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 27 B.L.R. 297, 41 C.R. (3d) 97, 55 A.R. 291, 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 9 C.R.R. 355 (sub nom. Hunter v. Southam Inc.), 11 D.L.R. (4th) 641, 84 D.T.C. 6467, 55 N.R. 241, the Supreme Court of Canada held that certain subsections of the Combines Investigation Act were inconsistent with the provisions of s. 8 of the Charter and "... therefore of no force and effect". In Singh supra, Madame Justice Wilson, in considering the application of the Charter found that subs. 52(1) thereof required "a declaration that s. 71(1) of the Immigration Act is of no force and effect to the extent it is inconsistent with s. 7". (Reasons p. 221) Additionally and pursuant to the broader provisions of s. 24 of the Charter, she ordered that the decision of this Court and the Immigration Appeal Board be set aside and remanded all seven cases "... for a hearing on the merits by the Board in accordance with the principles of fundamental justice articulated above". (Reasons p. 222)

35 It is interesting in the light of the above discussion to consider the formal pronouncement of the Supreme Court of Canada in the Singh case. After allowing the appeals, setting aside the

decisions of the Court and the Immigration Appeal Board, and remanding the refugee claims to the Board for a hearing on the merits in accordance with the principles of natural justice, the Court further ordered, inter alia:

> The appellants are entitled to a declaration that s. 71(1) of the Immigration Act, 1976 in its present form *has no application* to them.

(Emphasis added) It would be presumptuous of me to attempt to explain or to account for the differences in the terms used ("inoperative"; "of no force and effect"; and "has no application") and, in any event, quite unnecessary in the view I take of this matter. Since it has been consistently stated, as observed supra, that non-compliance with the Bill requires a declaration that the impugned provisions in legislation are inoperative, I propose to follow that approach in prescribing the appropriate remedy in the case at Bar.

The Appropriate Remedy in the Instant Case

36 In my view, the appropriate remedy here is a declaration in favour of MacBain that the provisions of subss. (1) and (5) of s. 39 of the Act are inoperative insofar as the complaint filed against him by the complainant Kristina Potapczyk is concerned. In his action for declaratory relief, MacBain also asked for a declaration that all of Pt. III of the Act is inoperative. Part III contains ss. 31 to 48 inclusive. I am not persuaded that it is necessary or proper to frame this declaration so broadly, having regard to the view expressed by Beetz J. in Singh, at pp. 235 and 236 that:

> There is probably more than one way to remedy the constitutional shortcomings of the Immigration Act, 1976. But is is not the function of this Court to re-write the Act. Nor is it within its power. If the Constitution requires, this and other courts can do some relatively crude surgery on deficient legislative provisions, but not plastic or re-constructive surgery.

37 For the reasons given supra, my conclusion is that the offensive portion of the statutory scheme on these facts, is the appointment of the Tribunal by the Commission since the Commission is also the prosecutor. This undesirable situation is exacerbated by the addition circumstance in this case that the Commission made the appointment of the Tribunal after it had concluded, pursuant to subs. 36(3) that the complaint in issue had been substantiated. As noted earlier, the Commission's original finding that Potapczyk's complaint against MacBain was substantiated, is not properly in question in these proceedings and therefore remains unimpeached. A declaration that subss. (1) and (5) of s. 39 are inoperative insofar as the complaint at Bar is concerned will, in my view, remedy the constitutional shortcomings of the statute *in the circumstances of this case.*

38 It was submitted by counsel for the complainant that a finding of breach of the provisions of subs. 2(e) of the Bill may result in the complainant being deprived of any remedy whatsoever, thereby jeopardizing her right to have the complaint adjudicated upon. The remedy which I propose does not produce such a result. It leaves the complainant with a finding of "substantiation" by

238

the Commission pursuant to subs. 36(3) of the Act. The matter of remedying the shortcomings in subss. (1) and (5) of s. 39 are matters which should be addressed to Parliament. In fashioning this remedy, I have attempted to restrict the necessary "surgery" to a bare minimum, bearing in mind that it is the function of Parliament, and not the Courts to legislate (except in a case such as this where the provisions of a quasi-constitutional instrument are infringed). On the other side of the ledger, MacBain might complain that while the effect of this decision is to nullify the order made against him by the Tribunal, he is left, nevertheless, with a finding by the Commission that the complaint against him has been substantiated. In answer to such a possible complaint, I would repeat that a s. 28 application could have been made attacking that finding by the Commission but no such proceedings were instituted. Furthermore, I think it unnecessary to declare subs. (3) of s. 36 inoperative in order to impeach that portion of the scheme which offends subs. 2(e) of the Bill on these facts.

39 Likewise, I am cognizant of the fact that this decision may possibly have some effect on other complaints before the Commission where Tribunals have been appointed or are about to be appointed under the present scheme. This consideration fortifies my view that declarations under the Bill should be strictly confined to those portions of otherwise valid leglislation which must necessarily be declared inoperative in order to dispose of the issues in a particular case.

The Doctrine of Necessity

40 As a final matter, I think it necessary to consider whether or not the doctrine of necessity applies so as to prevent the application of the Bill to the situation in this case. This principle is succinctly stated in the memorandum filed by counsel for the complainant as follows (memorandum of respondent Kristina Potapczyk, para. 35, pp. 7-8):

> ... where every eligible member of the tribunal is subject to the same disqualification for bias (that is, the very act of selection), the law must be carried out notwithstanding that potential disqualification. If the Appellant's position were accepted, there would be no person on the panel of prospective tribunal members who could escape disqualification for reasonable apprehension of bias.

41 In support of this submission the decision of this Court in the case of Caccamo v. Min. of Manpower & Immigration, supra, 75 D.L.R. (3d) 720 at 725 and 726, is cited. The Caccamo case was decided on two grounds; firstly, on the doctrine of necessity, and secondly, on the basis that a reasonable apprehension of bias did not exist on the facts of that case. Earlier in these reasons, I distinguished Caccamo from the present case on the issue of reasonable apprehension of bias. I now propose to discuss that case from the perspective of the doctrine of necessity. My initial comment is to the effect that I have considerable doubt that the Caccamo case is persuasive or determinative in light of the decision in Singh. I so conclude because of the characterization of the Bill as a quasi-constitutional instrument by Mr. Justice Beetz in his reasons in Singh at p. 224,

quoted supra, and because of his further view expressed at p. 239 of his reasons in Singh that the Drybones principle is still valid. In Drybones the majority of the Court held that the opening words of s. 2 of the Bill afford the clearest indication that the section is intended to mean and does mean that if a law of Canada cannot be "... sensibly construed and applied" so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized and declared by the Bill, then such law is inoperative "... unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights." [5]

42 Given this clear and unambiguous statement as to the paramountcy of rights conferred by the Bill, I doubt the applicability of the Caccamo case in view of the evolution of our jurisprudence since that case was decided.

43 In any event, the Supreme Court of Canada has recently considered the question of necessity in Reference re Language Rights under s. 23 of Manitoba Act, 1870, and s. 133 of Constitution Act, 1867, [1985] 4 W.W.R. 385, 35 Man. R. (2d) 83 (sub nom. Man. Language Rights Reference), 19 D.L.R. (4th) 1, 59 N.R. 321. Section 23 of the Manitoba Act, 1870, R.S.C. 1970, App. II, No. 8, provided that Acts of the Legislature were to be printed and published in both English and French. After Manitoba entered Confederation the statutes of Manitoba were not printed or published in French. In 1890, the Official Language Act was enacted by the Manitoba Legislature, S.M. 1890, c. 14. It made English the official language of Manitoba and provided that Manitoba statutes need only be printed and published in English. In 1979 that statute was declared unconstitutional by the Supreme Court of Canada. The Manitoba Legislature then passed an Act respecting the operation of s. 23 of the "Manitoba Act In Regard to Statutes". That Act was an attempt to circumvent the effect of the 1979 ruling of the Supreme Court of Canada. It left English as the dominant language. The question of whether s. 23 of the Manitoba Act, 1870 was mandatory and, if so, the effect on the validity of the statutes of Manitoba, was referred to the Supreme Court of Canada. The Court held that said s. 23 was mandatory and that all of the statutes of Manitoba since Manitoba entered Confederation, which were not enacted, printed and published in both English and French were invalid. To avoid the resulting disastrous legal vacuum in that Province the Court deemed the statutes temporarily valid for the minimum period of time necessary for their translation, re-enactment, printing and publication. To achieve this result, the Court invoked the "State Necessity Doctrine". After reviewing a number of analogous situations in different countries, the Court, at p. 368, stated the doctrine in the context of the Manitoba language situation as follows:

> A Court may temporarily treat as valid and effective laws which are constitutionally flawed in order to preserve the Rule of Law. ... under conditions of emergency, when it is impossible to comply with the Constitution, the Court may allow the government a temporary reprieve from such compliance in order to preserve society, and maintain, as nearly as possible, normal conditions. The overriding concern is the protection of the Rule of Law.

44 Addressing the question as to whether the decision in the Manitoba Language Rights Reference has any application to the situation in the case at Bar, I would observe that the situation here is dramatically different from that in the Manitoba case. As stated by the Court at p. 372 of that case:

> ... the Province of Manitoba is in a state of emergency: all of the Acts of the Legislature of Manitoba, purportedly repealed, spent and current (with the exception of those recent laws which have been enacted, printed and published in both languages), are and always have been invalid and of no force or effect, and the legislature is unable to immediately re-enact these unilingual laws in both languages.

In the case at Bar, there will be simply a declaration that a portion of the scheme of this particular Act is inoperative insofar as its application to this appellant/applicant is concerned. This is a far cry from the "legal chaos" referred to by the Supreme Court of Canada in the Manitoba case. The proposed declaration at Bar will affect only a portion of one statute. It will affect only the appellant/applicant in this case and possibly several other caases where the fact situation is identical to this case. It wiill not, in my view, affect the validity of the decisions already made by Tribunals appointed under the present scheme. I say this because of the comments at p. 373 [N.R.] in the Manitoba Language Reference where it was said:

> Rights, obligations and any other effects which have arisen under purportedly repealed or spent laws by virtue of reliance on acts of public officials, or on the assumed legal validity of public or private bodies corporate are enforceable and forever beyond challenge under the de facto doctrine. The same is true of those rights, obligations and other effects which have arisen under purportedly repealed or spent laws and are saved by doctrines such as res judicata and mistake of law.

45 For these reasons I conclude that the doctrine of necessity as employed in the Caccamo case cannot be applied to the factual situation here so as to deprive this appellant/applicant of the relief to which he is otherwise entitled under the Bill of Rights.

Conclusion

46 For all of the foregoing reasons, I conclude that the three proceedings in issue should be disposed of as follows:

47 (a) File A-703-84 — Since the subject-matter of this proceeding has become academic, the appeal should be dismissed. I would make no order as to costs in this appeal.

48 (b) File A-996-84 — I would allow the s. 28 application and set aside the decision made by the respondents Lederman, Robson and Cumming, acting as a Human Rights Tribunal appointed under s. 39 of the Act.

49 (c) File A-704-84 — I would allow the appeal with costs both here and in the Trial Division and make a Declaration that the provisions of subss. (1) and (5) of s. 39 of the Canadian Human Rights Act are inoperative insofar as the complaint filed against the appellant/applicant Alistair MacBain by the respondent Kristina Potapczyk is concerned.

Appeal against dismissal of application for prohibition dismissed. Appeal from dismissal of action for a declaration allowed and ss. 39(1) and (5) of the Canadian Human Rights Act declared inoperative in respect of the proceedings before the Court. Decision of Canadian Human Rights Tribunal set aside.

Footnotes

1 2. Committee for Justice & Liberty v. National Energy Bd., [1978] 1 S.C.R. 369 at 394-95, 68 D.L.R. (3d) 716, 9 N.R. 115 (S.C.C.).

2 3. The only exception noted by Chief Justice Deschênes in his study on the independent Judicial Administration of the Courts — September 1981, are the Yukon, Nova Scotia and Newfoundland.

3 4. Compare: Re W.D. Latimer Co. and Bray; Re Onuska and Bray (1974), 6 O.R. (2d) 129 at 137, 52 D.L.R. (3d) 161 per Dubin J.A.

4 5. See for example: Hogan v. R., [1975] 2 S.C.R. 574, 9 N.S.R. (2d) 145, 26 C.R.N.S. 207, 18 C.C.C. (2d) 65, 2 N.R. 343 (S.C.C.); A.G. Can. v. Canard, [1976] 1 S.C.R. 170, [1975] 3 W.W.R. 1, 52 D.L.R. (3d) 548, 4 N.R. 91 (S.C.C.); R. v. Burnshine, [1975] 1 S.C.R. 693, [1974] 4 W.W.R. 94, 25 C.R.N.S. 270, 15 C.C.C. (2d) 505, 44 D.L.R. (3d) 504, 2 N.R. 53 (S.C.C.); A.G. Can. v. Lavell, [1974] S.C.R. 1349, 23 C.R.N.S. 197, 11 R.F.L. (2d) 333, 38 D.L.R. (3d) 481.

5 6. This summary of the ratio in Drybones is taken from the headnote of the report. The full text is to be found in the reasons of Ritchie J. at p. 294 which have been reproduced earlier in these reasons.

2015 FC 102, 2015 CF 102
Federal Court

Nguesso c. Canada (Ministre de la Citoyenneté et de l'Immigration)

2015 CarswellNat 3285, 2015 CarswellNat 3286, 2015 FC 102, 2015 CF 102, 257 A.C.W.S. (3d) 672, 474 F.T.R. 217

Wilfrid Nguesso, Applicant and The Minister of Citizenship and Immigration, Respondent

Marie-Josée Bédard J.

Heard: January 14, 2015
Judgment: January 26, 2015
Docket: IMM-1144-14

Counsel: Johanne Doyon, pour le demandeur
Normand Lemyre, Lyne Prince, pour le défendeur

***Marie-Josée Bédard J.*:**

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

1 The current proceeding deals with an application for judicial review of a decision dated December 20, 2013, by Constance Terrier (the officer or Ms. Terrier), immigration officer in the Immigration Section at the Canadian Embassy in Paris. In her decision, the officer declared the applicant inadmissible on grounds of organized criminality and rejected his application for permanent residence in the family class.

2 Before the Court are three motions that were heard in the case management of this proceeding. [1] These motions were filed following numerous disagreements between the parties with respect to which documents should be included in the certified tribunal record (CTR) filed under Rule 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [Immigration Rules] and the scope of the right to cross-examine Ms. Terrier on her affidavits.

I. The context of the application for judicial review

A. The processing of the permanent residence application

3 The applicant is a citizen of the Republic of the Congo but lives in France and holds a residence card there that is valid until December 31, 2022. He is married to a Canadian citizen and is the father of six children, all of whom are Canadian citizens. On December 20, 2006, he filed an application for permanent residence as a member of the family class at the Canadian Embassy in Paris.

4 The processing of the application became long and drawn-out, and on May 22, 2012, the applicant applied for a *mandamus* order from this Court (Docket IMM-4924-12) to require the Embassy to render a decision. That dispute was settled out of court on July 3, 2012, on the basis of a timetable proposed by the respondent.

5 Thus, in July 2012, the applicant received a letter inviting him to attend an interview scheduled for September 19, 2012. Following a request by counsel representing the applicant at the time, a new invitation letter was sent with the interview date having been amended to September 25, 2012.

6 On September 5, 2012, the applicant received a "procedural fairness letter" from the Embassy's Immigration Section notifying him that there existed a number concerns regarding his admissibility under paragraph 37(1)(*a)* of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

7 The interview was held on September 25, 2012, and was conducted by the officer. On September 28, 2012, the Embassy's Immigration Section sent the applicant a letter containing a detailed list of additional documents and information to be provided, requesting that this be submitted within 90 days.

8 The applicant's current counsel, Johanne Doyon, began working on this case in January 2013. On February 1, 2013, she asked for additional time to provide the documents requested in the letter dated September 28, 2012. She further requested disclosure of the "open, convergent and consistent documentation" referred to in the procedural fairness letter of September 5, 2012. The officer granted the applicant additional time to submit the requested documentation, but she refused the disclosure request on the grounds that [TRANSLATION] "at this stage of the process, there is no requirement to provide all of the sources or copies of the documents consulted, given that your client has been provided with a reasonable opportunity to review the information which we intend to use as a basis for our decision". In addition, on February 27, 2013, the officer provided her interview notes to the applicant's counsel.

9 On April 30, 2013, the applicant, by way of Ms. Doyon, filed a complaint with the Director of the Embassy's Immigration Section alleging a breach of procedural fairness by reason of the officer's refusal to disclose the documents and information requested by him. The applicant also invoked bad faith on the part of the officer in the way she had conducted her examination. In the same letter, Ms. Doyon provided some of the information and documentation that had been requested in letter of September 28, 2012. The complaint was dismissed by the Immigration

Program Manager in a letter dated December 6, 2013, and Ms. Terrier remained the immigration officer assigned to applicant's file.

B. The decision under review

10 In her decision, the officer declared the applicant inadmissible to Canada on grounds of organized criminality pursuant to paragraph 37(1)(*a)* of the IRPA. She found that she had reasonable grounds to believe that the applicant was a member of a criminal group through his family connections (the applicant is the nephew and adopted son of the President of the Republic of the Congo), that he had been involved in organized criminal activity that included embezzlement and misappropriation of funds, misappropriation of company property and money laundering, and that he had participated in opaque financial arrangements for his own personal enrichment at the expense of corporate entities.

11 In her decision, the officer also noted that she had consulted information provided by the applicant, publicly accessible information, and information provided by the Canada Border Services Agency (CBSA) and by the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), and that this information had raised doubts about the applicant's advancement in the professional world and the origins of his personal enrichment. She indicated that the documents provided by the applicant in response to her request were incomplete and did not dispel her doubts; on the contrary, certain documents had actually confirmed those doubts. She then set out the factors underlying her decision.

C. The application for leave and judicial review

12 On February 25, 2014, the applicant filed an application for leave and judicial review of that decision. The application was allowed on August 14, 2014, by Justice Mosley.

13 In support of his judicial review application, the applicant raises a number of grounds. He argues, among other things, that the decision issued by the officer is tainted by errors in law, that it is unreasonable and that the process leading to the decision was marred by breaches of the rules of procedural fairness. In his allegation with respect to procedural fairness, the applicant argues in his memorandum that the officer failed to first disclose her real allegations against him and refused to disclose the documents and sources of information on which she based her allegations, which hindered his ability to prepare for and respond adequately to the questions at the interview and to the inadmissibility allegations. He further submits that the officer conducted the interview in an improper and unfair manner and that she based her decision on inadmissibility grounds that were different than those that were cited in the fairness letter of September 5, 2012.

14 In the affidavit he submitted in support of his application for leave and judicial review, the applicant placed much emphasis on the manner in which the officer conducted the interview. More specifically, he claims that during the interview the officer repeatedly used or made reference to

documents or information that had not been previously disclosed to him and that she had conducted the interview in an inappropriate manner. The applicant contends that the questions the officer asked him and the manner in which they were asked evince prejudice, insinuations and negative comments for which there was no basis in the evidence. The applicant further alleges that the officer's interview notes reveal multiple braches of procedural fairness and cast doubt upon the impartiality of the process.

D. The order granting leave and timetable

15 On August 14, 2014, Justice Mosley allowed the application for leave and established a timetable which was later amended at the request of the parties.

E. First motion for the complete disclosure of CTR

16 On August 25, 2014, the Immigration Section of the Embassy in Paris sent the CTR to the applicant. On September 15, 2014, the applicant filed a first motion pursuant to Rule 17 of the Immigration Rules for the complete disclosure of the CTR. The applicant first argued that numerous documents contained in the CTR had not been disclosed to him in the process of reviewing his application. He further argued that the CTR was incomplete and that the following specific documents of which he sought disclosure were missing:

- Communications between the Immigration Section at the Embassy in Paris and CBSA regarding the applicant and the processing of his file;
- Communications between the Immigration Section at the Embassy in Paris and/or Citizenship and Immigration (CIC) and/or CBSA (including its Organized Crime Section) with FINTRAC and any requests received by it regarding the applicant;
- Communications and requests between the Immigration Section at the Embassy in Paris and/or CIC and/or CBSA (including its Organized Crime Section) with Interpol regarding the applicant;
- Communications and requests between the Immigration Section at the Embassy in Paris and/or CIC and/or CBSA (including its Organized Crime Section) with the ICES regarding the applicant;
- All of the requests made to courts in France regarding the investigation in France of a complaint against the applicant's family and the responses received;
- Handwritten notes, summaries, memoranda and/or exchanges related to and following the CBSA recommendation dated November 1, 2012, to the effect that there were no reasonable grounds on which to declare inadmissibility under section 37 of the IRPA, if applicable.

17 In his arguments, the applicant maintained that these documents must exist and that these were among the documents and materials considered in the decision-making process that led up to the decision under review. The applicant further argued that if some of these documents were not used by the officer in rendering her decision, they were nonetheless relevant as they were necessary for him to be able to fully exercise his right to judicial review. More specifically, the applicant maintained that the documents in question were necessary in order for him to be able to prove his allegations of breaches of procedural fairness and bias.

18 In response to the motion, the respondent submitted an affidavit sworn by Ms. Terrier on September 19, 2014. In her affidavit, Ms. Terrier stated that she had supervised the preparation of the CTR. She further stated that the CTR contained all of the relevant documents she had consulted when making her decision and that were in the possession or control of the Embassy's Immigration Section at the time she made her decision. At paragraph 7 of her affidavit, Ms. Terrier declared in a more specific manner that the following documents were contained in the CTR:

- All of her communications with CBSA and CIC, including those related to information received from FINTRAC and Interpol;
- All communications between her colleagues from the Immigration Section of the Canadian Embassy in Paris and CBSA and CIC that had been communicated to her, including those related to information received from FINTRAC and Interpol;
- All of her documentary sources;
- All of her notes.

19 Ms. Terrier's affidavit also describes communications she claims to have had with investigating judges. She stated that on April 8, 2011, she contacted the senior investigative judge in Paris regarding an investigation into the ill-gotten gains acquired by certain African presidents and their families. She added that the senior investigative judge told her that the judge in charge of the matter was bound by professional privilege, but that the investigation was progressing and that he was hoping to see it concluded in early 2012. Ms. Terrier indicated that the senior investigative judge had authorized her to contact him again about the matter. She further indicated that on May 15, 2013, she contacted the investigative judge tasked with investigating the case, but that no information was disclosed to her due to the fact that investigations of this nature were protected by professional privilege.

20 Furthermore, she stated, at paragraph 12 of her affidavit, that there were no documents missing from the CTR that had been determinative of her decision.

21 The motion was heard by Justice Martineau on September 23, 2014. I listened to a recording of the hearing. During the hearing, counsel for the applicant waived cross-examination of Ms.

