Date: 20080228

Docket: A-215-07

Citation: 2008 FCA 75

CORAM: **DESJARDINS J.A.**
LÉTOURNEAU J.A.
TRUDEL J.A.

BETWEEN:

MICHEL GAUTHIER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Hearing held at Ottawa, Ontario on February 12, 2008.

Judgment rendered at Ottawa, Ontario on February 28, 2008.

REASONS FOR JUDGMENT: LÉTOURNEAU J.A.

CONCURRED IN BY: DESJARDINS J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issue

[1] Was the Assistant Deputy Minister of the Department of Human Resources and Skills Development Canada (the Department) justified in finding that the appellant, by his activities as a municipal councillor for the city of Saint-Jean-sur-Richelieu, was in an apparent conflict of interest with his duties as an investigator under the *Employment Insurance Act* and Regulations?

[2] Asked to rule on that question, Shore J. of the Federal Court of Canada (the judge) found in the affirmative: see *Gauthier v. Attorney General of Canada*, 2007 FC 304. He accordingly dismissed with costs the application for judicial review submitted to him by the appellant. That is the decision now before this Court on appeal.

[3] As usual, this question is accompanied by the thorny issue of the standard of review, which was and continues to be a source of difficulty and confusion in this case.

[4] I hasten to add that the integrity of the appellant Mr. Gauthier has not in any way been questioned in these proceedings. The issue is one of an apparent conflict of interest, not an actual conflict.

Facts

[5] For reasons that will become obvious in due course, relating to the appellant's arguments and the remedy he is seeking, it is unnecessary to provide a detailed account of the underlying facts of the case.

[6] The appellant is employed by the Public Service of Canada as an employment insurance investigator. The purpose of his investigations is to uncover fraud or abuse in the administration of the Act and Regulations governing participation in the insurance scheme and the granting of

employment insurance benefits. They may [TRANSLATION] “lead to fines, financial penalties or the establishment of overpayments”: see appeal record, page 98, paragraph 3 of the affidavit by the Assistant Deputy Minister of the Department.

[7] The appellant’s work in this capacity involves, *inter alia*, contact with the public, working in conjunction with local police services, recommending prosecution and laying informations: *ibid*., at paragraph 4.

[8] As a public servant, the appellant is subject to the *Values and Ethics Code for the Public Service* (the Code). The Code derives from a Treasury Board policy contained in a directive introduced pursuant to subsections 7(1) and 11.1(1) of the *Financial Administration Act*, R.S.C. 1985, c. F-11. It came into effect on September 1, 2003, replacing the *Conflict of Interest and Post-Employment Code for the Public Service*. Until that date, the appellant had been governed by the former Code.

[9] Between 1982 and April 2005, the appellant performed his investigator duties at the Saint-Jean-sur-Richelieu office. The area served by the office comprised several municipalities, including the town of Iberville.

[10] In 1999, he became involved in municipal politics. In November of that year he was elected to the Iberville town council and, at that point, was faced with the potential for a conflict of interest within the meaning of the Code. The appellant was aware of this. As the Code required, he

submitted a confidential report to the then Assistant Deputy Minister regarding his duties as an elected representative.

[11] In a letter to him on November 2, 1999, the appellant's contention that he was not in a conflict of interest situation was upheld. However, he was urged to be careful and cautious so as to avoid any conflict of interest, even an apparent one: see appeal record, page 67, letter from Danielle Vincent, then Assistant Deputy Minister.

[12] As a municipal councillor, the appellant was paid approximately $21,400 a year. In addition to his salary, he received a tax-free allowance of $10,700. He was involved on a number of committees, including recreation, public transit, public safety and town planning.

[13] Saint-Jean-sur-Richelieu did not escape the great wave of mergers that swept over the municipal world. In 2001, the name of Saint-Jean-sur-Richelieu remained, but the territory of the former town was enlarged by the addition of the towns of Iberville, Saint-Luc, L'Acadie and Saint-Athanase.

[14] On November 3 of the following year, the appellant was elected municipal councillor for District 2 of the new city of Saint-Jean-sur-Richelieu. This district corresponded to the old town of Iberville, for which he had been a municipal councillor prior to the merger.

[15] The appellant again sought to ensure that he was in compliance with the Code. He met with the Brossard Office director, who concluded that it was not necessary for the appellant to file another confidential report under the Code, since the circumstances that had previously existed were essentially still the same: *ibid.*, at page 33, see paragraph 14 of appellant's affidavit.

