Public Servants
Disclosure Protection
Tribunal Canada

Tribunal de la protection
des fonctionnaires
divulgateurs du Canada

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File No.: T-2011-01

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December 20, 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 ADMISSIBILITY OF EVIDENCE

[1] This is a decision to dispose of a motion brought by the individual respondents, for a preliminary ruling that any evidence that could be introduced by Sofia Scichilone, Manager, Investigations, Office of the Privacy Commissioner of Canada, and by Gail Gauvreau, Senior Investigator, Investigations and Inquiries, Office of the Public Sector Integrity Commissioner of Canada (OPSIC), is inadmissible.

[2] The motion was brought in accordance with the interim Public Servants Disclosure Protection Tribunal Rules, that have since been replaced by the Public Servants Disclosure Protection Tribunal Rules of Procedure, SOR/2011-170 (the Tribunal Rules).

[3] In a letter dated August 12, 2011, the employer stated that it supported the position of the individual respondents in this motion. The Commissioner and the complainant both oppose the motion.

[4] In addition to this motion, the Tribunal has issued three previous decisions on motions brought before it on the matter of this Application. These decisions pertain to the complainant's motion regarding jurisdiction (El-Helou v Courts Administration Service, 2011-PT-01 (El Helou #1)), the individual respondents' motion for summary judgment (El-Helou v Courts Administration Service, 2011-PT-02 (El-Helou #2)), and the individual respondents' motion to remove the name of one of the individual respondents (El-Helou v Courts Administration Service, 2011-PT-03 (El-Helou #3)).

[5] The proceedings before this Tribunal have been suspended, pending the hearing of an application for judicial review before the Federal Court, subject to the Tribunal's discretion to issue decisions on pending motions. Apart from the present motion, there is one additional motion before the Tribunal at this time, pertaining to the continuance of the interim confidentiality order that the Tribunal granted on June 10, 2011. This motion shall be disposed of at a later date in a separate decision from the Tribunal.

I. BACKGROUND BACKGROUND

[6] In the initial documentation of his complaint filed with the Office of the Public Sector Integrity Commissioner (OPSIC), dated July 3 and July 9, 2009, the complainant stated that he made two disclosures within the meaning of the Public Servants Disclosure Protection Act, SC

2005, c 46 (the Act) and identified four allegations of reprisal. The Commissioner determined that it would deal with the complaint and investigate the matter. The fourth allegation, pertaining to harassment in the initial complaint, was later withdrawn by the OPSIC investigator, with the complainant's consent, after the investigation began.

[7] Ms. Scichilone began the investigation. Ms. Gauvreau was later assigned to it. The investigation concluded that there were reasonable grounds for believing that reprisal was taken against the complainant with respect to one allegation only: withholding his Top Secret security clearance. On May 16, 2011, the Commissioner filed an Application to the Tribunal for a determination of whether reprisal was taken against the complainant. In the Application to the Tribunal (the Application), the Commissioner determined that there were sufficient grounds to proceed with that one allegation, initially brought by the complainant.

[8] In letters dated April 18, 2011, the Commissioner advised the parties that he would apply to the Tribunal, pursuant to subsection 20.4(1) of the Act, for a determination of whether withholding of the complainant's Top Secret security clearance constituted a reprisal. He also 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.

[9] The employer in this matter is the Courts Administration Service (CAS). The individual respondents, Mr. Éric Delage and Mr. David Power, are the applicants in this motion. They note that the Commissioner intends to call the two individuals who were the senior investigators in this matter: Ms. Scichilone, Manager, Investigations, Office of the Privacy Commissioner of Canada, and Ms. Gauvreau, Senior Investigator, Investigations and Inquiries, OPSIC. They request that the Tribunal issue a preliminary ruling that any evidence that they would introduce is inadmissible.

II. ARGUMENTS OF THE PARTIES

[10] The respondents submit that Ms. Scichilone and Ms. Gauvreau do not have first-hand knowledge of the events outlined in the complaint. Therefore, evidence that they could introduce regarding the information provided to them would constitute hearsay and should not be admitted

on that basis. They also argue that the evidence could constitute opinion evidence and should also not be admitted on that basis.

[11] With regard to exclusions based on hearsay, the respondents acknowledge that the rule pertaining to hearsay evidence may be more relaxed in the context of administrative tribunals. They submit, however, that the underlying rationale for the application of this principle is that administrative tribunals are generally less adversarial than criminal and civil cases. They assert that here, the potential outcome of the hearing is more akin to a criminal or civil proceeding than to an administrative matter and note that they are at risk of being subject to discipline. Therefore, a more relaxed approach to the rules of evidence is inappropriate.