248 Terrier about her affidavit. The parties subsequently presented their respective positions with regard to the notion of relevance within the meaning of Rule 17 of the Immigration Rules and more specifically the documents of which the applicant sought disclosure. The respondent argued that the documents in question were either non-existent or were not relevant. Justice Martineau dismissed the applicant's motion in an order dated September 24, 2014. The relevant excerpt from his order reads as follows:

> [TRANSLATION]
>
> **CONSIDERING** that "all papers relevant to the matter that are in the possession or control of the tribunal" were included in the Tribunal Record (TR), as stated in the September 19, 2014, affidavit of immigration officer Constance Terrier, who issued the impugned decision in this case;
>
> **CONSIDERING** that it remains open to the applicant to submit in his supplementary memorandum or to argue at the hearing that the immigration officer's failure to disclose, before the impugned decision was issued, any document or information mentioned at paragraph 3 of the notice of motion or in Ms. Terrier's affidavit raises a reasonable apprehension of bias or resulted in the applicant being denied the opportunity to a hearing or to make representations or to produce helpful evidence with a direct link to the impugned decision;

22 The matter subsequently pursued its course and the respondent filed a second affidavit sworn by Ms. Terrier on September 24, 2014, in support of its position on the merits of the application for judicial review. In that affidavit, Ms. Terrier recounts the various steps in the processing of the applicant's permanent residence application. Ms. Terrier was examined about her affidavit dated October 7 and 8, 2014.

23 During this examination, the respondent objected to Ms. Terrier being examined about her affidavit from September 19, 2014. The respondent also objected to a number of questions directed at Ms. Terrier and to several of the undertakings that were asked of her.

II. The October 14, 2014, motion subsequently amended on October 16, 2014

24 On October 16, 2014, the applicant filed a motion to amend the timetable on the ground that the objections raised by the respondent during the examination of Ms. Terrier and the delays caused by the need to dispose of those objections, required that the timetable ordered by Justice Mosley be amended. The motion also identified a disagreement between the parties as to the length of the supplementary memoranda.

25 The timetable is no longer at issue due to the fact that at the hearing the parties and I agreed that a new timetable would be established after the issuance of this order.

26 Accordingly, the sole remaining issue arising from this motion is that relating to the length of the supplementary memoranda.

27 The respondent is seeking leave to file a supplementary memorandum not to exceed 60 pages in length that would completely replace the memorandum filed by it at the application for leave stage.

28 Rule 70(4) of the *Federal Courts Rules*, SOR/98-106 [Rules] applies to immigration proceedings by way of Rule 4(1) of the Immigration Rules. Rule 70(4) of the Rules provides that a memorandum cannot exceed thirty pages unless otherwise ordered by the Court.

29 In *Canada v General Electric Capital Canada Inc*, 2010 FCA 92 at para 5, [2010] FCJ No 461, Justice Stratas insisted on the importance of concision in the preparation of memoranda while recognizing that in certain circumstances, leave should be granted to the parties to file memoranda in excess of thirty pages and that the need for procedural fairness is a paramount principle to be applied by the Court.

30 In this case, I am of the view that it is appropriate to grant leave to each party to file a supplementary memorandum that would replace the memorandum each of them filed at the application for leave stage and which would not be in excess of 60 pages. This matter raises a number of issues, some of which involve an allegation of bias and several aspects of procedural fairness. In addition, the processing of this file has extended over a long period and entailed the analysis of a large volume of documents. In short, the factual background is lengthy and the judicial review application raises a number of issues.

31 Therefore, I find that, given the specific circumstances of this case, the respondent's application is reasonable and it would be difficult for the parties to provide effective explanations of their respective arguments in a thirty-page memorandum. I am also of the view that the Court would benefit from the parties being provided with an opportunity to develop their arguments more fully in their respective memoranda.

III. The October 29, 2014, and November 20, 2014, motions

32 Following Ms. Terrier's examination, the applicant filed a motion dated October 29, 2014. That motion was followed by a second motion dated November 20, 2014. Some of the issues raised in each of the motions are connected and/or overlap.

A. Applicant's position

(1) The October 29, 2014 motion

250

33 The applicant filed a motion in which he sought five different findings. First, the motion sought a ruling on the objections raised by the respondent during the cross-examination of Ms. Terrier about her affidavit of September 24, 2014. At the time the motion was heard, 37 objections remained unresolved.

34 Second, the applicant sought leave to cross-examine Ms. Terrier about her affidavit of September 19, 2014.

35 Third, the applicant sought leave to cross-examine Susan Bradley about two affidavits sworn by her on April 25, and 28, 2014, in support of the memorandum filed by the respondent at the application for leave stage.

36 Fourth, the motion sought an order requiring the respondent to add documents to the CTR. The documents in question are in the possession of the applicant but were not included in the CTR and differ from the documents whose disclosure was sought in the motion presented before Justice Martineau.

37 Fifth, the motion sought an order requiring the respondent to add other documents to the CTR. Those documents were identified in the requests for undertaking made during Ms. Terrier's examination.

38 The applicant submits that he is entitled to cross-examine Ms. Terrier about the affidavit sworn by her on September 19, 2014, and that the Court should grant leave to re-examine her to that end. The applicant further submits that a number of the questions to which the respondent objected were in regard to the affidavit sworn by Ms. Terrier on September 24, 2014, and were relevant.

39 With respect to principles, both parties recognize that the fundamental principles that govern the right to cross-examine the deponent of an affidavit were set out by Justice Hugessen in *Merck Frosst Canada Inc v Canada (Minister of Health)*, [1997] FCJ No 1847 at para 7, 146 FTR 249 [*Merck Frosst*].

40 However, their positions differ with respect to the actual scope of those principles and others that have been recognized in certain decisions.

41 The applicant begins by arguing that in *Merck Frosst*, the Court acknowledged that the cross-examination of the deponent of an affidavit may centre on the facts sworn by the deponent in that affidavit or in any other affidavit filed in the proceeding. In support of his argument, the applicant also cites *Sam Levy & Associés v Lafontaine* (*sub nom Sam Lévy & Associés Inc. v Canada (Superintendent of Bankruptcy)*), 2005 FC 621 at para 10, [2005] FCJ No 768 [*Sam Levy*] and *Eli Lilly and Co v Novopharm Ltd*, [1996] FCJ No 465 at para 2, 67 CPR (3d) 362 [*Eli Lilly*], in which the Court quoted Justice Hugessen in *Merck Frosst*.

42 The applicant submits that in *Merck Frosst*, the Court also recognized the legal relevance of a question where it concerns a fact whose existence or non-existence can assist in determining whether or not the remedy sought by an applicant in an application for judicial review can be granted. Accordingly, the applicant views this as an opportunity to question Ms. Terrier about facts that he feels were omitted in her affidavit of September 24, 2014, but that are relevant to disposing of the grounds for his judicial review application.

43 The applicant further submits that the case law recognizes that the cross-examination on an affidavit may extend beyond the facts set forth by the deponent so long as the questions relate to subjects contained in the affidavit (*Maheu v IMS Health Canada*, 2003 FCT 647 at para 5, [2003] FCJ No 902 [*Maheu*]), to relevant matters arising from the affidavit itself (*Sivak v Canada (Citizenship and Immigration)*, 2011 FC 402 at para 13, [2011] FCJ No 513 [*Sivak*], or where they constitute corollary questions that arise from answers provided by the affiant (*Royal Bank of Scotland PLC v Golden Trinity (The)*, [2000] FCJ No 896, [2000] 4 FC 211). The applicant also relied on *Stella Jones Inc. v Mariana Maritime SA*, [2000] FCJ No 2033, (sub nom *Stella-Jones Inc. v Hawknet Ltd*) 2000 CarswellNat 3006 (FCA) [*Stella Jones*], *Stanfield v Canada (Minister of National Revenue)*, 2004 FC 584 at para 28, [2004] FCJ No 719 and *AgustaWestland International Ltd. v Canada (Minister of Public Works and Government Services)*, 2005 FC 627 at para 12, [2005] FCJ No 805 [*AgustaWestland International Ltd*].

44 The applicant further contends that questions that exceed the scope of the facts set out in the affidavit may be asked where they involve the affiant's credibility or where they concern an allegation of bias on the part of the decision-maker when such issues are raised in the judicial review application (*Sivak*, at paras 15-16).

45 A final element relied upon by the applicant is the contention that where the deponent is an agent or representative of the respondent, he or she may be required to inform themselves in order to respond to questions raised on examination, based on *Maheu*, at para 9. The applicant argues that in his permanent residence application file, Ms. Terrier acted as an agent for the Embassy's Immigration Section.

46 The applicant further suggests that the scope of Justice Martineau's order does not preclude him from cross-examining Ms. Terrier about her affidavit of September 19, 2014, for a number of reasons. First, he argues that Justice Martineau's order is an interim order that did not dispose of the CTR definitively. Second, he contends that Justice Mosley's order provides him with the right to cross-examine the affiants, with respect to all affidavits filed in the record. He further cites, as I noted earlier, his right to examine the deponent of any other affidavit produced in the proceeding.

47 The applicant further submits that all of the objections raised by the respondent to the questions posed to Ms. Terrier should be dismissed in their entirety because the questions were relevant to the two affidavits sworn by Ms. Terrier. In his view, all of the questions were within

252

the parameters developed in the case law. The applicant argues that the questions to which the respondent objected were all admissible and relevant questions as they dealt with:

- the September 19 affidavit with respect to the composition of the CTR; or
- the affidavit of September 24, 2014, which dealt with the history of the applicant's permanent residence application; or
- Ms. Terrier's credibility; or
- Facts she had omitted from her affidavit of September 24, 2014, and which are relevant to the grounds of the judicial review application and more specifically those related to breaches of procedural fairness and to reasonable apprehension of bias; or
- information or documents that pertain to Ms. Terrier's obligation to inform herself.

48 I will address each of the objections in detail later in my analysis.

49 The applicant is also asking the Court for leave to cross-examine Ms. Bradley about the affidavits sworn by her on April 25 and 28, 2014. Ms. Bradley is a legal assistant at the Department of Justice and her affidavit was filed by the respondent in support of its memorandum filed at the application for leave stage. In her affidavit of April 25, 2014, Ms. Bradley stated that Kathleen Knox-Dauthuile of the Immigration Section at the Canadian Embassy in Paris had consulted the applicant's file and assured the respondent that Ms. Terrier had at her disposal a certain number of documents that she listed when she issued the decision under judicial review. Ms. Bradley attached the documents in question to her affidavit. The purpose of the second affidavit sworn by Ms. Bradley on April 28, 2014, was to add two documents to those listed in her initial affidavit.

50 The applicant submits that Ms. Bradley's affidavit was filed by the respondent in support of its memorandum on the merits of the judicial review application and that it clearly fell within the scope of Justice Mosley's order.

51 The applicant further submits that a number of documents were missing from the CTR, some of which had been addressed during the cross-examination of Ms. Terrier. He is asking that the Court require the respondent to add these documents to the CTR. The missing documents are listed in the affidavit sworn by Ms. Doyon's assistant.

52 The applicant argues that the criterion that must be considered for determining which documents should be included in the CTR under Rule 17 of the Immigration Rules is that of relevance.

53 The applicant argues at the outset that the principles that have been developed with respect to the concept of relevance within the meaning of Rules 317 and 318 of the Rules also apply to the meaning to be assigned to the concept of relevance set out in paragraph 17(*b*) of the

Immigration Rules (*Douze v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1086 at para 19, [2010] FCJ No 1383 [*Douze*]. The applicant submits that the tribunal has an obligation to produce a complete record that must include all documents relevant to the proceeding that are in its possession or control.

54 The applicant contends that all documentation that was available to the decision-maker at the time the decision was made is presumed to be relevant and must be included in the CTR (*Jolivet v Canada (Minister of Justice)*, 2011 FC 806 at para 27, [2011] FCJ No 1094 [*Jolivet*]; *Kamel v Canada (Attorney General)*, 2006 FC 676 at para 13, [2006] FCJ No 876 [*Kamel*]).

55 Further, the applicant contends that documentation that was not before the decisionmaker but which ought to have been should be included in the CTR (*Kamel*, para 12). The applicant further submits that the CTR is not limited to the documents on which the decisionmaker based his or her decision. It should also include documentation that is relevant in making a determination on the grounds related to procedural fairness and bias he raised in the judicial review application. In this regard, he relies on *Canada (Human Rights Commission) v Pathak*, [1995] 2 FC 455 at para 10, [1995] FCJ No 555 [*Pathak*], in which the Federal Court of Appeal indicated that a document is relevant and must be transmitted by the tribunal if it may affect the decision that the Court will make on the judicial review application. The applicant also relies on the decision of the Federal Court of Appeal in *Maax Bath Inc v Almag Aluminium Inc*, 2009 FCA 204 at para 9, [2009] FCJ No 725 [*Maax Bath*]. The applicant submits that it is recognized that documents in the possession of a tribunal may be relevant and should be communicated, even if such documentation is not part of the tribunal record, if it tends to demonstrate bias on the part of a decision-maker or institution (*Majeed v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 908 (QL) at para 3, 68 FTR 75).

(2) The November 20, 2014, motion

56 In addition to the proceedings initiated here, the applicant filed access requests under the *Access to Information Act*, RSC 1985, c A-1, with CBSA and CIC. The applicant received the documents sent to him by CBSA on or about October 20, 2014, which was after the cross-examination of Ms. Terrier. The applicant argues that a number of the documents sent by CBSA had not been included in the CTR when they should have been. The applicant further argues that some of these documents contradict answers given by Ms. Terrier during her cross-examination.

57 The applicant also submits that this realization led him to review the documents that CIC had sent him on November 15, 2013, and June 5, 2014, upon which he noticed that some of the documentation sent to him by CIC should have been included in the CTR.

58 In his motion, the applicant first seeks a declaration by the Court noting the incomplete nature of the CTR and the respondent's failure to include documents of critical importance therein. In

254

addition, the applicant is asking the Court to issue an order requiring the respondent to supplement the CTR by adding the documents in question.

59 Second, the applicant is seeking leave to re-examine Ms. Terrier about her two affidavits from September 19 and 24, 2014. In addition, the applicant seeks an order that would allow him to file additional documents and a supplementary affidavit.

60 The applicant filed, by means of the affidavit of Ms. Doyon's assistant, the documents that, in his view, ought to have been filed in the CTR. The documents in issue that were sent to him by CBSA are as follows:

- Constance Terrier's e-mail to Michelle Sinuita (CBSA), August 30, 2012;
- E-mails from Michelle Sinuita (CBSA) and Ms. Terrier, August 10, 2012;
- Email from Michelle Sinuita (CBSA) to Constance Terrier, July 16, 2012;
- Constance Terrier's e-mail to Marie-Claude Beaumier, Me Joubert and Sean McNair (CBSA), July 13, 2012;
- Constance Terrier's e-mail to Marc Gauthier (CBSA), June 14, 2012;
- E-mails between Constance Terrier and Michelle Sinuita (CBSA), July 16, 2012;
- E-mails between Constance Terrier and Marc Gauthier (CBSA), June 22, 2012;
- E-mail from Marc Gauthier (CBSA) to Constance Terrier, June 22, 2012;
- Message sent by Kathleen Knox-Dauthuile from the Canadian Embassy Canada — Paris to CBSA, February 7, 2008;
- E-mails between Connie Reynolds (CBSA) and Luc Piché (Embassy), June 5, 2012;
- E-mails between CBSA employees, August 26 and 27, 2010, and April 13 and 14, 2011;
- Computerized notes from CBSA;
- FINTRAC report from April 5, 2011, regarding the applicant;
- "Case Log Sheet — OCS" signed by Michelle Sinuita (CBSA) November 1, 2012;
- Handwritten notes;
- E-mail from Sean Curran (CBSA) to Marie-Eve Proulx (War Crimes Section), April 6, 2009.

61 The documents from CIC are the following:

- Constance Terrier's e-mail to Vladislav Mijic (Embassy), June 1, 2012;

• Complaint of April 30, 2013, with handwritten annotations.

62 The applicant maintains that these documents are clearly relevant and that they should have been included in the CTR. He adds that these documents show that others were omitted from the CTR, documentation that relates to:

• All of Ms. Terrier's communications with CBSA and/or Section B of the Embassy's Immigration Section;

• The existence of a second, non-disclosed report prepared by FINTRAC about the applicant;

• All of Ms. Terrier's communications with the investigative judge in France and/or those with Section B of the Embassy's Immigration Section and/or CBSA, where applicable;

• The existence of Ms. Terrier's handwritten notes about the complaint of April 30, 2013, filed by the applicant.

63 The applicant contends that the missing documents show that the CTR was clearly incomplete and that some of these documents contradict a number of the answers given by Ms. Terrier during her cross-examination. The applicant suggests that these circumstances alone are reason enough for the Court to allow him to examine Ms. Terrier about her September 19 affidavit, no matter the scope of Justice Martineau's order. The applicant submits that the discovery of these documents constitutes a new development that calls for the issue of the completeness of the CTR to be re-examined and for the Court to allow Ms. Terrier to be re-examined about her affidavit of September 19, 2014. The applicant further submits that a number of the documents discovered are linked to the objections raised by the respondent during the examination of Ms. Terrier and should have an impact on the fate of those objections.

64 The applicant argues that in light of the grounds raised in the application for judicial review, and in particular his allegations of breach of procedural fairness and reasonable apprehension of bias, the documents that were not included in the CTR are of critical importance to the application for judicial review. The applicant alleges that the discovery of the documents after Ms. Terrier's examination shows that the respondent misled both him and the Court by falsely claiming that the CTR was complete.

B. Respondent's position

(1) The October 29, 2014, motion

65 The respondent objects to Ms. Terrier being cross-examined about her affidavit of September 19, 2014. In this regard, the respondent begins by arguing that the affidavit of September 19, 2014, was not filed in support of its position on the merits of the application for judicial review and that in no way does it fall within the scope of Justice Mosley's order.

66 The respondent points out that Ms. Terrier's affidavit of September 19, 2014, was filed in response to applicant's motion in which he claimed that the CTR was incomplete. The respondent argues that during the hearing of the motion before Justice Martineau, the applicant expressly waived cross-examination of Ms. Terrier about her affidavit of September 19, 2014. The respondent submits that the applicant is bound by that waiver and that he cannot suddenly change his mind in mid-proceeding. In support of its position the respondent relies on *Imperial Oil Limited v Lubrizol Corp*, [1998] FCJ No 1089, 1998 CanLII 8152 [*Imperial Oil*]. The respondent further submits that Justice Martineau's order definitively settled the issue as to the completeness of the CTR. There is therefore *res judicata* on this question (*Canada (Attorney General) v Central Cartage Co*, [1987] FCJ No 345, 10 FTR 225, aff'd by [1990] FCJ No 409).

67 The respondent also dismissed the applicant's argument to the effect that he has a right, notwithstanding Justice Martineau's order, to examine Ms. Terrier about all of the affidavits sworn by her during this proceeding. In this regard, the respondent also argues that the authorities on which the applicant relied, in particular *Merck Frosst* and *Sam Levy*, are not relevant because in both cases, there was no issue as to the right to cross-examine the deponent of an affidavit on another affidavit sworn by the same deponent produced in an interlocutory motion of which the Court has disposed.

68 As to the parameters of the applicant's right to cross-examine Ms. Terrier about her affidavit of September 24, 2014, the respondent advocates for a more restrictive view than that of the applicant.

69 The respondent submits that cross-examination on an affidavit in the context of an application for judicial review is much more limited than an examination for discovery in an action. The respondent contends that questions posed to deponents of an affidavit must be limited to questions that involve the credibility of the affiant or facts set out in the affidavit that have a connection to the purposes for which the affidavit was sworn. The respondent relies on *Merck Frosst*, *Lépine v Bank of Nova Scotia*, 2006 FC 1455 at paras 9, 18, [2006] FCJ No 1839, *Autodata Ltd v Autodata Solutions Co*, 2004 FC 1361 at paras 2, 19, [2004] FCJ No 1653 [*Autodata*] and *Imperial Chemical Industries PLC v Apotex*, 1988 CarswellNat 642 (WL) at para 9, 22 CIPR 226 (FCTD) [*Imperial Chemical*]). In this case, the respondent argues that the sole purpose of the affidavit sworn by Ms. Terrier on September 24, 2014, was to address the issue of procedural fairness and set out the steps that were taken to ensure such fairness. The respondent points out that on the merits, the Court should determine whether the applicant had an opportunity to fully participate in the decision-making process by having been apprised of the information that cast him in an unfavourable light and by having had an opportunity to present his point of view (*El Maghraoui v Canada (Minister of Citizenship and Immigration)*, 2013 FC 883 at para 27, [2013] FCJ No 916).

70 The respondent also insisted on the fact that the affidavit of a decision-maker cannot be used to complete or bolster the reasons for the decision that is the subject of the application for

judicial review (*Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 at para 145, [2012] FCJ No 1158; *Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255 at paras 45-47, [2008] FCJ No 1267; *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 40-42, [2013] FCJ No 553). Accordingly, the respondent argues that questions posed during cross-examination on an affidavit cannot be used to get an affiant to testify about the reasons for his or her decision, relying on *Pinto v Canada (Minister of Citizenship and Immigration)*, 2013 FC 349 at paras 8, 10, [2013] FCJ No 368.

71 The respondent further submits that the deponent of an affidavit is not obliged to answer questions of law or to set out the respondent's position on legal questions in issue. Moreover, deponents of an affidavit are not required to inform themselves in order to answer questions to which they do not know the answers (*Ward v Samson Cree Nation*, 2001 FCT 990 at para 3, [2001] FCJ No 1383). The respondent submits that in this case, Ms. Terrier is the officer who handled the applicant's permanent residence application, but that she is not the respondent's agent or representative. As a result, she is under no obligation to answer relevant questions to which she does not know the answers nor is she required to inform herself.

72 The respondent further submits that there is no obligation to give an undertaking on an affidavit and the deponent of an affidavit is under no obligation to produce documents. The respondent relies on *Autodata*, at paras 2, 19.

73 As for the questions to which objections were raised, the respondent submits that they were either:

- related to the affidavit of September 19, 2014; or
- outside the scope of the affidavit of September 24, 2014; or
- not relevant; or
- questions to which Ms. Terrier did not know the answers and about which she had no obligation to inform herself; or
- questions posed to Ms. Terrier dealing with questions of law.

74 As to the undertakings sought, the respondent argues that Ms. Terrier was under no obligation to inform herself or to look for or produce documents that were not in her possession.

75 The respondent also disagrees with the position of the applicant regarding which documents ought to have been included in the CTR. The respondent subscribes to the theory that the CTR need not contain all of the documents in the respondent's possession that related to the applicant's permanent residence application. In its view, the CTR should include only "materials before the Tribunal for the purpose of making its decision" (*Tajgardoon v Canada (Minister of Citizenship*

258

and Immigration), [2001] 1 FC 591 at para 15, [2001] FCJ No 1450). The respondent argues that the case law has defined relevance within the meaning of Rules 317 and 318 of the Rules and Rule 17 of the Immigration Rules as referring to documents that were of critical importance to the decision. The respondent supports its position on the case law establishing that the absence of documents in the CTR may lead to the setting aside of the decision under review if the missing document or documents were "material to the decision" (*Aryaie v Canada (Minister of Citizenship and Immigration)*, 2013 FC 469 at para 26, [2013] FCJ No 498 [*Aryaie*]).