[16] With the municipal elections approaching in 2005, the appellant submitted another confidential report to his employer in September 2004. In it, he informed the employer of his intention to seek another term as municipal councillor.

[17] By a letter dated February 23, 2005, the Assistant Deputy Minister for the Quebec Region indicated that, having reviewed the facts, she considered his activities as a municipal councillor for the city of Saint-Jean-sur-Richelieu to [TRANSLATION] "constitute an apparent conflict of interest situation": *ibid.*, see page 76 of letter from the Assistant Deputy Minister. I will return to this letter below.

[18] The appellant grieved the Assistant Deputy Minister's decision. To resolve the grievance, he and his union representative submitted two alternatives to the employer for remedying the conflict of interest.

[19] First, he suggested that the 25 to 30 potentially problematic files from his Iberville District No. 2 be transferred to the attention of one of his Office colleagues. In exchange, he would take on an equivalent number of that colleague's files.

[20] Second, if the first proposal were rejected, he asked that all his files be exchanged with the Brossard Office. He would leave Saint-Jean-sur-Richelieu and work in Brossard. In return, a colleague from Brossard would come and work in Saint-Jean-sur-Richelieu. Obviously, the appellant's proposal to travel to the neighbouring district would generate expenses for him, and he made it contingent on those expenses being covered by his employer. In passing, I do find it surprising, to say the least, that the appellant, who, according to the impugned decision, created an apparent conflict of interest for himself by deciding to take on other paid employment, should think himself entitled to demand that the costs of ending this conflict of interest be borne by his first employer, the victim of the conflict (and in this case, that means the taxpayers as a whole) in order for the appellant to be able continue in his second paid employment—the very source of the conflict. After all, under the Code, it is the responsibility of the employee to "prevent real, apparent or potential conflicts of interest from arising" and, needless to say, to take the actions necessary to end them: see appeal record, page 124, under item *Measures to Prevent Conflict of Interest*, the list of a public servant's responsibilities.

[21] Both of the appellant's proposals were rejected by his employer.

[22] On April 21, 2005, the appellant requested a temporary assignment to the Brossard territory until the date of the election, scheduled for November 6, 2005. The request was denied. The employer then offered the appellant one of the following three options, as appears from the e-mail sent by Yvan Desroches to the appellant on April 21, 2005:

[TRANSLATION]

1. Cease your political activities in the territory;

2. Give up your employment temporarily or permanently; and

3. Submit a written request for transfer.

[23] A request for a temporary transfer to Brossard was made by the appellant and was granted. At that time, he was still in Saint-Jean-sur-Richelieu, but was performing his investigator's duties in the Brossard territory.

[24] The Assistant Deputy Minister's decision was upheld at the final grievance level. It was this decision which was the subject of judicial review in the Federal Court: hence, the appeal to this Court.

Analysis of appellant's arguments and of impugned decision

[25] Counsel for the appellant submitted that the Court needs to intervene in this matter because the judge erred in law by applying the wrong standard of review to the decision before him.

[26] Additionally, he said the Court should intervene because the judge essentially endorsed the Assistant Deputy Minister's decision despite it being irremediably vitiated by two errors of fact and one error of law. I will address these points now, beginning with the standard of review.

(a) Applicable standard of review

[27] The judge applied the standard of patent unreasonableness to the decision before him, whereas, by the time of the hearing in Federal Court, our Court had already rendered its decision in *Canada (Attorney General) v. Assh*, 2006 FCA 358.

[28] The parties here informed us that *Assh* was in fact brought to the attention of the judge below and debated before him. They were unable to explain how he had arrived at that standard, considering that our Court had clearly identified a different one. No mention of *Assh* was made by the judge in his reasons.

[29] *Assh* raised a conflict-of-interest issue under the Code. The conflict in that case resulted from a pension beneficiary's $5,000 bequest to Mr. Assh, who had helped her to obtain the pension. Mr. Assh was a lawyer specializing in pensions employed by the Bureau of Pensions Advocates of the Department of Veterans Affairs. His role was to assist veterans and their surviving spouses to apply for pensions. Hughes J., also of the Federal Court of Canada, who had decided *Assh* some 17 months before the judge rendered his decision in the case at bar, ruled that the appropriate standard of review was reasonableness *simpliciter*, since the question was one of mixed fact and law resulting from application of the Code to the facts of the case: see *Assh v. Canada (Attorney General)*, 2005 FC 1411, at paragraph 32.

