Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney

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MOTION RECORD OF THE ATTORNEY GENERAL OF CANADA TO KARLHEINZ SCHREIBER'S APPLICATION REGARDING HIS PRESENCE FOR PART I AND II OF THE INQUIRY

John H. Sims
Deputy Attorney General of Canada
Department of Justice
234 Wellington Street
10th floor, East Tower, Room 1001
Ottawa, Ontario
K1A 0H8

Per: Paul B. Vickery

Tel: (613) 948-1483
Fax: (613) 941-5879
E-mail: paul.vickery@justice.gc.ca

Counsel for the Attorney General of Canada

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1. On May 11th, 2009, Karlheinz Schreiber, through his counsel, filed an application for an Order, Direction or Recommendation that he remain available in Ottawa to attend the balance of Part I and Part II in order to instruct counsel.

2. The Attorney General of Canada takes no position with respect to any recommendation that Mr. Schreiber remain available in Ottawa to attend and instruct counsel.

3. However, with respect to the issuance of an order or direction the Attorney General of Canada takes the following position:

Jurisdiction of Public Inquiries

4. As stated by Commissioner Major in the *Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182's* ruling on access to documents, a Commission of Inquiry's powers are limited by statute or its terms of reference:

> "Unlike a court of inherent jurisdiction, a Commission of Inquiry only has the powers granted to it by statute or by its Terms of Reference."[1]

5. In fact, a public inquiry's existence depends entirely on the Governor in Council and cannot operate outside the parameters established by the Governor in Council.[2]

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[1] See Major Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, ruling on access to documents at para. 10. Available online: http://www.majorcomm.ca/en/reasonsfordecision_aivfa_request/index.asp. [Major Commission].

6. As affirmed by the Supreme Court of Canada, there is no common law basis for a Commission's authority.[3]

Ministers Discretion in Extradition Matters

7. The *Extradition Act* (the "Act") serves as the statutory basis, along with a relevant extradition agreement, for all extraditions from Canada.[4]

8. Section 7 of the Act states that:

> "7. The Minister is responsible for the implementation of extradition agreements, the administration of this Act and the dealing with requests for extradition made under them"

9. The decision of whether or not to issue a warrant of surrender falls within the exclusive discretionary authority of the Minister of Justice. As stated by the Supreme Court of Canada in the *Idziak* [5] case:

> "It has been seen that the extradition process has two distinct phases. The first, the judicial phase, encompasses the court proceedings which determine whether a factual and legal basis for extradition exists. If that process results in the issuance of a warrant of committal, then the second phase is activated. There the Minister of Justice exercises his or her discretion in determining whether to issue a warrant of surrender.[...]
>
> [...]
>
> Parliament chose to give discretionary authority to the Minister of Justice. It is the Minister who must consider the good faith and honour of this country in its relations with other states. It is the Minister who has the expert knowledge of the political

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[2] *Dixon v. Canada (Commission of Inquiry into Somalia),* 149 D.L.R. (4th) 269 at p. 276; *Stevens v. Canada (Attorney General),* [2004] F.C.J. No 2116 at par. 22;

[3] *A.G. of Quebec and Keable v. A.G. of Canada. et al.,* [1979] 1 S.C.R. 218 at p. 244.

[4] *Extradition Act* 1999, 18, section 3 and 7

[5] *Idziak v. Canada (Minister of Justice)* [1992] 3 S.C.R. 631 at p. 17 of 21; see also, *Germany v. Schreiber* [2006] O.J No. 789 at par. 64; *Schreiber v. Canada (Minister of Justice)* 91 O.R. (3d) 641; *United Stes of America v. Kwok* [2001] 1 S.C.R. 532 at par. 89-93; United States of America v. Cotroni, [1989] 1 S.C.R. 1469 at p. 36;

> ramifications of an extradition decision. In administrative law terms, the Minister's review should be characterized as being at the extreme legislative end of the *continuum* of administrative decision-making."
>
> (Our underlining)

Conclusion

10. Considering the above, the Attorney General of Canada respectfully submits that the Applicant's request for the issuance of an Order or Direction that he remain available in Ottawa to attend the balance of Part I and Part II in order to instruct counsel must be dismissed. There exists no authority, granted by statute or by the Terms of Reference, which authorizes the Commissioner to make any such order or direction.

Dated at Ottawa this _____ of May, 2009.

_____
Counsel for the Attorney General of Canada

Counsel for the Attorney General of Canada

John H. Sims
Deputy Attorney General of Canada
Department of Justice
234 Wellington Street
10th floor, East Tower, Room 1001
Ottawa, Ontario
K1A 0H8

Per: Paul B. Vickery

Tel: (613) 948-1483
Fax: (613) 941-5879

E-mail: paul.vickery@justice.gc.ca

Department of Justice Canada | Ministère de la Justice Canada

Canada

Extradition Act (1999, c. 18)

Disclaimer: These documents are not the official versions (more).
Act current to April 16th, 2009
Attention: See coming into force provision and notes, where applicable.
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Extradition Act

1999, c. 18

E-23.01

[Assented to June 17th, 1999]

An Act respecting extradition, to amend the Canada Evidence Act, the Criminal Code, the Immigration Act and the Mutual Legal Assistance in Criminal Matters Act and to amend and repeal other Acts in consequence

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

Short title

1. This Act may be cited as the *Extradition Act*.

PART 1

INTERPRETATION

Definitions

2. The definitions in this section apply in this Act.

"Attorney General"
«*procureur général* »

"Attorney General" means the Attorney General of Canada.

"court"
«*tribunal* »

"court" means

(*a*) in Ontario, the Ontario Court (General Division);

(*b*) in Quebec, the Superior Court;

(*c*) in New Brunswick, Manitoba, Alberta and Saskatchewan, the Court of Queen's Bench;

(*d*) in Nova Scotia, British Columbia, Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice; and

(*e*) in Prince Edward Island and Newfoundland, the Trial Division of the Supreme Court.

"court of appeal"
«*cour d'appel* »

"court of appeal" means

(*a*) in the Province of Prince Edward Island, the Appeal Division of the Supreme Court; and

(*b*) in all other provinces, the Court of Appeal.

"extradition agreement"
«*accord* »

"extradition agreement" means an agreement that is in force, to which Canada is a party and that contains a provision respecting the extradition of persons, other than a specific agreement.

"extradition partner"
«*partenaire* »

"extradition partner" means a State or entity with which Canada is party to an extradition agreement, with which Canada has entered into a specific agreement or whose name appears in the schedule.

"International Criminal Court"
«*Cour pénale internationale* »

"International Criminal Court" means the International Criminal Court as defined in subsection 2(1) of the *Crimes Against Humanity and War Crimes Act*.

"judge"
«*juge* »

"judge" means a judge of the court.

"justice"

«*juge de paix* »

"justice" has the same meaning as in section 2 of the *Criminal Code*.

"Minister"
«*ministre* »

"Minister" means the Minister of Justice.

"specific agreement"
«*accord spécifique* »

"specific agreement" means an agreement referred to in section 10 that is in force.

"State or entity"
«*État ou entité* »

"State or entity" means

(*a*) a State other than Canada;

(*b*) a province, state or other political subdivision of a State other than Canada;

(*c*) a colony, dependency, possession, protectorate, condominium, trust territory or any territory falling under the jurisdiction of a State other than Canada;

(*d*) an international criminal court or tribunal; or

(*e*) a territory.

1999, c. 18, s. 2; 2000, c. 24, s. 47; 2002, c. 7, s. 169.

PART 2

EXTRADITION FROM CANADA

EXTRADITABLE CONDUCT

General principle

3. (1) A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecuting the person or imposing a sentence on — or enforcing a sentence imposed on — the person if

(*a*) subject to a relevant extradition agreement, the offence in respect of which the extradition is requested is punishable by the extradition partner, by imprisoning or otherwise depriving the person of their liberty for a maximum term of two years or more, or by a more severe punishment; and

(*b*) the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada,

(i) in the case of a request based on a specific agreement, by imprisonment for a maximum term of five years or more, or by a more severe punishment, and

(ii) in any other case, by imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to a relevant extradition agreement.

Conduct determinative

(2) For greater certainty, it is not relevant whether the conduct referred to in subsection (1) is named, defined or characterized by the extradition partner in the same way as it is in Canada.

Extradition of a person who has been sentenced

(3) Subject to a relevant extradition agreement, the extradition of a person who has been sentenced to imprisonment or another deprivation of liberty may only be granted if the portion of the term remaining is at least six months long or a more severe punishment remains to be carried out.

Further proceedings

4. For greater certainty, the discharge of a person under this Act or an Act repealed by section 129 or 130 does not preclude further proceedings, whether or not they are based on the same conduct, with a view to extraditing the person under this Act unless the judge is of the opinion that those further proceedings would be an abuse of process.

Jurisdiction

5. A person may be extradited

(*a*) whether or not the conduct on which the extradition partner bases its request occurred in the territory over which it has jurisdiction; and

(*b*) whether or not Canada could exercise jurisdiction in similar circumstances.

Retrospectivity

6. Subject to a relevant extradition agreement, extradition may be granted under this Act whether the conduct or conviction in respect of which the extradition is requested occurred before or after this Act or the relevant extradition agreement or specific agreement came into force.

No immunity

6.1 Despite any other Act or law, no person who is the subject of a request for surrender by the International Criminal Court or by any international criminal tribunal that is established by resolution of the Security Council of the United Nations and whose name appears in the schedule, may claim immunity under common law or by statute from arrest or extradition under this Act.

2000, c. 24, s. 48.

FUNCTIONS OF THE MINISTER

Functions of the Minister

7. The Minister is responsible for the implementation of extradition agreements, the administration of this Act and dealing with requests for extradition made under them.

PUBLICATION OF EXTRADITION AGREEMENTS

Publication in *Canada Gazette*

8. (1) Unless the extradition agreement has been published under subsection (2), an extradition agreement — or the provisions respecting extradition contained in a multilateral extradition agreement — must be published in the *Canada Gazette* no later than 60 days after it comes into force.

Publication in *Canada Treaty Series*

(2) An extradition agreement — or the provisions respecting extradition contained in a multilateral extradition agreement — may be published in the *Canada Treaty Series* and, if so published, the publication must be no later than 60 days after it comes into force.

Judicial notice

(3) Agreements and provisions published in the *Canada Gazette* or the *Canada Treaty Series* are to be judicially noticed.

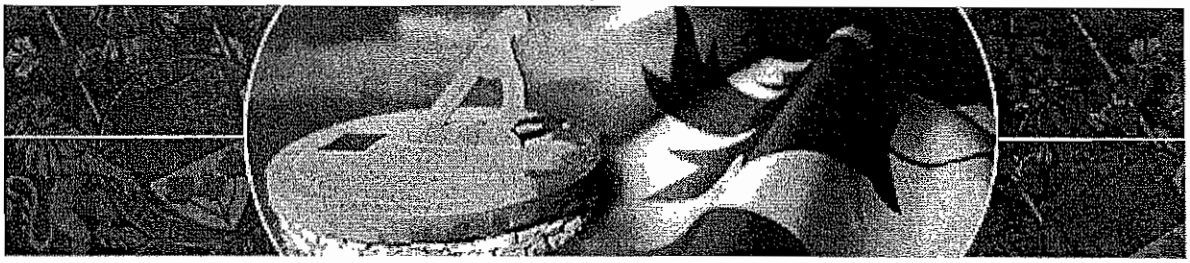
DESIGNATED STATES AND ENTITIES

Designated extradition partners

9. (1) The names of members of the Commonwealth or other States or entities that appear in the schedule are designated as extradition partners.

Amendments to the schedule

(2) The Minister of Foreign Affairs, with the agreement of the Minister, may, by order, add to or delete from the schedule the names of members of the Commonwealth or other States or entities.



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Air India Victims Families Association (AIVFA)
January 3, 2007

REASONS FOR DECISION WITH RESPECT TO THE AIVFA'S REQUEST FOR DIRECTIONS REGARDING ACCESS TO UNREDACTED DOCUMENTS AND *IN CAMERA* AN EX PARTE HEARINGS

INTRODUCTION

1. This motion for direction is dismissed. The families in this Inquiry have been promised full participation in the Air India Inquiry in accordance with Terms of Reference. The failure of this application requires a full explanation as to why the limit on their counsel attending *in camera* hearings or viewing redacted (edited) documents that could have been injurious to international relations, national defence or national security (hereinafter collectively referred to as "national security") is necessary and does not hamper the families participation.

2. Counsel for the families correctly acknowledge that if they were able to attend the *in camera* hearings, of which there have not been any as of yet, and or view security related documents they are and would be prohibited by law from disclosing, however innocuous, any aspects of those proceedings or documents to their clients who are members or relations of the families of the victims of the Air India explosion. That raises the question of what possible value such attendance or viewing documents would be to the families.

3. As a corollary to that restriction there is an obligation on this Commission to ensure to the extent possible that all hearings and document production be public. The reasons for hearings and production *in camera* camera for reasons of national security, which encompasses all Canadians, must be clearly demonstrated to the commission by the Government of Canada ("G.O.C.") when such procedure is sought.

4. While counsel are not entitled to attend *in camera* hearings, they are entitled to make submissions and call relevant evidence if any, to show that the particular request by the G.O.C. for an *in camera* hearing should not be ordered. The only basis for having the *in camera* hearings will be if the G.O.C. has demonstrated that the matter involved could in the opinion of the Commissioner, be injurious to national security.

5. The foregoing summary needs elaboration. The elaboration is intended to explain that any fear by the families of being excluded, misinformed or not being able to fully participate within the terms of reference is misplaced. The absence of their counsel from *in camera* hearings on national security will not affect their full participation.

THE POSITION OF THE PARTIES

6. AIVFA submits that their counsel who have top secret clearance granted by the Government of Canada be admitted to *in camera* hearings and be granted

access to unredacted documents. They submit there should be no national security concerns in allowing them to participate in *in camera* hearings and to see unredacted documents. Their counsel further submits that for them to have this access would ensure that AIVFA will be engaged, through its counsel, as a full contributor to the Commission's work while increasing the confidence and trust of family members in the Inquiry itself. AIVFA points specifically to the goal alluded to at the end of Stage 1 of the Inquiry, namely "to ensure that when parties leave this hearing that they feel they have had a full opportunity to explore the cause [of the failure to prevent the bombing] and be satisfied they know what happened to the extent that is possible." AIVFA submits that the access it seeks for its counsel is a means to achieve this goal and that nothing in the Inquiry's Terms of Reference prevents me from granting the direction or order being sought.

7. The Government of Canada opposes the motion. In support of its position, it cites the Terms of Reference of the Inquiry and the procedures set out in Section 38 of the Canada Evidence Act for dealing with top secret matters as well as the way national security is treated in other legal proceedings. G.O.C. submits that the Terms of Reference and the procedure set out in Section 38 preclude counsel for AIVFA, although holding top security clearance, being granted the access sought.

DISPOSITION

8. The explicit provisions of the Terms of Reference of this Inquiry and the procedural provisions outlined in Section 38 of the Canada Evidence Act support G.O.C. application preclude me from granting AIVFA counsel the access requested. From a functional point of view, even if I did have jurisdiction to grant access, it is difficult to see how such access could improve the knowledge or understanding of the families with respect to the subject matter of the Inquiry. Even if such access were possible, it would serve no practical benefit for the families themselves as penal sanctions prevent any disclosure to anybody including their clients of anything seen or heard at the *in camera* hearings or in unredacted documents. G.O.C. also submits that if the issue is seen as one of fairness, there are other guarantees of fairness in the Inquiry process that make the access sought unnecessary.

9. I agree that the concern advanced by the families demonstrates the necessity of holding as much of this Inquiry as possible in public but, that fact does not give me jurisdiction to allow the motion for attendance applied for.

***IN CAMERA* HEARINGS**

10. Unlike a court of inherent jurisdiction, a Commission of Inquiry only has the powers granted to it by statute or by its Terms of Reference. The Commission's Powers and Duties respecting the matters raised by AIVFA are found at paragraphs d, f, m, n and o of the Terms of Reference:

d. that the Commissioner be authorized to adopt any procedures and methods that he may consider expedient for the proper conduct of the Inquiry, and to sit at any times and in any places in or outside Canada that he may decide

f. that the Commissioner be authorized to grant to the families of the victims of the Air India Flight 182 bombing an opportunity for appropriate participation in the Inquiry

m. the Commissioner, in conducting the Inquiry, to take all steps necessary to prevent disclosure of information which, if it were disclosed, could, in the opinion of the Commissioner, be injurious to international relations, national defence or national security and to conduct the proceedings in accordance with the following procedures, namely,

> (i) on the request of the Attorney General of Canada, the Commissioner shall receive information *in camera* and in the absence of any party and their counsel if, in the opinion of the Commissioner, the disclosure of that information could be injurious to

international relations, national defence or national security

n. that nothing in that Commission shall be construed as limiting the application of the provisions of the *Canada Evidence Act*

o. the Commissioner to follow established security procedures, including the requirements of the *Government Security Policy,* with respect to persons engaged pursuant to section 11 of the *Inquiries Act* and the handling of information at all stages of the Inquiry.

11. At present AIVFA's request with respect to access to *in camera* proceedings is premature since there has not been any request by the Attorney General of Canada as set out in paragraph m(i) of the Terms of Reference, nor have I made any ruling to date that any session be *in camera*. However, undoubtedly such a request will be made and that it is necessary to determine the principles at this point, that will govern the conduct of *in camera* hearings. This provides procedural clarity and it is hoped will avoid unnecessary delay if such a request is made.

12. It should be noted that a mere request by the Attorney General of Canada is not sufficient to obtain an order that some particular matter be heard *in camera*. Pursuant to paragraph m(i) of the Terms of Reference, the Attorney General must satisfy me that disclosure of the information in question could be injurious to international relations, national defence or national security before I can order that the information be dealt with through *in camera* hearings. G.O.C. concedes that the parties in this Inquiry, including AIVFA through its counsel, have a right to make submissions in response to any such request and to oppose any specific request for an *in camera* hearing.

13. Paragraph m(i) of the Terms of Reference is clear that if I am satisfied by the Attorney General that disclosure of such information could be injurious to international relations, national defence or national security, I have no jurisdiction other than I "shall" receive the information "*in camera* and in the absence of any party and their counsel."

14. Paragraph d. of the Terms of Reference, which authorizes me to adopt any procedures and methods that I may consider expedient for the proper conduct of the Inquiry does not allow me to modify or ignore the clear instructions set out in paragraph m(i). I disagree with the proposed reading by AIVFA of paragraph m(i) which would, for purposes of the present motion, read the test to be whether "disclosure of that information and could be injurious..." as meaning that I should assess whether "disclosure *to counsel with top secret clearance* of that information could be injurious ...". I do not agree with this innovative argument as it is inconsistent with the express requirement that information, the disclosure of which could be harmful, must be received *in camera* "and the absence of any party *and their counsel.*" Wording to prevent this result could easily have been used had that been the G.O.C. intent.

ACCESS TO UNREDACTED DOCUMENTS

15. Paragraph n of the Terms of Reference provides that nothing in the Terms of Reference establishing the Commission is to be construed as limiting the application of the provisions of the *Canada Evidence Act.*

16. Pursuant to Section 38.11(2) of that *Act*, the Attorney General is entitled to make *ex parte* representations (i.e. representations outside of the presence of any party or its counsel) concerning the redaction of sensitive or potentially injurious information. I am not bound to accept the submissions of the Attorney General and Commission counsel may argue either in support of or in opposition to these submissions, but there is no doubt that the redaction process is not one in which counsel for the parties, with or without security clearance, may participate. I agree with the Attorney General's submission, that sensitive or potentially injurious information must be redacted from documents prior to their use in public hearings and that there is nothing that authorizes me to grant counsel for AIVFA access to unredacted versions of such documents.

FUNCTIONAL CONSIDERATIONS

17. A consideration of the functional implications of the directions being requested by AIVFA reinforces the conclusions that I have reached.

18. Counsel for G.O.C. submits the case law with respect to national security issues makes it clear that the potentially injurious consequences of disclosure have lead courts to take a very cautious approach. See *Secretary of State for the Home Department v. Rehman,* [2001] 3 W.L.R. 877. The principle stated there was accepted by the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3 at para. 33:

> "It is not only that the executive has access to special information and expertise in these matters [of national security]. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only be entrusting them to persons responsible to the community through the democratic process."

19. The principle that has been adopted by the Government of Canada in dealing with disclosure of information potentially injurious to national security or to the national interest, is to restrict disclosure on the basis of "need to know". This principle has been approved by the Federal Court of Appeal in connection with the "informer privilege" in *Canada (R.C.M.P. Public Complaints Commission) v. Canada (Attorney General),* 2005 FCA 213*. There, disclosure was sought by the RCMP Complaints Commissioner in order to "ensure the highest possible standard of justice." Lètourneau J.A. responded that "as laudable as this goal may be, it cannot justify granting access to persons who are not persons who need to know such information for law enforcement purposes." (paras 43-48)

20. This same "need to know" principle should be applied with respect to *in camera* hearings and access to unredacted documents. In the present circumstances, it cannot be said that in their role as counsel, counsel for AIVFA "need to know" the information to which access is being sought. As AIVFA acknowledges, counsel would not be able to disclose any information learned in the course of the *in camera* hearings nor could they disclose the redacted portions of documents to their clients. AIVFA explicitly acknowledges that counsel would be required to give an undertaking not to make such disclosure. In those circumstances, it is impossible to see how access to *in camera* hearings or unredacted documents would add to the families' "opportunity to explore the cause" or allow them "to be satisfied that they know what happened." Counsel themselves might believe that they had more information about what happened, but they could not communicate that information to their clients. This would not justify treating granting of access as capable of outweighing the Government's interest in restricting disclosure, and that would be the case even if the Terms of Reference allowed me to do such balancing, which, they do not. In fact, even if they were allowed to attend *in camera* sessions, counsel for AIVFA could only subsequently make arguments and submissions as if they had not attended them.

21. It is important that the public interest (which includes the interest of the families) with respect to a full exploration of all the facts is not left unguarded. At the restricted *in camera* hearing and/or the redaction of document it is the responsibility of the Commission and the role of Commission counsel to protect that public interest. As noted by Mr. Justice Dennis O'Connor, Commissioner at the Arar Inquiry, in his non-judicial article, "The Role of Commission Counsel in a Public Inquiry":

> "... commission counsel's role is not to advance any particular point of view, but rather to investigate and lead evidence in a thorough, but completely impartial and balanced manner. In this way, the commissioner will have the benefit of hearing all the relevant evidence unvarnished by the prospective of someone with an interest in a particular outcome." (2003), 22 Advocates Soc. J. No. 1, at para. 12.

22. As also noted by Justice O'Connor, where a public inquiry does hear evidence *in camera*, the role of Commission counsel in representing the public interest allows Commission counsel to depart somewhat from his or her normal role and to engage in pointed cross-examination where necessary, so as to ensure that evidence heard *in camera* is thoroughly tested – a procedure intended to be followed by this Commission.

CONCLUSION

23. There is no doubt, as submitted by AIVFA, that there is a valid interest in the fullest possible airing of all information relevant to the subject matter of the Inquiry. For that reason, to the extent that it is possible, hearings should be public and the information disclosed publicly. That is the principle set out in rule 22 of our Rules of Practice and Procedure. The operative concept, however, is the phrase "to the extent that that is possible", words that I also used in the passage cited by AIVFA in describing the educational goal of the Inquiry.

24. By the Terms of Reference of this Inquiry, I have no jurisdiction to grant access to counsel for AIVFA to any *in camera* hearings that may be held nor to unredacted versions of documents that have been redacted for national security reasons. Functional considerations, including the deference due to government with respect to matters touching on national security and the appropriateness of the "need to know" principle, lead in the present case, to the same result. For all the above as previously stated this application for direction is dismissed.

*Citation corrected from previous version.

to say, $VO_4$45 max, as urged by counsel for the respondent (or to whatever level would ensure that the same percentage of women pass that standard as men pass the higher one), that would serve, it seems to us, to introduce a new concept which could be labelled "reserve/adverse effect discrimination". There would, undoubtedly, be some individuals among the 30% to 35% of the males who fail to pass the fitness test standard of $VO_2$50 max but who could achieve, or even surpass, the lower level so fixed for female candidates in the position of Ms. Meiorin. But males in that group would, in turn, be denied admission because, and only because, of their maleness, and thus be subject to the very type of discrimination that would constitute a breach of their guaranteed human rights.

[20] In our opinion, the appellant has established that the requirement that all forest firefighters employed by the Ministry successfully complete what is called by the employer the *Bona Fide* Occupational Fitness Test does not discriminate on the basis of sex and that being so the appellant has not discriminated against Ms. Meiorin.

[21] We would allow the appeal and set aside the award of the arbitrator.

Appeal allowed.

Re Dixon and Commission of Inquiry into the Deployment of Canadian Forces to Somalia et al.

Re Dixon and Governor in Council

[Indexed as: Dixon v. Canada (Commission of Inquiry into the Deployment of Canadian Forces to Somalia)]

Court File No. A-282-97

Federal Court of Appeal
Isaac C.J., Marceau and McDonald JJ.A.

Heard: June 25, 1997
Judgment rendered: July 17, 1997

Public inquiries — Report — Order in Council establishing reporting date — Commission determining matters in original mandate impossible to examine — Commission not enjoying independence or right to complete mandate

— Power to impose reporting date belonging to Governor in Council — Accountable only to Parliament —Inquiries Act, R.S.C. 1985, c. I-11.

Administrative law — Rule making — Order in Council establishing reporting date — Commission determining matters in original mandate impossible to examine — Commission not enjoying independence or right to complete mandate — Power to impose reporting date belonging to Governor in Council — Accountable only to Parliament —Inquiries Act, R.S.C. 1985, c. I-11.

Appeal — Mootness — Matter of public importance determined — Adversarial context — Affecting relations between judiciary and executive.

A commission of inquiry determined that it was impossible to complete its original mandate after it was given a specific reporting date by the Governor in Council. An individual who would have given evidence before the commission, if it had been able to fulfil its mandate, obtained a declaration that without amendment of the mandate, the reporting date breached the rule of law by making it impossible for the commission to complete its mandate and infringed the commission's independence in determining whether they had heard sufficient evidence to report. Subsequent to the trial judge's decision, the commission's mandate was amended to reflect the matters that it could report on by the required reporting date. The commission appealed.

Held, the appeal should be allowed.

Marceau J.A., Isaac C.J. and McDonald J.A. concurring: Even if moot because of the commission's revised mandate, the appeal should be heard because it raised an important issue in an adversarial context that affected the division of responsibility between the judiciary and the executive.

A commission of inquiry appointed under the *Inquiries Act*, R.S.C. 1985, c. I-11, owes its existence to the Governor in Council and has no independence. Unlike courts, commissions of inquiry are not obliged to determine all issues in their terms of reference. The power to terminate a commission is found in the *Inquiries Act* and is not affected by s. 31(4) of the *Interpretation Act*, R.S.C. 1985, c. I-21. Absent a jurisdictional error or Charter violation, the Governor in Council is only accountable to Parliament, not to the courts.