[12] The respondents also argue that the evidence that could be given by Ms. Scichilone and Ms. Gauvreau does not involve any policy or social issues where evidence with respect to these issues contains a hearsay component that cannot be separated out. They state that the only evidence that these individuals could provide would consist of a summary of the information provided to them in the course of their interviews or their conclusions regarding such information.

[13] The respondents refer to The Law of Evidence in Canada, 3rd ed. (Markham: LexisNexis, 2009) (Alan W. Bryant et al, The Law of Evidence in Canada, 3rd ed. (Markham: LexisNexis, 2009 at 257 (Bryant)) to argue that unless hearsay is both relevant and not otherwise available, it cannot be considered necessary.

[14] With regard to opinion evidence, the respondents' position is that the evidence is inadmissible. They state that any conclusions that could be drawn by Ms. Scichilone or Ms. Gauvreau based upon their investigation would be impermissible opinion evidence that goes to the ultimate issue in the case. They submit that, even where a witness is recognized as a qualified expert, that evidence is only admissible if certain criteria are met. Citing R v Mohan, [1994] 2 SCR 9, they state that the anticipated evidence would not meet the well-established requirements for admissibility.

[15] They argue that the issues in this case are not technical or scientific in nature, that the two witnesses would not be able to provide information outside the experience or knowledge of the Tribunal, and that they would be drawing a conclusion that goes to the question at issue in this

case. They state that the Tribunal is capable of answering the questions at issue in this case, without expert assistance.

[16] The complainant opposes the motion. He submits that it is premature and that courts or tribunals should not make preliminary rulings on the admissibility of evidence except in the most obvious of cases. He refers to Federal Court jurisprudence in support of this principle, as well as jurisprudence from the Canadian Human Rights Tribunal (Canadian Tire Corporate v PS Partsource, 2001 FCA 8 (Partsource); Ab Hassl v Apotex, 2004 FC 166 at paragraph 2; Basudde v Health Canada, 2005 CHRT 21 at paragraph 21).

[17] The complainant refers to Partsource, where the Federal Court of Appeal (FCA) discussed the principles to be applied on a preliminary motion to strike evidence: 1) that it is clear that evidence is hearsay; 2) that the hearsay goes to a controversial issue; 3) that the other party would be prejudiced by leaving the matter for disposition by the trier of fact. He submits that the admissibility of hearsay is dependent on many factors and that it would be prejudicial to the complainant and the Commissioner to make a ruling at such an early stage.

[18] The complainant argues that the respondents have failed to show any prejudice in leaving the admissibility of the witnesses' evidence for disposition by the Tribunal in the ordinary course of proceedings. He argues that whether or not hearsay is admissible is contingent on several factors to assess the reliability of the evidence, and that the Tribunal cannot make a ruling as to the admissibility of evidence without knowing the other evidence tendered before it.

[19] In addition, the complainant refers to the principled approach to the admission of hearsay evidence, as expressed in Bryant (at pages 229-230, 245, 247-273, 261-391). He asserts that there are well-established exceptions to the hearsay rule, at least one of which may be applicable in the present case, namely the exception for statements against interest.

[20] The complainant states that in the administrative law realm, the rules of evidence do not apply in the same way that they do before a court of law. He refers to subparagraph 21.2(1)(c) of the Act, which gives the Tribunal an expanded right to receive and accept any evidence and other information, whether on oath, or by affidavit of otherwise, whether or not that evidence or information would be admissible in a court of law. He notes that the only exception to this is for conciliators under subsection 21.2(2) of the Act. He also refers to subsection 46(2) of the Act,

and states that this provision supports his view that the statutory regime contemplates the possibility for the appearance of investigators before the Tribunal. The complainant also calls for an expansive approach to hearsay before the Tribunal and refers to Bryant to support his position that hearsay is freely admissible and that the Tribunal must decide the weight to give to it.

[21] On the issue of opinion evidence, the complainant argues that this motion is premature. He refers to human rights jurisprudence and submits that it is impossible to determine the relevance and admissibility of evidence of the witnesses until it is actually tendered before the Tribunal. It would be a mistake to rule on these issues too early, before the repercussions of any ruling (Basudde v Health Canada, 2005 CHRT 21 at paragraph 21).

[22] He also disputes the respondents' position that all the evidence that could be given by the investigators as witnesses must either be inadmissible as hearsay or as opinion evidence. He argues that the respondents will be able to raise any objections pertaining to opinion evidence in the ordinary course of the hearing.

[23] The Commissioner submits that the evidence of the investigators is not hearsay evidence. He states that issues regarding the nature, extent and ambit of the investigation are well within the investigators' knowledge and that it is only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises. He argues that one must consider the purpose for which the out of court statement is tendered in defining what constitutes hearsay (R v Khelawon, [2006] 2 SCR 787, 2006 SCC 57; Bryant).