[30] On appeal, Evans J.A. of this Court undertook a pragmatic and functional analysis to identify the applicable standard. He considered the impact of the existence of a privative clause, which he considered to be fairly weak; the nature of the issues; the relative expertise of the decision-maker and of the Court; and the purposes of the Code.

[31] In the end, at paragraph 50 of his reasons, he found, with Nadon J.A. concurring (though dissenting on the merits), that the standard of review applicable to the interpretation of the Code and the facts at issue before him was that of correctness. Although some factors taken into account in the pragmatic and functional analysis suggested a measure of deference toward the decision-maker, he considered for two reasons that correctness was the standard that should prevail.

[32] First, the Code was in fact incorporated in Mr. Assh's employment contract. And, as is the case here, the decision was not that of an independent decision-maker.

[33] Second, the test at common law for an apparent conflict of interest situation is similar to that for reasonable apprehension of bias. It is a test with which the courts are familiar.

[34] I set out paragraphs 50 to 53 of his decision:

> ***(v) Conclusion***
>
> [50] On the basis of the pragmatic and functional considerations discussed above, I am of the opinion that correctness is the appropriate standard for reviewing the final level grievance decision respecting the interpretation of the relevant sections of the Code, and the application of the provision respecting possible influence.

> [51] In reaching this conclusion, I have attached particular weight to two factors. First, and more important, the Code is effectively incorporated into Mr. Assh's contract of employment, and the administrative decision-makers responsible for its interpretation and application are not independent of the employer. In my opinion, Parliament should not be taken to have intended that, subject only to judicial review for unreasonableness, the employer may determine unilaterally whether, by accepting this legacy, an employee would be in breach of contract.
>
> [52] It is true that breaches of the Code may be punished by the employer through discipline, more serious disciplinary measures may ultimately be referred to an Adjudicator under paragraphs 92(1)(*b*) or (*c*) of the *PSSRA*, and Adjudicators' decisions on such matters are normally reviewable for patent unreasonableness. However, this is not true of all disciplinary action. Moreover, in my view, federal public service employees should be able to obtain an independent determination of the scope of their contractual obligations without first having to expose themselves to disciplinary action by disregarding a grievance board's decision.
>
> [53] Second, the test for determining the existence of an apparent conflict of interest is somewhat similar to common law concepts: the reasonable apprehension of bias applied to decision-makers subject to the duty of fairness, and the strict principle that fiduciaries may normally not retain benefits obtained in circumstances where there is any potential conflict between their private interests and their legal duties as fiduciaries.
>
> [Emphasis added]

[35] In his written memorandum, counsel for the appellant argued that the applicable standard in the case at bar was reasonableness *simpliciter*. At the hearing, he added that he was relying on the standard of correctness if that was what this Court had decided in *Assh*.

[36] Counsel for the respondent emphasized that the standard that should be applied is reasonableness *simpliciter* because the issue turned on facts that were within the expertise of the decision-maker and because it required the Code to be applied to the established facts, thus implying a mixed question of fact and law.

[37] With respect, this argument, though accepted in the Federal Court in *Assh*, was rejected on appeal for the reasons stated above. Similarly, I do not think counsel for the respondent has succeeded in removing the case at bar from the ambit of the standard applied in *Assh*.

[38] That said, I believe that the decision should be reversed for the following errors of fact made in the analysis of the appellant's situation.

(b) First error of fact

[39] Counsel for the appellant is correct in his contention that the Assistant Deputy Minister was mistaken regarding the area served by the Saint-Jean-sur-Richelieu Office prior to the merger. In 1999, the services offered by the Office already covered both Saint-Jean-sur-Richelieu and the town of Iberville, for which the appellant was a municipal councillor. In that regard, the area served by the Office was in no way affected by the merger. As for the appellant, he had been conducting investigations within the territories of both municipalities since 1982.