(2) The November 20, 2014, motion

76 The respondent reiterates its position with respect to the documents that must be part of the CTR. It acknowledges that the Court may allow additional documents to be included in the CTR and the parties' records that were not in the possession of the decision-maker at the time he or she made their decision. However, the respondent argues that the filing of additional evidence should only be permitted in very limited circumstances, such as in instances where the documents in question are needed to resolve issues of rules of natural justice or procedural fairness (*Alabadleh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 716 at para 6, [2006] FCJ No 913).

77 In this case, the respondent contends that none of the documents the applicant claims to be "missing" are of critical importance to the grounds raised in support of his application for judicial review. The respondent further submits that the documents in issue are not relevant to determining whether the officer breached rules of procedural fairness or whether there was a reasonable apprehension of bias. Lastly, the respondent submits that a number of these documents had no effect on the impugned decision.

C. Analysis

78 Before making any specific determinations with regard to the various conclusions sought by the applicant in his motions or to the objections raised by the respondent during Ms. Terrier's examination, I will turn to some general principles that have influenced my findings.

(1) The contents of the CTR

79 I will begin by turning to the principles applicable to the contents of a CTR. At the outset, the parties were at odds over the types of documents that are to be included in the CTR pursuant to Rule 17 of the Immigration Rules. The Rule reads as follows:

> 17. Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order:
>
> (a) the decision or order in respect of which the application for judicial review is made and the written reasons given therefor,

(b) all papers relevant to the matter that are in the possession or control of the tribunal,

(c) any affidavits, or other documents filed during any such hearing, and

(d) a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application for judicial review, and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry.

17. Dès réception de l'ordonnance visée à la règle 15, le tribunal administratif constitue un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées consécutivement:

a) la décision, l'ordonnance ou la mesure visée par la demande de contrôle judiciaire, ainsi que les motifs écrits y afférents;

b) tous les documents relevants qui sont en la possession ou sous la garde du tribunal administratif,

c) les affidavits et autres documents déposés lors de l'audition,

d) la transcription, s'il y a lieu, de tout témoignage donné de vive voix à l'audition qui a abouti à la décision, à l'ordonnance, à la mesure ou à la question visée par la demande de contrôle judiciaire, dont il envoie à chacune des parties une copie certifiée conforme par un fonctionnaire compétent et au greffe deux copies de ces documents.

80 The respondent argues that the CTR must contain only those documents that the decisionmaker relied upon when making its decision. It goes so far as to claim that the relevant documents are limited to those of such importance to the decision that their omission from the CTR would be liable to cause the decision to be set aside. With respect, I do not share the respondent's view in this regard and I find the applicant's position to be more in line with the state of the law on this issue.

81 First, the criterion of relevance for the purpose of the contents of the CTR is different from the one to be applied when the Court is called upon to determine whether the failure to include a document in the CTR must result in the impugned decision being set aside.

82 It is true that failing to include certain documents in the CTR may lead to the decision being set aside if the missing documents were "material to the decision" (*Aryaie*, at para 26; see also *Machalikashvili v Canada (Minister of Citizenship and Immigration)*, 2006 FC 622 at para 9, [2006] FCJ 898).

260

83 There is however an important distinction between an administrative tribunal's obligation to produce a full CTR at the disclosure stage and the consequences that may result from a failure to include certain documents in the CTR. A document may very well have been omitted, which would mean that the administrative tribunal failed to meet its obligation under Rule 17 of the Immigration Rules. It does not necessarily follow that this should entail the setting aside of the decision.

84 A document may be relevant within the meaning of Rule 17 without being material to the decision. In a motion for disclosure, the Court may require that an administrative tribunal add to the CTR missing documents deemed to be relevant or allow the applicant to file additional documents and affidavits. It does not mean that it would be useful or appropriate for the Court to determine, at that stage of the proceeding, whether the documents in question are material to the decision. I find that where such an allegation is made, it is for the judge who will dispose of the application for judicial review on the merits to determine whether the documents not included in the CTR were of such importance that a failure to include them must result in the decision being set aside.

85 However, I find that the respondent has a far too narrow vision of the criterion of relevance within the meaning of Rule 17 of the Immigration Rules.

86 Indeed, the concept of relevance in a judicial review is not based solely on elements that influenced the decision of the *administrative tribunal*, but also on elements likely to influence the decision of the *reviewing court*. In *Pathak*, at para 10, the Federal Court of Appeal clearly held that the relevance of a document within the meaning of Rules 317 and 318 of the Rules must be viewed from the perspective of the grounds raised in the applicant's affidavit and application for judicial review, and indicated that a document is relevant where it may have an influence on the Court's decision:

> 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 applicant, 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 applicant.

87 The relevance rule for the purposes of Rules 317 and 318 of the Rules was reiterated in *Maax Bath*, where Justice Trudel indicated that relevance is not assessed solely on the basis of documents that had an influence on the decision of the administrative tribunal:

> 9 The relevant documents for the purposes of Rules 317-318 are those documents that may have affected the decision of the Tribunal or that may affect the decision that this Court will make on the application for judicial review (*Telus*, *supra* at paragraph 5; *Pathak*, *supra* at paragraph 10).

88 First, depending on the grounds for the application for judicial review, relevant documents could include all documents that were before the decision-maker, including for example, those dealing with the processing of the file. In fact, it is for this reason the case law has held that any document that was before the decision-maker, regardless of whether it affected the decision, is presumed to be relevant. For example, in *Access Information Agency Inc v Canada (Transports)*, 2007 FCA 224 at para 7, [2007] FCJ 814, Justice Pelletier, writing for the Federal Court of Appeal, stated the following with regard to Rules 317 and 318 of the Rules:

> It has been consistently held in the case law that the requesting party is entitled to be sent everything that was before the decisionmaker (and that the applicant does not have in its possession) at the time the decision at issue was made: *1185740 Ontario Ltd. v. Canada (Minister of National Revenue)*, [1999] F.C.J. No. 1432 (F.C.A.).
>
> [Emphasis added.]

89 As such, I share the opinion put forth by Justice Harrington in *Jolivet*, at para 27, wherein he states that any document that was before the decision-maker when it made its decision is presumed relevant and it is not for an administrative tribunal whose decision is under review to determine which documents are relevant. That responsibility belongs to the Court

> 27 Objectively speaking, we may be able to state that in this case some of the documents that were available to the Group were totally irrelevant, but it is not up to the Group to make that determination. As the reasons of the Federal Court of Appeal in *Maax Bath*, above, and *Telus Communications Inc. v. Canada (Attorney General)*, 2004 FCA 317, [2004] F.C.J. No. 1587 (QL) indicate, it is up to this Court to determine the relevance of the documentation before the Group. I will begin by saying that if a document was before the Group when it made its decision, this document must be presumed relevant (*Access Information Agency Inc. v. Canada (Transport)*, 2007 FCA 224, [2007] F.C.J. No.184 (QL) at paragraphs 7, 21). These documents should therefore be produced, unless one of the above-mentioned exceptions applies.
>
> [Emphasis added]
>
> [See also *Kamel*, at para 3]

90 Second, it is apparent from the principles set out in *Pathak* and *Maax Bath* that a document that was not before the decision-maker when it made its decision may nonetheless be relevant if it is useful to the assessment of, and connected to, an allegation of breach of procedural fairness or bias. Such a document would then be likely to influence the manner in which the Court will dispose of the application for judicial review.

262

91 In this regard, I cite the words of Justice Teitelbaum in *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities — Gomery Commission)*, 2006 FC 720 at paras 49-50, [2006] FCJ No 917, aff'd 2007 FCA 131, [2001] FCJ No 467:

> 49 According to *Pathak*, above, and subsequent jurisprudence, documents are relevant for the purposes of Rule 317 if they may affect the decision that the reviewing court will make. The relevance of requested materials is determined by having regard to the notice of application, the grounds of review invoked by the applicant, and the nature of judicial review.
>
> 50 It is trite law that in general only materials that were available to the decision-maker at the time of rendering a decision are considered relevant for the purposes of Rule 317. However, the jurisprudence also carves out exceptions to this rule. The Commission's own written representations indicate that, "An exception exists where it is alleged that the federal board breached procedural fairness or committed jurisdictional error": David Sgayias et al., *Federal Practice*, (Toronto: Thomson, 2005) at 695, reproduced in the Commission's Memorandum of Fact and Law (Chrétien, T-2118-05) at para. 24. The above comment is clearly supported by jurisprudence which indicates that materials beyond those before the decision-maker may be considered relevant where it is alleged that the decision-maker breached procedural fairness, or where there is an allegation of a reasonable apprehension of bias on the part of the decision-maker: *Deh Cho First Nations*, above; *Friends of the West*, above; *Telus*, above; *Lindo*, above
>
> [Emphasis added.]

92 In *Canada (Public Sector Integrity Commissioner) v Canada (Attorney General)*, 2014 FCA 270 at para 4, [2014] FCJ No 1167, the Federal Court of Appeal noted the parameters applicable to the right to gain access to documents that were not before the decision-maker when it made the decision:

> To obtain the disclosure of material that was not before the Commissioner when he made his decision, the applicant had to prove that the material sought is relevant within the meaning of Rule 317. First, since as a general rule a judicial review case must be decided on the basis of the information in the decision-maker's possession at the time the decision is made, the applicant had to raise in his request a ground of review that would allow the Court to consider evidence that was not before the Commissioner. These exceptions to the general rule are well settled by the case law. In the present case, the only relevant exception was a breach of procedural fairness, namely, the investigator's purported bias, which had allegedly tainted the entire investigation process. Second, the ground of review had to have a factual basis supported by appropriate evidence, as required (*Access Information Agency Inc. v. Canada (Transports)*, 2007 FCA 224, [2007] F.C.J. No. 814, paragraphs 17 to 21). The second criterion is particularly important because it prevents an applicant raising a breach of

> procedural fairness simply to gain access to material that the applicant could not otherwise access.

93 In short, relevance in a judicial review is not restricted to documents that influenced the administrative tribunal's decision, but extends to all materials that were before the decisionmaker and possibly, depending on the grounds argued in the judicial review application, to documents that were not before the decision-maker but that are relevant to an allegation of breach of procedural fairness, for example.

94 In *Douze*, at para 19, this Court recognized that the case law and principles developed with respect to the notion of relevance for the purposes of Rules 317 and 318 of the Rules are also helpful to defining the concept of relevance under Rule 17 of the Immigration Rules. I share this view.

95 Therefore, in my view, a priori, all of the documents that were available to Ms. Terrier in the processing of the applicant's permanent residence application are presumed to be relevant and ought to have been included in the CTR. The administrative tribunal must keep in mind that the CTR should be prepared in light of the allegations and grounds put forth in the applicant's affidavit and application for judicial review. In this case, it is clear from the applicant's affidavit and application for judicial review that procedural fairness and apprehension of bias are at issue. The applicant's allegations in this regard are sufficiently detailed in his memorandum and in his affidavit for the allegations to be well understood by the respondent. In such a context, I find that the respondent ought to have included in the CTR all documentation that was available to the officer that could shed some light on the manner in which the applicant's file was handled by the officer and that is relevant for the purposes of making a determination on the allegations of breach of procedural fairness and bias, even where the documentation did not affect her decision.

96 In her affidavit of September 19, 2014, Ms. Terrier affirmed having supervised the preparation of the CTR. If the CTR, as it was constituted, was put together based on the respondent's view of what was relevant, I find that it is highly likely that it is not complete.

97 The respondent argues that Justice Martineau's order definitively resolved the issue as to the completeness of the CTR. With respect, I do not agree.

98 In my view, Justice Martineau's order accepted the premise that the tribunal record contained all of the documents that officer Terrier considered to be relevant, but it did not definitively resolve the question as to how complete the CTR was. However, I also agree that in that motion, the applicant had waived his right to cross-examine Ms. Terrier about her affidavit of September 19, 2014, which was clearly about the contents of the CTR. By choosing not to cross-examine Ms. Terrier, the applicant accepted the premise set out in the affidavit that the CTR contained documents that Ms. Terrier had reviewed *that she considered relevant to making her decision*. The subsequent unfolding of events leads me to believe that it would have been preferable for the applicant to have examined Ms. Terrier about her affidavit of September 19, 2014, before the

264

Court ruled on the motion, given that such an examination would have in all likelihood provided some idea as to the parameters that guided Ms. Terrier when she supervised the preparation of the CTR. In addition, such an examination would have possibly helped identify the documents that were not included in the CTR because Ms. Terrier had not deemed them relevant for the purposes of her decision but which may nonetheless be relevant with respect to the allegations of breach of procedural fairness and bias. In any event, the applicant decided not to cross-examine Ms. Terrier about her affidavit and the Court had to dispose of the motion in light of the record as it was constituted. Thus, Justice Martineau did not have to determine the fairness of the notion of relevance that guided officer Terrier when she stated in her affidavit that all of the relevant documentation had been included in the CTR. I find that Justice Martineau was called upon to determine whether the CTR was complete in the specific context of the categories of documents listed in the motion. Having listened to a recording of the hearing, I can confirm that the relevance of each category of documents was debated by the parties. Given this context, I am of the view that the order issued by Justice Martineau definitively settled the issue of the relevance of the documents reviewed in the order but did not definitively settle all of the issues that could be raised with regard to the contents of the CTR and that might have arisen based on the way the matter had proceeded.

99 I will come back to the specific documents the applicant is seeking to have included in the CTR.

(2) Scope of the cross-examination on an affidavit

100 I shall now turn to general principles that, in my opinion, must frame the right to crossexamine the deponent of an affidavit in an application for judicial review and that will guide my assessment of the objections raised during the cross-examination of Ms. Terrier and of the other requests of the applicant.

101 It is well-settled that cross-examination on an affidavit is more limited than an examination for discovery in an action. One must bear in mind the summary and expeditious nature of an application for judicial review.

102 Like the parties, I find that in *Merck Frosst*, Justice Huguessen effectively laid out the basic parameters that frame the right to cross-examine the deponent of an affidavit in a judicial review proceeding. As a starting point, it is helpful to cite the relevant excerpt from that judgment:

> 4 It is well to start with some elementary principles. Crossexamination is not examination for discovery and differs from examination for discovery in several important respects. In particular:
>
> a) the person examined is a witness not a party;

b) answers given are evidence not admissions;

c) absence of knowledge is an acceptable answer; the witness cannot be required to inform him or herself;

d) production of documents can only be required on the same basis as for any other witness i.e. if the witness has the custody or control of the document;

e) the rules of relevance are more limited.

5 Since the objections which have given rise to the motions before me are virtually all based upon relevance, I turn, at once, to that subject.

6 For present purposes, I think it is useful to look at relevance as being of two sorts: formal relevance and legal relevance.

7 Formal relevance is determined by reference to the issues of fact which separate the parties. In an action those issues are defined by the pleadings, but in an application for judicial review, where there are no pleadings (the notice of motion itself being required to set out only the legal as opposed to the factual grounds for seeking review), the issues are defined by the affidavits which are filed by the parties. Thus, cross-examination of the deponents of an affidavit is limited to those facts sworn to by the deponent and the deponent of any other affidavits filed in the proceeding.

8 Over and above formal relevance, however, questions on cross-examination must also meet the requirement of legal relevance. Even when a fact has been sworn to in the proceeding, it does not have legal relevance unless its existence or non-existence can assist in determining whether or not the remedy sought can be granted. (I leave aside questions aimed at attacking the witness's personal credibility which are in a class by themselves). Thus, to take a simple example, where a deponent sets out his or her name and address, as many do, it would be a very rare case where questions on those matters would have legal relevance, that is to say, have any possible bearing on the outcome of the litigation.

103 It is clear from the start that subjects raised in a cross-examination on an affidavit must be connected to the grounds argued in the application for judicial review. Clearly, questions may be in regard to facts stated by the deponent.

104 However, since *Merck Frosst*, certain judgments have widened the parameters of cross-examination to allow questions that fall outside of the strict framework of facts stated by the deponent as long as those questions relate to subjects addressed in the affidavit and are relevant to the purposes for which the affidavit was sworn. Incidental questions that arise from answers given by the deponent are also permitted.

266

105 In this regard, I agree with the views expressed by Justice Kelen in *AgustaWestland International Ltd*, at para 12, who, when commenting on the musings of the Federal Court of Appeal in *Stella Jones*, wrote as follows:

> 12 Different treatments have been given in the reported cases to the scope of cross-examination and breadth of production of documents on cross-examination of affidavits in applications for judicial review. However, I am satisfied that the Federal Court of Appeal has broadened cross-examination on such affidavits so that it may extend to relevant matters beyond the four corners of the affidavit and require production of documents outside the affidavit material itself. The cross-examination and the production of documents are limited by what is relevant. See *Stanfield v. Canada (Minister of National Revenue - MNR)*, (2004) 255 F.T.R. 240, 2004 FC 584, per Hargrave P. at paragraphs 24 to 29 where Prothonotary Hargrave thoroughly reviews the jurisprudence. Hargrave P. stated at paragraph 28:
>
> > ... In essence what the Court of Appeal has done in Stella Jones is not only to broaden cross-examination on an affidavit so that it may extend to relevant matters well beyond the four corners of the affidavit, but also to broaden production of documents by requiring production of material related to previous dealings, being relevant documents clearly outside of the affidavit material itself. The Court of Appeal was of the view that it was not open to the motions judge to exclude the possibility that previous dealings might shed relevant light. Of course, cross-examination and document production arising out of cross-examination are bounded by what is relevant, including relevance as discussed by Mr. Justice Hugessen in Merck Frosst (supra) and by the Court of Appeal in Stella Jones Inc. (supra).

106 Similarly, I agree with the words of Justice Mosley in *Almrei (Re)*, 2009 FC 3 at para 71, [2009] FCJ No 1, when he wrote:

> The jurisprudence is to the effect that cross-examination is not restricted to the "four corners" of the affidavit so long as it is relevant, fair and directed to an issue in the proceeding or to the credibility of the applicant.

107 I also concur with the views expressed by Justice Russell in *Ottawa Athletic Club Inc (D.B.A. The Ottawa Atheletic Club) v Athletic Club Group Inc*, 2014 FC 672 at para 132, [2014] FCJ No 743:

> 132 Justice Hugessen's description of "factual" relevance as "facts sworn to by the deponent and the deponent of any other affidavits filed in the proceeding" is broader than some earlier articulations (see *Joel Wayne Goodwin v Canada (Attorney General)*, T-486-04 (October 6, 2004) [*Goodwin*] and *Merck (1994)*, above: matters arising from the affidavit itself as well as questions going to the credibility of the affiant), and narrower than others (*see Almrei (Re)*,

> 2009 FC 3 at para 71: "cross-examination is not restricted to the "four corners" of the affidavit so long as it is relevant, fair and directed to an issue in the proceeding or to the credibility of the applicant"). However, there seems to be a consensus that "[a]n affiant who swears to certain matters should not be protected from fair cross-examination on the very information he volunteers in his affidavit," and "should submit to cross-examination not only on matters set forth in his affidavit, but also to those collateral questions which arise from his answers": *Merck Frosst Canada Inc v Canada (Minister of National Health and Welfare)*, [1996] FCJ No 1038 at para 9, 69 CPR (3d) 49 [*Merck (1996)*], quoting *Wyeth Ayerst Canada Inc v Canada (Minister of National Health and Welfare)* (1995), 60 CPR (3d) 225 (FCTD).
>
> 133 However the proper scope of cross-examination on an affidavit is defined, the affiant is required to answer fair and legally relevant questions that come within that scope (*Merck (1996)*, above).
>
> [See also *Maheu*, para 5]

108 I therefore conclude that the questions that may be posed on cross-examination of affidavits may, depending on the context, exceed the scope of facts strictly set out in the affidavit. However, cross-examination must be limited to questions of fact, and not questions of law, that arise from stated facts and subjects addressed in the affidavit and from the reasons for which the affidavit was sworn and filed. As I stated earlier, it goes without saying that the relevance of questions must also be determined based on the grounds asserted in the application for judicial review.

109 In this case, Ms. Terrier's affidavit was sworn to support the respondent's position in response to the allegations of breach of procedural fairness and bias raised by the applicant in his judicial review application. The affidavit of September 24, 2014, describes the stages in the processing of the permanent residence application. In my view, questions about facts which were not necessarily set out directly in the affidavit, but that concern the steps followed by Ms. Terrier in the handling of the applicant's file and the manner in which the application was treated are relevant and arise from facts alleged in her affidavit.

110 It is also recognized, and the respondent acknowledged this, that the examination may exceed the scope of the facts alleged in the affidavit if the questions relate to the credibility of the deponent.

111 The applicant submits that his right to cross-examine includes the right to compel Ms. Terrier to inform herself in order to be able to respond to questions to which she does not know the answer. I do not share this view. Ms. Terrier was the immigration officer tasked with handling the applicant's permanent residence application. I do not find that, acting in that capacity, she could be considered as the respondent's corporate agent or representative within the meaning understood by the case law that would impose on a deponent of an affidavit an obligation to inform him or herself. Accordingly, I find that she was under no obligation to inform herself about factual elements above

and beyond those facts she had first-hand knowledge of and that were relevant to her handling of the applicant's permanent residence application. The grounds cited in support of the application for judicial review criticize the manner in which Ms. Terrier handled the applicant's permanent residence application, and what is relevant must be connected to the manner in which Ms. Terrier handled the applicant's permanent residence application and to the documents and information she had been apprised of.

112 I will now address the various requests made by the applicant.

(3) Examination of Ms. Terrier about her affidavit of September 19, 2014

113 The arguments raised by the applicant in his motion on October 29, 2014, to justify crossexamining Ms. Terrier about her affidavit of September 19, 2014, do not sway me.

114 First, I do not find that Justice Mosley's order applies to the affidavit dated September 19, 2014. In his order, Justice Mosley allowed the application for leave and established a timetable. This order concerned examinations that are normally conducted with regard to affidavits that have been filed by the parties in support of their arguments on the merits of the application for judicial review. The affidavit of September 19, 2014, was sworn and filed in the specific context of the motion for full disclosure of the CTR filed by the applicant. Its purpose was not to support the respondent's position on the merits of the grounds raised by the applicant in his judicial review application. I find that it does not fall under Justice Mosley's order.

115 Second, I reject the applicant's contention that the right to cross-examine the deponent of an affidavit includes the right to cross-examine that person about every other affidavit filed in the proceeding. I find that the authorities relied upon by the applicant in support of his position, in particular *Merck Frosst*, *Sam Levy* and *Eli Lilly*, are of no help to him in this case, and contrary to the context of those cases, the applicant expressly waived cross-examination Ms. Terrier about her affidavit of September 19, 2014.

116 I also find that during the examination that took place on October 7 and 8, 2014, the respondent was quite right to object to the applicant cross-examining Ms. Terrier about her affidavit of September 19, 2014. The applicant had expressly waived cross-examination of Ms. Terrier about her affidavit of September 19, 2014, at the hearing for his initial motion for disclosure. Ms. Terrier's affidavit had been sworn specifically for his motion for disclosure in which the applicant argued that the CTR was incomplete. I find that, barring any special circumstances, the applicant remains bound by his decision not to cross-examine Ms. Terrier. There is nothing in the record that would lead me to conclude that during the motion on October 29, 2014, there were any special circumstances would warrant allowing the applicant to change his mind.