Cases referred to

Beno v. Canada (Commission of Inquiry into the Deployment of Canadian Forces to Somalia) (1997), 146 D.L.R. (4th) 708, 212 N.R. 357 *sub nom. Beno v. Létourneau*, 71 A.C.W.S. (3d) 388 — **refd**

Borowski v. Canada (Attorney General) (1989), 57 D.L.R. (4th) 231, 47 C.C.C. (3d) 1, [1989] 1 S.C.R. 342, 33 C.P.C. (2d) 105, 38 C.R.R. 232, [1989] 3 W.W.R. 97, 75 Sask. R. 82, 92 N.R. 110, 7 W.C.B. (2d) 61 — **apld**

Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System) (1997), 142 D.L.R. (4th) 237, [1997] 2 F.C. 36, 207 N.R. 1, 123 F.T.R. 320*n*, 68 A.C.W.S. (3d) 1159 [leave to appeal to S.C.C. granted 143 D.L.R. (4th) vii] — **refd**

Canada (Attorney General) v. Inuit Tapirisat of Canada (1980), 115 D.L.R. (3d) 1, [1980] 2 S.C.R. 735, 33 N.R. 304, 5 A.C.W.S. (2d) 255 — **refd**

Canada (Attorney General) v. Nolan, [1952] 3 D.L.R. 433, [1952] A.C. 427, 6 W.W.R. (N.S.) 23 — **refd**

Canada (Minister of Energy, Mines and Resources) v. Canada (Auditor General) (1989), 61 D.L.R. (4th) 604, [1989] 2 S.C.R. 49, 40 Admin. L.R. 1, 97 N.R. 241 *sub nom. Auditor General of Canada v. Canada (Minister of Energy, Mines and Resources)*, 16 A.C.W.S. (3d) 407 — **refd**

Canada v. Thorne's Hardware Ltd., (1983), 143 D.L.R. (3d) 577, [1983] 1 S.C.R. 106, 46 N.R. 91 *sub nom. Irving Oil Limited, Canaport Limited, Kent Lines Limited and Thorne's Hardware Limited v. National Harbours Board*, 18 A.C.W.S. (2d) 136 — **refd**

Creative Shoes Ltd. v. M.N.R. (1972), 29 D.L.R. (3d) 89, [1972] F.C. 993, 73 D.T.C. 5127 [leave to appeal to S.C.C. refused by F.C.A., 31 D.L.R. (3d) 330, [1972] S.C.R. x, [1972] F.C. 1425, [1973] C.T.C. 46; by S.C.C., 38 D.L.R. (3d) 318*n*, [1973] S.C.R. x, [1973] C.T.C. 457] — **refd**

Gouriet v. Union of Post Office Workers, [1978] A.C. 435 — **refd**

Quebec (Attorney General) v. Canada (Attorney General) (1978), 90 D.L.R. (3d) 161, 43 C.C.C. (2d) 49, [1979] 1 S.C.R. 218, 6 C.R. (3d) 145, 24 N.R. 1 *sub nom. Keable and Attorney General of the Province of Quebec v. Attorney General of Canada*, 3 W.C.B. 22 — **refd**

Reference re Proclamation of Section 16 of the Criminal Law Amendment Act, 1968-69 (1970), 10 D.L.R. (3d) 699, [1970] 3 C.C.C. 320, [1970] S.C.R. 777, 12 C.R.N.S. 28, 74 W.W.R. 167, *sub nom. Re Reference by the Governor in Council Concerning the Proclamation of Section 16 of the Criminal Law Amendment Act, 1968-69* — **refd**

Reference re Regulations (Chemicals) under the War Measures Act, [1943] 1 D.L.R. 248, 79 C.C.C. 1, [1943] S.C.R. 1 — **refd**

Saskatchewan Wheat Pool v. Canada (Attorney General) (1993), 107 D.L.R. (4th) 190, 17 Admin. L.R. (2d) 243, 67 F.T.R. 98, 42 A.C.W.S. (3d) 951 — **refd**

Statutes referred to

Act to empower Commissioners for inquiring into matters connected with the public business, to take evidence on oath, S.C. 1846, c. 38

Inquiries Act, R.S.C. 1985, c. I-11

s. 2

s. 3

s. 13

Canadian Charter of Rights and Freedoms

Federal Court Act, R.S.C. 1985, c. F-7

s. 2, definition "federal board, commission or tribunal" [rep. & sub. 1990, c. 8, s. 1(3)]

s. 18

Interpretation Act, R.S.C. 1985, c. I-21

s. 31(4)

APPEAL from a judgment of Simpson J., 146 D.L.R. (4th) 156, 70 A.C.W.S. (3d) 565, declaring that a reporting date for a

commission of inquiry breached the rule of law and the commission's independence.

Donald J. Rennie and *Sandy Graham*, for appellant.
Joseph J. Arvay, Q.C., for respondent.

The judgment of the court was delivered by

MARCEAU J.A.:—The Governor in Council is appealing before us the well-publicized decision of the Trial Division that declared *ultra vires* his Order in Council P.C. 1997-174 relating to the Commission of Inquiry into the Deployment of Canadian Forces to Somalia (hereinafter the Commission or the Somalia inquiry).[1]

At the outset of the hearing, the appellant acknowledged, through his counsel, that there was an issue as to whether the Court should refuse to hear his appeal on the ground of mootness. Indeed, on receiving the Trial Division decision, the Governor in Council enacted a new order in council limiting the Commission's terms of reference in a manner that satisfied the respondent and followed the prescriptions of the Trial Division judge.[2] The appellant, however, asked the Court to hear and dispose of the appeal despite the apparent dissolution of the tangible and concrete dispute. He emphasized the fact that there was an important issue of public law involved and one that was not likely to come before the Court in the near future.

We agreed to hear the appeal. The trial decision, whether right or wrong, goes to an issue which lies at the heart of the division of responsibilities between the Judiciary and the Executive. Indeed, the case involves the extent to which a court, exercising its proper adjudicative role, should be entitled to interfere with discretionary decisions made by the Governor in Council. It is, therefore, rather unique in the sense that the need for the Judiciary to appreciate its proper adjudicative role in our political framework actually militated in favour of hearing the appeal. Moreover, the respondent remained intent on pursuing the appeal, which preserved the adversarial context and ensured that the issues were well and fully argued before this Court. As is evident from the litigation still pending in the Trial Division, notwithstanding the release of the Commissioners' report on June 30, 1997 (after the oral hearing in this appeal), there may be collateral consequences to the outcome which may have an impact on the final form in which the Commissioners' report remains on

public record. Applying the criteria laid down by the Supreme Court in *Borowski v. Canada (Attorney General)*,[3] we were of the view that, on balance, it was in the interest of justice for us to hear the appeal, and so we did.

The factual context in which the case presents itself is so well known that a very general review should suffice.

The Commission was established under Part I of the *Inquiries Act*[4] by Order in Council P.C. 1995-442, dated March 20, 1995, to investigate certain aspects of the deployment of Canadian Forces to Somalia on a peace-keeping mission in 1993. Its establishment was motivated in large part by two events which had attracted national media attention: the suspicious death on March 16, 1993 of Shidane Arone, a Somali youth, while in the custody of the Canadian Airborne Regiment Battle Group; and the incidents of March 4, 1993, when one Somali was killed and another wounded near the Canadian Forces base in Belet Uen. The Commission's terms of reference were, however, broadly defined so as to make it both investigative and advisory. The Commissioners were to:

> . . . inquire into and report on the chain of command system, leadership within the chain of command, discipline, operations, actions and decisions of the Canadian Forces and the actions and decisions of the Department of National Defence in respect of the Canadian Forces deployment to Somalia . . .

The Commissioners were further directed, "without restricting the generality of the foregoing", to inquire into and report on nineteen specific issues organized into three temporal phases of the peace-keeping mission: the pre-deployment phase (before January 10, 1993); the in-theatre phase (January 10, 1993 to June 10, 1993) and the post-deployment phase (June 11, 1993 to November 28, 1994). The nineteen specific issues are reproduced in the trial decision and repeating them here would serve no useful purpose.

In order to accomplish their assignment, in addition to the basic powers given to them by the *Inquiries Act*, the Commissioners were provided with important related authorizations. They could establish their own procedures, sit wherever and whenever in Canada they wished, rent whatever space and facilities they required, hire experts and others as needed, and sit *in camera* if they considered it necessary in the public interest.

Order in Council P.C. 1995-442, on establishing the Commission, provided that its report to the federal Cabinet (in both official languages) was to be made no later than December 22, 1995. This deadline, however, was to be extended at the request of the Commissioners, who said, on three subsequent occasions, that they needed more time to complete their inquiry. On July 26, 1995, by Order in Council P.C. 1995-1273, the reporting deadline was extended to June 28, 1996. On June 20, 1996, by Order in Council P.C. 1996-959, it was again extended for another nine months, to March 31, 1997. And finally, on February 4, 1997, Order in Council P.C. 1997-174 was enacted, giving the Commissioners until March 31, 1997 to complete public hearings and until June 30, 1997 to file their final report. The Commissioners' last request for an extension had asked for, at the earliest, a September 30, 1997 reporting date. By letter to the Commission dated January 10, 1997, an official of the Privy Council Office explained why the Governor in Council had refused to push back the deadline by as much as the Commissioners had requested. He stated:

> Although all scenarios proposed in your work-plan were examined, given the Government's desire to pursue solutions as quickly as possible, it was not regarded as being in the national interest to have to wait another year to receive the Commission's input.

It is this last Order in Council, which, like the previous extensions granted by the Governor in Council, pushed back the reporting date for only part of the time suggested by the Commissioners, that was attacked before the Trial Division and declared *ultra vires*. The attack was launched by the respondent, a former special advisor to the Minister of National Defence at the time of the Somalia incidents. Mr. Dixon had sought full standing before the inquiry in order to make clear the knowledge that he and his Minister had of the Arone death. The Commissioners, however, had refused his request for standing. In their reasons for denial, the Commissioners explained that, because their mandate had been "truncated" by Cabinet's decision to require completion of the public hearings by March 31, 1997, they were unable to investigate the involvement of high-ranking government officials in the Somalia affair, including the possibility that there had been a cover-up of the Arone death. On being advised of the refusal of the Commissioners, the respondent decided to seek relief in the Trial Division of this Court.

The Trial judge allowed the respondent's application for judicial review. She provided three reasons for her conclusion that Order in Council P.C. 1997-174 was *ultra vires* [reported 146 D.L.R. (4th) 156 at p. 179 D.L.R.]:

> 1) It does not comply with section 31(4) of the *Interpretation Act* which requires an order in council which reduces the Mandate in clear terms.
>
> 2) It breaches the rule of law by requiring the impossible of the Commissioners and by placing them in a position where they cannot obey the law.
>
> 3) It breaches the rule of law by not respecting the Commissioners' independence. They are entitled to determine how to investigate their Mandate and when their investigation is sufficient to support findings in their report.[5]

In light of these findings, the Trial judge made, *inter alia*, the following formal orders and declarations:

> (4) That Order in Council P.C. 1997-174 is set aside for being *ultra vires* of the Governor in Council, and that the target dates for the Commission of Inquiry's final report contained in the earlier Orders in Council P.C. 1995-442, P.C. 1995-1273, and P.C. 1996-959 have expired and are of no force and effect; and,
>
> (5) That, to correct the problems of lack of clarity and impossibility of performance identified in connection with Order in Council P.C. 1997-174, the Governor in Council may:
>
> a) issue an Order in Council which imposes final deadlines which allow the Commission of Inquiry the time it reasonably requires to complete its original mandate;
>
> b) or issue an Order in Council which eliminates specified matters from the Commission of Inquiry's mandate and imposes final deadlines which allow the Commission of Inquiry the time it reasonably requires to complete its reduced assignment,
>
> c) or take such other steps as it considers to be appropriate and consistent with the order and reasons herein.

The learned Trial judge gave lengthy reasons in support of her conclusions. Her reasons betray what appears to me, and I say it with respect, two inconsistencies in her overall reasoning. One is regarding the status of a commission of inquiry; the other, the reporting duty of commissioners. If I take some time to develop these points up-front, my analysis of the grounds upon which the learned judge founded her conclusion that P.C. 1997-174 was *ultra vires* the Governor in Council will be simplified considerably.

Let us consider first the attitude of the Trial judge in regard to the status of commissions of inquiry. It is well known that the present *Inquiries Act* traces its origins to *An Act to empower Commissioners for inquiring into matters connected with the public business, to take evidence on oath*, passed June 9, 1846, with a preamble that clearly articulated the purpose of enquiries and the concern for the protection of individual reputations:

> Whereas it frequently becomes necessary for the Executive Government to institute inquiries on certain matters connected with the good government of this Province; And whereas the power of procuring evidence under oath in such cases would greatly tend to the public advantage as well as to afford protection to Her Majesty's subjects from false and malicious testimony or representations . . .[6]

That Parliament enacted the present *Inquiries Act* with the same purpose and the same concern for the protection of individual reputations is made clear by the whole of the *Act* and especially by the wording of sections 2 and 3:

> 2. The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.
>
> 3. Where an inquiry as described in section 2 is not regulated by any special law, the Governor in Council may, by a commission, appoint persons as commissioners by whom the inquiry shall be conducted.

It had to be clear to the Trial judge, therefore, that a commission of inquiry issued pursuant to the *Inquiries Act* depends for its existence entirely on the Governor in Council — *i.e.*, the body in which the Executive power of the Canadian government is vested (by constitutional convention, the Cabinet).[7] The Governor in Council, in other words, had the full discretionary authority to establish the Somalia inquiry as a source of information and advice in relation to an important aspect of the governance of this country: our military. How then can the Trial judge arrive at the conclusion that, once created, the Commission somehow acquired independent status, not only with respect to the manner in which it exercised its powers within its terms of reference, but also with respect to its very existence and its institutional structures. Indeed, the Trial judge's decision, in effect, means that the Governor in Council cannot determine the duration (nor, by necessary implication, the cost) of a commission of inquiry by

imposing reporting deadlines: the most that he can do, says the Trial judge, is to set "target dates". His power to impose a final and imperative reporting date is subject to either acquiescence by the commissioners that they will be ready to report on all the terms of reference by the date chosen, or else a formal restriction of the terms of reference according to what the commissioners determine to be reasonable in view of the state of their inquiry. I fail to understand how, in the context of our public law, such a situation could possibly be allowed to exist. By what principle of public law can a commission of inquiry acquire, once created, the independence and autonomy necessary to allow it to prevail over the will of the Governor in Council as to its structure and its existence? How can the *Inquiries Act* be interpreted as granting to commissions of inquiry such legal status?

It has often been suggested, expressly or impliedly, especially in the media but also elsewhere, that commissions of inquiry were meant to operate and act as fully independent adjudicative bodies, akin to the Judiciary and completely separate and apart from the Executive by whom they were created. This is a completely misleading suggestion, in my view. The idea of an investigative body, entirely autonomous, armed with all of the powers and authority necessary to uncover the truth and answerable to no one, may well be contemplated, if one is prepared to disregard the risks to individuals and the particularities of the Canadian context. But a commission under section 1 of the *Inquiries Act* is simply not such a body. It is easy to realize nowadays the tremendous impact that commissions of inquiry, as they now exist, may have on Canadian society, but, in my view, their public importance is not and cannot be the source of a special legal status. No one disputes the necessity of preserving the independence of commissions of inquiry as to the manner in which they may exercise their powers, conduct their investigations, organize their deliberations and prepare their reports. The role they play in our democracy has become much too vital to accept that the manner in which they investigate matters and formulate the conclusions and recommendations that they arrive at, can be freely tampered with or influenced by anyone within or outside the government of the day, and that applies to any commission, whether or not its investigations relate to the conduct of government officials. And the fact is, in any event, that the *Act* itself provides for such investigative and advisory independence by explicitly setting out the nature, the general role

and the basic powers of commissions of inquiry, even if it does so rather succinctly. All this, however, does not alter, in any way, the basic truth that commissions of inquiry owe their existence to the Executive. As agencies of the Executive, I do not see how they can operate otherwise than within the parameters established by the Governor in Council.

With respect to the role and responsibilities of the commissioners, the Trial judge's inconsistency is even more striking. The Trial judge repeatedly acknowledges that commissions of inquiry are not courts of law; that their true nature and purpose completely differ from those of courts of law. She had before her two recent judgments of this Court[8] that reaffirmed the long-standing warning against assimilating or equating the two public institutions.[9] And yet, in her reasoning, the Trial judge appears to have failed to recognize, or simply ignored, what may be the main difference between the two. Courts of law are designed, if civil, to settle disputes between opposing parties and, if criminal, to establish guilt or innocence. They must arrive at definitive conclusions; they cannot leave a problem aside for lack of evidence or absence of a clear solution. Briefly put, it is their duty to dispose of the issues brought before them, to judge. Procedural rules regarding such matters as the onus and burden of proof have been developed precisely to allow courts to discharge this duty. Commissions of inquiry, be they investigative or merely advisory, are not, in any way, under the same duty. As investigative bodies, they, of course, are called upon to seek the truth, and no doubt they are ideally suited for uncovering facts that could not be discovered otherwise (precisely because they have broad investigative powers, they are inquisitorial, and they are not subject to the strict rules of evidence that apply to a court of law). Hence, their prestige. But, nowhere do we find the imposition upon them of a duty to conclude. On the contrary, their purpose, which is primarily to advise and to help the government in the proper execution of its duties, is not conducive to settling issues and drawing definitive conclusions. It is the legal duty of the commissioners to report, but that report is limited to explaining what they have done, what they were able to draw from their investigations (in terms of findings of fact) and what advice they are in a position to give to the Executive in light of those findings. It may be unusual for an Order in Council setting up a commission of inquiry to be as detailed as was P.C. 1995-442. But, the designated issues were

for its decisions. In other words, the validity of an Order in Council is measured against the statutory conditions precedent to its issuance, and not by its content. Dickson J. (as he then was) made this point clear in *Thorne's Hardware Ltd. v. The Queen*, when he stated:

> Decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings. Although, as I have indicated, the possibility of striking down an Order in Council on jurisdictional or other compelling grounds remains open, it would take an egregious case to warrant such action. This is not such a case.[12]

The two other grounds invoked by the Trial judge to declare Order in Council P.C. 1997-174 to be *ultra vires* — namely, the incompatibility of its requirement with the independence of the Commission and the impossibility for the Commissioners to discharge their duty within the time frame imposed on them — are directly related to the inaccurate views that the Trial judge held regarding the role of the Commissioners and the nature of their report, which I have already criticized. It is obvious that these grounds have no substance whatever if, as I think it is, the role of the Commissioners is not to decide issues definitively and their report is not intended to pronounce judgment, but merely to explain the results of their work and the opinions (in terms of conclusions and recommendations) which they were able to form given the time and resources available to them; no more, no less. The independence of the Commissioners as to the evaluation of the evidence and the possibility for them to express a view is in no way affected, and their ability to provide a complete and adequate report, in this sense, is indisputable. Again, the right of the Commissioners to decide when they have sufficient evidence to make a particular conclusion or recommendation is certainly not jeopardized by the Governor in Council exercising the right he *alone* has to decide when it is time to call for the Commission's report and advice. Likewise, the definition of terms of reference establishing the scope of the Commission's powers to investigate will, I suppose, suggest the framework of its report, but it cannot detract, when it comes to the content of such report, from the Commissioners' duty to remain within the limits of their findings and the conclusions they could have reached.

In my judgment, therefore, the Trial judge could not hold, as she did, that the impugned Order in Council P.C. 1997-174 was *ultra vires*. The Order in Council was properly enacted pursuant to Part I

of the *Inquiries Act*. It was valid on its face. Only an improper view as to the powers of the Governor in Council conferred upon him by Parliament and a misconception regarding the legal status of commissions of inquiry could permit her to conclude that the Governor in Council acted in a manner contrary to law.

It is even my opinion finally that, once the Trial judge ascertained that the impugned order was validly enacted pursuant to Part I of the *Inquiries Act*, she ought to have dismissed the application for judicial review on the basis that there were no other justiciable issues raised by the application. As I have said, the policy considerations which motivated the Governor in Council's decision to put an end to the life of the Somalia inquiry by June 30, 1997 may have been debatable or perhaps even suspect. But, it is a debate that a court of law, properly confined to its adjudicative role, ought not to have considered. [18]

I would, therefore, allow the appeal, quash the orders and declarations made by the Trial judge, and declare that the impugned Order P.C. 1997-174 was *intra vires* the Governor in Council.

Appeal allowed.

ENDNOTES

1 I refer to the Governor in Council as a human representative of the Crown in right of Canada, in accordance with the *Interpretation Act*, which defines "Governor in Council" as meaning "the Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada".

2 Order in Council P.C. 1997-456, dated April 3, 1997.

3 [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231.

4 R.S.C. 1985, c. I-11.

5 Reasons for the Order, at 33-34.

6 Province of Canada Statutes 1846, c. 38 (9 Vict.).

7 I will pause here for a moment to mention that one may see a jurisdictional issue in the proceedings as instituted. Indeed, cases may be cited for the proposition that that where the Governor in Council acts pursuant to a statute, he is a federal board, rather than an embodiment of the Crown.

8 *Canada (Attorney General) v. Royal Commission of Inquiry on the Blood System in Canada* (1997), 207 N.R. 1, 142 D.L.R. (4th) 237; and *The Honourable Gilles Létourneau v. Brigadier-General Ernest B. Beno*, dated May 2, 1997, Court File No. A-124-97, unreported [now reported 146 D.L.R. (4th) 708 *sub*

nom. Beno v. Canada (Commission of Inquiry into the Deployment of Canadian Forces to Somalia)].

[9] See *A.-G. Que. and Keable v. A.-G. Can.*, [1979] 1 S.C.R. 218 at 243-244, 90 D.L.R. (3d) 161 *per* Pigeon J.

[10] R.S.C. 1985, c. I-21. The provision in question reads thus:

"31(4) Where a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the same manner and subject to the same consent and conditions, if any, to repeal, amend or vary the regulations and make others."

[11] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[12] (1983), 143 D.L.R. (3d) 577 (S.C.C.) at p. 581. See also *Reference re Section 16 of the Criminal Law Amendment Act*, 1968-69, [1970] S.C.R. 777 at 782, 10 D.L.R. (3d) 699; *Reference re Chemical Regulations*, [1943] S.C.R. 1 at 12, [1943] 1 D.L.R. 248; *Attorney General of Canada v. Inuit Tapirisat*, [1980] 2 S.C.R. 735 at 753, 115 D.L.R. (3d) 1; *Attorney General for Canada v. Nolan and Hallet & Carey Ltd.*, [1952] A.C. 427 at 446, [1952] 3 D.L.R. 433; and *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435.

[13] *In Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49 at 90-91, 61 D.L.R. (4th) 604. Dickson C.J. explained the concept of justiciability as follows:

"As I noted in *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 459, justiciability is a 'doctrine . . . founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes', endorsing for the majority the discussion of Wilson J. beginning at p. 460. Wilson J. took the view that an issue is non-justiciable if it involves 'moral and political considerations which it is not within the province of the courts to assess' (p. 465). An inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue or, instead, deferring to other decision-making institutions of the polity."

City of Stoney Creek v. Ad Vantage Signs Ltd. et al.

[Indexed as: Stoney Creek (City) v. Ad Vantage Signs Ltd.]

Court File No. C18089

Ontario Court of Appeal
Houlden, Robins and Charron JJ.A.

Heard: May 21 and 22, 1997
July 15, 1997

Constitutional law — Charter of Rights — Freedom of expression — Municipal by-law prohibiting portable signs — Preventing expression of meaning

T-2682-87
2004 FC 1746

Sinclair M. Stevens (*Plaintiff*)

v.

The Attorney General of Canada (*Defendant*)

INDEXED AS: STEVENS v. CANADA (ATTORNEY GENERAL) (F.C.)

Federal Court, O'Keefe J.—Toronto, January 20-24, April 28-May 1, 2003, January 19, 22 and June 14-16, 2004; Ottawa, December 15, 2004.

Inquiries — Parker Commission Inquiry into conflict of interest allegations against federal Cabinet Minister — Action for declaration setting aside Report — Plaintiff said to have breached conflict of interest guidelines — Report concluded no evidence of wrongdoing but plaintiff, on six occasions, in real conflict of interest — Since guidelines in effect during relevant period failed to define "conflict of interest", Commissioner Parker developed own definition which was not revealed to plaintiff until Report issued — Even if Commissioner's terms of reference broadly construed, Order in Council not authorizing him to come up with own definitions — Where no jurisdiction, cannot arise from consent — Inquiry prosecutorial in nature — Unfair to develop standard after impugned conduct occurred — Denied full opportunity to be heard — Report set aside for excess of jurisdiction, breach of procedural fairness principles.

Plaintiff's action sought a declaration that the Parker Inquiry Report be set aside, an order removing that Report to Federal Court as well as the costs of this proceeding. Plaintiff had served as a member of Parliament; Cabinet Minister and Treasury Board President but had resigned as a Minister following media reports regarding conflicts of interest. The Privy Council named Ontario Chief Justice Parker to conduct a commission of inquiry into the conflict of interest allegations. Established under Part I of the *Inquiries Act*, the Parker Inquiry was tasked with inquiring into and reporting on the facts of plaintiff's conduct, and whether he had been in real or apparent conflict of interest. It was free to adopt whatever procedures and methods were considered expedient, to engage staff, counsel and experts and to rent office space in accordance with Treasury Board policy. Its report was to be

T-2682-87
2004 CF 1746

Sinclair M. Stevens (*demandeur*)

c.

Le procureur général du Canada (*défendeur*)

RÉPERTORIÉ: STEVENS c. CANADA (PROCUREUR GÉNÉRAL) (C.F.)

Cour fédérale, juge O'Keefe—Toronto, 20 au 24 janvier, 28 avril au 1er mai 2003, 19 et 22 janvier et 14 au 16 juin 2004; Ottawa, 15 décembre 2004.

Enquêtes — Enquête de la commission Parker sur les allégations de conflit d'intérêts concernant un ministre du Cabinet fédéral — Action visant à obtenir un jugement déclaratoire portant annulation du Rapport — Le demandeur est réputé avoir violé les lignes directrices concernant les conflits d'intérêts — Selon le Rapport, il n'y avait aucune preuve d'écart de conduite de la part du demandeur, mais il s'était trouvé en situation réelle de conflit d'intérêts à six reprises — Puisque les lignes directrices en vigueur pendant la période pertinente ne définissaient pas le «conflit d'intérêts», le commissaire Parker a rédigé sa propre définition qui n'a été communiquée au demandeur que lorsque le Rapport a été publié — Même si le mandat du commissaire a été interprété d'une façon générale, le décret ne l'autorisait pas à rédiger ses propres définitions — La compétence ne peut être conférée par consentement — L'enquête était de la nature d'une poursuite — Il est injuste d'élaborer une norme après la conduite reprochée — Le demandeur n'a pas eu toute la possibilité de se faire entendre — Le Rapport a été annulé pour excès de compétence et violation des principes d'équité procédurale.