[40] The following two paragraphs from the Assistant Deputy Minister's letter to the appellant clearly illustrate this error of fact. They are to be found at page 76 of the record and read as follows:

> [TRANSLATION]
>
> I understand that in fall 1999 you filed a confidential report setting out your duties as municipal councillor for the town of Iberville and you were told that this did not represent a conflict of interest situation. The situation was different at that time as you were not responsible for conducting investigations in the territory of that municipality.
>
> As you now have to perform your duties as investigator in a territory including the city of St-Jean-sur-Richelieu, you are now placed in a situation where your personal and professional activities could be a source of conflict, or appear to be in the eyes of the public, and your objectivity in the performance of your duties could be called into question.
>
> [Emphasis added]

[41] Despite the fact that this error was pointed out to the Assistant Deputy Minister in February 2005 by the appellant, she repeated it in her affidavit filed in support of her decision in March 2006: see appeal record, page 135, appellant's message to the Assistant Deputy Minister, and page 98, at paragraphs 7, 8 and 9 of the her affidavit, where the error is repeated.

(c) Second error of fact

[42] As appears at paragraph 19 of the Assistant Deputy Minister's affidavit (appeal record, page 100), she thought that the appellant's electoral district included downtown Saint-Jean-sur-Richelieu. That was not the case; he was responsible for District 2, made up of the territory of the old town of Iberville and of Saint-Athanase, while downtown Saint-Jean-sur-Richelieu is in Districts 1, 5, 6, 9, 10 and 11: see paragraph 5 of appellant's affidavit, page 185 of appeal record.

[43] This error led to the error in analyzing the proposal made by the appellant to exchange approximately 30 cases in District 2 Iberville with another Office colleague. In reaction to the appellant's proposal, the Assistant Deputy Minister concluded that the resultant workload would be impossible for one investigator to handle. At paragraph 19 of her affidavit, she stated:

> [TRANSLATION]
>
> Two investigators cover the territory of the city of Saint-Jean-sur-Richelieu. Mr. Gauthier's electoral district takes in downtown Saint-Jean-sur-Richelieu. The majority of that city's population lives in the downtown area. Allowing Mr. Gauthier not to handle cases from his electoral district would thus result in imposing the burden of cases from the downtown area on a single investigator, which is not possible . . .
>
> [Emphasis added]

The error also indicates a misunderstanding of the appellant's proposal.

(d) Error of law without foundation

[44] Counsel for the appellant submitted that his client's freedom of expression, as protected by section 2(*b*) of the *Canadian Charter of Rights and Freedoms* (the Charter), is at stake here. The effect of the loyalty obligation imposed by public-servant status and the Code is to limit the appellant's freedom of expression in the performance of his duties as a municipal councillor.

[45] The appellant does not question the constitutional validity or legitimacy of the Code. He accepted the test set forth by this Court in *Threader v. Canada (Treasury Board)*, [1987] 1 F.C. 41, at 57, for determining whether a conflict of interest situation exists:

> Would an informed person, viewing the matter realistically and practically and having thought the matter through, think it more likely than not that the public servant, whether consciously or unconsciously, will be influenced in the performance of his official duties by considerations having to do with his private interests?

His challenge on constitutional grounds was directed rather at the Assistant Deputy Minister's application of the Code. As applied by her, he submitted, the Code would unduly limit the appellant's freedom of expression and, as such, would offend section 2(*b*) of the Charter.

[46] He further submitted that the Assistant Deputy Minister did not take the Charter's impact into account at all when she analyzed the appellant's situation. As proof of this, he indicated that nowhere in her correspondence with the appellant did she refer to the Charter or to the federal government's obligation under the Charter, particularly with respect to minimal impairment.

[47] He submitted that the three options stated and offered by the employer did not meet the requirements of minimal impairment and that the options he proposed did meet those requirements and ought to have been accepted by his employer. I will begin by disposing of this last point.

[48] This proceeding is an appeal from a Federal Court judicial review decision. Neither this Court nor the one below has the authority to decide the substantive issue, namely, which of the above-mentioned options would have been the most appropriate. Judicial review is concerned with the legality, not the propriety, of the decision. However, counsel for the appellant, well aware of this limitation, asked that the case be referred back to the Assistant Deputy Minister at the final grievance level to be redetermined. As will be seen below, that is the solution I would suggest.

[49] It is true that the Assistant Deputy Minister's correspondence is silent regarding the Charter. However, though the letter of the Charter may not be there, its spirit is there and in the Code as well. I feel that implicit in the options offered by the employer, regardless of whether or not they were the most appropriate, is the employer's intention to reconcile the performance of the two positions held by the appellant, balancing the appellant's rights on the one hand against the public interest in an honest, impartial and effective Public Service on the other. These are among the objectives sought by the Code.

[50] The Code also recognizes the right of a public servant to hold employment outside the Public Service.