117 In *Imperial Oil*, which was relied on by the respondent, Justice Nadon indicated that, in principle, a party was bound by its decision to waive cross-examination of the deponent of an

affidavit. He did, however, acknowledge that certain circumstances would dictate that the Court allow a party to change its position:

> 9 I can only conclude that counsel for the defendants did not cross-examine Ms. Ethier because they were not concerned by her affidavit. It is not now open to the defendants to change their position. I am also not convinced that because a different judge is now presiding that the parties should be allowed to rethink past strategy. There may be cases where circumstances would dictate that a party be allowed to change its position, but the circumstances of the case before me are not in that category.
>
> [Emphasis added.]

118 Despite my position on the arguments relied on by the applicant in his motion dated October 29, 2014, I find that the situation evolved between the time Ms. Terrier was crossexamined (October 7 and 8, 2014) and the time the November 20, 2014, motion was filed. In my view, the facts relied on by the applicant in support of his motion dated November 20, 2014, shed light on special circumstances justifying revisiting the completeness of the CTR and allowing the applicant to cross-examine Ms. Terrier on her affidavit of September 19, 2014.

119 Indeed, I find that some of the documents received by the applicant through his access requests under the *Access to Information Act* raise doubts about the documents that were or were not included in the CTR.

120 For example, in her affidavit of September 19, 2014, Ms. Terrier stated that the CTR contained all the relevant documents that she consulted to make her decision and, more specifically, all her exchanges with CBSA. Ms. Terrier also indicated that the CTR contained all exchanges between her colleagues and CBSA and/or CIC that had been communicated to her. However, the e-mails between Ms. Terrier and Michelle Sinuita that were filed in support of the November 20, 2014, motion, as well as the e-mails that Ms. Terrier exchanged with Marc Gauthier, clearly constitute documents that record [TRANSLATION] "exchanges" between Ms. Terrier and CBSA representatives. Does that mean that when Ms. Terrier stated that the CTR included all her exchanges with CBSA, those [TRANSLATION] "exchanges" were limited to those that she deemed relevant? Or, were the documents listed in the motion inadvertently omitted? I cannot answer any of these questions, but I find that it is relevant that these ambiguities be clarified.

121 I wish to make clear that I make no determination that calls into question Ms. Terrier's good faith. However, I find that some of the documents received by the applicant as part of his access to information requests, which are not included in the CTR, raise doubts about the parameters that guided Ms. Terrier in overseeing the preparation of the CTR.

122 As I mentioned, I find that the documents that were at Ms. Terrier's disposal during the processing of the application for permanent residence are presumed to be relevant. I believe it is

important that the applicant be able to base the grounds in support of his application for judicial review upon a CTR that is complete. I believe it is equally important, given the grounds of the application for judicial review, that the Court also be able to conduct its analysis based on a CTR that is complete.

123 I therefore find that the circumstances underlying the November 20, 2014, motion are not the same as those that existed when the parties appeared before Justice Martineau, or the circumstances relied on in support of the October 29, 2014, motion. In such a context, and for the reasons already stated, I find that it is in the best interest of justice that the applicant be allowed to cross-examine Ms. Terrier on her affidavit of September 19, 2014, even though he waived cross-examination as part of his first motion for disclosure.

(4) Objections raised during the cross-examination of Ms. Terrier

124 I will now turn to the objections raised by the defendant during the cross-examination of Ms. Terrier, and I will rule on them in light of my decision to allow Ms. Terrier to be examined on her affidavit dated September 19, 2014.

Objection number	**Question**	**Decision**
	Examination on October 7, 2014	
1	[TRANSLATION] "Tell us, madam, did you oversee or were you involved in putting together and preparing the tribunal record?"	Question allowed — the question deals with the contents of the CTR.
10	[TRANSLATION] "But were you involved in preparing the tribunal record?"	Question allowed — the question deals with the contents of the CTR.
13	[TRANSLATION] "You failed to deal with that question when there was a response?"	Question allowed — why the response to the complaint was not placed in the CTR is relevant.
14	[TRANSLATION] "So, you were unaware of the content of the complaint?"	Objection upheld — Ms. Terrier had already answered by stating that she had forwarded the complaint to Alain Théault.
15	[TRANSLATION] "Is there a particular reason why the response is not written here in your affidavit?"	Question allowed — why the response to the complaint was not placed in the CTR is relevant.
25	[TRANSLATION] "Can you undertake to check whether said analysis notes by persons other than yourself concerning the complaints exist, please?"	Objection upheld — Ms. Terrier is not required to inform herself of facts of which she has no personal knowledge.
27	[TRANSLATION] "Can you check whether Boyd and Prémont, who were in Section 'B' of CIC ..., on what date they came over to the Border Services Agency?"	Objection upheld — Ms. Terrier is not required to inform herself of facts of which she has no personal knowledge.
32	[TRANSLATION] "I will ask you to undertake to provide us with ... the notes or the interventions of	Question allowed, but only with regard to the documents of which Ms. Terrier had knowledge and

	this section [Section B] and the responses provided by the Border Services Agency further to their emails, which are in the tribunal record at pages 208 to 210, during the period relevant to the processing of the file."	which were possibly not included in the CTR, and only if such documents exist.
33	[TRANSLATION] "I would just like to know whether she was aware of the mandate that was given to the person at the Border Services Agency who was responsible for the file before her — was she aware of the nature of the mandate that was in all likelihood given to the Agency in February 2008?"	Question allowed — the question is relevant with regard to alleged breaches of procedural fairness and bias, and with regard to the preparation of the CTR.
34	[TRANSLATION] "When you took over the file, did Ms. Knox explain to you what action she had taken or had not taken regarding the processing of that file and an inadmissibility determination to be verified in that file?"	Question allowed — the question is relevant with regard to alleged breaches of procedural fairness and bias.
35	[TRANSLATION] "When you processed Mr. Nguesso's application, did you take into account all the requests and the responses from the Border Services Agency in processing his file?"	Question allowed — the question is relevant with regard to alleged breaches of procedural fairness and bias.
36	[TRANSLATION] "So, if I understand correctly, the immigration officer was not aware of the concerns of Section 'B', nor was the individual, by virtue of that letter dated May 13, 2008?"	Objection upheld — the letter is in the CTR, and Ms. Terrier cannot testify regarding its content.
37	[TRANSLATION] "Do you admit that this letter does not relate any concerns either?"	Objection upheld — the letter is in the CTR, and Ms. Terrier is not required to testify regarding its content.
38	[TRANSLATION] "But the letter physically exists in your file?"	The letter is in the CTR, in the GCMS notes. The specific format is not relevant.
	Examination on October 8, 2014	
1	[TRANSLATION] "[C]an you tell us if there were ... if there could have been any discussions between Section B and the partners during that period when you were waiting for the results, or you were unaware, but it is possible that there were discussions between Section B, Fintrac, Section B ...?"	Question allowed, but only with regard to the information and/or documents that were brought to the attention of Ms. Terrier.
3	[TRANSLATION] "Can you find the out-of-court settlement in the 65-page file? I would have hoped that the letter was still in the file to supplement your affidavit on the period between 2008 and 2012."	Question allowed.

272

6	[TRANSLATION] "If you look at the out-of-court settlement letter dated ... July 3, from Ms. Joubert, that you received from your counsel because I served it on him as being evidence missing from the record, does it not mention such concerns?"	Objection upheld — Ms. Terrier does not have to testify regarding the contents of this letter.
10	The applicant introduced in evidence, under objection, a letter dated July 13, 2012, summoning him to an interview on September 19, 2012 (D-4).	Filing of letter authorized.
12	[TRANSLATION] "But the letter physically exists in your file?"	Question allowed.
17	[TRANSLATION] "When you say that it was agreed that he would provide the documents and that this was one way of proceeding — interview, documents — this is not true and is not reflected in that document, so is it accurate that this is not reflected?"	Question allowed — Ms. Terrier's understanding of the terms of the out-of-court settlement is relevant, but she cannot be questioned regarding the content of the out-of-court settlement letter itself.
18	[TRANSLATION] "But how do you explain your testimony? The document contradicts your testimony."	Question allowed — Ms. Terrier's understanding of the terms of the out-of-court settlement is relevant, but she cannot be questioned regarding the content of the out-of-court settlement letter itself.
26	[TRANSLATION] "Did you contact the examining judge in France yourself?"	Objection upheld — the answer is in the affidavit dated September 19, 2014.
28	[TRANSLATION] "Was this the first time you made such inquiries?"	Question allowed — in her affidavit dated September 19, 2014, Ms. Terrier mentions having contacted the examining judges twice, once on April 8, 2011, and once on May 15, 2013, while in the email dated June 1, 2012 (Exhibit C-3 in the motion of November 20, 2013), Ms. Terrier mentions having contacted the examining judges more than once.
30	[TRANSLATION] "Can you see how, to someone on the outside, your actions could straight out look like an attempt to inform the examining judge that the Canadian authorities had an interest in the case, and how your intervention was therefore intended more to give this information or to influence the examining judge than the opposite?"	Objection upheld — this is a question of opinion, not fact.
36	[TRANSLATION] "But in the tribunal record, did you assume that Mr. Nguesso had no formal criminal charges pending against him?"	Question allowed — the question is relevant with regard to alleged breaches of procedural fairness and bias.
37	[TRANSLATION] "Did you consult the documents from CBSA or	Question allowed — the question is relevant with regard to alleged

	Section B regarding the status of the formal charges against Mr. Nguesso, the lack thereof?"	breaches of procedural fairness and bias.
41	[TRANSLATION] "Do we have the notes that were sent to CBSA in the tribunal record?"	Questions 41 to 48 allowed.
45	[TRANSLATION] "Do you have the notes sent to CBSA?"	
46	[TRANSLATION] "Are they in the tribunal record?"	
47	[TRANSLATION] "Is there any evidence that you sent them to CBSA?"	
48	[TRANSLATION] "Did you send it to Section B?"	
51	[TRANSLATION] "And why [were they destroyed]?"	Objections 51 and 52 upheld — Ms. Terrier already answered the question.
52	[TRANSLATION] "That is the reason, because they were unintelligible, that is your reason?"	
54	[TRANSLATION] "Do you agree with me that the applicant could have commented on this document somehow to argue that he was not inadmissible? In other words, do you agree with me that the disclosure of this report could have been rooted in the fairness of this case?"	Objections 54 to 59 upheld — questions of opinion.
55	[TRANSLATION] "Do you think that the candidate, had he been informed of CBSA's comments, could have offered some clarifications ...?"	
58	[TRANSLATION] "[D]o you not think that Mr. Nguesso could in fact have used it to contradict the information and to clarify with regard to that aspect?"	
59	[TRANSLATION] "[D]o you not think that your communications with the examining judge or the convergent and open documentation that was identified, the long undisclosed list, that Mr Nguesso could have contradicted the reliability of the sources, the credibility, the motivations, the author, any other aspect, he could have, do you not agree, that he could have perhaps provided evidence that showed that your documentation was biased?"	

(5) The re-examination of Ms. Terrier on her affidavit dated September 24, 2014

274

125 Subject to the following exception, in my view, there is no need to re-examine Ms. Terrier on her affidavit dated September 24, 2014, with regard to subjects other than those related to the objections that I have ruled on, as I already allowed a cross-examination on her affidavit dated September 19, 2014, regarding the contents of the CTR. Moreover, the applicant has already asked the questions relating to procedural fairness and bias that he wanted to put to Ms. Terrier, and I find that the questions that I have allowed in deciding the respondent's objections are sufficient to adequately supplement the cross-examination of Ms. Terrier on her affidavit dated September 24, 2014. However, I will allow the applicant to question Ms. Terrier regarding whether she was aware of the November 2011 FINTRAC/CANAFE report because this aspect is relevant to the alleged breach of procedural fairness. Whether Ms. Terrier had that document in her possession is also a relevant question with regard to her affidavit dated September 19, 2014.

(6) Examination of Ms. Bradley

126 I see no relevance in the applicant examining Ms. Bradley since he is authorized to examine Ms. Terrier on her affidavit of September 19, 2014, with respect to the content of the CTR.

(7) Documents listed in the motion of October 29, 2014, that the applicant wants to see added to the CTR

127 The documents at issue are the following:

- the first letter inviting the applicant to an interview at the Embassy dated July 13, 2012;
- the disclosure request sent to the Embassy by Ms. Doyon on February 1, 2013;
- the letter sent by the Embassy to Ms. Doyon on February 27, 2013, in response to her disclosure request;
- the fairness letter sent by the Embassy to the applicant, dated February 27, 2013;
- a letter of July 3, 2012, from Michèle Joubert to the applicant's former counsel regarding the out of court settlement that occurred in the mandamus application (Docket IMM-4924-12);
- photocopies from Julie Resetarits, the applicant's former counsel, dated September 4 and 26, 2008, and October 31, 2008, requesting information on the status of the applicant's application and on the grounds justifying the request of documents and additional information requested from the applicant;
- the updated assignment before the judge of the Exécution du Tribunal de Grande Instance de Paris-SCP Bourgoing-Dumonteil & Associés Connecticut Bank of Commerce, which had been filed by Ms. Doyon in support of the complaint of April 30, 2013;

• the last three pages of the conclusions from SCP Bourgoing-Dumonteil & Associés to the enforcement-hearing judge, which had been filed by Ms. Doyon in support of the complaint of April 30, 2013;

• the excerpt of the Commerce et des Sociétés du Luxembourg registry, CANAAN CANADA S.A. dated April 15, 2013, which was filed by Ms. Doyon in support of the complaint of April 30, 2013;

• the handwritten notes from the interview of September 25, 2012;

• the beginning of the form "Renseignements supplémentaires Paris" found at pages 58-59 of the CTR;

• two e-mails exchanged between the Embassy and the office of the applicant's former counsel on October 28, 2011, regarding the follow-up of the processing of the applicant's file;

• the letter sent to the Embassy on November 14, 2013, regarding the follow-up of the complaint of April 30, 2013.

128 As I expressed, I consider that all the documents that were in Ms. Terrier's possession when she processed the applicant's file are presumed to be relevant. Therefore, the respondent should add the documents listed in the CTR insofar as Ms. Terrier had them in her possession.

(8) Documents listed in the motion of November 20, 2014, which the applicant wants to see added to the CTR

129 In his motion of November 20, 2014, the applicant requested that the Court direct the respondent to add to the CTR the following documents that were sent to it by the CBSA and the CIC following his access to information requests:

	Documents disclosed by the CBSA
A2-A3	Constance Terrier's e-mail to Michelle Sinuita (CBSA), August 30, 2012
A4	E-mail from Michelle Sinuita (CBSA) to Constance Terrier, August 10, 2012
A5	E-mail from Michelle Sinuita (CBSA) to Constance Terrier, July 16, 2012
A9	E-mails between Constance Terrier and Michelle Sinuita (CBSA), July 16, 2012
A6	Constance Terrier's e-mail to Marie-Claude Beaumier, Ms. Joubert and Sean McNair (CBSA), July 13, 2012
A7-A8	Constance Terrier's e-mail to Marc Gauthier (CBSA)
A10	E-mails between Constance Terrier and Marc Gauthier (CBSA), June 22, 2012
A11	E-mail from Marc Gauthier (CBSA) to Constance Terrier, June 22, 2012
A12	Mail sent from Kathleen Knox-Dauthuile of the Embassy of Canada — Paris to the CBSA, February 7, 2008
A13-A14	E-mails between Connie Reynolds (CBSA) and Luc Piché (Embassy), June 5, 2012
A15-A17	E-mails between CBSA employees, August 2010, April 2011
A18-A26	Computerized notes from the CBSA

276

A27-A35	Report from FINTRAC of April 5, 2011, regarding the applicant
A36	"Case Log Sheet — OCS" signed by Michelle Sinuita (CBSA) on November 1, 2012
A37-A38	Hand-written notes
A39	E-mail from Sean Curran (CBSA) to Marie-Eve Proulx (War Crimes Section), April 6, 2009
	Documents disclosed by the CIC
C3-C9	Constance Terrier's e-mail to Vladislav Mijic (Embassy), June 1, 2012
C10-C67	Complaint of April 30, 2013 with handwritten annotations

130 For the reasons already described, the respondent must add to the CTR all the documents among the documents listed above, which come from Ms. Terrier or which were in her possession while processing the applicant's file. The applicant is authorized to file the documents that were not included in the CTR and to file a supplementary affidavit if he considers that these documents are relevant to his allegations of breach of the rules of procedural fairness and bias.

(9) Declaration that the CTR is incomplete and the respondent's failure to include documents of critical importance

131 I have already indicated that, in my view, the CTR is not complete and I intend to order the production of certain documents. Therefore, I do not find it necessary to include in the order's conclusions a statement that the CTR is incomplete. Neither do I intend to decide whether the documents that were not included in the CTR are of criticaal importance. It will be up to the judge who will hear the merits of the application for judicial review to determine this issue if he or she considers it relevant and appropriate. It will also be up to him or her to determine probative value and allow the cross-examination of Ms. Terrier and the documents contained in the CTR.

Order

THE COURT ORDERS AND ADJUDGES that

1. *The parties are authorized to file supplementary memoranda of more than 60 pages, which will replace the memoranda that they filed at the authorization stage*;

2. The applicant is authorized to cross-examine Ms. Terrier on her affidavit of September 19, 2014;

3. The applicant is authorized to cross-examine Ms. Terrier on *her affidavit of September 24, 2014*, to respond to the questions that were the subject of the respondent's objections during the examinations of October 7 and 8, 2014, which I authorized *and examined regarding whether he is familiar with the FINTRAC report of November 2011*;

4. The respondent add to the CTR, *among* the documents listed at paragraphs *127* and *129* of the reasons, those of which Ms. Terrier is the author and those that she had in her possession while processing the applicant's file;

5. The applicant is authorized to file an additional affidavit to introduce into evidence the documents listed at paragraphs *127 and 129* of the grounds that were not included in the CTR and that he considers relevant to support the grounds raised in his application for judicial review, and specifically the allegations regarding apprehension of bias and breaches of procedural fairness;

6. *Without costs*.

Application granted.

Footnotes

1 In an order issued on November 4, 2014, Justice Noël ordered the case to proceed via case management and further to an order dated December 4, 2014, I was appointed as case management judge in this proeceeding by the Chief Justice.

Federal Court Cour fédérale

Date: 20190131

Docket: T-8-18

Vancouver, British Columbia, January 31, 2019

PRESENT: Case Management Judge Kathleen M. Ring

BETWEEN:

RIGHT TO LIFE ASSOCIATION OF TORONTO AND AREA, BLAISE ALLEYNE AND MATTHEW BATTISTA

Applicants

and

CANADA (MINISTER OF EMPLOYMENT, WORKFORCE, AND LABOUR)

Respondent

and

ACTION CANADA FOR SEXUAL HEALTH AND RIGHTS AND BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

ORDER

I. Overview

[1] On this motion, the Applicants seek an order pursuant to Rules 317 and 318 of the *Federal Courts Rules* [Rules] compelling the Respondent to produce further documents relating to the Applicants' Rule 317 request in their Notice of Application, as well as

additional categories of documents subsequently requested by the Applicants in correspondence to the Court and on this motion.

[2] Specifically, the Applicants seek the following Orders from the Court:

(a) a declaration that the Minister has breached Rule 317 by failing to produce relevant, non-privileged documents falling within the Applicants' 317 request;

(b) an order that the Respondent produce all of the classes of documents within the scope of the 317 request in the original Application, as further particularized in the April 17, 2018 letter, or such portions of them as found to be relevant and producible by the Court;

(c) an order that the Respondent produce the following further classes of documents as sought on this motion:

(i) all documents reviewed or considered by the Minister in reaching the 2018 CSJ attestation decision;

(ii) all the complaints from Canadians received and consulted by the Minister or the Department in making the Attestation Decision and the responses to those complaints from any government official;

(iii) briefing notes from the Department to the Minister relating to the Attestation Decision; and

(iv) all communications amongst the Minister or her staff, on the one hand, and other federal Ministers or their staffs or any other person (including members of the public which made complaints against the Applicants or other pro-life groups receiving CSJ funds) regarding the 2018 CSJ attestation requirement, including the reasons for it being adopted, written either before or after the Attestation Decision; and

(d) costs of the motion.

[3] For the reasons below, the Applicants' motion is granted in part. The Respondent shall transmit to the Court and the Applicants, in accordance with these reasons, a copy of "all the complaints from Canadians received and consulted by the Minister or EDSC in making the decision", and a redacted version of the Memorandum to the Minister dated December 1, 2017. The balance of the Applicants' motion is dismissed. The Respondent's objection to disclosure of the legal advice dated October 5, 2017 on the grounds of solicitor-client privilege is upheld.

II. Background

[4] In the underlying judicial review application, the Applicants challenge the decision of the Minister of Employment, Workforce, and Labour [Minister] to add a requirement to the application for funding under the Canada Summer Jobs [CSJ] program that applicants attest that: "Both the job and the organization's core mandate respect individual human rights in Canada, including the values underlying the Canadian Charter of Rights and Freedoms as well as other rights. These include reproductive rights, and …" [attestation clause].

[5] The Applicants included a request in their originating Notice of Application filed on January 4, 2018 that, pursuant to Rule 317, the Respondent produce:

> (a) all documents relating directly or indirectly to [the] Minister's Decision to require the attestation, including directives, memoranda, emails, handwritten notes, and policies, authored by, or sent to or from or within the possession or control, of the respondent; and
>
> (b) all documents consulted or considered by the Respondent relating to the Decision to impose the attestation.

[6] On January 17, 2018, the Respondent transmitted the Certified Tribunal Record to the Registry and to the Applicants pursuant to Rule 318 of the Rules. It consists of the CSJ 2018 Applicant Guide, the CSJ 2018 Program Policy Rationale, the Applicant's CSJ funding application, the CSJ acknowledgement of receipt of application, and the CSJ 2018 Proposed Key Dates document.

[7] The Certified Tribunal Record was accompanied by a "Certification" form signed by Alan Bully, Director General, Program and Services Oversight, Service Canada, Employment and Social Development Canada [ESDC], on behalf of Her Majesty, certifying that "attached as pages 1-52 are true copies of all the documents relevant to the application and the decision to require the attestation which the respondent does not object to producing."

[8] In its transmittal letter to the Court, the Respondent objected to portions of the Applicant's request, stating that:

> Pursuant to Rule 318(2), the Crown objects to portions of the applicant's request for the reasons that the request for materials is overly broad, is in the nature of discovery of documents, and seeks material irrelevant to the application. Furthermore, some records are objected to on the grounds that solicitor-client privilege prevents production of the documents. They were created for the purposes of legal advice and it was contemplated at the time they were created that they would remain confidential.

[9] On March 30, 2018, the Respondent served the Applicants with the Affidavit of Rachel Wernick pursuant to Rule 307 of the Rules. The Wernick Affidavit is slightly over 1900 pages in length and contains 101 exhibits.

[10] On April 10, 2018, the Applicants conducted a cross-examination of Ms. Wernick on her affidavit. Ms. Wernick testified that the Minister had briefing notes before her when she made the decision to require the attestation clause. When asked if Ms. Wernick could produce the briefing notes, counsel for the Respondent advised that there was one briefing note for the approval of the attestation clause and the Respondent claimed solicitor-client privilege over that briefing note.