L'action du demandeur visait à obtenir un jugement déclaratoire pour faire annuler le Rapport de la commission d'enquête Parker, une ordonnance en vue de la déposition dudit Rapport devant la Cour fédérale et les dépens. Le demandeur a été député fédéral, ministre et président du Conseil du Trésor, mais il a démissionné de ses fonctions de ministre à la suite de rumeurs médiatiques selon lesquelles il aurait été en situation de conflit d'intérêts. Le Conseil privé a confié au juge Parker, juge en chef de l'Ontario, le mandat de former une commission d'enquête sur les allégations de conflit d'intérêts. La commission d'enquête Parker, constituée conformément à la partie I de la *Loi sur les enquêtes*, a reçu le mandat de faire enquête et de présenter un rapport sur les faits entourant la conduite du demandeur et sur la question de savoir s'il était trouvé effectivement, ou selon toute apparence, en

(b) whether the Honourable Sinclair M. Stevens was in real or apparent conflict of interest as defined by the Conflict of Interest and Post Employment Code for Public Office Holders and the letter from the Prime Minister to the Honourable Sinclair M. Stevens of September 9, 1985; and

The Committee do further advise that the Commissioner be authorized,

(a) to adopt such procedures and methods as he may consider expedient for the proper conduct of the inquiry and to sit at such times and at such places as he may decide;

(b) to engage the services of such staff and counsel as he may consider necessary or advisable, at such rates of remuneration and reimbursement as may be approved by the Treasury Board;

(c) to engage the services of such experts and other persons as are referred to in section 11 of the Inquiries Act who shall receive such remuneration and reimbursement as may be approved by the Treasury Board; and

(d) to rent office space and facilities for the Commission's purposes in accordance with Treasury Board policy; and

The Committee do further advise that the Commissioner be directed to submit a report in both official languages to the Governor in Council as soon as possible, and to file his papers and records with the Clerk of the Privy Council as soon as reasonably may be after the conclusion of the inquiry.

[7] Commissioner Parker appointed Commission counsel and hired staff to assist him. Commissioner Parker appointed David Scott, Q.C. as senior Commission counsel and Marlys Edwardh and Edward Belobaba as associate Commission counsel.

[8] The plaintiff retained the late John Sopinka (who was appointed to the Supreme Court of Canada in 1988) as counsel. Mr. Sopinka was assisted by his associate, Kathryn Chalmers.

[9] Noreen Stevens was represented by Tom Lockwood and the Government of Canada was represented by Ian Binnie, now a Justice of the Supreme Court of Canada.

[10] The public hearing phase of the Parker Inquiry lasted from July 1986 to February 1987, sitting for 93

b) la possibilité que l'honorable Sinclair Stevens se soit trouvé effectivement, ou selon toute apparence, en situation de conflit d'intérêts tel que l'entend le Code pour les titulaires de charges publiques sur les conflits d'intérêts et l'après-mandat et comme l'indique la lettre qu'adressait le Premier ministre à l'intéressé en date du 9 septembre 1985.

Le Comité recommande en outre que le commissaire soit autorisé

a) à prendre toutes les mesures qui lui sembleront susceptibles de faciliter le déroulement de l'enquête, ainsi qu'à tenir audience aux lieux et aux heures qu'il jugera opportuns;

b) à recourir à des avocats ou à toute autre personne dont la contribution lui paraîtra essentielle ou souhaitable, le traitement et les indemnités à verser auxdites personnes devant d'abord être approuvés par le Conseil du Trésor;

c) à retenir les services de spécialistes mentionnés à l'article 11 de la Loi sur les enquêtes, le traitement et les indemnités à verser auxdites personnes devant d'abord être approuvés par le Conseil du Trésor;

d) à louer, conformément à la politique du Conseil du Trésor, les locaux et les installations que nécessitera la bonne marche des travaux de la commission.

Le comité recommande enfin qu'il soit enjoint au commissaire de soumettre dès que possible au gouverneur en conseil un rapport dans les deux langues officielles, et de transmettre ses dossiers au greffier du Conseil privé, dans un délai raisonnable, une fois que l'enquête sera terminée.

[7] Le commissaire Parker a retenu les services d'avocats et il a embauché le personnel dont il avait besoin pour l'aider. Il a nommé David Scott, c.r., avocat principal et Marlys Edwardh et Edward Belobaba, avocats associés de la Commission.

[8] Le demandeur a retenu les services de feu John Sopinka (nommé à la Cour suprême du Canada en 1988) comme avocat. M. Sopinka était aidé de son associée, Kathryn Chalmers.

[9] Noreen Stevens était représentée par Tom Lockwood et le gouvernement du Canada était représenté par Ian Binnie, aujourd'hui juge de la Cour suprême du Canada.

[10] Les audiences publiques de la Commission Parker se sont déroulées de juillet 1986 à février 1987: la

days, and hearing over 90 witnesses.

[11] Rogers Cable transmitted daily live broadcasts of the Parker Inquiry and the proceedings were covered by the print and news media.

[12] The deliberative phase of the Parker Inquiry ran from February 20, 1987 until the release of the Parker Report (the Report) on December 3, 1987 [*Report of the Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens*].

[13] During the deliberative phase of the Parker Inquiry, Commission counsel docketed approximately 1,700 hours.

[14] Commissioner Parker found there to be no evidence of wrongdoing by the plaintiff, but also concluded that the plaintiff had been in a real conflict of interest on six occasions during his tenure as a Minister of the Crown. These findings were made using a definition of conflict of interest drafted by Commissioner Parker and first made known as part of the Report.

[15] The plaintiff, during his term, was governed by three different conflict of interest schemes, namely:

(i) the *Conflict of Interest Guidelines for Ministers of the Crown* (1979), implemented under Prime Minister Joe Clark (the Clark Guidelines);

(ii) the *Conflict of Interest Guidelines for Ministers of the Crown* (1980), implemented under Prime Minister Pierre E. Trudeau (the Trudeau Guidelines) [see Appendix E of the Report]; and

(iii) the *Conflict of Interest and Post-Employment Code for Public Office Holders* (1985), implemented under Prime Minister Brian Mulroney (the Mulroney Code) [see Appendix F of the Report].

Commission a siégé pendant 93 jours et elle a entendu plus de 90 témoins.

[11] Rogers Cable transmettait quotidiennement des émissions en direct sur la Commission Parker et la procédure était décrite dans les médias d'information et dans la presse.

[12] La Commission Parker a délibéré du 20 février 1987 jusqu'à la publication du Rapport Parker (le Rapport), le 3 décembre 1987 [*Rapport de la Commission d'enquête sur les faits reliés à des allégations de conflit d'intérêts concernant l'honorable Sinclair M. Stevens*].

[13] Pendant les délibérations de la Commission d'enquête, les avocats de la Commission ont accumulé quelque 1 700 heures de travail.

[14] Le commissaire Parker n'a trouvé aucune preuve d'écart de conduite de la part du demandeur, mais il a également conclu que le demandeur s'était trouvé en situation réelle de conflit d'intérêts à six reprises pendant qu'il était ministre de la Couronne. Ces conclusions ont été tirées à l'aide de la définition du conflit d'intérêts rédigée par le commissaire Parker et qui a été rendu publique pour la première fois dans le Rapport.

[15] Pendant son mandat, le demandeur était assujetti à trois régimes distincts concernant les conflits d'intérêts, savoir:

(i) les *Lignes directrices concernant les conflits d'intérêts à l'intention des ministres de la Couronne* (1979) mises en œuvre par le premier ministre Joe Clark (les Directives Clark);

(ii) les *Lignes directrices concernant les conflits d'intérêts à l'intention des ministres de la Couronne* (1980) mises en œuvre par le premier ministre Pierre E. Trudeau (les Directives Trudeau) [voir annexe E du Rapport];

(iii) le *Code régissant la conduite des titulaires de charge publique en ce qui concerne les conflits d'intérêts et l'après-mandat* (1985) mis en œuvre par le premier ministre Brian Mulroney (le Code Mulroney) [voir annexe F du Rapport].

None of these conflict of interest schemes contained a definition of conflict of interest.

[16] The statement of claim filed by the plaintiff on December 18, 1987 claimed the following relief:

(A) a declaration that the Report be set aside and declared to be of no force and effect by reason of the matters set out in paragraph 5 of the Declaration [*sic*];

(B) an order removing to this Court the said Report and all records, proceedings, papers and transcript of evidence relating to the Inquiry;

(C) his costs of this proceeding; and

(D) such further and other relief as the Plaintiff may be entitled to and as to this Court may seem just.

Applicable Legislation

[17] The relevant sections of the *Inquiries Act* state:

2. The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.

3. Where an inquiry as described in section 2 is not regulated by any special law, the Governor in Council may, by a commission, appoint persons as commissioners by whom the inquiry shall be conducted.

4. The commissioners have the power of summoning before them any witnesses, and of requiring them to

(*a*) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and

(*b*) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

5. The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.

. . .

Aucun de ces régimes relatifs aux conflits d'intérêts ne contenait une définition du conflit d'intérêts.

[16] Dans sa déclaration déposée le 18 décembre 1987, le demandeur a demandé les mesures de redressement suivantes:

[TRADUCTION]

A) une déclaration selon laquelle le rapport doit être annulé et déclaré nul et non avenu pour les motifs énoncés au paragraphe 5 de la déclaration [*sic*];

B) une ordonnance en vertu de laquelle la Cour est saisie dudit rapport et de tous les dossiers, actes, documents et transcriptions de témoignages en rapport avec la commission d'enquête;

C) les dépens relativement aux présentes;

D) toute autre réparation à laquelle le demandeur aurait droit et que la Cour estime équitable.

Dispositions législatives applicables

[17] Voici les dispositions pertinentes de la *Loi sur les enquêtes*:

2. Le gouverneur en conseil peut, s'il l'estime utile, faire procéder à une enquête sur toute question touchant le bon gouvernement du Canada ou la gestion des affaires publiques.

3. Dans le cas d'une enquête qui n'est pas régie par des dispositions législatives particulières, le gouverneur en conseil peut, par commission, nommer les commissaires qui en sont chargés.

4. Les commissaires ont le pouvoir d'assigner devant eux des témoins et de leur enjoindre de:

a) déposer oralement ou par écrit sous la foi du serment, ou d'une affirmation solennelle si ceux-ci en ont le droit en matière civile;

b) produire les documents et autres pièces qu'ils jugent nécessaires en vue de procéder d'une manière approfondie à l'enquête dont ils sont chargés.

5. Les commissaires ont, pour contraindre les témoins à comparaître et à déposer, les pouvoirs d'une cour d'archives en matière civile.

[. . .]

11. (1) The commissioners, whether appointed under Part I or under Part II, may, if authorized by the commission issued in the case, engage the services of

(*a*) such accountants, engineers, technical advisers or other experts, clerks, reporters and assistants as they deem necessary or advisable; and

(*b*) counsel to aid and assist the commissioners in an inquiry.

(2) The commissioners may authorize and depute any accountants, engineers, technical advisers or other experts, the services of whom are engaged under subsection (1), or any other qualified persons, to inquire into any matter within the scope of the commission as may be directed by the commissioners.

(3) The persons deputed under subsection (2), when authorized by order in council, have the same powers as the commissioners have to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence, and otherwise conduct the inquiry.

(4) The persons deputed under subsection (2) shall report the evidence and their findings, if any, thereon to the commissioners.

12. The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of an investigation, to be represented by counsel.

13. No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

Issues

[18] The plaintiff stated the issues to be as follows:

(i) **Inadequacy of Notice**–the failure to proscribe a standard of 'conflict of interest' in the Trudeau Guidelines, the Code, and the Order-in-Council, or at any time during the public hearings or in advance of December 3, 1987, when the Parker Report was released, constitutes a denial of Mr. Stevens' right to procedural fairness and natural justice;

11. (1) Les commissaires, qu'ils soient nommés sous le régime de la partie I ou de la partie II, peuvent, s'ils y sont autorisés par leur commission, retenir les services:

a) des experts—comptables, ingénieurs, conseillers techniques ou autres—, greffiers, rapporteurs et collaborateurs dont ils jugent le concours utile;

b) d'avocats pour les assister dans leur enquête.

(2) Les commissaires peuvent—selon les modalités qu'ils fixent—déléguer aux experts qu'ils engagent ou à d'autres personnes qualifiées toute partie d'une enquête relevant de leur commission.

(3) La délégation confère, lorsqu'elle est autorisée par décret, les pouvoirs des commissaires en ce qui touche le recueil de témoignages, la délivrance des assignations, la contrainte à comparution et à déposition et, de façon générale, la conduite de l'enquête.

(4) Les délégués font rapport aux commissaires des témoignages recueillis ainsi que de leurs éventuelles conclusions sur la question étudiée.

12. Les commissaires peuvent autoriser la personne dont la conduite fait l'objet d'une enquête dans le cadre de la présente loi à se faire représenter par un avocat. Si, au cours de l'enquête, une accusation est portée contre cette personne, le recours à un avocat devient un droit pour celle-ci.

13. La rédaction d'un rapport défavorable ne saurait intervenir sans qu'auparavant la personne incriminée ait été informée par un préavis suffisant de la faute qui lui est imputée et qu'elle ait eu la possibilité de se faire entendre en personne ou par le ministère d'un avocat.

Questions en litige

[18] Le demandeur soutient que les questions en litige sont les suivantes:

[TRADUCTION]

(i) **Préavis insuffisant**–Ni les Directives Trudeau, ni le Code, ni le décret ne définissait le «conflit d'intérêts» qui n'a pas non plus été défini à quelque moment que ce soit pendant les audiences publiques ou avant le 3 décembre 1987, lorsque le rapport Parker a été publié; il s'agit d'une violation du droit de M. Stevens au respect des principes d'équité procédurale et de justice naturelle;

(ii) **Reasonable Apprehension of Bias**–Through their substantive participation in both the adjudicative and prosecutorial phases of the Parker Inquiry, Commission counsel's conduct gave rise to a reasonable apprehension of bias;

(iii) **Excess of Jurisdiction**–By conducting an investigation into what the definition of conflict of interest *should* be, and then measuring Mr. Stevens' conduct against it, Commissioner Parker exceeded the limits of the jurisdiction conferred on him by the Order-in-Council; and

(iv) **Violations of Fundamental Justice**–The Inquiry's procedural and substantive flaws in failing to proscribe the standard to be applied and provide adequate notice of the allegations constitute a violation of the principles of fundamental justice under s. 7 of the Charter.

(ii) **Crainte raisonnable de partialité**–À cause de leur très importante participation tant sur le plan juridictionnel que sur le plan de la poursuite à la commission Parker, la conduite des avocats de la commission soulève une crainte raisonnable de partialité;

(iii) **Excès de compétence**–En menant une enquête sur le sens que *devait* avoir la notion de conflit d'intérêts et en comparant la conduite de M. Stevens avec cette définition, le commissaire Parker a outrepassé la compétence que lui avait conférée le décret;

(iv) **Violations des principes de justice fondamentale**–Les erreurs commises par la commission, tant sur la forme que sur le fond, puisqu'elle n'a pas précisé la norme applicable et qu'elle n'a pas donné un préavis suffisant concernant les allégations, constituent une violation des principes de justice fondamentale, sous le régime de l'article 7 de la Charte.

General Remarks on Commissions of Inquiry

[19] There are two unofficial types of public inquiries in Canada. This was discussed by Collier J. in *Landreville v. The Queen*, [1977] 2 F.C. 726 (T.D.), at page 757:

This was a somewhat unusual Royal Commission. The majority of Royal Commissions seem to be constituted to investigate a particular subject, thing or state of affairs. Rarely do they relate to one person. This Commission was, however, directed to the investigation of one particular person and his dealings with a certain company, its officers, or its shares. The Commissioner was requested to inquire into those dealings and to express an opinion whether, in the course of them, there had been misbehaviour by the plaintiff as a judge, or whether the plaintiff, by the dealings had proved himself unfit. I am unable to see how those general terms indicated to the plaintiff there would, or might be, an allegation of gross contempt of certain tribunals amounting to misconduct.

[20] In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, at paragraphs 60-65:

Commissions of inquiry have a long history in Canada. This court has already noted (*Starr v. Houlden*, *supra*, at pp.

Observations générales concernant les commissions d'enquête

[19] Il existe deux types non officiels d'enquêtes publiques au Canada. Cette question a été examinée par le juge Collier dans la décision *Landreville c. La Reine*, [1977] 2 C.F. 726 (1re inst.), à la page 757:

Il s'agit là d'une commission royale quelque peu inhabituelle. La majorité des commissions royales sont instituées pour enquêter sur un sujet, une chose ou un état de choses. Elles se rapportent rarement à une personne. Toutefois, celle-ci a été constituée à la seule fin d'enquêter sur une personne en particulier et ses rapports avec une certaine compagnie, ses dirigeants et ses actions. Le commissaire a été chargé d'enquêter sur lesdits rapports et d'apprécier s'ils ont donné lieu à une mauvaise conduite de la part du demandeur dans l'exercice de ses fonctions de juge ou si celui-ci s'est révélé inapte à les remplir utilement. Je ne vois vraiment pas comment des termes aussi généraux pouvaient indiquer au demandeur qu'on alléguerait ou pourrait alléguer un outrage flagrant devant certains tribunaux, qui équivaut à une mauvaise conduite.

[20] Dans *Phillips c. Nouvelle-Écosse (Commission d'enquête sur la tragédie de la mine Westray)*, [1995] 2 R.C.S. 97; il est dit, aux paragraphes 60 à 65:

Les commissions d'enquête existent depuis longtemps au Canada. Notre Cour a déjà souligné (*Starr c. Houlden*, précité,

1410-11) the significant role that they have played in our country, and the diverse functions which they serve. As *ad hoc* bodies, commissions of inquiry are free of many of the institutional impediments which at times constrain the operation of the various branches of government. They are created as needed, although it is an unfortunate reality that their establishment is often prompted by tragedies such as industrial disasters, plane crashes, unexplained infant deaths, allegations of widespread child sexual abuse, or grave miscarriages of justice.

At least three major studies on the topic have stressed the utility of public inquiries and recommended their retention: The Law Reform Commission of Canada, Working Paper 17, *Administrative Law: Commissions of Inquiry* (1977); Ontario Law Reform Commission, *Report on Public Inquiries* (1992); and Alberta Law Reform Institute, Report No. 62, *Proposals for the Reform of the Public Inquiries Act* (1992). They have identified many benefits flowing from commissions of inquiry. Although the particular advantages of any given inquiry will depend upon the circumstances in which it is created and the powers it is given, it may be helpful to review some of the most common functions of commissions of inquiry.

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

aux pages 1410 et 1411), le rôle important qu'elles ont joué dans notre pays et les nombreuses fonctions qu'elles remplissent. En tant qu'organismes *ad hoc*, les commissions d'enquête sont libres d'un bon nombre des entraves institutionnelles qui limitent parfois l'action des diverses branches de gouvernement. Elles sont constituées pour répondre à un besoin, bien qu'il faille malheureusement admettre qu'elles doivent souvent leur existence à des tragédies comme un désastre industriel, des écrasements d'avions, des décès inexpliqués de jeunes enfants, des allégations d'exploitation sexuelle d'enfants largement répandue ou des erreurs judiciaires graves.

Au moins trois études d'importance sur le sujet ont mis en évidence l'utilité des enquêtes publiques et ont recommandé qu'elles soient maintenues: Commission de réforme du droit du Canada, Document de travail 17, *Droit administratif: les commissions d'enquête* (1977); Commission de réforme du droit de l'Ontario, *Report on Public Inquiries* (1992); Alberta Law Reform Institute, Report No. 62, *Proposals for the Reform of the Public Inquiries Act* (1992). D'après ces études, les commissions d'enquête présentent de nombreux avantages. Bien que ces avantages dépendent du contexte de la création de chaque commission et des pouvoirs qui lui sont conférés, il peut être utile de passer en revue certaines des fonctions les plus courantes de ces commissions.

L'une des principales fonctions des commissions d'enquête est d'établir les faits. Elles sont souvent formées pour découvrir la «vérité», en réaction au choc, au sentiment d'horreur, à la désillusion ou au scepticisme ressentis par la population. Comme les cours de justice, elles sont indépendantes; mais au contraire de celles-ci, elles sont souvent dotées de vastes pouvoirs d'enquête. Dans l'accomplissement de leur mandat, les commissions d'enquête sont, idéalement, dépourvues d'esprit partisan et mieux à même que le Parlement ou les législatures d'étudier un problème dans la perspective du long terme. Les cyniques dénigrent les commissions d'enquête, parce qu'elles seraient un moyen utilisé par le gouvernement pour faire traîner les choses dans des situations qui commanderaient une prompte intervention. Pourtant, elles peuvent remplir, et remplissent de fait, une fonction importante dans la société canadienne. Dans les périodes d'interrogation, de grande tension et d'inquiétude dans la population, elles fournissent un moyen d'informer les Canadiens sur le contexte d'un problème préoccupant pour la collectivité et de prendre part aux recommandations conçues pour y apporter une solution. Le statut et le grand respect dont jouit le commissaire, ainsi que la transparence et la publicité des audiences, contribuent à rétablir la confiance du public non seulement dans l'institution ou la situation visées par l'enquête, mais aussi dans l'ensemble de l'appareil de l'État. Elles constituent un excellent moyen d'informer et d'éduquer les citoyens inquiets.

This important characteristic was commented upon by Ontario Supreme Court Justice S. Grange following his inquiry into infant deaths at the Toronto Hospital for Sick Children:

> I remember once thinking egotistically that all the evidence, all the antics, had only one aim: to convince the commissioner who, after all, eventually wrote the report. But I soon discovered my error. They are not just inquiries; they are *public* inquiries. . . . I realized that there was another purpose to the inquiry just as important as one man's solution to the mystery and that was to inform the public. Merely presenting the evidence in public, evidence which had hitherto been given only in private, served that purpose. The public has a special interest, a right to know and a right to form its opinion as it goes along. [Emphasis in original.]

(S. G. M. Grange "How Should Lawyers and the Legal Profession Adapt?" in A. Paul Pross, Innis Christie and John A. Yogis, eds., *Commissions of Inquiry* (1990), 12 *Dalhousie L.J.* 151, at pp. 154-55.)

The public inquiry has been even more broadly characterized as serving a particular "social function" within our democratic culture:

> . . . a commission . . . has certain things to say to government but it also has an effect on perceptions, attitudes and behaviour. Its general way of looking at things is probably more important in the long run than its specific recommendations. It is the general approach towards a social problem that determines the way in which a society responds to it. There is much more than law and governmental action involved in the social response to a problem. The attitudes and responses of individuals at the various places at which they effect the problem are of profound importance.
>
> What gives an inquiry of this kind its social function is that it becomes, whether it likes it or not, part of this ongoing social process. There is action and interaction. . . . Thus this instrument, supposedly merely an extension of Parliament, may have a dimension which passes beyond the political process into the social sphere. The phenomenon is changing even while the inquiry is in progress. The decision to institute an inquiry of this kind is a decision not only to release an investigative technique but a form of social influence as well.

Le juge S. Grange de la Cour suprême de l'Ontario a souligné cette importante caractéristique à la suite de son enquête sur le décès de jeunes enfants à l'hôpital pour enfants de Toronto:

> [TRADUCTION] Je me souviens m'être un jour pris à penser égoïstement que toute la preuve présentée, tout ce cirque, ne visait qu'un but: convaincre le commissaire qui, après tout, rédigerait le rapport. Mais je me suis vite aperçu de mon erreur. Ce n'est pas seulement une enquête; c'est une enquête *publique*. [. . .] [J]e me suis rendu compte que l'enquête avait un autre but, tout aussi important que la solution qu'une seule personne allait proposer au mystère, celui d'informer la population. Simplement présenter en public la preuve qui avait jusqu'ici été produite à huis clos permettait d'atteindre ce but. La population a un intérêt particulier, le droit de savoir et le droit de se former une opinion au fur et à mesure. [En italique dans l'original.]

(S. G. M. Grange, «How Should Lawyers and the Legal Profession Adapt?», dans A. Paul Pross, Innis Christie et John A. Yogis, dir., *Commissions of Inquiry* (1990), 12 *Dalhousie L.J.* 151, aux pages 154 et 155.)

Un auteur a poussé plus loin cette caractérisation et affirmé que l'enquête publique remplissait une «fonction sociale» particulière dans notre culture démocratique:

> [TRADUCTION] [. . .] une commission [. . .] a des choses à dire au gouvernement, mais elle a aussi un effet sur les perceptions, les attitudes et les comportements. Sa manière générale de voir les choses sera probablement plus importante avec le temps que ses recommandations précises. C'est le point de vue général sur un problème social qui détermine la réaction de la société. La réponse de la société à un problème met en cause bien plus que le droit et l'action gouvernementale. Les attitudes et les réactions des particuliers aux différents endroits où ils peuvent intervenir revêtent une profonde importance.
>
> Ce qui donne à une enquête de ce genre sa fonction sociale c'est qu'elle devient, bon gré mal gré, une partie de ce processus social en cours. Il y a une action et une interaction. [. . .] Par conséquent, cet instrument, qui est censé n'être qu'un prolongement du Parlement, peut avoir une dimension qui dépasse le processus politique pour entrer dans le domaine social. Le phénomène évolue pendant que se déroule l'enquête. La décision d'instituer une enquête de ce genre est une décision non seulement de recourir à une technique d'enquête, mais encore d'exercer une influence sociale.

(Gerald E. Le Dain, "The Role of the Public Inquiry in our Constitutional System", in Jacob S. Ziegel, ed., *Law and Social Change* (1993), 79, at p. 85.)

The investigative, educational and informative aspects of inquiries clearly benefit society as a whole. As well, many commissions of inquiry have, through their recommendations, achieved improvements in the particular situation being reviewed. Nonetheless, it cannot be forgotten that harsh and persuasive criticisms have been levelled against them. Every inquiry created must proceed carefully in order to avoid complaints pertaining to excessive cost, lengthy delay, unduly rigid procedures or lack of focus. More importantly for the purposes of this appeal is the risk that commissions of inquiry, released from many of the institutional constraints placed upon the various branches of government, are also able to operate free from the safeguards which ordinarily protect individual rights in the face of government action. These are very real dangers that must be carefully considered. First, however, it may be helpful to examine the need for and the positive attributes of this inquiry.

I must now proceed to an analysis of this particular inquiry.

Analysis and Decision

[21] I propose to first deal with Issue 3.

[22] Issue 3

Excess of Jurisdiction - By conducting an investigation into what the definition of conflict of interest should be, and then measuring Mr. Stevens' conduct against it, did Commissioner Parker exceed the limits of the jurisdiction conferred on him by the Order in Council?

Commissioner Parker received his authority or jurisdiction to carry out the Commission of Inquiry from Order in Council P.C. 1986-1139, dated May 15, 1986 which read in part:

The Committee of the Privy Council, on the recommendation of the Prime Minister, advise that pursuant to section 37 of the Judges Act, the Honourable William Dickens Parker, be authorized to act as a Commissioner and that a Commission do issue under Part I of the Inquiries Act and under the Great Seal of Canada appointing the Honourable William Dickens Parker, to be a Commissioner to inquire into and report on

(Géraid E. Le Dain, «The Role of the Public Inquiry in our Constitutional System», dans Jacob S. Ziegel, dir., *Law and Social Change* (1973), 79, à la page 85.)

De toute évidence, les enquêtes profitent à toute la société sur ces trois plans: établissement des faits, éducation et information. Par surcroît, beaucoup de commissions d'enquête ont, par leurs recommandations, permis d'améliorer la situation en cause. Néanmoins, on ne peut pas oublier qu'elles ont été l'objet de critiques dures et convaincantes. Chaque enquête doit être entourée de précautions visant à éviter les plaintes contre les coûts excessifs, les longs délais, la trop grande rigidité du fonctionnement ou l'éparpillement des efforts. Plus important, en ce qui a trait au présent pourvoi, il y a le risque que les commissions d'enquête, libérées d'un bon nombre des contraintes institutionnelles auxquelles sont assujetties les diverses branches de gouvernement, soient aussi en mesure d'agir sans les garanties qui protègent d'ordinaire les droits individuels contre l'action gouvernementale. Ce sont des dangers très réels qu'il faut peser avec soin. Mais il est utile de nous arrêter d'abord à la nécessité et aux avantages de la présente enquête.

Il me faut donc maintenant analyser la commission d'enquête en cause.