[24] Even if the evidence is hearsay, the Commissioner submits that the Tribunal cannot automatically reject it, without first assessing its relevance and probative value. He draws parallels with subparagraph 226(1)(d) of the Public Service Labour Relations Act SC 2003, c 22, s 2 (PSLRA), which provides that an adjudicator may accept any evidence, whether admissible in a court of law or not. The Commissioner draws attention to the fact that the Federal Court of Appeal (FCA) has stated that the adjudicator is not bound to accept hearsay evidence in this context, but he cannot reject it out of hand simply because it is hearsay. He notes that the FCA also dealt with a serious disciplinary issue, not unlike the current proceedings, in coming to this determination. The issue is whether the evidence is reliable (Basra v Attorney General of Canada, 2010 FCA 24 at paragraph 21 (Basra)).

[25] The Commissioner also refers to Telus Communications Inc v Telecommunications Workers Union, 2005 FCA 262, where the FCA remarked that administrative tribunals are not bound by the strict rules of evidence. He submits that it is appropriate for the Tribunal to consider the factors of reliability and necessity in determining whether to admit hearsay evidence.

[26] The Commissioner submits that there is no absolute rule against the admissibility of opinion evidence from lay witnesses. He argues that the courts must weigh the value of opinion evidence in terms of its helpfulness. Referring to Bryant and to R v Graat, [1982] 2 SCR 819, he states that the rule against lay witnesses providing opinion evidence does not apply to "exclude inferences which are rationally based on the witness' perceptions and without which the witness could not accurately, adequately and with reasonable facility describe the underlying facts upon which her or his testimony is based."

[27] Within this context, the Commissioner concludes that the observations and findings of the investigators are admissible. Even if these findings constitute their opinions or "inferences based on the results of their investigation", he argues that the evidence is highly relevant and helpful to the Tribunal.

[28] In reply, the respondents elaborate that in order for hearsay evidence to be necessary, it must be relevant and otherwise unavailable. They submit that the investigators cannot testify to the truth of the statements made by interviewees, but only to the fact that they were stated. Therefore, the evidence is unnecessary. They also dispute the Commissioner's position that the investigators have first-hand knowledge of the events and note that the investigators' knowledge is drawn from third party statements made to them, and documents provided to them in the course of the investigation.

[29] The respondents also note that the Commissioner's response to the motion did not contest that the investigators are lay witnesses, not experts. They dispute the "helpfulness" standard advanced by the Commissioner in his arguments. They refer to Bryant's interpretation of R v Graat to submit that the investigators' anticipated opinion evidence fails on all the tests in that Supreme Court of Canada decision.

[30] They also argue that the investigators' evidence would not be provided independently, but rather, the investigators would function as advocates of the Commission. Noting that the Tribunal is not bound by the findings of the Commission, they submit that any evidence that may be provided by the investigators regarding the results of their investigation is irrelevant to the proceedings before the Tribunal.

[31] The respondents also submit that the motion is not premature, as the Tribunal must use its time and resources judiciously. They state that the evidence that could be provided by the investigators would add nothing of value to the Tribunal's understanding of the issues before it.

III. ANALYSIS

[32] The Tribunal finds that this motion cannot succeed. The motion is premature and cannot be addressed without the benefit of a hearing. In coming to this conclusion, it is important and useful to offer observations with regard to this Tribunal's proceedings and with regard to proof.

A. AN OVERVIEW OF THE TRIBUNAL PROCEEDINGS AND CONSIDERATIONS OF PROOF

[33] In the discussion below, the Tribunal will review the issue of the burden of proof required for the Tribunal to determine that reprisal has occurred and the fact that the Commissioner's "threshold" of evidence for referring an Application to the Tribunal is lower than the burden of proof to be used by this Tribunal in determining whether or not reprisal has taken place. It will also examine issues pertaining to persuasive burdens and the flexibility that is afforded the Tribunal in the admissibility of evidence. Finally, it will discuss the nature of its proceedings and discuss the fact that a focused stance – but not a formalistic or rigid one – to the admission of evidence is entirely appropriate and represents a judicious approach to the Tribunal's resources and time.

The lower threshold of "reasonable grounds to believe" that reprisal was taken against the complainant

[34] The "balance of probabilities" is generally the standard of proof used in civil proceedings and before administrative tribunals, unless otherwise expressed in the statute. This is the burden of proof upon which the Tribunal decides whether or not reprisal has been taken against the

complainant, in relation to the disclosure of wrongdoing within the meaning of the Act. If Parliament had intended that the burden of proof not be the civil standard of proof, this would have been clearly articulated in the legislation. To meet the standard of proof of the balance of probabilities, the evidence presented will outweigh the evidence that disputes the allegations. It is sometimes stated that for the "balance of probabilities" to be satisfied, the evidence presented must show that the facts as alleged are more probable than they are not.

