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CASE LAW UPDATE

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Gagliano v Gomery and the Attorney General (Canada)

2011 FCA 217 (Released June 29, 2011)

Administrative Law – Natural Justice – Bias – Public Inquiries

The Honourable Alfonso Gagliano (the "**appellant**") appealed the decision of the Federal Court to dismiss his application for judicial review of a report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities (the "**Sponsorship Inquiry**"). The Sponsorship Inquiry, led by Commissioner John Gomery, was mandated to investigate allegations of corruption and mismanagement of a federal program purportedly designed to promote national unity by advertising federal programs and initiatives. The report in dispute was the Phase I Report of the Sponsorship Inquiry, entitled "Who is Responsible – Fact Finding Report" (the "**report**"). The report concluded that responsibility for the program's problems lay in part with the appellant, who had served as Minister of Public Works and Government Services Canada.

Before the Federal Court, the appellant was unsuccessful in arguing that the report's findings should be set aside on the basis that Commissioner Gomery was biased.

On appeal, the appellant argued, among other grounds, that the Federal Court erred by: (1) applying a different test for bias in his case from the test applied in a judicial review of the same report by former Chief of Staff Jean Pelletier; (2) failing to take into account various grounds raised in support of his allegations of bias; (3) applying an overly onerous burden of proof of bias; and (4) deciding that Commissioner Gomery's conduct did not give rise to a reasonable apprehension of bias.

The Federal Court of Appeal confirmed that courts must apply different standards to allegations of bias depending on the context, and in particular, that allegations of bias in a public inquiry are not to be accorded the same treatment as allegations of bias in a criminal or civil trial. The court posited that public inquiries investigate rather than adjudicate, and that the inquisitorial process cannot be held to the same standard of bias as an adversarial process; investigations must seek out information themselves, while an adversarial process allows a court to weigh evidence that is collected and submitted by the parties.

The court therefore confirmed two distinctive tests to be applied to allegations of bias during public inquiries, depending on the stage at which the challenge is launched. While the public

inquiry is still underway, the commissioner will only be disqualified for bias if there is a reasonable apprehension that the commissioner's decisions are made on a basis other than the evidence. When bias is alleged against a commissioner after the report of a public inquiry has been issued, the conclusions of the report will be upheld if they are supported by "some evidence in the record of the inquiry".

The Federal Court of Appeal found that the Federal Court's decision was based on a finding that Commissioner Gomery's conclusions were supported by some evidence and the court did not disturb this finding. As this is the appropriate test for bias in a public inquiry once its report has been issued, the court found that it was unnecessary to consider other grounds raised by the appellant in support of his allegations of bias, or whether Commissioner Gomery's conduct gave rise to a reasonable apprehension of bias. The court also found that the same test had been applied to both Mr. Pelletier and the appellant, and that the outcome of their applications had differed because the fact situations in the two cases were not identical.

With respect to the alleged unfair burden placed on the appellant, the Federal Court of Appeal found no fault with the Federal Court's assertion that the onus of demonstrating bias is high, particularly in light of the Federal Court of Appeal's earlier comments regarding the higher threshold for proving bias arising from the inquisitorial nature of public inquiries.