Date: 20080109

Docket: A-221-07

Citation: 2008 FCA 1

CORAM: **DÉCARY J.A.**
LÉTOURNEAU J.A.
NOËL J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

JEAN PELLETIER

Respondent

Heard at Montréal, Quebec, on December 11, 2007.

Judgment delivered at Ottawa, Ontario, on January 9, 2008.

REASONS FOR JUDGMENT BY: DÉCARY J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
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REASONS FOR JUDGMENT

DÉCARY J.A.

[1] Immediately after the decision of Justice Simon Noël setting aside the Order-in-Council terminating Mr. Pelletier, formerly the Chairman of the Board of Directors of VIA Rail Canada Inc. (VIA Rail), the government of the day set in motion a process leading to a second Order-in-Council terminating Mr. Pelletier (the second termination order). This appeal deals with the validity of the second termination order.

[2] Mr. Pelletier argued in his application for judicial review that the second termination order was invalid because it was illegal. The appropriate Minister should have consulted the Board of Directors of VIA Rail before making his decision, and the comments of the appropriate Minister in the House of Commons raised a reasonable apprehension of bias. Mr. Justice Lemieux of the Federal Court agreed with the arguments of Mr. Pelletier and set aside the second termination order (2007 FC 342).

Facts

[3] A short summary of the relevant facts is as follows.

[4] On July 31, 2001, Mr. Pelletier was appointed by Order-in-Council to the position of Chairman of the Board of Directors of VIA Rail to hold office during pleasure for a term of five years. This appointment was made pursuant to subsection 105(6) of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (the FAA), after consultation with the Board of Directors. Mr. Pelletier's remuneration was set out in an annex to the Order that was not in the record before us. (A.B. vol. 1, page 681).

[5] On March 1, 2004, Mr. Pelletier was terminated from his position. He made an application for judicial review, seeking to set aside what can be referred to as the first termination order.

[6] On November 18, 2005, Mr. Justice Simon Noël of the Federal Court set aside the first termination order and referred the case back to the Governor General in Council (2005 FC 1545). He held that procedural fairness required that the Cabinet inform Mr. Pelletier of their reasons for the termination and that they allow him the opportunity to be heard: requirements that were not met.

[7] On November 21, 2005, the appropriate Minister (the Minister of Transport, the Honourable Jean Lapierre) informed Mr. Pelletier by letter that the nature and character of Mr. Pelletier's comments on February 26, 2004 regarding Ms. Myriam Bédard [TRANSLATION] "lead me to believe that there are grounds for me to recommend to the Governor in Council that your appointment be terminated for loss of confidence in you…". The Minister invited Mr. Pelletier to provide written reasons as to why he should not be terminated.

[8] Later that same day (November 21, 2005), the Minister stated the following during Question Period in the House of Commons:

> **Mr. James Moore (Port Moody—Westwood—Port Coquitlam, CPC)**: Mr. Speaker, although the reasons for doing so are obvious, the Prime Minister is incapable of properly dismissing the key figures in the sponsorship scandal whom Justice Gomery has clearly fingered in his report. The Prime Minister had promised to clean house, yet we find him not even able to just dismiss Mr. Pelletier.
>
> Will the Prime Minister force Jean Pelletier to step down from his duties at the head of VIA Rail, yes or no?
>
> **Hon. Jean Lapierre (Minister of Transport, Lib.)**: Mr. Speaker, the grounds on which Mr. Pelletier was dismissed in March 2004 are as valid as ever. That is why this morning I have initiated a process which will allow Mr. Pelletier to be heard and to provide us with reasons why he ought not to be dismissed on those grounds.
>
> Obviously, Mr. Pelletier no longer has our confidence to chair the board at VIA Rail. (Emphasis added)

[9] On November 30, 2005, Mr. Pelletier provided his reasons to the Minister and requested a hearing with the Minister.

[10] On December 1, 2005, the Minister met with Mr. Pelletier. The Honourable Lucienne Robillard, Minister of Intergovernmental Affairs and President of the Queen's Privy Council was also

in attendance. During the hearing, the Minister informed Mr. Pelletier that he would make a decision in a reasonable period of time, after considering the matter with a clear head.

