
CANADA / JUDGMENT

Stevens v. Canada (Attorney General)

2002 FCT 2

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Stevens v. Canada (Attorney General)

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Date: 20020103

Docket: T-2682-87

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BETWEEN:

SINCLAIR STEVENS

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR ORDER AND ORDER

HENEGHAN J.

INTRODUCTION

- [1] Mr. Sinclair M. Stevens (the "Plaintiff") appeals from an Order of Prothonotary Lafrenière dated August 8, 2000. In his order, the Prothonotary dismissed a request by the Plaintiff for leave to conduct discovery examination of the Honourable Mr. Justice W. D. Parker, Commissioner ("Commissioner Parker"), and other discretionary orders. The present motion seeks an order reversing the Prothonotary, as well as an order allowing the examination of Commissioner Parker, including cross-examination, out of court and the use of that evidence upon the trial of this matter.

FACTS

- [2] On May 15, 1986, Commissioner Parker, then Chief Justice of the Supreme Court of Ontario, High Court Division, was appointed a Commissioner under Part I of the Inquiries Act, R.S.C. 1985, c. I-11, as amended, by Order in Council with a mandate to conduct an inquiry into:
- 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;
 - b) whether the Honourable Sinclair M. Stevens was in real or apparent conflict of interest as defined in 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.
- [3] Commissioner Parker's report was submitted to the Governor-in Council on December 3, 1987. On December 18, 1987, the Plaintiff instituted this action in which he named both Commissioner Parker and the Attorney General of Canada as Defendants. In his Statement of Claim, the Plaintiff alleges that the report of the Commission has caused him injury and damaged his reputation. The Statement of Claim alleges that Commissioner Parker acted outside his jurisdiction and in excess of his jurisdiction, and failed to act in accordance with the principles of natural justice in conducting the inquiry. The Plaintiff, in his prayer for relief, seeks a declaration that the Commissioner's report be set aside and declared to be of no force and effect.

- [4] In March 1997, Commissioner Parker moved to be struck as a party Defendant in the action. In response, the Plaintiff took the position that the presence of Commissioner Parker as a Defendant was necessary to ensure a full and complete adjudication of his claim. The motion by Commissioner Parker did not succeed before the Trial Division, but on appeal, the Federal Court of Appeal ordered that Commissioner Parker be struck as a party Defendant.
- [5] The Plaintiff had attempted to examine Commissioner Parker in writing prior to his removal as a party to the action. Commissioner Parker declined to answer written interrogatories pending a final decision with respect to his status in the action. Since his removal as a party, Commissioner Parker has resisted any further discovery attempts by the Plaintiff.
- [6] The Plaintiff also attempted to obtain the information sought from the Commissioner through the discovery of the representative of the Defendant. However, the government deponent had no knowledge of the internal workings of the Commission. The Plaintiff also made a request pursuant to the Access to Information Act, R.S.C. 1985, c.A-1, as amended, but this proved ineffective due to statutory exemptions which greatly limited the extent of disclosure.
- [7] The Plaintiff then filed a motion seeking to examine Commissioner Parker as a non-party pursuant to the Federal Court Rules, 1998, SOR/98-106, Rule 238. The decision in relation to that motion is now under appeal.

DECISION OF THE PROTHONOTARY

- [8] The motion which was before the Prothonotary requested an order allowing the examination and cross-examination for trial of Commissioner Parker out of court. Rule 238 sets out four factors which the courts must consider before granting leave to examine a non-party. These factors are as follows:
- a) the person may have information on an issue in the action;
 - b) the party seeking discovery has been unable to obtain the information informally from that person or from any source by any other reasonable means;
 - c) it would be unfair to deprive the party of an opportunity to question the non-party before trial; and
 - d) the examination will not cause undue delay, inconvenience or expense to the non-party or to the other party.

