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Appendix G

RULINGS

Ruling on Standing (July 5, 2004)

Introduction

I have been appointed by Order in Council P.C. 2004-110, sometimes referred to in this Ruling as the "Terms of Reference" or "mandate", to conduct a factual inquiry and then to make recommendations. In the first part of my mandate, I am to investigate and report on the questions raised by Chapters 3 and 4 of the November 2003 Report of the Auditor General of Canada to the House of Commons with regard to the sponsorship program and advertising activities of the Government of Canada, including

i. the creation of the sponsorship program,
ii. the selection of communications and advertising agencies,
iii. the management of the sponsorship program and advertising activities by government officials at all levels,

iv. the receipt and use of any funds or commissions disbursed in connection with the sponsorship program and advertising activities by any person or organization, and

v. any other circumstance directly related to the sponsorship program and advertising activities that the Commissioner considers relevant to fulfilling his mandate.

The first part of the mandate is referred to in this Ruling as the "Factual Inquiry".

The second part of my mandate is to make any recommendations that I consider advisable based upon the findings in the Factual Inquiry to prevent mismanagement of sponsorship programs or advertising activities in the future, taking into account certain initiatives announced by the Government of Canada on February 10, 2004 which are detailed in the Order in Council.

This latter aspect of my mandate is referred to as the "Recommendations".

The following paragraphs in the Terms of Reference are relevant to this Ruling:

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

f. the Commissioner be authorized to grant to any person who satisfies him that he or she has a substantial and direct interest in the subject-matter of the inquiry an opportunity during the inquiry to give evidence and to examine or cross-examine witnesses personally or by counsel on evidence relevant to the person's interest;

A. Factual Inquiry

As already announced on May 7, 2004, I will conduct the Factual Inquiry by way of evidentiary hearings at which witnesses who give evidence under oath or affirmation will be examined and cross-examined. Documents will be produced, by these witnesses or by other means. I will receive closing submissions at the end of the Factual Inquiry.

The Draft Rules of Practice and Procedure proposed for use in the Factual Inquiry were announced in my Opening Statement made on May 7, 2004 and were published on the Commission's web site, www.gomery.ca. I invited interested parties to suggest modifications to these Rules not later than May 31, 2004. Following receipt of one submission from counsel representing the Government of Canada, articles 17, 39 and 40 of the Draft Rules have been amended. I draw the attention of interested parties to other changes in the Draft Rules to the definitions of the terms "full standing participant" and "partial standing participant". From now on a full standing participant will be known as a Party and a partial standing participant as an Intervenor. The Rules in final form have been published on the Commission's web site. Persons or groups participating in the Inquiry should visit our web site regularly for information on practical details and scheduling.

B. Recommendations

The formulation of the Commission's recommendations will follow the completion of the Factual Inquiry and will not be preceded by further formal evidentiary hearings. In due course the Commission will announce the procedure it intends to follow preparatory to the formulation of its recommendations.

Guiding Principles on Standing

In its Opening Statement the Commission invited persons interested in the Factual Inquiry to apply for standing not later than May 31, 2004. Prior to that date, I received thirteen applications from parties seeking standing as Parties or as Intervenors. Since that date, I have received requests to extend the delays from two applicants who wish to apply for standing. All fifteen applications were the subject of oral presentations in Ottawa on June 21 and 22, 2004. At that time I exercised my discretion to grant the requests of the two late applicants to be heard on the merits of their applications. I also received a late request from a private citizen which I dismissed prior to the hearings both as being outside the delay and for not disclosing a sufficient interest.

Before I address the merits of each of the fifteen applications, it is useful to summarize the general principles that have guided my decision on standing.

I am committed to ensuring that the Inquiry is both fair and thorough, and that in the course of the Inquiry I obtain and consider all relevant information relating to the issues identified in the Terms of Reference.

The Inquiry will examine not only what happened with respect to the sponsorship program and the advertising activities of the government as described in the Report of the Auditor General, but will also examine the circumstances surrounding the creation of the sponsorship program, its origins in preceding government initiatives, and the motivations, whether valid or not, for the manner in which it was organized. Similarly, the Inquiry will investigate the reasons why and how the government's sponsorship program and advertising activities were administered as they were. I intend to interpret the scope of my mandate broadly, with a view to understanding the extent to which these government activities were mismanaged, if indeed they were, and any improper use of the funds disbursed, if that occurred. Only in this way will it be possible to formulate intelligent recommendations to prevent mismanagement of similar activities in the future.

At the same time, I must continually bear in mind the importance of completing this Inquiry as expeditiously as is reasonably possible, particularly in light of paragraph (1) of the Terms of Reference which directs me to submit my Report on an urgent basis. In the past, some public inquiries have suffered from diminished credibility because of undue delay. I intend to act so as to avoid delay, repetition and the presentation of irrelevant or unhelpful evidence which will not assist me in making the findings called for by the mandate.

One of the principles which will guide the conduct of this Inquiry is that of transparency and openness. However, some prospective witnesses are facing criminal charges relating to the subject matter of the Inquiry and it may be necessary to hear all or parts of their evidence *in camera* or subject to an order of non-publication, in order to assure their right to a fair trial. The Commission may be requested to hear other witnesses *in camera* or

confidentially for other reasons. These matters will be dealt with by the Commission as they arise but to the greatest extent possible I will strive to ensure that the work of the Inquiry is accessible to the public and as open as possible.

I will rely upon Commission counsel to assist me throughout the Inquiry. They will ensure the orderly conduct of the Inquiry and have standing throughout. Commission counsel have the primary responsibility for representing the public interest, including the responsibility to ensure that all facts and circumstances that bear upon the public interest are brought to my attention. Commission counsel do not represent any particular interest or point of view, and their role is not adversarial or partisan.

As provided under the Rules of Procedure and Practice, there are two categories of participation in the Factual Inquiry. It is foreseen that parties may be either:

i. **Parties**, because their rights are directly and substantially affected by the Factual Inquiry; or
ii. **Intervenors**, where they are found to have clearly ascertainable interests and perspectives useful to the Commission's mandate. In such cases I am entitled to determine special conditions under which a party may participate.

In addition, any witness called to testify may be represented by counsel while testifying, and may be questioned by his own counsel. In other words, counsel for a witness will have standing for the purpose of his or her client's testimony at the Inquiry.

As will be seen from what follows, I have not granted to some applicants the right to participate that they sought. However, should circumstances change during the course of the hearing, I will be prepared to reconsider the matter and vary my earlier Ruling. For example, applicants having intervenor standing may apply for party standing if circumstances warrant.

What constitutes "a substantial and direct interest in the subject matter of the Inquiry"? Based upon what has been decided in comparable cases, the interest of the applicant may be the protection of a legal interest in the sense that the outcome of the Inquiry may affect the legal status or property interests of the applicant, or it may be as insubstantial as the applicant's sense of well-being or fear of an adverse effect upon his or her reputation. Even if such a fear proves to be unfounded, it may be serious and objectively reasonable enough to warrant party or intervenor standing in the Inquiry. What does not constitute a valid reason for a participant's standing is mere concern about the issues to be examined, if the concern is not based upon the possible consequences to the personal interests of the person expressing the concern. As was stated by Campbell J. in *Range Representative on Administrative Segregation Kingston Penitentiary* v. Ontario (1989), 39 Admin. L.R. at p. 13, dealing with a coroner's inquest:

> Mere concern about the issues to be canvassed at the inquest, however deep and genuine, is not enough to constitute direct and substantial interest. Neither is expertise in the subject matter of the inquest or the particular issues of fact that will arise. It is not enough that an individual has a useful perspective that might assist the coroner.

This extract was cited with approval by Mr. Justice O'Connor in his Ruling dated May 4, 2004 in the context of the Arar Commission of Inquiry.

This having been said, it is not possible to enumerate an exhaustive list of the factors to be taken into consideration when determining whether an applicant's interest is sufficiently substantial and direct to the subject matter of the Inquiry. The Terms of Reference, in stating that the Commissioner must be satisfied that an applicant has such an interest, leave me with a certain degree of discretion, which must be exercised judiciously, to decide which persons or groups shall be authorized to participate, and to what degree.

Disposition

A. Party Standing

I come to the conclusion, for the reasons given in each case, that the following persons or organizations have rights, privileges or interests that may be affected by the outcome of the Factual Inquiry. They therefore have a substantial and direct interest in the subject matter of the Inquiry sufficient to warrant being granted party standing, and will be entitled in each case to participate fully in the Inquiry with respect to the matters relevant to their interests.

1. **Attorney General of Canada, representing the Government of Canada.**
   The Government of Canada administered the sponsorship program. It authorized and paid for sponsorship grants and commissions, and authorized as well certain advertising activities, all at the heart of the November 2003 Auditor General's Report and concerns. It risks being reproached to the extent that there was any mismanagement or impropriety. The Attorney General represents not only the Government of Canada but also its employees and representatives, many of whom will be called to testify. His concerns are substantial and he has the required interest to participate fully in all phases of the Inquiry.

2. **Canada Post Corporation**
   Two transactions involving this Crown Corporation are directly referred to in the Auditor General's Report as giving cause for concern in the context of the sponsorship program. It is probable that Canada Post's methods and procedures in selecting advertising agencies will also be examined in the course of the Inquiry. It should therefore be granted party standing for Phases IA and IB of the Inquiry.

3. **VIA Rail Corporation**
   Like Canada Post, VIA Rail is a Crown corporation specifically mentioned in the Report of the Auditor General, and will be the subject of evidence to be presented in Phases IA and IB of the Inquiry. Some of its present and former employees will be heard as witnesses. It is entitled to be represented throughout the Factual Inquiry and to participate fully.

4. **The Right Honourable Jean Chrétien**
   Mr. Chrétien was the Prime Minister of Canada during the relevant period when the sponsorship program was administered. He alleges that he had a unique role in the creation of the program. It is not unreasonable to consider, as pleaded by his counsel, that he may be directly and substantially affected by the findings of fact or recommendations resulting from the Inquiry. He seeks standing as a Party for Phases IA and IB. It appears that his interest is direct and substantial and, accordingly, he will be entitled to be represented throughout the Factual Inquiry and to participate fully.

5. **The Honourable Alfonso Gagliano**
   Mr. Gagliano was Minister of Public Works and General Services from June 11, 1997 until January 14, 2002, and his ministry oversaw the administration of the sponsorship program during that period. At that time, he also had other ministerial responsibilities which may be relevant. He alleges that his reputation has been adversely affected by the findings of the Auditor General in her Report. He has therefore a direct and substantial interest in many aspects of the Factual Inquiry and will have the right as a Party to fully participate in it.

6. **Joseph Charles Guité**
   Mr. Guité describes himself in his application as a senior public servant and the central figure involved in the management of the sponsorship program and advertising activities. He is now the subject of a criminal prosecution directly related to the matters dealt with in the Auditor General's Report. He will surely have to testify at the Inquiry. His reputation is at risk and his direct interest in the issues to be dealt with by the Commission is apparent and substantial.

7. **Jean Lafleur**
   Until the business was sold as of January 1, 2001 to Communications Groupdirect Inc., Mr. Lafleur, as president of Jean Lafleur Communication Marketing Inc., was actively involved in the transaction and execution of numerous sponsorship contracts and related advertising. He or his firm received substantial revenues in the form of commissions and other remuneration as a result of the

sponsorship program, and are the subject of unfavourable comments in the Report of the Auditor General. His direct and substantial interest is evident.

8. **Jean Pelletier**
   Mr. Pelletier acted as Director of the Office of the Prime Minister of Canada from November 4, 1993 until his retirement on June 30, 2001. He alleges that in that capacity he had a direct knowledge of the circumstances surrounding the creation of the sponsorship program and its objectives, although he denies any direct involvement or knowledge of its administration. Nevertheless, there have been public suggestions that he had some degree of implication in the management of the program, or knowledge of at least some of the matters referred to in the Report of the Auditor General. These suggestions have, according to Mr. Pelletier's application, put at risk his reputation as a competent and honest public servant. The protection of his reputation is the primary reason for Mr. Pelletier's application for standing as a Party. His concern is legitimate.

9. **Ranald Quail**
   Mr. Quail served as Deputy Minister of Public Works and Government Services Canada from July 1993 until April 1, 2001. He was the most senior official in that government department during the time period which will be the focus of the Inquiry. As such, he was at least nominally responsible for the proper administration of the sponsorship program and advertising activities which are the subject of the Auditor General's Report. He has an interest in defending his record as a public servant and, specifically, his conduct and actions during the period relevant to the Inquiry. As his counsel points out, Mr. Quail's reputation may well be affected by the observations and findings of the Commission. For these reasons, he is entitled to standing as a Party.

10. **Business Development Bank of Canada**
    The Business Development Bank of Canada is a Crown corporation which is the subject of unfavourable comments in the Auditor General's Report. For the reasons already given with respect to

Canada Post and VIA Rail, it should have the right to participate in the Inquiry, as a Party.