[11] That same day, December 1, 2005, Parliament was dissolved by royal proclamation following a non-confidence vote.

[12] On December 19, 2005, the Attorney General of Canada filed a notice of appeal of the decision of Justice Simon Noël.

[13] On December 22, 2005, the second termination order was adopted by the Governor General in Council on the recommendation of Minister Lapierre, without consultation of the Board of Directors of VIA Rail.

[14] On January 11, 2007, our Court upheld the decision of Justice Simon Noël regarding the first termination order (2007 FCA 6) (Pelletier no. 1).

[15] On January 16, 2006, Mr. Pelletier filed an application for judicial review seeking to have the second termination order set aside.

[16] On March 30, 2007, Justice Lemieux set aside the second termination order.

[17] This leads us to the present appeal brought by the Attorney General of Canada.

Analysis

Existence of a constitutional convention

[18] I deal first with an argument put forward late in the process by the respondent that a transition of government constitutional convention exists, whereby a government that has lost the confidence of Parliament cannot nominate or terminate the presidents of Crown corporations. According to the respondent this argument was advanced not so that this Court quashes the second termination order because of a violation of the constitutional convention, but rather because a violation is further evidence of the government's bias.

[19] This argument has no merit. As a general rule, and it is a well-known rule, Courts will avoid making pronouncements on the existence of constitutional conventions, which are not rules of law that are subject to judicial enforcement (see *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 at pages 880, 882; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 26, 98, 99).

[20] Furthermore, the evidence does not establish the existence or scope of the alleged convention: what is required is not only the proof of precedents, but also proof that the political actors themselves believe that there is a rule they are obliged to respect (*Re: Resolution to amend the Constitution*, *supra* at page 888; *Re: Objection to a resolution to amend the Constitution*, [1982] 2 S.C.R. 193 at pages 814, 816, 817 and 818).

[21] In any event, because the constitutional convention argued by the respondent would have an effect on the validity of the second termination order, the respondent was required, as set out in section

57 of the *Federal Courts Act*, to file a Notice of Constitutional question and to serve that Notice on the Attorneys General of Canada and the provinces, which he did not do.

Obligation to consult the Board of Directors

[22] VIA Rail is a parent Crown corporation within the meaning of subsection 83(1) of the FAA in that it is "wholly owned directly by the Crown". It is included with the corporations listed in part 1 of schedule III. It was created by an Order-in-Council on April 1, 1978 (P.C. 1978-954).

[23] Subsection 105(5) of the FAA provides that:

Appointment of officer-directors	Nomination des administrateurs-dirigeants
105. (5) Each officer director of a parent Crown corporation shall be appointed by the Governor in Council to hold office during pleasure for such term as the Governor in Council considers appropriate.	105. (5) Les administrateurs dirigeants d'une société d'État mère sont nommés à titre amovible par le gouverneur en conseil pour le mandat que celui ci estime indiqué.

[24] Subsection 105(6) of the FAA requires the appropriate Minister to consult the Board of Directors of a parent Crown corporation before appointing officer-directors:

105. (6) Before an officer director of a parent Crown corporation is appointed, the appropriate Minister shall consult the board of directors of the corporation with respect to the appointment.	105. (6) Le ministre de tutelle consulte le conseil d'administration d'une société d'État mère avant que ses administrateurs dirigeants ne soient nommés.

[25] Subsection 24(1) of the *Interpretation Act* (R.S.C., 1985, ch. I-21) prescribes that the power to name a public officer during pleasure, includes the power of termination

24. (1) Words authorizing the appointment of a public officer to hold office during pleasure include, in the discretion of the authority in whom the power of appointment is vested, the power to	24. (1) Le pouvoir de nomination d'un fonctionnaire public à titre amovible comporte pour l'autorité qui en est investie les autres pouvoirs suivants :

(*a*) terminate the appointment or remove or suspend the public officer;	*a*) celui de mettre fin à ses fonctions, de le révoquer ou de le suspendre;
(*b*) reappoint or reinstate the public officer; and	*b*) celui de le nommer de nouveau ou de le réintégrer dans ses fonctions;
(*c*) appoint another person in the stead of, or to act in the stead of, the public officer.	*c*) celui de nommer un remplaçant ou une autre personne chargée d'agir à sa place.