- [9] The Prothonotary denied the Plaintiff's motion. He concluded that while the Plaintiff had met conditions (a), (c) and (d) as set out in Rule 238(3), he was not satisfied that the Plaintiff had exhausted all reasonable means in obtaining the required information from other sources. Specifically, questions concerning the scope of the terms of reference for the inquiry and the definition of the term "conflict of interest" should and could have been directed to the Defendant.
- [10] However, the Prothonotary found that there was one area of examination sought by the Plaintiff which met all of the conditions of Rule 238(3), that is concerning the role and activities of Commission counsel following the public hearing phase of the inquiry and that this information is clearly unavailable to the Plaintiff through other sources. The Prothonotary also found that the answers to the questions proposed by the Plaintiff are not protected by solicitor-client privilege. He then went on to consider whether the principles of judicial independence and deliberative secrecy apply to preclude the compellability of evidence from Commissioner Parker.
- [11] The Prothonotary referred to *Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal)* (1993), 99 D.L.R. (4th) 682 (Ont. Div. Ct.) for the proposition that valid reasons for believing that the rules of natural justice were not followed must be established before deliberative secrecy can be lifted. He then considered whether the following three facts presented by the Plaintiff constitute valid reasons for believing that the rules of natural justice were not followed by Commissioner Parker. These facts were:
- a) an article appeared in the *Globe and Mail* in November 1986 which reported that Mr. Scott, one of the Commission counsel, said that he would help Commissioner Parker write his report;
 - b) a meeting subsequently took place with counsel appearing at the inquiry and Commissioner Parker to address concerns regarding the role of Commission counsel; and
 - c) Commission counsel recorded over 1700 hours of work and billed more than \$230,000.00 in fees after the completion of the public hearings, between February 1987 and December 1987.
- [12] The Prothonotary concluded that these facts did not constitute sufficient or valid reasons to meet the very high threshold for piercing deliberative secrecy. He concluded that the Plaintiff was speculating that Commission counsel may have been involved in writing the Commission report and rejected that speculation as a valid reason for lifting deliberative secrecy. In the result, he said as follows:

The plaintiff is evidently grasping at straws, searching for some evidence that Commission counsel acted improperly in his subsequent dealings with Commissioner Parker. This is not in my view an exceptional case which warrants the Court's intervention. Therefore, I uphold Commissioner Parker's objection that he is not compellable as a witness based on deliberative secrecy.

[2001] 1 F.C. 156, p. 170.

PLAINTIFF'S SUBMISSIONS

- [13] The Plaintiff first addresses the standard of review applicable to an appeal from an order of the Prothonotary. He acknowledges that the test is the one set by the Federal Court of Appeal in *Canada v. Aqua Gem Investments Ltd.*, [1993] 2 F.C. 425, where the majority held that discretionary orders of a prothonotary should not be disturbed unless they are clearly wrong, in that the exercise of discretion was based on a wrong principle of law or misapprehension of the facts, or the orders raise questions vital to the ultimate disposition of the proceedings. In these circumstances, the appeal will proceed on the basis of a hearing *de novo*.
- [14] In the present case, the Plaintiff argues that the Prothonotary did not assess the facts in their proper context and failed to appreciate the evidence. His order impacts on a key issue in the action, that is the allegation that there was a breach of the rules of natural justice and of section 7 of the Charter of Rights and Freedoms, resulting from the process adopted by the Commission.
- [15] Specifically, the Plaintiff says that the Prothonotary failed to consider the context of the evidence about the role of Commission counsel, particularly in light of the fact that some 1700 hours of billable time were recorded by Commission counsel after the close of the public hearings and the presentation of submissions by counsel, including Commission counsel. The Plaintiff also refers to the adversarial role played by Commission counsel during the hearing and the introduction of new issues of alleged conflict of interest which were not part of the original terms of reference for the Commission of Inquiry.
- [16] As well, the Plaintiff says that the Prothonotary failed to assess the context of the meeting held in Chambers between Commissioner Parker, Commission counsel and Commission for parties involved before the Commission, at which the role of Commission counsel in the writing of the report was discussed.
- [17] The Plaintiff says that the Prothonotary failed to consider the content of the report and the absence of a standard for "conflict of interest", in context. Finally, the Plaintiff refers to the extension of employment contracts for junior counsel until April 17th, 1987, after the close of the public hearings and presentation of submissions, and says that the Prothonotary failed to consider the evidence about these contracts in the context of the alleged breach of the principles of natural justice resulting from the role played by Commission counsel.
- [18] The Plaintiff submits that the failure of the Prothonotary to look at this evidence in context leads to the conclusion that he misapprehended the evidence on a matter vital to this case, that is concerning the alleged breach of the principles of natural justice, and that his order should be reviewed on a *de novo* basis.

