Public Servants
Disclosure Protection
Tribunal Canada

Tribunal de la protection
des fonctionnaires
divulgateurs du Canada

Citation: Charbel El-Helou v. Courts Administration Service, 2011 PSDPT 3

File No.: T-2011-01

Issued at: Ottawa, Ontario
November 25, 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 MOTION FOR REMOVAL OF INDIVIDUAL RESPONDENT, DAVID POWER

[1] This decision disposes of a motion filed by the respondents, to have David Power, one of the individual respondents in this matter, removed from the Application of the Public Sector Integrity Commissioner (the Application) that was filed with the Public Servants Disclosure Protection Tribunal (the Tribunal). The motion was made in accordance with section 21.2(1) of the Public Servants Disclosure Protection Act, SC 2005, c 46 (the Act) and Rule 13(1) of the interim Public Servants Disclosure Protection Tribunal Rules, that have since been replaced by the Public Servants Disclosure Protection Tribunal Rules of Procedure, SOR/2011-170 (the Rules).

[2] The complaint was filed on July 3, 2009, with supplementary information sent to the Office of the Public Sector Integrity Commissioner (OPSIC) on July 9, 2009. In these complaint documents, the complainant alleged that four persons took reprisal against him. The respondents note however, that the complainant did not identify Mr. Power as having allegedly taken reprisal action against him, either in the complaint or in the supplementary documents that he filed.

[3] On May 16, 2011, the Public Sector Integrity Commissioner (the Commissioner) filed an Application to the Tribunal for a determination as to whether reprisal was taken against the complainant. In the Application, the Commissioner identifies Mr. Power as one of the two individual respondents and states that the Tribunal should consider disciplinary measures, should the Tribunal determine that reprisal occurred.

[4] The Public Sector Integrity Commissioner and the complainant oppose this motion. The employer supports this motion.

[5] Since the time that the Application was filed with the Tribunal, the Tribunal has issued decisions on the complainant's motion regarding jurisdiction, (El-Helou v Courts Administration Service, 2011-PT-01 (El-Helou # 1)), and on the respondent's motion for summary judgment (El Helou v Courts Administration Service, 2011 PT-02 (El-Helou #2)). Following El-Helou # 1, the Tribunal directed the complainant to advise the Tribunal and the parties as to whether he would proceed with an application for judicial review pertaining to the Commissioner's decision not to include all of the complainant's original allegations in the Application. On October 18, 2011, the complainant determined that he would proceed with the application for judicial review. Consequently, the Tribunal issued a letter confirming that it would suspend proceedings in the above Application, pending the determination by the Federal Court on the complainant's

application for judicial review, subject to the Tribunal's discretion to issue decisions on outstanding motions.

[6] In addition to the present motion, there are two outstanding preliminary motions pertaining to this Application. These motions relate to the admissibility of evidence and the continuance of the interim confidentiality order, dated June 10, 2011.

BACKGROUND

[7] This Tribunal provided a detailed background pertaining to the Application that is the subject of this motion in El-Helou #1 at paragraphs 13-28. In short, the complainant worked with the Courts Administration Service (the CAS) in the position of Director, Client Services and Infrastructure. His supervisor requested that he access e-mails from a member of the judiciary. The complainant was upset by the request, because some of the e-mails might contain sensitive information. Nevertheless, he complied with the request, although he thought it was improper, and informed the member of the judiciary as to what he had been required to do. The member of the judiciary subsequently reported what had happened to people in a higher position of responsibility.

[8] The complainant alleged that after this occurred, his relationships with both Mr. Delage and Mr. Francoeur deteriorated. He had several meetings with Mr. Power, who was senior counsel, and was acting in other roles, including that of designated Senior Officer for internal disclosures of wrongdoing under the Act. During a meeting with Mr. Power on March 25, 2009, the complainant disclosed his concern about the e-mail request. In addition, he expressed concern about suspected collusion related to a procurement contract that had been awarded to a company.

[9] On July 3, 2009, he filed a complaint with the OPSIC, with supplementary material on July 9, 2011. He made the following allegations of reprisal at that time:

> That on or about June 5, 2009 he was temporarily reassigned to other duties and that 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.

[10] In the complaint, the following individuals were identified as individual respondents: Laurent Francoeur, Eric Cloutier, Francine Côté and Éric Delage. At that time, Mr. Power was not identified as one of the individuals who had taken reprisal against the complainant.

[11] The Commissioner accepted the complaint and an investigation was initiated. The Commissioner's Application states that the investigator, with the complainant's consent, withdrew the fourth allegation in the complaint, relating to harassment, after the commencement of the investigation.

[12] Mr. Power's affidavit in support of this motion states that on August 19, 2009, he was interviewed by Sofia Scichilone and by another employee from the OPSIC. In the affidavit, he asserts that he was not advised that it was possible that he would be added as a respondent to the complaint and that he did not request legal counsel.