[26] Justice Lemieux interpreted the combined effect of subsection 24(1) of the ***Interpretation Act*** and subsection 105(6) of the FAA to be that the obligation to consult the Board of Directors before appointment included the obligation to consult them again before termination.

[27] The proper method of statutory interpretation (stated by the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at paras. 10 and 11 that statutes "must be interpreted in a textual, contextual and purposive way") leads me to conclude that the Applications Judge imported words into subsections 24(1) of the *Interpretation Act*, and 105(6) of the FAA that are not in accordance with the text and purpose of the provisions.

[28] The texts of the provisions are clear and unambiguous. The power of appointment is defined in subsection 105(5) of the FAA, which is the power referred to in subsection 24(1) of the *Interpretation Act*. Subsection 105(6) imposes an obligation to consult in the exercise of the power of appointment. No such obligation is imposed on the power to terminate established under paragraph 24(1)(*a*) of the *Interpretation Act*.

[29] The legislative context is also significant. In the very Act (the FAA) in which subsection 105(6) is found, when Parliament intended to create an obligation to consult before termination, it

expressly stated as much. Specifically, subsection 134(1) regarding auditors and subsection 142(2) regarding special examiners provide that:

134. (1) Subject to subsection (2), the auditor of a Crown corporation shall be appointed annually by the Governor in Council, after the appropriate Minister has consulted the board of directors of the corporation, and may be removed at any time by the Governor in Council, after the appropriate Minister has consulted the board.	134. (1) Sous réserve du paragraphe (2), le vérificateur d'une société d'État est nommé chaque année par le gouverneur en conseil après consultation par le ministre de tutelle du conseil d'administration de la société; le gouverneur en conseil peut le révoquer en tout temps, après consultation du conseil d'administration par le ministre de tutelle.
142. (2) Where, in the opinion of the Governor in Council, a person other than the auditor of a Crown corporation should carry out a special examination, the Governor in Council may, after the appropriate Minister has consulted the board of directors of the corporation, appoint an auditor who is qualified for the purpose to carry out the examination in lieu of the auditor of the corporation and may, after the appropriate Minister has consulted the board, remove that qualified auditor at any time.	142. (2) Le gouverneur en conseil, s'il estime contre-indiqué de voir confier l'examen spécial au vérificateur de la société d'État, peut, après consultation du conseil d'administration de la société par le ministre de tutelle, en charger un autre vérificateur remplissant les conditions requises; il peut également révoquer ce dernier en tout temps, après pareille consultation.
(my emphasis)	(mon soulignement)

[30] In other statutes when Parliament sought to create an obligation to consult or seek recommendations for both appointments and terminations, it stated so explicitly. See for example subsection 16(2) of the *National Film Act* (R.S.C., 1985, c. N-8) regarding the Government Film Commissioner, and subsection 165.21(2) of the *National Defence Act* (R.S.C., 1985, c. N-5) regarding military judges.

[31] The absence of an obligation to consult at the time of termination is also readily explainable in the present context. At the time of appointment, the candidate has the confidence of the government. Parliament intended that the Board of Directors be consulted in the appointment process in order to

avoid situations of serious conflict materialising once the Chairman began his work. At the time of termination, the person concerned, regardless of the opinion of the Board of Directors, no longer enjoys the confidence of the government, making a consultation with the Board of Directors pointless. It would also be a strange interpretation of the provision (in the absence of clear wording to the contrary) that the Chairman, who is a member of the Board of Directors, would be consulted regarding his own termination.