- [19] The Plaintiff's next argument is that the Prothonotary erred in concluding that the principles of judicial independence and deliberative secrecy applied so as to preclude Commissioner Parker from being compelled to testify. He argues that in *Tremblay v. Québec (Commission des Affaires Sociales)* (1992), 90 D.L.R. (4th) 609 at 619, the Supreme Court of Canada said that quasi judicial tribunals cannot rely on deliberative secrecy to the same extent as the courts of justice. Furthermore, deliberative secrecy can be lifted when there are valid reasons for believing that the rules of natural justice were not followed; see *Glengarry*, *supra*.
- [20] The Plaintiff argues that the fact that Commission counsel billed 1700 hours together with his statement that he would help Commissioner Parker write his report, creates the appearance that counsel has participated in the adjudicative process. In turn, this leads to an apprehension of bias and a denial of natural justice. In this regard, the Plaintiff relies on the decision 2747-3174 *Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919. Even if the decision making process does not actually interfere with the freedom of the decision-maker, it must not create an appearance of bias or lack of independence. Where there is an appearance or suspicion of such bias, it is crucial to determine the actual facts of the matter.
- [21] He also argues that the threshold for inquiry into procedural, as opposed to substantive, matters is lower. He relies on the following statement by Justice Gonthier in *Tremblay*, *supra*, at page 618:

In my opinion, the objections made by the Commission should be dismissed. The questions raised by the respondent did not touch on matters of substance or the decision-makers' thinking on such matters. These questions were directed instead at the formal process established by Commission to ensure consistency in its decisions.

[Emphasis in original]

- [22] The Plaintiff argues that some of the evidence sought from Commissioner Parker does not touch on substantive matters but deals with the process of consultation between Commission counsel and himself. Accordingly, deliberative secrecy does not apply to the procedural non-substantive information sought from Commissioner Parker. Deliberative secrecy should be lifted from the remainder of the information sought because there are valid reasons for concern that the rules of natural justice were violated in the course of the Commission of Inquiry.
- [23] The Plaintiff's third argument is that the Prothonotary erred in concluding that it was not necessary to deal with his request to examine Commissioner Parker out of court pursuant to Rule 271.

- [24] In this case, Commissioner Parker is of advanced years and spends part of his time outside of Ontario. It will be more efficient to arrange his examination for trial out of court to accommodate his schedule. As well, it would be more respectful of his former office to conduct his examination for trial out of court.
- [25] The Plaintiff's final argument is that the Prothonotary erred in failing to find that this is an appropriate case to order the cross-examination of Commissioner Parker. He submits that he has established that an order allowing the out of court examination of the Commissioner would be appropriate and the only outstanding issue is whether he should have the opportunity to cross-examine the Commissioner.
- [26] A party who calls an adverse party as a witness is entitled to cross-examine him or her, while the party to whom the witness is friendly may only ask non-leading questions; see *Whiten v. Pilot Insurance Co.* (1996), 27 O.R. (3d) 479 (Gen. Div.). The same reasoning should apply in this case.
- [27] Commissioner Parker has shown that he is adverse in interest to Mr. Stevens. Since his removal as a party he has maintained an adversarial stance by refusing to co-operate with the Plaintiff, as demonstrated by his refusal to answer written interrogatories and his opposition to this motion. In these circumstances, the interests of justice and the integrity of the adversarial system will best be served by allowing the Plaintiff the opportunity to cross-examine the Commissioner.