[11] On April 17, 2018, three months after receiving the Certified Tribunal Record, counsel for the Applicants wrote to the Court advising that the Applicants did not have an adequate record of the decision under review, and requesting the Court to make an order for production of the following materials:

1. Any Memorandum to Cabinet on the subject of the Policy or decision;
2. Any legal opinion on the subject of the Policy or decision;

3. Any memorandum to the Minister from departmental staff on the subject of the Policy or decision;

4. Any response of the Minister to any of the complainants referenced in the affidavit;

5. Any internal memorandum prepared by staff for the purposes of advising the Minister prior to the decision regarding the Policy or decision;

6. Any memorandum related to the Policy or decision from the Minister to other MPs created prior to the decision;

7. Any memorandum related to the Policy or decision to the Minister from other MPs created prior to the decision;

8. The results of any investigation or research conducted by the Minister or the department against any Canadian on the subject of the Canada Summer Jobs program or Policy prior to the decision.

[12] By directions dated April 18, 2018, the Court directed the Applicants to bring a formal motion seeking relief under Rule 318.

[13] By Order dated May 18, 2018, the Court granted leave to the Applicants to amend their Notice of Application to allege, as additional grounds for the application, that the decision was made in bad faith, with bias, for an improper purpose, and on irrelevant considerations.

[14] On August 20, 2018, three months after filing their Amended Notice of Application, the Applicants filed this motion seeking production of documents under Rules 317 and 318. The Applicants submit that the Minister has refused to file the complete record on which she made her decision in accordance with Rule 317, and that other available evidence demonstrates that clearly relevant documents have been withheld by the Minister in responding to their Rule 317 request.

[15] The Respondent opposes the motion on the basis that the Applicants seek production beyond what is permitted under Rule 317, and that some of the documents sought are protected by solicitor-client privilege.

III. Issues

[16] There are two primary issues on this motion:

(a) Are additional documents producible under Rule 317?

(b) Are some of the documents protected from disclosure by solicitor-client privilege?

IV. Analysis

A. Are Additional Documents Producible under Rule 317?

(i) Applicable Legal Principles

[17] The only material that is accessible under Rule 317 is that which is "relevant to an application" and is "in the possession" of the administrative decision-maker. Both criteria must be met to trigger the obligation to transmit the material: *Habitations Îlot St-jacques Inc v Canada (Attorney General)*, 2017 FC 147 at para 4.

[18] Turning to the first requirement, the material accessible pursuant to Rule 317 must be actually relevant. Material that "could be relevant in the hopes of later establishing relevance" does not fall within Rule 317: *Access Information Agency Inc v Canada (Attorney General)*, 2007 FCA 224, 66 Admin LR (4th) 83 at para 21 [*Access Information Agency*].

[19] Documents are "relevant" for the purposes of Rule 317 if they may have affected the decision of the administrative decision-maker, or if it may affect the decision that this Court will make on the application for judicial review: *Maax Bath Inc v Almag Aluminum Inc*, 2009 FCA 204 at para 9 [*Maax Bath*].

[20] The relevance of the documents requested is to be determined in relation to the grounds of review set forth in the notice of application and the affidavits filed: *Canada (Human Rights Commission) v Pathak*, [1995] 2 FC 455 at page 460 (CA)); *Tsleil-Waututh* at para 109.

[21] The general rule is that only materials that were available to the decision-maker at the time of rendering a decision are considered relevant for the purposes of Rule 317. However, there are exceptions to this rule. Documents in addition to those that were before the decision-maker may be considered relevant and subject to disclosure where there is an allegation of a breach of procedural fairness or an allegation of a reasonable apprehension of bias: *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2006 FC 720 at para 50 [*Gagliano #1*], appeal dismissed at 2007 FCA 131; *Humane Society of Canada Foundation v Canada (National Revenue)*, 2018 FCA 66 at paras 5 and 6 [*Humane Society*].

[22] To succeed in obtaining disclosure of material that was not before the decision-maker when he made the decision, the applicant must satisfy a two-part test laid out in *Canada (Public Sector Integrity Commissioner) v Canada (Attorney General)*, 2014 FCA 270 at para 4 [*Public Sector*].

[23] First, the applicant must raise a ground of review in his request that would allow the Court to consider evidence that was not before the decision-maker. Second, the ground of review must have a factual basis supported by appropriate evidence, as required. A bald assertion of bias is not sufficient and cannot support an order for production of documents to allow the moving party to go on a fishing expedition to see if something can be found to support the allegation of bias. The party demanding more complete disclosure has the burden of advancing the evidence justifying the request. The second criterion prevents an applicant raising a breach of procedural fairness simply to gain access to material that the applicant could not otherwise access: *Access Information Agency* at paras 17 to 21; *Public Sector* at para 4; *Humane Society* at paras 8 and 12.

[24] Rule 317 is also restricted to material "in the possession" of the administrative decision-maker. Rule 317 cannot be used to obtain material that is in the possession of others: *Tsleil-Waututh* at paras 111.

[25] Rule 317 does not in any way "serve the same purpose as documentary discovery in an action": *Access Information Agency* at para 17.

(ii) Positions of the Parties

[26] The Applicants argue in their written representations that since their challenge to the Minister's decision includes allegations of bad faith, bias, improper purpose, and infringement of *Charter* rights, the Respondent is obliged to produce a certified tribunal record that includes more than simply the documents that were before the Minister when she made her decision. They say that the Respondent must produce "literally all documents considered by the Minister in coming to her decision to impose the attestation", including any document requested by the

Applicants that was viewed or considered by the Minister prior to and after reaching her decision, which shed light on her considerations and motivations in deciding to include the attestation clause in the CSJ application form.

[27] The Applicants say that the Minister's conduct in filing an affidavit that includes documents that were excluded from the certified record, and the disclosure of some 200 pages of documents by the Respondent to the Canadian Press under the *Access to Information Act*, demonstrates that clearly relevant documents are being withheld by the Minister in producing the certified record in accordance with Rule 317 of the Rules.

[28] As the Applicants' written representations did not squarely address each category of requested documents and explain its relevance for the purposes of Rule 317, the Court asked the Applicants to do so during the hearing of the motion. The Applicants' submissions were similar for each category of documents. The Applicants argue that the Minister should be compelled to produce the additional documents because they may indicate what motivated the Minister's decision, and whether the Minister's decision was made for a proper statutory purpose or for another purpose.

[29] The Respondent says that the Rule 318 motion should be dismissed because the multiple requests for documents all lack the required specificity, and the Applicants have not met the burden of advancing sufficient evidence and cogent explanation that other documents, beyond those which were before the Minister when she decided on the attestation requirement, are relevant to the specific grounds pled in their Amended Notice of Application.

(iii) Admissibility of Evidence vs. Requirements of Rule 317

[30] The mere fact that the documents produced in the Minister's certified tribunal record in response to the Rule 317 request are not co-extensive with the documents included in the Respondent's supporting affidavit served under 307 does not, in itself, establish that the Minister failed to produce a complete record under Rule 318. In *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, [2016] 3 FCR 19, 2015 FCA 268 at para 21, the Court observed that "material that was *not* before the administrative decision-maker can *potentially* be placed before the reviewing court by way of affidavit".

[31] The Federal Court of Appeal has cautioned that the concept of admissibility of evidence on judicial review must be kept analytically separate from the substantive requirements of Rule 317. As the Court stated in *Tsleil-Waututh*, "Not everything that is admissible can be obtained under Rule 317": *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 63 and 117 [*Tsleil-Waututh*].

(iv) "Rolling" Requests for Documents from the Minister

[32] The Respondent takes the position that the Applicants have made only one Rule 317 request and it is that broad request which the Court must review. The Respondent says that the Rules do not contemplate "rolling Rule 317 requests" as occurred in this case.

[33] Conversely, the Applicants say that Rule 318 is a court procedure which serves the purpose of allowing an applicant to make a new request based on the awareness of material missing from the record.

[34] I disagree with the Applicants' interpretation of Rule 318. Rule 318 provides that a decision-maker is to transmit the material requested pursuant to Rule 317 unless the decision-maker objects under Rule 318(2). The Applicants have not drawn any authority to the Court's attention to support the proposition that the purpose of Rule 318 is to allow new requests for documents.

[35] At the same time, while the Rules do not expressly contemplate subsequent requests, the Applicant correctly observes that this Court previously considered a motion for further disclosure under Rule 318 in circumstances where the applicant submitted a second request for production: *Detorakis v Canada (Attorney G*eneral) 2009 FC 144.

[36] In my view, while multiple requests for material from the decision-maker are not to be encouraged, I am prepared to consider the Applicants' initial Rule 317 request and their further requests for records in the particular circumstances of this case. The apparent purpose of the second request was, at least in part, to address the Respondent's objection to the vagueness of the initial Rule 317 request. The third request was made after the Applicants filed an Amended Notice of Application which added new grounds of review alleging bias, breach of procedural fairness and improper purpose. The Respondent is not prejudiced by the Court's disposition of these further requests as it was afforded the opportunity to present written and oral submissions setting out its objections to these requests.

[37] In the next part of my analysis, I examine the categories of documents requested by the Applicants. In addition to carefully considering the written and oral submissions of both parties, as well as their written supplemental submissions, I have also reviewed the grounds of review and allegations in the Amended Notice of Application, as well as the affidavit evidence adduced

on this motion to assess whether the requested documents are properly producible in accordance with the jurisprudence governing Rules 317 and 318.

(v) Complaints Received by the Minister and Responses to those Complaints

[38] Two of the categories of documents sought by the Applicants on this motion relate specifically to the complaints received by the Minister or EDSC, namely:

> (a) All the complaints from Canadians received and consulted by the Minister or the Department in making the Attestation Decision and the responses to those complaints from any government official; and
>
> (b) Any response of the Minister to any of the complainants referenced in the affidavit.

[39] As a starting point, I considered the Applicants' request for these documents by reference to the Amended Notice of Application to ascertain the factual basis for the Applicants' allegations of bad faith, bias, improper purpose, and irrelevant considerations. The Applicants allege the Minister's decision was made to satisfy the lobbying demands of a group called 'Abortion Rights Coalition of Canada' [ARCC], and in furtherance of the federal government's "ideological commitment to there being absolutely no legal restrictions on abortion in Canada".

[40] The Amended Notice of Application alleges that: (a) as early as February, 2017, the Minister started receiving complaints from ARCC about groups it described as "anti-choice," saying that these groups should not receive Canada Summer Jobs funding because they held beliefs and opinions opposed to those of ARCC; (b) the Minister inspected the social media postings of the groups listed by ARCC, but did not contact the groups under scrutiny to examine

whether the complaints ARCC forwarded were accurate; and (c) in an April 12, 2017 iPolitics article, the Minister's press secretary stated that "any funding provided to an organization that works to limit women's reproductive rights last summer was an oversight. That's why this year we fixed the issue and no such organization will receive funding from any constituencies represented by Liberal MP's."

[41] The Amended Notice of Application indicates that the factual basis for the Applicants' allegations of bad faith, bias, improper purpose, and irrelevant considerations is, at least in part, that the Minister received complaints from ARCC that "anti-choice" groups should not receive CSJ funding, and that the Minister's decision was motivated by those complaints.

[42] I have also reviewed the Affidavit of Rachel Wernick, Senior Assistant Deputy Minister, Skills Development Branch, ESDC, which the Respondent served on the Applicant under Rule 307 of the Rules, and on which the Applicants rely in support of this motion. The Wernick Affidavit states that "during 2017, the Minister received complaints from Canadians about the nature of work placements for students being funded by the CSJ program and that organizations were distributing very graphic pictures of aborted fetuses or would not hire LGBTQ2 youth" (para 22) and that "the Minister and ESDC received complaints that CSJ funding was being used to undermine the rights of Canadians" (para 23).

[43] Examples of such complaints are attached as exhibits to the Wernick Affidavit, with personal information redacted to protect privacy. Paragraph 37 of the affidavit states that "as a result of the public complaints to the Minister outlined above, it came to the attention of the Minister that organizations which had received CSJ funding in the past, or applied for funding in 2017, active work to limit a women's reproductive rights".

[44] The Respondent opposes the request for "all the complaints from Canadians received and consulted by the Minister or the Department in making the Attestation Decision" on the basis that specific documents referenced in the Amended Notice of Application were already disclosed as exhibits to the Wernick Affidavit. I agree with the Applicants that there is no merit in this argument. The affidavit only attaches "examples" of such complaints. The affidavit does not purport to make full disclosure of the complaints received. It is no answer to say that because the Respondent provided with *some* documents relating to complaints received, the Applicants are not entitled to have the rest.

[45] When read in conjunction with the Wernick Affidavit, I find that the Applicants' request for "all the complaints from Canadians received and consulted by the Minister or the Department in making the Attestation Decision" is described with sufficient specificity to identify the requested documents. The Wernick Affidavit states that "the Minister received complaints from Canadians about the nature of work placements for students being funded by the CSJ program".

[46] I am also satisfied, on the material before me, that the complaints received by the Minister or the EDSC are relevant to the application. They relate to the allegations in the Amended Notice of Application described above, and may assist the Court in coming to a conclusion regarding the allegations of bad faith, bias, improper purpose, and irrelevant considerations.

[47] The Wernick Affidavit further establishes that the Minister was aware of the existence and tenor of the complaints: *Chrétien v Canada (Commission of Inquiry Into the Sponsorship Program and Advertising Activities)*, 2007 FCA 131 at para 7.

[48] Accordingly, I conclude that, excluding complaints already in their possession as exhibits to the Wernick Affidavit, the Applicants are entitled to receive copies of any other complaints from Canadians received and consulted by the Minister or EDSC in making the decision, with personal information redacted to protect privacy.

[49] The Applicants also seek disclosure of the responses to the complaints received. I decline to make such an order in the absence of any evidence that such responses exist, and without an adequate explanation by the Applicants as to the relevance of such responses to the allegations made in the Amended Notice of Application.

[50] In *Beno v Létourneau J et al* (1997), 1997 CanLII 5116 (FC), 130 FTR 183 at page 188, Mr. Justice Mackay held that the Court ought not to intervene to order production of documents of which there is no clear evidence of existence. The Applicants have adduced no evidence from their cross-examination of Ms. Wernick on her affidavit, or otherwise, to demonstrate that the Minister or ESDC provided any responses to the complaints received, or the content of such responses and their relevance to the allegations made in the Amended Notice of Application.

(vi) Briefing Notes / Memoranda to the Minister

[51] The Applicants request “briefing notes from the Department to the Minister relating to the Attestation Decision” and “any memorandum to the Minister from departmental staff on the subject of the Policy or decision”.

[52] The material before me indicates that there were three briefing notes before the Minister at the time of her decision. First, there was the Memorandum to the Minister dated

December 1, 2017 which sought a decision from the Minister on whether to proceed with the attestation for the 2018 CSJ program. Second, there were two other memoranda presented to the Minister in early December 2017 at or around the same time as the first memorandum.

[53] As explained later in these reasons, I have determined that the Respondent's objection to disclosure of the Memorandum to the Minister dated December 1, 2017 on the grounds of solicitor-client privilege is partially upheld. The Applicants are entitled to a redacted version of the Memorandum to the Minister which deletes the portions that are subject to solicitor-client privilege.

[54] Based on the material before me, I find that the Applicants failed to establish the relevance of the other two briefing notes to this application and therefore their request for disclosure of these documents is denied. The Bully Affidavit states neither of the other two memoranda sought a decision on the attestation clause. One of the memoranda sought approval of the information kit for Members of Parliament, and the other memorandum sought approval of the national priorities and launch dates for the 2018 CSJ program.

[55] Apart from the three memoranda herein described, the Applicants failed to establish the existence of any other briefing notes or memoranda to the Minister to support any order for disclosure of such documents.

(vii) Other Categories of Documents

[56] As for the remaining categories of requested documents, I decline to make an order for production of such documents because the Applicants failed to persuade me that the described

categories provide the requisite level of specificity, or that the requested documents exist and are relevant for the purposes of Rule 317.

[57] Rule 317 (1) requires a party to make a written request "identifying the material requested". In *Maax Bath Inc v Almag Aluminum Inc*, 2009 FCA 204 [*Maax Bath*], the Federal Court of Appeal found that the applicant's Rule 317 request for "… a copy of the material in the possession of the CITT prepared by the CITT's non-legal staff for use by the CITT members in making their determinations", without reference to any specific documents, lacked proper specificity and this defect was in itself sufficient to dismiss the applicant's motion for production of documents pursuant to Rule 318.

[58] In this case, I find that the remaining categories of documents are vague and overly broad, For example, the Applicants' initial 317 request seeks "all documents relating directly or indirectly to the Minister's decision to require attestation …" and "all documents consulted or considered by the Respondent relating to the Decision to impose the attestation".

[59] As earlier noted, the Applicants submitted correspondence dated April 17, 2018 to the Court which they describe as "setting out a more detailed list of the classes of documents believed to fall within the original 317 request". I find this further listing of documents, as well the additional categories of requested documents sought in this motion, remain overly broad and fail to provide the level of specificity required by the Federal Court of Appeal. For example, the Applicants' request for "any internal memorandum prepared by staff for the purposes of advising the Minister prior to the decision regarding the Policy or decision" is analogous to the Rule 317 request which the Court found to lack proper specificity in *Maax Bath*.

[60] The Applicants' request for "the results of any investigation or research conducted by the Minister or the department against any Canadian on the subject of the Canada Summer Jobs program or Policy prior to the decision" is similarly vague and overly broad. The request for the results of "any" investigation or research against "any Canadian" on the subject of "the Canada Summer Jobs program" could, as the Respondent noted, include for example the results of any investigation relating to complaints by students on how they were treated in a job funded by the CSJ program. The lack of proper specificity is alone sufficient to dismiss the Applicants' motion for production of these documents.

[61] Secondly, and in any event, the Applicants have requested these remaining categories of documents without providing any evidence that the requested documents even exist. For example, the Applicants request "any memorandum to Cabinet on the subject of the Policy or decision", but they have not adduced any evidence to indicate that any relevant memoranda to Cabinet may be in existence, or even that Cabinet or other Ministers were engaged in the decision. To the contrary, counsel for the Applicants candidly acknowledged during the hearing that the Applicants have no evidence that there was a memorandum to Cabinet relating to the decision on the attestation clause. As the Respondent observed, any such documents would, in any event, be subject to claims of Cabinet Confidence.

[62] In the same vein, the Applicants acknowledged during the hearing that they do not know if any documents actually exist that would fall within their request for "any memoranda related to the Policy or decision" from the Minister to other Members of Parliament, or from other MP's to the Minister created prior to the decision.

[63] Thirdly, the Court has not received an adequate explanation of the relevancy of the materials requested in the remaining categories of documents. There is no dispute that the Applicants have raised grounds of review in their Amended Notice of Application that *permit* the transmission of materials beyond those that were before the decision-maker. However, the Court is not *required* to provide the Applicants with the requested materials merely because they raise these grounds of review. The Applicants must also advance evidence and an adequate explanation as to how the requested information is relevant, by reference to the Amended Notice of Application, the grounds of review invoked by the Applicants, and affidavit evidence: *Public Sector* at para 4; *Gagliano #1* at paras 51 to 54.

[64] To take an example, the Applicants have not satisfied me as to the relevance of their request for any internal staff memoranda, if they even exist. The Applicants rely on *Telus Communications Inc v Canada (Attorney General),* 2004 FCA 317 where the Federal Court of Appeal ordered the disclosure of staff memoranda prepared for the tribunal on the basis that it may have affected the decision. However, as the appellate court subsequently explained in *Access Information Agency* at para 18, there was a factual basis for the disclosure request in *Telus,* as there were reasons to believe that a government policy had been implemented before it had been made public. In contrast, I find that the Applicants in this case have not established a factual basis for their request for internal staff memoranda.

[65] Overall, the assertion by the Applicants that these other categories of requested documents may be relevant appears to be based on pure speculation. The Applicants wish to view these documents, if they exist, to determine whether they may provide further support for their grounds of review. However, documents requested under Rule 317 are not transmitted first

so that a party may then determine whether they are relevant. Relevancy must be established by the Applicants to demonstrate that they are entitled to them in the first instance. As the Court observed in *Gagliano #1* at para 53, Rule 317 was specifically crafted in this manner to "avoid rewarding applicants for engaging in improper fishing expeditions".

[66] In the absence of an adequate explanation or evidence regarding relevance of the remaining categories of requested documents, or that they even exist, it is not necessary to consider the requirement of possession under Rule 317, and the Applicants' reliance on *Friends of The West Country Association v Canada (Minister of Fisheries and Oceans)*, 1997 CanLII 5107 (FC), 130 FTR 223; 46 Admin LR (2d) 144.

[67] For these reasons, the Court is not prepared to order that the Minister transmit the remaining categories of documents to the Applicants.

B. Are Some of the Documents Protected by Solicitor-Client Privilege?

[68] The Respondent objects to the disclosure of some documents on the grounds of solicitor-client privilege. The Respondent states in its transmittal letter to the Court that these documents were created for the purposes of legal advice and it was contemplated at the time they were created that they would remain confidential.

[69] Solicitor-client privilege is a legitimate ground of objection under Rule 318. Rules 317 and 318 are not a statutory abrogation of solicitor-client privilege: *Slansky v Canada (Attorney General)*, 2013 FCA 199 at paras 72 and 277 [*Slansky*].

[70] The criteria for determining whether a communication qualifies for legal advice privilege are that: (1) it must have been between a client and solicitor; (2) it must be one in which legal advice is sought or offered; (3) it must have been intended to be confidential; and (4) it must not have had the purpose of furthering unlawful conduct: see *R v Solosky*, [1980] 1 SCR 821 at 835; *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 SCR 809, 2004 SCC 31 at para 15 [*Pritchard*]; *Slansky* at para 74. Legal advice has been held to include not only telling clients the law, but also giving advice "as to what should prudently and sensibly be done in the relevant legal context": *Slansky* at para 77.

[71] Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to a client department. However, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege. Owing to the nature of the work of in-house counsel, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose: *Pritchard* at paras 19 and 20.

[72] The burden of establishing solicitor-client privilege lies with the person who seeks to invoke the privilege. The say-so of the decision-maker asserting solicitor-client privilege does not discharge that burden: *Canada (Attorney General) v Williamson*, 2003 FCA 361 at para 11; *Bernard v Public Service Alliance of Canada*, 2017 FCA 35 at para 13.

[73] Where a decision-maker claims solicitor-client privilege in respect of documents and the claim is challenged, the Court must examine the actual statements said to be privileged in order to draw a conclusion as to whether privilege arises or whether it

has been waived: *1185740 Ontario Ltd v Canada (Minister of National Revenue)*, (1999) 169 FTR 266, 1999 CanLII 8774 (FCA) at para 7.

[74] The Respondent filed two public affidavits, the Affidavit of Alan Bulley sworn September 11, 2018 and the Affidavit of March McCombs sworn September 10, 2018, to establish its objection based on solicitor-client privilege claim. The public affidavits indicate that the Respondent objects to the disclosure of two documents in the certified tribunal record on the grounds that they are solicitor-client privileged. The first document is legal advice with respect to a matter involving the CSJ program which ESDC requested from the Legal Services Unit that serves ESDC, and which the Legal Services Unit delivered to ESDC on October 5, 2017 [the "legal advice"].