B. Intervenor Standing

I am persuaded, for the reasons given in each case, that the following applicants should have standing before the Inquiry as Intervenors, since, although they do not appear to have a direct and substantial interest in the subject matter of the Inquiry, they have clearly ascertainable interests and perspectives essential to the Commission's mandate.

1. **B.C.P. Ltd.**
   B.C.P. Ltd. is a public relations firm which is mentioned in the Report of the Auditor General in relation to a sponsorship contract awarded to Tourism Canada. It seeks intervenor status only to enable it to correct any inaccuracies in the Report or misperceptions created by it. It should be granted the status it has requested.

2. **Office of the Auditor General of Canada**
   Since the mandate of the Commission is directly related to the Report of the Auditor General, the latter's participation in the Factual Inquiry is essential. She has a useful perspective on the issues relevant to the Commission's mandate. At the time she and other representatives of her office are called upon to testify, they will be entitled to representation by their counsel, including the right to re-examine, and the Office should be in a position to make submissions to the Inquiry at its conclusion.

3. **The Public Service Integrity Officer**
   On November 6, 2001, by Order in Council, Dr. Edward Keyserlingk was appointed as the Government's first Public Service Integrity Officer, to act in that capacity in accordance with the *Policy on the Internal Disclosure of Information concerning Wrongdoing in the Workplace* adopted by the Treasury Board of Canada pursuant to Section 11(2) of the *Financial Administration Act*. Dr. Keyserlingk's mandate is to deal with internal disclosures by public servants, to investigate allegations of wrongdoing in the public service, and to protect from

reprisal public servants who make good faith disclosures. He seeks party standing so as to effectively offer protection against reprisal to public servants who will appear before the Commission.

Public servants are automatically entitled to be represented by counsel for the Government of Canada, unless they opt to be represented by counsel of their own choosing for the purposes of their testimony before the Commission. If they choose to be represented by counsel for Dr. Keyserlingk, the latter will automatically have standing to put questions to the witness and generally to act on his or her behalf. If the witness chooses to be represented by the Attorney General of Canada or by another attorney, Dr. Keyserlingk's counsel would have no right to intervene.

Nevertheless, the mandate of the applicant entitles him to be present throughout as an Intervenor, since he may have valuable perspectives and representations to offer, especially at the close of the Factual Inquiry.

4. Conservative Party of Canada

The Conservative Party of Canada, like the Bloc Québécois, seeks full standing as a Party. It alleges that it has a direct and substantial interest in the issues to be considered in Phase IB of the Inquiry, in the following respects:

i. it is interested to identify those persons or organizations who received the funds disbursed by the government, to know the purpose for which the funds were disbursed, and the extent of the value for money received by the Government of Canada.

ii. it is interested to determine whether there was political influence on the distribution of the funds; and

iii. it is interested to inquire into the sufficiency of external monitoring and financial controls used by the recipients of the funds.

These would clearly be questions relevant to the Commission's mandate, and central to its Inquiry, especially in Phase IB, but it is not at all apparent that a political party, in this case one opposed to the party in power, has a direct and substantial interest of its own in these questions, other than its partisan interests. These play an

essential role within the political system but should not form part of the Commission's proceedings. Any misconduct which the Commission might find could result in political consequences, whether in Parliament or in an election, and therefore could be of great importance politically to the applicant. However, such political consequences should not be within the Commission's contemplation when drafting its Report and recommendations.

On the other hand, to the extent that the applicant's interests are not purely partisan and are those of the public interest, they are not distinct from those of every citizen concerned to understand the matters which are the object of the Inquiry.

I come to the conclusion that the applicant does not have a direct and substantial interest, as that expression has been defined in the jurisprudence cited to me, in the issues before the Commission.

There is an additional reason why political parties should not be given party standing. The Commission's jurisdiction is limited to an examination of the administration of the sponsorship program and advertising activities of the government, and to uncover all relevant facts resulting from any mismanagement or impropriety in the course of that administration or inappropriate use of the funds disbursed. The mandate of the Commission does not extend to an assessment of the political wisdom of the sponsorship program; that is a matter of government policy which the Commission has no mandate to examine, although it will inevitably learn, in the course of the hearings, what motivated the government to create the program and to disburse funds in accordance with the policy objectives it sought to promote. If the Commission were to permit a debate to occur in the course of the Inquiry as to the legitimacy of those objectives, or as to the desirability, from the public's point of view, of the sponsorship program and advertising activities of the government, the Commission would be distracted from its real objectives, and would waste valuable time in examining questions better left to the political arena. As was stated by Mr. Justice Dennis O'Connor in his Ruling on Standing and Funding at the Walkerton Inquiry, it is generally not desirable that a public inquiry be allowed

to become a partisan debate between opposing political factions; such debates are better left to another forum.

I adopt his reasoning entirely; he says, with reference to a request by the Ontario New Democratic Party for standing, the following at page 81 of his Report.

> The second ground upon which the ONDP Group claims an interest for which it ought to be granted standing is that the ONDP was vocal in calling for the government to establish this Inquiry. In my view, the fact that a political party or its members call for the government to establish a public inquiry, without more, does not create an interest within the meaning of s.5(1) of the Act.
>
> Finally, I do not think that this is a case in which I should exercise my discretion to grant standing. I say this for two reasons. First, parties who have been granted standing will bring a sufficiently broad range of perspectives to enable me to fulfil my mandate. In granting standing, I have attempted to ensure that all perspectives, and in particular those such as the ones held by this applicant, which question the effect of government policies, practices and procedures, are fully represented. It is essential that there be a thorough examination of these factors in relation to the events in Walkerton. I am satisfied that this will occur.
>
> The second reason why I am not inclined to grant this group standing is that it is, in my view, generally undesirable to use public inquiries to have political parties advance their positions or policies. There are other more appropriate arenas for them to do so. Mr. Jacobs, counsel for the ONDP Group, recognized this concern and assured me that this was not the motivation underlying the application. I accept Mr. Jacobs' assurance without reservation. Nevertheless, I think there is a danger that this applicant's participation could be viewed by the public as politicizing the Inquiry in a partisan way. To the extent possible, that result should be avoided.
>
> Finally, I note that the considerations in granting standing to a political party differ from those which apply to a

> government. Governments play a different role and have different responsibilities than do political parties. Moreover, the ONDP, unlike any other applicant, will have an opportunity to participate in the subject matter of the Inquiry by responding to my Report in the Legislature.

Although it is true that in the past some public inquiries have granted standing to political parties, others have refused such standing. It may be concluded that each case has to be decided on its individual merits.

In the circumstances of the present Commission, I find that it would be undesirable to give party standing to political parties which were, at the time of the events with which the Commission is concerned, in opposition to the government.

Nevertheless, I am satisfied that the applicant has clearly ascertainable interests and perspectives essential to the Commission's mandate, and that its participation as an Intervenor would enhance the work of the Commission in both Phases IA and IB. The Conservative Party of Canada represents a substantial body of opinion in Canada. It has a valuable perspective on public administration, the roles of office-holders and parliamentarians, and the process through which public funds are disbursed. The Commission would accordingly benefit from its participation, assistance and representations as an Intervenor.

5. Bloc Québécois

The application of the Bloc Québécois will be dealt with in the same manner as that of the Conservative Party of Canada, for the same reasons. One additional comment is necessary, because of allegations made on its behalf in its written application, and repeated at the hearing on June 22nd.

The Bloc Québécois alleges that it has a particular role to play in the Inquiry because of its unique position as a political party which advocates the sovereignty of the Province of Quebec and its eventual independence from the Canadian federation. Firstly, it alleges that the stated objective of the sponsorship program was the promotion of federalism in Quebec, and that this promotion sought to distort the political debate and to influence unfairly Quebec voters away

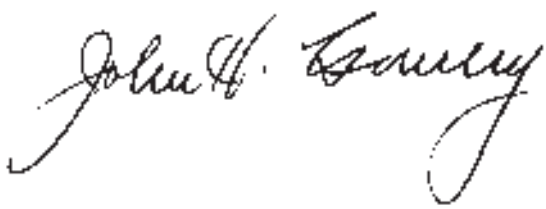
from the political option which the Bloc Québécois seeks to encourage. Secondly, it alleges that funds originating from the sponsorship program and advertising activities of the government were diverted into the electoral funds of the Liberal Party of Canada, to the detriment of the Bloc Québécois; this allegation, however, is not to be found in the Report of the Auditor General.

The applicant seeks to be allowed to introduce evidence in relation to these allegations into the hearings before the Commission.

These are two conceptually distinct grounds. The issue of whether public funds should have been used to promote federalism in Quebec is a matter of political debate. It should be dealt with in the political forum. As earlier stated, it does not form part of the Commission's mandate. This is not, therefore, a basis for the Bloc Québécois to be granted party standing.

In contrast, the allegations with respect to the diversion of public funds to a particular political party fall squarely within the Commission's mandate. It is not necessary to grant party status to the Bloc Québécois in order for the Commission to deal with possible evidence on this matter.

Accordingly, the Bloc Québécois' application for party standing is denied. However, for the reasons set out in relation to the Conservative Party application, it is granted status as Intervenor.



John H. Gomery, Commissioner

July 5, 2004

Ruling on Funding (July 19, 2004)

By the Order in Council dated February 19, 2004, I am authorized to recommend funding to a party who has been granted standing at the Inquiry.

The relevant paragraph reads as follows:

> (h) for purposes of the investigation referred to in paragraph (a), the Commissioner be authorized to recommend funding, in accordance with approved guidelines respecting rates of remuneration and reimbursement and the assessment of accounts, to a party who has been granted standing at the inquiry, to the extent of the party's interest, where in the Commissioner's view the party would not otherwise be able to participate in the inquiry;

Subsequently the Treasury Board approved funding guidelines which may be found on the Commission's website.

In the *Rules of Practice and Procedure* which have been adopted by the Commission, the criteria for an application for funding are set out in Rule 11, which reads:

In order to qualify for a funding recommendation, a party must:

a. establish the party's inability to participate in the Inquiry without funding and the absence of an alternative means of funding:

b. provide a satisfactory plan as to how it intends to use the funds and account for them;

c. demonstrate sufficient interest and proposed involvement in the Inquiry; and

d. establish a special expertise or experience with respect to the Commission's mandate.

Of the fifteen persons and organizations that have been granted either party or intervenor standing at Phases 1A and 1B of the Inquiry, three have submitted applications for funding, or, should I say more accurately, applications for a recommendation for funding, since the Order in Council makes it clear that my authority is limited to making a recommendation.

The three applicants are Mr. Joseph Charles Guité, the Conservative Party of Canada, and the Bloc Québécois.

Joseph Charles Guité

Mr. Guité alleges in his application that he has already been exposed to substantial expense for legal representation before the House of Commons Public Accounts Committee as well as before the criminal courts, where he is facing accusations directly related to the role he played in the administration of the sponsorship program. His participation in the Inquiry as a Party will involve him in further legal costs and disbursements. He acknowledges that in virtue of his status as a former public servant, some of the fees of his personal attorney who appeared with him before the Public Accounts Committee have been supported by the government in accordance with the *Treasury Board Policy on the Indemnification of and Legal Assistance for Crown Servants* ("Treasury Board Policy"), but in his application he says that he has not yet received confirmation from the Department of Public Works and Government Services Canada that this same policy will apply to the services of his attorneys before the present Inquiry.

Mr. Guité refers in his application to considerable legal expense involved in defending the criminal charges of which he has been accused, but this is not a relevant consideration in the present context.

With reference to his financial circumstances and his ability to participate in the Inquiry without government funding, Mr. Guité alleges, somewhat laconically, that "a significant portion, if not all of my liquid assets, are being expended on the retaining of legal counsel to represent me, on the criminal charges before the Quebec Superior Court of Justice," and that "my personal and financial circumstances are such that I do not have the financial resources available to retain legal counsel to represent my interests" before the Inquiry. A more detailed description of his "personal and financial circumstances" would have been advisable, to enable me to assess Mr. Guité's ability or inability, as the case may be, to pay his lawyer.

Be that as it may, it is almost certain that his legal expenses before the Inquiry will be met, as they have been previously with respect to his representation before the Public Accounts Committee, in accordance with Treasury Board Policy. If for some reason they are not, I recommend that they be funded in accordance with the Treasury Board guidelines.

The Conservative Party of Canada

The Conservative Party of Canada has been granted the standing of an Intervenor before the Inquiry. Its application for a funding recommendation states that it has limited revenues consisting of an allowance allocated to it pursuant to sections 435.01 and 435.02 of the *Elections Act*,and the donations it receives from its supporters. The latter are, by the effect of recent amendments to the *Elections Act* and the *Income Tax Act*, now restricted to a maximum of $5,000.00 per year from any one person; donations or contributions from corporations and trade unions are prohibited. According to its application, the budget of the Conservative Party of Canada is entirely used to cover its expenses to run its national operations and to support the election campaign expenses of its candidates. It did not, in its 2004 budget, make any provision for the expense of participating in the Inquiry, which arose after the beginning of the year. It will receive no further allocation in accordance with the *Elections Act* until January 2005. It says that contributions from its supporters tend to diminish after an election.