Analyse et décision

[21] Je commencerai par la question 3.

[22] Question 3

Excès de compétence - En menant une enquête sur le sens que devait avoir la notion de conflit d'intérêts et en comparant la conduite de M. Stevens avec cette définition, le commissaire Parker a-t-il outrepassé la compétence que lui avait conférée le décret?

Le commissaire Parker a reçu le pouvoir ou la compétence nécessaires pour présider la commission d'enquête du décret, C.P. 1986-1139, daté du 15 mai 1986 et qui dit, en partie:

Sur avis conforme du Premier ministre, le Comité du Conseil privé recommande que l'honorable William Dickens Parker soit autorisé à agir comme commissaire conformément à l'article 37 de la Loi sur les juges, et que soit émise, conformément à la partie I de la Loi sur les enquêtes, une commission revêtue du grand sceau du Canada portant que l'honorable William Dickens Parker est nommé commissaire et chargé de faire enquête et de présenter un rapport sur

(a) the facts following allegations of conflict of interest made in various newspapers, electronic media and the House of Commons, with respect to the conduct, dealings or actions of the Honourable Sinclair M. Stevens; and

(b) whether the Honourable Sinclair M. Stevens was in real or apparent conflict of interest as defined by the Conflict of Interest and Post Employment Code for Public Office Holders and the letter from the Prime Minister to the Honourable Sinclair M. Stevens of September 9, 1985; and

The Committee do further advise that the Commissioner be authorized,

(a) to adopt such procedures and methods as he may consider expedient for the proper conduct of the inquiry and to sit at such times and at such places as he may decide;

a) les faits suivant les allégations de conflit d'intérêts qui ont été faites par différents journaux et médias électroniques, ainsi qu'à la Chambre des communes, relativement à la conduite, aux transactions et aux agissements de l'honorable Sinclair Stevens; et

b) la possibilité que l'honorable Sinclair Stevens se soit trouvé effectivement, ou selon toute apparence, en situation de conflit d'intérêts tel que l'entend le Code pour les titulaires de charges publiques sur les conflits d'intérêts et l'après-mandat et comme l'indique la lettre qu'adressait le Premier ministre à l'intéressé en date du 9 septembre 1985.

Le Comité recommande en outre que le commissaire soit autorisé

a) à prendre toutes les mesures qui lui sembleront susceptibles de faciliter le déroulement de l'enquête, ainsi qu'à tenir audience aux lieux et aux heures qu'il jugera opportuns;

[23] Under paragraph (a), Commissioner Parker was given the jurisdiction to inquire into and report on the facts following the allegations of conflict of interest made against Mr. Stevens.

[23] En vertu de l'alinéa a), le commissaire Parker avait compétence pour faire enquête et présenter un rapport sur les faits suivant les allégations de conflit d'intérêts présentées contre M. Stevens.

[24] Under paragraph (b), Commissioner Parker was given the jurisdiction to inquire into and report on whether the plaintiff was in "real or apparent conflict of interest as defined by the Conflict of Interest and Post Employment Code of Public Office Holders and the letter from the Prime Minister to the Honourable Sinclair M. Stevens of September 9, 1985".

[24] En vertu de l'alinéa b), le commissaire Parker avait compétence pour faire enquête et rédiger un rapport sur la question de savoir si le demandeur s'était trouvé «effectivement, ou selon toute apparence, en situation de conflit d'intérêts tel que l'entend le Code pour les titulaires de charges publiques sur les conflits d'intérêts et l'après-mandat et comme l'indique la lettre qu'adressait le Premier ministre à l'intéressé en date du 9 septembre 1985».

[25] As noted earlier in these reasons, the plaintiff was subject to three different conflict of interest guidelines during the period he was a member of Parliament or a Cabinet minister. These were the Clark Guidelines, the Trudeau Guidelines and the Mulroney Code. Because of the timetable for implementation of the Mulroney Code, the plaintiff was only covered by the Mulroney Code from April 11, 1986 to May 12, 1986, the date of his retirement. Commissioner Parker noted that he would consider both the Trudeau Guidelines and the Mulroney Code to be applicable (page 14 of the Report).

[25] Tel que mentionné plus haut dans les présents motifs, le demandeur était assujetti à trois régimes différents concernant les conflits d'intérêts pendant qu'il était député ou ministre du Cabinet: les Directives Clark, les Directives Trudeau et le Code Mulroney. À cause de l'échéancier relatif à la mise en œuvre du Code Mulroney, le demandeur n'a été assujetti au Code Mulroney que du 11 avril 1986 au 12 mai 1986, date de sa retraite. Le commissaire Parker a mentionné que, selon lui, tant les Directives Trudeau que le Code Mulroney s'appliquaient (page 14 du Rapport).

[26] Counsel for the plaintiff stated that it did not matter whether Commissioner Parker applied the Trudeau Guidelines or the Mulroney Code because neither contained a definition of conflict of interest, but counsel still argued that Commissioner Parker only had jurisdiction to determine the facts under paragraph (a) of the Order in Council.

[27] Commissioner Parker recognized this problem and in his Report stated at pages 13-14:

This chapter describes the rules relating to conflict of interest in place during the period between September 1984 and May 1986. A proper understanding of the rules is necessary to draw conclusions about whether Mr. Stevens complied with them, conclusions I have determined are inherently part of the fact-finding process with which I am charged.

As a preliminary matter I address the issue of which rules were in force during the period in which most of the events comprising the allegations took place.

The Applicable Conflict of Interest Regime

During this period the Government of Canada had in place two regimes to deal with conflicts of interest and ministers of the Crown. The first was contained in the guidelines (Appendix E) that were released together with a letter of commentary by Prime Minister Pierre Elliott Trudeau on April 28, 1980 (Appendix G). When the present administration came to power in September 1984 the guidelines were continued in effect pending a complete review of conflict of interest matters within the public service. Following this review, a new regime was announced by Prime Minister Brian Mulroney in the House of Commons on September 9, 1985, embodied in the code (Appendix F), the text of which was released that day together with a letter of commentary (the letter) from the prime minister (Appendix H).

The code took effect on January 1, 1986. Under section 74 of the code, however, a minister continued to be governed by the guidelines until a review of his or her compliance arrangements was completed. In the case of Mr. Stevens, this review was completed on April 11, 1986; therefore, until that date he was subject to the guidelines.

The matter is of some significance because my terms of reference direct me in part to inquire into and report on whether the Honourable Sinclair M. Stevens was in real or

[26] L'avocat du demandeur a dit qu'il importait peu que le commissaire Parker ait appliqué les Directives Trudeau ou le Code Mulroney parce qu'aucun d'eux ne définissait la notion de conflit d'intérêts, mais l'avocat était néanmoins d'avis que le commissaire Parker n'avait compétence que pour décider des faits en vertu de l'alinéa a) du décret.

[27] Le commissaire Parker a reconnu l'existence du problème et, dans son Rapport, il a dit aux pages 13 et 14:

Dans la présente partie, nous décrirons les règles qui étaient en vigueur durant la période de septembre 1984 à mai 1986. Il importe de bien comprendre la nature et la portée de ces règles afin de déterminer, comme l'exige le mandat qui m'a été confié, si M. Stevens s'y est conformé.

J'examinerai dans un premier temps, quelles règles étaient en vigueur durant la période pendant laquelle se sont déroulés la plupart des événements visés par les allégations.

Les règles pertinentes sur les conflits d'intérêts

Durant la période qui nous intéresse, le gouvernement du Canada a assujetti les ministres à deux séries distinctes de règles sur les conflits d'intérêts. Il y eut d'abord les Lignes directrices concernant les conflits d'intérêts (annexe E), publiées le 28 avril 1980 avec une lettre du Premier ministre Trudeau les commentant (annexe G). Ces Lignes directrices continuèrent d'être appliquées après l'arrivée au pouvoir de l'administration actuelle, en septembre 1984, en attendant que soit terminé l'examen exhaustif des questions de conflit d'intérêts à l'intérieur de la Fonction publique. Une fois l'examen terminé, le Premier ministre Mulroney annonça en Chambre, le 9 septembre 1985, une nouvelle série de directives portant le nom de Code (annexe F) lequel fut publié le même jour accompagné d'un commentaire sous forme de lettre (la Lettre) du Premier ministre (annexe H).

Le Code est entré en vigueur le 1er janvier 1986. Toutefois, l'article 74 prévoit que les ministres continueront à être régis par les Lignes directrices jusqu'à ce qu'on ait terminé l'examen des mesures prises par eux en vertu du nouveau Code pour prévenir les conflits d'intérêts. L'examen du dossier de M. Stevens fut terminé le 11 avril 1986; jusqu'à cette date celui-ci a donc été régi par les Lignes directrices.

Ces faits et ces dates ont une certaine importance étant donné que mon mandat me charge, entre autres choses, de faire enquête et de présenter un rapport sur la possibilité que

apparent conflict of interest as defined by the Conflict of Interest and Post Employment Code for Public Office Holders and the letter from the Prime Minister to the Honourable Sinclair M. Stevens of September 9, 1985.

I must determine how these terms can be construed in light of my finding that, during the period in which almost all the activities giving rise to the allegations took place, Mr. Stevens was subject to another conflict of interest regime.

There can be no serious question that my task is to assess the allegations in light of the applicable regime. The applicable regime was for the most part the guidelines, not the code. However, this finding does not alter my task appreciably since there is no substantial difference of concept, policy, or language between the two regimes. As well, neither contains an explicit definition of conflict of interest, and thus the definition itself, dependent on outside sources, does not vary. Further, all counsel dealing with the regimes addressed both of them. Finally, to interpret my terms of reference literally, as precluding analysis and consideration of the guidelines, would mean having to determine whether Mr. Stevens was in real or apparent conflict of interest as defined by a regime to which he was not subject, and so would be unfair to him.

To give meaning to my terms of reference, therefore, I have concluded that I must consider both regimes. In doing so, I am satisfied that I am neither altering in any meaningful way the ambit of my instructions, nor prejudicing Mr. Stevens. An examination of relevant provisions of the guidelines and code follows.

[28] The question now becomes whether Commissioner Parker exceeded his jurisdiction by adopting the definition of conflict of interest that he included in his Report. For the final outcome of this case, I do not believe that it matters whether Commissioner Parker referred to the Trudeau Guidelines plus the Mulroney Code as neither of these documents contained a definition of conflict of interest. I would add, however, that Commissioner Parker's mandate was defined by the Order in Council and that only authorized

l'honorable Sinclair Stevens se soit trouvé effectivement, ou selon toute apparence, en situation de conflit d'intérêts tel que l'entend le Code pour les titulaires de charges publiques sur les conflits d'intérêts et l'après-mandat et comme l'indique la lettre qu'adressait le Premier ministre à l'intéressé en date du 9 septembre 1985.

Je dois déterminer l'interprétation qu'il convient de donner à cette instruction compte tenu du fait que j'ai établi que, durant la période durant laquelle presque toutes les activités donnant matière aux allégations ont eu lieu, M. Stevens était régi par des lignes directrices autres que celles qui sont précisées dans mon mandat.

On ne saurait contester sérieusement qu'il m'incombe d'évaluer les allégations à la lumière des directives pertinentes. Ces directives émanaient surtout des Lignes directrices et non du Code. Cette constatation, toutefois n'affecte par sensiblement ma tâche car il n'y a pas de distinction substantielle, que ce soit au niveau des concepts, de la politique ou du langage employé, entre les Lignes directrices d'une part et du Code et la Lettre d'autre part. De plus, ni les Lignes directrices ni le Code ne définissent explicitement ce qu'est un conflit d'intérêts et cette définition provenant de source extérieure ne varie pas. Aussi tous les avocats dans leurs plaidoiries ont traité des deux sources de directives. Enfin, interpréter cette partie de mon mandat littéralement, c'est-à-dire en excluant toute analyse, tout examen des Lignes directrices, signifierait qu'il me faut déterminer si M. Stevens s'est trouvé effectivement, ou selon toute apparence, en situation de conflit d'intérêts aux termes de directives qui ne s'appliquaient pas à lui, et serait donc injuste à son égard.

Pour répondre à l'esprit de mon mandat en ce qui concerne les allégations portées, j'en suis par conséquent venu à la conclusion que je devais examiner les deux régimes. Je suis convaincu que, ce faisant, je ne modifie pas de façon significative la portée de mon mandat et que je ne cause pas de préjudice à M. Stevens. J'examinerai maintenant les dispositions pertinentes des Lignes directrices et du Code.

[28] La question est donc maintenant de savoir si le commissaire Parker a outrepassé sa compétence en adoptant la définition du conflit d'intérêts qu'il a présentée dans son Rapport. Pour trancher la question, j'estime qu'il n'est pas important de savoir si le commissaire Parker s'est fondé tant sur les Directives Trudeau que sur le Code Mulroney puisqu'aucun de ces documents ne définit la notion de conflit d'intérêts. J'ajouterais, toutefois, que le mandat du commissaire Parker était défini par le décret qui ne l'autorisait qu'à

him to determine whether the plaintiff was in a real or apparent conflict of interest "as defined by the Conflict of Interest and Post Employment Code for Public Office Holders and the letter from the Prime Minister to the Honourable Sinclair M. Stevens of September 9, 1985". This would indicate to me that when dealing with (potential) conflict of interests, he was only given authority to consider the Mulroney Code and the letter of September 9, 1985, and not the Trudeau Guidelines.

[29] In the alternative, even if I was to find that Commissioner Parker could determine whether the plaintiff was in a real or apparent conflict of interest using the Trudeau Guidelines, that does not assist the defendant as neither the Mulroney Code nor the Trudeau Guidelines contained a definition of conflict of interest.

[30] Commissioner Parker, after hearing the evidence and submissions concluded in Chapter 3 of the Report at page 35, that the definitions of real and apparent conflict of interest should be:

Definitions

- A real conflict of interest denotes a situation in which a minister of the Crown has knowledge of a private economic interest that is sufficient to influence the exercise of his or her public duties and responsibilities.
- An apparent conflict of interest exists when there is a reasonable apprehension, which reasonably well-informed persons could properly have, that a conflict of interest exists.

These are the definitions of real and apparent conflict that in my view accord with the common law, and with the provisions of the guidelines and code. These are the definitions that I will be using in this report.

[31] Counsel for the defendant stated that the Court should not take an "overly and unduly legalistic restrictive, narrow approach to interpreting the terms of reference" for Commissioner Parker, as they represent the extent of Commissioner Parker's jurisdiction *vis-à-vis* his determination of the definition of conflict of interest for use in his Report.

décider si le demandeur s'était trouvé effectivement, ou selon toute apparence, en situation de conflit d'intérêts «tel que l'entend le Code pour les titulaires de charges publiques sur les conflits d'intérêts et l'après-mandat et comme l'indique la lettre qu'adressait le Premier ministre à l'intéressé en date du 9 septembre 1985». Cela voudrait dire, selon moi, que lorsqu'il étudiait la possibilité d'un conflit d'intérêts (potentiel), il avait uniquement le pouvoir de tenir compte du Code Mulroney et de la lettre du 9 septembre 1985 et non des Directives Trudeau.

[29] À titre subsidiaire, même si je devais en arriver à la conclusion que le commissaire Parker pouvait décider si le demandeur s'était trouvé effectivement, ou selon toute apparence, en situation de conflit d'intérêts en appliquant les Directives Trudeau, cela n'est d'aucune utilité pour le défendeur puisque ni le Code Mulroney ni les Directives Trudeau ne contenait une définition du conflit d'intérêts.

[30] Après avoir entendu la preuve et les observations des parties, le commissaire Parker a conclu, à la page 38 du chapitre 3 du Rapport, que les définitions d'un conflit d'intérêts réel ou apparent devaient être:

Définitions

- Est qualifiée de conflit d'intérêts réel une situation dans laquelle un ministre de la Couronne a connaissance d'un intérêt pécuniaire privé suffisant pour influer sur l'exercice de ses fonctions et responsabilités officielles.
- Il y a conflit d'intérêts apparent lorsqu'il y a crainte raisonnable de conflit d'intérêts, crainte qu'une personne raisonnablement bien informée pourrait à bon droit avoir.

Ce sont là les définitions du conflit réel et du conflit apparent d'intérêts qui, selon moi, concordent avec la Common law et avec les dispositions des Directives et du Code même. Je m'y tiendrai donc jusqu'à la fin du présent rapport.

[31] L'avocat du défendeur a dit que la Cour ne devrait pas adopter une [TRADUCTION] «approche trop rigoriste, restrictive et étroite en interprétant le mandat» du commissaire Parker, puisque le mandat établit l'étendue de la compétence du commissaire Parker pour ce qui touche sa décision concernant la définition du conflit d'intérêts qu'il appliquerait dans son Rapport.

[37] Issue 1

Inadequacy of Notice - the failure to proscribe a standard of "conflict of interest" in the Trudeau Guidelines, the Code, and the Order-in-Council, or at any time during the public hearings or in advance of December 3, 1987, when the Parker Report was released, constitutes a denial of Mr. Stevens' right to procedural fairness and natural justice.

[38] The parties are in agreement that the rules of procedural fairness apply at a commission of inquiry such as the Parker Commission. In *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 2 F.C. 36 (C.A.), Décary J.A. stated for the Court at paragraph 73:

The *Inquiries Act* does not impose any code of procedure. Section 2 of the terms of reference in fact authorizes the Commissioner "to adopt such procedures and methods as he may consider expedient for the proper conduct of the inquiry". It is common ground that while a commissioner has all necessary latitude, the procedure he establishes must nonetheless respect the rules of procedural fairness, including those set out in sections 12 and 13 of the Act. The concept of procedural fairness is a shifting one; it changes depending on the type of inquiry and varies with the mandate of the commissioner and the nature of the rights that the inquiry might affect. A public inquiry under the *Inquiries Act* is not, I would point out, a trial, the report of a commissioner is not a judgment and his recommendations may not be enforced. Thus a commissioner has broad latitude and discretion, and the courts will question his procedural choices only in exceptional circumstances.

And at paragraph 32:

This respect for the institution that the creation of a commission of inquiry has come to be in Canada must not, however, amount to blind respect. However legitimate and important the objective may be, it does not justify all the means that might be used to achieve it. The search for truth does not excuse the violation of the rights of the individuals being investigated. Individuals whose conduct is being scrutinized at a public inquiry conducted under Part I of the Act are so vulnerable and so powerless that the courts must not allow an inquiry to continue when a commissioner is ostensibly abusing his powers and transforming his role from investigator into inquisitor. The considerable powers of commissioners and the ready, numerous and often tempting opportunities for abuse

[37] Question 1

Préavis insuffisant - Ni les Directives Trudeau, ni le Code, ni le décret ne définissait le «conflit d'intérêts» qui n'a pas non plus été défini à quelque moment que ce soit pendant les audiences publiques ou avant le 3 décembre 1987, lorsque le rapport Parker a été publié; il s'agit d'une violation du droit de M. Stevens au respect des principes d'équité procédurale et de justice naturelle.

[38] Les parties conviennent qu'une commission d'enquête comme la commission Parker est tenue de respecter les règles d'équité procédurale. Au paragraphe 73 de l'arrêt *Canada (Procureur général) c. Canada (Commissaire de l'enquête sur l'approvisionnement en sang)*, [1997] 2 C.F. 36 (C.A.), le juge Décary, J.C.A. a dit, au nom de la Cour:

La *Loi sur les enquêtes* n'impose aucun code de procédure. L'article 2 du mandat autorise d'ailleurs le Commissaire «à adopter les méthodes et procédures qui lui apparaîtront les plus indiquées pour la conduite de l'enquête». Il est acquis que si un commissaire dispose de toute la latitude voulue, la procédure qu'il établit doit néanmoins respecter les règles d'équité procédurale, dont celles prévues aux articles 12 et 13 de la Loi. Le concept d'équité procédurale est un concept fuyant, qui évolue au gré des types d'enquête et varie selon le mandat du commissaire et la nature des droits que l'enquête est susceptible d'affecter. Une enquête publique en vertu de la *Loi sur les enquêtes* n'est pas, je le rappelle, un procès, le rapport d'un commissaire n'est pas un jugement et ses recommandations ne sont pas exécutoires. Aussi la marge de manœuvre et de discrétion d'un commissaire est-elle grande et les tribunaux ne remettront en question ses choix procéduraux que dans des circonstances exceptionnelles

Et, au paragraphe 32:

Ce respect de l'institution qu'est devenue au Canada l'établissement d'une commission d'enquête, ne doit cependant pas être aveugle. La fin recherchée, si légitime et si importante soit-elle, ne justifie pas tous les moyens qu'on puisse utiliser pour y arriver. La recherche de la vérité n'excuse pas la violation des droits des personnes sous enquête. La vulnérabilité et l'impuissance des personnes dont la conduite est examinée dans le cadre d'une enquête publique menée en vertu de la partie I de la Loi sont telles que les tribunaux ne doivent pas permettre que se continue une enquête au cours de laquelle un commissaire abuse ostensiblement de ses pouvoirs et transforme son rôle d'enquêteur en celui d'inquisiteur. La vigilance des tribunaux

make it particularly necessary that the courts be vigilant. As Mr. Justice Cory observed:

> . . . [there is] the risk that commissions of inquiry, released from many of the institutional constraints placed upon the various branches of government, are also able to operate free from the safeguards which ordinarily protect individual rights in the face of government action.

[39] In *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1977] 3 S.C.R. 440 Cory J. for the Court stated, at paragraph 31:

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

And at paragraph 55:

> The findings of fact and the conclusions of the commissioner may well have an adverse effect upon a witness or a party to the inquiry. Yet they must be made in order to define the nature of and responsibility for the tragedy under investigation and to make the helpful suggestions needed to rectify the problem. It is true that the findings of a commissioner cannot result in either penal or civil consequences for a witness. Further, every witness enjoys the protection of the *Canada Evidence Act* and the *Charter*, which ensures that the evidence given cannot be used in other proceedings against the witness. Nonetheless, procedural fairness is essential for the findings of commissions may damage the reputation of a witness. For most, a good reputation is their most highly prized attribute. It follows that it is essential that procedural fairness be demonstrated in the hearings of the commission.

[40] The plaintiff submitted that the Parker Inquiry was set up to inquire into allegations involving only him, and that it was prosecutorial in nature, which entitled

est d'autant plus nécessaire que les pouvoirs des commissaires sont considérables et les occasions d'abus, faciles, nombreuses et souvent tentantes. Ainsi que l'observait le juge Cory:

> [. . .] il y a le risque que les commissions d'enquête, libérées d'un bon nombre des contraintes institutionnelles auxquelles sont assujetties les diverses branches de gouvernement, soient aussi en mesure d'agir sans les garanties qui protègent d'ordinaire les droits individuels contre l'action gouvernementale.

[39] Au paragraphe 31 de la décision *Canada (Procureur général) c. Canada (Commission d'enquête sur le système d'approvisionnement en sang au Canada)*, [1997] 3 R.C.S. 440, le juge Cory a dit, au nom de la Cour:

> Les rôles d'enquête et d'éducation du public qui sont conférés à une commission d'enquête ont une très grande importance. Ces rôles ne devraient cependant pas être remplis aux dépens du respect des droits des personnes faisant l'objet de l'enquête. La nécessité de parvenir à un juste équilibre a été reconnue par le juge Décary lorsqu'il a dit, au par. 32, que «[l]a recherche de la vérité n'excuse pas la violation des droits des personnes sous enquête». Cela signifie que si important que soit le travail d'une commission, il ne peut se faire aux dépens du droit fondamental de tout citoyen d'être traité équitablement.

Et, au paragraphe 55:

> Il se peut fort bien que la constatation des faits et les conclusions du commissaire portent préjudice à un témoin ou à une partie à l'enquête. Il faut néanmoins les tirer pour que lumière soit faite sur la nature de la tragédie visée par l'enquête et les responsabilités engagées afin que puissent être formulées des suggestions utiles susceptibles de corriger le problème. Il est vrai que les conclusions d'un commissaire ne peuvent donner lieu à des conséquences pénales ou civiles pour un témoin. De plus, chaque témoin jouit de la protection que lui garantissent la *Loi sur la preuve au Canada* et la *Charte*, qui prévoient que son témoignage ne peut être utilisé dans d'autres procédures contre lui. Il n'en demeure pas moins que le respect de l'équité procédurale est un élément essentiel, puisque les conclusions d'une commission peuvent ternir la réputation d'un témoin. Une bonne réputation représentant la valeur la plus prisée par la plupart des gens, il est essentiel de démontrer le respect des principes de l'équité procédurale dans les audiences de la commission.

[40] Le demandeur prétend que la commission Parker a été établie pour faire enquête sur des allégations qui ne visaient que lui et qu'elle était de la nature d'une

him to a higher level of procedural fairness. Commissioner Parker's testimony about the Inquiry before the Special Joint Committee of the Senate and of the House of Commons on Conflict of Interests, *Minutes of Proceedings and Evidence*, 3rd Session, 34th Parliament, Issue No. 3, contained the following exchange at page 31:

Mr. Layton: My memory goes back those four years, to watching the situation, the atmosphere, on TV. To me, it was adversarial.

Mr. Parker: It was.

Mr. Layton: So the legal counsel you would have called on was really almost like a prosecutor.

Mr. Parker: Yes, and on the other side, he was like a defendant. What I tried to do was get somewhere in between. I had a lot of good lawyers making suggestions. It is only my opinion. What I decided was fair and reasonable in the right way. I respect the opinions of other people.

I agree with the plaintiff that this was the type of public inquiry that looked only at the conduct of one person.

[41] The plaintiff submitted that there was a breach of the duty of procedural fairness owed to him because he did not know the standard that he had to meet, in that, no definition of conflict of interest was contained in the Trudeau Guidelines, the Mulroney Code or the Prime Minister's letter of September 9, 1985. In addition, he submitted that the definition of conflict of interest utilized by Commissioner Parker to find him to have been in a conflict of interest was not made known to him until the release of the Report. The defendant submitted that since the standards of review were addressed both at the Inquiry and in the submissions of the parties to Commissioner Parker, the plaintiff had sufficient notice of the definition of conflict of interest.

[42] I am of the opinion that the plaintiff did not know the standard he was to be judged against as the definition of conflict of interest was not made known to him until the Report was given to him. This is especially so when

poursuite; il avait donc droit à un degré plus élevé d'équité procédurale. Dans son témoignage concernant l'enquête devant le Comité mixte spécial du Sénat et de la Chambre des communes relatif aux conflits d'intérêts, *Procès-verbaux et témoignages*, 3e sess., 34e Légis., fascicule nº 3, le commissaire Parker a eu la discussion suivante, reprise à la page 31:

M. Layton: Je me souviens, il y a quatre ans, de la situation, de l'ambiance qu'on pouvait constater à la télévision. Cela me paraissait très conflictuel.

M. Parker: Ce l'était.

M. Layton: L'avocat-conseil auquel vous auriez fait appel, faisait presque figure de procureur.

M. Parker: Oui et, par ailleurs, il était presque défendeur. J'ai essayé de parvenir à un équilibre. J'étais conseillé par beaucoup d'excellents avocats. C'est simplement mon avis. Ma décision était équitable et raisonnable. Je respecte l'avis des autres.

Je conviens, avec le demandeur, qu'il s'agissait d'une enquête publique concernant la conduite d'une seule personne.