[75] The second document that the Respondent objects to produce on the basis of solicitor-client privilege is a Memorandum to the Minister dated December 1, 2017, which sought a decision from the Minister on whether to proceed with new eligibility requirements and an attestation for the 2018 CSJ program. The Bulley Affidavit states that the Memorandum to the Minister was included with and appended the legal advice.

[76] The Respondent also filed a confidential affidavit, pursuant to an Order dated May 18, 2018, containing the two documents which it objected to produce on the grounds of solicitor-client privilege [Confidential Affidavit].

[77] Having reviewed these affidavits, I am satisfied on the evidence before me that the first document – the legal advice - meets the test for establishing solicitor-client privilege. The public affidavits establishes that in 2017, officials in the office of the Assistant Deputy Minister of the

Program Operations Branch at ESDC requested legal advice from the Legal Services Unit, and on October 5, 2017, a lawyer with the Legal Services Unit provided the legal advice to the ESDC in response to the request. Having reviewed the legal advice contained in the Confidential Affidavit, I am satisfied that it entails the giving of legal advice, and not policy advice.

[78] I am also satisfied on the evidence before me that the legal advice was intended to be confidential. Mr. Alan Bulley, the ESDU official to whom the LSU Legal Opinion was provided, states in his affidavit that he expected the communications between himself and the LSU regarding the LSU Advice to remain confidential.

[79] As regards the last criteria for solicitor-client privilege, there is no evidence before me that the legal advice had the purpose of furthering unlawful conduct.

[80] On my review of the first document, I conclude that the legal opinion is protected by solicitor-client privilege in its entirety. It is not a situation where parts of the document are privileged and parts are not.

[81] I have also reviewed the second document, the Memorandum to the Minister, which is contained in the Confidential Affidavit. Every page of the Memorandum is marked "SOLICITOR CLIENT PRIVILEGE". The Memorandum encloses a copy of the first document, the legal advice. The Memorandum also contains passages within the Memorandum itself which summarize or refer to the legal advice. As I have already concluded that the legal advice meets the test for establishing solicitor-client privilege, the Memorandum is likewise subject to privilege to the extent that it includes or appends the legal advice.

[82] The Applicants argue that the Minister waived any privilege over the legal advice when she released certain materials to the media. I reject this argument. The Applicants rely solely on a media article which contains vague references to legal advice. The article does not describe the date of the legal advice or the subject matter of the legal advice. It is pure speculation by the Applicants that the legal advice referred to in the article is the same legal advice to which the Respondent claims solicitor-client privilege on this motion.

[83] During the hearing, counsel for the Respondent advised that the Respondent would be amenable to producing a redacted version of the Memorandum if the Court made an order that disclosure of the redacted Memorandum does not constitute waiver over the redacted portions of the Memorandum. Counsel indicated that the Respondent had refrained from producing a redacted version of the Memorandum because of case law holding that, by redacting portions of a document, a party waived privilege over the entire document.

[84] The Respondent did not draw the Court's attention to any jurisprudence of this Court that stands for the proposition that disclosure of a redacted document constitutes waiver of privilege over the privileged portions of the document. To the contrary, in *Slansky* at para 266, Justice Stratas of the Federal Court of Appeal stated, albeit in a dissenting judgment, that privileged statements can be severed from non-privileged statements. He observed that the redaction of isolated, privileged material plays a regular and important role in Canadian litigation, citing the following passage from *Guelph (City) v Super Blue Box Recycling Corp*, 2004 CanLII 34954 (ON SC) at para 119:

> The practice of "redacting" documents has been in wide use in commercial litigation in Ontario for at least two decades. It follows a practice developed in American jurisdictions to balance the goals of full disclosure and protection of privilege. It is very common for documents that are otherwise producible to contain a portion that deals with receipt of legal advice on the topic at hand. For example, the minutes of a board meeting might contain twelve business items, one of which concerned receipt of legal advice pertaining to litigation. An "all or nothing" approach to disclosure would see the document entirely produced (thus breaching solicitor client privilege in respect to the advice given concerning the litigation), or entirely suppressed (depriving the opposing party with the record of the balance of the document). The proper solution is to produce the portion of the document that is not privileged, delete the portion that is privileged, and show the deletion on the face of the document to alert the opposing party that privileged material has been removed. [footnote omitted]

[85] Several decisions of this Court indicate that the Court may, in appropriate circumstances, order the disclosure of a redacted document, and that such disclosure does not constitute a waiver of privilege over the redacted portions of the document. *Ross v Canada (Justice)*, 2013 FC 757 at para 20, Mr. Justice Mosley held that the respondents did not waive their claim to solicitor-client privilege with respect to any information in the Final Investigative Report by disclosing a redacted version of the Report when directed to do so by the Court under Rule 318.

[86] In *Bank of Montreal v Sasso*, 2013 FC 584 at para 27, Mr. Justice Hughes observed that although redaction may be difficult in some cases, it is commonplace in many cases that come before this Court. He did not find any objection to the Adjudicator's Order simply on the basis that it afforded a party the opportunity to redact privileged material from certain documents that it may produce.

[87] In the particular circumstances, I am of the view that disclosure of a redacted Memorandum is practically possible in this case, based on the position taken by the Respondent and my own review of the Memorandum. Such an approach accords with the remedial flexibility

of the Court when determining the validity of a Rule 318 objection. It furthers and reconciles objectives of the protection of privilege and the meaningful review of administrative decisions: *Lukács v Canada (Transportation Agency)*, 2016 FCA 103 at paras 13 to 15.

[88] For these reasons, I conclude that the Respondent's objection to disclosing the first document – the legal advice - on the basis of solicitor-client privilege is upheld. The Respondent's objection to disclosure of the Memorandum to the Minister dated December 1, 2017 on the grounds of solicitor-client privilege is partially upheld. The Respondent is directed to deliver a redacted version of the Memorandum to the Applicants, which redacts the portions that are subject to solicitor-client privilege. For clarity, the disclosure of a redacted version of the Memorandum to the Applicants shall not constitute a waiver of solicitor-client privilege by the Respondent over the whole Memorandum.

[89] As success was divided, I would award neither party its costs in respect of this motion.

THIS COURT ORDERS that:

1. Excluding complaints already in the Applicants' possession, the Respondent shall transmit to the Court and the Applicants, within thirty (30) days of the date of this Order, copies of all other complaints from Canadians received and consulted by the Minister or EDSC in making the decision, with personal information redacted to protect privacy.

2. The Respondent's objection to disclosure of the legal advice dated October 5, 2017 on the grounds of solicitor-client privilege is upheld.

3. The Respondent's objection to disclosure of the Memorandum to the Minister dated December 1, 2017 on the grounds of solicitor-client privilege is partially upheld. The Respondent shall, within thirty (30) days of the date of this Order, transmit a redacted version of the Memorandum to the Court and the Applicants, which redacts the portions that are subject to solicitor-client privilege.

4. The balance of the Applicants' motion is dismissed.

5. There shall be no order as to costs of this motion.

"Kathleen M. Ring"

Case Management Judge

2011 CAF 299, 2011 FCA 299
Federal Court of Appeal

Stemijon Investments Ltd. v. Canada (Attorney General)

2011 CarswellNat 4372, 2011 CarswellNat 5330, 2011 CAF 299, 2011 FCA 299, [2011] F.C.J. No. 1503, [2012] 1 C.T.C. 207, 2011 D.T.C. 5169 (Eng.), 209 A.C.W.S. (3d) 721, 341 D.L.R. (4th) 710, 425 N.R. 341

Stemijon Investments Ltd., Appellant and The Attorney General of Canada, Respondent

Canwest Communications Corporation, Appellant
and The Attorney General of Canada, Respondent

Canwest Direction Ltd., Appellant and The Attorney General of Canada, Respondent

Leonard Asper Holdings Inc., Appellant and
The Attorney General of Canada, Respondent

Lenvest Enterprises Inc., Appellant and The Attorney General of Canada, Respondent

Sensible Shoes Ltd., Appellant and The Attorney General of Canada, Respondent

Marc Noël, Johanne Trudel, David Stratas JJ.A.

Heard: October 11, 2011
Judgment: October 26, 2011
Docket: A-376-10, A-374-10, A-375-10, A-377-10, A-378-10, A-382-10

Proceedings: affirming *Stemijon Investments Ltd. v. Canada (Attorney General)* (2010), 2010 CarswellNat 3943, 2010 CF 893, 2010 D.T.C. 5156 (Eng.), 2010 CarswellNat 3315, 2010 FC 893 (F.C.)

Counsel: Ian S. MacGregor, Peter Macdonald, for Appellants
Josée Tremblay, Julian Malone, for Respondent

Subject: Income Tax (Federal)

APPEAL by taxpayers from judgment reported at *Stemijon Investments Ltd. v. Canada (Attorney General)* (2010), 2010 CarswellNat 3943, 2010 CF 893, 2010 D.T.C. 5156 (Eng.), 2010 CarswellNat 3315, 2010 FC 893 (F.C.), upholding Minister of National Revenue's decision not to waive penalties and interest assessed against taxpayers for their late filings.

***David Stratas J.A.*:**

A. Introduction

1 Before this Court are six appeals from six judgments of the Federal Court (*per* Justice Mandamin): 2010 FC 892 (F.C.), 2010 FC 893 (F.C.), 2010 FC 894 (F.C.), 2010 FC 895 (F.C.), 2010 FC 897 (F.C.), 2010 FC 898 (F.C.). In each, the Federal Court dismissed an application for judicial review brought by the taxpayer concerning a decision by the Minister of National Revenue. In each, for identical reasons, the Minister refused the taxpayer relief from penalties and interest under subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

2 Since the facts and the law are substantially the same in each matter, this Court consolidated the appeals, the appeal in file A-376-10 being designated as the lead appeal. A copy of these reasons for judgment will be filed in each of files A-374-10, A-375-10, A-376-10, A-377-10, A-378-10 and A-382-10, and shall serve as this Court's reasons for judgment in each appeal. Given the identical nature of the appellant's submissions, the Minister's decision for each appellant, and the Federal Court's decision, these reasons will speak of one decision, one decision letter and one Federal Court decision.

3 In my view, for the reasons set out below, the Minister's decision falls outside the range of defensibility and acceptability and, thus, is unreasonable. However, the relief is discretionary. In these particular circumstances, no practical end would be accomplished by setting aside the Minister's decision and returning the matter back to him for redetermination: the Minister could not reasonably grant relief on these facts. Therefore, I would dismiss the appeals.

B. The basic facts

(1) Background information

4 The Act requires persons to file certain forms in certain circumstances. These forms convey information to the Canada Revenue Agency. The Canada Revenue Agency uses this information to discharge its responsibilities under the Act.

5 Form T1135 is one such form. This form must be filed by taxpayers who own specified foreign property, the total cost amount of which is over $100,000: subsection 233.3(3) of the Act.

6 The appellants were obligated to file this form for each of the 2000 to 2003 taxation years. They did so, but were late. Due to their lateness, the Minister assessed penalties and interest against the appellants.

7 The appellants sought relief from the penalties and interest from the Minister. The Minister can grant such relief under subsection 220(3.1) of the Act. Broadly speaking, the appellants alleged

that they had made an innocent mistake and that it would be unfair to levy penalties and interest in the amounts assessed.

(2) How the late filings happened

8 The appellants employed a common financial representative to make all tax filings on their behalf.

9 For the 1998 and 1999 taxation years, the appellants' representative filed the appellants' Forms T1135 on time. However, for the 2000 to 2003 taxation years, the appellants' representative formed the view, contrary to the wording of subsection 233.3(3) of the Act, that it was unnecessary to file the forms. The appellants' representative felt that the Canada Revenue Agency was getting all the information it needed from other filings made by the appellants' Canadian investment managers.

10 Specifically, the appellants' representative believed that Form T1135 did not need to be filed where a foreign investment portfolio was managed by a Canadian investment manager subject to Canadian tax reporting requirements. In his view, that was the case with each of the appellants. However, as the appellants' representative conceded in a letter dated June 2, 2005, that logic did not apply to the appellant Canwest Communications Corporation, which had U.S. investments administered by U.S. fund managers.

11 Somewhat later, the Canada Revenue Agency alerted the appellants to the fact that they had not filed their forms for some time. The appellants complied, filing their forms late and explaining their misunderstanding.

(3) The appellants' request for relief from interest and penalties and the first level administrative decision

12 The appellants' financial representative wrote on behalf of the appellants to the Fairness Committee of the Canada Revenue Agency, requesting relief under subsection 220(3.1) of the Act against the penalties and interest assessed against the appellants for their late filings of the forms. The representative conceded that the delay in filing was "a conscious decision" but was done in the mistaken belief, described above, that the forms did not need to be filed. The representative explained that it was guilty of "administrative oversight."

13 In its first level administrative decision, the Canada Revenue Agency denied the appellants' request for relief. It found that the appellants did not fall within one of the three specific scenarios set out in Information Circular (IC) 07-01 ("Taxpayer Relief Provisions"), a policy statement issued by the Minister. These three specific scenarios are extraordinary circumstances beyond the taxpayer's control, actions of the Canada Revenue Agency, and inability to pay. The Canada Revenue Agency also denied the appellants' request for relief under a "one chance policy" that

310 existed at the time. The appellants failed to qualify under that policy because they filed the forms only as a result of an inquiry made by the Canada Revenue Agency.

(4) The appellants' further request for relief from interest and penalties and the Minister's decision

14 Dissatisfied, the appellants made a second level request for relief to a delegate of the Minister (hereafter, the "Minister"). They explained that their representative had engaged in an "administrative oversight." They enclosed their previous correspondence that explained that the representative believed that the forms did not need to be filed because the Canada Revenue Agency was getting information about the appellants' foreign holdings from other filings. They suggested that the delay of the Canada Revenue Agency should result in some relaxation in the interest charges. Finally, they also argued that there was an "error of omission common to all entities" and so the penalty, levied for each of the six appellants, should be substantially reduced.

15 The Minister set out his reasons in a decision letter. In his decision letter, the Minister partly granted the appellants' request for relief. He was prepared to reduce the interest charged during six months due to the Canada Revenue Agency's delay in replying to the appellants. The Minister denied the remainder of the appellants' request for relief.

(5) The applications to the Federal Court for judicial review

16 The appellants applied to the Federal Court for judicial review of the Minister's denial of relief.

17 In the Federal Court, and also in this Court, the appellants focused on the reasons set out in the Minister's decision letter. They submitted that the Minister improperly narrowed the scope of discretion permitted to him under subsection 220(3.1) of the Act. In their view, the Minister had regard only to the three scenarios of relief specifically set out in the Information Circular rather than the general concept of fairness under subsection 220(3.1) of the Act. In other words, the Minister improperly fettered his discretion.

18 The appellants also submitted that the Minister's refusals of relief on the facts of this case could not be sustained under the standard of review of reasonableness.

(6) The Federal Court's decision

19 The Federal Court rejected the appellants' submissions. It found that the Minister had not fettered his discretion. Instead, he was aware of the full extent of his discretion and decided against granting relief. The Federal Court based this conclusion on the fact that the Minister had before him an array of material that went beyond the three scenarios set out in the Information Circular, such as the submissions of the appellant and a wide-ranging Taxpayer Relief Report. The Federal

Court also found that the Minister fully addressed the appellants' requests for relief and reached a conclusion that passed muster under the standard of review of reasonableness.

C. Analysis

(1) The standard of review to be applied

20 The Federal Court held that the standard of review of the Minister's decision is reasonableness. In this Court, the parties accept this. This Court can interfere only if the Minister reached an outcome that is indefensible and unacceptable on the facts and the law: *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23 (F.C.A.) at paragraphs 24-28; *Slau Ltd. v. Canada (Revenue Agency)*, 2009 FCA 270 (F.C.A.) at paragraph 27; *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 (S.C.C.) at paragraph 47, [2008] 1 S.C.R. 190 (S.C.C.).

21 The appellants' submissions, while based on reasonableness, seem to articulate "fettering of discretion" outside of the *Dunsmuir* reasonableness analysis. They seem to suggest that "fettering of discretion" is an automatic ground for setting aside administrative decisions and we need not engage in a *Dunsmuir*-type reasonableness review.

22 On this, there is authority on the appellants' side. For many decades now, "fettering of discretion" has been an automatic or nominate ground for setting aside administrative decisionmaking: see, for example, *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.) at page 6. The reasoning goes like this. Decision-makers must follow the law. If the law gives them discretion of a certain scope, they cannot, in a binding way, cut down that scope. To allow that is to allow them to rewrite the law. Only Parliament or its validly authorized delegates can write or rewrite law.

23 This sits uncomfortably with *Dunsmuir*, in which the Supreme Court's stated aim was to simplify judicial review of the substance of decision-making by encouraging courts to conduct one, single methodology of review using only two standards of review, correctness and reasonableness. In *Dunsmuir*, the Supreme Court did not discuss how automatic or nominate grounds for setting aside the substance of decision-making, such as "fettering of discretion," fit into the scheme of things. Might the automatic or nominate grounds now be subsumed within the rubric of reasonableness review? On this question, this Court recently had a difference of opinion: *Kane v. Canada (Attorney General)*, 2011 FCA 19 (F.C.A.). But, in my view, this debate is of no moment where we are dealing with decisions that are the product of "fettered discretions." The result is the same.

24 *Dunsmuir* reaffirms a longstanding, cardinal principle: "all exercises of public authority must find their source in law" (paragraphs 27-28). Any decision that draws upon something other than the law — for example a decision based solely upon an informal policy statement without regard or cognizance of law, cannot fall within the range of what is acceptable and defensible and,

312 thus, be reasonable as that is defined in *Dunsmuir* at paragraph 47. A decision that is the product of a fettered discretion must *per se* be unreasonable.

25 In the circumstances of this case, if the Minister did not draw upon the law that was the source of his authority, namely subsection 220(3.1) of the Act, and instead fettered his discretion by having regard only to the three specific scenarios set out in the Information Circular, his decisions cannot be regarded as reasonable under *Dunsmuir*.

(2) Subsection 220(3.1) of the Act

26 Subsection 220(3.1) of the Act provides that if an application for relief is made in time, the Minister has discretion to grant relief against penalties and interest. Subsection 220(3.1) reads as follows:

> **220.** (3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.
>
> **220.** (3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

27 The scope of the Minister's discretion under this subsection is determined, like any other matters of statutory interpretation, by examining the statutory words setting out the discretion (here unqualified), the other sections of the Act which may provide context, and the purposes underlying the section and the Act itself. When that examination is conducted, it is fair to say that the scope of the Minister's discretion is broader than the three specific scenarios set out in the Information Circular.

(3) Does the Minister's decision pass muster under the standard of review of reasonableness?

28 In my view, the Minister fettered his discretion, and thereby made an unreasonable decision. He did not draw upon subsection 220(3.1) of the Act to guide his discretion. He looked exclusively to the Information Circular. This is seen from the Minister's reasons for decision.

(a) The Minister's reasons for decision, as evidenced by his decision letter

29 In his decision letter, the Minister sets out reasons for his decision. At the beginning of the decision letter, the Minister mentions that his decision falls under "Taxpayer Relief Legislation." He explains that this legislation "gives the Minister the discretion to waive or cancel all or part of any penalty or interest payable." At this point, he says nothing about the scope of his discretion under this legislation. He never does.

30 In the next sentence in his decision letter, the Minister defines the scope of his discretion, limiting it somewhat. He does this by reference to the Information Circular, not subsection 220(3.1). Specifically, he states that his discretion is to be guided by "whether the penalty or interest resulted from extraordinary circumstances, is due mainly to actions of the Canada Revenue Agency (CRA), or...[is due to an] inability to pay." As we have seen in paragraph 13 above, these are the three specific scenarios set out in the Information Circular for the granting of relief. These words show that the Minister was limiting his consideration to the three circumstances set out in the Information Circular, and was not considering the broad terms of subsection 220(3.1) of the Act.

31 Alone, reference to a policy statement, such as the Information Circular, is not necessarily a cause for concern. Often administrative decision-makers use policy statements to guide their decision-making. As I mention at the end of these reasons, such use is acceptable and helpful, within limits. But many administrative decision-makers are careful to note those limits — policy statements can only be a guide, and, in the end, it is the governing law that must be interpreted and applied. In his decision letter, however, the Minister did not note any limits on his use of the Information Circular.

32 In the next portion of his decision letter, the Minister stated that the appellants sought relief on the basis of "administrative oversight." This was incomplete: as mentioned in paragraph 14, above, the appellants offered other explanations and justifications. The Minister never addressed these in his decision letter. The Minister responded to the appellants' explanation of "administrative oversight" by reminding them about their responsibility to determine and follow the deadlines set out in the Act.

33 Next, the Minister turned to the appellants' request for interest relief due to the Canada Revenue Agency's delay. Here, as mentioned in paragraph 15 above, he granted limited relief. In granting that relief, the Minister did not refer to the Information Circular. However, delay by the Canada Revenue Agency does fit within the second scenario set out in the Information Circular for the granting of relief, namely conduct by the Agency.

34 At the end of his decision letter, the Minister refused the rest of the relief sought by the appellants. In support of this, he offered the following explanation:

> While I can sympathize with your position, the Taxpayer Relief Provisions do not allow for cancellation of penalties and interest when a Taxpayer, or their representative, lacks knowledge or fails to meet filing deadlines. I trust this explains the Agency's position in this matter.

35 This passage offers further evidence that the Minister was restricting his consideration to the three scenarios set out in the Information Circular and was not drawing upon subsection 220(3.1) of the Act as the source of his decision-making power. This is seen from the Minister's reference to the "Taxpayer Relief Provisions" — the title of the Information Circular — as the source of his decisionmaking power, not subsection 220(3.1) of the Act. On a fair reading of this passage, the Minister denied the appellants relief because their claims for relief did not fit within the scenarios set out in the Information Circular.

(b) Does the record before the Minister shed any further light on the Minister's decision?

36 The respondent urges us to go beyond the stated reasons in the Minister's decision letter. It points to the record that was placed before the Minister, and an affidavit filed with the Federal Court. The respondent submits that these materials demonstrate that the Minister drew upon more than the Information Circular as the source of his authority.

37 I agree that the reasons in a decision letter should not be examined in isolation. Reasons can sometimes be understood by appreciating the record that was placed before the administrative decision-maker: *Vancouver International Airport Authority v. P.S.A.C.*, 2010 FCA 158 (F.C.A.) at paragraph 17.

38 But sometimes the record is of no assistance. That is the case here. While the Minister had a broad record before him, his decision letter shows no awareness that he could go beyond the Information Circular. To the contrary, his decision letter shows an understanding — faulty — that he was governed exclusively by the Information Circular. Further, as explained in paragraph 32, above, the Minister did not seem to have full and accurate regard to key portions of the record before him, namely the explanations and justifications in letters sent by the appellants. In such circumstances, resort to the record to explain why the Minister decided in the way that he did is not possible.

39 The Federal Court was willing to assume that the Minister considered the record before him. In my view, that assumption was not open to it given the reasons in the preceding paragraph.

(c) Does an affidavit filed in the Federal Court shed any further light on the Minister's decision?