RESPONDENT'S SUBMISSIONS

- [28] The Respondent argues three issues. First, she argues that the Plaintiff has not satisfied the conditions required for the granting of leave to examine a non-party for discovery and to examine a witness before trial, pursuant to Rules 238 and 271 respectively. The Respondent says that questions relating to the alleged discussion between the Commissioner and all counsel involved in the Commission of Inquiry, to the effect that Commission counsel would not participate in drafting the report, can be addressed to the Plaintiff's own counsel who were present at the meeting when these discussions allegedly took place.
- [29] The questions proposed by the Plaintiff concerning the concept of "conflict of interest" as defined and adopted by the Commission can be answered either by the Plaintiff himself or are answered by reference to the documentary record. Questions relating to the particulars of notice given to the Plaintiff with respect to the scope of the inquiry and the standard against which his conduct would be measured are addressed in the Commissioner's report which speaks for itself.
- [30] Concerning Rule 271, the Respondent submits that the Prothonotary was correct when he found that the mere fact that the Commissioner is of advanced age would warrant the relief requested.

- [31] Second, the Respondent argues that the areas of examination proposed by the Plaintiff would necessarily involve the breach of solicitor-client privilege. While upholding the privilege attaching to communications between the Commissioner and Commission counsel, the Prothonotary would allow the Commissioner to be examined on areas relating to the role in activities of the Commission counsel following the public hearings phase of the inquiry. The Respondent says that the Prothonotary erred in this regard, in drawing a distinction between communications between the Commissioner and his counsel, and the activities carried out by counsel.
- [32] The Respondent refers to the status of Commissions of Inquiry as ad hoc bodies that are created, when necessary, by the executive branch of the government in order to serve an important investigative function by investigating issues, events or series of events. In this regard, the Respondent relies on the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at 457 ("Krever"). Commissioners of inquiry are extensions of the executive, not the judicial, branch of the government and as such do not have a status that is independent of the executive branch; see *Dixon v. Canada (Governor in Council)*, [1997] 3 F.C. 169 (C.A.).
- [33] The Respondent argues that the fact that the Commissioner is an arm of the executive branch of government does not preclude the application of solicitor-client privilege to the legal advice sought from and provided by Commission counsel; see *R. v. Campbell*, [1999] 1 S.C.R. 565 at 601-605.
- [34] The Respondent relies on the principles concerning solicitor-client privilege which were described in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 at 348 as follows:
- 1) the promotion of frank communications between solicitor and client where legal advice is being sought or given;
 - 2) facilitating access to justice;
 - 3) recognizing the inherent value of personal autonomy;
 - 4) and affirming the efficacy of the adversarial process.
- [35] Protection of the Commissioner from the compulsion of answering questions concerning the role which he assigned to Commission counsel and the advice given to him by his counsel, is consistent with the rationales underlying the solicitor-client privilege as discussed in *Chrusz*, supra. The proposed questions contained in the Plaintiff's written interrogatories show that he is really seeking information related to the communications that passed between the Commissioner and Commission counsel.

- [36] The Respondent argues that it would be practically impossible for the Commissioner to answer questions as to whether he acted on the advice provided to him by Commission counsel without revealing what that advice was. By describing his questions as an inquiry into the role played by Commission counsel, the Plaintiff is seeking access, indirectly, to an area which he could not access by more direct means.
- [37] The Respondent also argues that the Prothonotary erred in concluding that the principles of judicial independence applied to the Commissioner. Since the Commissioner was neither a court nor a quasi judicial body with adjudicative functions, but rather an arm of the executive branch of the government, the Commissioner cannot rely on the principle of judicial independence in order to shield his deliberative processes from judicial scrutiny. However, there are compelling policy grounds for recognizing a qualified deliberative privilege in the Commissioner.
- [38] In *Slavutych v. Baker*, [1976] 1 S.C.R. 254 at 260, the Supreme Court of Canada identified the following four fundamental conditions necessary to establish a privilege against the disclosure of communications:
- a) the communications must originate in confidence that they will not be disclosed;
 - b) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
 - c) the relationship must be one which, in the opinion of the community, ought to be sedulously fostered;
 - d) the injury that would occur to the relationship by the disclosure of the communications must be greater than the benefit gained by such disclosure, for the correct disposal of litigation.
- [39] The Respondent argues that the recognition of a qualified privilege in the Commissioner relative to his deliberative processes corresponds with the test adopted in *Slavutych*, *supra*.
- [40] However, the deliberative privilege that should be recognized in the Commissioner is not absolute. The Commissioner must discharge his mandate in accordance with the principles of procedural fairness and where there are valid reasons to believe that he has not done so, he should be subject to examination, even on matters related to his deliberative process. In this regard, the Respondent relies on *Krever*, *supra*, at page 471 and *Tremblay*, *supra*, at page 619.
- [41] The Respondent argues that there are no valid reasons to show that the Commissioner failed to conduct the inquiry in accordance with the principles of procedural fairness. The Plaintiff's allegations of impropriety are founded upon the participation of Commission counsel in the drafting of the Commissioner's report. Even if this allegation is correct, in the context of commissions of inquiry the law does not prohibit the involvement of Commission