[35] The Commissioner's threshold for the referral of an Application and the Tribunal's burden of proof is different. This can be understood by examining the wording as well as the structure of the Act.

[36] The wording used in the Act under subsection 20.4(3) is distinctly different than the wording for the balance of probabilities. In the Canadian Oxford Dictionary, 2nd Edition (Edited by Katherine Barber, Canadian Oxford Dictionary, 2nd Edition, Oxford University Press: Don Mills, Ontario, 2004) for example, the definitions of the word " reasonable" include "having sound judgment; moderate; ready to listen to reason…in accordance with reason; not absurd."

[37] The term suggests that reasonable grounds are those that are not absurd, that demonstrate sound judgment or perhaps go beyond a mere bald assertion or beyond a mere suspicion. Nevertheless, this wording does not state that, at the time that an Application is referred to the Tribunal, the Commissioner must meet the civil standard of proof in arriving at his opinion that an Application is warranted. The term relates to a lower threshold, and is clearly different from the "balance of probabilities" which commonly refers to a civil burden of proof for finding that more likely than not, reprisal did in fact occur.

[38] In addition, with regard to the legislative structure, Parliament could not have intended that the threshold for the Commissioner to bring an Application to the Tribunal would be one and the same as the "balance of probabilities", which is the burden of proof to be weighed by this Tribunal when it decides whether or not a complainant has been subject to reprisal. The Act makes it clear that the Commissioner is performing a "gatekeeping" function when he or she refers an Application to the Tribunal. This screening function is not at all determinative of whether or not reprisal has actually occurred.

[39] Prior to arriving at an opinion that some or all of the allegations in a complaint ought to be referred to the Tribunal in an Application, the Commissioner goes through four steps. These steps require that the admissibility of the complaint be assessed (Step 1); that there be a determination of whether or not to investigate the complaint and designate an investigator (Step 2); that the Commissioner determine whether or not the complaint warrants the referral of an Application to the Tribunal (Step 3); and if so, determining the scope of the Application. These latter issues include whether or not the Application should deal only with remedy; whether or not individual respondents should be included on the Application; and whether the Commissioner should request that the Tribunal consider disciplinary measures, should reprisal be found to have occurred (Step 4). (See generally paragraphs 73-77 of El-Helou #1).

[40] In arriving at an opinion that an Application warrants referral, the Commissioner, as "gatekeeper" must take into account many factors. One factor is whether there are "reasonable grounds to believe that reprisal was taken against the complainant" for bringing an Application to the Tribunal (section 20.4(3)(a)).

[41] There are other factors that are considered in relation to Step 3 above: whether the investigation into the complaint could not be completed because of a lack of cooperation on the part of one or more chief executives or public servants (section 20.4(3)(b)); whether the grounds under sections 19.3(1)(a) to (d) apply, namely the subject-matter of the complaint has been adequately dealt with or could be dealt with more appropriately according to another procedure; where the complaint concerns a member or former member of the RCMP, there are considerations pertaining to disciplinary procedure under section 19.1(5); and whether the complaint is beyond the jurisdiction of the Commissioner; or the complaint was not made in good faith (subparagraph 19.3(1)(1)(d); subsection 20.4(3)(c)).

[42] Quite importantly, the Commissioner must also take into account whether it is in the public interest to make an Application to the Tribunal, having regard to all the circumstances relating to the complaint (subparagraph 20.4(3)(d)).

[43] The significance of the Application, once it has been referred to the Tribunal, is not that it proves the contents before it. It does not. The significance of the Application is that it allows the Tribunal to seize jurisdiction, in order to perform its adjudicative functions. The Application provides the Tribunal with the scope of its jurisdiction. The Tribunal's mandate is then to

determine whether or not reprisal has occurred. In other words, the Commissioner's mandate is not to make that determination but rather, to refer an Application to the Tribunal where it is warranted.

[44] Therefore, the Application and its supporting documents, and the parties' statements of particulars and supporting documents are not yet before the Tribunal as evidence. As noted in El Helou #3, the Tribunal Rules require that the parties, including the Commissioner as a party, submit all the documentation that is to be relied upon in their respective cases. However, at the point that these documents are filed with the Tribunal, they are not yet tendered as evidence (see El-Helou #3 at paragraph 60).