[32] It is also worth noting that Parliament did not intend the appointment of all officer-directors of parent Crown corporations to be open to termination at the will of the government. For example, the Chairperson of the Canadian Broadcasting Corporation (*Broadcasting Act*, S.C. 1991, c. 11 subsection 36(3)), the Governor of the Bank of Canada (*Bank of Canada Act* (R.S.C., 1985, c. B-2 subsection 6(3)), and the President of the Business Development Bank of Canada, (*Business Development Bank of Canada Act* (S.C. 1995, c. 28 subsection 6(2)), are appointed to hold office during good behaviour (see *Vennat v. Canada*, 2006 FC 1008). If Parliament had intended an appointment other than during pleasure, the position of Chairman of VIA Rail could have been changed to the same good behaviour standard held, for example, by the President of Business Development Bank of Canada.

[33] Imposing an obligation to consult at the time of termination of a person appointed during pleasure in the absence of clear wording, even if only symbolic, would change the very nature of their appointment i.e. their intrinsically precarious status.

[34] Justice Lemieux relied on a short passage from a text by Louis-Philippe Pigeon entitled *Rédaction et interprétation des lois*, 3e édition, Publications du Québec, 1988, at paragraphs 27 and

28, which was cited by the Québec Superior Court in *Gill v. Québec (Ministre de la justice)* [1995] R.J.Q. 2690 (Sup. Ct.) (*Gill*), and *Commission scolaire de Montréal v. Québec (Procureur général)*, [1999] R.J.Q. 2978 (Sup. Ct.) (*Commission scolaire*):

> Consequently, if removal from office is not to be subject to a rule different from that of appointment, there is no need to speak of this.

[35] I am not convinced that Mr. Pigeon intended to say anything other than: unless there are words to the contrary, he who has the authority to appoint also has the authority to terminate. In any event, he was dealing with section 55 of Québec's *Interpretation Act*, a provision that is much more general in scope than subsection 24(1) of the Federal *Interpretation Act*, which deals specifically with appointments of public officers during pleasure.

[36] Regarding the two Québec authorities relied on by the Applications Judge, neither concerns a person appointed during pleasure. *Gill* was based on considerations related to judicial independence, and *Commission scolaire* was based on an interpretation of Québec's *Education Act*.

[37] I therefore conclude that the appropriate Minister did not have an obligation to consult the Board of Directors of VIA Rail before terminating Mr. Pelletier.

Procedural Fairness

[38] Justice Lemieux, at paragraph 33 of his reasons, wrote that our Court in Pelletier no. 1,

> "…confirmed that given that Mr. Pelletier's appointment had been revoked for misconduct, the highest standard of procedural fairness applied" (my emphasis)

[39] He confirmed this view at paragraph 51 of his decision, where he wrote:

> "…the removal of Mr. Pelletier was not a removal without cause, but rather a removal justified by his misconduct, justifying the application of the strictest standard of procedural fairness, as stated by the Federal Court of Appeal." (my emphasis)

[40] With respect, the Applications Judge has misinterpreted the decision of our Court in Pelletier no. 1. The Attorney General had conceded that a certain degree of procedural fairness was applicable and that a "higher standard" of procedural fairness was applicable when the reason for removal was misconduct. The Attorney General, however, argued that even this higher standard of procedural fairness did not require an explicit notice of the reasons for the government's dissatisfaction with Mr. Pelletier. He argued it was sufficient that Mr. Pelletier knew or ought to have known that his appointment was at risk (see paragraph 30 of the reasons of Pelletier J.A.).

[41] The heart of the debate in Pelletier no. 1, therefore, was the determination of the content of that "higher standard of procedural fairness". The Court, at paragraph 39, held that "[P]rocedural fairness requires actual knowledge of the pending threat and of the reasons for it; constructive knowledge will not do". The Court concluded, thus confirming the decision of Justice Simon Noël, that the evidence established that Mr. Pelletier did not have "actual knowledge" of the threat he faced.