[41] Le demandeur a fait valoir qu'il y a eu violation des règles d'équité procédurale à son égard parce qu'il ignorait la norme applicable et que ni les Directives Trudeau, ni le Code Mulroney, ni la lettre du 9 septembre 1985 du Premier ministre ne définissait le conflit d'intérêts. En outre, il a soutenu qu'il a ignoré la définition du conflit d'intérêts qu'avait appliquée le commissaire Parker pour décider qu'il était en situation de conflit d'intérêts jusqu'à la publication du Rapport. Le défendeur a prétendu que puisque les normes d'examen ont été soulevées tant à l'enquête que dans les observations des parties au commissaire Parker, le demandeur avait été suffisamment avisé de la définition de la notion de conflit d'intérêts.

[42] Je suis d'avis que le demandeur ignorait la norme qui s'appliquerait à sa situation puisque la définition du conflit d'intérêts ne lui a été communiquée que lorsqu'on lui a remis le Rapport. Il est en particulièrement ainsi

Commissioner Parker was to determine whether the plaintiff was in a real or apparent conflict of interest as defined by the Mulroney Code and the letter from the Prime Minister dated September 9, 1985. As well, it appears to me that it would be unfair to develop a standard at a point in time after the conduct being complained of has occurred. I am of the view that it was a breach of the duty of procedural fairness owed to the plaintiff, to set a standard or definition of conflict of interest by stating the definition for the first time in the Report. In my view, the definition should have been stated in the various conflict of interest guidelines or code.

[43] Mr. Stevens also submitted that section 13 of the *Inquiries Act*, was not complied with. For ease of reference, section 13 states:

13. No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

[44] The plaintiff does not contend that he was not given the right to be heard in person or by counsel. He submitted the question is whether he was allowed "full opportunity to be heard in person or by counsel" when he did not know the standard that his conduct was to be judged against, as the standard or definition of conflict of interest was not made known until it was seen in the Report.

[45] In *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, Cory J. stated, at paragraph 56:

That same principle of fairness must be extended to the notices pertaining to misconduct required by s. 13 of the *Inquiries Act*. A commission is required to give parties a notice warning of potential findings of misconduct which may be made against them in the final report. As long as the notices are issued in confidence to the party receiving them, they should not be subject to as strict a degree of scrutiny as the formal findings. This is because the purpose of issuing notices is to allow parties to prepare for or respond to any possible findings of misconduct which may be made against them. The

puisque le commissaire Parker devait décider si le demandeur s'était trouvé effectivement, ou selon toute apparence, en situation de conflit d'intérêts au sens du Code Mulroney et de la lettre du 9 septembre 1985 du Premier ministre. En outre, il me semble qu'il est injuste d'élaborer une norme après la conduite reprochée. Je pense qu'il s'agit d'une violation du droit à l'équité procédurale du demandeur, d'établir une norme ou d'appliquer une définition du conflit d'intérêts et d'énoncer cette définition pour la première fois dans le Rapport. Selon moi, la définition aurait dû être mentionnée dans les divers codes ou directives sur les conflits d'intérêts.

[43] M. Stevens prétend également que l'article 13 de la *Loi sur les enquêtes*, n'a pas été respectée. Voici, par souci de commodité, l'article 13:

13. La rédaction d'un rapport défavorable ne saurait intervenir sans qu'auparavant la personne incriminée ait été informée par un préavis suffisant de la faute qui lui est imputée et qu'elle ait eu la possibilité de se faire entendre en personne ou par le ministère d'un avocat.

[44] Le demandeur ne prétend pas qu'il n'a pas eu le droit de se faire entendre en personne ou par le ministère d'un avocat. Il soutient qu'il s'agit de savoir si on lui a accordé «la possibilité de se faire entendre en personne ou par le ministère d'un avocat» alors qu'il ignorait la norme de conduite qui s'appliquerait à sa situation puisque la norme ou définition de la notion de conflit d'intérêts est demeurée inconnue jusqu'à ce qu'il en prenne connaissance dans le Rapport.

[45] Dans *Canada (Procureur général) c. Canada (Commission d'enquête sur le système d'approvisionnement en sang au Canada)*, le juge Cory a dit, au paragraphe 56:

Le même principe d'équité doit s'étendre aux préavis concernant la faute exigés par l'art. 13 de la *Loi sur les enquêtes*. Toute commission est tenue de donner aux parties un préavis les informant des conclusions faisant état d'une faute susceptibles d'être tirées à leur égard dans le rapport final. Tant qu'ils sont remis à la partie visée sous le sceau de la confidentialité, les préavis ne devraient pas être assujettis à un degré d'examen aussi strict que les conclusions finales. C'est que les préavis ont pour objet de permettre aux parties de se préparer ou de répondre aux conclusions faisant état d'une

more detail included in the notice, the greater the assistance it will be to the party. In addition, the only harm which could be caused by the issuing of detailed notices would be to a party's reputation. But so long as notices are released only to the party against whom the finding may be made, this cannot be an issue. The only way the public could find out about the alleged misconduct is if the party receiving the notice chose to make it public, and thus any harm to reputation would be of its own doing. Therefore, in fairness to witnesses or parties who may be the subject of findings of misconduct, the notices should be as detailed as possible. Even if the content of the notice appears to amount to a finding that would exceed the jurisdiction of the commissioner, that does not mean that the final, publicized findings will do so. It must be assumed, unless the final report demonstrates otherwise, that commissioners will not exceed their jurisdiction.

faute que la commission pourrait tirer à leur égard. Plus le préavis est détaillé, plus il peut être utile à la partie. En outre, le seul tort qui pourrait être causé par la délivrance de préavis détaillés se limite à la réputation d'une partie. Mais tant que les préavis ne sont délivrés qu'à la partie susceptible d'être visée par une conclusion, il n'y a rien à redire. Le public ne peut prendre connaissance de la faute reprochée que si la partie ayant reçu le préavis choisit de le rendre public, auquel cas elle est elle-même responsable du tort ainsi causé à sa réputation. Par conséquent, en toute justice pour les témoins ou les parties qui peuvent faire l'objet de conclusions faisant état d'une faute, les préavis devraient être le plus détaillés possible. Même si les allégations exposées dans les préavis semblent équivaloir à une conclusion qui risque d'outrepasser la compétence du commissaire, cela ne signifie pas qu'il en serait ainsi des conclusions finales destinées à être divulguées. Il faut supposer, jusqu'à preuve du contraire à la communication du rapport final, que les commissaires n'outrepasseront pas leurs pouvoirs.

[46] The problem in this case arose because neither the Trudeau Guidelines, the Mulroney Code, nor the Prime Minister's letter of September 9, 1985 contained the standard, or the definition of conflict of interest that the plaintiff was supposed to have met. In addition, the terms of reference appointing Commissioner Parker did not give him jurisdiction to define a standard or definition of conflict of interest.

[46] En l'espèce, le problème est dû au fait que ni les Directives Trudeau, ni le Code Mulroney, ni la lettre du 9 septembre 1985 du Premier ministre ne précisait la norme applicable, ni ne définissait le conflit d'intérêts. En outre, le mandat du commissaire Parker ne lui conférait pas compétence pour établir une norme ou pour définir la notion de conflit d'intérêts.

[47] Given that one of the purposes of issuing the section 13 notices is to allow a party to respond to any possible findings of misconduct that might be made against him, I believe that at the very least, the party must know what standard is being applied to his conduct to determine whether he breached that standard. In the present case, it cannot be said that the plaintiff had "full opportunity to be heard in person or by counsel" when he did not know what the standard or the definition of conflict of interest was until he read about it in the Report.

[47] Compte tenu qu'un des buts visés par l'exigence relative au préavis en vertu de l'article 13 est de permettre à une partie de répondre aux conclusions faisant état d'une faute susceptibles d'être tirées à son égard, j'estime qu'à tout le moins, la partie doit connaître la norme qui est appliquée à sa conduite pour savoir si elle n'a pas respecté la norme. En l'espèce, on ne saurait dire que le demandeur avait eu «la possibilité de se faire entendre en personne ou par le ministère de son avocat» alors qu'il ignorait la norme ou la définition du conflit d'intérêts avant de l'apprendre en lisant le rapport.

[48] For the above reasons, I am of the view that the plaintiff's claim should succeed.

[48] Pour ces motifs, je suis d'avis que la demande doit être accueillie.

[49] The plaintiff's claim is allowed and a declaration is issued that the Parker Report is set aside and declared to be of no force or effect in consequence of the excess of jurisdiction by the Commissioner, and a failure to act in accordance with the principles of procedural fairness.

[49] La demande est accueillie et la Cour déclare que le Rapport Parker est annulé et qu'il est nul et non avenu au motif que le commissaire Parker a outrepassé sa compétence et qu'il n'a pas respecté les principes d'équité procédurale.

[50] Because of my disposition on these issues, I will not deal with the remaining issues raised by the plaintiff.

[51] The parties are entitled to speak to costs.

ORDER

[52] IT IS ORDERED that:

1. The plaintiff's claim is allowed and a declaration is issued that the Parker Report is set aside and declared to be of no force or effect in consequence of the excess of jurisdiction by the Commissioner, and a failure to act in accordance with the principles of procedural fairness.

2. The parties are entitled to speak to costs and a further order will issue with respect to costs.

[50] Compte tenu de ma décision à l'égard de ces questions, je ne traiterai pas des autres questions soulevées par le demandeur.

[51] Les parties ont le droit de s'exprimer sur les dépens.

ORDONNANCE

[52] LA COUR ORDONNE:

1. La demande du demandeur est accueillie et la Cour déclare que le Rapport Parker est annulé et qu'il est nul et non avenu au motif que le commissaire a outrepassé sa compétence et qu'il n'a pas respecté les principes d'équité procédurale.

2. Les parties ont le droit de s'exprimer sur les dépens et une autre ordonnance sera rendue à cet égard.

Indexed as:

Quebec (Attorney General) v. Canada (Attorney General)

Attorney General of the Province of Quebec and Jean Keable, appellants;
and
The Attorney General of Canada and The Solicitor General of Canada, respondents;
and
The Commissioner of the Royal Canadian Mounted Police, mis en cause;
and
The Attorney General of Ontario, The Attorney General of New Brunswick, The Attorney General of Manitoba, The Attorney General of British Columbia, The Attorney General of Saskatchewan and The Attorney General of Alberta, intervenors.

[1979] 1 S.C.R. 218

Supreme Court of Canada

1978: May 23, 24, 25, 26 / 1978: October 31.

Present: Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law -- Provincial commission of inquiry -- Powers in relation to federal agencies -- Criminal activities involving members of the Royal Canadian Mounted Police -- British North America Act, ss. 91, 92 -- Public Inquiry Commission Act, R.S.Q. 1964. c. 11 -- Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9 -- Department of the Solicitor General Act, R.S.C. 1970, c. S-12.

Crown -- Immunity of its representatives -- Application of provincial statutes to the Crown in right of the federal government -- Privilege invoked in the interest of national security -- Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 41 -- Official Secrets Act. R.S.C. 1970, c. 0-3, s. 4.

Administrative law -- Provincial commission of inquiry -- Evocation -- Staying order - Code of Civil Procedure, arts. 846 to 850.

Appellant Jean Keable ("the Commissioner") was given a mandate, under the Public Inquiry Commission Act of Quebec, to investigate and report on various allegedly illegal or reprehensible incidents or acts in which various police forces were involved, including the Royal Canadian Mounted Police. Respondents' application for a writ of evocation against the Commissioner was dismissed in the Superior Court, but granted by the Court of Appeal of Quebec, which ordered the Commissioner to suspend all proceedings and to transmit to the office of the Superior Court the record in the case (Kaufman J.A., dissenting in part, would have issued a restricted staying order). Appellants are appealing this judgment of the Court of Appeal and this Court must provide answers on constitutional issues raised in the form of five questions.

Held: The appeal should be allowed in part and the answers to the constitutional questions are as follows:

Question 1: Are the Orders in Council defining the mandate of the commissioner, in whole or in part, ultra vires the Province of Quebec?

Answer: Yes, to the following extent as concerns the Royal Canadian Mounted Police: in paragraph a), the words "et la fréquence de leur utilisation" (and the frequency of their use); in paragraph c) the words "ainsi que la fréquence de leur utilisation" (and the frequency of their use); and paragraph d).

Question 2: Are the powers of a commissioner appointed under provincial legislation for the purpose of inquiring into matters concerning the administration of justice in the Province limited by the distribution of legislative powers as provided for in the British North America Act?

Answer: Yes.

Question 3: If members of a federal institution, namely, the Royal Canadian Mounted Police, be involved in allegedly criminal or reprehensible acts, does such a commissioner have the right, while conducting an inquiry into the circumstances surrounding the commission of said acts, to inquire into the federal institution itself or one of its services, its rules, policies and procedures, and to make recommendations for the prevention of the commission of said acts in future?

Answer: No.

Question 4: Can the Solicitor General of Canada or any other Minister of the Crown in right of Canada be compelled by such a commissioner to appear, testify and produce documents?

Answer: No.

Question 5: Does a Minister of the Crown in right of Canada have the constitutional power to prevent, by means of affidavit or otherwise, the production of documents demanded by such a commissioner when such documents may relate to the commission of allegedly criminal or reprehensible acts, to circumstances surrounding such acts, or to the frequency of their occurrence?

Answer: Yes.

The suspension of proceedings is limited to proceedings in respect of matters relating to the parts of the mandate found to be ultra vires and to the decisions and subpoenas of the Commissioner under attack.

Per Pigeon, Martland, Ritchie, Dickson and Beetz JJ.: The Judge of the Superior Court was not justified in ruling that the "Commissioner is not a court and will become one only when and to the extent that he decides to impose penalties in the exercise of his ancillary powers". Evocation was available to challenge the validity of the Commissioner's mandate, subpoenas and orders on jurisdictional and constitutional grounds.

A provincial statute cannot be effective beyond the constitutional limits of a provincial legislature's authority. A province may therefore set up a commission and issue it to investigate and report on "The Administration of Justice in the Province" since it is a matter within the scope of provincial authority. It can also investigate a matter of general scope, such as organized crime, as in Di Iorio v. Warden of the Montreal Jail, [1978] 1 S.C.R. 152, or a criminal homicide as in Faber v. The Queen, [1976] 2 S.C.R. 9, or arson, as in R. v. Coote (1873), L.R. 4 P.C. 599. In the case at bar, the inquiry into specific criminal acts allegedly committed by members of the R.C.M.P. was validly ordered. However, the Commissioner cannot base himself on this power to inquire into the administration of the R.C.M.P., which is operating under the authority of a federal statute. Parliament has the authority for the establishment and administration of this force and no provincial authority may intrude into its management. While acknowledging the power of the Commissioner to inquire into the methods used during searches or other incidents mentioned in the mandate, the parts of paragraphs (a) and (c) [of Order in Council 2986-77, amended by Order in Council 3719-77] dealing not with the methods used during the incidents in question but with "the frequency of their use" must be considered ultra vires with respect to the R.C.M.P. The inquiry then no longer contemplates criminal acts but the methods used by the police forces. For similar reasons and to the same extent, paragraph (d) is ultra vires, as it gives the Commissioner the power to make recommendations on steps to be taken to avoid the repetition of illegal acts, since such recommendations would contemplate changes in the regulations and practices of an agency of the federal government.

To answer the fourth constitutional question, it must be noted that the law relating to the Crown is governed by the common law, under which a commission of inquiry has no power to compel the attendance of witnesses and to require the production of documents. Any jurisdiction for such purposes depends on statutory authority and provincial legislation cannot be effective by itself to confer such jurisdiction as against the Crown in right of Canada. The subpoenas issued to the Solicitor General are not addressed to him personally but in his capacity as representative of the Crown.

The last constitutional question relates to the extent of the Crown privilege claimed in the interest of national security, as well as the scope of s. 41 of the Federal Court Act with respect to the Commissioner. Although this enactment is in the Federal Court Act, it is applicable to any court, as well as to any official invested with the powers of a court for the production of documents. Whenever the Commissioner claims to exercise such powers he is subject to the provisions applicable to a court. The Commissioner cannot challenge the affidavit submitted by the minister in order to justify Crown privilege, since he is not a superior court, and he is therefore bound to accept the affidavit submitted. This Crown privilege is also applicable to the documents which the Commissioner obtained from other witnesses. Even apart from the Official Secrets Act, in the present case, the

documents entrusted by the R.C.M.P. to members of police forces under provincial authority remained secret and any obligation of confidentiality assumed by the latter does not disappear in the face of orders given by their provincial superiors.

As for the suspension of all proceedings in the inquiry, the Court of Appeal was right to extend the suspension of all the proceedings in the inquiry since art. 848 C.C.P. contemplates the transmission to the office of the Superior Court of the "record in the case". When the validity of the Commissioner's mandate was in issue, the case was the whole inquiry. Now that the Court has decided which parts of this mandate are valid, the suspension of proceedings should be restricted to the parts of the mandate declared ultra vires and to the decisions and subpoenas of the Commissioner under attack.

Per Spence and Estey JJ.: Reference is made especially to the judgments of this Court in Faber and Di Iorio in recognizing the validity of the Commissioner's mandate in the case at bar, and it is important to emphasize that Di Iorio must not be read as permitting the invasion by provincial action of the sanctity of the right to remain silent during what is in truth and substance a criminal investigation. Even if the majority in this Court stressed in Faber the fact that the latter had not been charged when he was called to testify, the circumstances, sometimes almost accidental or at least undirected, of the existence or non-existence of a charge by indictment, information or otherwise, is not of controlling significance when determining the constitutional status of a process such as we are now considering.

In Di Iorio and in the case at bar, the inquiry is general in scope, but the Commission cannot perform its mandate without an investigation into specific instances of alleged criminal activities. However, where, as in the case here, the substance of the provincial action is predominantly and essentially an inquiry into some aspects of the criminal law and the operations of provincial and municipal police forces in the Province, and not a mere prelude to prosecution by the Province of specific criminal activities, the provincial action is authorized under s. 92(14) of the B.N.A. Act. This right on the part of the Province to investigate the operations of the provincial and municipal police is part of the provincial authority over the administration of justice but does not by a back door, as it were, lead to a right to investigate a federal police organization. This judgment, and the aforementioned judgments of this Court, must not be seen as a hardening into what might be construed as an arbitrary principle available in a slide rule sense for the determination of appropriate provincial or federal actions in related but not necessarily parallel circumstances.

Per Pratte J.: Had it not been for the majority decision of this Court in Faber, he would have answered the first constitutional question differently and said that the Commission's mandate was in excess of provincial powers to the extent that it provides for a coercive inquiry which is essentially aimed at investigating specific crimes and searching for their authors.

Cases Cited

Di Iorio v. Warden of the Montreal Jail, [1978] 1 S.C.R. 152; Faber v. The Queen, [1976] 2 S.C.R. 9, applied; R. v. Coote (1873), L.R. 4 P.C. 599; Three Rivers Boatman v. Canada Labour Relations Board, [1969] S.C.R. 607; Bell v. Ontario Human Rights Commission, [1971] S.C.R. 756; Cotroni v. The Quebec Police Commission, [1978] 1 S.C.R. 1048; Reference re a Commission of Inquiry into the Police Department of Charlottetown (1977), 74 D.L.R. (3d) 422; Kelly and Sons v. Mathers (1915), 23 D.L.R. 225; Attorney General for the Commonwealth of Australia v. Colonial Sugar, [1914] A.C. 237; Cook v. Attorney General (1909), 28 N.Z.L.R. 405; McGee v. Pooley, [1931] 4

D.L.R. 475; Lymburn v. Mayland, [1932] A.C. 318; Attorney General for Saskatchewan v. Attorney General of Canada, [1949] A.C. 110; Her Majesty in right of Alberta v. C.T.C., [1978] 1 S.C.R. 61; Quebec North Shore Paper v. C.P. Ltd., [1977] 2 S.C.R. 1054; R. v. Richardson, [1948] S.C.R. 57; Gauthier v. The King (1917), 56 S.C.R. 176; R. v. Snider, [1954] S.C.R. 479; La Société Les Affréteurs Réunis and The Shipping Controller, [1921] 3 K.B. 1; Crombie v. The King, [1923] 2 D.L.R. 542; R. v. Lanctot (1941), 71 Que. K.B. 325; Cahoon v. Le Conseil de la Corporation des Ingénieurs, [1972] R.P. 209; Duncan v. Cammell Laird and Co. Ltd., [1942] A.C. 624; Conway v. Rimmer, [1968] A.C. 910; Attorney General of Quebec v. Farrah, [1978] 2 S.C.R. 638; Re Royal Commission and Ashton (1975), 64 D.L.R. (3d) 477; Rogers v. Secretary of State, [1972] 2 All E.R. 1057; Batary v. Attorney General for Saskatchewan et al., [1965] S.C.R. 465, referred to; Guay v. Lafleur, [1965] S.C.R. 12; St. John v. Fraser, [1935] S.C.R. 441, distinguished.

APPEAL from a decision of the Court of Appeal of Quebec [[1978] C.A. 44.] reversing a judgment of the Superior Court [[1977] S.C. 982]. Appeal followed in part.

Gérald Tremblay and Rodolphe Bilodeau, for the Attorney General of Quebec.
Michel Décary and Jean-Pierre Lussier, for Jean Keable.
Joseph Nuss, Q.C., and G.H. Waxman, for the Attorney General of Canada.
Michel Robert and Louyse Cadieux, for the Solicitor General of Canada.
Pierre Lamontagne, Q.C., and Victoria A. Percival, for the Commissioner of the Royal Canadian Mounted Police.
J.D. Watt, D.W. Mundell, Q.C., and L.E. Weinrib, for the Attorney General of Ontario.
H. Hazen Strange, Q.C., and Patricia L. Cumming, for the Attorney General of New Brunswick.
M. Samphir and B.W Drever, for the Attorney General of Manitoba.
Louis Lindholm, for the Attorney General of British Columbia.
S. Kujawa, Q.C., and K.W. MacKay, for the Attorney General of Saskatchewan.
Ross Paisley, Q.C., and W. Henkel, Q.C., for the Attorney General of Alberta.

Solicitors for the Attorney General of Quebec: Gérald Tremblay and Rodolphe Bilodeau, Montreal.
Solicitors for Jean Keable: Michel Decary and Jean-Pierre Lussier, Montreal.
Solicitors for the Attorney General of Canada: Ahern, Nuss & Drymer, Montreal.
Solicitors for the Solicitor General of Canada: Robert, Dansereau, Barre, Marchessault & Thibeault, Montreal and Réjean F. Paul, Montreal.
Solicitors for the Commissioner of the Royal Canadian Mounted Police: Courtois, Clarkson, Parsons & Tétrault, Montreal.
Solicitor for the Attorney General of Ontario: Allan Leal, Toronto.
Solicitors for the Attorney General of New Brunswick: Gordon F. Gregory and H. Hazen Strange, Fredericton.
Solicitor for the Attorney General of Manitoba: G.E. Pilkey, Winnipeg.
Solicitor for the Attorney General of British Columbia: Louis F. Lindholm, Victoria.
Solicitor for the Attorney General of Saskatchewan: Serge Kujawa, Regina.
Solicitors for the Attorney General of Alberta: R.W. Paisley and W. Henkel, Edmonton.

The judgment of Martland, Ritchie, Pigeon, Dickson and Beetz JJ. was delivered by

PIGEON J.:-- This is an appeal from a judgment of the Court of Appeal of Quebec reversing the judgment of Hugessen J. of the Superior Court and ordering the issuance of a writ of evocation against Jean Keable, one of the appellants in this Court, also ordering him to suspend all proceedings as inquiry commissioner arid to transmit to the office of the Superior Court the record in the case and all the exhibits connected therewith. Kaufman J.A., dissenting in part, would have issued a restricted staying order.

The proceedings were instituted by a motion to a judge of the Superior Court under art. 846-850 C.C.P. for the issuance of a writ of evocation against appellant Jean Keable in his capacity of Commissioner, appointed under the Public Inquiry Commission Act of the Province of Quebec (R.S.Q. 1964, c. 11). It was alleged that the subject matter of the inquiry being related to the administration of the Royal Canadian Mounted Police was beyond the scope of provincial powers and that some decisions of the Commissioner respecting the scope of the inquiry and the documents required to be produced by the Solicitor General of Canada were invalid.

Availability of evocation

In the Superior Court, Hugessen J. dismissed the application on the basis that the Commissioner was not a court and therefore not amenable to evocation: [TRANSLATION] "respondent Commissioner is not a court and will become one only when and to the extent that he decides to impose penalties in the exercise of his ancillary power".

The Court of Appeal was unanimous in rejecting that view. Under s. 7 of the Public Inquiry Commission Act, a commissioner has "with respect to the proceedings upon the hearing, all the powers of a judge of the Superior Court in term". Relying on this provision the Commissioner has issued subpoenas to the Solicitor General of Canada and rendered decisions requiring him to produce a number of documents pertaining to the administration of the Royal Canadian Mounted Police. In so acting, the Commissioner was claiming to exercise some powers of a court against the Solicitor General. The latter could not be required to wait until he was sentenced for contempt in order to challenge the validity of the orders and of the Commission itself if he had good legal grounds to dispute their validity. The writ of evocation under the present Code of Civil Procedure is the equivalent of certiorari and prohibition combined: Three Rivers Boatman v. Canada Labour Relations Board [[1969] S.C.R. 607.]. Prohibition is properly applied for at the outset of the impugned proceedings: Bell v. Ontario Human Rights Commission [[1971] S.C.R. 756.]. It was suggested that an injunction would have been the proper remedy but, under art. 758 C.C.P., "an order of injunction can in no case be granted to restrain legal proceedings".

Much was sought to be made of such cases as Guay v. Lafleur [[1965] S.C.R. 12.] and St. John v. Fraser [[1935] S.C.R. 441.], in which applications to restrain the proceedings of a commission of inquiry were dismissed on the basis that these were administrative not judicial proceedings, but those were applications made by persons whose actions were being investigated and against whom no judicial power was being exercised. Such is not the case here. Assuming the Commissioner's report will not amount to any judicial or quasijudicial determination, what is presently in issue is the validity of strictly judicial acts: the compulsion of witnesses to testify and to produce documents. It is conclusively established by the recent judgment of this Court in Cotroni v. Quebec Police Commission [[1978] 1 S.C.R. 1048.], that the validity of the conviction of a witness for contempt by a commissioner with similar powers is subject to judicial review. The Court of Appeal was

plainly right in holding that this was not the only possible remedy and that evocation was available to challenge the validity of the Commissioner's mandate, subpoenas and orders on jurisdictional and constitutional grounds.