The application does not identify the amount allocated from government funds to the Conservative Party of Canada in 2004, but as appears from a press release dated December 11, 2003 issued by the Chief Electoral Officer of Canada, attached as Appendix A, the Conservative Party of Canada received at the beginning of 2004 the sum of $8,476,872.25. This amount is subject to revision based upon the number of valid votes cast in its favour in the 38th general election held on June 28, 2004, but should not be significantly different in the future. Accordingly, starting in January 2005, the Conservative Party will be entitled to receive quarterly instalments of more than $2 million each.

Notwithstanding these very considerable resources, the applicant asserts that it is unable to participate in the Inquiry without funding, because its budget is entirely committed to its regular political activities. It seeks funding only to the extent necessary to a limited participation in the Inquiry, which it describes in detail in its application. It alleges that without such funding, it will be unable to participate in the Inquiry as an Intervenor.

The foregoing has led me to reflect upon whether it is reasonable and appropriate to require a political party to rely upon the funds allocated to it by reason of ss. 435.01 and 435.02 of the *Elections Act* for the purposes of its legal representation before a commission of inquiry. After careful consideration I have come to the conclusion that I should not impose such a requirement upon the applicant.

As its title indicates, the main purpose of the *Elections Act* is to regulate elections. It may therefore be assumed that the recent amendments to the *Elections Act* that provide for public financing of political parties anticipate that the funds so provided from public sources will be primarily used by political parties so as to promote the possibility that some of their candidates will be elected to Parliament in a general election. It may also be assumed that they do not foresee that those funds will be used for non electoral and non political purposes such as the participation of a political party in the work of a commission of inquiry.

The Commission intends to ask the Conservative Party of Canada to refrain from promoting its political objectives in its submissions to the Inquiry; this should be apparent from its Ruling on standing. It would therefore be contradictory and unfair to require it to use its financial resources, provided under the *Elections Act*, normally dedicated to political purposes, to pay its lawyers for their services related to the work of the Inquiry.

It is this contradiction that has persuaded me to exercise my discretion to recommend limited funding to the applicant, generally but not entirely in accordance with its Plan for Use and Accounting which forms part of its Submissions, and which is attached as Appendix B. Accordingly:

a. funding is recommended for one junior and one senior lawyer, to work separately, the bulk of the work to be performed by the junior lawyer, under supervision by the senior lawyer who will make decisions and present closing submissions to the Inquiry;

b. funding is recommended for pre-hearing preparation limited to 40 hours of work for each lawyer, and for suggestions from time to time to Commission counsel and related representatives limited to 40 hours of work by the senior lawyer;

c. funding is recommended for review of daily transcripts and documents limited to three hours per day by the junior lawyer and one hour per day by the senior lawyer;

d. funding is recommended for necessary expenses and travel, it being taken for granted that in most instances the applicant's lawyers will not have to incur costs for copies of documents or transcripts, and will not need to travel to Ottawa or Montreal to take cognizance of exhibits;

e. funding is recommended for the preparation and presentation of closing submissions limited to 30 hours for each lawyer.

I will remain open to the possibility of amending these recommendations as circumstances dictate, on application.

Bloc Québécois

With respect to the application of the Bloc Québécois, it alleges that it intends to participate actively in the Inquiry. For example, it proposes to have an attorney present at the hearing at all times, whereas the Conservative Party would be satisfied to take cognizance of the daily transcripts, and does not propose to have a legal representative present throughout the hearing. The need for the Bloc Québécois to be present at all times at the hearing of witnesses is not established to my satisfaction.

With respect to its financial resources, the Bloc Québécois makes little attempt in its application to describe in detail its situation. It says only that its financial resources are used in connection with its regular political

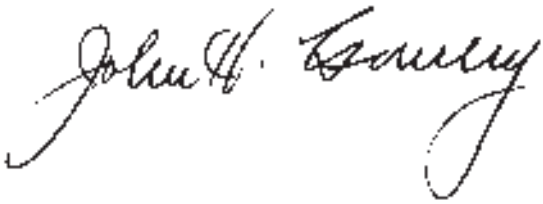
activities, and that no provision has been made for extraordinary costs such as those related to the Inquiry.

Its application for funding makes no mention of the amounts allocated and to be allocated to the Bloc Québécois as a result of the recent amendments to the *Elections Act*. According to Appendix A, it received in 2004 the sum of $2,411,022.25, and it may be assumed that it received additional donations from its own supporters. As a result of its success in the recent election, it will be receiving a greater allocation in the future than it received in 2004.

Nonetheless, the application alleges in paragraphs 7 and 8:

> 7. Les ressources financières dont dispose le Bloc Québécois ne permettent donc pas de couvrir des dépenses liées à de quelconques activités extraordinaires telle qu'une participation à une commission d'enquête. Aucune somme n'a donc été prévue et n'est disponible pour ce faire.
>
> 8. Dans les circonstances, il est clair que le Bloc Québécois est et sera incapable d'acquitter les sommes nécessaires à sa participation à la Commission d'enquête. Il n'est d'ailleurs pas en mesure d'obtenir de tels fonds, dont la somme est considérable, par d'autres sources de financement. L'assistance financière fournie par le gouvernement est donc essentielle à sa présence dans le cadre de l'enquête factuelle et des représentations finales qui suivent celle-ci.

These submissions and the considerations that have led me to conclude that the Conservative Party of Canada is entitled to public funding for the services of its attorneys in relation to the work of the Commission persuade me that the Bloc Québécois is equally entitled to a recommendation for funding. However, I am not persuaded that it deserves more generous funding than what I recommend for the Conservative Party. Accordingly, I exercise my discretion to recommend funding to the Bloc Québécois, but only to the same extent that it is recommended for the Conservative Party of Canada. If the Bloc Québécois chooses to instruct its attorneys to participate in the Inquiry to a greater extent, it will have to finance any additional legal costs so incurred from its own resources.



John H. Gomery, Commissioner

July 19, 2004

Supplementary Ruling on Funding (October 26, 2004)

Introduction

By my Ruling dated July 19, 2004, I recommended public funding to the Conservative Party of Canada and the Bloc Québécois, which have intervenor status before the Inquiry. They are entitled, as detailed in the Ruling, to payment of the fees of their lawyers limited to three hours a day for a junior lawyer and one hour per day for a senior lawyer, with additional amounts for pre-hearing preparation, for the representations during the hearings, and for closing submissions. At that time I stated that I would remain open to the possibility of amending these recommendations as circumstances might dictate, on application.

Both the Conservative Party and the Bloc Québécois are now applying for a recommendation for increased funding. At the same time the Liberal Party of Canada, which was granted intervenor status on September 13, 2004, asks for funding for the first time. All three applications were presented on October 20, 2004 and were taken under advisement. The present Ruling will deal with them together.

Analysis

The application of the Liberal Party of Canada takes it for granted that it would at least be entitled to the same funding recommendation as has been already granted to the two other political parties. At first glance this is a reasonable assumption, except that the belated arrival upon the scene of the Liberal Party of Canada, after the hearing of witnesses had commenced, reduces its need of the same allocation for pre-hearing preparation. In addition, it is not my intention to recommend funding on a retroactive basis, which means that the Liberal Party will be entitled to receive funding for the services of its attorneys only from the date of its application; whatever legal costs may have incurred prior to that date will have to be financed from its other resources.

All three applicants argue that the amounts allowed by my earlier Ruling are inadequate to enable them to participate in the Inquiry as fully as they would wish, and as needed to fulfill their responsibilities, as they define them. They refer to the voluminous documentation which has been and is being communicated to them as the hearings advance, and the time required to

peruse it carefully. They also invoke the difficulty of reading and comprehending daily transcripts when the exhibits referred to by witnesses may not be readily at hand, and the impossibility of suggesting questions in a timely way to Commission counsel, for submission to witnesses.

On this latter question, there is clearly a misunderstanding as to the intended role of these Intervenors. Although section 8 of the Rules of Procedure and Practice indicates that an Intervenor's participation includes "the opportunity to suggest areas for examination of a certain witness by Commission counsel, failing which, the opportunity to request leave to examine the witness on such areas", this right is at the Commission's discretion. It should have been obvious to the parties concerned that since it was not contemplated that they would be present at the Inquiry's hearings but would limit their participation to an examination of the daily transcripts, they would be, for all practical purposes, unable to suggest particular questions to witnesses, who would usually have completed their testimony before any such suggestions could be submitted, on details of their testimony. In other words, time spent formulating such questions would be wasted time and unnecessary. The Intervenors should instead be giving their attention to suggesting areas of inquiry relevant to their perspectives as office-holders or parliamentarians.

In general, it appears to me, from the written applications and the oral representations made by counsel for the three applicants, that they have generally misapprehended the scope of their participation in this Inquiry, and what the Commission expects of them.

On July 5, 2004, when the Conservative Party of Canada and the Bloc Québécois were granted the status of Intervenors at the Inquiry, I took care to explain that they were not being granted full participation because of the danger that that would introduce an element of partisan debate to the Inquiry which would be better left to another forum. With the subsequent arrival upon the scene of the Liberal Party of Canada, this consideration is reinforced. The only reasons these political parties have been granted intervenor status are those expressed in the following extract from the decision, referring to the Conservative Party:

> *The Conservative Party of Canada represents a substantial body of opinion in Canada. It has a valuable perspective on public administration, the roles of office-holders and parliamentarians, and the process through which public funds are disbursed. The Commission would accordingly benefit from its participation, assistance and representations as an Intervenor.*

The same reasoning applies to the Bloc Québécois and the Liberal Party of Canada.

In my opinion, in order to assist the Commission's work, it is not necessary for the Intervenors to analyze the daily transcripts with the attention which would be required of a lawyer mandated to defend the interests of a client. The three applicants have no interests to defend in the Inquiry. To the extent that they have interests, these should not be the concern of their counsel, but rather the public interest. The transcripts need only be examined by them with a view to the submissions which they will be making from time to time, but mainly at the end of the Inquiry.

With respect to documentation, counsel for the Intervenors should take cognizance only of the documents which form part of the record, since it is only that evidence which I will take into consideration in making my findings and recommendations. The remaining documentation communicated to the other participants may be of interest to the latter, who have the interests of their respective clients to defend, but the Intervenors, who do not represent clients having direct and substantial interests effected by the Inquiry, may safely ignore it.

I am not persuaded that counsel for the Intervenors require more funding than what has already been recommended. Probably the task of summarizing the daily transcripts will take longer on some days than the three hours allowed, but almost certainly on other days less time will be required. Counsel should seek alternative methods of facilitating their work, with a view to economizing public funds as much as possible. The drain upon the public purse caused by the work of the Commission should be minimized.

I am conscious of the possibility that at some point in the future, it may be necessary for one or other of the present applicants to seek the standing of a full participant. Should such an application be justified, the party concerned

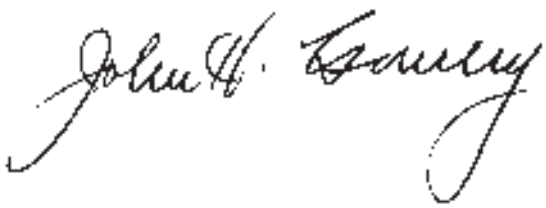
will then be entitled to ask for a revision of my recommendation with respect to funding.

Disposition

The applications of the Conservative Party of Canada and Bloc Québécois for a modification of my Ruling dated July 19, 2004 on recommended funding are dismissed.

The application of the Liberal Party of Canada for funding is granted as follows:

I recommend that limited funding be granted to counsel for the Liberal Party of Canada to the same extent that was recommended to the Conservative Party of Canada in the Ruling dated July 19, 2004, except that pre-hearing preparation should be limited to 20 hours of work for each lawyer, and funding should not otherwise be granted for services performed prior to October 20, 2004.



John H. Gomery, Commissioner

October 26, 2004

Supplementary Ruling on Funding-Liberal Party of Canada (Quebec) (April 4, 2005)

The Liberal Party of Canada and the Liberal Party of Canada (Quebec)—(collectively the Liberal Party), filed a written application on April 4, 2005, supplemented by oral submissions on the same date, to change the Party's status in the current proceedings from that of an intervenor to that of a full party. As well, the application included a request for funding according to Treasury Board guidelines on the same basis as that accorded to other parties with full party status.