[45] In considering the structure of the Act, the role of the Tribunal is not to perform a "reconsideration" of the Commissioner's decision to refer an Application to it. It is also not performing the functions of an appellate body or a body that judicially reviews the Commissioner's decision to refer an Application to it (see El-Helou # 1, El-Helou #2, and El Helou #3). The Tribunal must, on the balance of probabilities, determine whether or not reprisal has been taken against the complainant.

[46] The issue of the lower threshold for the Commissioner's referral of an Application is important to consider. For example, it may have repercussions in relation to whether or not the investigators' evidence could be admitted as opinion evidence. Although there is no longer an absolute rule preventing opinion evidence on the ultimate issues (R v Mohan, at page 20, Bryant at page 826) the fact that the threshold is considerably lower supports the notion that the Application itself is not ultimately determinative of a question before the Tribunal. This issue of threshold is also significant in relation to the arguments that this motion is premature, which is discussed in the Tribunal's reasons below.

Issues pertaining to persuasive burdens

[47] For the same reasons, while the Tribunal will not delve into the area of persuasive burdens in detail in these reasons, some observations relating to the issue of persuasive burdens are worth noting. In El-Helou #2 the Tribunal discussed the steps in its proceedings (paragraphs 34-46). In that decision, the Tribunal noted that the Act is silent as to the order in which the parties should proceed. It stated that generally, the Commissioner would begin the proceedings.

[48] Although the Commissioner has determined that the proceedings before the Tribunal are warranted, he or she has come to that determination based on the complaint that was filed with OPSIC. In addition, the Commissioner does not represent the complainant and is not before the Tribunal on behalf of the complainant. The duty of the Commissioner is to adopt the position that is in the public interest, having regard to the nature of the complaint (subsection 21.6(2)). It could indeed be said that the Commissioner represents the public interest.

[49] The complainant must advance his or her own case before the Tribunal and meet the burden of proof of the balance of probabilities in order to establish that reprisal was taken. The situation with the Commissioner is different and the nature of the Commissioner's role and the extent of his or her participation in Tribunal proceedings could vary, depending on the circumstances of each case that he or she determines warrants an Application to the Tribunal.

[50] With these points in mind, it is also important to consider the nature of reprisal and the potential challenges with disclosure. In certain situations, the Tribunal may determine that the possibility of a dismissal of an Application before it will not turn solely on what evidence is presented through the complainant's case, or through the evidence presented through the complainant's and the Commissioner's cases. The Tribunal may find it necessary to hear evidence from the respondent to decide whether an Application will be dismissed or will be allowed.

[51] In addition, it is possible that in some situations, the respondent or the employer, or both, decide to simply deny the complainant's arguments that he or she was the subject of reprisal for having disclosed a wrongdoing within the meaning of the Act. However, the mandate of this Act is such that it is likely that they each will want to raise a defence where evidence has been advanced in support of an allegation. In addition, it is possible for this Tribunal to draw inferences, in the absence of the response (of either the employer or respondent or both, as the case may be) to evidence that supports an allegation made that reprisal has been taken within the meaning of the Act. In other words, where assertions are made regarding reprisal, and these are not bald assertions, the Tribunal may draw negative inferences if they are not addressed by the respondent or by the employer in their arguments and evidence.

Principles of evidence and the flexibility in the Act

[52] One of the underlying principles attached to concerns related to hearsay pertains to the fact that this type of evidence cannot be tested for its reliability and therefore should be excluded on that basis. There are, however, situations where the exclusionary rules that apply to hearsay can be troubling and confusing. The principled approach adopts a reliability and necessity analysis to determine whether or not those underlying concerns exist. As noted in Bryant generally, cases such as R v Khan, [1990] 2 SCR 531, and R v Smith, [1992] 2 SCR 915, have overshadowed a categorical approach to the application of exceptions to hearsay in adopting the principles approach. Smith in particular stated that the Khan decision was "the triumph of a principled analysis over a set of ossified judicially created categories" (Smith at page 3 i*n the headnote and at page 20).*

[53] In R v Khelawon, [2006] SCJ 57 (at paragraphs 59 to 70), the Court elaborated on the principled approach to the admissibility of hearsay evidence. The Court continued to leave room for the exclusionary rule to apply and emphasized the two requirements of necessity and reliability. It also examined the underlying concern with hearsay evidence – that is, its trustworthiness and the inability to test it. It stated that, with the principled approach, the reliability requirement is aimed at identifying those cases where this difficulty is overcome to a sufficient degree that would justify receiving the evidence as an exception to the general exclusionary rule.

[54] In addition to the changes in approach to hearsay in the courts at large, which essentially eliminate a categorical analysis, it is significant that the proceedings before this Tribunal, though adjudicative in nature, are not in the criminal law realm. Rather, these proceedings are in the administrative law realm and this Tribunal is given flexibility in how to accept evidence, whether or not that evidence is accepted in a court of law.