40 During argument of this appeal, the respondent referred us to an affidavit that was filed with the Federal Court. The affidavit is from the delegate of the Minister who made the decision that is the subject of judicial review in these proceedings. In that affidavit, and also in cross-examination on that affidavit, the delegate testified that he relied on other matters when he made his decision, including "the relevant sections of the *Income Tax Act*." The respondent points to this affidavit as evidence that the Minister had regard to the full extent of his discretion under subsection 220(3.1) of the Act and drew upon that section as the source of his authority.

41 The Federal Court appears to have placed no weight on this evidence. I also place no weight on it. This sort of evidence is not admissible on judicial review: *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.). The decision-maker had made his decision and he was *functus*: *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848 (S.C.C.). After that time, he had no right, especially after a judicial review challenging his decision had been brought, to file an affidavit that supplements the bases for decision set out in the decision letter. His affidavit smacks of an after-the-fact attempt to bootstrap his decision, something that is not permitted: *Bransen Construction Ltd. v. C.J.A., Local 1386*, 2002 NBCA 27 (N.B. C.A.) at paragraph 33. As a matter of common sense, any new reasons offered by a decision-maker after a challenge to a decision has been launched must be viewed with deep suspicion: *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267 (S.C.C.).

42 In this case, the Minister was obligated to disclose the full and true bases for his decision at the time of decision. The decision letter, viewed alongside the proper record of the case, is where the bases for decision must be found. In this case, the proper record sheds no light on the bases for the Minister's decision, and so the bases set out in the Minister's decision letter must speak for themselves.

(d) Conclusion: the Minister's decision was unreasonable

43 I conclude that in making his decision the Minister did not draw upon the law that was the source of his authority, namely subsection 220(3.1) of the Act. Instead, he drew upon the Information Circular, and nothing else. His decision thereby became unreasonable.

(4) Should the decision be set aside and the matter returned to the Minister for redetermination?

44 Just because a decision is unreasonable does not mean that it must automatically be set aside and returned to the decision-maker for redetermination. Relief on an application for judicial review is discretionary.

45 In particular, this Court may decline to grant relief for an unreasonable decision where, for example, there is no substantial miscarriage of justice or the granting of relief would serve no

practical end: *MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 (S.C.C.); *Dennis v. Adams Lake Band*, 2011 FCA 37 (F.C.A.).

46 In this case, there would be no practical end served in setting aside the Minister's decision and returning the matter to him for redetermination. The excuses and justifications offered by the appellants for the delay in filing and the grounds offered in support of relief have no merit. The Minister could not reasonably accept them and grant relief under subsection 230(3.1) of the Act. Returning the matter back to the Minister would be an exercise in futility.

47 The appellants say that their financial representative had a reasonable but mistaken belief that filing the form was not obligatory. This is belied by the fact that it did file the forms for the 1998 and 1999 taxation years. It knew that the Act required that the forms be filed and filed them.

48 After the 1999 taxation year, the appellants' representative consciously chose not to comply with the Act. It did so on the basis that the Canada Revenue Agency was getting information from other sources, such as the appellants' Canadian money managers. As it turned out, this basis did not apply to the appellant Canwest Communications Corporation.

49 Even if the Canada Revenue Agency was getting the information from other sources, this cannot be an acceptable excuse or mitigating factor for non-compliance in the circumstances of this case, especially where we are dealing with the appellants' representative, a professional firm that deals with tax matters. It is notorious that in various provisions of the Act, the Canada Revenue Agency is allowed to obtain the same type of information from different sources. This allows it to verify compliance with the Act. For example, an employer is obligated to file T-4 slips reporting the income it has paid to its employees. At the same time, the employees disclose their income from employment. The employers' and employees' figures should match. What if the employer, after filing T-4 forms for a period of years, consciously declined to file the T-4 slips and then argued that it should avoid penalties because the Canada Revenue Agency would get information about the employees' income from the employees? In those circumstances, would there be any case for relief? Of course not.

50 In this case, compliance was fully within the appellants' control. Compliance happened in the 1998 and 1999 taxation years and there were no new extenuating circumstances that might explain the later non-compliance. These facts fall outside of what this Court has identified as being a focus of subsection 220(3.1), namely the granting of relief where there are extenuating circumstances beyond the control of the person seeking relief: *Bozzer v. Minister of National Revenue*, 2011 FCA 186 (F.C.A.) at paragraph 22.

51 The appellants also argued that it is unfair for the Minister to levy six separate, sizeable penalties against the six appellants when there was really only one mistake made by their one common representative. The appellants contended that the penalties should be substantially reduced for that reason. This argument, smacking of a plea for a "volume discount," has no

merit. Each of the appellants is a separate legal entity and a separate taxpayer, potentially subject to penalties and interest for its own non-compliance. Each is capable of independent decision-making concerning the forms that are to be filed. Each, accepting the risk, chose instead to have a representative look after the filings. That risk materialized: their representative made a conscious decision not to file the forms, a decision made without reasonable excuse or justification, as explained above. Granting relief under subsection 220(3.1) on the basis of this argument would be an unreasonable exercise of discretion.

52 I accept that the normal remedy for an unreasonable decision is to set it aside and return the matter back to the decision-maker for redetermination. I also accept that this Court should be reluctant to wade into the merits of administrative decision-making. But there are cases, perhaps rare, where no practical end would be served by returning the matter back to the decision-maker. This is just such a case.

53 In these circumstances, the appellants' explanations and justifications are entirely without merit. The appellants could not succeed on them if we returned the matter to the Minister for redetermination. Similar to what happened in *MiningWatch Canada*, *supra*, the Minister made an unreasonable decision but no practical end would be served in returning the matter back to him for redetermination. Therefore, in this case, I would decline to do so.

D. Postscript

54 So that these reasons provide proper guidance and are not misunderstood and misapplied in future cases, I wish to make three brief observations.

-I -

55 Portions of the language used in the decision letter in this case are identical to that used in other decision letters: see, for example, *Spence v. Canada (Revenue Agency)*, 2010 FC 52 (F.C.). In itself, there is nothing wrong with using form letters or stock language taken from other decision letters. The reasons offered in one case can be appropriate for other cases, and the repeat use of those reasons is efficient. However, as this case shows, a blind use of form letters or stock language can sometimes lead to trouble.

56 Whether the reasons are cut and pasted from a previous letter, are slightly modified from a previous letter or have to be drafted from scratch, the final product issued to the applicant for relief under subsection 220(3.1) of the Act should show an awareness of the scope of the available discretion under the Act, offer brief reasons why relief could or could not be given in the particular circumstances, and meaningfully address the arguments made that have a chance of success. If the reasons do not deal with one or more of these matters — something that can happen through careless or unthinking use of a form letter or stock language — the decision may not pass muster under the standard of review of reasonableness.

-II -

57 The foregoing comment and these reasons should not be taken to impose onerous new reasons-giving requirements upon the Minister. In this case, all that was required was perhaps a few additional lines in a letter that was just 33 lines long: *Vancouver International Airport Authority*, *supra* at paragraphs 16 and 17.

-III -

58 Finally, these reasons should not be taken to cast any doubt on the ability of administrative decision-makers, such as the Minister, to use policy statements, such as the Information Circular in this case, as an aid or guide to their decision-making.

59 Policy statements play a useful and important role in administration: *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385 (F.C.A.). For example, by encouraging the application of consistent principle in decisions, policy statements allow those subject to administrative decision-making to understand how discretions are likely to be exercised. With that understanding, they can better plan their affairs.

60 However, as explained in paragraphs 20-25 above, decision-makers who have a broad discretion under a law cannot fetter the exercise of their discretion by relying exclusively on an administrative policy: *Thamotharem*, *supra* at paragraph 59; *Maple Lodge Farms*, *supra* at page 6; *Dunsmuir*, *supra* (as explained in paragraph 24 above). An administrative policy is not law. It cannot cut down the discretion that the law gives to a decision-maker. It cannot amend the legislator's law. A policy can aid or guide the exercise of discretion under a law, but it cannot dictate in a binding way how that discretion is to be exercised.

61 In this case, the Minister ran afoul of these principles. Fortunately for him, however, he reached the only reasonable outcome on these facts.

E. Proposed disposition

62 For the foregoing reasons, I would dismiss the appeals. However, in light of the unreasonableness of the Minister's decisions, I would not award the respondent in each appeal its costs of the appeal.

***Marc Noël J.A.* :**

I agree.

***Johanne Trudel J.A.* :**

I agree.

Appeal dismissed.

2000 CarswellNat 947
Federal Court of Canada — Appeal Division

Zündel v. Citron

2000 CarswellNat 3268, 2000 CarswellNat 947, [2000] 4 F.C. 225, [2000] F.C.J. No. 679, 183 F.T.R. 160 (note), 189 D.L.R. (4th) 131, 256 N.R. 201, 25 Admin. L.R. (3d) 113, 38 C.H.R.R. D/88, 97 A.C.W.S. (3d) 723

Sabina Citron, Toronto Mayor's Committee on Community and Race Relations, The Attorney General of Canada, The Canadian Human Rights Commission, Canadian Holocaust Remembrance Association, Simon Wiesenthal Centre, Canadian Jewish Congress and League for Human Rights of B'Nai Brith, Appellants and Ernst Zundel and Canadian Association for Free Expression Inc., Respondents

Isaac, Robertson, Sexton JJ.A.

Heard: April 4, 2000
Judgment: May 18, 2000 *
Docket: A-253-99

Proceedings: reversing (1999), 3 F.C. 409, 165 F.T.R. 113, (sub nom. Zündel v. Canada (Attorney General)(No. 9)) 35 C.H.R.R. D/354 (Federal Court of Canada — Appeal Division)

Counsel: *Jane S. Bailey*, for Appellants, Sabina Citron, Canadian Holocaust Remembrance Association.
Andrew A. Weretelnyk, for Appellant, Toronto Mayor's Committee on Community and Race Relations.
Richard Kramer, for Appellant, Attorney General of Canada.
René Duval, for Appellant, Canadian Human Rights Commission.
Robyn M. Bell, for Appellant, Simon Wiesenthal Centre.
Joel Richler and *Judy Chan*, for Appellant, Canadian Jewish Congress.
Marvin Kurz, for Appellant, League for Human Rights of B'Nai Brith.
Douglas Christie and *Barbara Kulaszka*, for Respondent, Ernst Zündel.
Gregory Rhone, for Respondent, Canadian Association for Free Expression Inc.

The judgment of the court was delivered by *Sexton J.A.*:

Introduction

1 Ms. Devins is a member of the Canadian Human Rights Tribunal (the "Tribunal") that is hearing a complaint brought against Ernst Zündel. At issue in this appeal is whether Ms. Devins is subject to a reasonable apprehension of bias, stemming from a now twelve-year old press release that was issued by the Ontario Human Rights Commission (the "Commission" or "Ontario Human Rights Commission") when Ms. Devins was a member of that Commission, in which the Commission, among other things, applauded a court ruling that found Mr. Zündel to be guilty of publishing false statements that denied the Holocaust.

Background Facts

2 On May 11, 1988, a jury found Mr. Zündel to be guilty of wilfully publishing a pamphlet called "Did Six Million Really Die?" that he knew was false and that causes or is likely to cause injury or mischief to a public interest, contrary to s. 177 of the *Criminal Code*. [1]

3 Two days after the jury had reached its verdict, the Ontario Human Rights Commission issued the following press release:

> TIME/DATE: 10:32 Eastern Time May 13, 1988
>
> SOURCE: Ontario Human Rights Commission
>
> HEADLINE: *** HUMAN RIGHTS COMMISSION COMMENDS RECENT ZÜNDEL RULING***
>
> PLACELINE: TORONTO
>
> The Ontario Human Rights Commission commends the recent court ruling that found Ernst Zundel guilty of publishing false statements denying the Holocaust.
>
> "This decision lays to rest, once and for all, the position that is resurrected from time to time that the Holocaust did not happen and is, in fact, a hoax," said Chief Commissioner, Raj Anand. "We applaud the jury's decision since it calls for sanctions against a man responsible for contradicting the truth of the suffering experienced by the Jewish people, which was visited upon them solely because of their religion and ethnicity."
>
> Mr. Anand also stated that the decision is of broader significance in that it affirms not only the rights of Jews, but also of and [***sic***] other religious and ethnocultural groups to be free from the dissemination of false information that maligns them.

4 Mr. Zündel's criminal conviction was eventually overturned by the Supreme Court of Canada, which held that s. 177 of the *Criminal Code* [2] was contrary to the right of free expression

guaranteed by s. 2(b) of the *Charter*, and that the infringement could not be saved by s. 1 of the *Charter*. [3]

5 Approximately four years after the Supreme Court overturned Mr. Zündel's conviction, two complainants laid complaints with the Canadian Human Rights Commission. The complainants said that they believed that an Internet website operated by Mr. Zündel would be "likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination," contrary to subsection 13(1) of the *Canadian Human Rights Act*. [4] A panel of the Canadian Human Rights Tribunal was appointed to inquire into the complaints. Reva E. Devins was one of three persons appointed to determine the complaint.

6 At the inquiry, which commenced on May 26, 1997, the Canadian Human Rights Commission relied heavily on the "Did Six Million Really Die?" pamphlet that had been published on Mr. Zündel's website. This pamphlet was the same one that had led to the earlier criminal charges and to the press release issued by the Ontario Human Rights Commission.

7 After approximately forty days of hearings, Mr. Zündel requested that the Tribunal fax him the biographies of the three Tribunal members. Approximately one week after the biographies had been faxed to him, counsel for Mr. Zündel located the press release while searching Quicklaw Systems' databases. That same day, counsel for Mr. Zündel brought a motion before the Tribunal, seeking to dismiss the s. 13(1) complaints on the basis that Ms. Devins was subject to a reasonable apprehension of bias.

The Tribunal's Decision

8 The Tribunal rejected Mr. Zündel's motion. It concluded that the press release had been made by the then Chief Commissioner of the Ontario Human Rights Commission, not by the Commission or by Ms. Devins personally. Moreover, the Tribunal added, the statements was arguably within the Chief Commissioner's statutory mandate. These factors, the Tribunal held, made it difficult to understand how the press release could be said to create a reasonable apprehension of bias on the part of the Chief Commissioner, or that any bias could then be imputed to Ms. Devins. In any event, the Tribunal held that even if Mr. Zündel's submission had any merit, it held that it was "totally inappropriate at this late state for this matter to be advanced." [5] The Tribunal reasoned that because the statement had been made long before the hearing had commenced, Mr. Zündel could have raised the bias allegation at the outset of the proceedings. In so doing, the Tribunal implied that Mr. Zündel had waived his right to raise an allegation of reasonable apprehension of bias. Mr. Zündel sought judicial review of the Tribunal's decision to the Federal Court — Trial Division.

The Federal Court — Trial Division's Decision

9 In his decision, the Motions Judge held that the press release was a "gratuitous political statement" [6] that made "a specific damning statement" [7] against Mr. Zündel, which was "thoroughly inappropriate for the Chair of the Ontario Commission" [8] to do. He held that "an institution with adjudicative responsibilities has no legitimate purpose in engaging in such public condemnation." [9]

10 The Motions Judge reasoned that because the press release stated that "*the Ontario Human Rights Commission* commends the present court ruling," [10] and that "*we* applaud the jury's decision," [11] the Chair purported to speak on behalf of all members of the Commission, including Ms. Devins. The Motions Judge added that it would be a "reasonable conclusion to reach that at the time the statement was made, the members of the Ontario Commission held a strong actual bias" [12] against Mr. Zündel. Nevertheless, he concluded that by the time the Canadian Human Rights Tribunal was convened to inquire into the s. 13(1) complaint, there was "insufficient evidence to find present actual bias" [13] against Ms. Devins.

11 The Motions Judge concluded that even though the statement was released some ten years before Ms. Devins was called to inquire into the s. 13(1) complaint brought against Mr. Zündel, a reasonably informed bystander would apprehend that the "extreme impropriety" [14] of the press release would make her subject to a reasonable apprehension of bias.

12 The Motions Judge rejected the Tribunal's decision that Mr. Zündel had waived his right to bring the bias complaint by not bringing it at the outset of the Tribunal's proceedings. The Motions Judge accepted Mr. Zündel's evidence that he was not aware of the press release until shortly before the bias allegation was brought.

13 Even though he concluded that Ms. Devins was subject to a reasonable apprehension of bias, the Motions Judge declined to prohibit the remaining member of the Tribunal from continuing to hear and to ultimately determine the complaint. He held that because the *Canadian Human Rights Act* permits one Tribunal member to complete an already-commenced hearing where other appointed members are unable to continue, [15] the one remaining member of the panel could continue to hear and decide the complaint.

14 Ms. Citron and the other appellants now appeal the Motion Judge's decision that Ms. Devins was subject to a reasonable apprehension of bias. They have not appealed the Motion Judge's decision that Mr. Zündel did not waive his right to raise the bias allegation by not bringing it at the outset of the Tribunal's proceedings. Mr. Zündel has cross-appealed one aspect of the Motion Judge's decision, arguing that the Motions Judge should have quashed the Tribunal's proceedings in their entirety.

Issues

1. Was the finding of the Motions Judge that there was a reasonable apprehension of bias on the part of Ms. Devins unreasonable, based on erroneous considerations, reached on wrong principle, or reached as a result of insufficient weight having been given to relevant matters?

2. Was the Motions Judge correct in holding that, if there was a reasonable apprehension of bias, the Tribunal could continue with the hearing?

Analysis

1. The Reasonable Apprehension of Bias Test

15 In *R. v. S. (R.D.)*, [16] Cory J. stated the following manner in which the reasonable apprehension of bias test should be applied:

> The 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. [...] [The] test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter though — conclude [...] [17]

16 He held that the test contained 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." [18]

Does the press release address the same issue as the complaint before the Canadian Human Rights Tribunal?

17 On appeal, Mr. Zündel submits that a reasonable bystander would conclude that the press release, which attributes certain statements directly to the Ontario Human Rights Commission, and not merely to the Chair of that Commission, would cause Ms. Devins (who was a member of the Ontario Human Rights Commission when the press release was issued) to be subject to a reasonable apprehension of bias. Mr. Zündel submits that the criminal charges upon which the press release was based were directly in relation to his publication "Did Six Million Really Die?", the very same pamphlet that Mr. Zündel had reproduced on his website and that led to the s. 13(1) human rights complaint that Ms. Devins and the other two members of the Tribunal were asked to determine.

18 In my view, the press release draws a distinction between statements made by the Ontario Human Rights Commission, and statements made by Mr. Anand, the Chair of the Ontario Human

Rights Commission. The only statements contained in the press release that are directly attributed to the Ontario Human Rights Commission are the following:

> (i) The Ontario Human Rights Commission commends the recent court ruling that found Ernst Zundel guilty of publishing false statements denying the Holocaust;
>
> (ii) We applaud the jury's decision since it calls for sanctions against a man responsible for contradicting the truth of the suffering experienced by the Jewish people, which was visited upon them solely because of their religion and ethnicity.

19 The criminal charge that the Ontario Human Rights Commission addressed in the press release was s. 177 of the *Criminal Code*, later renumbered to s. 181. The section states:

> 181. Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

20 By contrast, s. 13(1) of the *Canadian Human Rights Act* states:

> 13 (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

21 In *Canada (Human Rights Commission) v. Taylor*, [19] Dickson C.J. held that "s. 13(1) [of the *Canadian Human Rights Act*] provides no defences to the discriminatory practice it describes, and most especially does not contain an exemption for truthful statements." [20] He concluded that "[...] the *Charter* does not mandate an exception for truthful statements in the context of s. 13(1) of the *Canadian Human Rights Act*." [21]

22 The press release was made in response to a criminal charge that did afford a defence of truthfulness ("[...] that he knows is false.") [22] The statements attributed to the Ontario Human Rights Commission simply criticize Mr. Zündel for denying the truthfulness of the Holocaust. By contrast, in a s. 13(1) complaint, the truth or non-truthfulness of statements is immaterial to whether the complaint is substantiated. Consequently, the issue faced by the jury in 1988 is different from the issue faced by the Canadian Human Rights Tribunal.

23 Shortly stated, the essence of the offence in section 177 of the *Criminal Code* was that the statement was false and that it could or would likely cause injury or mischief to a public interest. Thus, the truth of the statement would provide a complete defence. On the other hand, the essence

of the complaint before the Canadian Human Rights Tribunal is that certain people were exposed to hatred or contempt. The truth of the statement would provide no defence.

24 The only statement contained in the press release that might be material to the s. 13(1) complaint is the following:

> Mr. Anand also stated that the decision is of broader significance in that it affirms not only the rights of Jews, but also of and [***sic***] other religious and ethnocultural groups to be free from the dissemination of false information that maligns them.

25 It could be argued that the statement reproduced above states that the information disseminated by Mr. Zündel exposes Jews to hatred, the essence of a s. 13(1) complaint. However, in my view, an informed person, viewing the matter realistically and practically — and having thought the matter through — would conclude that the press release draws a distinction between statements made by the Ontario Human Rights Commission (*i.e.* "the *Ontario Human Rights Commission* commends [...]" or "*we* applaud [...]") and statements made by Raj Anand, the Chief Commissioner of the Ontario Human Rights Commission. The statement reproduced above is attributed to Mr. Anand, and not to the Commission as a whole. Accordingly, I do not think that a reasonable and informed observer would conclude that the above statement should be attributed to Ms. Devins.

26 Counsel for Mr. Zündel relied heavily on the Ontario Divisional Court's judgment in *Dulmage v. Ontario (Police Complaints Commissioner)*[23] to demonstrate that statements made by one member of an organization can be used to demonstrate that a different member of that organization is subject to a reasonable apprehension of bias.

27 In *Dulmage*, the president of the Mississauga chapter of the Congress of Black Women of Canada had been appointed to a Board of Inquiry pursuant to Ontario's *Police Services Act*.[24] The Board was appointed to investigate a complaint that a public strip search had taken place, contrary to the manner provided in the Metropolitan Toronto Police Force's regulations. Approximately one year before the president of the Mississauga chapter of the Congress of Black Women of Canada was appointed to the Board, the vice-president of the Toronto chapter of that organization was reported to have publicly stated that the strip search incident at issue was "not an 'isolated case' and reflects the 'sexual humiliation and abuse of black women.'"[25] In a different statement, the vice-president recommended "an RCMP investigation of [the] incident,"[26] and urged that the then-Chief of the Metropolitan Toronto Police Force resign, saying that "Chief McCormack has clearly demonstrated an inability to give effective leadership to the Police Force."[27]

28 In its decision, the Divisional Court concluded that the president who had been appointed to the Board of Inquiry was subject to a reasonable apprehension of bias. O'Brien J. held:

328

> [...] Inflammatory statements dealing with this very incident involved in this inquiry were made by an officer of the Congress of Black Women of Canada. Those statements were made in Toronto, closely adjacent to the City of Mississauga. They deal with an incident which received significant public attention. The statements referred to the incident as an "outrage" and called for the suspension of the officers involved. Those officers were the very ones involved in this hearing. Ms. Douglas was the president of the Mississauga chapter of the same organization. [28]

29 Similarly, in his dissenting reasons (although not on this point), Moldaver J. held that "the remarks themselves related, at least in part, to the critical issue which the board was required to decide." [29]

30 In my view, *Dulmage* is distinguishable because the statements at issue in *Dulmage* dealt with the very question at issue before the Board of Inquiry, whereas the statements made by the Ontario Human Rights Commission address an issue that is immaterial to the s. 13(1) Tribunal inquiry that Ms. Devins has been asked to determine.