counsel in the report-drafting process, unless there is evidence that Commission counsel received materials that were not disclosed to the parties to the inquiry. The Respondent here relies on the decision of the Federal Court of Appeal in *Canada (Attorney General) v. Canada (Commissioner of Inquiry on the Blood System)*, [1997] 2 F.C. 36 at 79-81, affirmed by the Supreme Court of Canada. There is no such evidence in this case.

SUBMISSIONS BY THE RESPONDENT NON-PARTY, THE HONOURABLE W. D. PARKER

- [42] Commissioner Parker first raises the issue of the standard of review. Again, he acknowledges that the test is the one established by the Federal Court of Appeal in *Canada v. Aqua Gem Investments Ltd.*, *supra*. However, contrary to the position taken by the Plaintiff, he argues that the appropriate standard of review in this appeal is one of curial deference since the Plaintiff has not shown that the Prothonotary improperly exercised his discretion or made an order impacting upon a final issue which is dispositive of the Plaintiff's action.
- [43] The Commissioner submits that the Plaintiff's motion before the Prothonotary related to a discovery examination. Decisions of the Prothonotary concerning matters related to discovery have been held to be discretionary in nature and subject to curial deference. In this regard, he relies on *James River Corp. of Virginia v. Hallmark Cards, Inc.*, (1997), 72 C.P.R. (3d) 157 (F.C.T.D.).
- [44] The Commissioner argues that in order to succeed, the Plaintiff must show that the Prothonotary was clearly wrong in the exercise of his discretion, that is by proceeding upon a wrong principle of law or upon a misapprehension of the facts. The Commissioner says that the Plaintiff does not argue that the Prothonotary applied the wrong test or that he made findings of fact which were unsupported by the evidence. Rather, the Plaintiff takes issue with the conclusion reached by the Prothonotary as to the significance of the evidence and that conclusion differs from the one sought by the Plaintiff.
- [45] In short, the Commissioner says that the Plaintiff is arguing that the Prothonotary ought to have exercised his discretion in a different manner. This is not a sufficient basis to reverse the order of the Prothonotary, in the absence of an error of law or misapprehension of the facts. The Commissioner argues that this Court ought to exercise curial deference and dismiss the appeal.
- [46] Alternatively, the Commissioner submits that the Prothonotary's decision to dismiss the Plaintiff's motion, on the basis of the principles of deliberative secrecy and judicial independence, was a correct exercise of his discretion and the appeal ought to be dismissed.