The mandate

The Commissioner's terms of reference as determined by provincial orders in council 1968-77, 2736-77, 2986-77 and 3719-77 are as follows:

> [TRANSLATION] (a) to investigate and report on all the circumstances surrounding the search carried out during the night of October 6 to 7, 1972 at 3459 St. Hubert Street in Montreal, as well as any previous or subsequent events that might be related thereto, and the conduct of all persons involved in the search or in a previous or subsequent event that might be related thereto, and, without restricting the generality of the foregoing:
>
> (i) the closing of the investigation files that had been opened in the Montreal Urban Community Police Department following the complaints that were filed, shortly after the search, by the three organizations whose premises had been searched;
> (ii) the discrepancy in the different versions that were given of this search;
> (iii) the disposal of the documents that were seized during the search;
> (iv) the collaboration of the R.C.M.P., the Quebec Police Force and the Montreal Urban Community Police Department with the Department of Justice during the investigation that was launched after the existence of this search became publicly known;
> (v) the methods used during this search and the frequency of their use;
>
> (b) to investigate and report on any circumstances and any previous or subsequent events that might be related to the following acts, as well as the conduct of all persons involved in the following acts and events:
>
> (i) the illegal entry made during January 1973 into premises in which computer tapes were kept, containing a list of the members of a political party;
> (ii) setting fire to a farm known as "Petit Québec Libre" in Sainte-Anne-de-la-Rochelle on May 9, 1972;
> (iii) a theft of dynamite in Rougemont in the spring of 1972;
>
> (c) to investigate and report on the methods used during the acts referred to in paragraph (b) and the frequency of their use;
> (d) to make recommendations on the measures to be taken to ensure that any illegal or reprehensible acts the Commission uncovers will not be repeated in future;

The subpoenas

The list of documents called for in the subpoena issued September 28, 1977 to the Solicitor General of Canada included the following:

> [TRANSLATION] Concerning the search (opération bricole) made during the night of October 6 to 7, 1972 in the premises located at 3459 St. Hubert Street in Montreal, occupied by the Agence de presse libre du Québec, the Mouvement pour la défense des prisonniers politiques du Québec and the Coopérative de demenagement du 1 mai;
>
> PLEASE BRING WITH YOU:
>
> I---The originals of all files or documents in your possession prepared by the R.C.M.P., the Quebec Police Force or the Montreal Urban Community Police Department, or any other person, relating to opération bricole, and, without restricting the generality of the foregoing:
>
> 1.--All operation reports in your possession;
>
> 2.--All analysis reports on the documents seized;
>
> 3.--The notebooks, analysis reports and operation reports and records of the R.C.M.P. members who took part in the operation;
>
> ...
>
> 7.--All analysis reports on the Mouvement pour la defense des prisonniers politiques du Québec, the Agence de presse libre du Québec and the Coopérative de demenagement du 1 mai prior to October 7, 1972;
>
> 8.--All reports on technical projects (electronic eavesdropping) concerning the Mouvement pour la defense des prisonniers politiques du Québec, the Agence de presse libre du Québec and the Coopérative de demenagement du 1 mai prior to October 7, 1972;
>
> 9.--The microfilms of the documents seized at 3459 St. Hubert in Montreal during the night of October 6 to 7, 1972;
>
> 10.--The files on the Mouvement pour la defense des prisonniers politiques du Québec, the Agence de presse libre du Québec and the Coopérative de demenagement du 1 mai, as given to Messrs. Robert Samson and Guy Bonsant when they were assigned to these movements;

11.--All photographs and all negatives of photographs taken by a member of the R.C.M.P. during the night of October 6 to 7, 1972, and while the documents seized at the residence of Mr. Jean Claude Brodeur were being examined;

12.--All written correspondence or written reports of oral communication between January 1, 1972 and September 28, 1977:

-- among the various police forces;

-- within these same police forces;

-- with the Quebec Department of Justice;

-- or with the Solicitor General of Canada;

...

16.--The originals of all files or documents concerning the following subjects:

(a) The allegations concerning break and entry into the home of Louise Vandelac on October 24, 1972;
(b) The allegations concerning the theft of Louise Vandelac's handbag at her residence during the night of October 25, 1972;
(c) The interrogation of a member of the Agence de presse libre du Quebec who used Louise Vandelac's motorcycle between October and December 1972;
(d) The use and discovery of microphones at 2074 Beaudry Street, in Montreal (November 1973);

17.--All instruction manuals as well as all written instructions, administrative policies and documents in effect during October 1972, and any amendments, concerning:

(a) all rules respecting the operation of the R.C.M.P.'s Security Service;
(b) The opening, keeping, disposal and/or destruction of any file, document or daily notebook for members of the R.C.M.P.;
(c) The conducting of all police operations, including investigations, searches, electronic eavesdropping, shadowing, surveillance and so on;
(d) The rules of ethics of the members of the R.C.M.P.;
(e) The pattern of authority among the members of different levels of the R.C.M.P.;
(f) List of all cases where reports must be made by members to their superiors;

(g) List of all cases where an authorization is required by superior officers;
(h) The functioning of a joint operation among different police forces, particularly in the case of operations taking place on the territory of the Montreal Urban Community where the R.C.M.P., the Quebec Police Force and the Montreal Urban Community Police Department are all involved at the same time;
(i) The operation of internal communications, including the operation of the Telex system;

II--The originals of any files or documents, not specifically mentioned in this request, but which you believe would be useful for the work of the Commission under its mandate, and in particular any documents in any file whatsoever that might reveal the existence [and] use of methods similar to those that are the subject of this investigation and/or that might reveal the frequency of use of such similar methods.

On November 11, a further subpoena was served upon the Solicitor General with an amended list of documents which I do not find necessary to cite. There were also, within a few days, further subpoenas covering the three following lists:

[TRANSLATION]

I-- The original of a memorandum to which the Prime Minister of Canada, Mr. Trudeau, referred on June 2, 1977 in a statement in the House of Commons (Hansard, pages 6207-6208);

II-- Concerning an investigation known to have begun on or about June 1, 1977 under the direction of Messrs. Nowlan and/or Quintal and/or other persons: all reports, including the files and documents appended, prepared for one or more of these persons, or any other person, concerning allegations of acts said to be illegal or reprehensible and committed within the territory of Quebec;

III--All files and documents concerning the setting fire to a farm known as "Petit Québec Libre" in Sainte-Anne-de-la-Rochelle on May 9, 1972 as well as all files and documents concerning a theft of dynamite in Rougemont in the spring of 1972.

Regarding the electronic eavesdropping carried out at 3459 St. Hubert Street in Montreal:

1.-- A written authorization or a written report of an oral authorization given by Mr. Jean-Pierre Goyer to Mr. John Starnes and/or other persons, on or about November 3, 1972;

2.-- Any other written authorizations or any other written reports of oral authorizations given by Mr. Jean-Pierre Goyer to Mr. John Starnes and/or other persons.

I -- The originals of all files or documents in your possession prepared by the R.C.M.P., the Quebec Police Force or the Montreal Urban Community Police Department, or any other person, on the following subjects or events mentioned in a letter dated May 28, 1976 from Commissioner M.J. Nadon to the Hon. Warren Allmand, Solicitor General of Canada, and forwarded by the latter on May 31, 1976 to the Hon. Fernand Lalonde, Solicitor General of Quebec, to wit:

1.-- "In January 1970, Daniel COHN-BENDIT, a revolutionary known around the world, arrived in Montreal, where he stayed with a former F.L.Q. member, Bernard MATAIGNE."

2.-- "In June of the same year, two (2) Quebec terrorists were trained in a guerilla camp in Jordan to act as assassins once they returned to Quebec."

3.-- "In October 1970, James Richard CROSS and Pierre LAPORTE were kidnapped and the latter was subsequently assassinated. In the first communiqué from the Liberation Cell, the F.L.Q. demanded the release of the terrorists in prison (political prisoners)."

4.-- "During the same period searches revealed that Pierre VALLIERES, one of the ideological leaders of the F.L.Q., had sent a letter to Jacques LARUE LANGLOIS on June 26, 1968, advising him to proceed with the kidnapping of political figures. Later VALLIERES admitted he was guilty of this criminal offence with which he was charged."

5.-- "Toward the end of 1971 the latter stayed in hiding to avoid being charged with sedition. After four (4) months he came out of hiding, stating that "in theory" the violent actions of guerillas were ineffective and reckless."

6.-- "On February 9, 1972, 90 sticks of dynamite were found in a room in the Laurentian Hotel in Montreal."

7.-- "In May 1972 the Montreal Urban Community Police Department arrested Christian LEGUERRIER, who confessed at that time that a group was making plans, giving rise to the suspicion that there might be selective assassinations and kidnappings (and in particular your file D-928-2372 and a report dated May 31, 1972)."

8.-- "On September 19, 1972 the R.C.M.P. informed the Solicitor General of Canada that Marcel GUERIN, Donald LACOSTE, Hélène LACASSE, Jacques BEAULNE and Jean-Luc ARENE were planning to commit criminal acts with a view to obtaining the release of the alleged political prisoners (and in particular, your file D-909-2-D-6 and the report dated September 19, 1972)."

9.-- "On September 26, 1972 Jacques BEAULNE, André BEAULNE, Pierre DORAIS, Donald McINNES, Renald LEVESQUE, Roger VINCENT, D'Arcy ARCHAMBAULT and André LAFOND were preparing an airplane hijacking, for the same purpose (and in particular, your file D-926-113-D-1-3 and a report dated September 26, 1972)."

II-- The files and documents on "DISRUPTIVE TACTICS", and in particular those classified in file D-938-Q-25.

The Solicitor General's affidavit

The affidavit submitted to the Commissioner by the Solicitor General in its final form under date October 13, 1977 included the following statements:

[TRANSLATION] 3. I have taken cognizance of a subpoena addressed to me as Solicitor General of Canada by the Commissioner of the said Commission and dated September 28, 1977.

4. The said subpoena, as amended by an oral order of the Commissioner dated October 6, 1977, requires inter alia the files or documents of the R.C.M.P. concerning an operation known as "Opération Bricole", and requires in particular the production of the following files and documents:

(a) All analysis reports on the Mouvement pour la defense des prisonniers politiques du Québec, the Agence de presse libre du Québec and the Coopérative de déménagement du 1 mai from January 1, 1972 to September 28, 1977;
(b) All reports on technical projects (electronic eavesdropping) concerning the Mouvement pour la défense des prisonniers politiques du Québec, the Agence de presse libre du Québec and the Coopérative de demenagement from January 1, 1972 to September 28, 1977;
(c) The files on the Mouvement pour la defense des prisonniers politiques du Québec, the Agence de presse libre du Québec and the

Coopérative de demenagement du 1 mai, as given to Messrs. Robert Samson and Guy Bonsant when they were assigned to these movements;

(d) The originals of all files or documents concerning the following subjects:

(i) The allegations concerning break and entry into the home of Louise Vandelac on October 24, 1972;
(ii) The allegations concerning the theft of Louise Vandelac's handbag at her residence during the night of October 25, 1972;
(iii) The interrogation of a member of the Agence de presse libre du Quebec who used Louise Vandelac's motorcycle between October and December 1972;
(iv) The use and discovery of microphones at 2074 Beaudry Street, in Montreal (November 1973).

5. Before receiving the said subpoena I had already, through my solicitors, produced before the Commission the R.C.M.P. files entitled "Opération Bricole", except for certain documents contained in a list attached hereto as Appendix 1.
6. I have examined the R.C.M.P. files entitled "Opération Bricole" and the documents mentioned in the Appendix to this affidavit.
7. I have further examined the R.C.M.P. files and documents relating to the documents mentioned in sub paragraphs (c) and (d)(i), (ii), (iii) and (iv) of paragraph 4 of this affidavit. I have also examined the R.C.M.P. files and documents relating to the documents mentioned in subparagraphs (a) and (b) of paragraph 4 of this affidavit for the period from January 1, 1972 to September 28, 1977.
8. I know and in fact believe that the documents and files mentioned in paragraph 7 above and in the attached Appendix were prepared and are kept in the strictest secrecy, as part of current and ongoing investigations in all regions of Canada into matters of extreme importance for national security.
9. To allow any of the documents mentioned in paragraph 7 and the attached Appendix to be produced, or the contents of any one of them to be disclosed in testimony, would seriously jeopardize the effectiveness of the current and ongoing investigations being carried out by the R.C.M.P.'s Security Service, and might thwart the operations being conducted by the R.C.M.P.'s Security Service in accordance with the mandate it has been given by the Government of Canada.
10. In particular, production of the documents mentioned in paragraph 7 and the attached Appendix, or disclosure of their contents, would reveal quite specifically certain sources of information, certain methods of collecting information, the personnel involved in investigations and the scope of these investigations, and this could only have consequences injurious to these investigations, which the Government of Canada decided were necessary in the interest of national security.

11. For all these reasons I am of the opinion, and I certify under s. 41(2) of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, that the production or discovery of the files and documents mentioned in paragraph 7 of this affidavit and the attached Appendix, or any one of them, would be injurious to national security.
12. I therefore object to the production of these files and documents and the disclosure of their contents by a member of the R.C.M.P., or by any person having one of these documents in his possession either lawfully or unlawfully or having had access to them on occasion, or as the result of an exchange of information between the R.C.M.P. and the various police forces, including the Quebec Police Force and the Montreal Urban Community Police Department.

The Commissioner's orders

The conclusions of the decision given by the Commissioner on October 18, 1977 after considering the affidavit and the submissions of counsel for the Solicitor General were as follows (numbers added for convenience as agreed at the hearing):

[TRANSLATION] The Commission:

1. CONSIDERS that it is a court within the meaning of s. 41(2) of the Federal Court Act with regard to present and former members of the R.C.M.P., employees and former employees of the Government of Canada and federal government politicians;
2. CONSIDERS that it is not a court with regard to all its other witnesses; an affidavit from the Solicitor General of Canada under s. 41(2) is not effective against it in such cases;
3. REJECTS affidavits P-6 and P-7 as not being in accordance with the Act;
4. ACCEPTS affidavit P-40 as regards the R.C.M.P. files and documents that were not produced before the Commission by the R.C.M.P., the Quebec Police Force or the Montreal Urban Community Police Department; the same applies to the contents of Appendix 1 of affidavit P-40; it will refuse discovery and production without any examination of the documents;
5. AUTHORIZES counsel for the Solicitor General to be present, solely for the purpose of helping the Commission fulfill its obligation arising from the filing of affidavit P-40 during the in camera hearings at which evidence will be given by present and former members of the R.C.M.P., employees and former employees of the Government of Canada and federal government politicians;
6. ACKNOWLEDGES that counsel for the Solicitor General of Canada have the same rights as any counsel appearing before it during public hearings;
7. REJECTS, even assuming that it constitutes a court with regard to all its witnesses an assumption which is denied, those parts of affidavit P-40 concerning non-production and non-disclosure of:

-- the R.C.M.P. files and documents produced before the Commission by the Q.P.F. or the M.U.C.P.D. and marked as follows: "This document is the property of the Government of Canada. It must be classified as a SECRET document and its contents may not be circulated in whole or in part without the author's prior consent";

-- the R.C.M.P. files and documents sent to the Q.P.F. or the M.U.C.P.D. that were produced before the Commission by the Q.P.F. or the M.U.C.P.D. and not marked as being the property of the Government of Canada;

-- the telexes of reports on the electronic eavesdropping carried out by the R.C.M.P. at 3459 St. Hubert Street in Montreal that were sent to the M.U.C.P.D. and produced before the Commission by the M.U.C.P.D.;

-- certain parts of a document prepared by Mr. Fernand Tanguay of the M.U.C.P.D. that was filed before the Commission as Exhibit P-38;

-- the analysis reports on the documentation seized from the M.D.P.P.Q., the A.P.L.Q. and the Cooperative de demenagement du 1 mai, prepared during the months following the search and produced before the Commission;

-- certain documents referred to in affidavit P-40 as

> reports on technical projects (electronic eavesdropping) produced before the Commission by the M.U.C.P.D. as Exhibit H-15 and made public as P-34 and P-35;

8. INVITES the representatives of the Solicitor General of Canada to make the representations they consider appropriate under article 3.2 of the Commission's rules of practice and procedure.

The conclusions of the motion for a writ of evocation take exception to paragraphs 2, 5 and 7 of the above conclusions. They also challenge in its entirety a further decision of the Commissioner issued November 1st, 1977 in the following terms:

> [TRANSLATION] On October 20, 1977 one of the Commission's counsel, Mr. Michel Décary, asked Mr. Claude Brodeur, a member of the R.C.M.P., the following question:

"Were you aware that members under your authority, your command, participated in illegal operations or activities?" (October 20, 1977, volume 29, p. 18)

Various representations having been made, the Commission decided to suspend the examination of Mr. Brodeur and to make a final ruling on the objection on November 1, 1977.

The evidence adduced in The Queen v. Coutellier, Beaudry and Cobb, which the Commission examined with the authorization of the Attorney General of Quebec, and that gathered by the Commission itself, indicate:

(A) That the witness was personally involved in the circumstances surrounding the search made during the night of October 6 to 7, 1972 at 3459 St. Hubert Street in Montreal;
(B) That the witness was personally involved in certain previous or subsequent events that might be related to the circumstances surrounding the search or the search itself;
(C) That consequently the Commission must examine his behaviour as a person involved in the search or in a previous or subsequent event that might be related to the circumstances of the search or to the search itself.

It should be mentioned that among the specific points which the Commission is to investigate and report on, the Lieutenant-Governor in Council specifically mentioned:

"The methods used during this search and the frequency of their use".

The word "method" means "way of acting with regard to someone else" and refers to behaviour, conduct, manner of acting or method to be followed to obtain a result.

The evidence already reveals some of the methods used during the search carried out at 3459 St. Hubert Street in Montreal, but our inquiry should not stop there. What is at the very heart of the methods used, and characterizes the entire operation or the conduct of the police in this matter, is the fact that the police acted illegally.

The question asked is aimed directly at ascertaining the existence and frequency of use of the illegal methods employed on other occasions and the frequency of their use. This question falls squarely within the Commission's mandate.

The Commission accordingly orders you, Mr. Brodeur, to answer the following question:

> "Were you aware that members under your authority, your command, participated in illegal operations?"

Finally exception is taken to a decision of the Commissioner given December 5, 1977 the conclusions of which read:

> [TRANSLATION] The Commission:
>
> REQUIRES the production before it of a written authorization or a written report of an oral authorization given by Mr. Jean-Pierre Goyer to Mr. John Starnes and/or other persons on or about November 3, 1972, as well as of any other written authorizations, or any other written reports of oral authorizations, given by Mr. Jean-Pierre Goyer to Mr. John Starnes and/or other persons regarding the electronic eavesdropping carried out at 3459 St. Hubert Street in Montreal;
>
> REQUIRES the production before it of the files and documents concerning "disruptive tactics", and in particular those classified in file D-938-Q-25;
>
> REQUIRES the production before it of all files, including the documents, statements, depositions and reports, connected with the investigation known to have begun on or about June 1, 1977 under the direction of Messrs. Nowlan and/or Quintal and/or other persons, prepared for one or more of these persons or any other person, concerning allegations of acts said to be illegal or reprehensible and committed in the territory of Quebec;
>
> ORDERS the Solicitor General of Canada, under all penalties provided for by the Act, to give it the said files and documents on December 12, 1977 at 2:00 p.m. in room 5.15 of the Courthouse, 1 Notre Dame Street East, in Montreal;
>
> INVITES the representatives of the Solicitor General of Canada to make any representations they consider appropriate under article 3.2 of the Commission's rules of practice and procedure after giving it the said documents.

The allegations

In respect of all the above, the motion for a writ of evocation includes the following main allegations:

> [TRANSLATION] 26. Moreover, respondent Keable is giving his mandate an unconstitutional interpretation, which is ultra vires the powers of the Quebec Legislature, in that he is inquiring into and intends to inquire into the following subjects:

(a) the operating rules of the R.C.M.P.'s Security Service;
(b) the Security Service organization, including the pattern of authority among the various levels;
(c) the methods of collecting information, such as:

(i) technical or electronic sources;
(ii) human sources, recruiting, informing and payment;
(iii) searches;
(iv) interviews with subjects of interest;
(v) infiltration;
(vi) surveillance and shadowing;

(d) the system of classifying files on individuals and the movements of and rules governing the management of the files;
(e) the operation of internal communications and communications among the various police forces;
(f) internal disciplinary investigations, and in particular the investigation conducted by superintendent Nowlan during June 1977;
(g) the relations between the Commissioner of the R.C.M.P. and the Director General of Security and senior officials of the Solicitor General's Department, the Prime Minister of Canada's Office, the Cabinet, the Solicitor General of Canada, the Prime Minister of Canada and the Cabinet Committee on Security;
(h) the kidnapping of James Cross, the kidnapping and assassination of Pierre Laporte, the visit of Cohn-Bendit to Canada, an alleged escape plot in 1972, an alleged airplane hijacking plot in 1972 and other subjects related to the 1970 October crisis and the acts of terrorism between 1963 and 1973;
(i) interception of mail for purposes of counter-espionage or anti-subversion;

...

31. The inquiry conducted by respondent may lead to breaches of the Official Secrets Act by the witnesses, and confronts members and former members of the R.C.M.P. with multiple and contradictory obligations: the obligation to give answer to respondent, the obligations under the R.C.M.P. Act and the obligations under the Official Secrets Act;
32. The inquiry conducted by respondent encroaches upon the function of the federal commission of inquiry into the R.C.M.P's Security Service, negates the precautions for confidentiality taken by the federal government in the direction of this commission, and in general this investigation conducted by respondent usurps the authority and functions of a commission validly created by the Governor in Council in the exercise of his mandate.

The constitutional questions

On the appeal to this Court an order was made stating the constitutional issues raised in the form of the five following questions:

1. Are the Orders-in-Council 1968-77, 2736-77, 2986-77 and 3719-77, in whole or in part, ultra vires the Province of Quebec?
2. Are the powers of a commissioner appointed under provincial legislation for the purpose of inquiring into matters concerning the administration of justice in the Province limited by the distribution of legislative powers as provided for in the British North America Act?
3. If members of a federal institution, namely the Royal Canadian Mounted Police, be involved in allegedly criminal or reprehensible acts, does a commissioner appointed under provincial legislation for the purpose of inquiring into matters concerning the administration of justice in the Province have the right, while conducting an inquiry into the circumstances surrounding the commission of said acts, to inquire into:

   (a) the federal institution, namely, the Royal Canadian Mounted Police;
   (b) the rules, policies and procedures governing the members of the institution who are involved;
   (c) the operations, policies and management of the institution;
   (d) the management, operations, policies and procedures of the security service of the Royal Canadian Mounted Police;

   and to make recommendations for the prevention of the commission of said acts in the future?

4. Can the Solicitor General of Canada or any other Minister of the Crown in Right of Canada, in his official capacity, be compelled to appear, testify and produce documents by a commissioner appointed pursuant to provincial legislation for the purpose of inquiring into matters concerning the administration of justice in the Province?
5. Does a Minister of the Crown in Right of Canada, in his official capacity, have the constitutional power to prevent by means of affidavit or otherwise, the production of documents demanded by a commissioner appointed pursuant to provincial legislation for the purpose of inquiring into matters concerning the administration of justice in the Province, when such documents may relate to the commission of allegedly criminal or reprehensible acts, to circumstances surrounding such acts, or to the frequency of their occurrence?

The interventions

Interventions have been filed on behalf of the Attorneys General of Ontario, New Brunswick, Manitoba, British Columbia, Saskatchewan and Alberta, generally supporting the appeal in varying degree. Leaving aside for the moment the question raised by the dissenting judge in the Court of Appeal--the extent of a staying order--I propose to deal with the merits by considering the constitutional questions in order, but taking the first three together.

The validity of the Commission's mandate

Although unanimously of the view that the motion's allegations required the issuance of a writ of evocation, the Court of Appeal was equally unanimous in holding that the Commission's mandate was not in excess of provincial powers.

In support of this conclusion, appellants submitted first that there was no constitutional restriction on the possible scope of such an inquiry. It was contended that there was nothing to prevent a provincial government from ordering, in the public interest, an investigation into any subject whatever, just as any university or private institution can. The short answer to this contention is that this is not an inquiry of the same kind; it is being made, not by resorting only to generally available sources of information, but by compelling the attendance of witnesses to testify under oath and to produce documents. Such powers are not available to a commission set up by virtue of the royal prerogative, they depend on statutory authority, in the present case, on the Public Inquiry Commission Act under which this Commission was established. A provincial statute cannot be effective beyond the constitutional limits of a provincial legislature's authority. In Reference re a Commission of Inquiry into the Police Department of Charlottetown [(1977), 74 D.L.R. (3d) 422.], Nicholson C.J., P.E.I., said after referring to Kelly and Sons v. Mathers [(1915), 23 D.L.R. 225.], (at p. 424):

> This statement of Perdue, J.A., with which I agree, is to the effect that the Lieutenant-Governor in Council of a Province has power, apart from the Public Inquiries Act, to issue a commission to investigate matters which fall strictly within one of the classes of subjects assigned exclusively to the provincial Legislatures by s. 92 of the British North America Act, 1867, but that such a power by itself would not by itself entitle the commissioner or persons named to compel the attendance of witnesses or to administer oaths.

This is in accordance with what Viscount Haldane has said in Attorney General for the Commonwealth of Australia v. Colonial Sugar [[1914] A.C. 237.10], (at p. 257):

> A Royal Commission has not, by the laws of England, any title to compel answers from witnesses, and such a title is therefore not incidental to the execution of its powers under the common law.

On the other hand, it appears to me that the majority opinion in Di Iorio v. Warden of the Montreal Jail [[1978] 1 S.C.R. 152.], is conclusive of the validity of the Commission's mandate to the extent that it is for an inquiry into specific criminal activities. I can see no basis for a distinction between such an inquiry and an inquiry into "organized crime" as in Di Iorio, or a coroner's inquiry into a criminal homicide as in Faber v. The Queen [[1976] 2 S.C.R. 9.], or a fire marshal's inquiry into arson as in Regina v. Coote [(1873), L.R. 4 P.C. 599]. Notwithstanding all the arguments submitted by counsel for the Solicitor General of Canada, I find myself bond by authority to hold that such inquiries come within the scope of "The Administration of Justice in the Province".

Reference was made to the judgment of the Court of Appeal of New Zealand in Cook v. Attorney General [(1909), 28 N.Z.L.R. 405.]. I do not find the decision of great interest, it merely turns on the proper construction of the relevant Commissions of inquiry Act. In the present case, no question arises as to the extent of the legislation under which the inquiry was ordered. The issue is as to the extent of the province's legislative authority over this inquiry.

Reference was also made to the judgment in McGee v. Pooley [[1931] 4 D.L.R. 475.], where an injunction was issued to restrain a security frauds investigation on the basis that this was an inquiry into a criminal matter. That case is of no authority: it rests on views which are not in accordance with the decision of the Privy Council rendered the following year in Lymburn v. Mayland [[1932] A.C. 318.].

Great stress was laid by the appellants as well as by intervenants on Dickson's J. statement in Di Iorio, at p. 208, that "A provincial commission of inquiry, inquiring into any subject, might submit a report in which it appeared that changes in federal laws would be desirable". This was said obiter in a case concerning an inquiry into organized crime. As previously noted, the basis of the decision was that such an inquiry into criminal activities is within the proper scope of "The Administration of Justice in the Province". The intended meaning of the sentence quoted is not that a provincial commission may validly inquire into any subject, but that any inquiry into a matter within provincial competence may reveal the desirability of changes in federal laws. The commission might therefore, whatever may be the subject into which it is validly inquiring, submit a report in which it appeared that changes in federal laws would be desirable. This does not mean that the gathering of information for the purpose of making such a report may be a proper subject of inquiry by a provincial commission.

I thus must hold that an inquiry into criminal acts allegedly committed by members of the R.C.M.P. was validly ordered, but that consideration must be given to the extent to which such inquiry may be carried into the administration of this police force. It is operating under the authority of a federal statute, the Royal Canadian Mounted Police Act, (R.S.C. 1970, c. R-9). It is a branch of the Department of the Solicitor General, (Department of the Solicitor General Act, R.S.C. 1970, c. S-12, s. 4). Parliament's authority for the establishment of this force and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management. While members of the force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force. The doctrine of colourability is just as applicable in adjudicating on the validity of a commission's term of reference or decisions as in deciding on the constitutional validity of legislation. As Viscount Simon said in Attorney General for Saskatchewan v. Attorney General for Canada [[1949] A.C. 110.], (at p. 124) "you cannot do that indirectly which you are prohibited from doing directly".