The Commissioner has ruled in favour of the Liberal Party of Canada and the Liberal Party of Canada(Quebec) application and makes a recommendation to the Treasury Board to amend the previous ruling of October 20, 2004 as follows:

Change a) to read:

a. funding is recommended for one junior and one senior lawyer. The junior lawyer will work under the supervision of the senior lawyer who will make decisions and present closing submissions to the Inquiry;

Item b) remains unchanged:

b. funding is recommended for pre-hearing preparation limited to 20 hours of work for each lawyer, and for suggestions from time to time to Commission counsel and related representatives limited to 40 hours of work by the senior lawyer;

Change c) to read:

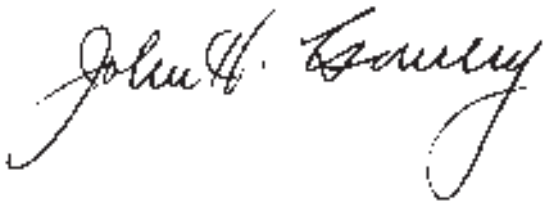
c. counsel will be funded to a limit of 10 hours per diem, to include both preparation for and attendance at the hearings; the Applicant will only be reimbursed for one legal counsel to attend for any one hearing day;

Change d) to read:

d. funding is recommended for necessary expenses and travel;

Item e) remains unchanged:

e. funding is recommended for the preparation and presentation of closing submissions limited to 30 hours for each lawyer.



John H. Gomery, Commissioner

April 4, 2005

Supplementary Ruling on Funding-Bloc Québécois (April 6, 2005)

The Bloc Québécois made a written application on April 5, 2005 for:

I. A change from Intervenor status to full Party status; and

II. additional funding as a result

The Commissioner rejected the applicant's motion for a change from Intervenor to Party status. However he makes a recommendation to the Treasury Board to amend the previous ruling of July 19, 2004, to take effect as and from April 6, 2005, as follows:

Change a) to read:

a. funding is recommended for one junior and one senior lawyer. The junior lawyer will work under the supervision of the senior lawyer who will perform the bulk of the work, make decisions and present closing submissions to the Inquiry;

Item b) remains unchanged:

b. funding is recommended for pre-hearing preparation limited to 40 hours of work for each lawyer, and for suggestions from time to time to Commission counsel and related representatives limited to 40 hours of work by the senior lawyer;

Change c) to read:

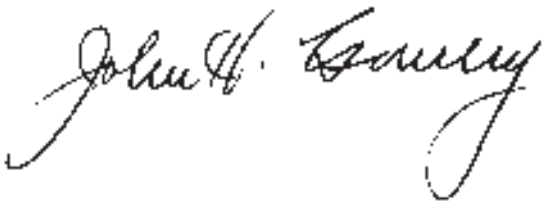
c. funding is recommended for the review of daily transcripts and documents limited to three hours per day for the junior lawyer or one hour per day for the senior lawyer; in the alternative funding is recommended for one legal counsel to prepare and attend the hearings to a limit of 8 hours per day;

Change d) to read:

d. funding is recommended for necessary expenses and travel;

Item e) remains unchanged:

e. funding is recommended for the preparation and presentation of closing submissions limited to 30 hours for each lawyer.



John H. Gomery, Commissioner

April 6, 2005

Supplementary Ruling on Funding-Conservative Party of Canada (April 6, 2005)

The Conservative Party of Canada made a written application on April 6, 2005, supplemented by an oral submission on April 7, 2005 and, a further request on April 12, 2005 for:

I. Additional funding to enable its Counsel to attend the proceedings before the Commission; and

II. Permitting its Counsel on occasion to attend the hearings at Place Guy Favreau in Montreal through teleconferencing, videoconferencing or other similar technology.

The Commissioner has ruled in favour of the Conservative Party's application and makes recommendation to the Treasury Board to amend the previous ruling of July 19, 2004, to take effect as and from April 6, 2005, as follows:
Change a) to read:

a. funding is recommended for one junior and one senior lawyer. The junior lawyer will work under the supervision of the senior lawyer who will make decisions and present closing submissions to the Inquiry;

Item b) to remain unchanged:

b. funding is recommended for pre-hearing preparation limited to 40 hours of work for each lawyer, and for suggestions from time to time to Commission counsel and related representatives limited to 40 hours of work by the senior lawyer;

Change c) to read:

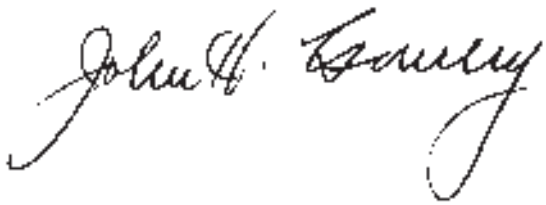
c. funding is recommended for the review of daily transcripts and documents limited to three hours per day for the junior lawyer or one hour per day for the senior lawyer; in the alternative funding is recommended for one legal counsel to prepare and attend the hearings either in person or through teleconferencing, videoconferencing or other similar technology, to a limit of 8 hours per day;

Change d) to read:

d. funding is recommended for necessary expenses and travel;

Item e) remains unchanged:

e. funding is recommended for the preparation and presentation of closing submissions limited to 30 hours for each lawyer.



John H. Gomery, Commissioner

April 6, 2005

Ruling on *In Camera* Hearing (Mr. Joseph Guité) (October 28, 2004)

This ruling deals with an application made by Joseph Charles Guité for an *in camera* hearing of his testimony, or, subsidiarily, for a publication ban of his evidence, or, again subsidiarily, for a postponement of his testimony until after his criminal trial. Mr. Guité fears that the publicity which will result from his appearance before the Commission, which is scheduled to take place within the next two weeks, will make it impossible for him to have a fair trial on the criminal charges which are pending against him. He alleges that he expects that his criminal trial before a court composed of a judge and jury, will take place in Montreal at the January assizes, that is to say within the next two or three months.

There are three circumstances that are to be taken into consideration in deciding this application; these circumstances do not usually exist in other cases where publication bans and similar remedies are sought.

First, this is a public inquiry on questions of national importance. It is particularly important that the Canadian public be enabled to follow what occurs at the Commission and to read media reports of the evidence presented, unless there are compelling reasons not to allow free access to such reports. Since the inquiry is public, it is more important that there be no limitation on media access than if the inquiry were one conducted, for example, by a coroner.

Secondly, counsel for the Commission have undertaken not to adduce evidence before the Commission of the contracts that are the subject of the criminal charges upon which Mr. Guité is to be tried. Accordingly, Mr. Guité, in his testimony before the Commission, will not be compelled to say anything of an incriminating nature which might predispose a jury candidate to consider him guilty of the counts in the indictment.

Thirdly, Mr. Guité has already testified at some length before the Public Accounts Committee of the House of Commons. One may assume therefore that impact or shock value of his testimony before the Commission will be lessened. Publicity concerning his statements has already occurred, and to the extent that that publicity might affect the possibility of empanelling an impartial jury to try him, the damage has already occurred and would not be substantially aggravated by a repetition of that testimony

Nevertheless, it is to be expected that Mr. Guité's appearance before the Commission will be the occasion of extensive reporting and comment in the media. Many potential jurors will have heard about Mr. Guité and his involvement in the administration of the sponsorship program and advertising activities of the Government as a result of his appearance before the Commission. The question which his application raises is as follows: has he shown that that publicity will so jeopardize his chances of having a fair trial that steps should be taken to avoid such publicity by an *in camera* order, or a publication ban, or by postponing his appearance to a later date.

From the submissions made to me by counsel for the applicant, by Commission counsel, and by the other parties who have made submissions on this question, I retain that the decision of the Supreme Court of Canada in Dagenais, and the opinion of Mr. Justice Cory in the Westray case, are the leading authorities on the subject. I do not propose to make a detailed analysis of this jurisprudence; it would be presumptuous for me to comment on it in any case, since the rules have been very clearly established.

First of all, the rule as enunciated by Chief Justice Lamer in Dagenais is stated as follows[1]:

> *A publication ban should only be ordered when:*
>
> *(a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and*
>
> *b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.*

I take it that the same rule would apply to an application for an *in camera* hearing.

With respect to the criterion of necessity, it is well established by the jurisprudence that a publication ban is not necessary if there are reasonable alternatives to assure a fair trial to the accused person. In this case, the only threat to a fair trial is the possibility that the impartiality of prospective jurors will be affected by the publicity surrounding Mr. Guité's testimony before the Commission. Surely I am entitled to assume, in the absence of evidence

to the contrary, that the Judge of the Superior Court of Quebec who will have the responsibility of supervising the selection of a jury for Mr. Guité's trial, will take the usual precautions to ensure that prospective jurors are untainted by pre-trial publicity. Any prospective jurors who may have heard about Mr. Guité's involvement in the sponsorship program and advertising activities of the Government, (and let me say that it is probable that some prospective jurors will not have heard any such reports, in spite of widespread publicity), will be carefully screened to determine if they have formed opinions unfavorable to the accused; if they have formed such opinions, it may be assumed that questions will be put to the candidate to find out whether or not those opinions are so firmly held that they cannot be changed in the light of the evidence to be presented by the Crown.

In this fashion, biased jury candidates are weeded out. I am also entitled to assume that the presiding judge will give the usual instructions to the jury, once it has been formed, that they should judge the case on the evidence presented at the trial and not on the basis of what they might have heard elsewhere. And finally, I believe that I am entitled to assume that the jurors will listen attentively to the judge's instructions and will comply with them. In other words, I am of the opinion that the usual procedures involved in the choosing of an impartial jury and the instructions to be given to it in the course of Mr. Guité's trial provide a reasonable alternative to what is requested here by Mr. Guité, and they therefore avoid the infringement to freedom of expression which is the inevitable consequence of an *in camera* hearing or a publication ban.

What I have already said is sufficient, in my opinion, to dispose of the matter, but I would like to add an additional comment on one issue, which was strongly urged by several counsel, concerning the evidentiary burden upon the person requesting a publication ban, and, to an even greater extent, on the person urging the more draconian remedy of an *in camera* hearing. This issue is dealt with as follows by Mr. Justice Cory in the Westray decision[2]:

6. *Those seeking to have the court ban the publication of evidence have the burden of establishing the necessity of the ban. That is to say they must demonstrate that the effect of publicizing the evidence will be to leave potential jurors irreparably prejudiced or so impair the presumption of innocence that a fair trial is impossible. Before relief is granted in order to preserve the right to a fair trial, satisfactory proof of the link between the publicity and its adverse effect must be given.*

7. *Assessment of the effect of the publicity on the right to a fair trial must take place in the context of the existing procedures to safeguard the selection of jurors. Further, the nature and extent of the publicity must be considered.*

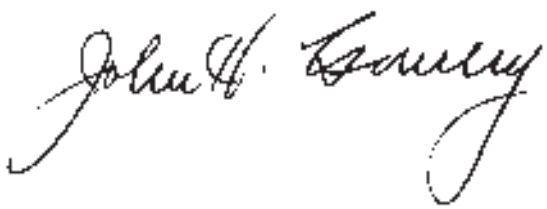
8. *The applicant seeking the ban must establish that there are no alternative means available to prevent the harm the ban seeks to prevent.*

In the present case the applicant's only evidence goes to establishing that there has been, and presumably will be, extensive media coverage of the issues giving rise to the present inquiry and Mr. Guité's involvement in it. There is no evidence at all of the effect this publicity has had or will potentially have on the minds and opinions of jury candidates, and there is nothing to indicate that they will or might become irreparably prejudiced as a result. Mr. Auger argues that this absence of evidence may be overcome by the use of common sense. However, I cannot say that my own common sense, which has been to some extent sharpened by my experiences as judge who has presided over a number of jury trials, leads me to conclude that the minds and opinions of jurors are so readily influenced by the media that they lose irretrievably their ability to decide upon the guilt or innocence of an accused upon the basis of the evidence presented at a criminal trial, rather than upon the basis of what they see and hear on the television and in newspapers. In any event, regardless of my own personal beliefs and experiences, and what I like to think of as my common sense, Mr. Guité has quite simply failed to discharge his evidentiary burden of showing the possibility, much less the probability, of bias resulting from publicity, no matter how extensive.

With respect to the lesser remedy of postponing the testimony of Mr. Guité until after his criminal trial, present indications are that the trial will not take place before January 2005 and that it will last for from four to six weeks. In practical terms this means that if I were to accept his request to

postpone his testimony, the postponement would have to be until about the end of February 2005, by which time all or most of Phase 1A of the Inquiry would have been completed. This would completely distort the presentation of the evidence as it has been envisaged by counsel for the Commission and would make it difficult if not impossible to lead evidence in a logical way by other witnesses who had dealings with Mr. Guité. Just as Mr. Guité has rights to defend, other parties have rights and interests, the defense of which requires them and Commission counsel to know in advance what Mr. Guité has to say about his dealings with others. In all of the circumstances, I agree with the submission of Mr. Finkelstein that any postponement of Mr. Guité's testimony is an unacceptable interference with the orderly presentation of evidence before the Commission, an interference unjustified when weighed against the prejudice which he alleges pre-trial publicity might cause to him. As already indicated, I am not persuaded that any such prejudice is irreparable and cannot be avoided by other alternatives such as careful jury selection.

For these reasons, Mr. Guité's application is dismissed.



John H. Gomery, Commissioner

October 28, 2004

[1] Dagenais v. Canadian Broadcasting Corp. , [1994] 3 S.C.R. 835 at 878.