[42] Pelletier J.A. stated this conclusion at paragraph 49 of his decision:

> "In light of the above, I conclude that where the government, in the exercise of its statutory power to terminate the appointment of persons named to office at pleasure, proposes to act on the basis of a person's misconduct, the duty of procedural fairness requires that, where that person does not know that his or her position is in jeopardy by reason of that misconduct, the person be informed of the possibility of removal and of the reasons for that removal, and be given the opportunity to be heard. I have deliberately refrained from speaking of "disciplinary reasons" because it seems to me to be inappropriate to import into the context of the removal, by the executive branch of government, of persons holding office at pleasure, notions which are generally associated with wrongful dismissal in the context of an employer/employee relationship." (my emphasis)

[43] In the circumstances, the Order-in-Council was set aside because Mr. Pelletier was not informed of the possibility of removal and of the allegations of misconduct being asserted against him, and he was not offered an opportunity to be heard. Contrary to the conclusion of Justice Lemieux, it was not a question of applying the "highest standard of procedural fairness". Because he was removed for misconduct, Mr. Pelletier had the right to be informed, and the right to be heard, no more, no less.

[44] It is helpful here to restate that when removing a person appointed during pleasure for whatever reason, the government's termination decision does not require "the necessity to show just cause" (*Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at page 674 (*Knight*), cited by Pelletier J.A. at paragraph 34 of his reasons). Specifically, Pelletier J.A. noted that:

> "The duty of procedural fairness, whatever its content, deals only with the process by which the government exercises its right to terminate his appointment and not with the substance of the decision itself. The right to be given reasons and the right to be heard do not create, by implication or otherwise, a right to be removed from office only for reasons which meet some standard of rationality."

[45] In the case at bar, this exact obligation was met by the appropriate Minister: he informed Mr. Pelletier of his reasons and he gave him an opportunity to be heard. The Minister met the procedural fairness requirements placed on him by Justice Simon Noël (requirements later confirmed by our Court). On this basis, the second termination order should, in principle, be found valid.

[46] Mr. Pelletier, nevertheless, maintains that the right to be heard implies that the decision maker is not biased. And that the decision should be set aside if there is proof of a reasonable apprehension of bias on the part of the decision maker.

[47] The Attorney General, in response, argues that the proper standard is the lower standard of a closed mind, rather than the more strenuous reasonable apprehension of bias.

[48] The termination of a person appointed by the Cabinet during pleasure is essentially a political and discretionary administrative decision. The fact that it is subject to a certain standard of procedural fairness, and that the standard is higher because the reason alleged is misconduct, does not in anyway change the nature of the decision. The decision does not, in either form or substance, resemble a judicial or quasi-judicial decision.

[49] In a series of decisions, the most recent being *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624 (*Imperial Oil Ltd.*), the Supreme Court of Canada has clearly established that the content of the duty of impartiality varies according to the functions of the administrative decision maker, and the question being decided. The content varies between those of the judiciary and administrative tribunals whose adjudicative functions are very similar to those of the judiciary (attracting the highest standard of reasonable apprehension of bias) and those of administrative decision makers such as ministers or officials who perform policy making discretionary functions (attracting the lower standard of closed mind).

[50] At paragraph 31 of *Imperial Oil Ltd.*, *supra*, LeBel J. summarises the law on this point:

> The appellant's reasoning thus treats the Minister, for all intents and purposes, like a member of the judiciary, whose personal interest in a case would make him apparently biased in the eyes of an objective and properly informed third party. This line of argument overlooks the contextual nature of the content of the duty of impartiality which, like that of all of the rules of procedural fairness, may vary in order to reflect the context of a decision maker's activities and the nature of its functions (*Baker*, *supra*, at para. 21; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, per L'Heureux Dubé J.; *IWA v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 323-24, per Gonthier J.; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p. 636, per

> Cory J.). These variations in the actual content of the principles of natural justice acknowledge the great diversity in the situations of administrative decision makers and in the roles they play, as intended by legislatures (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52, at para. 24, per McLachlin C.J.). The categories of administrative bodies involved range from administrative tribunals whose adjudicative functions are very similar to those of the courts, such as grievance arbitrators in labour law, to bodies that perform multiple tasks and whose adjudicative functions are merely one aspect of broad duties and powers that sometimes include regulation making power. The notion of administrative decision maker also includes administrative managers such as ministers or officials who perform policy making discretionary functions within the apparatus of government. The extent of the duties imposed on the administrative decision maker will then depend on the nature of the functions to be performed and on the legislature's intention. In each case, the entire body of legislation that defines the functions of an administrative decision maker, and the framework within which his or her activities are carried on, will have to be carefully examined. The determination of the actual content of the duties of procedural fairness that apply requires such an analysis. (my emphasis)