31 I think the House of Lords' decision in *R. v. Bow Street Metropolitan Stipendiary Magistrate* [30] can be distinguished on a similar basis. In that appeal, the House of Lords vacated the earlier order it had made in *R. v. Bow Street Metropolitan Stipendiary Magistrate* [31] because Lord Hoffman, one of the members who heard the appeal, had links to an intervener (Amnesty International) that had argued on the appeal at the House of Lords.

32 When Lord Hoffman heard the appeal at issue in *R. v. Bow Street Metropolitan Stipendiary Magistrate*, he had been a Director and Chairperson of Amnesty International Charity Limited. That corporation was charged with undertaking charity work for Amnesty International, the entity that had intervened in *R. v. Bow Street Metropolitan Stipendiary Magistrate*.

33 The type of bias at issue in *R. v. Bow Street Metropolitan Stipendiary Magistrate* was characterized by Lord Browne-Wilkinson as "where the judge is disqualified because he is a judge in his own cause." [32] Lord Browne-Wilkinson then held that "if the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, *in promoting the same causes in the same organisation as is a party to the suit*." [33] Lord Browne-Wilkinson highlighted that "the facts of this present case are exceptional," [34] holding that "the critical elements are (1) that [Amnesty International] was a party to this appeal; [...] (3) the judge was a Director of a charity closely allied to [Amnesty International] and sharing, in this respect, [Amnesty International's] objects." [35] He concluded that "only in cases where a judge is taking an active role as trustee or Director of a

charity which is closely allied to *and acting with a party to the litigation* should a judge normally be concerned either to recuse himself or disclose the position to the parties." [36]

34 Accordingly, *R. v. Bow Street Metropolitan Stipendiary Magistrate* is not analogous to this appeal. It might be so if the Ontario Human Rights Commission was a party to the proceedings before the Tribunal. Since it was not, I do not think that *R. v. Bow Street Metropolitan Stipendiary Magistrate* demonstrates that Ms. Devins is subject to a reasonable apprehension of bias.

Other Errors Made by the Motions Judge

35 I now turn to other alleged errors made by the Motions Judge. In my view, he committed the following errors, each of which I address at greater length below:

1. He failed to address the presumption of impartiality;

2. He failed to consider whether the press release demonstrated an objectively justifiable disposition;

3. He failed to properly connect Ms. Devins to the press release;

4. He failed to give appropriate weight to the passage of time;

5. He erred in concluding that the Ontario Human Rights Commission was an adjudicative body and had no legitimate purpose in making the press release;

6. He erred in concluding that a doctrine of "corporate taint" exists.

Presumption of impartiality

36 In my view, the Motions Judge erred by failing to take into account the principle that a member of a Tribunal will act fairly and impartially, in the absence of evidence to the contrary. In *R. v. S. (R.D.)*, Cory J. held 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'." [37] He added that "the threshold for a finding of real or perceived bias is high," [38] and that "a real likelihood of probability of bias must be demonstrated, and that a mere suspicion is not enough." [39] Further, Cory J. held that "the onus of demonstrating bias lies with the person who is alleging its existence." [40]

37 In *Beno v. Canada (Somalia Inquiry Commission)*, [41] this Court held that there is a presumption that a decision-maker will act impartially. [42] Similarly, in *E.A. Manning Ltd. v. Ontario (Securities Commission)*, [43] the Ontario Court of Appeal held, in the context of a bias

allegation levelled against a securities commission, that "it must be presumed, in the absence of any evidence to the contrary, that the Commissioners will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case." [44] And in *Finch v. Assn. of Professional Engineers & Geoscientists (British Columbia)*, [45] the British Columbia Court of Appeal held that it must be assumed, "unless and until the contrary is shown, that every member of this committee will carry out his or her duties in an impartial manner and consider only the evidence in relation to the charges before the panel." [46]

Failure to consider whether the press release demonstrated an objectively justifiable disposition

38 In *R. v. S. (R.D.)*, Cory J. offered a useful definition of the word "bias." He held that "bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues." [47] He added that "not every favourable or unfavourable disposition attracts the label of prejudice." [48] He held that where particular unfavourable dispositions are "objectively justifiable," [49] such dispositions would not constitute impermissible bias. He offered "those who condemn Hitler" [50] as examples of objectively justifiable dispositions and, therefore, such comments do not give rise to a reasonable apprehension of bias on the part of the speaker.

39 In the Supreme Court's judgment that overturned Mr. Zündel's criminal conviction for publishing the "Did Six Million People Really Die?" pamphlet, McLachlin J. (as she then was) referred to Mr. Zündel's beliefs as "admittedly offensive," [51] while Cory and Iacobucci JJ. described the pamphlet as part of a "genre of anti-Semitic literature" [52] that "makes numerous false allegations of fact." [53] In light of these statements, how could it *not* be objectively justifiable for the Ontario Human Rights Commission and its Chair to have made similar statements regarding the same pamphlet in their press release?

Failure to connect Ms. Devins to the press release

40 The Motions Judge held that it would be a reasonable conclusion to think that at the time the press release was issued, both the Chair of the Ontario Human Rights Commission and its members held a strong actual bias (*i.e.* and not just a reasonable apprehension of bias) as against Mr. Zündel.

41 He later held that "the passage of time does not eradicate the fact that Ms. Devins is reasonably attributed with strong actual bias." [54] However, from the Motion Judge's reasons, it appears that he took Ms. Devins' present denial of bias into account to conclude that at the time the Tribunal was appointed to inquire into the s. 13(1) complaint, there was "insufficient evidence to find present actual bias by Ms. Devins against the applicant." [55]

42 In my view, the Motions Judge's reasons confuse the passage of time with Ms. Devins' actual connection to the press release. There was no evidence that Ms. Devins was aware of the press release, let alone agreed with or was party to its issuance so as to demonstrate actual bias at the time the press release was issued. Similarly, there was no evidence of conduct of Ms. Devins from which one could infer a reasonable apprehension of bias later.

Failure to give appropriate weight to the passage of time

43 In the instant matter now on appeal, the Motions Judge attributed little or no weight to the time that had passed between the date the press release was issued and the date on which Ms. Devins was appointed to determine the complaint launched against Mr. Zündel. He held that "the passage of time does not eradicate the fact that Ms. Devins is reasonably attributed with strong actual bias." [56]

44 In so doing, I think the Motions Judge failed to give appropriate weight to the amount of time that had passed between the date on which the press release was issued and the date Ms. Devins was asked to hear the s. 13(1) complaint. In *Dulmage*, referred to earlier in these reasons, Moldaver J. concluded that the impugned board member was subject to a reasonable apprehension of bias in part because the press conference during which the statements were made had only taken place one year before the board hearing, a period of time that he did not consider to be "sufficient to expunge the taint left in the wake of these remarks." [57]

45 In the instant appeal, the Tribunal at issue was appointed some nine years after the press release was issued: a much greater time lag than was at issue in *Dulmage*, and one that, along with the other factors considered in this judgment, I consider to be sufficient to expunge any taint of bias that might have existed by reason of the press release.

Error in concluding that a doctrine of "corporate taint" exists

46 By concluding that all members of the Ontario Human Rights Commission would be biased by reason of the press release, the Motions Judge appeared to conclude that there is a doctrine of corporate "taint," a taint that is said to paint all members of a decision-making body with bias in certain circumstances. In *Bennett v. British Columbia (Securities Commission)*, [58] the British Columbia Court of Appeal rejected the doctrine of corporate taint. It held:

> We wish to add one further observation and that is as to the target of a bias allegation. Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear. No individual is identified here. Rather, the effect of the submissions is that all of the members of the commission appointed pursuant to s. 4 of the *Securities Act*, regardless

> of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where an entire tribunal of unidentified members had been disqualified from carrying out statutory responsibilities by reason of real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration. [59]

47 Similarly, in *Laws v. Australian Broadcasting Tribunal*, [60] Australia's High Court concluded that the doctrine of corporate taint did not exist, absent circumstances that permit an inference to be drawn that all members of an administrative tribunal authorized or approved statements or conduct that gave rise to a reasonable apprehension of bias on the part of one of its members. In *Laws*, three members of the Australian Broadcasting Tribunal conducted a preliminary investigation of Mr. Laws, and concluded that he had breached broadcasting standards. The Director of the Tribunal's Programs Division later gave an interview in which she repeated the conclusions made by the three Tribunal members. Mr. Laws sought an order prohibiting the entire Tribunal from later holding a formal hearing to determine whether it should exercise regulatory powers against Mr. Laws. His application was brought on the basis that the prejudgment expressed by the three members who had conducted the preliminary investigation and the statements made by the Director of the Programs Division served to taint the entire Tribunal.

48 Australia's High Court rejected Mr. Laws' application. It held:

> However, though it might be correct to regard the interview as a corporate act, it was not necessarily an act done on behalf of each of the individual members of the corporation. The circumstances are not such as to justify the drawing of an inference that each of the individual members of the tribunal authorised the interview or approved of its content. At best, from the appellant's viewpoint, it might be inferred that the three members of the tribunal who made the decision of 24 November so authorised or approved the interview. [61]

49 These decisions, I think, demonstrate that there is no doctrine of corporate taint. I prefer the reasoning in these decisions to the implication drawn by the majority in the *Dulmage* decision that such a taint could be said to exist. [62]

50 As I have previously explained in these reasons, I do not think that the proviso contained in the paragraph reproduced above from the *Laws* decision applies in the circumstances of this appeal: one cannot draw an inference that each of the individual members of the Ontario Human Rights Commission authorized the entire press release that was issued. To the extent that the members of the Commission could be said to have authorized certain statements contained in the press release, any such statements are immaterial to the complaint that Ms. Devins has been asked to determine.

The Supreme Court of Canada's Judgment in Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)

51 Counsel for the appellants relied on the Supreme Court of Canada's judgment in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* [63] for the proposition that the Ontario Human Rights Commission was engaged in a policy-making function at the time the press release was issued and therefore the statements contained in the press release were subject to a much lower standard of impartiality.

52 In *Newfoundland Telephone*, Andy Wells was appointed to a Board that was responsible for the regulation of the Newfoundland Telephone Company Limited. After he was appointed to the Board, and after the Board had scheduled a public hearing to examine Newfoundland Telephone's costs, Mr. Wells made several strong statements against Newfoundland Telephone's executive pay policies. Mr. Wells was one of five who sat on that hearing. Counsel for Newfoundland Telephone objected to Mr. Wells' participation at the hearing, arguing that the strong statements Mr. Wells had made demonstrated that he was subject to a reasonable apprehension of bias.

53 In *Newfoundland Telephone*, Cory J. recognized that administrative decision-makers were subject to varying standards of impartiality. He held that "those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts," [64] while boards with popularly-elected members are subject to a "much more lenient" standard. [65] He added that administrative boards that deal with matters of policy should not be subject to a strict application of the reasonable apprehension of bias test, since to do so "might undermine the very role which has been entrusted to them by the legislature." [66] Accordingly, he held that "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." [67]

54 Accordingly, Cory J. held that, had the following statement been made before the Board's hearing date was set, it would not amount to impermissible bias: "[s]o I want the company hauled in here — all them fat cats with their big pensions — to justify (these expenses) under the public glare [...] I think the rate payers have a right to be assured that we are not permitting this company to be too extravagant." He supported that conclusion in the following manner:

> That comment is no more than a colourful expression of an opinion that the salaries and pension benefits seemed to be unreasonably high. It does not indicate a closed mind. Even Wells' statement that he did not think that the expenses could be justified, did not indicate a closed mind. However, should a commissioner state that, no matter what evidence might be disclosed as a result of the investigation, his or her position would not change, this would indicate a closed mind. [68]

55 In *Newfoundland Telephone*, Cory J. held that once a board member charged with a policy-making function is then asked to sit on a hearing, "a greater degree of discretion is required

334

of a member."[69] Once a hearing date was set, Cory J. held that the board members at issue in *Newfoundland Telephone* had to "conduct themselves so that there could be no reasonable apprehension of bias."[70] In other words, a person who is subject to the "closed mind" standard can later be required to adhere to a stricter "reasonable apprehension of bias" standard.

56 Counsel for the appellants have seized on these aspects of Cory J.'s judgment in *Newfoundland Telephone*, to demonstrate that the Motions Judge erred by concluding that when the Ontario Human Rights Commission issued the press release, it was engaged in adjudicative functions, and was therefore required to abide by a high standard of impartiality. Instead, counsel for the appellants argue that the Ontario Human Rights Commission was engaged in a policy-making function when it issued the press release, and was therefore subject to a much lower standard of impartiality.

57 While I agree that the Motions Judge erred when he concluded that the Ontario Human Rights Commission was engaged in an adjudicative role when it issued the press release, I do not agree with the further implications sought to be drawn by the appellants.

58 When the press release was issued by the Ontario Human Rights Commission, it was charged with the following functions:

> 28. It is the function of the Commission,
>
> > (a) to forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;
> >
> > (b) to promote an understanding and acceptance of and compliance with this Act; [...]
> >
> > (d) to develop and conduct programs of public information and education and undertake, direct and encourage research designed to eliminate discriminatory practices that infringe rights under this Act; [...][71]

59 Subsections 28(a), (b) and (d) demonstrate that the Ontario Human Rights Commission is vested with policy-making functions and with an obligation to educate and to inform the public. Accordingly, I do not agree with the Motion Judge's conclusion that the press release issued by the Ontario Human Rights Commission was "thoroughly inappropriate." Rather, the statement was consistent with its statutory obligation, *inter alia*, "to forward the policy that the dignity and worth of every person be recognized."

60 However, I do not think that the *Newfoundland Telephone* case provides much assistance to the appellants. In my view, one should bear in mind that in *Newfoundland Telephone*, the Board

was specifically charged with dual functions: investigatory ones and adjudicative ones. Among its investigatory powers, the Board was permitted to "make all necessary examinations and enquiries to keep itself informed as to the compliance by public utilities with the provisions of law," [72] to "enquire into any violation of the laws or regulations in force," [73] to "summarily investigate [...] whenever the Board believes that any rate or charge is unreasonable or unjustly discriminatory [...]." [74] In the same breath, the Board was permitted to hold hearings "if, after any summary investigation, the Board becomes satisfied that sufficient grounds exist to warrant a formal hearing [...]." [75] Accordingly, the statute specifically envisaged that Board members who had acted in an investigatory capacity could later act as adjudicators. Indeed, in *Newfoundland Telephone*, Cory J. held that even when the Board at issue in that appeal was required to abide by the reasonable apprehension of bias standard, the standard "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."

61 By contrast, the Canadian Human Rights Tribunal is vested with no policy functions or with dual functions: it is simply charged with the adjudication of human rights complaints. Accordingly, unlike *Newfoundland Telephone*, there is no statutory authority for the proposition that Parliament specifically envisaged that members of the Canadian Human Rights Tribunal would have engaged in policy-making functions with regard to the very same issues that they would later be asked to adjudicate.

Conclusion on Bias

62 In my view, the Motions Judge erred when he concluded that Ms. Devins was subject to a reasonable apprehension of bias. I would set aside his decision, and remit the matter to the Canadian Human Rights Tribunal.

2. Was the Motions Judge correct in holding that, if there was a reasonable apprehension of bias, the Tribunal could continue with the hearing?

63 In the event I am wrong on the first issue it is necessary to deal with the second issue: namely, whether the Motions Judge erred by concluding that even though Ms. Devins was subject to a reasonable apprehension of bias, the remaining member of the Tribunal could continue to determine the as-yet undetermined complaint at issue before the Canadian Human Rights Tribunal.

64 In my view, the Motions Judge erred by concluding that where a reasonable apprehension of bias is proven, the remaining members of the Tribunal could continue to hear and determine the complaint. At the time the bias allegation was raised, the panel of which Ms. Devins was a member had sat for some fourty days, and had made approximately 53 rulings. Counsel for Mr. Zündel argued that each one of those rulings was contrary to the result for which he had argued.

65 Viewed in this light, I cannot see how the Tribunal's proceedings could somehow be remedied merely by virtue of there being one remaining member of the Tribunal who could determine the complaint. How could one ever know whether the Tribunal's ultimate decision was somehow affected by one or more of the Tribunal's rulings? How could one ever know whether the biased member had expressed her preliminary views on the merits of the complaint before she was ordered to be recused from the proceedings? And how could one ever know whether those consultations might have somehow affected the remaining member's decisions on the interlocutory rulings? These concerns, I think, demonstrate that where one member of an administrative tribunal is subject to a reasonable apprehension of bias and a number of serious interlocutory orders have been made over the course of a lengthy hearing, the tribunal's proceedings should be quashed in their entirety, even though a statutory provision on its face permits the tribunal to proceed with fewer members where a member is, for some reason, unable to proceed.

66 My conclusions are supported by Cory J.'s reasons in *R. v. S. (R.D.)*, where he held:

> If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. See *Newfoundland Telephone, supra*, at p. 645; see also *Curragh, supra*, at para. 6. Thus, the mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from other words or conduct of the judge. In the context of an application to disqualify a judge from sitting in a particular lawsuit, it has been held that where there is a reasonable apprehension of bias, "it is impossible to render a final decision resting on findings as to credibility made under such circumstances." [76]

Conclusion

67 I would allow the appeal, with costs and set aside the order of the Motions Judge dated April 13, 1999 and remit the matter back to the Tribunal for completion of the hearing.

Appeal allowed, cross-appeal dismissed, and matter remitted to tribunal.

Footnotes

* Leave to appeal refused (December 14, 2000), Doc. 28008 (S.C.C.).

1 R.S.C. 1985, c. C-46.

2 By the time the Supreme Court heard Mr. Zündel's appeal, s. 177 of the *Criminal Code* had been renumbered to s. 181.

3 [1992] 2 S.C.R. 731 (S.C.C.), at 778, *per* McLachlin J. (as she then was).

4 R.S.C. 1985, c. H-6.

5 Appeal Book, p. 74.

6 *Zündel v. Citron*, [1999] 3 F.C. 409 (Fed. T.D.) at 421.

7 *Zündel v. Citron*, *Ibid.*

8 *Zündel v. Citron*, *Ibid.*

9 *Zündel v. Citron*, *Ibid.*

10 *Zündel v. Citron*, *Ibid.* (emphasis in original).

11 *Zündel v. Citron*, *Ibid.* (emphasis in original).

12 *Zündel v. Citron*, *Ibid.*

13 *Zündel v. Citron*, *Ibid.*, p. 422.

14 *Zündel v. Citron*, *Ibid.*

15 The Motions Judge never specifically identified the provision of the *Canadian Human Rights Act* on which he relied.

16 [1997] 3 S.C.R. 484 (S.C.C.).

17 *Ibid.*, p. 530.

18 *R. v. S. (R.D.)*, *Ibid.*, p. 531.

19 [1990] 3 S.C.R. 892 (S.C.C.).

20 *Canada (Human Rights Commission) v. Taylor*, *Ibid.*, p. 934.

21 *Canada (Human Rights Commission) v. Taylor*, *Ibid.*, p. 935.

22 Subsection 177 (which was later renumbered to s. 181) stated that "every one who wilfully publishes a statement, tale or news that *he knows is false* and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years" (emphasis added).

23 (1994), 21 O.R. (3d) 356 (Ont. Div. Ct.).

24 R.S.O. 1990, c. P.15.

25 *Dulmage*, *supra* at p. 360.

26 *Dulmage*, *Ibid.*

27 *Dulmage*, *Ibid.*, p. 361.

28 *Ibid.*, p. 363 (emphasis added).

29 *Dulmage*, *Ibid.*, p. 365.

30 [1999] 2 W.L.R. 272 (U.K. H.L.).

31 [1998] 4 ALL E.R. 897 (U.K. H.L.).

32 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *supra* at para. 30.

33 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *Ibid.*, para. 37 (emphasis added).

34 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *Ibid.*, para. 40.

35 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *Ibid.*

36 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *Ibid.* (emphasis added).

37 *R. v. S. (R.D.)*, *supra* at 531 (emphasis in original).

38 *R. v. S. (R.D.)*, *Ibid.*, p. 532.

39 *R. v. S. (R.D.)*, *Ibid.*, p. 531.

40 *R. v. S. (R.D.)*, *Ibid.*

41 [1997] 2 F.C. 527 (Fed. C.A.).

42 *Beno v. Canada (Somalia Inquiry Commission)*, *Ibid.*, p. 542.

43 (1995), 23 O.R. (3d) 257 (Ont. C.A.), application for leave to appeal to S.C.C. dismissed August 17, 1995 [reported:(1995), 8 C.C.L.S. 242n (S.C.C.)].

44 *E.A. Manning Ltd. v. Ontario (Securities Commission)*, *Ibid.*, p. 267.

45 [1996] 5 W.W.R. 690 (B.C. C.A.).

46 *Finch v. Assn. of Professional Engineers & Geoscientists (British Columbia)*, *Ibid.*, p. 704.

47 *R. v. S. (R.D.)*, *supra* at p. 528.

48 *R. v. S. (R.D.)*, *Ibid.*

49 *R. v. S. (R.D.)*, *Ibid.*

50 *R. v. S. (R.D.)*, *Ibid.*

51 *R. v. Zündel*, *supra* at 743.

52 *R. v. Zündel*, *Ibid.*, p. 779.

53 *R. v. Zündel*, *Ibid.*, p. 781.

54 *Zündel*, *supra* at p. 422.

55 *Zündel*, *Ibid.*

56 *Zündel*, *Ibid.*

57 *Dulmage*, *supra* at p. 365.

58 (1992), 69 B.C.L.R. (2d) 171 (B.C. C.A.).

59 *Ibid.*, p. 181.

60 (1990), 93 A.L.R. 435 (Australian H.C.).

61 *Ibid.*, p. 445.

62 In his dissenting reasons, Moldaver J. appeared to recognize that no such doctrine exists. He held that "a member need not automatically withdraw solely because of statements made by a representative of an affiliated community organization about issues before the board" (at 363). Later in his judgment, he repeated the point, holding:
Lest there be any doubt about it, I wish to emphasize that mere association, either past or present, on the part of a board member with an organization, which, by its very nature, might be said to favour one side or the other, will not of itself satisfy the test for reasonable apprehension of bias (at 366).

63 [1992] 1 S.C.R. 623 (S.C.C.).

64 *Newfoundland Telephone*, *Ibid.*, p. 638.

65 *Newfoundland Telephone*, *Ibid.*

66 *Newfoundland Telephone*, *Ibid.*

67 *Newfoundland Telephone*, *Ibid.*, p. 639.

68 *Ibid.*, p. 642-643.

69 *Newfoundland Telephone*, *Ibid.*, p. 643.

70 *Newfoundland Telephone*, *Ibid.*, p. 644.

71 *Human Rights Code*, S.O. 1981, c. 53.

72 *The Public Utilities* Act, R.S.N. 1970, c. 322, as am. by S.N. 1979, c. 30, s. 1, s. 14.

73 *Ibid.*, s. 15.

74 *Ibid.*, s. 79.

75 *Ibid.*, s. 85.

76 *Ibid.*, p. 526.