[2] Phillips v. N.S. (Westray Mine Inquiry), [1995] 2 S.C.R. 98 at 173-174.

Ruling on Parliamentary Immunity (November 22, 2004)

Counsel for the House of Commons has advised me that her client has decided by motion to reaffirm the immunity and privilege which, according to her submission, attach to the testimony of Mr. Guité before the Public Accounts Committee, and not to waive that privilege. I am grateful to the House of Commons for the dispatch with which it considered and dealt with this issue.

This morning counsel for Mr. Guité presents a motion by which he reasserts his pretension that the transcription of his client's testimony before the Public Accounts Committee should not be used or referred to in any way during his cross-examination. In addition to the argument based upon parliamentary privilege, he invokes certain promises made to him prior to testifying to the effect that his testimony would not be used in other proceedings. These promises appear to have been an important consideration in the deliberations of the Committee of the House of Commons which recommended that no waiver be given. Mr. Guité asks that I issue an order accordingly, and maintain his objection to the use of any evidence previously given by him before the Public Accounts Committee.

Counsel for Mr. Pelletier who is cross-examining Mr. Guité, as well as counsel for certain other parties who will wish to cross-examine, wish to use the transcriptions as evidence of prior statements made by the witness which are, according to their pretensions, inconsistent with the testimony given before this Commission; in this way they propose to attack the credibility of the witness and the probative value of his testimony. Counsel for the House of Commons appeared before the Commission on October 18, 2004 and again on October 25, 2004, to argue that the use of transcripts or evidence given before any House of Commons Committee is constitutionally impermissible.

The objection to any admission of the PAC transcripts is based on the parliamentary privilege of "free speech" which is part of the Constitution of Canada by virtue of the preamble and s. 18 of the *Constitution Act*, 1867 and s. 4 of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1. Section 4 confirms the privileges of our Parliament and its members with reference to the privileges of the United Kingdom House of Commons as at

Confederation, which then included the parliamentary freedom of speech guaranteed by Article 9 of the United Kingdom's 1689 *Bill of Rights*. Article 9 provides "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament".

It is not suggested by any of the parties contesting the objection that Article 9 does not apply to the proceedings of committees of the House of Commons, but they argue that it applies only to what is said by members of Parliament, and does not extend to what is said by persons appearing as witnesses before Parliament or its committees. Counsel for these parties argue that Article 9 was not intended to apply to such witnesses but to the statements made in debate by parliamentarians themselves and that the purpose of the enactment was to protect the latter from civil or criminal proceedings based upon such statements. Its objective was not, according to their submission, to protect from scrutiny in the Courts the declarations made by witnesses before parliamentary committees which they later contradicted in court proceedings, or which are inconsistent with their testimony. They note the historical context in which the *Bill of Rights* was enacted, as part of legislation which brought William of Orange and his wife Mary to the throne of England, after the reigns of the Stuarts which had been marked by conflict between the Monarchy and Parliament. In 1689 parliamentarians clearly wished to ensure their immunity from prosecution for what was said in parliamentary debate, but it may be doubted that they were thinking of the testimony of witnesses before parliamentary committees. It may even be doubted that parliamentary committees existed in 1689, at least as we know them today.

One of the difficulties I have in deciding whether to maintain or dismiss the objection is that there is no Canadian case directly dealing with the issue. I am referred, however, to jurisprudence in cases alleged to be persuasive originating in other countries which have, like Canada, inherited the Westminster form of parliamentary government and the protections afforded by the *Bill of Rights* of 1689. Of this jurisprudence two cases stand out, the decision of Mr. Justice Hunt in the Australian case of *R. v. Murphy* (1986) 64 A.L.R. 498 and the decision of the Judicial Committee of the Privy Council,

in an appeal from a decision of the Courts of New Zealand, in *Prebble v. Television New Zealand Ltd.* (1995) 1 A.C. 321. Sadly, these two decisions are at the same time well-reasoned, persuasive and completely contradictory. The parties contesting the objection, who argue that parliamentary immunity does not attach to the transcripts of Mr. Guité's testimony before the Public Accounts Committee, rely upon the reasons for judgment of Mr. Justice Hunt, which include the following extract from page 8 of his Judgment:

> *What is meant by the declaration that "freedom of speech. . . in Parliament ought not to be impeached or questioned in any court or place out of Parliament" is, in my view, that no court proceedings (or proceedings of a similar nature) having legal consequences against a member of Parliament (or a witness before a parliamentary committee) are permitted which by those legal consequences have the effect of preventing that member (or committee witness) exercising his freedom of speech in Parliament (or before a committee) or of punishing him for having done so. In other words, the phrase "impeached or questioned in any court or place out of Parliament" in Art. 9 should be interpreted in the sense that the exercise of the freedom of speech given to members of Parliament (and committee witnesses) may not be challenged by way of court (or similar) process having legal consequences for such persons because they had exercised that freedom.*

He continues at page 11 as follows:

> *Freedom of speech in Parliament is not now, nor was it in 1901 or even in 1688, so sensitive a flower that, although the accuracy and the honesty of what is said by members of Parliament (or witnesses before parliamentary committees) can be severely challenged in the media or in public, it cannot be challenged in the same way in the courts of law. It is only where legal consequences are to be visited upon such members or witnesses for what was said or done by them in Parliament that they can be prevented by challenges in the courts of law from exercising their freedom of speech in Parliament. It is only when that is the consequence of the challenge that freedom of speech in Parliament needs any greater protection from what is said or done in the courts of law than it does from what is said or done in the media or in public.*

This decision so alarmed the Parliament of Australia that it promptly enacted legislation to explicitly affirm the parliamentary privilege argument rejected by Mr. Justice Hunt, by the *Parliamentary Privileges Act* of 1987.

The opposing view, upon which counsel for the House of Commons and Mr. Guité rely, is enunciated in the Privy Council decision in *Prebble v. Television New Zealand Ltd.*, which takes a much broader view of the immunity created by Article 9 of the *Bill of Rights*. Lord Browne-Wilkinson expressly disagrees with the conclusions reached by Mr. Justice Hunt, and says in his opinion that Article 9 of the *Bill of Rights* is a manifestation of the principle that the courts and Parliament should recognize their respective constitutional roles and that one should not be allowed to challenge in any way what is said or done in the other. He continues as follows at p. 332 of the reported decision:

> *According to conventional wisdom, the combined operation of article 9 and that wider principle would undoubtedly prohibit any suggestion in the present action (whether by way of direct evidence, cross-examination or submission) that statements were made in the House which were lies or motivated by a desire to mislead.*

After expressing, politely but firmly, his profound disagreement with the conclusions of Mr. Justice Hunt in *R. vs. Murphy*, his Lordship concludes as follows (p. 334):

> *Moreover to allow it to be suggested in cross-examination or submission that a member or witness was lying to the House could lead to exactly that conflict between the courts and Parliament which the wider principle of non-intervention is designed to avoid. Misleading the House is a contempt of the House punishable by the House: if a court were also to be permitted to decide whether or not a member or witness had misled the House there would be a serious risk of conflicting decisions on the issue.*

It should be noted that decisions of the Privy Council rendered in 1995 are not binding on Canadian courts, although of course its views as to the proper interpretation to be given to an English statute such as the *Bill of Rights* of 1689 should be given great weight.

Before I undertake to choose between contradictory precedents, I must first consider the particular context in which the present dispute arises. Certain important distinctions from the cases mentioned are apparent. First of all, I am not here sitting as a court of law, but am presiding over a Commission of Inquiry, which has the mandate to make factual findings in order to make,

subsequently, recommendations to prevent mismanagement of sponsorship programs or advertising activities of the Government of Canada in the future. The Terms of Reference by which the Commission was created require me to submit, on an urgent basis, reports to the Governor in Council, and I interpret this requirement to mean that as Commissioner I should avoid, to the greatest degree possible, legal entanglements that would have the effect of delaying the Commission's hearings and the submission of its reports. Since the Terms of Reference forbid me to make findings of civil or criminal responsibility, the present Commission is not at all similar to a court, although some of its procedures are comparable to what occurs during a trial. I also note that the Terms of Reference authorize the Commissioner "to adopt any procedures and methods that he may consider expedient for the proper conduct of the inquiry", meaning that the usual rules with respect to procedure and the admissibility of evidence do not apply, the only limitation to my liberty to proceed as I deem expedient and appropriate being my obligation to act fairly and in accordance with the requirements of natural justice.

Another distinguishing factor should be noted. This is a public inquiry into matters of great interest to the public, which relies upon the media for information concerning the evidence. The hearings are televised, as were the hearings before the Public Accounts Committee. Should I decide to maintain the objection, I would be in the seemingly paradoxical situation of deciding to exclude from consideration by the Commission testimony which has been available to the population in general and which has been widely commented upon in the media. However, this is not so paradoxical as it may at first appear. Facts having their source in privileged communications are often denied to judges and juries, as triers of questions of fact, yet no one contests the legal validity of their eventual findings and verdict.

The final distinction is the explicit promise made to Mr. Guité by the Public Accounts Committee that he would benefit from parliamentary immunity. From the case reports it does not appear that a similar promise was made to the witness concerned in the cases of *Murphy and Prebble*.

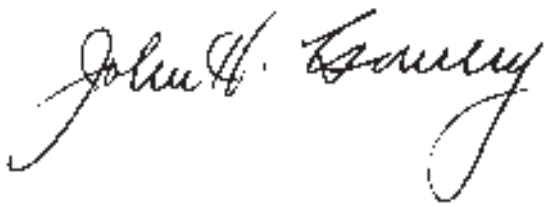
Should I decide the objection by authorizing the use of the transcripts for the purposes of cross-examination, I would undoubtedly have the advantage

of knowing to what extent Mr. Guité may have made declarations to the Public Accounts Committee which may be inconsistent with his testimony before the Commission, but this would be at the cost of the risk of provoking an application for judicial review of my decision and the possibility of a stay of the hearings of the Commission. This is, in my opinion, a much greater danger and disadvantage to the completion of my mandate than being deprived of the use of the transcripts.

It should be remembered that questions to a witness concerning prior inconsistent statements have for their sole objective the undermining of the witness's credibility. They do not serve to put into evidence the earlier testimony of the witness; only what the witness says in his or her deposition before this Commission has what we call probative value. It should also be recalled that such questions are only one method of attacking a witness's credibility. All of the other means of assessing and testing credibility remain. In my view, even without the use of his prior testimony, I should be able to come to satisfactory conclusions concerning the credibility of Mr. Guité, based upon my experience as a judge, the documentation in the record, prior inconsistent statements he may have made elsewhere than before that particular Committee, and the usual indicia upon which triers of fact rely, such as the manner in which witnesses testify, contradictions, if any, in their testimony and the evidence of other witnesses.

In my view it is important that this Commission should not be seen to encroach in any way upon the privileges and immunities of the Parliament of Canada, and should respect the promises and undertakings it made to Mr. Guité. For this reason and for the practical reason that it is desirable and necessary to proceed with the work of this Commission of Inquiry without interruption, I propose to maintain the objection. Should this Ruling give rise to an application for judicial review by the parties contesting the objection or by one of them, in the event that my Ruling on the objection is eventually overturned before the Report of the Commission has been produced, Mr. Guité could, if necessary, be recalled to be questioned concerning the allegedly contradictory statements made previously. In other words, nothing will have been done that cannot be subsequently corrected.

For the time being, the objection is maintained and counsel are prohibited from asking Mr. Guité any question based upon an allegedly contradictory declaration made by him before the Public Accounts Committee of the House of Commons.



John H. Gomery, Commissioner

November 22, 2004

Ruling on Motion for Recusal (February 1, 2005)

A Motion presented on behalf of the Right Honourable Jean Chrétien asks me to recuse myself as Commissioner of this Inquiry.

Before dealing with some of the specific allegations made in support of the Motion, I would like to make a few remarks of a general nature.

I realize now, with the benefit of hindsight, that it was an error for me to agree to be interviewed by the media before Christmas. I also recognize that some of the statements made by me during those interviews were ill-advised and inappropriate. My inexperience in handling the media is obvious to everyone, and has served to detract attention from the real objective of the Inquiry, which is to get at the truth of the matters which were the subject of Chapters 3 and 4 of the Report of the Auditor General. I very much regret this distraction.

However, the question raised by Mr. Chrétien's Motion is not whether the interviews and the statements were ill-advised and inappropriate, but whether they demonstrate a reasonable apprehension of bias on my part, as that expression has been explained by the Courts, most recently in the *Beno* and *Krever* decisions.

In the representations made before me on January 11th, Mr. Scott declared and I quote: "You have closed your mind". That statement was factually incorrect; I am the only person in the world who could know if I had closed my mind, and I said then, to reassure Mr. Scott and others, that my mind remained open. It is still open today and I repeat that I have not yet reached any final conclusion on any of the questions which this Inquiry calls upon me to decide.