[51] A few years earlier in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (*Newfoundland Telephone Co.*), Cory J. explained why the standard of impartiality varied with the circumstances:

> 28 Janisch published a very apt and useful Case Comment on *Nfld. Light & Power Co. v. P.U.C.* (Bd.) (1987), 25 Admin. L.R. 196. He observed that Public Utilities Commissioners, unlike judges, do not have to apply abstract legal principles to resolve disputes. As a result, no useful purpose would be served by holding them to a standard of judicial neutrality…
>
> 29 Further, a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. This does not of course mean that there are no limits to the conduct of board members. It is simply a confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the Board which is being considered… (page 639)

[52] In *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 (*Old St. Boniface*), Sopinka J. explained the concepts of "prejudice" or of having a "closed mind":

> In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of Council who are capable of being persuaded. The Legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy

> the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. (page 1197)
>
> (my emphasis)

At page 1198, Sopinka J. concluded:

> "It was error, therefore, for the learned judge to apply the reasonable apprehension of bias test**"**

[53] Not a single Supreme Court of Canada case with a situation remotely similar to ours was brought to our attention.

[54] In *Old St. Boniface*, *supra*, at issue were municipal councillors. In *Knight*, *supra*, at issue was a school board. In *Imperial Oil Ltd.*, *supra*, at issue was the Québec Minister of the Environment acting under the powers conferred on him by the *Environment Quality Act* and "the principles of procedural fairness that apply to the situation … codified by the *Act respecting Administrative Justice*, required only that he comply with the procedural obligations set out in the law and that he carefully and attentively consider the representations made by the person subject to the law he administers" (at para. 39). In *Newfoundland Telephone Co.*, *supra*, at issue was a member of the Board of Commissioners of Public Utilities, charged with regulating the Newfoundland Telephone Company Ltd. In *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, another decision cited by the respondent, at issue was the abolishment of the position of a senior public servant appointed to hold office during good behaviour.

[55] In the case at bar, no legislation restrains the powers of the appropriate Minister. What we have is a decision of cabinet, taken at the discretionary instigation of a Minister, aimed at removing a person appointed during pleasure (a person whose status is, by definition, precarious). This is, without question, a "policy making discretionary" administrative decision (to use the words of LeBel J. in

Imperial Oil Ltd.), which attracts, at best, a standard of impartiality of a closed mind. (see *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*, [2000] F.C.J. No. 1946 (FCA) at para. 36).

[56] The respondent argues vigorously for application of the distinction in *Newfoundland Telephone Co., supra*, between the comments of a member of a Commission before and during an inquiry, where the applicable standard is that of a closed mind (see pages 17 and 20), and the comments, "[O]nce the order directing the holding of the hearing was given", where the applicable standard is a reasonable apprehension of bias (see pages 19 and 20). At issue was a formal inquiry followed by a formal hearing in a specific legislative context. As will appear below, the process followed in our case cannot be in any way compared with the process followed in *Newfoundland Telephone Co., supra*.

[57] Justice Lemieux therefore erred in law in applying the higher standard procedural fairness of a reasonable apprehension of bias, instead of the lower standard of a closed mind.

[58] When an error of law is made by an application of the wrong standard, the Court of Appeal has an obligation to consider the facts afresh, apply the correct standard and come to its own conclusion. I undertake this analysis in the paragraphs below. (*Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para 43).

The contents of the closed mind test in the present context

[59] The decision making process in this case is very particular and turns aside from the beaten track. We are here in the heart of the political sphere, which is a sphere that courts, aside from the minimal procedural fairness requirements described above, avoid interfering in.