- [47] The Commissioner states that the Plaintiff acknowledges the application of the principle of deliberative secrecy to the inquiry because he relies on *Tremblay v. Québec*, supra, in support of his argument that the Prothonotary ought to have exercised his discretion to lift the veil of deliberative secrecy because the Plaintiff had demonstrated "valid reasons for believing that the process followed did not comply with the rules of natural justice".
- [48] The Commissioner says that the Plaintiff appears to be proceeding on the assumption that the decision of the Supreme Court of Canada in 2747-3174 *Québec Inc. v. Québec (Régie des permis d'alcool)*, supra, established a rule of law that the participation of the counsel exercising a "prosecutorial" function in the drafting of a decision of an administrative tribunal is per se a breach of the rules of natural justice, and that the evidence led by the Plaintiff before the Prothonotary established valid reasons to believe that Commission counsel in this case exercised both a "prosecutorial" function and participated in the drafting of the final report.
- [49] The Commissioner argues that the foregoing arguments cannot succeed. The Federal Court of Appeal's decision in *Canada (Attorney General) v. Canada (Royal Commission of Inquiry on the Blood System)*, supra, which was made subsequent to the decision in 2747-3174 *Québec Inc. v. Québec (Régie des permis d'alcool)*, supra, replaced the earlier line of authority represented by that decision. According to the Commissioner, the Federal Court of Appeal determined that considerable latitude must be given to Commission counsel assisting in an inquiry established under the Inquiries Act, supra.
- [50] Furthermore, the Commissioner argues that the evidence upon which the Plaintiff relies to establish impropriety is insufficient to demonstrate a reasonable apprehension of bias or denial of natural justice. The Commissioner submits that the Prothonotary properly assessed the evidence which was adduced by the Plaintiff and reasonably found it to be lacking.
- [51] Next, the Commissioner addresses the issue of solicitor-client privilege relative to the information sought to be obtained by the Plaintiff. He argues that the Prothonotary properly held that his communications with Commission counsel are protected by solicitor-client privilege. However, the Commissioner argues that the Prothonotary erred in concluding that the information sought by the Plaintiff respecting the role and activities of Commission counsel after the public hearing phase of the inquiry could be provided without breaching solicitor-client privilege.
- [52] In this regard, the Commissioner argues that solicitor-client privilege applies not only to communications with counsel but to any information concerning any role played by those counsel after the public hearing phase, including advice provided by counsel to the Commissioner during the writing of his report. He says that the Plaintiff has made it clear in his written submissions that he is seeking information about communications with Commission counsel during the report-writing stage, including information as to whether Commissioner counsel exercised influence at that time.

- [53] The Commissioner argues that these matters are properly covered by solicitor-client privilege and that the Prothonotary erred in limiting the application of that privilege only to communications with Commission counsel.
- [54] Finally, the Commissioner argues that the Prothonotary correctly concluded that the Plaintiff had failed to meet the mandatory requirements of Rules 238 and 271 which would justify the issuance of an order requiring his attendance, as a non-party to the action, for discovery or an out-of-court examination for trial.
- [55] The Commissioner says that the evidence produced by the Plaintiff fails to support the issuance of the order which he seeks and that Prothonotary properly exercised his discretion in denying the Plaintiff's requests.

ANALYSIS

- [56] The standard of review applicable to the appeal of an order made by a prothonotary is set out in *Canada v. Aqua Gem Investments Ltd.*, supra, at 463 as follows:

...

Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion *de novo*.

- [57] In *James River Corp. of Virginia*, supra, at page 160, Justice Reed discussed the meaning of questions that are vital to the final issues in the case, as follows:

Questions that are vital to the final issues of a case are, for example, the entering of default judgment, a decision not to allow an amendment to pleadings, a decision to add additional defendants and thereby potentially reduce the liability of the existing defendant, or a decision on a motion for dismissal for want of prosecution. None of the questions raised by the present appeals with respect to the answering of questions on discovery can be characterized as vital to the final issues of the case. [Footnotes omitted]

- [58] The present appeal and underlying notice of motion relate primarily to a discovery examination. The matter of disallowing an application for leave to examine a non-party for discovery does not involve determination of a final issue in this case. For that reason, it is not appropriate to conduct this appeal on the basis of a *de novo* hearing.
- [59] Insofar as the Plaintiff also seeks an order to obtain evidence for use at trial following out-of-court examination of the Commissioner, that motion was dismissed by the Prothonotary. The order of the Prothonotary in that regard was also an exercise of his discretion. In my opinion, dismissal of that part of the Plaintiff's motion likewise does not impact on a final issue in the case and remains subject to review on the basis of whether the Prothonotary properly exercised his discretion.

[60] Review of the manner in which the Prothonotary exercised his discretion must be considered in relation to the type of proceeding giving rise to this action, that is the Commission of Inquiry conducted pursuant to the Inquiries Act, *supra*. In *Krever*, *supra*, the Supreme Court of Canada discussed at length the distinctive nature of a commission of inquiry. At page 460, Justice Cory said:

A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom.