The words [TRANSLATION] "and the frequency of their use" at the end of paragraph a) as well as the words "and the frequency of their use" at the end of paragraph c), of the Commissioner's mandate, do not contemplate an inquiry into criminal acts but into the methods used by the police forces. Those are essential aspects of their administration and therefore, to the extent that those words relate to the R.C.M.P., what they purport to authorize is beyond provincial jurisdiction to inquire into. That this is the intended scope of the inquiry is apparent from the subpoenas which call for the production of all operating rules and manuals. For similar reasons, I would hold that paragraph d) is invalid in so far as it relates to the R.C.M.P. This paragraph pertaining to recommendations, following as it does provisions contemplating an inquiry into the regulations and practices of the R.C.M.P., is clearly intended to invite, as a purpose of the inquiry, recommendations for changes in such regulations and practices. Inasmuch as these are the regulations and practices of an agency of the federal government, it is clearly not within the proper scope of the authority of a provincial legislature to authorize such an intrusion by an agent of a provincial government.

Counsel for the appellants took exception to the statement by Paré J.A. that [TRANSLATION] "a commission of inquiry ... is merely an extension of the executive branch, which it serves and to which it reports". It was contended that a commission's status was like that of a court, one of independence towards the executive. In support of this contention, reference was made to the report of the Royal Commission on some spying activities dated June 27, 1946, in which, at p. 683, reference is made to Clokie and Robinson, Royal Commissions of inquiry, at pp. 150-151. It should, however, be noted that at p. 87 the authors of this book have written:

> ... A "crown-appointed" or "royal" commission is only in a formal sense a monarchial weapon; in practice it is quite clearly and undeniably an agency of ministers who possess a majority in the House of Commons.

The Solicitor General not a compellable witness

I do not find it necessary to review at great length the numerous authorities cited on the fourth constitutional question. Because, at common law, a commission of inquiry has no power to compel the attendance of witnesses and to require the production of documents, any jurisdiction for such purposes depends on statutory authority, and it seems clear that provincial legislation cannot be effective by itself to confer such jurisdiction as against the Crown in right of Canada. In the recent case of Her Majesty in right of Alberta v. C.T.C. [[1978] 1 S.C.R. 61.], Laskin C.J., said with the concurrence of all but two of the other members of the Court (at p. 72):

> ... a Provincial Legislature cannot in the valid exercise of its legislative power, embrace the Crown in right of Canada in any compulsory regulation.

In Quebec North Shore Paper v. C.P. Ltd. [[1977] 2 S.C.R. 1054.], Laskin C.J., said, speaking for the full Court, (at p. 1063):

> ... It should be recalled that the law respecting the Crown came into Canada as part of the public or constitutional law of Great Britain, and there can be no pretence that that law is provincial law. In so far as there is a common law associated with the Crown's position as a litigant it is federal law in relation to the Crown in right of Canada, just as it is provincial law in relation to the Crown in right of a Province, and is subject to modification in each case by the competent Parliament or Legislature ...

In R. v. Richardson [[1948] S.C.R. 57.], Estey J. said with reference to the Ontario Highway Traffic Act barring any action after the expiration of twelve months from the time the damages were sustained:

> ... this statutory provision enacted by the province does not specifically mention His Majesty and therefore would not be effective against His Majesty in the right of the province and much less against His Majesty in the right of the Dominion...

In Gauthier v. The King [(1917), 56 S.C.R. 176.], Anglin J., as he then was, said at p. 194:

> ... Provincial legislation cannot proprio vigore take away or abridge any privilege of the Crown in right of the Dominion ...

Appellants submit that the decision of this Court in Regina v. Snider [[1954] S.C.R. 479.] means that a minister of the Crown is a compellable witness at a trial and they point out that under s. 7 of the provincial Act a commissioner has "all the powers of a judge of the Superior Court in term". This enactment cannot, at least towards federal authorities, have the effect of making an inquiry the legal equivalent of a trial. Such an inquiry is rather in the nature of a discovery and it seems to be well established that, at common law, the Crown enjoys a prerogative against being compelled to submit to discovery. In La Société Les Affréteurs Réunis and The Shipping Controller [[1921] 3 K.B.1.], Darling J. said (at p. 15):

> ... But even if the statement of Rigby L.J. was an obiter dictum, this Court is entitled to have regard to it and must look at it in order to see whether or not it lays down a principle which appears to be the right one. What he said was: "I have got to administer the law; the law is that the Crown is entitled to full discovery, and that the subject as against the Crown is not (1897) 2 Q.B. 384, 395." It was stated in Tomline v. The Queen, 4 Ex. D. 252, that the Crown does not owe discovery to the subject. I think Rigby L.J. was saying no more than that. There is thus a definite decision of the Court of Exchequer that the Crown is not bound to give discovery to the subject, and the opinion of a Lord Justice in the Court of Appeal recognizing that decision, and that decision and opinion are sufficient authority for this Court to recognize the rule which they lay down as the law of the land, unless it is convinced that it cannot be so. Rigby L.J. goes on: "That is a prerogative of the Crown, part of the law of England, and we must administer it as we find it...."

In Crombie v. The King [[1923] 2 D.L.R. 542.], Masten J. said (at p. 546):

> ... But, though discovery is a remedy merely, yet none the less the right of the Crown to refuse discovery is a matter of prerogative right: ...

In R. v. Lanctot [(1941), 71 Que. K.B. 325.], Bond J. said (at p. 332):

> It would appear accordingly, from the authorities--a few of which I have referred to--that the Crown cannot he compelled to give discovery ...

Counsel for the appellants suggested that this question did not appear to have been raised initially as part of the Solicitor General's objections to the Commissioner's demands. Be that as it may, the point is raised in one of the constitutional questions set down in this Court, and was explicitly dealt with in the Court of Appeal where Paré J.A. said:

> [TRANSLATION] I am therefore of the opinion that the provincial statute on commissions of inquiry, and the powers a commissioner is given under this statute, cannot bind the Crown in right of Canada, and respondent Commission cannot exercise against a Minister of the Crown in right of Canada the powers it is given by sections 7, 9, 10 and 11 of this statute. It should be emphasized in this regard that the subpoenas ordering the Solicitor General to appear and produce the required documents are not addressed to him personally but in his capacity as

Solicitor General of Canada. In fact this could not have been otherwise, since it is only in this capacity that he has control of the documents required.

I would therefore answer question 4 in the negative.

The Crown privilege

The last constitutional question relates to the extent of the Crown privilege claimed in the interest of national security. This brings up for consideration the provisions of s. 41 of the Federal Court Act which reads:

> 41. (1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit.
>
> (2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.

Although this enactment is in the Federal Court Act, the wording makes it clearly applicable to "any court". This makes it applicable not only to the provincial courts which are, in the main, courts of general jurisdiction, federal and provincial, but also to any official invested with the powers of a court for the production of documents. I would in this respect make the same reasoning as for the availability of evocation: whenever the Commissioner claims to exercise such powers he is subject to the provisions applicable to a court in respect of those powers.

Counsel for the appellants pointed out that the Commissioner does not deny that he is subject to the application of s. 41 of the Federal Court Act. However, he has claimed the right to decide to what extent the Solicitor General's objections made by affidavit should be upheld, and the Court was invited by counsel to examine all the documents filed with the motion, including the complete transcript in thirty volumes of all of the proceedings at the inquiry. In my view, such an exhaustive examination of the voluminous exhibits filed with the motion and therein referred to does not come within the scope of the task assigned to the judge called upon to decide whether a writ of evocation should issue. Under the two-step procedure contemplated by the Code of Civil Procedure, the duty of the judge at the first hearing is described as follows, in art. 847 C.C.P., second paragraph:

> The judge to whom the motion is presented cannot authorize the issuance of a writ of summons unless he is of opinion that the facts alleged justify the conclusions sought.

In my view this enactment does not require a full examination of all the proceedings of the Commissioner. It is sufficient to examine his terms of reference and his impugned decisions in the light of the facts alleged in the motion in order to determine whether, taking for the moment those facts as established, the issuance of the writ is justified. It is not the duty of the Court at this juncture to review all the proceedings of the Commissioner in order to decide immediately to what extent the allegations of the motion are proved or disproved by the complete record.

In my view, the effect of the above quoted enactment is correctly. stated by Deschênes J.A., as he then was, in Cahoon v. Le Conseil de la Corporation des Ingénieurs [[1972] R.P. 209.], as follows (at pp. 212-13):

> [TRANSLATION] It must therefore be held that, in performing its duty under Art. 847(2) C.C.P., the Court is fully entitled to refer to the documents that have been filed in support of the motion, provided however that these are authentic documents or exhibits the accuracy of which is not in dispute between the parties. A fortiori the Court may have recourse to them where, as here, the applicant incorporates them into his motion and extracts from them passages which he introduces into his actual allegations.
>
> Obviously, the judge hearing the motion for authorization to issue the writ should not decide prematurely the merits of the case, on the basis of his examination of the documents produced by the applicant. However, he may draw from them the conclusions he feels are necessary in order to ascertain whether "the facts alleged justify the conclusions sought" (art. 847(2) C.C.P.).

No question is raised as to the constitutional validity and applicability of s. 41, and I find it unnecessary to review the well known decisions of the House of Lords in Duncan v. Cammell Laird and Co. Ltd. [[1942] A.C. 624.] and Conway v. Rimmer [[1968] A.C. 910.], in which somewhat different views were taken of the nature of the privilege in question at common law. Parliament has subsequently enacted explicit provisions which spell out the law for Canada and the affidavit submitted to the Commissioner was obviously made under subs. 2 of s. 41. There was much discussion at the hearing whether such an affidavit is really conclusive or may somehow be challenged. I do not find it necessary to decide this point because, if such an affidavit can be challenged this may be done only before a court of competent jurisdiction and a commissioner is not such a court and does not enjoy the powers of such a court.

Section 7 of the provincial Act purports to confer upon a commissioner "all the powers of a judge of the Superior Court in term" but this cannot make him a superior court, as this is something a provincial legislature cannot do by reason of s. 96 of the B.N.A. Act (see the recent judgment of this Court in Attorney General of Quebec v. Farrah [[1978] 2 S.C.R. 638.]). The Commissioner does not enjoy the status of a superior court, he has only a limited jurisdiction. His orders are not like those of a superior court which must be obeyed without question; his orders may be questioned on jurisdictional grounds because his authority is limited. Therefore his decisions as to the proper

scope of his inquiry, the extent of the questioning permissible, and the documents that may be required to be produced, are all open to attack, as was done before the Ontario Divisional Court in Re Royal Commission and Ashton [(1975), 64 D.L.R. (3d) 477.]. In that case this was done by stated case under some specific provisions of the Ontario Public Inquiries Act. In the absence of similar provisions in Quebec, evocation is the proper remedy, just as certiorari was found proper by the House of Lords in Rogers v. Secretary of State [[1972] 2 All E.R. 1057.].

Because a commissioner has only limited authority he enjoys no inherent jurisdiction, unlike superior courts which have such jurisdiction in all matters of federal or provincial law unless specifically excluded. It is by virtue of this inherent jurisdiction that superior courts have a general superintending power over federal as well as provincial authorities, as held in Three Rivers Boatman (supra). It is unnecessary to decide in the present case whether any possible attack against an affidavit made under s. 41(2) of the Federal Court Act comes within the exclusive jurisdiction conferred upon the Trial Division of the Federal Court by s. 18 of that Act, because I find it clear that any jurisdiction for entertaining such attack can only be found in a superior court. The Commissioner is therefore bound to accept the affidavit as submitted unless it is set aside by a competent court.

The Official Secrets Act

A special point has been made with reference to some documents for which the Solicitor General's affidavit claims Crown privilege in the interest of national security but which the Commissioner has obtained from other witnesses. The Commissioner was of the view that the claim of privilege by affidavit was ineffective. In the present case, those documents had been entrusted by R.C.M.P. officers to members of police forces under provincial authority. These documents were classified as secret and stamped as such. They were communicated under obligation to preserve their confidentiality. Counsel for the Commissioner sought to defend his decision to make some of those documents public over the Solicitor General's objection, not only on the basis that the affidavit became ineffective when the Commissioner managed to get the documents from other sources, but also on the basis that any obligation of confidentiality assumed by members of police forces under provincial authority disappeared in the face of orders given by their provincial superiors. I find this an untenable contention. Even apart from the provisions of the Official Secrets Act, an employee's duty of obedience towards his employer does not mean that the latter has any power to compel his employee to act in breach of a duty of confidentiality. The medical director of a hospital cannot release a doctor from his obligation of confidentiality towards his patient, only the latter may release him from his duty. Section 4 of the Official Secrets Act makes it clear that it is the duty of every person who has in his possession information entrusted in confidence by a government official and subject to the Act, to refrain from communicating it to any unauthorized person. No special form is prescribed for bringing this duty to the attention of all concerned. The Commissioner certainly could not brush aside the objection because it was raised by affidavit and after he had obtained possession of the documents. Whether these were in fact subject to the Act will have to be decided on the merits.

The Staying Order

As previously mentioned, the Court of Appeal when ordering the issue of the writ also directed that all proceedings in the inquiry be suspended. Kaufman J.A. dissenting on that point said:

suspended while some secondary issues are being litigated on the merits. At first sight, art. 848 of the Code of Civil Procedure would appear to contemplate a complete suspension of proceedings because it reads:

> 848. The writ introductive of suit is addressed to the opposite party and to the court, judge or functionary, and it orders the suspension of all proceedings and the transmission to the office of the Superior Court, within the delay fixed, of the record in the case and all the exhibits connected therewith.

It must however be noted that what is the "case" is not specified. It is clear that when the validity of the Commissioner's mandate was in issue, the "case" was the whole inquiry. But now that this issue is being disposed of by the judgment on this appeal, does the remaining "case" include anything more than the specific decisions of the Commissioner under attack, the subpoenas to the Solicitor General and R.C.M.P. documents including the transcript of the argument and evidence relating thereto? I fail to see any reason for

construing art. 848 as preventing the Court from so defining the "case". I would therefore allow the appeal for the purpose of issuing a restricted staying order.

Conclusions

For those reasons, I would allow the appeal in part and answer the constitutional questions stated in this case as follows:

Question 1: Yes, to the following extent as concerns the Royal Canadian Mounted Police, namely: In paragraph a), the words "et la fréquence de leur utilisation" (and the frequency of their use); in paragraph c), the words "ainsi que la fréquence de leur utilisation" (and the frequency of their use); and paragraph d).

Question 2: Yes.

Question 3: No.

Question 4: No.

Question 5: Yes.

I would direct that the suspension of proceedings ordered by the Court of Appeal be limited to proceedings in respect of matters relating to the parts of the Commissioner's mandate found to be

> was not primarily of a criminal nature, but came to have a social context. (at p. 30)

There have been several earlier judicial dissertations in other courts on the legal characterization of the coroner's inquest. and, generally, it may be said that the main stem of the classification or characterization was the absence of a lis and that there was no accused and no charge. Indeed, this Court in Batary v. Attorney General for Saskatchewan et al. [[1965] S.C.R. 465.], found that the characterization in law of a coroner's inquest may well depend upon the timing of the laying of a charge or the preferring of an indictment. In the Batary case, supra, this Court found that a writ of prohibition should indeed issue against the coroner on the application of one of several persons arrested in connection with the death of a person which was being investigated by the coroner and in the course of which investigation the accused applicant had been subpoenaed to appear before the coroner for examination as a witness in the proceedings. The coroner ruled that the applicant under subpoena and criminal charge was a compellable witness but this Court found otherwise. In the Faber case, supra, the Batary judgment was distinguished by the majority judgment in this Court on the footing that the applicant for prohibition, Faber, had not at the time he was required to testify before the coroner been charged with an offence in connection with the death under investigation before the coroner. The circumstance, sometimes almost accidental or at least undirected, of the existence or non-existence of a charge by indictment, information or otherwise, is not, in my view, of controlling significance when determining the constitutional status of a process such as we are now considering.

In Di Iorio, supra, the subject of the proceedings was, as pointed out by my brother, Pigeon J., "an inquiry into organized crime". The mandate of the Commission of Enquiry was expressed this way:

> That in the fight against organized crime, the Quebec Police Commission shall make an enquiry into the activities of any organizations or systems including their ramifications ...

Two things are abundantly clear from the terms of the mandate as they are in part set forth in the report at p. 181:

> (a) The Quebec Police Commission was directed to enquire into the activities of unspecified organizations or systems where such operate "in illegal gaming and betting, etc."; and,
> (b) That the Commission, upon completing its investigation, shall submit a "written report setting forth the findings" which it will have made.

This Court found that such executive direction by a Province to a provincially constituted enquiry was constitutionally valid.

The nature of the directed enquiry now before this Court is generically similar to the Di Iorio enquiry in that:

> (a) The Commission is directed to investigate certain specified activities of the Police of the City of Montreal, the Quebec Police Force and the Royal Canadian Mounted Police; and

> [TRANSLATION] (b) "to make recommendations on the measures to be taken to ensure that any illegal or reprehensible acts the Commission uncovers will not be repeated in future;"

It is equally clear in both instances that the mandate could not be performed by the enquiry tribunal without an investigation into specific instances of alleged criminal activities or at least events and circumstances in the course of which it is alleged offences had been committed.

In my view, the "administration of justice" authorizes and indeed requires a province to establish, maintain and operate such facilities as may from time to time be necessary and advisable for the proper and effective enforcement of the criminal law. That is not to say that only these activities are embraced in the expression "administration of justice". On the other hand, it is not only the Province and its agencies which may be concerned with the enforcement of the criminal law. It is equally clear that s. 92(14) does not authorize the Province to legislate with respect to criminal procedure directly or indirectly. It is the Criminal Code which sets forth the procedure prescribed by the sovereign authority, the Parliament of Canada, and which is to be followed in the investigation of crime and in the prosecution of ensuing charges. The Province, in the discharge of its role under s. 92(14) of The British North America Act may be required, or may find it convenient, to examine by the usual executive agencies or by a commission of enquiry, the operation of its policing facilities and personnel, and the prevalence of crime and its nature in the Province. Such was the case before the Court in Di Iorio, supra. At the other end of the scale, the enforcement agencies of the Province may of course investigate allegations or suspicions of specific crime with a view to the enforcement of the criminal law by prosecution. This investigation must be in accordance with federally prescribed criminal procedure and not otherwise, as for example, by coercive enquiry under general enquiry legislation of the Province.

In the middle of the scale is the situation facing the Court in this proceeding. The Province has set out to investigate the operations of provincial and municipal police apparatus in relation to certain specific events which have obvious criminal connotations. Each such enterprise when undertaken by a province must be examined in its own particular circumstances. Where the object is in substance a circumvention of the prescribed criminal procedure by the use of the enquiry technique with all the aforementioned serious consequences to the individuals affected, the provincial action will be invalid as being in violation of either the criminal procedure validly enacted by authority of s. 91(27), or the substantive criminal law, or both. Where, as I believe the case to be here, the substance of the provincial action is predominantly and essentially an enquiry into some aspects of the criminal law and the operations of provincial and municipal police forces in the Province, and not a mere prelude to prosecution by the Province of specific criminal activities, the provincial action is authorized under s. 92(14).

One of the main bastions of the criminal law is the right of the accused to remain silent. In the coldest practical terms, that right, so long as it remains unaltered by Parliament, may not be reduced, truncated or thinned out by provincial action.

On the other hand, to strip a province of the right to investigate the operations of provincial and municipal police in the detection of crime and the enforcement of the criminal law would be to put a serious impediment in the path of those authorities charged with "the administration of justice" within the Province and I would not readily find such an interpretation to be appropriate in the application of these competing subsections of ss. 91 and 92. This right or authority on the part of the Province in relation to s. 92(14) does not by a back door, as it were, lead to a right to investigate a

validly established federal organization, including a federal police organization. That is not to say that where members of such a federally organized force offend the criminal law, the ordinary agencies of criminal investigation and law enforcement within the Province would not operate as in the case of any other individuals. There may be circumstances in those Provinces which have contractual or other arrangements with the federal government with reference to the maintenance of police forces which will call into question different principles, but with which we are not here concerned.

It is my view, therefore, that a province may investigate an identified crime in the manner and through the procedures prescribed by Parliament, remaining free in the directing of its forces engaged in the administration of justice within the Province to investigate crimes and criminal activities generally and the operations of provincially organized agencies engaged in law enforcement; but neither plenary authority may investigate the undertaking of an agency validly established by the other plenary authority. The dividing line will at all times be difficult to establish. This is an unhappy characteristic of constitutional law and its application. Difficulty in ascertaining the precise boundary in specific circumstances is no reason to withdraw from the responsibility of enunciating a constitutional doctrine which recognizes the validity of the exclusive authorities in the subsections of ss. 91 and 92 respectively.

I add these few words in these proceedings because of the tendency which may develop to construe the aforementioned judgments of this Court as necessarily indicating a hardening into what might be construed as an arbitrary principle available in a slide rule sense for the determination of appropriate provincial or federal actions in related but not necessarily parallel circumstances.

PRATTE J.:-- I have read the reasons proposed to be delivered by my brother Pigeon and in which, in answer to the first constitutional question, he expresses the view that the mandate was valid except as concerns the Royal Canadian Mounted Police and to the extent indicated by him.

Had it not been for the majority decision of this Court in the case of Faber v. The Queen [[1976] 2 S.C.R. 9.], I would have answered this first question differently. I would have said that the Commission's mandate was in excess of provincial powers to the extent that it provides for a coercive inquiry which is essentially aimed at investigating specific crimes and searching for their authors. However, in the light of the decision in the Faber case, I feel obligated to answer this constitutional question in the manner proposed by Pigeon J.

As to the other points raised in the appeal, I agree with Pigeon J.

Appeal allowed in part.

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Idziak v. Canada (Minister of Justice)

Boniface Robert Idziak, appellant;
v.
The Minister of Justice, The Honourable Kim Campbell, and the Superintendent of the Sault Ste. Marie Jail, Jude Lake, respondents.

[1992] 3 S.C.R. 631

[1992] S.C.J. No. 97

File No.: 21845.

Supreme Court of Canada

1992: May 25 / 1992: November 19.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (69 paras.)

Constitutional law -- Charter of Rights -- Fundamental justice -- Extradition -- Application to Minister to exercise discretion not to extradite -- Internal memorandum advising minister -- Minister not informing fugitive of memorandum -- Whether s. 7 right to fundamental justice infringed -- Canadian Charter of Rights and Freedoms, s. 7.

Prerogative writs -- Habeas corpus with certiorari in aid -- Fugitive committed for extradition -- Whether writ lies before actual process of extradition commences.

The U.S. sought to extradite appellant to face charges in Michigan of participating in a conspiracy to obtain funds from investors through fraudulent representations regarding two Canadian corporations. Appellant was arrested on a warrant of apprehension in 1987 and a warrant for his committal was issued after the extradition hearing. The Supreme Court of Ontario allowed in part his application to quash the warrant of committal. The prosecution appealed and appellant cross-appealed on the remaining charges on which the warrant of committal was outstanding. Both the appeal and the cross-appeal were abandoned.

Appellant sought, under s. 25 of the Extradition Act, to have the Minister of Justice refuse to exercise the [page632] Minister's discretionary authority to surrender him to the U.S. authorities. The minister, however, advised him that there were no grounds justifying a refusal to surrender him and signed the warrant of surrender.

Counsel for appellant then learned of an internal memorandum which the Minister had reviewed before making his decision. Appellant requested but never received a copy. He then commenced these proceedings by applying to the Supreme Court of Ontario for a writ of habeas corpus with certiorari in aid to set aside the warrant of surrender on the ground that the minister had denied his rights to fundamental justice guaranteed by s. 7 of the Canadian Charter of Rights and Freedoms. The application was dismissed as was the appeal to the Court of Appeal. This appeal is from the decision of the Court of Appeal.

At issue here are: (1) whether this Court has jurisdiction to hear the appeal, and (2) if so, whether the Minister breached the principles of fundamental justice guaranteed by s. 7 of the Charter in reaching the decision not to refuse to surrender appellant. Leave to appeal had been restricted to the second issue.

Held: The appeal should be dismissed.

Per L'Heureux-Dubé, Cory and Iacobucci JJ.: When an unrestricted leave to appeal is granted, a respondent may advance any argument supporting the judgment below subject to the sole restriction that it does not require additional evidence to be adduced at trial. Leave to appeal here was granted on only one ground, however, and the Court thereby limited its own jurisdiction. While the grounds of appeal should not be expanded beyond the ground set out in the order, the Court nonetheless should always have the capacity to consider its own jurisdiction and should never be placed in a position requiring it to rule on a matter in which it did not have jurisdiction. An issue as to the Court's jurisdiction is the exception to the rule of limited jurisdiction.

Ontario's superior courts have always had jurisdiction to issue a writ of habeas corpus. The availability of certiorari in aid, recognized by the statute, simply ensures that the reviewing court will have access to the record of the proceedings concerning the detention of the applicant.

The rules dealing with habeas corpus should always be given a generous and flexible interpretation. An individual [page633] can properly invoke habeas corpus as a means of challenging increased or secondary detention even though success would not result in the release of the prisoner from a lawful primary detention. Here, the execution of the warrant of surrender would result in appellant's transfer to the custody of the requesting state. This important and far reaching restriction on his residual liberty constitutes a form of secondary detention empowering the superior court to consider the application for the issuance of habeas corpus. To require appellant to wait until the Canadian authorities actually initiated the surrender phase by confining him for the purposes of transfer to the United States before applying for habeas corpus would place an unfair and intolerable burden upon him and would be contrary to the nature of the remedy habeas corpus is designed to provide. The time constraints alone would place the remedy beyond reach.

The provincial superior courts and the Federal Court share concurrent jurisdiction to hear all habeas corpus applications other than those specified in s. 17(6) of the Federal Court Act. The Federal Court Act does not remove the historic and long standing jurisdiction of provincial superior courts

to hear an application for a writ of habeas corpus. To remove that jurisdiction from the superior courts would require clear and direct statutory language.

The appellant was not required to proceed in the Federal Court in spite of any concurrency of jurisdiction. Parliament did not provide a comprehensive statutory scheme of review, tailored to the extradition process.

This Court could appropriately consider appellant's allegation of a reasonable apprehension of bias based upon the statutory scheme. Ample notice was given because it was raised in both the application for leave to appeal and appellant's factum. Respondents were given the opportunity to file any additional evidence and have suffered no real prejudice by the loss of the opportunity to respond to this claim in the courts below.

The decision of the Minister to issue a warrant of surrender pursuant to s. 25 of the Extradition Act must be exercised in accordance with the "principles of fundamental justice". This phrase includes the right to be heard by an unbiased decision-maker. At the adjudicative end of the decision-making spectrum, the appropriate test is: could an informed bystander reasonably perceive bias on the part of the adjudicator? At the [page634] legislative end, the test is: has the decision-maker pre-judged the matter to such an extent that any representations to the contrary would be futile?

The extradition process has two distinct phases. The first encompasses the court proceedings which determine whether a factual and legal basis for extradition exists. It is judicial in its nature and warrants the application of the full panoply of procedural safeguards. If that process results in the issuance of a warrant of committal, then the second phase is activated. When the Minister of Justice exercises his or her discretion in determining whether to issue a warrant of surrender, no lis is in existence. The decision-making process is political in nature and is at the extreme legislative end of the continuum of administrative decision-making. The Minister must weigh the fugitive's representations against Canada's international treaty obligations. This is not a case of a single official's acting as both judge and prosecutor in the same case.