[55] The Act recognizes the Tribunal's expertise in performing its mandate to determine whether or not reprisal occurred (El Helou # 1 at paragraphs 48 and 86). The Act provides the Tribunal with flexibility in relation to the admissibility of evidence. Section 21.2(1)(c) of the Act provides the member or panel sitting on a matter with the right to receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or

panel sees fit, whether or not that evidence or information is or would be admissible in a court of law.

[56] Subsection 21.2(2) provides an exception to this, in relation to conciliators appointed to settle complaints. In this case, they are deemed not to be competent or compellable witnesses in hearings before the Tribunal.

[57] The Tribunal also agrees that the Act recognizes that investigators may appear before the Tribunal. Section 46 states that the Commissioner or any person acting on his or her behalf is not a competent or compellable witness in any proceedings, except for a prosecution under the Act. However, under section 46(2), the Commissioner or any person acting on his or her behalf may participate in proceedings before the Tribunal.

[58] The Tribunal therefore, cannot generally endorse the respondents' position that a more relaxed approach to hearsay cannot be applied in this Tribunal's proceedings. First, Bryant presents the general rationale for the greater leniency to the acceptance of hearsay evidence in the administrative tribunal context, namely policy and social issues are often considered in such proceedings. However, the rationale referred to from Bryant, (whether or not it applies to the Tribunal proceedings), is by no means absolute. Whether or not it has application in the proceedings before this Tribunal, this Act clearly affords flexibility to the Tribunal in how it receives and accepts evidence, which arguably includes hearsay evidence and opinion evidence.

[59] In addition, it is clear that the legislative framework envisioned the possibility that the Tribunal could adopt a more relaxed approach. Basra v Attorney General of Canada, 2010 FCA 24, supports the principle that, where such a legislative framework is in place, a decision-maker cannot reject hearsay out of hand. The possibility, however, that hearsay may be accepted, due to the flexibility in the wording of a statute, does not mean that Parliament has signaled that the Tribunal will always admit hearsay evidence or must always admit hearsay evidence.

[60] In addition, the Tribunal does not agree that it cannot adopt a more flexible approach because of potential negative outcomes to the individual respondents, should they ultimately face disciplinary penalties. As noted in argument, in the labour relations context, disciplinary matters are often heard on the basis of the civil standard and with the possibility that hearsay evidence is received, accepted and weighed in the process (see for example, Basra, above). In addition, the

Tribunal's powers in relation to discipline are not punitive in nature and parallels with the criminal context are tenuous.

[61] It is also noteworthy that subsection 21.2(1)(c) includes provisions allowing a flexible approach to admissibility. Subsection 21.2(2) provides exceptions. Section 46 addresses compellability. Nevertheless, there are no provisions that indicate that there are exceptions to the flexibility afforded to the Tribunal in relation to discipline or disciplinary measures that may be imposed on individual respondents.

[62] While the Tribunal does not support the respondents' absolutist position on hearsay in relation to disciplinary proceedings, evidence must be carefully weighed in making determinations as to discipline, as it must be in making determinations as to reprisal or any other matter relating to its mandate. This observation may be obvious, but it is worth highlighting, given the seriousness of the findings that the Tribunal must make and the impact that those findings may have on the parties.

[63] With regard to opinion evidence, the general approach is to qualify expert evidence. The scope of the testimony of the investigators may be such that it does not constitute opinion evidence. Even if the scope of the investigators' evidence draws it into the realm of opinion evidence, the discussion above regarding the structure of the Act and the lower threshold required to determine that an Application is warranted, must be kept in mind. It is the Tribunal that makes the determination as to whether or not reprisal has occurred, not the investigator who has conducted an investigation which forms part of the basis upon which the Commissioner refers an Application. Even where the testimony and reports of the investigators may be accepted as evidence, the investigators' views, as they may be reflected in testimony or documentary evidence, do not ultimately determine the matters before the Tribunal.

[64] In R v Graat, the Supreme Court of Canada recognized that it is not always clear whether or not assertions made by a lay witness are fact or opinion. Bryant notes that the Supreme Court acknowledged that in some cases a non-expert may give an opinion or draw inferences from facts, and that the line between fact and opinion can be ambiguous. He also remarks upon the Court's finding that a non-expert witness may give an opinion or draw inferences from facts in some circumstances (at page 771).