[60] At issue in this case is a Cabinet decision. This decision, by its very nature, is collective and the decision making process is secret. This raises a number of questions. To whom do we apply the closed mind test? Cabinet? The appropriate Minister? Where do we look for evidence to prove or disprove the allegations? In the present case, I accept that the appropriate Minister's state of mind is the most significant to consider, although this is not to say it is necessarily determinate.

[61] The decision of the appropriate Minister is already made at the time the person concerned is informed of it. However, the decision is not final and it must be approved by Cabinet. In other words, the appropriate Minister has already formed an opinion when he gives the person concerned the opportunity to be heard. A Minister does not venture into a process to terminate someone unless he is convinced that there is a basis for the termination.

[62] The hearing can be informal, as long as the person concerned is permitted to attempt to change the mind of the Minister. The Minister, no matter how well founded the explanations of the person concerned, is not required to change his decision, or to explain why he refuses to change his decision. It is on this basis that any comparison with *Newfoundland Telephone Co., supra*, where there was an inquiry, a notice of hearing and a formal hearing, is distinguishable.

Application of the closed mind test to the facts of this case

[63] The appropriate Minister decided to recommend to Cabinet the termination of Mr. Pelletier. His mind was made up; however he retained the opportunity to change his mind once he had heard the submissions of Mr. Pelletier. Consequently, when he said in the House of Commons on November 21, 2005 that "the grounds on which Mr. Pelletier was dismissed in March 2004 are as valid as ever" and that, "[O]bviously, Mr. Pelletier no longer has our confidence to chair the board at VIA Rail", he did nothing more than describe the situation as it stood at that time. The test for a "closed mind" is not applicable at this early stage of the process. I would also add that the context of those comments should be considered and inordinate weight should not be given to impromptu responses from a Minister in the heat of Question Period.

[64] The hearing is the proper moment to apply the closed mind test to the Minister. The transcription of the hearing reveals that the Minister excused himself for some of his earlier statements, asked questions about the incidents leading to the first termination of Mr. Pelletier, and promised to consider the matter with a clear head before making a decision. The following extract is significant:

> [TRANSLATION]
>
> MS. SUZANNE COTE:
> I have a question for you. After how long of a delay can we hope to receive news further to this hearing?
>
> THE HONOURABLE JEAN-C. LAPIERRE:
> I don't know; I will have to reflect on everything I have heard. I would imagine after a reasonable delay.
>
> MS. SUZANNE COTE:
> And for you, a reasonable delay, can … for certain people, it can be a few days, for other people it can be a few weeks.
>
> THE HONOURABLE JEAN-C. LAPIERRE:
> It is because… Listen… I have to do this with a clear head; I have to consider the whole question.
>
> (A.B. vol. 3 p. 363)

[65] I do not see how, in the circumstances, it is possible to conclude that the Minister had a closed mind. I note, moreover, that it was the respondent himself who pressed the Minister to render the decision in the shortest time possible. I also note, and this is not an irrelevant consideration because ultimately this was a Cabinet decision, that Minister Lucienne Robillard also participated in the hearing and that no allegations have been made suggesting that she had a closed mind.

Disposition

[66] For the reasons given above, I would allow the appeal, set aside the judgment of the Federal Court, dismiss the application for judicial review filed by the respondent and restore the validity of the December 22, 2005 Order-in-Council terminating the appointment of Mr. Pelletier.

[67] I would award costs to the appellant in this Court and in the Court below.

"Robert Décary"
J.A.

"I agree.
Gilles Létourneau J.A."

"I agree.
Marc Noël J.A."

Translation

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-221-07
STYLE OF CAUSE:	The Attorney General of Canada v. Jean Pelletier
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	December 11, 2007
REASONS FOR JUDGMENT BY:	DÉCARY J.A.
CONCURRED IN BY:	LÉTOURNEAU J.A. NOËL J.A.
DATED:	January 9, 2008

APPEARANCES:

Ms. Carole Bureau Mr. Warren Newman	FOR THE APPELLANT
Ms. Suzanne Côté Mr. Patrick Girard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims c.r. Deputy Attorney General of Canada Montréal, Quebec	FOR THE APPELLANT
Stikeman Elliott LLP Montréal, Quebec	FOR THE RESPONDENT