The arguments made in support of the Motion no longer appear to be that I am actually biased but rather that a reasonably well-informed person would conclude from the remarks that I made to journalists that I am biased, in spite of my reassurances to the contrary, and that I cannot be counted upon to decide fairly the matters which are to be decided. In paragraph 31 of the Motion, certain facts are cited in support of this proposition, which I would like to deal with briefly.

When I referred to the report of the Auditor General, I am quoted as saying that I "was coming" to the same conclusions as she did, not that I had so concluded. In other words, I indicated that my mental processes were ongoing; I have not closed my mind to contrary evidence, should such evidence be adduced.

When I made reference to autographed golf balls, I said that it was disappointing to have heard evidence that a Prime Minister *would* allow (note the use of the conditional tense) his name to be used in this way. My mind remains open to any reasonable explanation, and it is a small point in any event. I am looking forward to hearing Mr. Chrétien's testimony.

I have heard contradictory evidence, from various witnesses. I must conclude that some witnesses have not been truthful, but I did not say which witness or witnesses I was talking about, or indicate which of the conflicting versions I may be inclined to prefer. As to the relative truthfulness of various witnesses, these are conclusions I will draw only in light of all the evidence thus far and yet to come.

Finally, my description of Mr. Guité and the characterization of him as a "charming scamp", which is admittedly the kind of colourful language that judges should avoid using, does not in any way betray how I feel about his credibility. Sometimes charming people are credible and sometimes not. It is too soon to decide what weight I will give to Mr. Guité's testimony. That remains to be decided when the hearings are completed. The other matters referred to in subparagraph (c) of paragraph 31, namely the admissibility of testimony before the Public Accounts Committee and the decision to exclude evidence relating to outstanding criminal charges are raised in an application for judicial review which is pending before the Federal Court, upon which I should not comment.

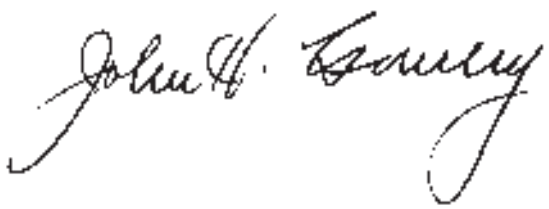
The Motion refers to the political past of the Commission's lead counsel, Me. Bernard Roy. It acknowledges that those political activities ended more than fifteen years ago. His past was known to all parties concerned from the time I made the appointment, and is totally irrelevant to the subject-matter of the Inquiry. Me. Roy should be judged solely on the basis of his work for the Inquiry, which has been professional, impartial and objective. He has my full confidence. My conduct of the Inquiry has not been in any way influenced or affected by what Me. Roy might have done in the 1980's, or by any political views that he has now or may have had in the past.

I do not concede that anything that I said, or the language that I used, would persuade a reasonably well-informed and fair-minded person, viewing the matter realistically and practically, that I am biased or partial, or that I have closed my mind and come to conclusions prematurely about the issues with which this Commission is concerned, or that the proceedings are being conducted unfairly. After giving the matter careful consideration, I am firmly of the opinion that a reasonable, well-informed and fair-minded person understands the difference between committing an error and being biased.

I note that the Applicant's complaint about the phrasing of my question to Mr. Beaudoin has taken a small number of lines out of the much larger context in which the exchange took place. As to the comments made to certain journalists by Mr. Perreault, the Commission media spokesman, I wish to state that those comments were made without my knowledge. In any event, Mr. Perreault simply stated the content of e-mails received—a matter of fact.

I consider that it is my duty to take into account the work that has already been accomplished by the Commission, including extensive preparations and more than 60 days of hearings extending over a period of nearly five months. The recusal of its sole Commissioner would place all parties, including the witnesses who have already been heard and those who have not yet testified, in a position of stressful uncertainty, and would necessitate lengthy delays and huge costs in addition to those already incurred. The public interest would be badly served by a suspension of the hearings for any reason.

For these reasons I dismiss the Application for my recusal as Commissioner of this Inquiry.



John H. Gomery, Commissioner

February 1, 2005

Ruling on Applications for Publication Ban (March 29, 2005)

This Ruling deals with three applications, filed respectively on behalf of Jean S. Brault, Paul Coffin and Joseph Charles Guité, each having been charged by the Attorney General of Quebec in preferred indictments with multiple counts of fraud and conspiracy under the *Criminal Code*. Their trials, before courts composed of a Quebec Superior Court judge and jury, are scheduled to begin on May 2, 2005 and are expected to last from four to six weeks. In the meantime they have been subpoenaed to appear before this Commission to testify concerning matters relevant to its mandate. The applications ask that their testimony be made subject to a publication ban to have effect until the completion of their criminal trials.

The expression "publication ban" as it is used in this decision, should be taken to have the meaning those words have been given in subsection 486(4.9) of the *Criminal Code*, which states that "no person shall publish in any way (...) any evidence taken, information given or submissions made at a hearing", in this case, a hearing of the Commission. In my interpretation of this disposition, "broadcast" includes a posting on the Internet.

The word "broadcast" means "broadcast to the public", so that a publication ban would not prohibit a television broadcaster such as CPAC from continuing to capture the television images and sound of the Commission's proceedings, and from transmitting them to the media room and other in-house outlets, as it does at present. Rule 50 of the Commission's *Rules of Procedure and Practice* should not be construed so as to prevent this practice.

All three applicants request that the publication ban should be made to apply not only to their own testimony, but also to the testimony of others which relates to the criminal charges they are facing. It should be remembered, however, that at the very beginning of the hearings counsel for the Commission agreed and undertook not to adduce evidence before the Commission relating to the matters that are the subject of the criminal charges which the applicants are facing. This undertaking will continue to be respected. The testimony of the applicants themselves may give rise to other problems, such as impressions that potential jurors might receive with respect to their character or conduct; this difficulty will be dealt with later, but for now, I

will say, for reasons that will be explained later, that I am not convinced that there is any justification for a publication ban with respect to the evidence introduced by persons other than the applicants themselves.

The applications in written form presented by Messrs. Coffin and Guité also ask that their testimony be heard *in camera*, but in their oral representations before me no arguments in favor of an *in camera* hearing were formulated, and I have concluded that this aspect of the applications has either been withdrawn, or is not their true objective.

In the application presented on behalf of Mr. Guité he requests, as an alternative conclusion, that his appearance before the Commission to testify be postponed until after his criminal trial. This request will not be granted since a publication ban, if it is granted, gives him equivalent relief. In addition, the postponement of his testimony would disrupt the orderly presentation of evidence and unduly delay the completion of the Commission's hearings, and the production of its first Report, a matter of considerable urgency.

Accordingly, the sole issue which remains to be decided is whether or not there should be a publication ban with respect to the testimony of the applicants, and if so, its scope and duration.

All of the applicants allege that the media attention which will be given to their appearances before the Commission will make it impossible for them to have a fair trial, since the jury selected to try them will inevitably be influenced by that publicity. They point to paragraph (k) of the Commission's Terms of Reference which directs me "to ensure that the conduct of the inquiry does not jeopardize any ongoing criminal investigation or criminal proceedings"; they argue that if the effect of their testimony before the Commission is to make it impossible for them to have a fair trial, I will have failed to fulfill this obligation.

The applications are contested by Mr. Bantey representing a consortium of newspapers and broadcast media. He submits that all of the reasons given in my Ruling of October 28, 2004 for refusing a publication ban which was then requested by Mr. Guité still apply, and that there is no reason alleged or evidence offered to support a modification of that Ruling. Counsel for the Auditor General of Canada, the Attorney General of Quebec, the

Attorney General of Canada and counsel for the Commission itself, all indicate in their representations that if a publication ban is contemplated, it should be limited as to its duration and scope, so as to conform to the principles enunciated by Chief Justice Lamer for the majority of the Supreme Court of Canada in the *Dagenais case*[1], by Mr. Justice Cory in the *Westray case*[2], and by the Supreme Court, unanimously, in *Mentuck*[3].

This matter is a classic case where a balance must be found between two constitutionally protected rights, the right of the public to be informed of matters affecting them, guaranteed by section 2 of the *Canadian Charter of Rights and Freedoms*[4], and the right of every person accused of a crime to have a fair trial, guaranteed by section 11(d) of the *Charter*. It should be noted that Canadian citizens have an interest in the protection of both of these rights, since the freedom of the press is an essential value in a democracy, and the guarantee that every person is presumed innocent and cannot be found guilty of a criminal offence without undergoing a fair trial is for the protection of us all.

I do not propose to repeat in detail what I said in my decision of October 28, 2004; the reasons that were given then continue to be valid, but it must be again recalled that in their testimony before the Commission, the applicants will not be questioned with respect to the matters underlying any of the criminal charges upon which they are to be tried in May. Accordingly, they have no reason to fear self-incrimination on those charges. I also wish to emphasize that the fundamental responsibility for assuming that accused persons have a fair trial rests primarily upon the court that tries them, which has many means at its disposal to ensure that the citizens chosen as jurors are impartial and able to decide upon the guilt or innocence of the accused based only upon the evidence presented at their trial, and not upon what they may have heard elsewhere.

Nevertheless, I am obliged to take into account the great interest with which the proceedings of the Commission have been followed by the public, as evidenced by extensive media and broadcast coverage and commentary. As the Supreme Court of Canada commented recently in *Krymowski*[5], a court may accept without the requirement of proof facts that are either

"(1) so notorious or generally accepted as not to be the subject of debate amongst reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy."

Judging by the number of journalists and cameramen who are present at the hearings, the intensity of this media coverage has increased since Mr. Guité first testified before me in Ottawa in November. Media reports of which I am aware refer to a high degree of public indignation at certain recent revelations in the evidence presented before the Commission. Applying judicial experience and common sense, these factors probably make it more difficult than previously to empanel an impartial and dispassionate jury.

The problem is aggravated by the circumstance that the testimony of the applicants will be presented before the Commission only a few weeks or days before the commencement of their trials. It may not be easy for potential jurors to distinguish between the facts admitted into evidence in the criminal trials and the facts, possibly of a prejudicial nature, which will be disclosed in the evidence presented during their appearances before the Commission.

Mr. Bantey takes the position that in spite of these factors, it should be possible to select, by a careful screening process, jurors who either have not followed the media coverage of the proceedings of the Commission, or who have not formed opinions favorable or unfavorable to the applicants. Furthermore, he argues that no evidence has been presented by the applicants to demonstrate that the depositions of the applicants will leave potential jurors irreparably prejudiced or impair the presumption of innocence.

These arguments have two inherent weaknesses.

First of all, in spite of the efficiency and effectiveness of the screening process, Mr. Justice Cory, in his opinion in *Westray*, does not entirely exclude the necessity, in some cases, of a publication ban. In other words, it must be foreseen that in some cases, admittedly cases of an exceptional nature, the pool of potential jurors may be irreparably tainted by information that has been disseminated prior to the criminal trial.

Secondly, the difficulty for an accused person to demonstrate, by an evidentiary process, that future publicity will cause him an irreparable prejudice, should

not be underestimated. I cannot imagine how one is to assess the effect that revelations will have upon the public consciousness, particularly when one does not know what the revelations will be, the extent to which they will be reported by the media, and in what terms. The burden of proof imposed upon an applicant for a publication ban[6], presupposes that the extent and nature of the publicity is already known and measurable, whereas in the present matter, where the applicants have not yet testified, the possibly prejudicial effect of their depositions and how they may be reported and commented upon can only be guessed.

Mr. Justice Cory expresses the opinion that the hearings of a public inquiry do not in general present an unacceptable risk to the *Charter* right of an accused to have a fair trial, expressing himself on this subject in the following terms:

> *Often the publicity pertaining to the evidence given at the Inquiry will have little effect on potential jurors. The impact may be fleeting and quickly fade away. How very quickly the details of a news story can be forgotten. The passage of a very few days may suffice to dim if not obliterate the memory of the reporting of Inquiry evidence. The likelihood of a prejudicial effect upon fair trial rights may be small indeed, a minor item washed away in the flood of information generated daily by the media.*[7]

It is on the basis of this passage that I have concluded that there is no justification for a publication ban with respect to the evidence produced by persons other than the applicants themselves.

Mr. Justice Cory sees the matter differently however when the evidence before the public inquiry is the testimony of the persons accused of criminal offences. He is of the view that in those cases a publication ban may be necessary, as appears from the following passage:

> *However, the publication of the testimony of the two accused managers presents a very different situation. Obviously anything said by the accused will have a far greater impact than the evidence of many other witnesses. There is a real possibility that it will be stressed in media reports and well remembered by potential jurors. Yet, as accused, the managers can never be required to testify at their trial. The publication of their evidence at the Inquiry might mean that potential jurors would have been exposed to testimony that they might never hear at the trial. This coupled with the fact that it*

> *came from the accused themselves would make it difficult for jurors, despite their good intentions and the best of instructions from the trial judge to set it aside and leave it out of their considerations. In respect of this evidence, then, there is a clearly identifiable and serious risk that the fair trial rights of the two accused will be jeopardized.*[8]

I am of the opinion, notwithstanding the undertaking made by Commission counsel, that the foregoing citation is applicable to the present hearings. A publication ban is needed, as a precaution, with respect to the testimony of the applicants and evidence presented during their depositions, in order to prevent a serious risk to the proper administration of justice, because reasonable alternative measures cannot be sure to prevent that risk.