[65] In addition to jurisprudence, the flexibility of the Act with regard to admissibility (under subsection 21.2(1)(c)) also affords the Tribunal with some latitude for allowing evidence that may enter into the realm of opinions. Therefore, without the benefit of the context of hearing, the Tribunal is not prepared to accept the respondents' argument that none of the four criteria in R v Graat have been met: (1) the witness has personal knowledge of the observed facts; (2) the witness is in a better position than the trier of fact to draw the inference; (3) the witness has the necessary experiential capacity to draw the inference, that is, form the opinion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts that she or he is testifying about.

[66] In this regard, it is interesting to note that the wording of the statute recognizes that the Commissioner must come to an opinion, when he or she determines that a complaint warrants referral to the Tribunal. Section 20.4 states:

20.4(1) If, after receipt of the report, the Commissioner is **of the opinion** that an application to the Tribunal in relation to the compliant is warranted, the Commissioner may apply to the Tribunal for a determination of whether or not reprisal was taken against the complainant and, if the Tribunal determines that reprisal was taken, for….	20.4 (1) Si, après réception du rapport d'enquête, le commissaire **est d'avis** que l'instruction de la plainte par le Tribunal est justifiée, il peut lui demander de décider si des représailles ont été exercées à l'égard du plaignant et, le cas échéant :

(Emphasis added)

[67] The fact that the Commissioner must also protect the public interest in advancing its position and in explaining how its investigators drew the conclusions that they did may also become an important consideration in how evidence might be accepted and received by the Tribunal.

[68] If, as the Commissioner asserts, Ms. Scichilone and Ms. Gauvreau are to testify in relation to the nature, extent and ambit of the investigation, this would support the notion that that these are issues within their personal and direct knowledge. Even if they are not within their personal knowledge, it is arguable that their evidence could be helpful in explaining the basis upon which the matter was referred to the Tribunal.

[69] The Tribunal agrees with the argument made by the complainant that an absolute refusal of this evidence is not compelling at this point in time. This approach suggests that all the evidence which could be given by one of these witnesses must either be inadmissible as hearsay or as opinion evidence. Depending upon the nature of the evidence, it may not be hearsay, or it may be admissible as hearsay or subject to an exception, even if it is not opinion evidence.

The requirements of a Tribunal hearing

[70] In El-Helou #2, the Tribunal outlined the requirements for a hearing (at paragraph 21 of El-Helou #2). It stated that once an Application has been referred to it, it must ensure that its proceedings are conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow (section 21 of the Act). The Tribunal must also ensure that the parties are given a full and ample opportunity to be heard (subsection 21.6(1)). In addition, it referred to the Commissioner's duty to represent the public interest (subsection 21.6(2)).

[71] The Tribunal has also referred to other requirements of its proceedings in its previous decisions. As noted in El-Helou #1 (at paragraph 88) the Tribunal is in place to ensure that each party has a right to be heard on the issue of whether or not reprisal has occurred. It does so as an impartial adjudicator; hears the contradictory positions of the parties and witnesses; and makes findings of fact and assessments as to credibility through a cross-reference of the evidence before it. Furthermore, a framework of procedural rules is in place to ensure fairness, transparency and objectivity in the decision – making process. In El-Helou #2, the Tribunal also emphasized the transparency of its functions (at paragraphs 30 and 31), particularly in comparison to other avenues that are available within the legislative framework for the protection of public servants from reprisal when they disclose wrongdoing.

Summary

[72] All of the above considerations suggest that the adoption of a flexible approach, rather than a categorical and rigid one, is important in relation to evidence in proceedings before the Tribunal. The steps in the proceedings make it clear that the threshold of evidence applied by the Commissioner to refer a matter to the Tribunal must be lower than that required by the Tribunal in its determination of whether or not reprisal has occurred. The wording of "reasonable grounds to believe that reprisal was taken against the complainant" is a lower threshold than the balance

of probabilities. In addition, the Commissioner does not represent the complainant, but rather, the public interest, in advancing his or her case.

[73] In addition, there is flexibility in the Act as to how the Tribunal admits evidence, which strongly suggests that opinion evidence and hearsay could be subject to more relaxed standards. Nonetheless, the Tribunal would need to ensure fairness in its proceedings for all the parties, and adopt a focused approach to its proceedings and the tendering of evidence. In this manner, it can assure that its time and resources are utilized judiciously.

[74] The Tribunal recognizes that it must weigh evidence carefully, given the serious consequences of the proceedings. Nevertheless, the provisions of the Act pertaining to a more flexible approach to the admissibility of evidence guide the Tribunal, and suggest that a formalistic approach ought not to be adopted. This general stance is also supported by Supreme Court of Canada jurisprudence. Given the requirements of a hearing and the mandate of the Tribunal, it must be cautious in any request that asks that it rule in an anticipatory fashion on the admissibility of evidence.