The Minister acted fairly in considering the issuance of the writ of surrender. There was no evidence of improper influence on the part of anyone involved in prosecuting the extradition proceedings, no evidence of the minister's pre-judging the matter, and no evidence of the minister's having an impermissible bias against appellant.

Solicitor-client privilege protected the memorandum prepared by the Minister's staff. It contained nothing that was not known to the appellant apart from the recommendation and was not evidence for use in an adversary proceeding. Failure to disclose did not constitute unfairness.

Per Lamer C.J. and McLachlin J.: Apart from the issue of grounding the confidentiality of the document on solicitor-client privilege, the reasons of Cory J. were concurred with. That issue was specifically left open.

Per La Forest J.: The reasons of Cory J. were agreed with. In considering the issue of surrender, the minister was engaged in making a policy decision rather in the nature of an act of clemency and was entitled to consider the views of her officials who were versed in the matter. She was dealing with a policy matter wholly within her discretion and there was no reason why she should be compelled to reveal these views. A decision [page635] as to whether the memorandum fell with the solicitor-client privilege was therefore unnecessary.

Per Sopinka J.: The reasons of Cory J. were agreed with, subject to the reservation expressed by Lamer C.J.

Cases Cited

By Cory J.

Applied: United States of America v. Cotroni, [1989] 1 S.C.R. 1469; distinguished: R. v. Gamble, [1988] 2 S.C.R. 595; R. v. Miller, [1985] 2 S.C.R. 613; Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643; Morin v. National Special Handling Unit Review Committee, [1985] 2 S.C.R. 662; Pringle v. Fraser, [1972] S.C.R. 821; Re Peiroo and Minister of Employment and Immigration (1989), 69 O.R. (2d) 253; Steele v. Mountain Institution, [1990] 2 S.C.R. 1385; Radulesco v. Canadian Human Rights Commission, [1984] 2 S.C.R. 407; considered: Canada v. Schmidt, [1987] 1 S.C.R. 500; Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177; R. v. Lippé, [1991] 2 S.C.R. 114; Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779; referred to: In re Isbell, [1930] S.C.R. 62; Argentina v. Mellino, [1987] 1 S.C.R. 536; Perka v. The Queen, [1984] 2 S.C.R. 232; R. v. Wigman, [1987] 1 S.C.R. 246; R. v. Warner, [1961] S.C.R. 144; Lizotte v. The King, [1951] S.C.R. 115; Canadian Dredge & Dock Co. v. The Queen, [1985] 1 S.C.R. 662; Dumas v. Leclerc Institute, [1986] 2 S.C.R. 459; Masella v. Langlais, [1955] S.C.R. 263; Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653; Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission), [1989] 2 S.C.R. 879; R. v. Lyons, [1987] 2 S.C.R. 309; Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711; Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623; Solosky v. The Queen, [1980] 1 S.C.R. 821.

By La Forest J.

Referred to: Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 7. Criminal Code, R.S.C. 1970, c. C-34, s. 423(2)(a).

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Department of Justice Act, R.S.C., 1985, c. J-2, ss. 2(1), (2), 4, 5.
Extradition Act, R.S.C., 1985, c. E-23, s. 25.
Federal Court Act, R.S.C., 1985, c. F-7, ss. 17(6)(now part of s. 18 by An Act to Amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act and other acts in consequence thereof, S.C. 1990, c. 8), 18.
Habeas Corpus Act, R.S.O. 1980, c. 193 (am. S.O. 1984, c. 11, s. 182), ss. 1(1), 5.
Immigration Act, R.S.C. 1952, c. 325 (later R.S.C. 1970, c. I-2).
Parole Act, R.S.C., 1985, c. P-2.
Securities Act, R.S.O. 1980, c. C-466.

Authors Cited

La Forest, Anne Warner. La Forest's Extradition to and from Canada, 3rd ed. Aurora: Canada Law Book, 1991.

APPEAL from a judgment of the Ontario Court of Appeal (1990), 67 D.L.R. (4th) 639, 48 C.R.R. 187, dismissing an appeal from a judgment of Doherty J. (1989), 70 O.R. (2d) 498, 63 D.L.R. (4th) 267, 53 C.C.C. (3d) 464, 48 C.R.R. 179 -- made after ruling that habeas corpus lies: (1989), 53 C.C.C. (3d) 385, 48 C.R.R. 165 -- dismissing an application for habeas corpus from an order of Warren Dist. Ct. J. committing accused for extradition. Appeal dismissed.

Henry S. Brown, Q.C., for the appellant.
J. E. Thompson, Q.C. and D. D. Graham Reynolds, for the respondents.

Solicitors for the appellant: Gowling, Strathy & Henderson, Ottawa.
Solicitors for the respondents: The Attorney General of Canada, Ottawa.

The following are the reasons delivered by

1 **LAMER C.J.**:-- I concur with the reasons of my colleague Justice Cory, except with respect to the issue of the solicitor-client privilege. While it may well be that the nature of the relationship involved here makes this document confidential, I would not want to decide in this case whether the confidentiality is grounded on the solicitor-client privilege. Given the conclusion that s. 7 of the Canadian Charter of Rights and Freedoms has not been violated, [page637] we do not need to deal with this issue in this case.

The following are the reasons delivered by

2 LA FOREST J.:-- I fully agree with Justice Cory including (apart from some reservation as to nomenclature) his reasons regarding the Minister's privilege to refuse to reveal a confidential document. In my view, in considering the issue of surrender in the present case, the Minister was engaged in making a policy decision rather in the nature of an act of clemency. In making a decision of this kind, the Minister is entitled to consider the views of her officials who are versed in the matter. I see no reason why she should be compelled to reveal these views. She was dealing with a policy matter wholly within her discretion; see Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735, at pp. 753-54. It is thus unnecessary to hold that the Minister's privilege to keep the memorandum confidential falls within the solicitor-client privilege, and I prefer not to do so because I have not weighed the full implications of so holding.

The judgment of L'Heureux-Dubé, Cory and Iacobucci JJ. was delivered by

CORY J.:--

Factual Background

3 There are two issues that are raised on this appeal.

4 First, does this Court have jurisdiction to hear the appeal?

5 Secondly, if the necessary jurisdiction does exist, then did the Minister of Justice breach the principles of fundamental justice guaranteed by s. 7 of the Canadian Charter of Rights and Freedoms in reaching the decision to surrender Mr. Idziak?

[page638]

6 The appellant is a 67-year-old American citizen. He is a prospector presently residing in Blind River with his wife of 31 years. He has lived in Canada since 1956 and acquired landed immigrant status in 1962. In 1981, Mr. Idziak was charged with conspiring to commit fraud in excess of $200, theft over $200, and contravening Ontario's Securities Act, R.S.O. 1980, c. C-466. In 1982, he pleaded guilty to two counts of conspiracy contrary to the provisions of what was then s. 423(2)(a) of the Criminal Code, R.S.C. 1970, c. C-34. He was sentenced to 60 days on each count to be served concurrently and the Crown withdrew the remaining charges.

7 On October 5, 1983, Mr. Idziak was indicted in the State of Michigan on 41 counts alleging that he had participated in a conspiracy to obtain funds from investors in Michigan through fraudulent representations regarding two Canadian corporations. The United States of America sought his extradition on these counts. In 1987, Mr. Idziak was arrested on a warrant of apprehension and brought before the District Court of Ontario for an extradition hearing. Agents of the Attorney General appeared as prosecutors acting on behalf of the United States. Following the hearing, a warrant for his committal was issued on January 26, 1988. Mr. Idziak then applied to the Supreme Court of Ontario seeking to quash the warrant of committal. He was in part successful on this application. The prosecution appealed the order and Mr. Idziak cross-appealed on the remaining charges on which the warrant of committal was outstanding. Both the appeal and the cross-appeal were abandoned.

8 Mr. Idziak then applied to the then Minister of Justice, the Honourable Doug Lewis, pursuant to s. 25 of the Extradition Act, R.S.C., 1985, c. E-23, seeking to have the Minister refuse to exercise his discretionary authority to surrender Mr. Idziak to the U.S. authorities. On May 10, 1989, the Minister of Justice wrote to Mr. Idziak advising him that no grounds existed to justify a refusal to surrender [page639] him. The Minister then signed the warrant of surrender.

9 On May 29, 1989, counsel for Mr. Idziak learned for the first time of the existence of an internal memorandum submitted to the Minister of Justice dealing with the case. Before making his decision the Minister had quite naturally reviewed this document. A copy of it had never been delivered to Mr. Idziak or his counsel although a request was made for it. On July 5, 1989, Mr. Idziak commenced these proceedings by applying to the Supreme Court of Ontario for a writ of habeas corpus with certiorari in aid to set aside the warrant of surrender on the grounds that the Minister had denied his rights guaranteed by s. 7 of the Charter. The application was dismissed as was the appeal to the Court of Appeal. This appeal is from the decision of the Court of Appeal.

Relevant Legislation

10

Canadian Charter of Rights and Freedoms

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Department of Justice Act, R.S.C., 1985, c. J-2

2.(1) There is hereby established a department of the Government of Canada called the Department of Justice over which the Minister of Justice appointed by commission under the Great Seal shall preside.

(2) The Minister is ex officio Her Majesty's Attorney General of Canada, holds office during pleasure and has the management and direction of the Department.

...

4. The Minister is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada and shall

(a) see that the administration of public affairs is in accordance with law;

[page640]

(b) have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces;
(c) advise upon the legislative Acts and proceedings of each of the legislatures of the provinces of Canada, and generally advise the Crown on all matters of law referred to the Minister by the Crown; and
(d) carry out such other duties as are assigned by the Governor in Council to the Minister.

5. The Attorney General of Canada

(a) is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, in so far as those powers and duties are applicable to Canada, and also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when the Constitution Act, 1867, came into effect, in so far as those laws under the provisions of the said Act are to be administered and carried into effect by the Government of Canada;
(b) shall advise the heads of the several departments of the Government on all matters of law connected with such departments;

(c) is charged with the settlement and approval of all instruments issued under the Great Seal;
(d) shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada; and
(e) shall carry out such other duties as are assigned by the Governor in Council to the Attorney General of Canada.

Extradition Act, R.S.C., 1985, c. E-23

25. Subject to this Part, the Minister of Justice, on the requisition of the foreign state, may, under his hand and seal, order a fugitive who has been committed for surrender to be surrendered to the person or persons who are, in the Minister's opinion, duly authorized to receive the fugitive in the name and on behalf of the foreign state, and the fugitive shall be so surrendered accordingly.

[page641]

Earlier Proceedings

The Minister of Justice

11 The Minister wrote to Mr. Idziak and assured him that he had considered all his submissions with care. He went on to explain that, in light of the importance of Canada's international obligations under extradition treaties, the refusal to surrender a fugitive could only occur in compelling cases, related either to specific exceptions in the treaty or to situations where it was required by the principles of fundamental justice guaranteed in the Constitution. The Minister was of the view that neither of these special exceptions pertained in Mr. Idziak's case.

Supreme Court of Ontario

Doherty J. (September 1, 1989 hearing re: jurisdiction) (1989), 53 C.C.C. (3d) 385, 48 C.R.R. 165

12 Counsel for the Minister of Justice challenged the jurisdiction of the Supreme Court of Ontario to hear the application for a writ of habeas corpus against the Minister's warrant of surrender. It was submitted that the writ of habeas corpus was an inappropriate remedy because Mr. Idziak was detained pursuant to the lawful warrant of committal and not the impugned warrant of surrender. Further it was submitted that the applicant should have sought judicial review of the Minister's decision by means of the procedures set out in the Federal Court Act, R.S.C., 1985, c. F-7.

13 Doherty J. recognized that Mr. Idziak was not presently in detention as a result of the impugned warrant of surrender. He held however that imminent custody provides a sufficient basis for invoking the habeas corpus remedy. He cited in support of his conclusion the decision In re Isbell, [1930] S.C.R. 62. As well he relied on R. v. Gamble, [1988] 2 S.C.R. 595, for his position that the courts should refrain from applying technical rules to obstruct access to relief under the Charter.

[page642]

14 Doherty J. also rejected the Minister's submission that Mr. Idziak should have sought the review in the Federal Court, Trial Division, pursuant to s. 18 of the Federal Court Act. He held that, in light of its institutional expertise, a provincial superior court was the proper forum for an application for a writ of habeas corpus in the extradition process. He therefore chose to exercise his jurisdiction in deference to the choice of forum made by the applicant.

> Doherty J. (October 30, 1989 hearing re: application for a writ of habeas corpus) (1989), 70 O.R. (2d) 498, 63 D.L.R. (4th) 267, 53 C.C.C. (3d) 464, 48 C.R.R. 179

15 Two positions were put forward on behalf of Mr. Idziak. First, it was said that the procedure followed by the Minister in deciding to surrender the applicant contravened the principles of fundamental justice guaranteed by s. 7 of the Charter. Second, it was argued that even if the procedure survives constitutional scrutiny the decision to surrender the appellant breached the substantive component of s. 7.

16 Doherty J. in his careful reasons held that s. 25 of the Extradition Act merely empowers a Minister of Justice to consider the existence of exceptional circumstances which would merit a refusal to issue an order of surrender. He noted that a decision made pursuant to s. 25 must, to a large extent, involve the weighing of policy concerns rather than the adjudication of a legal issue. In those circumstances, he concluded that the appropriate standard of fairness required that the applicant should have sufficient access to the decision-maker to bring forward any argument or fact which a fair-minded person would need to reach a rational conclusion.

17 The applicant sought the disclosure of a confidential memorandum given to the Minister by a member of the Department of Justice. Doherty J. had earlier seen and reviewed the document and ruled that it was protected by solicitor/client privilege. He went on to reject the applicant's claim [page643] that either the use or failure to disclose this confidential document compromised procedural or substantive fairness.

18 Doherty J. observed that this Court in Argentina v. Mellino, [1987] 1 S.C.R. 536, had recognized that s. 7 of the Charter imposes a constitutional standard on the exercise of the discretion granted to the Minister of Justice by s. 25 of the Extradition Act. However, he held that the humanitarian considerations put forward by Mr. Idziak did not substantiate a claim of exceptional circumstances. As well, he discounted the relevance of Mr. Idziak's prior conviction on factually related, but not identical, offences in Canada. Lastly, he dismissed the argument that delay by American authorities should prevent the surrender; he noted that such matters should normally be left to the courts of the requesting state. In the result, Doherty J. concluded that both the manner in which the Minister reached his decision and the decision itself accorded with principles of fundamental justice; he therefore dismissed the application for a writ of habeas corpus against the warrant of surrender.

Ontario Court of Appeal (1990), 67 D.L.R. (4th) 639, 48 C.R.R. 187

> the dictates of the Charter" (p. 455) and that even "disputes of a political or foreign policy nature may be properly cognizable by the courts" (p. 459)....
>
> I have no doubt...that in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances....Situations...may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7.

47 La Forest J. went on to emphasize that, although the Charter applies to the executive decision to surrender the fugitive, the court should pay due deference to the detailed information the executive would possess and to the expert knowledge it [page656] would exercise in making the decision. On page 523, he wrote:

> The courts have the duty to uphold the Constitution. Nonetheless, this is an area where the executive is likely to be far better informed than the courts, and where the courts must be extremely circumspect so as to avoid interfering unduly in decisions that involve the good faith and honour of this country in its relations with other states. In a word, judicial intervention must be limited to cases of real substance.

48 It is clear then that the application of the Charter to the extradition procedure empowers the courts to examine the fairness of the extradition procedure set out in the legislation. Further, the authorities make it clear that the decision of the Minister to issue a warrant of surrender pursuant to s. 25 of the Extradition Act must be exercised in accordance with the principles of fundamental justice.

49 It has been held that the phrase "principles of fundamental justice" refers to both substantive and procedural rights. The phrase was considered in Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177. There, at pages 212-13, Wilson J. writing for the Court stated:

> ...at a minimum the concept of "fundamental justice" as it appears in s. 7 of the Charter includes the notion of procedural fairness articulated by Fauteux C.J. in Duke v. The Queen, [1972] S.C.R. 917. At page 923 he said:
>
> > Under s. 2(e) of the Bill of Rights no law of Canada shall be construed or applied so as to deprive him of "a fair hearing in accordance with the principles of fundamental justice". Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.

50 The elements of fairness form a minimum standard of s. 7 protection. The extent and nature of that protection, which is based upon the common law notion of procedural fairness, will depend

[page657] upon the context in which it is claimed. See, for example, Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653 and Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission), [1989] 2 S.C.R. 879, at pp. 895-96. To determine the nature and extent of the procedural safeguards required by s. 7 a court must consider and balance the competing interest of the state and the individual. See R. v. Lyons, [1987] 2 S.C.R. 309, at p. 361, and Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711, at p. 744.

Did the Minister's Review Raise a Reasonable Apprehension of Bias?

(a) Is There Institutional Bias Created by the Extradition Process?

51 The extradition process in which Mr. Idziak was involved must then meet the minimal standards of procedural fairness. These standards will include the right to be heard by an unbiased decision-maker. It is the appellant's position that the Extradition Act creates an impermissible apprehension of bias. The issue of institutional bias was considered in R. v. Lippé, [1991] 2 S.C.R. 114. Chief Justice Lamer, with whom the majority agreed on this point, defined the threshold test for a party claiming institutional bias in this way at p. 144:

> Step One: Having regard for a number of factors including, but not limited to, the nature of the occupation and the parties who appear before this type of judge, will there be a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases?
>
> Step Two: If the answer to that question is no, allegations of an apprehension of bias cannot be brought on an institutional level, but must be dealt with on a case-by-case basis. [Emphasis in original.]

52 The requirement that the alleged bias occur in a substantial number of cases is met in this case as the challenged overlapping of the roles of the Minister of Justice in the extradition process would [page658] apply to every extradition proceeding. The difficulty arises in applying step two which requires a court to consider the "nature of the occupation" and the parties. In order to comply with this aspect of the test, it is necessary to examine the character of the impugned provisions.

53 It has been seen that the extradition process has two distinct phases. The first, the judicial phase, encompasses the court proceedings which determine whether a factual and legal basis for extradition exists. If that process results in the issuance of a warrant of committal, then the second phase is activated. There, the Minister of Justice exercises his or her discretion in determining whether to issue a warrant of surrender. The first decision-making phase is certainly judicial in its nature and warrants the application of the full panoply of procedural safeguards. By contrast, the second decision-making process is political in its nature. The Minister must weigh the representations of the fugitive against Canada's international treaty obligations. The differences in the procedures were considered in Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779, at pp. 798-99:

> In this two-step process any issues of credibility or claims of innocence must be addressed by the extradition judge. Kindler had ample opportunity before Pinard J. to challenge the credibility of the evidence led against him at his trial. This he did not do. It was therefore not open to him to seek to adduce fresh evidence before the Minister of Justice as to the credibility of witnesses or his innocence of the offence. The Minister was obliged neither to consider such issues, nor to hear viva voce evidence.
>
> The Minister was not required to provide detailed reasons for his decision. Nonetheless he expressly stated in his letter to counsel for Kindler that he had "examined this case thoroughly and with care" and that the decision was "based on a review of the evidence presented at trial, the extradition proceedings and the materials and representations [which had been] submitted." Among those representations were the written and oral submissions of counsel which dealt with various aspects of the case, including the method of execution used in Pennsylvania. The material presented included a letter from Kindler. [page659] The Minister's letter indicates that he considered the submissions and material and found them insufficient to overcome the countervailing policy concerns.
>
> The Minister, both in determining what evidence he should consider on the application and in reaching his decision, complied with all the requirements of natural justice. It follows that the appellant's submissions cannot be accepted.

54 Parliament chose to give discretionary authority to the Minister of Justice. It is the Minister who must consider the good faith and honour of this country in its relations with other states. It is the Minister who has the expert knowledge of the political ramifications of an extradition decision. In administrative law terms, the Minister's review should be characterized as being at the extreme legislative end of the continuum of administrative decision-making.

55 The appellant contends that a dual role has been allotted to the Minister of Justice by the Extradition Act. The Act requires the Minister to conduct the prosecution of the extradition hearing at the judicial phase and then to act as adjudicator in the ministerial phase. These roles are said to be mutually incompatible and to raise an apprehension of bias on their face. This contention fails to recognize either the clear division that lies between the phases of the extradition process, each of which serves a distinct function, or to take into account the separation of personnel involved in the two phases.

56 It is correct that the Minister of Justice has the responsibility to ensure the prosecution of the extradition proceedings and that to do so the Minister must appoint agents to act in the interest of the requesting state. However the decision to issue a warrant of surrender involves completely different considerations from those reached by a court in an extradition hearing. The extradition hearing is clearly judicial in its nature while the actions of the Minister of Justice in considering whether to issue a warrant of surrender are primarily political in nature. This is certainly not a case of a single official's acting as both judge and prosecutor in the [page660] same case. At the judicial phase the fugitive possesses the full panoply of procedural protection available in a court of law. At the ministerial phase, there is no longer a lis in existence. The fugitive has by then been judicially

committed for extradition. The Act simply grants to the Minister a discretion as to whether to execute the judicially approved extradition by issuing a warrant of surrender.

57 It is significant that the appellant's argument has already been rejected by this Court in United States of America v. Cotroni, [1989] 1 S.C.R. 1469. At page 1500, La Forest J. noted:

> ... I find the argument that the fact that the executive discretion to refuse surrender and the duty to present requests for extradition in court, both fall within the responsibilities of the Minister of Justice, somehow create an unacceptable conflict to have no merit.

58 I agree with this comment. Certainly the arrangement could not raise apprehension of bias in a fully informed observer. The appellant's allegation of institutional bias must fail.

(b) Is There Actual Bias Demonstrated by the Acts of the Minister?

59 The appellant next raised the argument that in the particular circumstances of this case, the reasonably informed person could have had a reasonable apprehension of bias by the Minister against the appellant. The determination of bias in a specific case will depend upon the characterization of the decision-maker's function. Administrative decision-making covers a broad spectrum. At the adjudicative end of the spectrum, the appropriate test is: could a reasonably informed bystander reasonably perceive bias on the part of the adjudicator? At the opposite end of the continuum, that is to say the legislative end of the spectrum, the test is: has the decision-maker pre-judged the matter to [page661] such an extent that any representations to the contrary would be futile? See Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623, at p. 638.

60 The basis for the distinction is that, in an adjudicative proceeding, the parties' confidence in the result will depend upon the decision-maker's adhering to a standard of judicial impartiality. On the other hand, an administrative body created to determine policy issues may need the expert knowledge of members who are representative of interested parties. The legislative goal in creating such administrative bodies would be frustrated if courts held their members to the strict reasonable apprehension of bias standard. The exercise by the Minister of Justice of the authority to surrender an individual already judicially committed for extradition clearly falls in the legislative end of the continuum. The closed mind test applied in Newfoundland Telephone, supra, is applicable in this case.

61 There is no suggestion that the Minister was improperly influenced by anyone involved in prosecuting the extradition proceedings against Mr. Idziak nor is there any evidence that the Minister in any way pre-judged the matter. The appellant has certainly not established that the Minister as decision-maker held an impermissible bias against him. This submission of the appellant cannot be sustained.

Did the Failure to Disclose the Internal Memorandum Breach the Appellant's Procedural Rights?

62 The appellant alleges that the Minister of Justice violated the principles of audi alteram partem by considering a confidential memorandum when determining whether to issue a warrant of surrender. That memorandum was prepared by staff counsel and not by the agents of the Minister who

acted in the judicial proceedings in the District Court which resulted in the issuing of the warrant [page662] of committal. It included: a summary of all the proceedings involving Mr. Idziak, a summary of Mr. Idziak's representations to the Minister concerning the surrender decision, and a recommendation. The appellant did not learn of this document until after the Minister had issued the warrant. The appellant contends that this breached the requirements of procedural fairness. The appellant has maintained that he should have received a copy of the memorandum so that he could have prepared his own representations with full knowledge of "the case against him". The appellant asserts this claim despite the contention of the Minister upheld in the courts below that the document should enjoy solicitor-client privilege and should not have been disclosed.

63 Once again there can be no doubt that the Minister, in considering the issuance of the writ of surrender, must act fairly. What must be assessed is whether the legislative scheme of ministerial review achieves a reasonable balance between the interest of the state and that of the individual. Mr. Idziak has of course a right to expect that the Minister will exercise his or her discretion fairly. The state as well has an interest in honouring Canada's international commitment to the extradition process. In perpetrating crimes, criminals have never had any particular respect for international boundaries. Fraud and particularly offences involving narcotics are prime examples of such crimes. Extradition treaties support the endeavours of law enforcement agencies on both sides of our international borders. It is certainly appropriate that criminals should be prosecuted in the country where the crime was allegedly committed and where the persons and witnesses most interested in bringing the accused to trial may live. As well, the state from which a fugitive is requested has a legitimate interest in seeing that it does not become a haven for criminals. La Forest, in her helpful text La Forest's Extradition to and from Canada (3rd ed. 1991), comments at p. 15 to this effect:

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> The desirability of the [extradition] procedure is evident, especially in these days of rapid communication. It strengthens the law enforcement agencies within the state requesting the surrender by reducing the possibility of its criminals escaping. And it is to the advantage of the state to which a criminal has escaped, for no country desires to become a haven for malefactors. These benefits could be obtained, it is true, if states punished criminals for offences committed outside their jurisdiction -- such as may be done, for instance, in the cases of piracy and of bigamy committed abroad by a Canadian citizen who has left Canada for the purpose -- but it is better in general that a crime be prosecuted in the country where it is committed and where the witnesses and the persons most interested in bringing the criminals to justice reside.

64 All Canadians have a very real interest in seeing that Canada's obligations under our extradition treaties are properly fulfilled. If they were not, it would be increasingly difficult to expect that our country's requests would be granted to extradite accused persons to Canada.

65 The Minister quite properly claims solicitor-client privilege for the memorandum. As a result of the nature of the proceedings before the Minister and the conclusion that s. 7 of the Charter has not been violated, very little need be said on this issue and what little will be said should be re-

stricted in the application to the situation presented on this appeal. It is noteworthy that, apart from the recommendation, there was nothing in the document that was not known to the appellant. Further the confidential memorandum was not evidence to be used in an adversary proceeding. Rather, it was a briefing note to the Minister from a staff member who did not have any interest in the outcome. I agree with the findings and conclusion of Doherty J. that this document was indeed privileged. It meets the criteria outlined in Solosky v. The Queen, [1980] 1 S.C.R. 821 at p. 837. As a result, it did not have to be disclosed to the appellant. The failure to disclose it did not constitute unfairness viewed in [page664] light of the nature of the proceedings before the Minister.

66 The appellant relied upon the decision of Radulesco v. Canadian Human Rights Commission, [1984] 2 S.C.R. 407. Yet that case is clearly distinguishable. There the decision-making body had conceded that access should have been granted to the confidential document. It is far different from the case at bar, where the Minister has constantly and correctly claimed solicitor-client privilege for the document.

Summary

67 In summary, it can be said that:

(a) there is no institutional bias or unfairness in the statutory procedures enacted for the extradition of an individual;
(b) there was no apprehension of bias demonstrated at any point in the course of Mr. Idziak's hearings;
(c) viewed in light of the nature of the ministerial decision whether to issue a warrant of surrender, no unfairness was demonstrated by the refusal to produce the memorandum of a Department of Justice lawyer prepared for the Minister. Taken in the context of the ministerial decision, the document was properly entitled to solicitor-client privilege and need not have been produced.

Disposition

68 In the result the appeal must be dismissed.

The following are the reasons delivered by

69 SOPINKA J.:-- Subject to the reservation expressed by Chief Justice Lamer which I share, I agree with Justice Cory.

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