[61] Justice Décary of the Federal Court of Appeal, in relation to the *Krever* Inquiry, spoke about the considerable latitude enjoyed by Commissions of Inquiry in relation to procedural matters in *Canada (Attorney General) v. Canada (Royal Commission of Inquiry on the Blood System)*, *supra*. At page 72 he stated:

The Inquiries Act does not impose any code of procedure... 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.

[62] I conclude that, in the present case, the standard of review is one of extremely high deference in which the court can find procedural unfairness on the part of Commissioner Parker, only under "exceptional circumstances".

[63] In the present case, the Plaintiff alleges that he suffered from a breach of the principles of procedural fairness as a result of the role played by Commission counsel in the conduct of the Inquiry, particularly in the post-hearing and report-writing stage. He seeks the opportunity to obtain information from the Commissioner about the actions of Commission counsel at that time. Because the Commissioner is a "stranger" to the action, the Plaintiff sought an order for discovery of a person not a party to the proceeding, pursuant to Rule 238.

[64] In his decision, Prothonotary Lafrenière concluded that there was only one area of examination which met all conditions in Rule 238(3), that is the area relating to the role and activities of Commission counsel following the public hearings phase of the inquiry. The Prothonotary went on to discuss whether solicitor-client privilege protected the proposed areas of examination and concluded that such privilege is upheld only when it covers communications and not the activities of Commission counsel. Concerning the arguments relative to judicial independence and deliberative secrecy, he found that quasi judicial

tribunals do not enjoy absolute immunity but relied on *Glengarry*, supra, for the conclusion that valid reasons must exist for believing that the rules of natural justice were not followed, before deliberative secrecy would be lifted. He found there were no valid reasons in this case.

- [65] The Plaintiff argues that there are valid reasons for believing that the rules of natural justice were not followed by Commissioner Parker and raises the same arguments upon this appeal that were presented to the Prothonotary. The Respondent says that the Prothonotary erred in his conclusions about solicitor client privilege and argues that the areas of examination proposed by the Plaintiff would necessarily breach solicitor client privilege.
- [66] The question to be determined now is whether the Prothonotary was "clearly wrong" in his finding that the Plaintiff had failed to provide valid reasons for believing that the Commissioner had breached procedural fairness.
- [67] In my opinion, he was not "clearly wrong". He considered the evidence that was presented by the Plaintiff. That evidence includes a newspaper article and the fact that Commission counsel had billed 1700 hours in the post-public hearing phase. The Prothonotary found that this evidence failed to support the conclusion that the Commissioner had breached the principles of natural justice. I see no error in his assessment of the weight of this evidence.
- [68] Second, I am not convinced that the participation of Commission counsel in the writing of a report is necessarily a violation of procedural fairness, particularly if the Commissioner reviewed the report, signed it and adopted it as his own. Justice Décary made the following comments about the role of Commission counsel in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, supra, at page 80:

We must be careful not to impose too strict standards on a commissioner who is conducting a public inquiry of the nature and scope of this Inquiry, in terms of the role he may assign to his counsel once the actual hearings have concluded. A final report is not a decision and the case law that may have developed in relation to decisions made by administrative tribunals, particularly in disciplinary matters, does not apply. We must be realistic and pragmatic. The Commissioner will not likely be able to write all of his report himself, or verify the accuracy of the facts set out in it on his own, any more than he could reasonably have asked all the questions during the examination of witnesses or sift through the hundreds of documents that were introduced. What is important is that the findings he makes in his report be his own. If, in order to make those findings, he considers it advisable to seek the assistance of one or more of his counsel, including those who conducted the examination of witnesses, in relation to questions of fact, evidence of law, he must have broad latitude to do so. [Footnotes omitted]