[13] In her affidavit attached to the Commissioner's response to this motion, Ms. Scichilone states that she did not consider Mr. Power to be a person who could have taken reprisals against the complainant, at the time of the initial review of the complaint. She notes that on July 20, 2009, Mr. Raymond Guenette, the Deputy Head for the CAS at that time, wrote the Commissioner and invited the investigator assigned to the file to consult with the department's Senior Officer for Internal Disclosure, Mr. Power. She also states that in the course of preparing for that meeting, she informed Mr. Power that he could be accompanied by a person of his choice.

[14] Ms. Gail Gauvreau, a senior investigator with the OPSIC, was subsequently assigned to work on the investigation of this complaint. In her affidavit in support of the Commissioner's response to this motion, she states that she decided to add Mr. Power as an individual respondent

due to the failure to grant the complainant his security clearance and to the fact that Mr. Power had allegedly received the disclosure and participated in recommending the action taken.

[15] On January 28, 2010, the OPSIC notified the CAS that Mr. Power would be added as an individual respondent to the complaint. In the Application to the Tribunal, the Commissioner determined that there are sufficient grounds to proceed with only one of the three allegations initially brought by the complainant, namely, the suspension of the security clearance of the complainant. Two persons were named as individual respondents: Mr. Delage and Mr. Power.

[16] Given their pertinence to the Application, some paragraphs from the Commissioner's statement of particulars merit noting in the background to the reasons for this decision on the motion. At paragraph 54, the Commissioner found that, prior to the events that led to the protected disclosure, the complainant's relationship with his supervisor had started to deteriorate. In the opinion of the Commissioner, these difficulties intensified following the e-mail incident, setting a series of events in motion that led to the security clearance being withheld. At paragraph 59, the Commissioner also observed that while Mr. Delage indicated to this office that he felt that there had been a security breach, the CAS never followed the required procedure to investigate the alleged breach. The Commissioner stated that it was on the recommendation of Mr. Power and Mr. Delage that the security clearance remain in abeyance.

[17] At paragraph 63, the Commissioner also found that there was evidence that the CAS wanted the complainant to leave and that the threat of a security clearance investigation was used as leverage. The Commissioner stated that had the security breach been so egregious as to cast doubt about the complainant's reliability in the minds of the senior staff at the CAS, then other steps ought to have been taken. For example, a security investigation ought to have been initiated, or the department to which the complainant moved ought to have been notified.

ANALYSIS

[18] The respondents submit that the Act does not allow the Commissioner to add Mr. Power as a party because he was not identified in the initial complaint filed with the OPSIC. They also argue that the interview conducted by OPSIC with Mr. Power was privileged and was not appropriately protected. They take the position that Mr. Power was entitled to the presence of legal counsel when interviewed in the course of the OPSIC investigation.

[19] In a letter dated August 12, 2011, the employer states that it supports the position taken by the respondents. Both the complainant and the Commissioner dispute this motion. In addition, the complainant submits that the respondent is in the wrong forum.

[20] The individual respondents' arguments in the present motion focus largely upon the principles of natural justice. On the one hand, they submit that the Commissioner exceeded his jurisdiction in adding Mr. Power as a party to the Application, when he was not identified in the original complaint filed with OPSIC. On the other hand, they argue that Mr. Power was not afforded the protection of the principles of natural justice in the course of the investigation that led to the present Application before the Tribunal.

[21] At the outset, the Tribunal notes that the motions in El-Helou # 1, El-Helou # 2 and the present case all involve a consideration as to whether or not the Tribunal can seize its jurisdiction from anything but the Application before it. In El-Helou # 1, the Tribunal provided extensive reasons as to why it could not deviate from the jurisdiction it is afforded in the Application. It follows, therefore, that if the Application has certain inclusions, such as additional respondents, a request to consider disciplinary measures against these respondents, or a request to consider remedy, these considerations must be determined in the Tribunal proceedings. The reason for this is precisely because the Tribunal seizes its jurisdiction from the Application, which has resulted from the screening function performed by the OPSIC.

[22] This motion and the motion in El-Helou # 2 also share common issues in so far as they deal with preliminary legal devices that have the potential effect of dismissing a matter pertaining to reprisal and named respondents, before a hearing has been held on all the issues. In El-Helou # 2, the individual respondents sought summary dismissal of the Application, as it related to both of them. In that decision, the Tribunal cautioned against an over adherence to preliminary actions that would result in striking down an Application. It considered the legal framework of the Act, the Commissioner's role as "gatekeeper", and, the importance of the Tribunal proceedings once the Application is referred to it. Highlighting the importance of transparency in its proceedings, the Tribunal expressed concern with preliminary actions, should they foreclose the possibility of hearing the evidence and issues relating to allegations of reprisal due to the disclosure of wrongdoing.