B. THE MOTION IS PREMATURE

[75] The Tribunal also finds that the motion of the individual respondents is premature. There is very little before the Tribunal at this point in time that would allow it to come to a determination that evidence from the two investigators ought to be rejected outright. Only the statement of particulars of the Commissioner and the Application are filed with the Tribunal at the present time. In this regard, this motion presents some of the same challenges presented in the previous motions from the individual respondents in El-Helou #2 and El-Helou #3. In those cases as well, the Tribunal found that the motions were premature.

[76] The respondent argues that the evidence adduced by the investigators will be hearsay, and will not fall into exceptions to the hearsay rule pertaining to reliability and necessity. The Tribunal finds that this cannot be determined outside of the context of a hearing. Referring back to the respondents' motion (at paragraph 4 a.) for example, it is premature to determine how the Tribunal might address the "information regarding what was said during the interviews they (the investigators) conducted, which was recorded and transcribed…"

[77] For example, a witness might be called to provide evidence of what transpired at a particular meeting where two people were present. The other individual who attended the same meeting may or may not also be called as a witness, in order to provide oral testimony as to what occurred at that time. Arguably, the oral testimony of those witnesses is the best evidence of what occurred at the meetings held. However, if there are different versions of events, or if arguments are raised that the credibility of a witness ought not to be trusted, or if there are other issues pertaining to the evidence before the Tribunal, hearsay evidence may become important for the Tribunal to consider and to carefully weigh.

[78] To illustrate with another example, the evidence described in the paragraph above of what transpired at a meeting or at meetings may provide the best evidence of certain events that, allegedly, led to acts of reprisal. What transpired during these particular events however, may not provide the best evidence as to the motivation and rationale for a certain decision or action or measure that allegedly constituted reprisal. Whether or not there is a nexus between the disclosure of wrongdoing and alleged acts of reprisal may not always be adduced only through a linear account of the events in question. There could be situations where evidence as to the nexus could be accepted through other evidence and where the investigators' testimony and information regarding what was said during interviews is considered and weighed.

[79] Determinations as to evidence are normally made in the course of a tribunal's proceedings. The proceedings before this Tribunal have been suspended, pending the hearing of an application for judicial review before the Federal Court, as noted in paragraph 5 above. In the normal course of events, once the suspension has been removed, it would normally be expected that the Application would continue with all of the parties addressing the disclosure requirements in accordance with the Tribunal Rules (Rules 19 to 29).

[80] Even before the hearing itself, the Tribunal can exercise its discretion to require the parties to elaborate upon their disclosure in order to ensure that the hearing proceeds expeditiously. For example, upon completion of the requirements for disclosure, it would be within the Tribunal's discretion to require the parties to file a Joint Book of Documents with all of the documents upon which the parties intend to rely. Should the Tribunal direct the parties to file a Joint Book of Documents, it would also be within its discretion to require the parties to identify whether or not the document will be admitted as to its authenticity; whether or not the

document or parts of the document will be admitted as to the truth of its content; whether or not there is a dispute as to the admission of the document or parts of the document in relation to its authenticity or in relation to the truth of its contents; whether or not the document is subject to a previously issued confidentiality order; and whether or not there is an anticipated motion for a confidentiality order.

[81] It would also be within the Tribunal's discretion to require the parties to provide a list of the witnesses to be called and a general summary of the testimony that the witnesses will give. This is often referred to as a "will-say" statement. This would also guide the Tribunal in how it might determine objections as to the admissibility of evidence in areas such as hearsay or opinions. In addition, even with steps such as these prior to the hearing, in the course of the hearing itself, the context for the admissibility of evidence may still be the matter of debate.

[82] The respondents have not advanced any argument that suggests why the adjudication of these issues in the course of the Tribunal's proceedings would prejudice them (Partsource). As parties to the proceedings they will have the opportunity to be heard, and to advance their arguments as to admissibility. On the other hand, a preliminary ruling on these issues could prejudice the hearing of this matter.

[83] By way of comment, this Tribunal agrees with the general spirit of the statements made by the Canadian Human Rights Tribunal in Basudde, one of the cases cited by the complainant. In particular, the issues that have been raised in this motion are not yet properly defined. Rulings on evidence or procedural matters should be dealt with when the interests have materialized before the tribunal. Furthermore, it would be a mistake to rule on these matters too early, before the repercussions of that decision have become apparent.

For all these reasons, the motion is denied.

DATED this 20th day of December 2011.

"Luc Martineau

Chairperson

PUBLIC SERVANTS DISCLOSURE PROTECTION TRIBUNAL
PARTIES OF RECORD

DECISION NUMBER:	2011 PSDPT 4
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:	December 20, 2011

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

APPEARANCES:

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