Since publication bans should be limited as to their duration, scope and content, in order to minimally restrict the freedom of the press and the right of free expression that it represents, I will impose a publication ban only until the moment at the end of the criminal trial of the applicant concerned when jurors are sequestered to deliberate. In the meantime, at the end of the deposition of each of the applicants, I will be prepared to hear representations from interested parties, including counsel for the media, on the question of whether some or all of the deposition should be immediately released from the publication ban, taking into consideration the effect that such a release might have upon forthcoming jury selection.

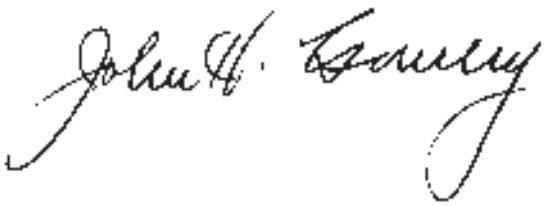
For these reasons, the three motions are granted in part, and I order

(1) That the testimony of Jean S. Brault, Paul Coffin and Joseph Charles Guité before this Commission of Inquiry during Phase 1B of its hearings, and any written evidence presented or referred to during their depositions, or any representations by counsel with respect thereto, shall be the subject of a publication ban as that term is used in subsection 486(4.9) of the *Criminal Code*, to remain in effect until the completion of the trial of the witness concerned before the Superior Court of Quebec, when the jury is sequestered to deliberate, unless ordered otherwise in the meantime;

(2) That upon the completion of the deposition of each of these witnesses, I will hear representations by counsel for interested parties who may request the immediate release from the effect of the

publication ban of the deposition of the witness concerned, or a part or parts thereof.

(3) That notwithstanding Rule 50 of the Commission's *Rules of Procedure and Practice*, CPAC may continue to capture the television images and sound of the Commission's proceedings, and to transmit them to the media room and other in-house outlets, as it does at present.



John H. Gomery, Commissioner

March 29, 2005

[1] Dagenais v. CBC, [1994] 3 SCR 835

[2] Phillips v. Nova Scotia, [1995] 2 SCR 97 (Westray)

[3] R. v. Mentuck, [2001] SCR 442

[4] Schedule B to the Constitution Act, 1982, enacted as the Canada Act, 1982 (U.K.), c. 11

[5] R. v. Krymowski, 2005 SCC 7 at para. 22

[6] Westray at pages 173-4

[7] Westray at page 177

[8] Westray at pages 177-8

Ruling Modifying Publication Ban (Jean S. Brault) (April 7, 2005)

On March 29, 2005 a publication ban was ordered with respect to the testimony of Jean S. Brault, which was then about to begin, and I undertook to hear representations by counsel for interested parties at the end of his deposition to determine if the ban should be released in whole or in part. His testimony ended yesterday afternoon. Counsel for Mr. Brault, supported by counsel for Mr. Guité, asks that the publication ban remain in effect until the completion of the trial of their clients, now fixed to begin on June 6th. All of the other parties that have made representations submit that it should be lifted, in whole or in part, except for counsel for Mr. Welch, who does not have standing, and who wants a delay to consider his position. This application cannot be granted; the interests of the other parties are of greater importance.

I am of the opinion that almost all of Mr. Brault's testimony and the documentation filed as part of his evidence have little to do with the accusations of fraud and conspiracy that he is facing. It is in the public interest that this evidence, with only a few exceptions, be made available to the public, remembering that publication bans constitute a violation of constitutional rights and are to be imposed rarely, particularly in the context of a public inquiry. At the time the ban was imposed, I did not know what Mr. Brault would say, and imposed the ban as a precaution, to prevent a possible prejudice to his right to a fair trial before an impartial jury. I will make a few exceptions to this general release, recalling the remarks of Mr. Justice Lamer in Dagenais c. C.B.C., [1994] 3 R.C.S. 835 at page 886 where he states:

> *Lorsque le procès est précédé d'une période intense de publicité relativement à des questions qui feront l'objet du procès, la situation est plus problématique. L'impact des directives est alors considérablement atténué. La publicité peut créer, dans l'esprit du jury, des impressions qui ne peuvent être consciemment dissipées. Le jury risque en fin de compte d'être incapable de distinguer la preuve entendue au procès de l'information implantée par un déversement continu de publicité.*

The evidence of the frequency of the contacts between Mr. Brault and Mr. Guité, and of the dealings they had, as described in Mr. Brault's testimony, could leave impressions in the minds of potential jurors, impressions that they might have difficulty to set aside, that they conspired together or were

motivated by a common desire to derive improper benefits from their relationship. To reduce the possibility of such impressions being created, a few portions of Mr. Brault's testimony as identified below, and a few exhibits, will remain subject to the publication ban until after their trial.

Accordingly, the publication ban ordered on March 29, 2005, is lifted with respect to the deposition of Jean S. Brault and all representations by counsel made with respect to it, except for

1) The following portions of the transcription of Mr. Brault's testimony and the related portions of the broadcast tapes, namely:

   a. Volume 88, for March 30, 2005, page 15688, line 3 to page 15690, line 13;

   b. Volume 89, for March 31, 2005, page 15806, line 9 to page 15807, line 8;

   c. Volume 90, for April 1, 2005, page 15926, line 10 to page 15932, line 10;

   d. Volume 91, for April 4, 2005, page 16027, line 9 to page 16028, line 20, and page 16032, line 17 to page 16058, line 3;

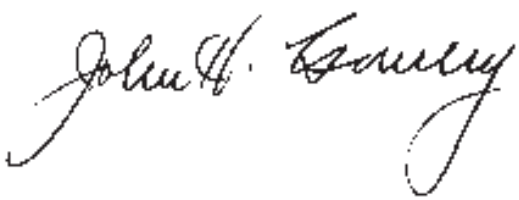
   e. Volume 92, for April 5, 2005, page 16284, line 21 to page 16297, line 17, and page 16303, line 4 to page 16312, line 11;

   f. Volume 93, for April 6, 2005, page 16557, line 7 to line 18;

2)

   a. Exhibit C313, page 78

   b. Exhibit C299, pages 9 to 27 inclusive including the addenda following page 9, and pages 33 to 59.



John H. Gomery, Commissioner

April 7, 2005

Ruling Modifying Publication Ban (Paul Coffin) (April 27, 2005)

On March 29, 2005 a publication ban was ordered with respect to the testimony of Paul Coffin, and I undertook to hear representations by counsel for interested parties at the end of his deposition to determine if the ban should be released in whole or in part. His testimony ended this morning.

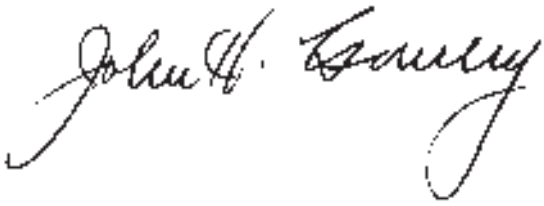
Counsel for Mr. Coffin asks that all or most of their client's testimony should remain subject to the publication ban until after his criminal trial, which will begin in mid June. Counsel for the Commission takes the position that only selected portions of the testimony should remain subject to the ban, those portions containing references to billing practices used by Mr. Coffin which were in some respects similar to those which are the subject of the criminal charges. The Crown prosecutor concerned supports this submission. All of the other parties who have made representations on this issue are in favor of a complete lifting of the ban.

None of the questions put to Mr. Coffin refer specifically to the criminal charges, but in two of his answers he made statements that might, correctly or incorrectly, be considered by potential jurors to be admissions of the fraudulent acts which will be the subject of his trial. Since the purpose of the publication ban was to protect Mr. Coffin from a breach of his right not to incriminate himself, those statements should not be published. All of the remainder of his testimony should be made available to the public; there is no serious danger that his actions and conduct which he describes could be confused with the actions and conduct which are the subject of the indictment.

Accordingly the publication ban ordered on March 29, 2005 is lifted with respect to the deposition of Paul Coffin and all representations by counsel made with respect to it, except for the following portions of the transcription of Mr. Coffin's testimony for April 26, 2005 and the related portions of the broadcast tapes, namely:

a. Page 19459, line 16 to page 19460, line 13;

b. Page 19496, lines 1 to 19.



John H. Gomery, Commissioner

April 27, 2005

Ruling Modifying Publication Ban (Joseph Charles Guité) (May 4, 2005)

On March 29, 2005 a publication ban was ordered with respect to the testimony of Joseph Charles Guité, and I undertook to hear representations by counsel for interested parties at the end of his deposition to determine if the ban should be released in whole or in part. His cross-examination ended this morning and I have heard representations from all interested parties.

The importance of a publication ban in the case of Mr. Guité is lessened by the fact that his trial has been postponed to June 6, 2005 and may well be postponed again to a date in September.

However, to be consistent, there should remain in effect a publication ban with respect only to certain dealings that Mr. Guité had with Mr. Brault, considering that they are accused of criminal conspiracies. The lifting of the ban will be postponed until 3:30 this afternoon, so that Mr. Justice Brunton, who is seized with the record in the Quebec Superior Court, will have an opportunity to take such measures as he deems necessary to protect the rights of the accused to a fair trial. I apologize to my colleague for the short delay within which he will be obliged to act, but the right of the public to be informed of the testimony of Mr. Guité should not be compromised for longer than has already occurred.

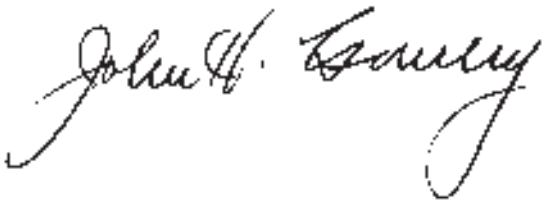
Accordingly, the publication ban is to be lifted, as of 3:30 p.m. with respect to the testimony of Joseph Charles Guité, except for:

1) The transcript and broadcast tapes with respect to the representations made by Me. Bernard Roy today between 12:15 and 12:30;

2) Exhibit 376A, pages 293, 294 and 295;

3) The following portions of the transcription of Mr. Guité's testimony and the related portions of the broadcast tapes:

a. Volume 108, page 19710, line 13 to page 19716, line 7;
b. Volume 110, page 20106, line 22 to page 20109, line 8.



John H. Gomery, Commissioner

May 4, 2005

Ruling on Confidentiality Order (April 13, 2005)

The applicants, Malcom Media Inc. and Luc Lemay, have requested that I order that some of the documents that Commission Counsel intend to file as evidence be kept confidential and not disclosed to anyone unless a confidentiality agreement is signed.

In effect, the request amounts to a kind of no-publication order for these documents, which are the financial statements for a trust and corporations for which Mr. Lemay was the guiding spirit and principal stockholder. Mr. Lemay alleges that disclosure of these financial statements would be prejudicial to him vis-à-vis his competitors, his clients, his suppliers and potential purchasers of his companies.

I have no doubt that the disclosure of this financial information would have a negative impact on the intentions and business interests of the applicants, and constitute an invasion of their privacy. However, this is a public investigation of considerable interest to the people of Canada. Non-disclosure of the financial position of the applicants in all its details would deprive Canadians of a source of information that could help them, and the Commission itself, acquire a better understanding of where the sponsorship money paid by the Government of Canada went.

In *Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522, Iacobucci J. in paragraph 53 of his reasons, summarized the rules to be followed when a litigant requests a confidentiality order, as follows:

> *A confidentiality order under Rule 151 should only be granted when:*
>
> *a. such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and*
>
> *b. the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.*

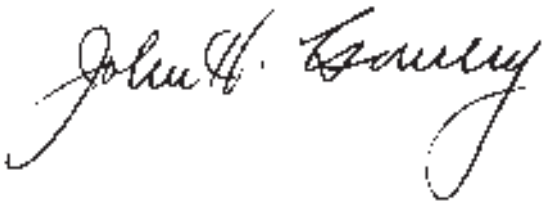
In the following paragraphs he added that to constitute a serious risk to an important interest, the risk must be real and important, insofar as it is

solidly substantiated by the evidence and poses a serious threat to the commercial interest in question.

According to Mr. Justice Iacobucci, the interest in question cannot merely be specific to the party requesting the order but also one which can be expressed in terms of a public interest in confidentiality.

This requirement is not met in this case. The public interest requires complete disclosure of the financial statements in question. Moreover, within the context of this Commission of Inquiry, freedom of expression, a fundamental right, must be respected and protected, even at the expense of private interests, particularly strictly commercial interests.

For these reasons I dismiss the request.