[23] As noted in the references to the Commissioner's statement of particulars above, Mr. Power has been implicated in the allegation in the Application and the Commissioner decided to add his name as an individual respondent. The motion in El-Helou # 2 also involved the inclusion of respondents in the Application, one of whom was Mr. Power. In its consideration of the motion for summary judgment in that matter, as it related to Mr. Power (and Mr. Delage), the Tribunal stated that it would address such summary motions with caution. Otherwise, the entire purpose of the Act could be weakened and there could also be a reduced confidence in the legislation. In considering this framework, the Tribunal also found that the motion was premature and that the threshold for summary dismissal had not been met.

[24] These previous two decisions issued by the Tribunal need to be highlighted, because they are pertinent to the reasons that the Tribunal must deny the present motion as well. In addition, and as discussed in its reasons below, the Tribunal finds that the Act is clear in affording the Commissioner with the power to add parties. The Tribunal has also determined that the motion is premature and that there is nothing on the face of the Application at this point in time that would lead it to conclude that Mr. Power's name should be removed by way of a preliminary motion. In the final part of its reasons, the Tribunal has also offered its observations as to the appropriate forum for the concerns that the individual respondents have raised in the present motion.

THE COMMISSIONER'S STATUTORY POWER TO ADD PARTIES TO AN APPLICATION

Overview

[25] The respondents submit that the Act does not provide the Commissioner with the authority to add a party to an Application where the name of that person was not in the original reprisal complaint. They state that section 19.8(2) of the Act, which refers to the provision of notice to any other party by the investigator at OPSIC, does not apply in this context. They would interpret the scope of this provision narrowly, and state that it merely allows the investigator to notify any person he or she considers appropriate regarding the substance of the complaint. In addition, the respondents state there is no provision that allows the Commissioner to expand its inquiry into a reprisal complaint beyond the contents of that complaint.

[26] The Tribunal does not agree. It canvasses the respondents' arguments on this question in relation to a) general principles of interpretation, b) a comprehensive interpretation of the part of

the Act pertaining to complaints of reprisal, c) the appropriate interpretation of section 33 of the Act relating to the Commissioner's power to investigate other wrongdoings, and d) the need to ensure that the Act is not rendered sterile through an overly technical interpretation.

General principles of interpretation Conclusion

[27] The Tribunal must interpret the Act in light of its entire context, in the grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the legislation and the intention of Parliament (Ruth Sullivan, Sullivan on the Construction of Statutes, 5th ed. (Markham: LexisNexis, 2008) at 1, 257-259, 264-269). The objective of the Act is to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose those wrongdoings. Several measures are put into place to do this. In addition, several institutions and agencies have powers and duties under the Act.

[28] The preamble recognizes the importance of the federal public administration as part of the "essential framework of Canadian parliamentary democracy." It also asserts that it is in the public interest to maintain and enhance public confidence in the integrity of public servants. It expresses the need for enhancing confidence in public institutions by establishing effective procedures for the disclosure of wrongdoing and for protecting public servants who disclose wrongdoings. The preamble balances the duty of loyalty owed by public servants in the course of their employment and the right to freedom of expression guaranteed by the Canadian Charter of Rights and Freedoms. It also states that it is committed to establishing a Charter of Values of Public Service, and that this should guide public servants in their work and professional conduct.

[29] It is in this context that an examination of the Act must be conducted. In considering the Act as a whole and the part of the Act pertaining to complaints of reprisal, it becomes clear that Parliament focussed on the substance of the complaint, and not on who may or may not have been identified as potential respondents in the original complaint. In addition, as discussed below, the processes for reprisal complaints demonstrate Parliament's intention to ensure that notice be provided to potential respondents, whether or not they were named in a complaint. This requirement of notice ought not to be considered as merely a procedural formality, but rather, as an important step in ensuring fairness to all of those affected by an investigation and, possibly, an Application before the Tribunal. In the course of an investigation, other parties might be

identified and Parliament wanted to ensure that the principles of natural justice could be addressed as a complaint progressed.

Complaints relating to reprisals

[30] The Tribunal's mandate is to determine whether or not reprisal has occurred. The provisions relating to complaints of reprisals, and to Applications that come before the Tribunal after the investigation of these complaints, are outlined in the Act from section 19 to section 21.9 under the part entitled "Complaints Relating to Reprisals". This part of the Act covers several distinct areas:

a) "Complaints" (from sections 19.1 to 19.4);
b) "Disciplinary Action (from sections 19.5 to 19.6);
c) "Investigations into Complaints" (from section 19.7 to 19.9);
d) "Conciliations" (from Sections 20 to 20.2);
e) "Decision after Investigation" (from sections 20.3 to 20.6): and
f) "Public Servants Disclosure Protection Tribunal" (section 20.7 to 21.9).

[31] When sections 19, 19.1, 19.3, 19.4, 19.8, 20.4, 20.6, 21.4 and 21.5 are considered both individually and together, it is abundantly clear that Parliament intended that the Commissioner have the power to add a party, even if that person was not included in the original complaint.

[32] Section 19 – Prohibition against reprisal: The first provision in this part of the Act prohibits reprisal by any person against a public servant. It states that no person shall take any reprisal against a public servant or direct that one be taken against a public servant. This provision highlights the critical importance of prohibiting reprisal against a public servant. In doing so, it also sets the stage for an understanding that an investigation into reprisal will be focussed on the subject matter or substance of a complaint, and that a by-product of such an investigation may be the identification of any person who has committed reprisal.

[33] Section 19.1 – Complaints: Section 19.1 allows a public servant or a former public servant to file a complaint where he or she has reasonable grounds for believing that reprisal has been taken against him or her. This provision is worded in a general matter and does not in any way require the public servant to identify the individual or individuals that he or she believes

committed a reprisal. It is evident that, in many cases, individuals will be named. Nonetheless, whether or not individuals are named, it is the substance of the complaint that is of primary importance. The Act foresees the possibility that, in the course of an investigation, individuals may be identified who were not mentioned in the original complaint of reprisal.

[34] Section 19.3 – Refusal to deal with complaint: Likewise, the grounds for refusal to deal with a complaint under section 19.3 do not specifically identify a factor relating to whether the complainant has correctly identified the person who may or may not be the individual respondent. Rather, the factors address the Commissioner's jurisdiction, vexatious and bad faith complaints, and the appropriate avenue for addressing the substance of the complaint that has been brought by the complainant. The grounds for refusal relate largely to the substance of the complaint: whether the subject matter of the complaint could "more appropriately be dealt with" according to procedures under an Act or Parliament or a collective agreement, under subparagraph (a); whether the subject matter of the complaint has been adequately dealt with by certain procedures related to the Royal Canadian Mounted Police Act, RSC 1985, c R-10, under subparagraph (b); whether the complaint is beyond the jurisdiction of the Commissioner, under subparagraph (c); and whether the complaint was not made in good faith under subparagraph (d).

[35] Subsection 19.4(2) – Notice-decision to deal with complaint: Section 19.4 of the Act outlines the requirement to give notice, should the Commissioner decide to deal with a complaint. Subparagraph 19.4(2) states that, should the Commissioner decide to deal with a complaint, he or she must send a written notice of this decision to the complainant and to the person or entity that has the authority to take disciplinary action against each person who participated in the taking of a measure alleged by the complainant to constitute a reprisal. Nothing in the provision restricts the Commissioner in relation to who he or she might consider to have participated in the taking of a measure of reprisal. Likewise, the Commissioner's decision to add a person or entity who has the authority to take disciplinary action is not restricted by a consideration as to whether those persons had been identified in the initial complaint.

[36] Subsection 19.8(1) – Notice to chief executive; Section 19.8(2) – Notice to others: Subsection 19.8(1) states that when the Commissioner determines that an investigation should be conducted, the investigator must notify the chief executive concerned and inform that person of

the substance of the complaint to which the investigation relates. Section 19.8(2) allows the investigator to notify any other person he or she considers appropriate. The investigator is not restricted to considering only that person or those persons whose conduct is called into question in the complaint.

[37] This provision must be read in relation to the entire part of the Act relating to complaints of reprisal and again, the focus of the investigation is on the substance of the allegations made by the complainant, whether or not these individuals are mentioned in the initial complaint. For example, this provision can also be appreciated through the optic of the Act's preamble and its commitment to the enhancement of confidence in public institutions by "establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings".

[38] The Act recognizes the potentially insidious nature of reprisal due to the disclosure of wrongdoing. By allowing the Commissioner to identify parties in the course of an investigation, the Act ensures that a complaint is not subject to austere and unnecessary detours and delays in those situations where the complainant may not have been able to identify the person or persons who are alleged to have committed reprisal for disclosure of wrongdoing. In addition, the provision of notice ensures that the parties are afforded the protections of natural justice, such as the right to be heard, at the earliest opportunity.

[39] The Tribunal agrees with the argument made by the Commissioner in relation to subsection 19.8(2), that the proper use of the discretionary power to add any other person who he or she considers appropriate, responds to the "fluid and evolutionary nature of any investigation." As an independent agent of Parliament, with important screening functions under the Act, the Commissioner's determinations under the Act are not categorically driven by who the complainant thought may have committed reprisal, but rather, by the integrity of the investigation that is conducted in relation to the substance of the complaint. It is through the integrity of the investigation and conduct of a thorough investigation that the Commissioner will be able to make decisions relating to whether or not individuals should be added as individual respondents. In this context, the Tribunal supports the notion that OPSIC has to conduct its investigatory power as "master of its own proceedings" (Gravelle v Canada (Attorney General), 2006 FC 251 at paragraph 23).

[40] Section 20.4 – Application to Tribunal: Section 20.4 of the Act allows the Commissioner to file an Application to the Tribunal if he or she is of the opinion that an Application to the Tribunal is warranted. It is noteworthy that the factors that the Commissioner is to consider in coming to this determination do not require an assessment as to whether reprisal was taken against the complainant by persons the complainant has named. Rather, subsection 20.4(3)(a) states that the Commissioner must take into account whether "there are reasonable grounds for believing that a reprisal was taken against the complainant."

[41] Other factors that assist in this consideration include whether the investigation could not be completed because of lack of cooperation on the part of one or more chief executives or public servants (subsection 20.4(3)(b)); whether the grounds already discussed with regard to the refusal to deal with a complaint apply (section 19.3 and subsection 20.4(3)(c)); and whether, having regard to all the circumstances relating to the complaint, it is in the public interest to make an application to the Tribunal.

[42] Section 20.6 – Notice: With the filing of an Application before the Tribunal, certain notice provisions again come into play. Section 20.6 provides that, when the Commissioner has come to a determination that an Application is warranted, notice must be provided to several individuals. Again, the Commissioner's discretion is not defined by the complaint, but rather by the investigation that has been conducted by the OPSIC. The Commissioner's discretion to add individuals, even when they were not identified in the complaint, is not fettered. Rather, subsections 20.6(d) specifies that the person or persons to be notified are those identified in the investigator's report as being the person or persons who may have taken the alleged reprisal.

[43] Furthermore, as already discussed above in relation to other notice provisions under this part of the Act, this provision ensures that the principles of natural justice are met in the course of an investigation. Similar to subsection 19.8(2) this section ensures the integration of principles of fairness in the process and procedures applied to prevent wrongdoing and to protect public servants who disclose wrongdoing from reprisal: to ensure, for example, that individuals who have been identified have a right to notice, have a right to know what is being alleged against them, and have a right to be heard in the proceedings that have been initiated at the Tribunal.

[44] Subsection 21.4(3) and section 21.5 – Addition of party (during Tribunal proceedings): Section 21.4(3) was discussed in detail in El-Helou # 2. This subsection allows the Tribunal to

add an individual or individuals who are found to have committed the reprisal. When an Application is before it and it has not identified individual respondents, the Tribunal may nevertheless determine that an individual should be added as a party if that individual has been identified as being a person who may have taken the alleged reprisal. In El-Helou # 2, the Tribunal also found that this power applies equally to situations where individual respondents have been named, but there may be additional parties identified (at paragraphs 49-52). As noted in El-Helou # 2 (at paragraph 47), it is obvious that this power to add an individual as a party should be exercised at the earliest possible opportunity. Again, the requirement to provide notice to a party and to add a party is not a trivial procedural formality, but rather, affords the protections of natural justice, similar to sections 19.4 and 20.6, discussed above.

Section 33 and the power to investigate other wrongdoings

[45] The respondents refer to section 33 of the Act and the powers of the Commissioner to initiate an investigation into wrongdoings on its own initiative. They note that section 33 of the Act is limited to investigations into disclosures, and not, as here, to investigations of reprisal complaints. The Tribunal does not support the respondents' suggestion that section 33 of the Act has an impact on the powers of the Commissioner to add an individual respondent in an investigation of a complaint of reprisal. The fact that the Commissioner cannot initiate a reprisal complaint on its own, but that it can initiate a complaint with regard to wrongdoing has no bearing on the possibility that additional respondents might be added to an Application that is referred to the Tribunal. It is not at all relevant in the present motion.

[46] The Tribunal finds that the distinction that the respondents make is artificial and essentially compares two separate processes. The title referring to section 33 is distinctly described as the Power to investigate other wrongdoings. It is not related to the issue of complaints of reprisal and the capacity to add other parties. It pertains only to the power to investigate other wrongdoings in situations where information is provided to the Commissioner by a person who is not a public servant or in situations where information arises during the course of an investigation. The provision allows the Commissioner to commence an investigation in those situations, if he or she believes, on reasonable grounds, that the public interest requires an investigation. It addresses additional disclosures of wrongdoing in substance, and not the question as to whether individuals should be added as parties because they may have

committed an alleged reprisal. As noted by the Commissioner in his response to the respondents' argument on this point, in an investigation into a complaint of reprisal, the substance of a complaint does not change, even if other parties are identified in the process of the Commissioner's inquiry.

Ensuring that the Act is not rendered sterile through an overly technical interpretation

[47] Furthermore, the Tribunal cannot support the respondents' argument that there is no inherent power to add parties. First, the Tribunal finds that the Act is explicit in affording this power to the Commissioner. In addition, several cases have recognized that, notwithstanding the general principle that administrative tribunals and agencies are "creatures of statute" and do not have the inherent powers of courts, they may have powers that are not expressly stated, but that exist by implication of their statute.

[48] The Supreme Court of Canada's decision in Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 SCR 1722 (Bell Canada) recognizes that the powers of any administrative tribunal must be stated in its enabling statute and must not be unduly broadened. At the same time, the Court asserted that to it is important to circumvent a sterile approach to these powers "through overly technical interpretations of enabling statutes." (at page 36). As noted in Bell Canada, these powers may exist by necessary implication when considered with the structure, wording and purpose of the legislative scheme in place. Hence, the Supreme Court cautions against unduly interpreting provisions of a tribunal's statute in a way that would render its powers meaningless.

[49] In considering this principle in the present case, it is important to note that the procedures put in place to protect public servants from reprisal are not identical to those in a traditional civil action, or those in a traditional labour relations action. An overly technical approach to the Act would sterilize its impact. The steps and stages in the process for protection from reprisal have been discussed in detail in El-Helou # 1 and El-Helou # 2 in relation to jurisdiction and to traditional procedural devices that may shorten a procedure. The mandate of the Act, its context in the stages and steps in the process, the role of the Commissioner and that of the Tribunal are critically important in considering the interpretation of powers under the Act.

[50] Although the complainant may be able to identify the substance of the reprisal and must do so for a complaint to be addressed by the OPSIC, it may be difficult, if not impossible, for a complainant to identify who may have committed the reprisal. It is through a thorough and independent investigation that the individuals who may have committed acts of reprisal may be more adequately discerned for the purpose of an Application before the Tribunal. Once the Commissioner is of an opinion that an Application to the Tribunal is warranted, it is then up to the Tribunal to determine, using its full powers of inquiry, whether or not reprisal occurred and, in certain circumstances, whether or not individual respondents committed the reprisal.

THE INVESTIGATION AND THE PRINCIPLES OF NATURAL JUSTICE

[51] In the alternative, the respondents argue that the principles of natural justice were violated in the investigation process itself. They allege that the absence of legal counsel was a fatal error in this Application. They rely upon Parrish (Re), [1993] 2 FC 60 at paragraph 65, and Cardinal v Kent Institution, [1985] 2 SCR 643 at paragraph 23 to argue that the absence of legal counsel to Mr. Power, at the outset of the investigation, resulted in an error that was fatal to this Application in relation to him.

[52] The respondents also submit that the decision to add Mr. Power was improperly based upon his conduct during confidential settlement negotiations. In particular, they argue that the discussions with Mr. Power during the investigation were based on privileged discussions. It is alleged that during the investigation of the complaint by OPSIC, the complainant stated that Mr. Power had tried to have him sign an admission of guilt by implying that he would not receive a beneficial reference if he did not. The respondents state that, despite the fact that the complainant could have obtained a favourable reference from another CAS official, and did in fact obtain favourable references, the OPSIC considered this to be evidence of an additional reprisal against the complainant, and added Mr. Power as a respondent on this basis.

[53] With regard to the first argument pertaining to legal representation, the Commissioner states that the respondent was provided with sufficient notice, in accordance with section 19.8(2) and had the right to make full answer and defence in relation to the complaint. He argues that the importance of the right to counsel must be assessed in relation to the stage of the process in question, and that the right decreases with investigative and inquiry processes, as opposed to adjudicative processes. He discusses the factors related to the duty of procedural fairness that are

discussed in Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 to argue that there was fairness in the process. Citing Gravelle, the Commissioner submits that the level of scrutiny of his decisions might increase where there is a dismissal of a complaint, as opposed to a referral to the Tribunal. He also submits that the principles of fundamental justice did not require the investigator to specifically inform Mr. Power of his right to counsel. Furthermore, during Ms. Scichilone's discussion with Mr. Power on August 17, 2009, when she indicated that he could be accompanied by someone of his choice, it was reasonable for her to assume that he could be accompanied by a lawyer.

[54] The Commissioner also disputes the issue of settlement privilege, and states that the affidavit of both of the investigators makes it very clear that the issue of settlement discussions between the CAS and the complainant were not considered relevant to Mr. Power's involvement.

[55] The complainant submits that there is no indication that the respondent requested representation. He notes that Mr. Power is a lawyer and would have been aware of his rights. Finally, he submits that the principles of natural justice would not have been upheld had the individual respondent not been added as a party. On the second issue of settlement privilege, the complainant submits that there is no evidence that the discussions were privileged; that there is no evidence of improper conduct on the part of the Commissioner; and that the respondent himself has now waived privilege on the information in question.

[56] The Tribunal is not prepared to make a finding that Mr. Power's name should be removed from the Application due to a breach of the principles of natural justice in the course of the investigation. First, as referred to at the outset of this analysis, Mr. Power's name has been added to the Application and the Tribunal's jurisdiction is defined by the scope of that Application.

[57] As far as proceedings before the Tribunal are concerned, the Application is the originating document. The parties have a right to dispute it, in filing their particulars in response. Mr. Power has not lost his right to be heard or to make representations before the Tribunal. At the hearing before the Tribunal, each party has the right to be heard, to advance evidence and to challenge the positions of the other parties. The Tribunal has the power to give the appropriate weight to both the documentary evidence filed (should it be admitted) and the oral evidence at the hearing.

[58] Second, the issues raised by the respondents relating to natural justice are issues of both fact and law. As there has not been any hearing on the matter as yet, any determination of these issues would be premature. The allegation pertaining to the individual respondent has yet to be proven. Considering the nature of the proceedings before the Tribunal, it finds that there is nothing on the face of the Application, or the documentation before it, which suggests that the name of Mr. Power should be struck at this point in time.

[59] It is helpful to elaborate on the steps in the proceedings before the Tribunal, once an Application has been referred. These steps were discussed in detail in El-Helou # 2. The first step is the reception of the Application by the Tribunal. The Tribunal's jurisdiction is determined by the scope of the Application, which may include some or all of the allegations of a complaint. If the Commissioner has identified individual respondents, they are also parties. (Paragraphs 34 to 36 of El-Helou # 2, see also El-Helou # 1)

[60] At this first step, the statement of particulars and the Application are not proof of the issues raised by the Commissioner. Furthermore, while the Tribunal Rules require that the parties file the list of documents upon which they rely, as well as the actual documentation, that documentation does not yet form part of the record. Any documentation filed with the Tribunal is not yet evidence, until it has been admitted as such.

[61] The second step in the Tribunal proceedings relates to the hearing, and the presentation of evidence and of argument. It is the Commissioner who begins this process. As is the case with all of the parties, the Commissioner is required to prove his or her case. In this regard, it is important to emphasize that the rules of evidence apply and that the Commissioner cannot simply file his or her report and documentation as truth of its contents. Likewise, the other parties must also provide evidence and argument to advance their position. (Paragraphs 36 to 38 of El-Helou # 2)

[62] At the third step that the Tribunal determines whether reprisal has occurred due to the disclosure of wrongdoing. Finally, steps 4 and 5 relate to the Tribunal's determinations as to remedy and discipline respectively (paragraphs 39 to 46 of El-Helou #2). The third (and possibly fourth and fifth) step(s) occur after the evidence has been heard, with the benefit of a hearing which comes with the right of examination and cross-examination of the witnesses, and the possibility of testing evidence in relation to weight, relevance and admissibility.

[63] As for the present motion, it is clear that the parties are still in the first step of the proceedings at this point in time. There has not been a full exchange of particulars, and therefore no opportunity for the process of discovery, in accordance with the Tribunal Rules. There is yet to be a hearing on the matter. The decision in Harelkin v University of Regina [1979] 2 SCR 561, which was raised in reply by the individual respondents, related to a situation where a party had not had the opportunity to be heard at all, and a decision was made in his absence. This is not the case here. This is not a situation where there is any evidence that demonstrates, on the face of it, that the processes in place for Tribunal proceedings will result in a denial of the right to a fair hearing. Mr. Power has a full right to be heard as a party to the proceeding before the Tribunal.

[64] The Tribunal would not be prepared to make a determination based only on the affidavit evidence before it that the process leading up to this Application was a nullity. The parties, including Mr. Power, will have the opportunity to address the allegation before the Tribunal, an allegation that must be proven. In addition, the respondents' arguments as to the breach of natural justice include issues of law and issues of fact, which must be proven.

OBSERVATIONS REGARDING THE FORUM FOR CHALLENGING THE COMMISSIONER'S APPLICATION

[65] By way of comment, the Tribunal reminds all the parties that it does not receive its jurisdiction from the complaint. The originating document that allows the Tribunal to seize its jurisdiction is the Application. In *El-Helou # 1*, this was the very reason that the Tribunal denied the complainant's motion and determined that it could only examine the one allegation in the Application that was referred to it by the Commissioner, even though the original complaint contained other allegations. In other words, it is not for the Tribunal to say that the Commissioner's Application is wrong or that it should have contained or not contained certain inclusions. As noted by the Tribunal in *El-Helou* # 1 (at paragraph 79), the finality of the Commissioner's decisions (that may or may not lead to an Application) should be challenged in Federal Court:

> 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.

[66] It is not within the Tribunal's power to judicially review the Commissioner's decisions as to what would and would not be included in an Application. As discussed below, this power belongs to the Federal Court. Under section 20.4(1) of the Act, the Commissioner makes an Application to the Tribunal if he or she is of the opinion that it is warranted. As discussed in both El-Helou # 1 and in El-Helou #2, once the Commissioner has determined that an Application should be referred to the Tribunal, he or she has several other decisions to make that relate to the scope of the Application. This is also clear from section 20.4 of the Act.

[67] In the present Application, the Commissioner's decisions in relation to the Application address two areas that are also at the heart of the respondent's motion. One essential decision that the Commissioner must make, once he or she has determined that an Application is warranted, is whether or not the Application will deal only with the complainant and the employer, or whether individual respondents should be added (subparagraph 20.4(1)(b)). In this case, the Commissioner determined that the Application would include both the employer and two individual respondents, and one of these individual respondents is identified as Mr. Power.

[68] Another decision made by the Commissioner, also germane to this motion, is whether or not the scope of the Application will deal both with the remedy for the complainant and disciplinary action against the person who took the reprisal (subparagraph 20.4(1)(b)). In this case, the Commissioner determined that the Application would include a requirement that, should the Tribunal determine that reprisal has occurred, it should also determine whether or not disciplinary action should be taken against the person or persons who are alleged to have taken the reprisal.

[69] The decisions of the Commissioner in both these areas are final in nature. The only way to challenge the Commissioner's decisions in relation to the Application is through an application for judicial review before the Federal Court. The grounds for relief under subsection 18.1(4) of the Federal Courts Act, RSC 1985, c F-7, include grounds pertaining to the arguments

in the respondents' motion, relating to exceeding jurisdiction and the violation of natural justice. That provision states that the Federal Court may grant relief if it is satisfied that the federal board, commission or other tribunal acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction (subparagraph 18.1(4)(a); failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe (subparagraph 18.1(4)(b)); erred in law in making a decision or an order, whether or not the error appears on the face of the record (subparagraph 18.1(4)(c)); based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it (subparagraph 18.1(4)(d); acted, or failed to act, by reason of fraud or perjured evidence (subparagraph 18.1(4)(e); or acted in any other way that was contrary to law (subparagraph 18.1(4)(f)).

[70] Section 18.1(1) of the Federal Courts Act allows anyone directly affected by the matter, with respect to which relief is sought, to bring an application for judicial review. The Act is silent as to whether or not an individual respondent would be considered directly affected by a decision by the Commissioner to add him as a party. For example, individual respondents are not addressed in the deeming provision of subparagraph 51.2(1)(b) of the Act. That section presumes that a public servant who has made a complaint of reprisal is directly affected by a decision of the Commissioner to refuse to deal with or dismiss the complaint, within the meaning of section 18.1 of the Federal Courts Act. However, it is clear that Mr. Power is being named as a party and is also identified as an individual who may be disciplined, should the Tribunal determine that reprisal has occurred. It is likely that Mr. Power would be a person "directly affected" by the decision to have his name added to the Application. Therefore, the appropriate avenue likely is an application to the Federal Court for judicial review.

[71] Support for the Tribunal's observations as to the appropriate forum is reinforced by examining the structural similarities between the present Act and the Canadian Human Right Act, RSC 1985, c H-6. The complainant raised several cases that stand for the proposition that there is no authority on the part of the Tribunal to review the decision of the Commissioner. Rather, the review of the Commissioner's decisions should occur in Federal Court (Anderson v Canada (Royal Canadian Mounted Police), 2003 CHRT 42 at paragraph 8; Oster v International Longshore & Warehouse Union (Marine Section) Local 400, 2001 FCT 1115 at paragraphs 29-30; Cooper v Canada (Human Rights Commission), [1996] 3 SCR 854 at paragraphs 48-51),

CONCLUSION

[72] In summary, the Tribunal finds that, in considering the allegation in the Application, which will have to be proven through evidence before the Tribunal proceedings, there is nothing on the face of this Application that suggests that the name of Mr. Power ought to be struck out at this point in time. The Act clearly provides the Commissioner with the authority to add a party, even if that party was not considered in the initial complaint brought to the OPSIC. Furthermore, the Tribunal finds that, at this point, there is no basis upon which the name of Mr. Power ought to be struck out on the basis of a breach of natural justice in the process itself. Likewise, the Tribunal finds that it would be premature to rule on the issue of legal representation and settlement privilege, which was raised by the respondent. These involve facts that have not yet been proven. In addition, the allegation that is at issue in relation to the individual respondent has yet to be proven. In this motion, the Tribunal has also reminded the parties once again, that the originating document through which it seizes jurisdiction is the Application and not the complaint; and that the Tribunal does not perform the role of judicial review in relation to the decisions that the Commissioner makes as to the content of that Application. The Tribunal has also offered its observations that if a party is not satisfied with the Commissioner's determinations with regard to the content of an Application, the forum for recourse is judicial review of that decision or those decisions before the Federal Court.

For all the reasons given, this motion is denied.

DATED this 25th day of November 2011.

Luc Martineau

Chairperson

PUBLIC SERVANTS DISCLOSURE PROTECTION TRIBUNAL
PARTIES OF RECORD

DECISION NUMBER:	2011 PSDPT 3
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
DECISION OF THE TRIBUNAL DATED:	November 25, 2011

DECISION RENDERED ON THE BASIS OF THE WRITTEN ARGUMENTS AND RECORDS FILED

APPEARANCES:

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