- [69] The words of Justice Décaré are instructive. It is clear that the Commissioner is entitled to establish his method of proceeding in the discharge of his mandate. This liberty must mean that he is authorized to engage and instruct counsel, and to utilize their services as he sees fit. He is entitled to the benefit of the presumption that he will act properly in the discharge of his duty as a Commissioner; the maxim omnia praesumuntur legitime facta donec probetur in contrarium applies to this case.
- [70] The Plaintiff argues that the possibility that Commission counsel were involved in writing the final report gives rise to a reasonable apprehension of bias, in light of their adversarial role during the hearing process. However, there is no evidence to support that allegation and furthermore, no evidence that the Commissioner abdicated his responsibility to discharge his mandate, including the writing of his report, in a proper manner. The argument concerning bias must fail.
- [71] As for the arguments concerning solicitor-client privilege raised by the Respondent, the Respondent submits that the proposed questions contained in the Plaintiff's written interrogatories demonstrate that what is sought is information relating to communications that passed between the Commissioner and Commission counsel. In my opinion, there is merit in this submission. I refer to the following questions which appear in the Plaintiff's written interrogatories:
36. Do the defendants agree that, notwithstanding these concerns, Commissioner Parker invited Commission counsel to make written submissions and these submissions were over 700 pages in length and favoured positions and conclusions that were adverse to Mr. Stevens?
 40. What decision did Commissioner Parker ultimately make about the role, if any, which would be assigned to Commission counsel in the preparation of his report?
 41. After the close of public hearings on February 20, 1987, did Commissioner Parker at any time receive submissions or advice from Commission counsel? If so, to what did these submissions or this advice relate?
 44. Did Commissioner Parker act on the submissions or advice he received from Commission counsel after the close of public hearings? If so, in what way? If not, why not?

Plaintiff's Motion Record, pages 17 - 19.

- [72] I am satisfied that this line of questioning falls under the protection of deliberative secrecy because it is directed to matters related to the conclusory function that was part of the Commissioner's mandate. The Prothonotary reviewed authorities dealing with principles of deliberative secrecy and the circumstances in which that secrecy can be pierced. The Prothonotary was not "clearly wrong" in his consideration of this issue. There are no compelling reasons to overturn his decision in this regard.

- [73] The Plaintiff says that only the Commissioner can give evidence as to his subjective understanding of the terms of reference and the meaning of "conflict of interest". Furthermore, although the report sets out the standards against which the Plaintiff's conduct was measured, the process by which these standards were established is unknown. Since Commission counsel is subject to solicitor-client privilege which can only be waived by Commissioner Parker, and has not been waived, the Plaintiff argues that only the Commissioner can give evidence concerning influences which may have been brought to bear by another party, such as Commission counsel, after the close of the public hearings.
- [74] The Prothonotary rejected these arguments. I am not persuaded that he was "clearly wrong" in doing so, having regard to his consideration of the principles of deliberative secrecy and judicial immunity. His decision should not be set aside on this basis.
- [75] As for the request to examine Commissioner Parker out of court pursuant to Rule 271, the Prothonotary declined to address this request. I am satisfied that there is insufficient evidence to support the request.
- [76] Finally, with respect to the request to cross-examine the Commissioner, I am not persuaded that the Prothonotary has committed a reviewable error in his decision on this issue. There are no grounds to allow the request to cross-examine Commissioner Parker or even to examine him pursuant to Rule 238 and 271.
- [77] In the result, the Plaintiff's motion is dismissed.

ORDER

The Motion is dismissed. If the parties are unable to agree on costs of this motion, they shall proceed to assessment of costs before the Prothonotary subject to any further direction which may be issued in that regard.

"E. Heneghan"

J. F. C. C.

Ottawa, Ontario

January 3, 2002

FEDERAL COURT OF CANADA TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: T-2682-87

STYLE OF CAUSE: Sinclair Stevens v. Attorney General of Canada

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 17, 2001

REASONS FOR JUDGMENT OF the Honouable Madam Justice Heneghan DATED: January 3, 2002

APPEARANCES

Mr. Peter Jervis (416) 601-2356 Mr. Sean Gaudet (416) 954-1213 Ms. Eleanor Cronk & Mr. David Gruber (416) 644-5359

FOR PLAINTIFF FOR DEFENDANT FOR RESPONDENT (Non Party)

SOLICITORS OF RECORD: Mr. Peter Jervis (416) 601-2356 Mr. Sean Gaudet (416) 954-1213 Ms. Eleanor Cronk (416) 644-5359

FOR PLAINTIFF FOR DEFENDANT FOR RESPONDENT (Non Party)

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