[51] The following passages from the Code, which government officials are responsible for applying and enforcing, attest to their duty to find a compromise solution when a conflict of interest situation arises or is apprehended:

> **Objectives of this Code**
>
> The *Values and Ethics Code for the Public Service* sets forth the values and ethics of public service to guide and support public servants in all their professional activities. It will serve to maintain and enhance public confidence in the integrity of the Public Service. The Code will also serve to strengthen respect for, and appreciation of, the role played by the Public Service within Canadian democracy.
>
> . . . . .
>
> Ministers are responsible for preserving public confidence in the integrity of management and operations within their departments and for maintaining the tradition of political neutrality of the Public Service and its continuing ability to provide professional, candid and frank advice.

> **Ethical Values:** *Acting at all times in such a way as to uphold the public trust.*
>
> Public servants shall perform their duties and arrange their private affairs so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced.
>
> . . . . .
>
> If a conflict should arise between the private interests and the official duties of a public servant, the conflict shall be resolved in favour of the public interest.
>
> **Responsibilities, Authorities and Accountabilities**
>
> . . . . .
>
> **Deputy Heads**
>
> . . . . .
>
> 4. To determine the appropriate method for a public servant to comply with the Code, as set out in Chapters 2 and 3, in order to avoid conflicts of interest. In doing so, the Deputy Head will try to achieve mutual agreement with the public servant.
>
> . . . . .
>
> **Methods of Compliance**
>
> . . . In determining appropriate action, the Deputy Head will try to achieve mutual agreement with the public servant in question . . .
>
> **Outside Employment or Activities**
>
> Public servants may engage in employment outside the Public Service and take part in outside activities unless the employment or activities are likely to give rise to a conflict of interest or in any way undermine the neutrality of the Public Service.
>
> [Emphasis added]

[52] In short, I do not think that the employer failed to consider its obligations under the Charter. It was aware of its obligations under the Code, one of which is to strive for minimal impairment of a

public servant's rights by means of a solution that either forms a consensus or receives the public servant's consent.

[53] Moreover, given the case law that has developed around the Code and its application, I would be hard pressed to assume or reasonably infer that the employer was unaware of (a) the clash of values that exists between freedom of expression as guaranteed by the Charter and the public service duty of loyalty imposed on government employees by the Code and (b) its obligation to reconcile those values.

[54] For these reasons, I do not think this Court should support the allegation that there was a failure to consider the appellant's Charter rights and that an error of law resulted.

Conclusion

[55] I feel that the errors of fact made by the Assistant Deputy Minister in her analysis of the existence of a conflict of interest situation are serious and significant. They are at the very heart of the issue she had to decide. They also had an impact on the analysis and choice of options to remedy what she saw as an apparent conflict.

[56] It may be that, despite these errors of fact, the Assistant Deputy Minister's decision as to the existence of an apparent conflict of interest and the solutions proposed was the right one; it may be that the decision was the right one regarding the apparent conflict but wrong as to the choice of

solutions, because of these errors; or it may be that her decision on both of these matters was not the one she would have made had she not been mistaken as to the facts. It is not for this Court to rule on any of those questions. However, one thing is very clear to me in the case at bar: the appellant is entitled to a fair and equitable decision, which decision needs to be made on the basis of a factual analysis free from errors as significant as the ones committed.

[57] The judge seized of the appellant's application for judicial review should have intervened to remedy the unfairness resulting from these errors in the decision-making process.

[58] For these reasons, I would allow the appeal with costs and set aside the Federal Court's judgment of March 30, 2007. Rendering the judgment which should have been rendered, I would allow the appellant's application for judicial review with costs, set aside the decision of the Assistant Deputy Minister at the final grievance level dated November 22, 2005, and refer the matter back to him for redetermination, taking the present reasons for judgment into account and making the necessary corrections to the errors of fact that vitiated the decision of the former Assistant Deputy Minister.

"Gilles Létourneau"

J.A.

I concur.

Alice Desjardins J.A.

I concur.

Johanne Trudel J.A.

Translation certified true.
Stefan Winfield, reviser

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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STYLE OF CAUSE:	MICHEL GAUTHIER v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 12, 2008
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	DESJARDINS J.A. TRUDEL J.A.
DATED:	February 28, 2008

APPEARANCES:

James Cameron	FOR THE APPELLANT
Jennifer Champagne	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP/srl Ottawa, Ontario	FOR THE APPELLANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT