Public Servants
Disclosure Protection
Tribunal Canada

Tribunal de la protection
des fonctionnaires
divulgateurs du Canada

Citation: El-Helou v. Courts Administration Service, 2011 PSDPT 1

File No.: T-2011-01

Issued at: Ottawa, Ontario
October 6, 2011

In the Matter of an Application by the Public Sector Integrity Commissioner of Canada to the Public Servants Disclosure Protection Tribunal

BETWEEN:

CHARBEL EL-HELOU
Complainant

-and-

OFFICE OF THE PUBLIC SECTOR INTEGRITY COMMISSIONER
Commissioner

and

COURTS ADMINISTRATION SERVICE
Employer

and

DAVID POWER
Individual Respondent

and

ÉRIC DELAGE
Individual Respondent

INTERLOCUTORY DECISION ON THE TRIBUNAL'S JURISDICTION

THE PRESENT JURISDICTIONAL MOTION

[1] This interlocutory decision disposes of a motion brought by the complainant on July 15, 2011, relating to the scope of jurisdiction of the Public Servants Disclosure Protection Tribunal (the Tribunal) when the Public Sector Integrity Commissioner (the Commissioner) files an application to it, under subsection 20.4(1) of the *Public Servants Disclosure Protection Act*, SC 2005, c 46 (the Act).

[2] The Act creates a safe haven for public servants so that they can disclose wrongdoing and be protected from reprisal. It establishes a Public Sector Integrity Commissioner and the Public Servants Disclosure Protection Tribunal. One of the Commissioner's many powers is to apply to the Tribunal for a determination as to whether measures taken against a public servant were reprisals within the meaning of the Act.

[3] The present application (the Application) to the Tribunal arises from a complaint made in July 2009 to the Commissioner. It involves consideration of the conduct of the Courts Administration Service (CAS or the employer) and of some of its senior personnel. The role of CAS is to provide administrative services to four courts of law: the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court of Canada and the Tax Court of Canada.

[4] While in the employment of CAS, the complainant, Mr. El-Helou, observed what he considered to be wrongdoing on the part of other public servants, and reported same to the person designated as the Senior Officer for internal disclosure of wrongdoing under the Act, Mr. David Power, one of the named individual respondents, who also happened to be, at the time, the Acting Deputy Chief Administrator for Corporate Services of the employer.

[5] In the complaint filed with the Office of the Public Sector Integrity Commissioner (OPIC), dated July 3 and July 9, 2009, the complainant alleged:

a) Mr. Laurent Francoeur, the complainant's supervisor, asked Mr. Eric Cloutier, Director, Information Management, to obtain information about the complainant's management style and to solicit negative comments from subordinates. Mr. Cloutier apparently carried out this request on or about May 25, 2009, when Mr. Francoeur was on vacation and Mr. Cloutier was acting in his position (the first allegation);

b) On June 5, 2009, Ms. Francine Côté, Deputy Chief Administrator, temporarily reassigned the complainant to other duties and his supervisory responsibilities were taken away from him (the second allegation);

c) His security clearance at the Top Security level was withheld in May 2009 until his departure in February 2010 (the third allegation).

[6] The Office of the Commissioner accepted the complaint and investigated the matter. There was a fourth allegation pertaining to harassment in the initial complaint, but it was later withdrawn by the OPIC investigator, with the complainant's consent, after the investigation had begun. The Senior Investigator concluded that the evidence did not support the conclusion that there were reasonable grounds to sustain the first two allegations above; however, she found that there were reasonable grounds for believing that a reprisal had been taken against the complainant with respect to the withholding of the complainant's Top Secret security clearance. The Commissioner accepted the findings and recommendations contained in the investigator's report dated April 14, 2011.

[7] By letters dated April 18, 2011, parties to the complaint were advised that:

(1) The Commissioner had dismissed, pursuant to section 20.5 of the Act, all allegations made against Mr. Cloutier, Ms. Côté and Mr. Francoeur as part of the complaint; and

(2) The Commissioner would apply to the Tribunal, pursuant to subsection 20.4(1) of the Act, for a determination of whether the withholding of the complainant's Top Secret security clearance constituted a reprisal, and if so, whether disciplinary action should be taken against Mr. Power and Mr. Delage.

[8] On May 16, 2011, the Commissioner filed the present application and on June 7, 2011, the Commissioner filed his statement of particulars but only with respect to the third allegation.

[9] Prior to being called to file his own statement of particulars, the complainant announced his intention to ask the Tribunal to make an order confirming its jurisdiction to deal with all allegations of reprisal in the complaint (the present jurisdictional motion). Moreover, the

complainant concurrently challenged the legality of the decision of the Commissioner to dismiss the first two allegations of the complaint before the Federal Court (Docket T-862-11).

[10] On June 10, 2011, the Tribunal directed all the parties to suspend the filing of their statements of particulars until further notice, pending determination of the jurisdictional motion and the other preliminary motions. The Tribunal directed that the complainant's jurisdictional motion be heard orally and that all other preliminary motions be decided on the basis of the motion material and written representations submitted by the parties.

[11] Given that the Commissioner's application under subsection 20.4(1) of the Act was limited to one of the three allegations in the complaint (the other two having been dismissed under section 20.5 of the Act on the basis that there was insufficient evidence), the issue is whether the Tribunal must, may, or cannot consider that the measures taken with respect to the other two allegations were reprisals and, if so, order that remedial measures be taken.

[12] On August 31, 2011, a panel of three members of the Tribunal heard arguments from all parties to the Application. In passing, Mr. Delage and Mr. Power (the individual respondents) and CAS (the employer) are represented by separate counsel. The counsel representing the individual respondents also acts as counsel for Mr. Francoeur, Mr. Cloutier and Ms. Côté (the interested parties), who have also been allowed by the Tribunal to participate in the complainant's jurisdictional motion.

FACTUAL BACKGROUND

[13] The events leading to the Application occurred in 2009 and are summarized in a number of documents already filed to the Tribunal, including the Notice of Application and the statement of particulars filed by the Commissioner in this proceeding.

[14] On May 16, 2011, concurrently with the filing of his application, the Commissioner filed a notice of motion for an order declaring Appendices A and B of the Application confidential. Appendix A is a copy of the original complaint and attached material filed with the Commissioner on July 3, 2009, while Appendix B is a copy of additional information and material filed with the Commissioner on July 9, 2009, to supplement the original complaint made by the complainant.

[15] Notably, the complaint contains numerous references to a security investigation conducted by CAS in relation to threats made against a member of the judiciary, and it also contains allegations made against persons whose conduct was not found to be at fault by the Commissioner.

[16] On June 10, 2011, the Tribunal issued an interim confidentiality order, on consent, with respect to the documents marked as Appendices A and B and an interim publication ban order, to remain in force until the Commissioner's motions can be disposed of by the Tribunal or until such time as the Tribunal orders otherwise.

[17] On August 23, 2011, the Tribunal agreed to continue the publication ban until the Tribunal makes a final decision in regard of the Application, or until the Tribunal orders otherwise.

[18] The events outlined below are drawn from a number of documents already filed, on the understanding that the Tribunal accepts that these are facts or allegations to be proven at the hearing of this Application.

[19] At the time the alleged reprisals took place, the complainant held the position of Director, Client Services and Infrastructure and was a public service employee working at CAS in Ottawa. He left CAS in February 2010 and continues to be employed as a public servant at the Department of Public Works and Government Services Canada.

[20] Sometime in 2009, an investigation was conducted by the CAS and the Ottawa Police Service concerning threatening e-mails that had been sent from an individual to a member of the judiciary. In the course of that investigation, Mr. Éric Delage, Director General, Administrative, Facilities and Security Services Division, requested that several e-mails from the week of January 26, 2009 be accessed and copied. On February 2, 2009, Mr. Francoeur, Director General, Information Technology Services, asked the complainant to follow through on this request (paragraph 6 of the statement of particulars).

[21] The complainant later informed Mr. Francoeur that there were no e-mails from the individual who was allegedly threatening the member of the judiciary prior to January 28, 2009. During that discussion, Mr. Francoeur repeated his previous request that he wanted all the

e-mails of the week of January 26, 2009, and emphasized that he wanted to see the emails that the member of the judiciary was sending (paragraph 8 of the statement of particulars).

[22] The complainant was upset by the request to access these e-mails, some of which he thought could contain sensitive information. Although he believed that the request was improper, he complied with it. After completing the work, he informed the member of the judiciary that he had been asked to access and copy the e-mails for the week of January 26, 2009, and that he believed that this request was inappropriate (paragraph 11 of statement of particulars). The member of the judiciary subsequently reported what had happened to people in a higher position of responsibility.

[23] The complainant stated that subsequently, his relationship with both Mr. Delage and Mr. Francoeur deteriorated. He had several meetings with Mr. Power, who was Senior Counsel, and was also acting in a number of other capacities: as acting Deputy Chief Administrator for Corporate Services, as Mr. Francoeur's acting manager, and as the designated Senior Officer for internal disclosure of wrongdoing under the Act (paragraphs 15 and 16 of the statement of particulars).

[24] During a meeting on March 16, 2009, the complainant expressed concern to Mr. Power that Mr. Francoeur had undermined him, although he did not raise the issue of the e-mails at that time. On March 18, 2009, Mr. Power learned about the complainant's actions in relation to the e-mails, while following up with Mr. Francoeur on the issues that had been raised by the complainant. During a meeting on March 25, 2009, the complainant disclosed his concern about the e-mail request to Mr. Power (paragraphs 16 and 17 of the statement of particulars).

[25] It was during this latter meeting that the complainant also expressed concern about a procurement contract that had been awarded to a company. More specifically, the complainant suspected collusion between three different companies. Mr. Power informed the complainant that he had provided legal advice on the decision to award this contract and recused himself from further discussion about it. He referred the complainant to another legal counsel at the CAS and stated that he could make a protected disclosure of wrongdoing directly to OPIC (paragraph 21 of the statement of particulars).

[26] The complainant has alleged that a number of reprisal measures were taken by the employer as a result of the two protected disclosures above. These allegations have already been described above (see paragraph 5). The Senior Investigator concluded that there were no reasonable grounds to sustain the first two allegations, but that there were reasonable grounds to believe that the complainant's Top Secret security clearance had been withheld as a reprisal.

[27] In particular, the Senior Investigator concluded that there is evidence that CAS wanted the complainant to leave and that the threat of a security clearance investigation was used as leverage. The Commissioner considered that the withholding of the security clearance was a punitive measure affecting the complainant's working conditions taken in reprisal after a protected disclosure. However, the Senior Investigator concluded that the evidence was insufficient to establish a causal link between the protected disclosures and the temporary reassignment of the complainant, the removal of his supervisory responsibilities, and the meeting with the complainant's subordinates to obtain information about his management style and to solicit negative comments about him.

[28] The Commissioner accepted the findings and recommendations contained in the investigation report on April 14, 2011. In letters dated April 18, 2011, he advised the parties that, pursuant to section 20.5 of the Act, he had dismissed all the allegations that were made against Mr. Cloutier, Ms. Côté, and Mr. Francoeur (the first and second allegations above). The Commissioner also stated that he would apply to the Tribunal, pursuant to subsection 20.4(1) of the Act, for a determination of whether the withholding of the complainant's Top Secret security clearance constituted a reprisal (the third allegation above). He stated that, pursuant to paragraph 20.4(1)(b) of the Act, should the Tribunal find that a reprisal was taken, he intended to seek an order respecting a remedy in favour of the complainant and an order respecting disciplinary action against the person or persons alleged to have taken a reprisal (the individual respondents).

ANALYSIS AND REASONS

[29] While the entirety of the Application filed by the Commissioner on May 16, 2011, is important, paragraphs 11, 12 and 13 of the Summary are central to the issue before the Tribunal. These paragraphs are reproduced below:

> 11. The complainant's original reprisal complaint (Appendices A and B) concerned the following allegations of reprisal:
>
> > That on or about June 5, 2009, the complainant was temporarily re-assigned to other duties and his supervisory responsibilities were taken away from him;
> >
> > That on or about May 25, 2009, a manager met with the complainant's subordinates to obtain information about his management style and to solicit negative comments from employees reporting to him;
> >
> > That the complainant's Top Secret security clearance was withheld from him beginning in May 2009; and
> >
> > That he was subject to ongoing harassment.
>
> 12. The fourth allegation relating to harassment was withdrawn by the investigator with the complainant's consent after the commencement of the investigation.
>
> 13. Based on the results of the investigation, I have determined that there are sufficient grounds to warrant an Application to the Tribunal in relation to allegation 3) above, that the complainant's Top Secret Security clearance was withheld from him as a reprisal measure. Pursuant to section 20.5 of the Act, I have dismissed allegations 1) and 2), having determined that there are insufficient grounds to warrant an Application to the Tribunal.

[30] The complainant argued that once the Commissioner has referred the Application, this Tribunal has the ability to entertain all of the allegations, even those from the initial complaint that the Commissioner dismissed. To come to this conclusion, he stated that the Act is quasi-constitutional in nature; that the Tribunal has the statutory authority to hear all the allegations; that the Tribunal has broad discretion over its proceedings; and that this issue should be addressed in a manner similar to situations where a human rights tribunal decides to amend a complaint that has come before it. The complainant also referred to the practical circumstances of this complaint and the essential nature of the dispute.

[31] The Commissioner did not oppose the complainant's motion, though he qualified any agreement with it in his discussion of the role and responsibilities of the Commissioner in the disclosure protection process of the Act, and the role of the Tribunal in the determination as to whether reprisal has occurred.

[32] The employer, individual respondents, and the interested parties opposed the complainant's motion.

[33] For the reasons that follow, the present jurisdictional motion cannot succeed.

HISTORY OF DISCLOSURE OF WRONGDOING IN THE FEDERAL REALM

[34] An historic perspective is helpful in order to understand and contextualize the legislative framework. The disclosure of wrongdoing is a relatively recent field, both in Canada and abroad. Canadian judicial dialogue on the ability of public service employees to protect the public by disclosing wrongdoing is several decades old. J.M. Weiler's 1981 arbitral decision in *Re Ministry of Attorney General and British Columbia Government Employees Union* (1981), 3 LAC (3d) 140 (at pages 162-163), offers helpful observations. It was referred to by the complainant in his motion and states:

> With respect to public criticisms of the employer, the duty of fidelity does not impose an absolute "gag rule" against an employee making any public statements that might be critical of his employer. An employee need not, in every circumstance, follow Cervantes' advice, "A closed mouth gathers no flies." The duty of fidelity does not mean that the Daniel Ellsbergs and Karen Silkwoods of the world must remain silent when they discover wrongdoing occurring at their place of employment. Neither the public nor the employer's long-term best interests are served if these employees, from fear of losing their jobs, are so intimidated that they do not bring information about wrongdoing at their place of employment to the attention of those who can correct such wrongdoing.

[35] In 1985, the Supreme Court of Canada established the foundation for the defence of "whistleblowing" in *Fraser v Canada (Public Service Staff Relations Board)*, [1985] 2 SCR 455. The Supreme Court acknowledged the importance of freedom of expression, but ultimately did not find that the defence of "whistleblowing" could be upheld in that particular case.

[36] In its inquiry into the traditions of the public service, the Supreme Court examined the duty of loyalty. The qualities considered essential for public service – impartiality, fairness and integrity – could also be understood through the role of the executive (in implementing and administering government policy) and the principle of separation of powers. The Supreme Court stated however that the duty of loyalty is not absolute and could not support an absolute "gag rule" against an employee. In some instances, a public servant's freedom of speech was permissible.

[37] The Supreme Court identified three areas in which a public servant may make disclosures of wrongdoing by other public servants: 1) if an individual was engaged in illegal acts; 2) if the policy in place jeopardized the life, health or safety of individuals; and 3) if the disclosure made by the public servant did not have an impact on his or her ability, or on the perception of that ability, to effectively perform his or her duties.

[38] The *Canadian Charter of Rights and Freedoms* (the Charter) had not been proclaimed at the time that the facts in *Fraser* arose, but the Supreme Court acknowledged that freedom of speech was a deep-rooted democratic value. The *Fraser* decision, and several other decisions that followed in which the Charter was directly at issue, have ruled upon the important balance to be struck between freedom of expression and the duty of loyalty to the employer. Canadian jurisprudence now clearly states that it is through the right to freedom of expression under section 2 of the Charter that a public servant has the right to disclose wrongdoing.

[39] The common law duty of loyalty is also recognized under the Charter, as a limit "prescribed by law" under section 1. That duty is considered essential to promoting an effective public service and to the functioning of a democratic society. This was highlighted by the Federal Court in *Haydon v Canada*, [2001] 2 FC 82 (*Haydon No. 1*). This decision incorporated the principles of *Fraser* within the scope of the Charter by associating the duty of loyalty of public servants with one of the reasonable limits provided for in section 1 of the Charter. Tremblay-Lamer, J stated:

> In conclusion, I am of the view that the common law duty of loyalty as articulated in Fraser sufficiently accommodates the freedom of expression as guaranteed by the Charter, and therefore constitutes a reasonable limit within the meaning of section 1 of the Charter. (paragraph 89)

[40] The Federal Court recognized therefore, that a public servant might be protected by the Charter and common law when he or she discloses illegal acts or practices or policies that may harm public safety. It also specified that the "whistleblowing" defence, which arises from *Fraser*, applies to issues of public interest.

[41] As the legal principles defining the balance between the duty of loyalty and freedom of expression of a public servant developed, the federal government implemented several initiatives

in the area of values and ethics. These initiatives resulted in the development of the current legislative framework for the disclosure of wrongdoing and the protection of those who make a disclosure.

[42] In 2004, Bill C-25, the Public Servants Disclosure Protection Act, was tabled in Parliament. The purpose of this bill was to replace the Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace. Among other things, it provided a definition of reprisal and considered the taking of a reprisal as wrongdoing. The bill died on the order paper when the 2004 general election was called.

[43] In 2004, the Criminal Code was amended with the addition of subsection 425.1(1), prohibiting an employer from taking reprisals against an employee who had disclosed a contravention of a federal or provincial law. This provision states that an employer or a person acting on behalf of an employer or in a position of authority cannot take disciplinary measures against, demote, terminate or otherwise adversely affect the employment of an employee, or threaten to do so, on the ground that the employee disclosed or intended to disclose an illegal activity.

[44] In 2005, Bill C-11, the Public Servants Disclosure Protection Act, received Royal Assent, but was not in force when the 2006 general election was called. The Act included provisions requiring that the Commissioner report directly to Parliament. It also enhanced protection from reprisals for authorized public disclosures.

[45] The Federal Accountability Act (C-2) was granted Royal Assent on December 12, 2006. This statute, omnibus in nature, amended several statutes, including the Public Servants Disclosure Protection Act. The amendments established the current disclosure protection regime, including the creation of the Tribunal. The Act came into effect on April 15, 2007. It maintains the integrity of the "whistleblower" defence from the jurisprudence and builds upon it. It confirms the need to consider the duty of loyalty owed by public servants as well as the primacy of freedom of expression.

[46] The Act also expands upon the circumstances set out in Fraser for permissible disclosure of wrongdoing with the following: a misuse of public funds or a public asset; a gross

mismanagement in the public sector; an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment; a serious breach of a code of conduct established under the Act; and knowingly directing or counselling a person to commit any of these wrongdoings.

[47] The Act creates a much broader system for disclosure protection within the public service at several junctures and at different levels: internally to a supervisor or the departmental Senior Officer (section 12) of a department or agency; externally to the Commissioner (section 13); or where there is not sufficient time to disclose a serious offence under Canadian legislation or an imminent risk of a substantial and specific danger, the disclosure may be made to the public (subsection 16(1)).

[48] The creation of the Public Servants Disclosure Protection Tribunal – a new, specialized and independent tribunal – represents a markedly different approach from traditional labour relations models for redress. The Commissioner may now apply to this Tribunal for a determination of whether or not a reprisal was taken if "an application to the Tribunal in relation to the complaint is warranted" (subsection 20.4(1)). The Act confers upon the Tribunal the power to engage persons having technical or special knowledge under subsection 20.8(3). This ensures a level of expertise in the area of reprisal and whistleblowing that transcends the appointment of members. The members of this Tribunal, including its Chair, are federally appointed judges.

[49] Indeed, the passage of the Act represents a systematic legislative response to major trends in jurisprudence. Recounting this history of the disclosure of wrongdoing in relation to jurisprudence and the federal framework confirms that the Act was implemented only after careful thought and study. It was neither unplanned, nor created on the spur of the moment. The issues raised in this motion must be examined within this context

WHETHER THE ACT HAS QUASI-CONSTITUTIONAL STATUS

[50] The complainant argued that the Act must be interpreted through a consideration of its preamble and its reference to freedom of expression, which is an important Charter value and which is also recognized as an important freedom in jurisprudence generally. Even without a direct reference to the Charter, he argued that a statute can enjoy quasi-constitutional status and

referred to the *Privacy Act*, RSC 1985, c P-2, the *Official Languages Act*, RSC 1985, c 31 (4th Supp) and the *Canadian Human Rights Act*, RSC 1985, c H-6. He submits that, in this case, the Act should also have this special status. His reference to jurisprudence relating to unique legislation for discrete groups also inferred that this special status might apply even where legislation establishes certain basic rights only for a small group of individuals in society (*Writers Union of Canada v The League of Canadian Poets* (File No: 95-0014-A). He submitted that the legislation must be given a fair, large and liberal interpretation. He noted that when quasi-constitutional legislation and other legislation cannot stand together, it is the legislation with special status that prevails in the interpretation of the conflict in question.

[51] The employer and the individual respondents disagreed with this position and drew distinctions between the Act and other legislations that have been recognized as having quasi-constitutional status. They submitted that the preamble in and of itself, cannot confer this status, which is exceptional in nature and requires that the legislation be considered paramount.

[52] The Tribunal recognizes that it must play its role to ensure that this new legislative scheme not be "enfeebled". It is worth remembering that the federal *Interpretation Act* asserts that statutes are deemed to be remedial and are to be given such fair, large and liberal interpretation as will best ensure that their objects are attained (*CN v Canadian Human Rights Commission*, [1987] 1 SCR 1114 at page 1134).

[53] Both the framework and the wording of the Act illustrate the importance that Parliament places on integrity in the federal public administration and on the need to establish relevant and effective procedures to achieve its objectives. The preamble to the Act recognizes four important principles:

i) the federal public administration is an important national institution and is part of the essential framework of Canadian parliamentary democracy;

ii) it is in the public interest to maintain and enhance public confidence in the integrity of public servants;

iii) confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings;

iv) public servants owe a duty of loyalty to their employer and enjoy the right to freedom of expression as guaranteed by the Canadian Charter of Rights and Freedoms.

[54] Section 13 of the *Interpretation Act,* RSC 1985, c I-21, provides that "the preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purpose and object". In this case, the preamble and its specific wording corroborate the importance given by Parliament to the Act. The objective of the Act is to maintain and enhance public confidence in the integrity of public servants. The federal public administration is an important national institution, which is part of the essential framework of Canadian parliamentary democracy. A careful balance must be struck, when interpreting the Act, between the duty of loyalty and the right to freedom of expression. In providing remedies to public servants who have suffered reprisal, including possible compensation for pain and suffering, the Act is a remedial statute. Therefore, the Act should be given a large and liberal interpretation, in light of its objectives, preamble and remedial nature.

[55] A broad interpretation of the Act however does not preclude the application of the ordinary rules of statutory interpretation. This is especially true when the language of the Act and the intent of Parliament are clear. Even where legislation does have special status, the status in itself does not operate to depart from the traditional approach to the interpretation of legislation (*Lavigne v Canada*, [2002] 2 SCR 773 at paragraph 25). In this case, it is not necessary to determine whether the Act is of a quasi-constitutional nature and the Tribunal will not embark on that issue here. Such an inquiry is important in addressing provisions that conflict, or in filling gaps in the legislation, in order to give effect to policy. However, as the Tribunal explains below, the intent of Parliament with respect to both the scope of jurisdiction and the role of the Commissioner and of the Tribunal are clear.

THE LEGISLATIVE FRAMEWORK OF THE PUBLIC SERVANTS DISCLOSURE PROTECTION ACT

[56] The complainant argued that the wording of the Act must be interpreted to allow the Tribunal to deal expansively with the Application before it, including all allegations contained in the original complaint. He referred to subsection 20.4(1) of the Act, which states that the Commissioner may apply to the Tribunal for a determination of whether or not a reprisal was

taken against the complainant if, after receipt of an investigator's report, the Commissioner is of the opinion that an Application to the Tribunal in relation to the complaint is warranted. He argued that the Tribunal's powers in section 21.2 of the Act reflect Parliament's intention that the Tribunal should be master of its own procedure. He concluded that the Tribunal cannot be constrained by the findings of the Investigator or the Commissioner.

[57] The complainant also referred to sections 21.4 and 21.5 of the Act, which require that it is the Tribunal that must determine whether the complainant has been subject to a reprisal on the Application made by the Commissioner. He stated that through these provisions, the Tribunal must give a full hearing and consideration of the entire complaint, prior to determining whether the complainant has been subject to a reprisal. On this basis, it would be clear that Parliament did not intend that the Tribunal's jurisdiction be constrained by the Commissioner's findings, once an Application has been made.

[58] The complainant submitted that, should the Tribunal inquire into only one of the allegations of reprisal, the Tribunal would be delegating its decision making power to the Commissioner. He referred to the general principles applied in amending complaints before human rights tribunals. In these situations, issues arising out of the same set of facts should normally be heard together as this improves the efficiency of the process and avoids inconsistent rulings (Cook v Onion Lake First Nation, [2002] CHRD 12 (QL)). Another important consideration in determining whether to amend a human rights complaint relates to prejudice to the respondent by doing so (Parent v Canada (Canadian Armed Forces), 2006 FC 1313). The complainant also noted that it is the Tribunal that makes the decision on the merits, not the Commission (Canadian Museum of Civilization Corporation v Public Service Alliance of Canada, 2006 FC 703).

[59] Applying the same principles to this Application, the complainant stated that the allegations of reprisal all arise from the same set of facts and in a single complaint. He further argued that the Tribunal can prevent prejudice through its flexibility to add parties under subsection 21.4(3) of the Act.

[60] The Commissioner stated that all three allegations arose out of the facts that form the basis of the original complaint and that the complainant is not seeking an order from the Tribunal

to deal with a new and separate complaint. He took the position that the Tribunal may deal with all three allegations because they form part of the original reprisal complaint and were accepted for investigation by the Commissioner.

[61] The Commissioner emphasized that the Tribunal does not exercise supervisory jurisdiction over its decisions with regard to whether or not to deal with a complaint once it is filed (section 19.4); a decision that an Application to the Tribunal is warranted (section 20.4); a decision to include in an Application a request that the Tribunal impose disciplinary action on any person(s) identified by the Commission in the Application as being the person(s) who took the reprisal (20.4(1)(b); and a decision that an Application to the Tribunal is not warranted and that a complaint should be dismissed (section 20.5).

[62] The Commissioner stated that he did not object to the Tribunal inquiring into all three allegations of reprisal because all three had been investigated. If the Commissioner had decided not to investigate the other two allegations at the outset, he would have opposed the motion. The Commissioner also argued that so long as there is not significant prejudice to the respondents, the Tribunal has authority to deal with all three allegations. In addition, he referred to the fact that both the complainant and the Commissioner are distinct parties in the proceedings and that the complainant can contest the Commissioner's findings on questions of fact and law. He cautioned the Tribunal however, that should it proceed to hear all three allegations, it could not review the Commissioner's decision as to who should be named as respondents.

[63] The employer advanced the position that the legislator's clear intention was that an agency be created to screen complaints and that this power was not to be conferred on any other agency. It submitted that Parliament specifically gave the Commissioner the authority to determine whether an Application should be made to the Tribunal. Had Parliament wanted to confer these powers on the Tribunal, it would have specified this in the legislation.

[64] The employer cited sections 19.1, 19.4, 20.4 and 20.5 of the Act, in support of its view that it is only the Commissioner who has the jurisdiction to receive or dismiss a complaint that is filed. If the Tribunal had the power to accept allegations that the Commissioner had determined were unfounded, then it would essentially be engaging in judicial review, stepping into the supervisory role of the Federal Court.

[65] The employer referred to section 21.1 and stated that it is only on receipt of the Application by the Commissioner that the Tribunal has jurisdiction. It stated that the Commissioner had the discretion to refuse to pursue two of the three complaints filed on the basis of the OPIC investigation. It argued that this interpretation is supported by wording in the preamble such as "effective procedures" and the need to achieve an "appropriate balance between the two important principles of duty of loyalty to the employer and the right to freedom of expression as guaranteed by the Canadian Charter of Rights and Freedoms."

[66] The employer also described the human rights regime as almost identical to the regime for the protection of public servants who disclose wrongdoing. The human rights regime provides for a two-step process, where the Canadian Human Rights Commission refers the complaint to the Canadian Human Rights Tribunal. It is not the tribunal however, that determines what part of a complaint is referred to it. Rather, the Canadian Human Rights Commission (CHRC) plays this role. The employer stated that the Canadian Human Rights Commission is not an adjudicative body, but rather, fulfils a screening function not unlike the role taken by a judge at a preliminary inquiry (Cooper v Canada (Human Rights Commission), [1996] 3 SCR 854). Should the complainant not be satisfied with the decision of the CHRC, he or she is left with only one option, and that is to seek judicial review of its decision.

[67] The employer stated that several cases, including jurisprudence referred to by the complainant and the Commission, support its position that under the federal legislation for protection from reprisal, the Tribunal can only receive its jurisdiction from the Application made by the Commissioner. It concluded that the Tribunal has no authority to question the validity of the Commissioner's decision to refer a complaint to it (Cook; Canadian Museum of Civilization Corporation v Public Service Alliance of Canada; Wang v York Regional Police Services, 2007 HRTO 11 (CAN LII) at paragraphs 12 and 13).

[68] The individual respondents and the interested parties largely supported the employer's arguments pertaining to the statutory framework of the Act. They stated that the Tribunal's jurisdiction flows from its enabling legislation, essentially arguing that the Tribunal is a creature of statute. They submitted that the Commissioner's statutorily recognized function is to screen complaints and it is the investigation done by the OPIC that reveals that some or all of the

allegations in the complaint warrant determination by the Tribunal. Therefore, it is not the complaint that originates the proceedings before the Tribunal, but the Application itself.

[69] To address these arguments, it is helpful to examine the Commissioner's dual role in receiving disclosures under the Act and in determining whether to refer an Application to the Tribunal. Reviewing these two areas and the steps involved in the Application process clarifies how the Tribunal's jurisdiction is triggered, helps to identify the originating document that allows the Tribunal to seize jurisdiction, and contributes to an understanding of the scope of its jurisdiction.

[70] The wording of the Act is clear on the stages of the process for protecting public servants who make a disclosure of wrongdoing. When the public servant decides to make a disclosure through the external mechanism of the Commissioner, the Act provides for a two-stage process. The first stage is initiated by the public servant. If the public servant believes that he or she has suffered reprisal after making a protected disclosure of wrongdoing, the complaint must be filed with OPIC (section 19.1). The public servant cannot file the complaint with the Tribunal directly. Only the Commissioner can receive the complaint.

[71] It is the Commissioner who initiates the second stage. The Commissioner makes an Application to the Tribunal if he or she is of the opinion that it is warranted (subsection 20.4(1)). It is abundantly clear from this two-stage process in the legislation that it is only the Commissioner who can bring this Application to the Tribunal.

[72] In order to decide whether or not an Application to the Tribunal should be made, the Commissioner must exercise his discretion. In this regard, the process to be used by the Commissioner can be divided into four steps.

[73] **Step 1: Assessing the admissibility of the complaint**: The first step consists of assessing the admissibility of the complaint (subsection 19.4(1)). This assessment considers many elements, such as: the form of the complaint (subsection 19.1(1)), the timeline of the filing (subsection 19.1(2)), the use of other recourse provided by another federal law or a collective agreement (paragraph 19.3(1) a)), the jurisdiction of the Commissioner (paragraph 19.3(1) c)) and whether the complaint has been filed in good faith by the complainant (paragraph 19.3(1)

d)). The Commissioner may not deal with a complaint if a person or body is dealing with the subject matter under another federal law or a collective agreement (subsection 19.3(2)). If the Commissioner determines that the complaint is not admissible, his decision is final and the file is closed.

[74] **Step 2: Deciding to investigate or not**: During this second step, the Commissioner must decide whether or not to investigate the complaint (subsection 19.7(1)). If the Commissioner decides to investigate the complaint, he may designate an investigator (section 19.7). During the investigation, the investigator may recommend to the Commissioner that a conciliator be appointed to attempt to settle the complaint (subsections 20(1) and (2)). If a settlement is reached, it must be approved by the Commissioner (subsection 20.2(1)). If the Commissioner approves a settlement with regard to the remedy to be provided to the complainant, the complaint is dismissed (subsection 20.2(2)). If the Commissioner approves a settlement with regard to the disciplinary action to be imposed on a person, the Commissioner cannot apply to the Tribunal in relation to taking disciplinary action (subsection 20.2(3)).

[75] **Step 3: Deciding whether or not an Application to the Tribunal is warranted**: At the third step, the Commissioner decides whether an Application to the Tribunal is warranted. The Commissioner must consider whether there are reasonable grounds for believing that reprisal has taken place, whether the investigation could not be completed due to a lack of cooperation, and whether it is in the public interest to make such an Application (subsection 20.4(3)). These aspects represent the "basis" upon which the Commissioner applies to the Tribunal and this is reflected in Rule 5(b) of the *Public Servants Disclosure Protection Tribunal Rules of Procedure*, SOR/2011-170. If the Commissioner is of the opinion that an Application to the Tribunal is not warranted, he or she must dismiss the complaint (section 20.5).

[76] With regard to step 3, section 20.5 of the Act states that if, after receipt of the investigator's report, the Commissioner is of the opinion that an Application to the Tribunal is not warranted in the circumstances, he or she must dismiss the complaint. The Tribunal finds that this provision can operate to dismiss the complaint in its entirety or to dismiss certain allegations in the complaint. The infrastructure of the Act supports this interpretation through its recognition of the Commissioner's "gatekeeper" role. Parliament could not have intended to have an agency

performing this role, but then insisted that the gatekeeping function only apply to the entire complaint and not parts of it. Otherwise, Parliament would have provided for a regime where complaints of disclosure went directly to the Tribunal. The jurisdiction of the Tribunal would be automatic, and not the function of a screening process. This approach is also supported by the French version of section 20.5 of the Act, which refers to the decision of the Commissioner to dismiss the complaint "*compte tenu des 'circonstances relatives à la plainte'*."

[77] **Step 4: The scope of the Application before the Tribunal**: The fourth step occurs when an Application is to be made to the Tribunal. At this step, the Commissioner determines the scope of the Application to be made. The Commissioner must determine if the Tribunal will deal only with the remedy in favour of the complainant (subparagraph 20.4(1)(a); or if the Tribunal will deal with the remedy in favour of the complainant and disciplinary action against the person who took the reprisal (subparagraph 20.4(1)(b)). More specifically, the Commissioner will ask the Tribunal to determine whether or not a reprisal was taken against the complainant and, if so, the Commissioner will ask the Tribunal to make an order respecting a remedy in favour of the complainant. If applicable, the Commissioner may also ask the Tribunal to make an order respecting disciplinary action against the person identified as having taken the reprisal.

[78] With regard to step 4, the English version of section 20.4(1) of the Act states that an Application to the Tribunal is made "in relation to the complaint". The wording highlights that the Application itself is the originating document to the Tribunal and allows for the possibility that in some cases the screening function performed by the Commissioner may result in the referral by Application of only some allegations from the initial complaint. The French version of this provision is not quite the same in its wording. It states: *Si…le commissaire est d'avis que l'instruction de la plainte par le Tribunal est justifiée.* In a literal translation to the English language, this wording refers to the word "complaint" ("*plainte*"). The subtitle of both the French and English versions of this provision, however, makes it clear that the reference in section 20.4 pertains to the process of bringing an Application.

[79] The decisions in these four steps pertain to the screening of a complaint that might or might not make its way to the Tribunal by way of an Application by the Commissioner. These decisions are the expression of the role that the Commissioner plays as a "gatekeeper" under the

Act. This role is significant. The decisions identified in these four steps are final in nature. Nothing in the legislation allows for a reconsideration of the decisions in the screening process. Nor is the Tribunal provided with the power to do so. The only way to challenge the Commissioner's decisions is through an application for judicial review before the Federal Court.

[80] Viewed from another perspective, the Tribunal's jurisdiction is conferred by the Application made by the Commissioner. The steps in the Commissioner's decision-making process may or may not lead to such an Application. The third and fourth steps of this process may lead to the referral of an Application embracing all the allegations from the initial complaint filed with OPIC, or only some of them.

[81] In summary, the structural framework of the Act, which was created after long consideration, must be taken into account in the present case. The issue before the Tribunal is not one where it could or could not be "estopped" from proceeding with the entire complaint. It must consider the roles and responsibilities of both the Tribunal and the Commissioner in the process of disclosure of wrongdoing and protection against reprisals. Furthermore, the fact that the Tribunal has broad powers to add parties in order to ensure fairness in the process cannot lead to its determination as to whether it can consider all of the allegations from the initial complaint. These types of procedural considerations proceed after the Tribunal is seized of its jurisdiction, and not before. The Tribunal's jurisdiction is seized with the Application referred to it, and the allegations referred to it in that Application. The consequent scope of its jurisdiction is conferred through the Application.

[82] The Tribunal cannot support the Commissioner's argument that it should seize jurisdiction and examine the entire complaint due to the wording of subparagraph 20.4(3)(b). That particular provision deals with the lack of cooperation in the investigation process. The present situation concerns a totally distinct situation where the Commissioner has already dismissed two allegations in a complaint.

[83] By way of comment, although the comparison is not determinative, the parallels between the *Public Servants* Disclosure *Protection Act* and the *Canadian Human Rights Act* support this interpretation. In both statutory frameworks, Parliament clearly demonstrated its intention to have a gatekeeping function through an agency (commission). In both statutes, there is a two-

stage process: only the respective "commissions" are entitled to receive and screen the complaints and only these "commissions" can determine whether the allegations in a complaint can be referred to the respective "tribunal" for adjudication. There is no direct access to the tribunal in either regime.

[84] The jurisprudence related to human rights cited by the parties also sheds light on the central importance of the screening function, through the creation of a two-stage process, which starts with the commission's investigatory function and leads to the tribunal through the referral of the complaint. These cases do not, however, reflect the specific situation in this motion. They largely address the issue of amendments to complaints before a tribunal, and not the issue of amendments where the commission had dismissed parts of the complaint beforehand. (There are other decisions that were not argued that are similar to the situation in the present case and that support the interpretation above (*Kowalski v Ryder Integrated Logistics*, 2009 CHRT 22; *Côté v Canada (Royal Canadian Mounted Police)*, 2003 CHRT 32)).

THE SCOPE OF THE TRIBUNAL'S DISCRETION WITH PROCEEDINGS

[85] There can be no dispute with the general principle raised by the complainant that this Tribunal, like many other administrative tribunals, is master of its proceedings and has broad discretion as to how to administer its proceedings in a fair and impartial manner. However, the Tribunal's adjudicative function is triggered only by the reception of the Commissioner's Application. It is only at the point that the Tribunal has been seized of the matter that it will proceed with a hearing. At this juncture, the Tribunal does not sit in judicial review of the Commissioner's decision. Indeed, the Tribunal is where the hearing of first instance occurs.

[86] Several provisions of the Act recognize the Tribunal's expertise in determining whether reprisal has occurred. In contrast to the screening function of the Commissioner, the Tribunal has broad adjudicative powers. Section 21.5 gives the Tribunal the power to determine whether the complainant has been subject to a reprisal and whether the actions of a person or persons identified in the Commissioner's Application constituted reprisal. If the Tribunal determines that reprisal was taken, it may also grant a remedy to the complainant. The Tribunal may add parties, should it determine that it is necessary. It has the power to order disciplinary action in relation to the reprisal. Under subsection 21.2(1), the Tribunal has the power to summon and enforce the

attendance of witnesses and compel them to give evidence on oath; to administer oaths; to receive and accept evidence on oath or by affidavit; and to rule on any procedural or evidentiary questions.

[87] Part I of the Inquiries Act, RSC, 1985, c I-11, confers a "commission" being created with the power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases. Traditionally, these powers are accorded to an adjudicative function where findings of fact and credibility can be made. The Commissioner does not have the powers under Part I of the Inquiries Act, when investigating a complaint of reprisal. (This is why paragraph 20.4(3)(b), concerning the lack of cooperation during an investigation made by the Commissioner, is one of the factors to consider when he or she decides whether or not to make an Application to the Tribunal.)

[88] Unlike the Commissioner, the Tribunal adjudicates as an impartial decision-maker in order to determine whether reprisal occurred. It hears the contradictory positions of the parties and witnesses. It is the Tribunal that makes findings of fact and assessments as to credibility through a cross-reference of the evidence before it. A framework of procedural rules is in place to ensure fairness, transparency and objectivity in the decision-making process.

[89] The powers of the Tribunal can only be exercised once jurisdiction is conferred upon it through the content of the Application. There may be situations, such as arising in this case, where an Application is referred to the Tribunal, but it still leaves the complainant unsatisfied because of the Commissioner's decision to dismiss certain allegations from the original complaint that was initially filed with OPIC. Yet, it is not within the Tribunal's power to amend the Application and add allegations to it.

ESSENTIAL CHARACTER OF THE DISPUTE

[90] The complainant raised concerns about the lack of fluidity in the structure of the Act, because the decision-making process in Applications that refer only part of the complaint might be dependent on judicial review before proceeding. The complainant referred to *Weber v Ontario Hydro,* [1995] 2 SCR 929, *Vaughan v Canada,* [2005] 1 SCR 146, 2005 SCC 11 and the recent decision of the Federal Court of Appeal in *Amos v Canada,* 2011 FCA 38.

[91] The Tribunal recognizes the underlying concern raised by the complainant as to the subtle ways in which measures of reprisal may surface in the workplace. Nevertheless, the Tribunal is of the view that it must remain faithful to Parliament's intention. There is no ambiguity in the Act that would invite a choice to be made between one body and another in this instance, or a choice that would allow the Tribunal to take an integrated approach and become the forum of "exclusive jurisdiction". The Act clearly provides for a two-stage process. The issue of concern in this motion pertains to the role of the Commissioner on the one hand, and the role of the Tribunal on the other. It is abundantly clear that the Tribunal's jurisdiction and mandate is determined by the nature and content of the Commissioner's Application. There is no opportunity here for an inferential interpretation of the Act, which would allow the Tribunal to seize jurisdiction of the two allegations that are not before it in this Application.

[92] The iron clad protection of public servants who disclose wrongdoing is a prerequisite for the functioning of the disclosure regime. The development of this framework arose, in part, from the considerable recognition that without effective protection, public servants may very well be reluctant to proceed with making a disclosure of wrongdoing. The legislative framework is still relatively new, and at the time that it came into force, had not benefited from actual or tested application. The Act envisioned the possibility of a recalibration of its provisions after an independent review. Similar to the federal laws that significantly modernized public service staffing and labour relations and moved issues such as staffing into previously uncharted waters (*Public Service Employment Act and the Public Service Labour Relations Act*), section 54 of this Act states that a five year review must be carried out independently with a report on the review to be laid before the Houses of Parliament.

CONCLUSION

[93] Parliament clearly intended that the Commissioner perform a screening function to determine whether an Application to the Tribunal is warranted. Nothing prevents the Commissioner from bringing an Application to the Tribunal that refers to all the allegations in the original complaint or only some of the allegations. This function logically flows from the Commissioner's role.

[94] The Application of the Commissioner is the originating document that confers jurisdiction to the Tribunal. The decision of the Commissioner as to the Application can only be challenged through judicial review made before the Federal Court.

[95] In the present case, the Application of the Commissioner is limited to the third allegation, that the complainant's Top Secret security clearance was withheld. The two other allegations are not part of the Application. Consequently, the Tribunal cannot deal with the two first allegations.

[96] In passing, section 19(2) of the Act states that a complaint must be filed not later than 60 days after the day on which the complainant knew or, in the Commissioner's opinion, ought to have known, that the reprisal was taken. In the present case, OPIC was able to deal with the three allegations at once, due to their occurrences during a relatively short time frame. In other situations however, complaints of reprisal could take place over an extended period of time, perhaps even years. In those situations, the complaint of an earlier allegation of reprisal may have already been addressed (for the sake of example, through dismissal by the Commissioner), long before a subsequent complaint by the same employee has been addressed. Even if the Commissioner were to form an opinion that the events in a subsequent complaint of alleged reprisal are linked to the previous complaint (dismissed in this example), the wording of the Act makes it clear that it would be inconsistent with its scheme, and the duties which fall upon the Commissioner, that the complaints about earlier reprisal essentially be "revived" and referred to the Tribunal, to be considered as part of the Application. Considering then, the scheme of the Act, while the span of time of the allegations of reprisal in the present complaint is not long, it would be inconsistent with the scheme of the Act, and the duties of the Commissioner, that the two allegations already dismissed be "revived" and referred to the Tribunal as part of the Application itself.

[97] That said, the present jurisdictional motion addresses only the issue of the scope of the Application. The Tribunal's decision on this matter does not prevent the possibility that evidence relating to the allegations that the Commissioner dismissed might be relevant to the proceedings related to the allegation that warranted the Application. Facts relating to the allegations that were dismissed might have contextual relevance to the allegation that the Commissioner found warranted a referral of an Application to the Tribunal. This evidence may be important to

provide context to the series of events that led to the alleged reprisal at issue. There is the possibility therefore, that evidence related to the initial complaint and all of its allegations may be considered at the hearing, once tested through legal principles such as admissibility, relevance and weight. There was agreement from all of the parties on this point. It is premature however, to embark on any determinations as to evidence in this motion.

DECISION AND NEXT STEPS

[98] The motion of the complainant for the confirmation of the Tribunal's jurisdiction to deal with all of the allegations in the initial complaint is denied.

[99] The logical consequence to the dismissal of the motion is that the parties complete the disclosure and the Tribunal proceeds to schedule a hearing.

[100] On May 19, 2011, the complainant filed a Notice of Application for judicial review of the Commissioner's decision to dismiss the first two allegations of the complaint (Docket T-862-11). On August 11, 2011, this action was stayed, pending a further order from the Federal Court (Court Index and Docket, Doc 16).

[101] Should the complainant determine that he intends to continue with the Application for judicial review of the Commissioner's decision in Docket T-862-11, he must advise the Tribunal and the parties of his decision to do so, no later than October 18, 2011.

[102] Should the complainant determine that he will continue with the application for judicial review before the Federal Court, the Tribunal will suspend its proceedings, pending a determination on that application.

[103] Should the complainant determine that he wants to discontinue the application for judicial review referred to in Federal Court Docket T-862-11, he must advise the Tribunal and the parties of his decision to do so, no later than October 18, 2011.

[104] Should the complainant determine that he will discontinue the Federal Court application above, the Registrar will issue a letter outlining the timelines within which the exchange of particulars will be due. The Registrar will also schedule a hearing on the matter. A Pre-Hearing

Conference will be held once the disclosure and the exchange of the statement of particulars is completed by the parties.

[105] There are also other preliminary motions pertaining to the Application brought under section 20.4 of the Act. These motions relate to a motion for summary judgment; a motion

[106] pertaining to the admissibility of evidence; and a motion for the continuance of the interim confidentiality order, dated June 10, 2011. These motions shall be disposed of at a later date by separate decisions from the Tribunal.

DATED this 6th day of October, 2011.

"Luc Martineau"
Chairperson

"Sean Harrington"
Member

"Marie-Josée Bédard"
Member

PUBLIC SERVANTS DISCLOSURE PROTECTION TRIBUNAL

PARTIES OF RECORD

DECISION NUMBER:	2011 PSDPT 1
TRIBUNAL FILE:	T-2011-01
STYLE OF CAUSE:	Charbel El-Helou v Courts Administration Service and David Power and Éric Delage
BEFORE:	The Honourable Mr. Justice Luc Martineau The Honourable Mr. Justice Sean Harrington The Honourable Madam Justice Marie-Josée Bédard
DECISION OF THE TRIBUNAL DATED:	October 6, 2011
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	August 31, 2011

APPEARANCES:

Mr. Andrew Raven Raven, Cameron, Ballantyne and Yazbeck LLP/s.r.l.	For the Complainant
M. Brian Radford	For the Office of the Public Sector Integrity Commissioner
Mr. Ronald Caza Ms. Julie Paquette Heenan Blaikie	For the Employer
Mr. Stephen Bird Ms. Alanna Twohey Bird Richard	For the Individual Respondents and the Interested Parties