John H. Gomery, Commissioner

April 13, 2005

Ruling on Public Accounts Committee Evidence (May 20, 2005)

On October 18 and 25, 2004 I heard argument on Mr. Guité's objection to the attempt by Mr. Gagliano's counsel to cross-examine Mr. Guité on the basis of his prior testimony before the House of Commons' Standing Committee on Public Accounts ("PAC") in April of the same year. Mr. Gagliano was supported in his attempt by counsel for two other parties, Messrs. Chrétien and Pelletier, and was opposed by counsel for Mr. Guité. Mr. Guité's counsel, as well as counsel for the House of Commons, took the position that parliamentary privilege precluded the use of Mr. Guité's testimony for the purpose of impugning his credibility.

My decision dated November 22, 2004 was to exclude the use of the PAC testimony. I expressed the view that even without the testimony I had sufficient means to assess Mr. Guité's credibility; it was therefore unnecessary for me to make a final determination whether or not parliamentary privilege forbade the use of the PAC testimony to impugn Mr. Guité's credibility.

My decision not to allow the PAC testimony into evidence was upheld by the Federal Court on judicial review by a decision dated April 27, 2005. However, Madam Justice Tremblay-Lamer's conclusion was based on an assessment of the law of parliamentary privilege as it applied to the PAC testimony. She concluded that the essential test was whether, in order to ensure the effective operation of parliamentary committees, it was necessary to forbid the cross-examination of committee witnesses in any other forum, using transcripts of their committee testimony, and found that it was necessary to preclude cross-examination based on committee testimony, so as to encourage witnesses to testify openly before parliamentary committees, to allow the committee to exercise its investigatory function and to avoid contradictory findings of fact.

Mr. Gagliano's present application asks that I order deposit of the PAC transcripts and the corresponding audio-visual recordings into the record. Furthermore, basing himself on the last factor mentioned by Justice Tremblay-Lamer, namely the necessity of avoiding contradictory findings of fact, Mr. Gagliano asks for an additional order substituting the PAC evidence for this Commission's examination and cross-examination of Mr. Guité in November last year and in April and May this year. The application was argued before

me on May 13, 2005 by counsel for Mr. Gagliano, for the House of Commons (accorded standing for the purposes of this application), for the Government of Canada and for this Commission. I was advised in writing by Mr. Guité's counsel that he opposed the application.

The first proposition of Mr. Gagliano's argument is that the filing of the PAC testimony as evidence of historical fact would not of itself violate parliamentary privilege. His second proposition is that Mr. Guité's PAC testimony should be admitted into evidence because its content is relevant to the Commission's inquiry, and essential to Mr. Gagliano's natural justice right to present evidence that contradicts Commission testimony that is adverse to his interests. His third proposition is that, according to the recent Federal Court decision, I am obliged to disregard Mr. Guité's allegedly inconsistent Commission testimony because the law concerning parliamentary privilege determines that the PAC testimony cannot be questioned. Finally, it is argued that Mr. Guité's PAC testimony meets the admissibility criteria specified by the Supreme Court of Canada in the *K.G.B.* decision.[1]

Mr. Gagliano's written submission adds that Mr. Guité's PAC testimony is likely to have been more frank and open than his "unprotected" testimony before this Commission because he was advised that his PAC testimony would be protected by parliamentary privilege; it follows that excluding the PAC testimony from the record would mean depriving this Commission of the best evidence available.

The principal argument opposing Mr. Gagliano's application was presented by counsel for the House of Commons, who argued that the mere admission of the PAC testimony into evidence, remembering that parliamentary privilege precludes an evaluation of the content of that testimony for credibility and weight, would frustrate the Commission's obligation to draw conclusions based upon its own evaluation of the evidence. It is obvious that Mr. Gagliano's real purpose is to admit the prior testimony for the truth of its contents rather than as a simple fact. It was also argued that admitting the testimony would frustrate this Commission's procedural fairness obligations, in particular its obligation to allow Mr. Guité an opportunity to try to explain any contradictions between his prior and current testimony. I was reminded that I had already come to the conclusion that I am able to assess Mr. Guité's

credibility without resorting to the PAC testimony. Since the Committee has not itself evaluated the testimony or Mr. Guité's credibility, the potential for contradictory findings would remain. Finally, it was argued that the common law "best evidence" rule cannot prevail over a rule of privilege.

Counsel for the Government of Canada supported the House of Commons in its submissions, and added that, to the extent that Mr. Gagliano's argument relied on the principles of natural justice, the Supreme Court of Canada decisions in *Ocean Port*[2] and *Donahoe (New Brunswick Broadcasting)*[3] stand for the proposition that those principles may give way to conflicting statutory provisions (absent an overriding constitutional provision) and must give way to conflicting rules of constitutional law.

Commission counsel argued by analogy for the exclusion of the evidence on the basis of the common law rule that one cannot resort to the principles of natural justice to override professional privilege. He also noted that the *KGB* rules for the admission of prior contradictory statements only operate where the evidence sought to be introduced is otherwise admissible.

There is superficial merit to Mr. Gagliano's argument that the mere admission of the PAC testimony into evidence would not violate parliamentary privilege. Certainly, as noted in Mr. Gagliano's written submissions, the Judicial Committee of the Privy Council said in the *Prebble*[4] decision that courts may admit Hansard into evidence "to prove what was done and said in Parliament as a matter of history"[5]. However, on closer examination, the case law cited by the Applicant provides him little support in the particular circumstances of this case.

In *Comalco*[6], a decision of the Supreme Court of the Australian Capital Territory, the plaintiff corporation sued the media for defamation in a television program, in which were cited statements reportedly made by a government minister in the territorial legislature. In its defence, the media sought to adduce those statements in evidence and parliamentary privilege was invoked to preclude admission. The Australian Court reviewed a number of authorities, including the English defamation case of *Church of Scientology v. Johnson-Smith*[7] in which the plaintiff had alleged that the defendant member of Parliament had consistently attacked the Church of Scientology in the House of Commons. The English Court excluded the particulars that relied on Hansard to

establish what was said in the House. Subsequently, in *Comalco*, the Australian Court clarified that the Church of Scientology ruling was that the defendant's statements in the House could not be used against him on the issue of malice, but not that Hansard was itself inadmissible. The Australian Court concluded[8] :

> ... I think that the way in which the court complies with Art 9 of the Bill of Rights 1689, and with the law of the privileges of Parliament, is not by refusing to admit evidence of what was said in Parliament, but by refusing to allow the substance of what was said in Parliament to be the subject of any submission or inference. The court upholds the privileges of Parliament, not by a rule as to the admissibility of evidence, but by its control over the pleadings and the proceedings in court.

Accordingly, passages from Hansard were held to be admissible solely to establish the fact that certain statements were made by the Minister, given their possible relevance to the defence of fair comment.

The House of Lords decision in *Pepper v. Hart*[9] was principally about the rule that prevented British courts from relying on Hansard as a statutory interpretation tool, a rule already rejected by Canadian courts. There was some discussion whether the simple act of admitting Hansard into evidence breached parliamentary privilege. In answering that question, the Law Lords focused on whether the admission of Hansard as a tool to resolve an ambiguity in statutory language would involve "any impeachment, or questioning of the freedom of speech or debates or proceedings in Parliament." The Attorney-General had argued that such use would entail a "questioning" of the freedom of speech or debate. Lord Browne-Wilkinson, with whom the other Law Lords expressed their agreement, held that "…the use of clear ministerial statements by the court as a guide to the construction of ambiguous legislation would not contravene article 9." He continued: "No doubt all judges will be astute to ensure that counsel does not in any way impugn or criticise the Minister's statements or his reasoning."[10]

In *Clarke*[11] , the defendant was charged with inciting a riot on the steps of the Ontario legislature. The Court allowed him to enter correspondence between himself and the Speaker's Office for the purpose of establishing

his state of mind, but prohibited the use of the same documents to criticise or review the actions of the Speaker's Office or the Speaker's decisions.

Finally, although the *Prebble* case clearly supports the admission of Hansard as proof of the historical fact of certain things having been said in Parliament, the Law Lords very clearly limited the uses to which such evidence could be put, and placed certain oversight obligations on the court admitting the evidence[12]:

> ... Thus, in the present action, there cannot be any objection to it being proved what the plaintiff or the Prime Minister said in the House … or that the State-Owned Enterprises Act 1986 was passed. ... It will be for the trial judge to ensure that the proof of these historical facts is not used to suggest that the words were improperly spoken or the statute passed to achieve an improper purpose.

They continued[13]:

> It is clear that, on the pleadings as they presently stand, the defendant intends to rely on these matters not purely as a matter of history, but as part of the alleged conspiracy or its implementation. Therefore, in their Lordships' view, Smellie J. was right to strike them out. But their Lordships wish to make it clear that if the defendant wishes at the trial to allege the occurrence of events or the saying of certain words in Parliament without any accompanying allegation of impropriety or any other questioning there is no objection to that course.

In my view, the superficial attractiveness of Mr. Gagliano's argument that parliamentary privilege allows the admission of Mr. Guité's PAC testimony into evidence before this Commission disappears when one realises that the real purpose in admitting the testimony would be to establish what he affirmed. The fact that Mr. Guité testified is not contested; what Mr. Gagliano really wants to prove is that Mr. Guité may have made statements before the PAC which cannot be reconciled with his testimony before the Commission. This is directly contrary to the Federal Court decision on Mr. Gagliano's prior application; the record of Mr. Guité's PAC testimony cannot be used to test his credibility. In order to establish its allegedly contradictory

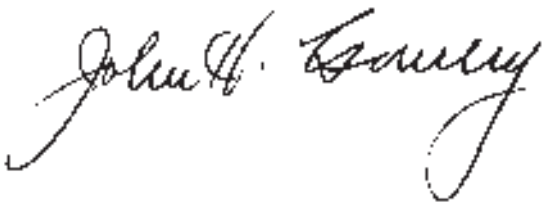
nature, I would have to examine the PAC testimony and compare it to the testimony given before me. In my view, such an exercise is far too closely-related to the cross-examination that, according to Justice Tremblay-Lamer, is forbidden by parliamentary privilege.

For the purpose of the exercise of my discretion to control the proceedings before me, I find that the principal value of the jurisprudence cited above lies in their reminder of the care that must be taken by a tribunal if it is suggested that a record of parliamentary proceedings should be made part of the record. The tribunal must "refuse to allow the substance of what was said… to be the subject of any submission or inference,"[14] and must also "ensure that counsel does not in any way impugn or criticise the speaker's statements or reasoning"[15] and ensure that the admission of the transcripts or audio-visual recording "is not accompanied by any allegation of impropriety or any other questioning."[16].

With reference to the second conclusion of Mr. Gagliano's application, he argues that in the event I admit the transcript of the PAC testimony into evidence, I should then substitute it for the testimony given before this Commission. However, since Mr. Guité's PAC testimony is not evidence made in accordance with the Rules of the Commission, I cannot accept it without prior cross-examination, among other reasons. If I were inclined to defer to the Committee's assessment of Mr. Guité's testimony, I could not use the PAC testimony as evidence since the Committee has not yet reported. Indeed, reliance on the PAC testimony might ultimately lead to contradictory findings as between this Commission and PAC since PAC might eventually reject some or all of the testimony I had accepted.

In conclusion, since the Federal Court has decided that Mr. Guité's PAC testimony cannot be questioned, weighed or assessed for credibility by any body other than Parliament itself, and cannot be used against Mr. Guité in the Commission's proceedings, I find that the admission of Mr. Guité's PAC testimony would serve no useful purpose. I therefore exercise my discretion to continue to exclude that testimony from the record before me.

Mr. Gagliano's application is dismissed.



John H. Gomery, Commissioner

May 20, 2005

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[1] Her Majesty the Queen v. K.G.B., [1993] 1 S.C.R. 740

[2] Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), [2001] 2 S.C.R. 781

[3] New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319

[4] Prebble v. Television New Zealand Ltd., [1995] 1 A.C. 321 (P.C.)

[5] Ibid., at p. 337

[6] Comalco Ltd. v. Australian Broadcasting Corporation, (1983) 50 A.C.T.R. 1 (S.C.)

[7] Church of Scientology of California v. Johnson-Smith, [1972] 1 QB 522

[8] Comalco, at p. 5

[9] Pepper (Inspector of Taxes) v. Hart, [1993] A.C. 593 (H.L.(E.))

[10] Ibid., at p. 639

[11] Her Majesty the Queen v. John Clarke et al., unreported, Superior Court of Justice (Ontario), court file no. 0075/02, April 2, 2003

[12] Prebble, at p. 337

[13] Ibid., at p. 337

[14] Comalco

[15] Pepper v. Hart

[16] Prebble

Ruling on Motion Pertaining to the Role of Commission Counsel

Volume 131, June 2, 2005

Page: 24877 Line 4 to 10

THE COMMISSIONER: Thank you very much.

I am going to dismiss the motion. I think that it has been apparent to everybody, as I have heard it, that I am unsympathetic to the proposition that I would be influenced improperly by facts that I might hear about, other than the facts that I have heard about in this room or in the room that we occupied when the hearings were going in Ottawa.